

# Michigan Journal of International Law

---

Volume 24 | Issue 2

---

2003

## Some Troubling Elements in the Treaty Language of the Rome Statute of the International Criminal Court

Catherine R. Blanchet  
*University of Michigan Law School*

Follow this and additional works at: <https://repository.law.umich.edu/mjil>



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

---

### Recommended Citation

Catherine R. Blanchet, *Some Troubling Elements in the Treaty Language of the Rome Statute of the International Criminal Court*, 24 MICH. J. INT'L L. 647 (2003).

Available at: <https://repository.law.umich.edu/mjil/vol24/iss2/4>

This Note is brought to you for free and open access by the Michigan Journal of International Law at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Journal of International Law by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mjil.repository@umich.edu](mailto:mjil.repository@umich.edu).

## STUDENT NOTE

# SOME TROUBLING ELEMENTS IN THE TREATY LANGUAGE OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

*Catherine R. Blanchet\**

I. INTRODUCTION .....	647
II. REQUIREMENTS FOR ACCEPTANCE OF JURISDICTION BY THE ICC.....	648
III. JURISDICTIONAL REQUIREMENTS FOR CRIMES AGAINST HUMANITY .....	654
IV. CONCLUSION.....	661

### I. INTRODUCTION

The International Criminal Court (ICC) is designed to further the ends of international justice by ensuring effective prosecution of serious crimes at the international level.<sup>1</sup> It is intended to contribute to the “lasting respect for and the enforcement of international justice.”<sup>2</sup> It is also supposed to provide a reliable and fair forum for prosecuting Heads of State and the perpetrators of particularly heinous international crimes.<sup>3</sup> However, a reading of the Rome Statute, which governs the ICC, as it has been adopted reveals a loophole which can be easily exploited by States that are either powerful, acting in bad faith, or both.

To the extent that the purpose of the ICC is strictly prosecution of heinous international crimes, its jurisdictional reach is inadequate.<sup>4</sup> The Rome Statute requires either a nationality or territorial connection with a ratifying State Party for jurisdiction over an individual.<sup>5</sup> Alternately, a case must be referred to the ICC by the Security Council under its

---

\* J.D. University of Michigan Law School, expected 2003; B.A. University of Texas at Austin, 1999. The author would like to thank Emily Dawson, Michael Ellison, and Beatrice Tice.

1. *E.g.*, General Overview of the Rome Statute of the International Criminal Court [hereinafter Overview of the Rome Statute], available at <http://www.un.org/law/icc/general/overview.htm>.

2. Rome Statute of the International Criminal Court, adopted by the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998, pmbl., U.N. Doc. A/CONF. 183/9 (1998), 37 I.L.M. 999 [hereinafter Rome Statute].

3. *See, e.g.*, David J. Scheffer, *Staying the Course with the International Court*, 35 CORNELL INT'L L.J. 47 (Nov. 2001–Feb. 2002).

4. *See* Overview of the Rome Statute, *supra* note 1.

5. Rome Statute art. 12.

Chapter VII jurisdiction.<sup>6</sup> Bad actors who control internationally powerful States are thus made immune from the jurisdiction of the ICC.

A supplemental function of the Rome Statute is to provide the first treaty-based definition of crimes against humanity.<sup>7</sup> Unfortunately, the definition encapsulated in the Rome Statute is an uneasy compromise between two positions that leaves the actual definition unclear.<sup>8</sup>

This Note will examine problems that arise from the language of the Rome Statute itself. Part II will examine the potential strategic uses of the Rome Statute's jurisdictional aspects.<sup>9</sup> It will also examine how the fairness concerns raised by this potential usage are exacerbated when the potential State abuser is a permanent member of the Security Council.<sup>10</sup> Part III will look at the language of the Rome Statute's definition of crimes against humanity.<sup>11</sup> It will also examine the various and varying interpretations of this language by the scholars and commentators who have examined the issue.

## II. REQUIREMENTS FOR ACCEPTANCE OF JURISDICTION BY THE ICC

The International Criminal Court is designed to be an independent, permanent tribunal headquartered in The Hague, Netherlands.<sup>12</sup> Since the International Criminal Court was created by treaty, its jurisdictional reach had to be negotiated among the various State Parties. The crimes over which the ICC has jurisdiction were relatively easy to negotiate.<sup>13</sup> The actual mechanism for granting the Court jurisdiction, however, was the subject of a great deal of debate.<sup>14</sup>

---

6. Rome Statute art. 13.

7. John F. Murphy, *The Quivering Gulliver: U.S. Views on a Permanent International Criminal Court*, 34 INT'L LAW. 45, 54 (2000).

8. Those scholars and commentators who have addressed this issue have muddied the waters further with their contradictory views on both the definitions of critical words and the jurisdictional threshold requirement. This will be discussed at greater length *infra*.

9. See Rome Statute arts. 5–21.

10. At this time, only France and Great Britain have ratified the Rome Statute. Ratification Status of the Rome Statute, available at <http://www.un.org/law/icc/statute/rome fra.htm> (last visited Apr. 27, 2003).

11. Rome Statute art. 7.

12. Rome Statute art. 3(1).

13. Ruth Wedgwood, *The United States and the International Criminal Court: Achieving a Wider Consensus Through the "Ithaca Package"*, 32 CORNELL INT'L L.J. 535, 535–37 (1999). The exception is the crime of aggression. It was agreed that aggression should be included in the list of crimes under the Court's jurisdiction. However, the delegates could not agree on the definition of the crime. *Id.* at 539–41. The delegates therefore included aggression in the Rome Statute pending later definition. Rome Statute art. 5(2).

14. In my discussion of this area, I omit the principle of complementarity because it has been thoroughly discussed elsewhere. The principle of complementarity allows the ICC to take jurisdiction of a case only if 1) national courts are "unwilling or unable" to take the case;

The United States favored a plan whereby all prosecutions must be referred to the ICC through the Security Council, or at least that the Security Council should have a veto on prosecutions.<sup>15</sup> This was an attempt to make the treaty politically feasible in the United States Congress, which was primarily concerned that United States servicemen and servicewomen would be prosecuted in the ICC for political reasons.<sup>16</sup> Senators Jesse Helms (R-N.C.), and Zell Miller (D-Ga.) explained their opposition to the ICC as follows:

The ICC is without supervision or oversight. It is only a matter of time until some nations, seeking to divert attention from their prior support of terrorist groups, will be trying to use the court to blur the distinctions between the terrorists and U.S. counter-terrorist efforts by trumping up charges against members of the armed forces of the United States.<sup>17</sup>

If the Rome Statute granted what amounted to a United States veto on any prosecution, the United States delegation hoped that Congress would be willing to ratify it.<sup>18</sup>

Other States were not blind to the United States delegation's intent. Those States that were not permanent members of the Security Council especially resented this attempt.<sup>19</sup> Many of these States felt that the ICC should have automatic jurisdiction on those crimes committed by citizens of States that became parties to the ICC.<sup>20</sup> On the other hand, these States accepted that United States' participation in the ICC was necessary to make it a viable institution.<sup>21</sup> What emerged was an uneasy compromise that leaves many holes for States to behave strategically and gives a strategic-minded State no incentive to ratify the treaty.<sup>22</sup>

The jurisdictional requirements of the International Criminal Court give States that commit crimes against their own citizens the incentive to simply circumvent the Court's jurisdiction by refusing to ratify the

---

2) the case reaches a certain level of gravity; and 3) the person has not been previously tried in a valid court for the same offense. LEILA NADYA SADAT, *THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW: JUSTICE FOR THE NEW MILLENNIUM* 119 (2002).

15. James Podgers, *Launch Time: The International Criminal Court Becomes Reality Despite Continuing U.S. Opposition*, 14 ABA J. E-REP. 1 (Apr. 12, 2002).

16. *Id.*

17. *Id.*

18. *Id.*

19. *See id.*

20. *Id.*

21. *Id.*

22. *See* Alex Ward, *Breaking the Sovereignty Barrier: The United States and the International Criminal Court*, 41 SANTA CLARA L. REV. 1123 (2001).

treaty.<sup>23</sup> A State with a position on the U.N. Security Council essentially guarantees its citizens immunity from prosecution as long as it refuses to become a party to the Rome Statute.<sup>24</sup>

A case may be referred to the International Criminal Court in three ways. First, a State Party to the treaty may refer the case to the Prosecutor.<sup>25</sup> Second, the Security Council may refer it to the Prosecutor under its Chapter VII duties.<sup>26</sup> Finally, the Prosecutor may begin prosecution of a crime on his or her own after having received permission from the Pre-Trial Chamber.<sup>27</sup>

In the case of prosecutions initiated by a State Party or the ICC Prosecutor, the ICC has jurisdiction to take the case only if the crime occurred in the territory of a State Party or if the alleged perpetrator is a national of a State Party.<sup>28</sup> A State that is not a party may consent to the jurisdiction of the ICC "with respect to the crime in question" by lodging a declaration with the registrar to that effect.<sup>29</sup> This language appears to allow a State to consent to prosecution by the ICC for only the specific crime alleged to have been committed by its national or to have taken place on its territory.<sup>30</sup>

This triad approach to jurisdiction creates large areas where States can use the ICC strategically. As long as any State does not consent to be bound by the Rome Statute, it can have the best of both worlds. The ICC has no jurisdiction over that State's citizens who commit genocide, crimes against humanity, or war crimes as long as they do so within the boundaries of States that are not members of the ICC.<sup>31</sup> In contrast, if a person who is a national of a State Party to the ICC commits genocide, crimes against humanity, or war crimes within a State that is not part of

---

23. Mark A. Summers, *A Fresh Look at the Jurisdictional Provisions of the Statute of the International Criminal Court: The Case for Scrapping the Treaty*, 20 WIS. INT'L L.J. 57, 71 (2001).

24. See Rome Statute art. 13.

25. Rome Statute art. 14.

26. *Id.* art. 13. Chapter VII of the Charter of the United Nations is entitled "Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression." U.N. CHARTER ch. VII, available at <http://www.un.org/overview/charter/chapter7.html>. The Rome Statute specifically gives the referral power to the Security Council under its Chapter VII powers. Rome Statute art. 13.

27. *Id.* art. 15. This is known as an investigation *proprio motu*. *Id.* The Pre-Trial Chamber is comprised of judges elected under article 36 of the Rome Statute and assigned only to the Pre-Trial Chamber. *Id.* art. 39. The majority of the judges elected to the Pre-Trial Chamber are supposed to have criminal trial experience. *Id.*

28. *Id.* art. 4(2); see also SADAT, *supra* note 14, at 105.

29. Rome Statute art. 12(3). The registry is the administrative branch of the ICC. The registrar is the head of the registry and the "principal administrative officer of the court." Rome Statute art. 43.

30. Summers, *supra* note 23, at 72-73.

31. Rome Statute art. 12(2).

the ICC, the ICC will have jurisdiction over them.<sup>32</sup> A State that is not a party to the Rome Statute cannot initiate the prosecution of crimes by a national of an ICC Member State.<sup>33</sup> However, article 14 of the Rome Statute allows any State to initiate prosecution, whether they have any connection to the crime or not.<sup>34</sup> A powerful State could have any State within its sphere of influence that is a party to the Rome Statute initiate prosecution under article 14.<sup>35</sup> Many States that are parties to the Rome Statute might also initiate a prosecution in this situation as a matter of principle.

Even if a person who is not a national of a State Party commits a crime, a State which is not a party to the Rome Statute can force prosecution by consenting to the jurisdiction of the ICC only for a specific past incident.<sup>36</sup> In addition to jurisdiction based on the nationality of the criminal, the ICC has jurisdiction based on the locale where the crime is committed.<sup>37</sup> Once it accepts the jurisdiction of the ICC for this specific crime, a non-party State has all the benefits of a State Party to the Rome Statute.<sup>38</sup> Article 11(2) makes it plain that a non-party State can decide to waive sovereignty and submit to the jurisdiction of the ICC for a specific crime after that crime has been committed.<sup>39</sup>

It is also possible that the ICC Prosecutor might initiate prosecution. The Pre-Trial Chamber is supposed to provide a check on the independent Prosecutor.<sup>40</sup> The concern is that the Prosecutor might choose cases for their political rather than judicial merits.<sup>41</sup> However, the Pre-Trial Chamber looks only to whether there is "a reasonable basis to proceed with an investigation" and whether "the case appears to fall within the jurisdiction of the court."<sup>42</sup> It is not delineated in the statute that the judges of the Pre-Trial Chamber should look outside the four corners of the case to the political considerations behind the investigation.<sup>43</sup> Perhaps a custom will develop that allows the Pre-Trial Chamber to block

---

32. *Id.* art. 12(2). See *id.* art. 5 for the crimes over which the ICC has jurisdiction.

33. *Id.* art. 9.

34. *Id.* art. 14.

35. *See id.*

36. *See id.* art. 12(3).

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

38. *Id.* art. 12(3).

39. "[T]he 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." *Id.* art. 11(2).

40. The Pre-Trial Chamber makes the determination whether the Prosecutor's allegations warrant a trial before the ICC. *Id.* art. 15.

41. *E.g.*, Dianne Marie Amann & M.N.S. Sellers, *The United States of America and the International Criminal Court*, 50 AM. J. COMP. L. 381 (2002).

42. Rome Statute art. 15(4).

43. *Id.*

prosecutions for political or fairness reasons, but it is not encapsulated in the Rome Statute.<sup>44</sup> As long as the case has merit, it is not currently the duty of the Pre-Trial Chamber to screen for political motivations in the cases actually brought before it.<sup>45</sup>

In this way, a State that is not a party to the Rome Statute can gain all of the benefits of ratifying it without any of the burdens. The ICC can punish genocide, crimes against humanity, and war crimes committed in the non-party State by foreigners. However, the non-party State citizens are immune from punishment under the Rome Statute as long as they commit crimes against their own nationals. This creates fairness problems on two levels. First, a State that is not a party to the Rome Statute will have the support of the international community to enforce the standards of the ICC on others without any promise or accountability to conform to the standards itself. Second, the justice meted out for crimes within a State that is not a party to the Rome Statute could differ dramatically depending on the nationality of the perpetrators. This will be especially true in States that traditionally have not met and do not meet their human rights obligations to their nationals.

Michael Summers offers a cautionary tale from another context. During the Kosovo conflict, NATO began a bombing campaign in the Federal Republic of Yugoslavia. During this campaign, the Federal Republic of Yugoslavia filed a declaration accepting the International Court of Justice's (ICJ) jurisdiction in order to sue NATO for an injunction against its bombing campaign in Serbia.<sup>46</sup> In the lawsuit, the ICJ was able to duck the issue by claiming its jurisdiction extended only from the time Yugoslavia ratified.<sup>47</sup>

If the ICJ had not been able to avoid the case, it would have been faced with two unfavorable choices. It could have found the heads of NATO guilty of war crimes, or it could have found a principle of customary international law that allowed humanitarian intervention without the approval of the United Nations Security Council.<sup>48</sup> Neither of these

---

44. See Timothy L.H. McCormack & Sue Robertson, *Jurisdictional Aspects of the Rome Statute for the New International Criminal Court*, 23 MELB. U. L. REV. 635, 642-43 (1999).

45. *Id.* Countries which favored the inclusion of an independent Prosecutor viewed the position as a victory in the battle to establish an independent Court. They saw the Prosecutor's ability to act independently as a way to "help assuage concerns about the inherently political considerations of the UN Security Council as well as individual states." *Id.* at 643. This suggests that at least these State Parties to the Rome Statute do not want the Pre-Trial Chamber to reintroduce political considerations.

46. Summers, *supra* note 23, at 72.

47. *Id.* at 72-74. The ICJ said that since the bombings commenced before Yugoslavia consented to ICJ jurisdiction, which act created the jurisdictional nexus for the case, the ICJ did not have jurisdiction over the cause of action. *Id.*

48. *Id.*

options would have helped the political situation or enhanced the future credibility of the ICJ.<sup>49</sup>

The ICC, however, will not be able to avoid hearing political cases by limiting its jurisdiction to the period after ratification. The Rome Statute specifically allows States to accept its jurisdiction over crimes that have already been committed.<sup>50</sup>

The jurisdiction of the ICC is widely described as stemming from the notion of universal jurisdiction.<sup>51</sup> The idea is that all States are coming together to prosecute crimes that any could prosecute singly without a need for the Rome Statute or any other treaty.<sup>52</sup> However, there is only one instance where that truly applies under the Rome Statute; when a crime is referred to the Prosecutor by the Security Council acting under its Chapter VII powers.<sup>53</sup> This is the only instance where consent of at least one State with territorial or nationality connections to the crime is not required.<sup>54</sup>

There are serious fairness issues in allowing this method of prosecution. There is no requirement that the members of the Security Council have signed or ratified the Rome Statute.<sup>55</sup> Several permanent members of the Security Council have not, in fact, ratified the Rome Statute.<sup>56</sup> These States have not accepted the jurisdiction of the ICC over their own nationals.<sup>57</sup> However, they can force another State that has not ratified the Rome Statute to accept the jurisdiction of the ICC over its nationals.<sup>58</sup> In other words, powerful States can force less powerful States to accept the jurisdiction of the ICC while keeping their nationals immune.

This is particularly pertinent to permanent members of the Security Council because they have veto power over the Security Council's decisions.<sup>59</sup> To give the ICC jurisdiction over a matter, the Security Council is

---

49. *Id.*

50. Rome Statute arts. 12(3), 11(2).

51. *See, e.g.,* SADAT, *supra* note 14; Michael P. Scharf, *The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the US Position*, 64 LAW & CONTEMP. PROBS. 67, 76 (2001), available at <http://www.law.duke.edu/journals/64LCP/Scharf>.

52. *See* Scharf, *supra* note 51, at 76–110.

53. Rome Statute art. 13(b).

54. *Id.*

55. *See id.*

56. Of the permanent members of the Security Council, China, the United States, and the Russian Federation have yet to ratify. Of the elected members in 2003, Angola, Cameroon, Chile, Guinea, Mexico, Pakistan, and the Syrian Arab Republic have not ratified. Ratification Status of the Rome Statute, *supra* note 10; Membership and Presidency of the Security Council in 2003, at [http://www.un.org/Docs/sc/unsc\\_members.html](http://www.un.org/Docs/sc/unsc_members.html).

57. *Id.*

58. Rome Statute art. 13.

59. Frederic L. Kirgis, Jr., *The Security Council's First Fifty Years*, 89 AM. J. INT'L L. 506, 506 (1995).



required to pass a resolution under its Chapter VII powers.<sup>60</sup> Therefore, there is no avenue by which a permanent member of the Security Council's nationals can be punished for crimes within the permanent member's borders without its consent, absent its ratification of the Rome Statute.

In terms of political reality, this probably makes little difference. The permanent members of the Security Council that have not ratified the Rome Statute are unlikely to ratify any treaty that requires them to give up their Heads of State to an international criminal tribunal of any sort. Even if any of them did ratify the Rome Treaty, none of them could be compelled by force to, and probably would not, give over their nationals to the tribunal.

Symbolically, however, the jurisdictional elements of the Rome Statute send an unfortunate message. The Rome Statute purports to apply international standards of justice to a criminal tribunal.<sup>61</sup> The treaty allows States that are not a party to the ICC to enjoy all of the benefits of the treaty for any situation they choose. However, if a State is a permanent member of the Security Council, its nationals are granted immunity from the jurisdiction of the ICC for crimes committed against its own citizens as long as the State refuses to ratify the Rome Statute.

It also says that persistent bad actors in powerful countries can escape punishment for crimes which bad actors in less powerful countries cannot. In fact, persistent bad actors whose nations have a seat on the Security Council can vote to have other bad actors from less powerful countries indicted for crimes the international community knows that they themselves have committed and do commit. It is troubling that this reality should be enshrined in a treaty text and presented as an ideal for international justice.

### III. JURISDICTIONAL REQUIREMENTS FOR CRIMES AGAINST HUMANITY

Crimes against humanity, while recognized since the Nuremberg trials,<sup>62</sup> had never before been defined in a universal multilateral treaty.<sup>63</sup>

---

60. Jimmy Gurule, *United States Opposition to the 1998 Rome Statute Establishing an International Criminal Court: Is the Court's Jurisdiction Truly Complementary to National Jurisdictions?*, 35 CORNELL INT'L L.J. 1, 21-22 (Nov. 2001-Feb. 2002). Chapter VII requires a determination that there has been a breach of the peace, aggression, or a threat of a breach of the peace. Such a resolution requires the affirmative vote of nine members, which can be overridden by a veto. *Id.*

61. See Rome Statute pmbl.

62. See *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/64Add.1 (1946).

63. Murphy, *supra* note 7, at 54.

There was no general agreement, in either treaty or customary law, on what constituted such crimes.<sup>64</sup> All of the States involved in the negotiation of the Rome Statute agreed that crimes against humanity should be included in the statute.<sup>65</sup> However, there was also an understanding that the Rome Statute's definition of crimes against humanity would be regarded as definitive.<sup>66</sup> There was wide disagreement over the range of crimes that should be included in the Rome Statute.<sup>67</sup>

All of the State negotiators agreed that inhumane acts had to pass a certain threshold to become a crime against humanity in the international setting.<sup>68</sup> Criminalization of murder, for instance, was not the issue. Instead, the issue was determining at what point the international community had the right and the obligation to step in and prosecute murders committed by an actor.<sup>69</sup> One group of States initially argued for the approach taken by the International Criminal Tribunal for the Former Yugoslavia, which had no statutory jurisdictional threshold.<sup>70</sup> However, the delegates eventually agreed that the threshold test should incorporate terms used in previous jurisprudence and commentary, namely "widespread" and "systematic."<sup>71</sup>

The controversy then shifted to whether these requirements would be conjunctive (the action must be both widespread and systematic) or disjunctive (the action must be either widespread or systematic).<sup>72</sup> One group of States argued that a disjunctive requirement was already established under international law. They pointed to the Statute of the International Criminal Tribunal for Rwanda, which required that the acts be committed as "part of a widespread or systematic attack against any civilian population."<sup>73</sup>

Another group of States, led by members of the Security Council, but comprising a large number of Arab and Asian States, believed that a disjunctive test would be overinclusive.<sup>74</sup> They had some concern that a

---

64. *Id.*

65. McCormack & Robertson, *supra* note 44, at 651.

66. *Id.*

67. *Id.*

68. SADAT, *supra* note 14, at 148–49.

69. *Id.*

70. *Id.* at 152.

71. Darryl Robinson, *Defining "Crimes Against Humanity" at the Rome Conference*, 93 AM. J. INT'L L. 43, 47 (1999).

72. *Id.*

73. *Id.*; see also Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, Annex, U.N. SCOR, 49th Sess., 3453d mtg., art. 3, U.N. Doc. S/Res/955 (1994), amended by S.C. Res. 1165, U.N. SCOR, 53d Sess., 3877th mtg., U.N. Doc. S/Res/1165 (1998); S.C. Res. 1329, U.N. SCOR, 55th Sess., 4240th mtg., U.N. Doc. S/Res/1329 (2000), available at <http://www.icttr.org/wwwroot/ENGLISH/basicdocs/statute.html>.

74. Robinson, *supra* note 71, at 47.

widespread but unrelated series of actions could be understood as a crime against humanity for the purpose of the statute; a result that was not supported by previous conceptions of international law.<sup>75</sup> The United States was also concerned that such a definition might include recent actions like the bombings in Afghanistan and the Sudan.<sup>76</sup>

With these differences seemingly irreconcilable, Canada submitted language that it felt embraced a reasonable compromise between the positions.<sup>77</sup> Ultimately, this language, with some modifications, was used for the definition of crimes against humanity.<sup>78</sup> Unfortunately, the solution in this instance was worse than the problem as the final language allows for a bevy of contradictory interpretations.

The first difficulty is in the interpretation of the terms “widespread” and “systematic.” This is difficult because these terms are expected to be read together to create a standard, rather than conform strictly to their dictionary definitions.<sup>79</sup> A comprehensive treatment of the language, clearly illustrating this point, was promulgated by the International Criminal Tribunal for the Former Yugoslavia in the case *Prosecutor v. Tihomir Blaskic*.<sup>80</sup> The tribunal said,

The systematic character refers to the four elements which for the purposes of this case may be expressed as follows:

- the existence of a political objective, a plan pursuant to which the attack is perpetrated or an ideology, in the broad sense of the word, that is, to destroy, persecute or weaken a community;
- the perpetration of a criminal act on a very large scale against a group of civilians or the repeated and continuous commission of inhumane acts linked to one another;
- the preparation and use of significant public or private resources, whether military or other;

---

75. *Id.*

76. Murphy, *supra* note 7, at 54.

77. MACHTELD BOOT, GENOCIDE, CRIMES AGAINST HUMANITY, WAR CRIMES: NULLUM SINE LEGE AND THE SUBJECT MATTER JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT (2002).

78. *Id.*

79. *See id.* at 479; *see also* Robinson, *supra* note 71, at 47–50.

80. *See* BOOT, *supra* note 77, at 479.

- the implication of high level political and/or military authorities in the definition and establishment of the methodical plan.<sup>81</sup>

The tribunal declared that the plan “need not necessarily be declared expressly or even stated clearly and precisely. It may be surmised from the occurrence of a series of events” and then went on to list possible examples.<sup>82</sup> It also emphasized that such a plan need not “be conceived at the highest level of State machinery.”<sup>83</sup>

The tribunal is even less precise when defining “widespread.”<sup>84</sup> It creates a vague standard that relies primarily on exclusion rather than inclusion. “Widespread,” the Court said, “refers to the scale of the acts perpetrated and to the number of victims.”<sup>85</sup> The Court explicitly referenced both the Draft Code of the International Law Commission and *Prosecutor v. Dusko Tadic* in determining that “a crime may be widespread or committed on a large-scale by the cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude.”<sup>86</sup> *Prosecutor v. Dusko Tadic* states, and the tribunal in *Blaskic* agrees, that the term “widespread” “excludes an isolated inhumane act committed by a perpetrator acting on his own initiative and directed against a single victim.”<sup>87</sup>

Other commentators have been equally vague when defining widespread and systematic. For instance, Leila Sadat leaves both words undefined in her discussion of crimes against humanity in the Rome Statute.<sup>88</sup> Machteld Boot cites the *Blaskic* judgment for a definition of systematic, and says, “the widespread characteristic . . . refers to the scale of the acts perpetrated or the number of victims.”<sup>89</sup> Darryl Robinson defines widespread as “a high-threshold test, requiring a substantial number of victims and massive, frequent, large-scale action.”<sup>90</sup> He sees systematic as “requiring some element of scale . . . a course of conduct

---

81. *Prosecutor v. Blaskic*, ICTY Case No. IT-95-14, Judgment, ¶ 203 (Mar. 3, 2000), available at <http://www.un.org/icty/judgement.htm>.

82. *Id.* ¶ 204.

83. *Id.* ¶ 205.

84. *Id.* ¶ 206.

85. *Id.*

86. *Id.* ¶ 206. (internal quotations omitted). The Draft Code was the starting point for the drafting of the Rome Statute. See Daniel Bodansky et al., *Counterintuiting Countermeasures*, 96 AM. J. INT'L L. 817, 817 (2002).

87. *Blaskic*, ¶ 206.

88. See SADAT, *supra* note 14, at 148–60.

89. BOOT, *supra* note 77, at 479.

90. Robinson, *supra* note 71, at 48 (internal quotations omitted). Robinson was a member of the Canadian delegation, which proposed the compromise language. *Id.*

involving multiple crimes.”<sup>91</sup> Joshua Bardavid merely restates the proposition that widespread and systematic “eliminates minor and isolated incidents from the jurisdiction of the court.”<sup>92</sup> McCormack and Robertson say that widespread refers to the scale of the attack “not an isolated act but a large scale action directed against multiple victims.”<sup>93</sup> Systematic “carries a connotation of premeditation by an organized group—an attack carefully planned and undertaken as part of a common policy.”<sup>94</sup>

The ambiguous definitions of the terms make the assessment of the jurisdictional nexus of crimes against humanity difficult. The wording of the Rome Statute adds to the confusion because the compromise language makes the application of the terminology subject to multiple interpretations.

Crimes against humanity are defined in article 7 of the Rome Statute.<sup>95</sup> Article 7(1) reads, in pertinent part, “any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

Murder . . .

Torture

Rape . . . or any other form of sexual violence of comparable gravity.”<sup>96</sup>

This language appears to create a disjunctive requirement—the acts must be either widespread or systematic. However, when reading article 7(1) in conjunction with article 7(2)(a), the requirements of the jurisdictional threshold become unclear.<sup>97</sup> Article 7(2) is the definitional section of article 7 of the Rome Statute.<sup>98</sup> Article 7(1) reads “[f]or the purpose of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”<sup>99</sup> Article 7(2)(a), on the other hand, reads “[f]or the purpose of paragraph 1: (a) ‘attack directed against any civilian population’ means a course of conduct involving the multiple commission of acts referred to in paragraph 1

91. *Id.* at 51.

92. Joshua Bardavid, *The Failure of the State-Centric Model of International Law and the International Criminal Court*, 15 N.Y. INT’L L. REV. 9 (2002). Bardavid was a delegate to the United Nations 9th Preparatory Commission for the International Criminal Court. *Id.*

93. McCormack & Robertson, *supra* note 44, at 653.

94. *Id.*

95. Rome Statute art. 7.

96. *Id.*

97. Payam Akhavan, *Contributions of the International Criminal Tribunals for the Former Yugoslavia and Rwanda to Development of Definitions of Crimes Against Humanity and Genocide*, 94 AM. SOC’Y INT’L L. PROC. 279, 280 (2000).

98. Rome Statute art. 7(2).

99. Rome Statute art. 7(1).

against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.”<sup>100</sup>

This language has given rise to multiple interpretations of the requirements for an act or acts to rise to the level of a crime against humanity that can be heard by the ICC. Commentators in the current literature take one of three positions. They believe that the requirement is either conjunctive, disjunctive, or some compromise position between the two.

Leila Sadat uses a strict reading of the chapeau to article 7(1) to argue that the requirements are disjunctive.<sup>101</sup> In support of her position, she references the Statute of the International Criminal Tribunal for Rwanda, which explicitly contains disjunctive language, and the position of the *Tadic* case.<sup>102</sup> Several other commentators follow this position.<sup>103</sup>

McCormack and Robertson, however, take the view that article 7(1) must be read in conjunction with article 7(a)(2) to pass the threshold requirement for acceptance to the ICC.<sup>104</sup> They express the threshold in the following way:

The particular acts must have been committed as part of a widespread or systematic attack directed against any civilian population where such an attack is understood to mean a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.<sup>105</sup>

---

100. Rome Statute art. 7(2)(a).

101. SADAT, *supra* note 14, at 152.

102. *Id.* The Statute of the International Criminal Tribunal for Rwanda was very influential in the process of creating the Rome Statute. Some procedural, electoral, and financial aspects of the Rome Statute were explicitly modeled on those of the International Criminal Tribunal for Rwanda. McCormack & Robertson, *supra* note 44, at 638. The *Tadic* case was also very influential in the creation of the Rome Statute. See Susan W. Tiefenbrun, *The Paradox of International Adjudication: Development in the International Criminal Tribunals of the Former Yugoslavia and Rwanda, the World Court, and the International Criminal Court*, 25 N.C.J. INT'L L. & COM. REG. 551, 593 (2000); see also John L. Washburn, *What Lessons Can Be Learned from the Ad Hoc Criminal Tribunals?*, 9 U.C. DAVIS J. INT'L L. & POL'Y 23, 28–30 (2002).

103. See, e.g., Simon Chesterman, *An Altogether Different Order: Defining the Elements of Crimes Against Humanity*, 10 DUKE J. COMP. & INT'L L. 307, 314–16 (2000); Jelena Pejic, *The United States and the International Criminal Court: One Loophole Too Many*, 78 U. DET. MERCY L. REV. 267, 277 (2001).

104. McCormack & Robertson, *supra* note 44, at 654.

105. *Id.* (internal quotations to the Rome Statute article 7(2) omitted).

They believe that it will be insufficient for the Prosecutor to show only one index of gravity; he or she must show that the act in question is both widespread and systematic.<sup>106</sup>

Boot agrees that “although many were pleased to have won the battle over the words ‘widespread’ and ‘systematic’ as alternative requirements . . . the interpretation of Article 7 as a whole reveals that the requirements are conjunctive, requiring a state or organizational policy.”<sup>107</sup> He believes that this should present little difficulty, though, since “it is hardly conceivable that such crimes are committed systematically without being widespread at the same time.”<sup>108</sup>

A third group of commentators believes that the Rome Statute creates a compromise between the two positions. Unfortunately, they do not agree on precisely what that compromise entails. The more authoritative suggestion comes from Darryl Robinson, who was a part of the Canadian delegation when the Canadian compromise was suggested.<sup>109</sup>

Darryl Robinson suggests that the language of article 7 introduces a policy requirement.<sup>110</sup> Policy is not limited to that of a State, but needs to be more than the work of isolated individuals.<sup>111</sup> The Rome Statute also requires a multiplicity of acts.<sup>112</sup> He believes that this requires that

[t]he prosecution must establish an ‘attack directed against any civilian population,’ which involves multiple acts and a policy element (a conjunctive but low threshold test), and show that the attack was either widespread or systematic (higher threshold but disjunctive alternatives). If the prosecutor chooses to prove the “widespread” element, the concern about completely unrelated acts is addressed, because of the policy element. If the prosecutor chooses to prove the “systematic” element, some element of scale must still be shown before ICC jurisdiction is warranted, because a course of conduct involving multiple crimes is required.<sup>113</sup>

In another attempt to read a compromise into the language of article 7, Beth Van Schaack looks to the language of article 7(1) and argues that the nexus is disjunctive. However, in order for the ICC to have jurisdic-

---

106. *Id.* at 654.

107. BOOT, *supra* note 77, at 533.

108. *Id.*

109. Robinson, *supra* note 71, at 43 n.1. However, it should be noted that there were some modifications to the Canadian proposal’s language before it was adopted as part of the Rome Statute. *E.g.*, BOOT, *supra* note 77, at 477.

110. Robinson, *supra* note 71, at 48–52.

111. *Id.*

112. *Id.*

113. *Id.* at 51.

tion over an individual, that individual must “knowingly contribute to the attack.” She regards *mens rea* as a jurisdictional, rather than a proof element of a crime against humanity.<sup>114</sup>

All of these arguments appear plausible, at least on their face. It is not the purpose of this Note to select any of them as the correct approach. Rather, they illustrate the difficulty in determining the exact definition of crimes against humanity in the Rome Statute.

#### IV. CONCLUSION

The recent tribunals in the former Yugoslavia and Rwanda spurred on the formation of the ICC.<sup>115</sup> The desire for an international criminal court had percolated through the international community since the Nuremberg trials.<sup>116</sup> While the preparation for the Rome Statute took years, the actual convention that led to its adoption lasted only five weeks.<sup>117</sup> Since many areas of the Rome Statute were controversial, much of the language was changed during these weeks.<sup>118</sup> It is therefore not surprising that some of the language is less precise than lawyers might wish.

However, this is the language of the treaty as it now stands. Changing any of the language of the Rome Statute requires a two-thirds majority vote of its members.<sup>119</sup> Caught between delegates from States that wanted the ICC to be a supranational body with universal jurisdiction and delegates from States who resisted the idea of non-treaty parties being subject to the ICC, the Rome Statute ended up with a sloppy compromise which created the potential for exploitation of the ICC by powerful countries and those that act in bad faith.<sup>120</sup> On its face, the Rome Statute rewards bad actor States that persistently refuse to ratify it, especially powerful ones.

The current definition of crimes against humanity is as problematic. Since an accepted international definition of crimes against humanity did not exist, the delegates created one for the statute.<sup>121</sup> Unfortunately, the

---

114. Beth Van Schaack, *The Definition of Crimes Against Humanity: Resolving Their Incoherence*, 37 COLUM. J. TRANSNAT'L L. 787, 788, 844–45 (1999).

115. See, e.g., McCormack & Robertson, *supra* note 44, at 638.

116. E.g., Bruce Broomhall, *Developments in Criminal Law and Criminal Justice: Looking Forward to the Establishment of an International Criminal Court: Between State Consent and the Rule of Law*, 8 CRIM. L. F. 317, 318 (1997).

117. Bardavid, *supra* note 92, at 10.

118. Marcus R. Mumford, *Building on a Foundation of Sand: A Commentary on the International Court Treaty Conference*, 85 INT'L L. & PRAC. 151 (1999).

119. Rome Statute arts. 9, 112.

120. For a discussion on the negotiation that took place over the jurisdictional issues, see Podgers, *supra* note 15; Mumford, *supra* note 118, at 170–90.

121. See BOOT, *supra* note 77.



language is unclear enough that every commentator can argue that it enshrines his or her position as a principle of international law.<sup>122</sup>

Certainly these issues will be resolved over time as various cases come before the ICC.<sup>123</sup> However, one can sympathize with those commentators who want to see the ICC in action before they endorse it.<sup>124</sup> The fairness issues inherent in the language itself could pale beside the fairness issues of the administration of the court.<sup>125</sup> Ratification by the remaining permanent members of the Security Council would give the ICC both legitimacy and powers that are unprecedented in international criminal law. Perhaps it is better for these members, as well as for the state of international law itself, that these countries see the ICC in action before committing themselves.

---

122. See, e.g., SADAT, *supra* note 14, at 148–60; McCormack & Robertson, *supra* note 44, at 654.

123. Even before Mr. Luis Moreno Ocampo was elected Prosecutor of the ICC, the Ivory Coast had already announced its intention to ask the ICC for assistance in punishing rebels in an internal dispute. Mark John & Sylvia Aloisi, *Ivory Coast Seeks Global Criminal Court Probe*, REUTERS, Feb. 27, 2003, available at [http://story.news.yahoo.com/news?tmpl=story&u=/nm/20030227/wl\\_nm/rights\\_ivorycoast\\_dc\\_3](http://story.news.yahoo.com/news?tmpl=story&u=/nm/20030227/wl_nm/rights_ivorycoast_dc_3). Several NGOs have also called for the prosecution of various Heads of State for crimes against humanity. See, e.g., *International Bar Association Calls for International Criminal Court to Investigate and Try Robert Mugabe*, (Mar. 6, 2003), at <http://allafrica.com/stories/200303060482.html>.

124. E.g., Alan Dershowitz, *Back the World Court?*, JD JUNGLE, Nov./Dec. 2002, at 26 (arguing that the United States should wait to ratify the Rome Statute until there is some evidence that the ICC will “serve objective, universal justice.”) *Id.*

125. Mumford, for instance, points out that while only seven States voted against the Rome Statute in 1998, those States represented more than 50 percent of the world’s population. Mumford, *supra* note 118, at 186–89.