The Statute of the International Criminal Court and Third States

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THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT AND THIRD STATES

Gennady M. Danilenko*

INTRODUCTION .................................................................................................................. 445

I. POSSIBLE EFFECTS OF THE ROME STATUTE ON THIRD STATES .... 447

II. THE ROME STATUTE AS A CONSTITUTIVE INSTRUMENT OF AN INTERNATIONAL INSTITUTION ................................................................. 450

III. THE JURISDICTIONAL REACH OF THE ICC ......................................................... 453
   A. The Nature of the ICC’s Jurisdiction ................................................................ 455
   B. Universal and Treaty-Based Extraterritorial Jurisdiction ............................... 458
   C. The Power to Create Joint International Tribunals ......................................... 464
   D. Nullum Crimen Sine Lege .................................................................................. 466

IV. ISSUES OF IMMUNITY ......................................................................................... 469

V. DOMESTIC CRIMINAL PROCEDURES IN THIRD STATES AND COOPERATION IN THE ADMINISTRATION OF CRIMINAL JUSTICE .. 475

VI. THE ICC PROCEDURE AND THIRD STATES ....................................................... 478

VII. THE ROME STATUTE AND GENERAL INTERNATIONAL CRIMINAL LAW ................................................................................................................. 479
    A. Genocide ............................................................................................................. 482
    B. Crimes Against Humanity ................................................................................ 483
    C. War Crimes ....................................................................................................... 485

VIII. FOREIGN LEGAL POLICY ISSUES ................................................................... 490

CONCLUDING REMARKS .............................................................................................. 494

INTRODUCTION

At the end of the twentieth century the international community finally summoned its will to establish a permanent international criminal court. In 1998, determined to put an end to impunity for the perpetrators of atrocities and to prevent grave international crimes, the diplomatic conference in Rome adopted the Statute of the International Criminal Court (ICC).1 The Rome Statute was approved by an overwhelming

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vote.\(^2\) Official statements and other sources indicate that the United States and several other important States voted against the Rome Statute.\(^3\) Although these powerful States oppose the present Statute, it appears likely that it will still come into force. An important factor here is the position of Member States of the European Union. The European Union is a strong supporter of the establishment of the ICC. All European Union Member States have undertaken to complete their respective constitutional procedures concerning ratification as speedily as possible. Ratification of the Rome Statute by at least sixty\(^4\) countries by the end of the year 2000 has been proclaimed as "a political objective of the Union."\(^5\) In its relations with third countries, in particular the applicant States and States linked to the Union by association or cooperation agreements, the European Union encourages ratification of the Rome Statute.\(^6\) Democratic States from other regions of the world also support the ICC. In view of this, the Rome Statute may well come into force in the foreseeable future.\(^7\)

The decision of the United States and several other countries not to sign the Rome Statute raises many questions about the effects of this multilateral treaty on non-Party or Third States. This paper examines the principal legal and political effects of the Rome Statute on non-parties. In particular, it explores the significance of the creation of a new powerful international institution for all members of the international community. It discusses the jurisdictional reach of the ICC which will inevitably affect all States. This paper also analyzes possible application of some provisions of the Rome Statute to non-States Parties in so far as these may reflect or generate customary international law. It suggests


\(^4\) The ICC will come into being when sixty countries ratify the Rome Statute. Rome Statute, supra note 1, art. 126.


\(^6\) See id.

that despite the traditional principle of treaty law, according to which treaties do not bind Third States, the Rome Statute will affect non-States Parties in many significant ways.

I. POSSIBLE EFFECTS OF THE ROME STATUTE ON THIRD STATES

While there were many proposals to establish the ICC as a U.N. organ through the existing U.N. mechanism, the drafters of the Rome Statute decided that a separate multilateral treaty would be the most appropriate mechanism for the ICC's creation. Creation by multilateral treaty is indeed the best way to guarantee the ICC's permanence, authority and universality.

As an international treaty, the Rome Statute binds the contracting States only. The sovereign equality of States excludes any automatic effect of treaties on Third States which remain for them res inter alios acta. According to the general rule of international law, codified in Article 34 of the Vienna Convention on the Law of Treaties, "a treaty does not create either obligations or rights for a third state without its consent." The general rule pacta tertiis nec nocent nec prosunt is supported, as the International Law Commission has observed, by "almost universal agreement." The rule has been reiterated many times by the Permanent Court of International Justice and the International Court of

9. As the International Law Commission noted, the proponents of the treaty approach: believed that a treaty would provide a firm legal foundation for the judgements delivered against the perpetrators of international crimes, enable States to decide whether or not to accept the draft statute and the jurisdiction of the court, particularly in view of the sensitive issue of national criminal jurisdiction, and avoid the practical difficulties of amending the [U.N.] Charter as well as the possible challenges to the legitimacy of a body established by a [U.N.] resolution. Report of the International Law Commission on the work of its forty-sixth session, [1994] 2 Y.B. Int'l L. Comm'n. at 22, U.N. Doc. A/CN.4/SER.A/1994/Add.1(Part 2).
12. In the case concerning Certain German Interests in Polish Upper Silesia, the Permanent Court of International Justice stated that "[a] treaty only creates law as between the states which are parties to it . . . ." German Interests in Polish Upper Silesia (Germany v. Polish Republic), 1926 P.C.I.J. (Ser. A) No. 7, at 29 (May 25). Cf. Nationality Decrees Issued in Tunis and Morocco, 1923 P.C.I.J. (Ser. B), No. 5, at 27–28 (Sept. 10); Territorial Jurisdiction of the International Commission of the River Order, 1929 P.C.I.J. (Ser. A) No. 23, at 19–22 (Sept. 10); Free Zones of Upper Savoy and the District of Gex, 1932 P.C.I.J. (Ser. A/B) No. 46, at 141 (June 7).
Justice. However, the *pacta tertiis* principle does not mean that treaties may not have certain indirect effects on non-States Parties. Practice suggests that multilateral treaty arrangements often create legal and political realities that could in one way or another affect political and legal interests of Third States and impose certain constraints on the behavior of non-parties. These constraints may result not from imposition of legal obligations upon Third States, but from the fact that a large portion of the international community adopts, in conformity with international law, a decision to deal with contemporary problems of community concern by creating appropriate institutions and procedures.

The Rome Statute is a special treaty because it is a constituent instrument of a new international organization. It envisions the establishment of a powerful permanent institution that will exercise jurisdiction over nationals of numerous countries for the most serious crimes of international concern. The general rule that only parties are bound by the treaty also applies to the constituent instruments of international organizations. However, the creation of international organizations always affects even non-Member States. These States may find it difficult to ignore the ICC.

Under the Rome Statute, the ICC will have jurisdiction with respect to the crime of genocide, crimes against humanity, war crimes and the still-undefined crime of aggression. In certain instances the ICC will be able to assert its jurisdiction even with respect to nationals of Third States. When the ICC actually comes into existence, it will, for example, have jurisdiction over military personnel of Third States stationed in a participating country, or senior civilian and military leaders of a Third State responsible for their State’s foreign policy. Non-Member States will not be able to block prosecutions of their nationals. Although only nationals of Third States, and not the Third States themselves, will be defendants before the ICC, it is obvious that the activities of the new institution will implicate vital legal interests of non-Member States. The creation of the ICC, which is authorized to exercise jurisdiction over numerous individuals around the world, means that it will affect an essential element of State sovereignty, namely criminal jurisdiction of all.


14. Rome Statute, supra note 1, art. 5. The Rome Statute lists the crime of aggression as one of the crimes within the ICC’s jurisdiction. However, according to Article 5(2) the ICC will be able to exercise jurisdiction over this crime only when a definition of aggression is adopted by the Assembly of State Parties in accordance with Articles 121 and 123 of the Statute.

15. See infra notes 24–79 and accompanying text.
States over their nationals. Once established, the ICC will affect all States’ governmental structures and decision-making processes.  

The Rome Statute may have additional effects on Third States. The Statute includes elaborate definitions of the most serious crimes of concern to the international community as a whole. To the extent that these definitions restate pre-existing international law, they may be applicable to all international actors without exception. Substantive criminal law innovations introduced by the Rome Statute may also generate new customary law. Any treaty, as Judge M. Sørensen put it, could “serve as an authoritative guide for the practice of States faced with the relevant new legal problems, and its provisions thus become the nucleus around which a new set of generally recognized rules may crystallize.” If there is a general and uniform State practice supporting new principles and rules laid down by the Rome Statute accompanied by the relevant opinio juris, they may pass into the corpus of generally binding customary law. As a permanent institution, the ICC will also contribute to further clarification and even elaboration of the elements of these crimes. These developments will also have at least an indirect effect on Third States.

The establishment of a permanent international criminal court will have a far-reaching effect on State cooperation in criminal matters and on domestic enforcement of international criminal law. From a purely legal perspective, this effect will not result from the Rome Statute itself. Rather, the changes are likely to occur as a result of the activities of the ICC as an international institution. It appears that no State will be able to ignore the impact of these developments.

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16. As G. Arangio-Ruiz stated during the International Law Commission’s debate on a future international criminal court:

[T]he jurisdiction of the international criminal court would affect States in the exclusive “control” that they exercised over their nationals and most particularly over their leaders or officials. The very fabric of states would be penetrated; there would be a break in the veil of their sovereignty in that they would be sending individuals in high Government posts to the court for trial and possible sentencing .... [T]he individual who might be brought before the court, tried, condemned and compelled to serve a sentence could be a head of State, a prime minister, the supreme commander of the armed forces or the minister of defense of any given country. Summary Records of the 233rd Meeting [1994] 1 Y.B. Int’l L. Comm’n at 33-34, U.N. Doc. A/CN.4/SER. A/1994.

II. THE ROME STATUTE AS A CONSTITUTIVE INSTRUMENT OF AN INTERNATIONAL INSTITUTION

Because the Rome Statute envisions the creation of a new global institution, it has acquired the status of a constitutive instrument of an international organization. According to Article 4 of the Rome Statute, the ICC "shall have international legal personality" and "shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes." The contracting parties have thus expressly conferred international legal personality on the ICC. Under the law of treaties, the legal personality of the ICC operates only vis-à-vis Member States. Third States are not legally bound by it because for them this provision is res inter alios acta.

However, the creation of a universal public body cannot be totally ignored by Third States. First, the express provision of the Rome Statute conferring on the ICC legal personality in international law means that non-Member States would not have any doubts about the ICC’s competence to perform international acts. Second, and more importantly, the Rome Statute establishes an objective legal personality of the ICC that could be asserted even with respect to non-members. In the 1949 Reparation for Injuries advisory opinion, the International Court of Justice found that:

Fifty states, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone.18

The Court’s pronouncement makes it clear that in cases of universal international organizations, non-Member States cannot claim that for them they had no legal existence. In the Reparation for Injuries case the International Court of Justice was not asked to indicate precisely how many States are required to endow international organizations with objective personality. Nevertheless, the Court did say that "the vast majority of the international community" had the power to create an entity possessing objective international personality. The Rome Statute had been approved by 120 States. The ICC will come into being when sixty countries ratify it. Although at this stage sixty States do not represent "the vast majority of the members of the international community," Third States can hardly treat the ICC as non-existent. When the Rome

Statute comes into force and the ICC comes into being, the ICC will be opposable to all States.

It may be argued that Third States should respect the position of a large number of States that created a new international entity. Legal grounds for such an indirect effect of constitutive instruments of international organizations on all States result from different political and legal considerations. The Special Rapporteur of the International Law Commission on the topic of treaty law, Sir G. Fitzmaurice, described the legal grounds for an indirect effect of such treaties in the following way:

The 'effect' is simply that the third state is called upon to take up a certain attitude towards the treaty and its contents and consequences—an attitude of recognition, respect, non-interference, tolerance, sufferance, as the case may be. The principle of non-intervention could be invoked here. But the duty is really a broader one of respect for valid international acts.¹⁹

In view of these considerations, a question arises as to the legitimacy of the U.S. campaign against the ICC. Senator Jesse Helms appears to have expressed the prevailing sentiment in this country when he stated that "the United States must fight this [Rome] Treaty."²⁰ There are indications that the United States may adopt a policy of total non-cooperation with the ICC. It may, in particular refuse to acknowledge the ICC rulings and to cooperate with other members of the Security Council to refer cases to the ICC.²¹

Non-Member States may argue that under current international law they have a perfect legal right to refuse formal recognition of new international institutions they dislike. However, Sir G. Fitzmaurice's suggestions concerning "respect," "non-interference" and "tolerance"²² must be taken into account by non-Member States. A more complicated issue is the policy of non-recognition of specific powers granted to the ICC, for example the power to carry out criminal investigation, and to try and convict nationals of all States, including nationals of non-Member States. Refusal to recognize the competence of the ICC in this

²⁰. 1998 Hearing, supra note 3, at 4. See also, statement of Senator Rod Grams, id. at 4. ("[T]his court . . . is the monster and it is the monster that we need to slay.")
²¹. See id. at 3 (statement of Senator Rod Grams) ("Should this court come into existence, we must have a firm policy of total non-cooperation, no funding, no acceptance of its jurisdiction, no acknowledgment of its rulings, and absolutely no referral of cases by the Security Council.").
²². See supra note 19 and accompanying text.
area amounts to denial of the effected transfer of powers from Member States to the ICC. Under the Rome Statute, State Parties transfer to the ICC their national jurisdiction over grave crimes of international concern. There is no doubt that all States have a sovereign right to determine how to exercise their jurisdiction over crimes committed on their own territory or their recognized jurisdiction over crimes of universal concern. As will become apparent from the following section, non-Member States have no legal ground to object to the legitimate transfer of existing national powers of Member States to an international judiciary, in particular their power to exercise jurisdiction over grave international crimes.

Calls for total "non-cooperation," in particular calls for non-cooperation with other members of the Security Council to refer the most serious crimes of concern to the international community as a whole to the ICC, may lead to violations of a general legal duty of all States to cooperate in effective prosecution and prevention of these crimes. Because it is well established that such grave crimes threaten the peace, security and well-being of the world, such a policy may also amount to violation of U.N. Charter duties to maintain international peace and security and to take effective collective measures for the prevention and removal of threats to the peace. This line of argument is particularly important in view of the fact that the ICC has been granted true universal jurisdiction with respect to nationals of all members of the international community only when a situation is referred to the ICC by the Security Council.

From a broad political perspective, the effectiveness of the refusal to recognize the ICC and its specific powers will depend on the degree of community participation in the ICC and the importance of State Parties. If the majority of members of the international community, including important powers, become parties to the Rome Statute, the political pressure on non-participating States may become quite strong. In response to the policy of non-recognition and non-cooperation Member States may, for example, put certain pressure on non-recognizing States through the existing system of international cooperation in criminal matters.

23. *Cf.* U.N. Charter, Art. 1 (stating that one the purposes of the United Nations is "[t]o maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace . . . .") and Art. 24 (stating that U.N. member states have conferred on the Security Council "primary responsibility for the maintenance of international peace and security").
III. THE JURISDICTIONAL REACH OF THE ICC

The jurisdictional provisions are central to the Rome Statute. They were also the most hotly debated issues in the International Law Commission, in the Preparatory Committees and during the Rome Conference.

According to the Statute, the ICC’s power to exercise criminal jurisdiction must be accepted by State Parties. This means that the ICC’s jurisdiction is essentially consensual. However, in contrast to earlier proposals providing for different “opt-in” and “opt-out” regimes, the ICC will operate under the regime of “inherent” or automatic jurisdiction. When a State ratifies the Rome Statute it thereby accepts the ICC’s jurisdiction over all crimes within its scope. No additional declarations of acceptance by State Parties are required. An exception to automatic jurisdiction is the transitional provision which allows State Parties to “opt-out” of the ICC’s jurisdiction over war crimes committed on their territory or by their nationals for a nonrenewable seven year period by filing a special declaration to that effect.

Article 12 of the Rome Statute defines actual preconditions to the exercise of jurisdiction. According to Article 12 the ICC can exercise its jurisdiction only if the State of the territory where the crime was committed or the State of nationality of the accused are parties to the Rome Statute or have accepted the jurisdiction of the ICC ad hoc with respect to the crime in question. It is important to note that under Article 12 the consent of any of the above States is enough. There is no mandatory consent of the State of nationality of the accused. This means that persons accused of committing the relevant crimes may be subject to prosecution even if the State of their nationality is not a party to the Rome Statute. In addition, Article 12 provides that no consent of the territorial State or the accused’s State of nationality is required in all cases when a situation in which a crime appears to have been committed is referred to the ICC by the Security Council acting under Chapter VII of the U.N. Charter. Under this provision, the ICC will have jurisdiction even if a crime is committed in territories of non-Member States by nationals of non-Member States.


25. See Rome Statute, supra note 1, art. 12(1).

26. Id. art. 124.
During the negotiations leading to the Rome Statute, the United States supported the referral by the Security Council because, as a permanent member, it would always be able to shield its nationals from the ICC's prosecution. At the same time, the United States argued that in other situations the consent of the State of the accused's nationality should be an essential precondition for the ICC's jurisdiction. In Rome the United States proposed an amendment requiring the consent of the territorial State and the State of nationality of the accused before the ICC could exercise jurisdiction. This proposal was rejected by the Rome Conference. Because the Rome Conference took the view that the position of the accused's country of nationality is irrelevant, U.S. nationals can be tried by the ICC without U.S. ratification of the Rome Statute if the ICC otherwise has jurisdiction. For example, if U.S. soldiers participating in a peacekeeping mission commit war crimes in a country that ratified the Rome Statute, they may face ICC prosecution.

The Rome Statute also includes provisions which allow the "surrender" of non-party nationals from custodial States to the ICC. Under Articles 58 and 59 of the Statute, the ICC may transmit a request for the arrest and surrender of a person accused of an international crime to any State Party on the territory of which that person may be found. The custodial State is expected to comply with the ICC's requests for arrest and surrender. In this respect, the Rome Statute will serve as a multilateral quasi-extradition treaty which allows transfers of nationals of non-parties to the ICC even in cases when they are not present in the territory of the State where the crime was committed. For example, a former U.S. official, such as Secretary of State, accused of planning the perpetration of a grave international crime on the territory of one of the parties to the Rome Statute, may be arrested and surrendered to the ICC if he or she visits any country that ratified the Rome Statute.


29. Note that Art. 102 of the Rome Statute distinguishes between "extradition" from one state to another and "surrender" from a state party to the ICC. Rome Statute, supra note 1, at art. 102. However, art. 102 does not require state parties to make this terminological distinction in their national legislation. Id.

30. Issues of personal immunity that may arise in this situation are discussed infra notes 96-111 and accompanying text.
of other Third States may find themselves in the same precarious position.

The jurisdictional reach of the ICC under the Rome Statute encountered strong opposition in the United States. U.S. officials often claim that the jurisdictional scheme of the ICC conflicts with "the most fundamental principles of treaty law" according to which States cannot be bound by a treaty without their consent. The opponents of the Rome Statute also argue that "it is simply and logically untenable to expose the largest deployed military force in the world, stationed across the globe to maintain international peace and security and to defend U.S. allies and friends, to the jurisdiction of a criminal court the U.S. Government has not yet joined and whose authority over U.S. citizens the United States does not yet recognize."

Four interrelated but analytically distinct questions arise in connection with the ICC's jurisdictional reach. The first is the nature of the ICC's jurisdiction under the Rome Statute. The second relates to the power of participating States to exercise universal or treaty-based extraterritorial jurisdiction. The third raises the issue of the legitimacy of the transfer of territorial, universal or treaty-based extraterritorial jurisdiction to an international institution. The final issue is the principle of legality or nullum crimen sine lege.

A. The Nature of the ICC's Jurisdiction

Under Article 12 of the Rome Statute the ICC can exercise jurisdiction over any alleged conduct only if there is a nexus between such conduct and the State where the crime was committed or the State of the accused person's nationality, and only if one of these States is a party to the Rome Statute. This means that the Rome Statute does not give the ICC universal jurisdiction. Under the universality principle the ICC would have been able to prosecute and try any person suspected of committing grave international crimes, such as genocide or war crimes, wherever the offense takes place and whoever the perpetrator.

This interpretation is supported by the travaux préparatoires. During the Rome Conference Germany argued that under current
international law all States have universal jurisdiction over crimes defined by the Rome Statute and that the ICC should be in the same position. However, the German proposal was rejected. If this approach had been accepted, the ICC would have had jurisdiction over any suspect regardless of whether the territorial state, state of nationality or any other interested state was a party to the Rome Statute. Any state party which obtains custody of the putative offender would be able to transfer the accused to the ICC and the ICC would then be able to exercise jurisdiction without the consent of other interested states. Regrettably, under the Rome Statute the ICC will not have jurisdiction over crimes committed by nationals of Third States on their own territory. Thus, even when the Rome Statute enters into force, future grave violations of, for example, humanitarian law by national military leaders in situations like Kosovo or Chechnya will not be prosecuted by the ICC if Yugoslavia or Russia did not join the ICC. In contrast, because any individual state has the right to try the same persons according to the principle of universal jurisdiction, the accused, at least in principle, runs a much greater risk to be prosecuted for the same crimes by domestic courts in individual members of the international community.

Under Article 12 of the Rome Statute the ICC has been granted true universal jurisdiction covering the whole world only when a situation in which a crime appears to have been committed is referred to the ICC by the Security Council acting under Chapter VII of the U.N. Charter. Only in such a situation would every custodial state have the right and maybe even the obligation to transfer the accused to the ICC. No consent of the territorial state or the accused's state of nationality is required.

Even if the ICC has not been granted universal jurisdiction, the adoption of the Rome Statute will facilitate prosecution of perpetrators of the most serious international crimes by all state parties. Like numer-


Under current international law, all states may exercise universal criminal jurisdiction concerning acts of genocide, crime against humanity and war crimes, regardless of the nationality of the offender, the nationality of the victims and the place where the crime was committed. This means that, in a given case of genocide, crime against humanity or war crimes, each and every state can exercise its own national criminal jurisdiction, regardless of whether the custodial state, the territorial state or any other state has consented to the exercise of such jurisdiction beforehand . . . . [T]here is no reason why the ICC—established on the basis of a treaty concluded by the largest possible number of states—should not be in the very same position to exercise universal jurisdiction for genocide, crimes against humanity and war crimes in the same manner as the contracting parties themselves.

35. See infra notes 43–64 and accompanying text.
ous other multilateral treaties dealing with crimes of international concern, the Rome Statute provides a treaty base for the joint exercise of extraterritorial jurisdiction with respect to crimes defined by the Statute. The Rome Statute thus endorses the idea of a treaty-based extraterritorial jurisdiction over crimes of genocide, crimes against humanity and war crimes.

The United States argues that the ICC’s major jurisdictional problem is its power to try the accused in cases when only the territorial state ratifies the Rome Statute. However, it has long been recognized that any state has an unquestionable right to exercise criminal jurisdiction with respect to all persons within its territory, including non-nationals. In the *Lotus Case* the Permanent Court of International Justice stated that “jurisdiction is certainly territorial.” U.S. courts traditionally support this concept. In *Schooner Exchange v. McFaddon* Chief Justice J. Marshall stated that “the jurisdiction of the nation within its own territory is necessarily exclusive and absolute.”

The territorial principle has expanded over the years to justify jurisdiction not only over offenses that actually take place within a state’s territory, but also where any essential constituent element of a crime or effect of the offense occurs in the territorial state. It is also recognized that in some situations states have the right to exercise jurisdiction over acts of non-nationals committed in foreign countries. This possibility was recognized already in 1927 when the Permanent Court of International Justice stated in the *Lotus Case* that “territoriality of criminal law... is not an absolute principle of international law and by no means coincides with territorial sovereignty.” While usually there must be a direct and substantial connection to justify a state treating as criminal the conduct of non-nationals taking place in foreign countries, in cases of universal or quasi-universal jurisdiction over grave international crimes such a connection is not required.

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36. See infra notes 67–72 and accompanying text.
40. Id. at 20.
41. Note that at least in principle the idea of universal jurisdiction may be incorporated into the traditional doctrine of territoriality by declaring that any grave international crime committed abroad has some domestic effect in the prosecuting country or is deemed to have been an act committed in the prosecuting country. In *Regina v. Finta* the Canadian Supreme Court affirmed jurisdiction over war crimes committed during the occupation of Hungary by Germany in 1944 by referring to the principle of universality. *Regina v. Finta*, 104 INT’L. L.
B. Universal and Treaty-Based Extraterritorial Jurisdiction

Article 12 of the Rome Statute expressly bases the ICC's jurisdiction on the traditional principles of territoriality and nationality. At the same time, it envisions international cooperation in extraterritorial exercise of these well established bases of jurisdiction. By focusing on this cooperation effort, U.S. critics of the Rome Statute often claim that it created a form of "universal jurisdiction." Even if this assertion was true, it cannot undermine the legitimacy of the ICC. General international law clearly recognizes the principle of universality. To the extent that the jurisdictional reach of the ICC may be based on the idea that every State has an interest in the prosecution of the most serious international crimes defined by the Rome Statute, namely the crime of genocide, war crimes and crimes against humanity, the Rome Statute simply reflects contemporary trends and tendencies in international law.

Under the universality principle any State may assert a claim to arrest, prosecute and try any person suspected of committing grave international crimes, such as genocide or war crimes, wherever the offense takes place and whoever the victim. Clear examples of universal crimes under modern general international law are genocide and torture. It is beyond any dispute that any State has the right to prosecute perpetrators of genocide because genocide is a universal crime under both the 1948 Genocide Convention and general international law. The International Court of Justice stated in the 1996 Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide that "the rights and obligations enshrined in the [Genocide] Convention are rights and obligations erga omnes." The Court also
noted that “the obligation each state thus has to prevent and to punish the crime of genocide is not territorially limited by the Convention.” The International Law Commission has confirmed that universal jurisdiction with respect to the crime of genocide exists as “a matter of customary law for those states that are not parties to the [Genocide] Convention.”

With respect to torture, the Yugoslav Tribunal stated in the Furundzija case that the prohibition of torture “has evolved into a peremptory norm or jus cogens.” The Tribunal then stated that “one of the consequences of the jus cogens character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction.”

Although the total number of actual prosecutions based on the universality principle is fairly limited, practice indicates that this principle of international law has been invoked by courts of various States with respect to different crimes. In the famous Eichmann case involving jurisdiction over a Nazi war criminal, the district court of Jerusalem noted that Eichmann was accused of committing crimes against the law of nations “which struck at the whole of mankind and shocked the conscience of nations.” It held that “the jurisdiction to try crimes under international law is universal.” The Supreme Court of Israel affirmed the judgment and noted that the State which prosecutes and punishes a person accused of committing an international crime acts merely as an organ of the international community. It held that the State of Israel was therefore “entitled, pursuant to the principle of universal jurisdiction and in the capacity of a guardian of international law and an agent for its enforcement, to try the appellant.” In Regina v. Finta the Canadian Supreme Court affirmed jurisdiction over crimes committed in Hungary in 1944 because “the principle of universality permitted a State to

48. Id. at para. 156.
50. Id. (emphasis in the original).
52. Id. at 304.
53. See Regina v. Finta supra note 41.
exercise jurisdiction over criminal acts committed by non-nationals against non-nationals wherever they took place if the offense constituted an attack on the international legal order.

In the well-publicized Pinochet Case several States, especially Spain and Belgium, sought Pinochet's extradition from Britain. The House of Lords judgment in this case is a strong new indication of general community acceptance of the principle of universal jurisdiction.

In this connection it is important to note that U.S. courts have also recognized the power of the United States and other States to prosecute foreign nationals for transgressions of international law under the theory of universality. In the Demjanjuk case which dealt with the extradition of an alleged Nazi concentration camp guard to Israel, a U.S. Court of Appeals for the Sixth Circuit referred to the "universality principle" over "crimes universally recognized and condemned by the community of nations." The Court noted that the "universality principle is based on the assumption that some crimes are so condemned that the perpetrators are the enemies of all people." It added that when proceeding on that jurisdictional premise, neither the nationality of the accused or the victim(s), nor the location of the crime is significant. The underlying assumption is that the crimes are offences against the law of nations or against humanity and that the prosecuting nation is acting for all nations.

Other U.S. courts have relied on the principle of universal jurisdiction in a variety of contexts. It is therefore not surprising that the

54. Id. at 287.


56. Belgium's domestic law also allows universal jurisdiction over international crimes. In 1999 Belgium adopted a special domestic act concerning the punishment of grave breaches of international humanitarian law, including genocide, crimes against humanity, and war crimes. See Belgium: Act Concerning The Punishment of Grave Breaches of Humanitarian Law, reprinted in 38 I.L.M. 918, 921 (1999). Art. 7 of the 1999 Act provides that "the Belgian courts shall be competent to deal with breaches provided for in the present Act, irrespective of where such breaches have been committed." Id. at 924.


59. Id.

Restatement of the Foreign Relations Law of the United States includes the following summary of universal jurisdiction:

A state has jurisdiction to define and prescribe punishment for certain offences recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism [even in the absence of other jurisdictional bases.]\(^{61}\)

In view of these trends, Third States, including the United States, are hardly in a position to argue that the ICC’s jurisdictional arrangement is something extraordinary. General international law recognizes universal jurisdiction over the majority of offenses defined by the Rome Statute. The only valid basis for concern of non-States Parties may be the exact extent of universal jurisdiction, if any, granted to the ICC. A claim may be made that the crimes within the ICC’s jurisdiction “go beyond those arguably covered by universal jurisdiction.”\(^{62}\) Indeed, not so long ago some prominent writers claimed that there was no general rule which gives “the states the right to punish foreign nationals for crimes against humanity in the same way as they are, for instance, entitled to punish acts of piracy.”\(^{63}\)

Even if these objections could be sustained, there is still another perfectly valid basis for the Rome Statute’s jurisdictional reach. International law recognizes that State Parties to an international treaty may exercise extraterritorial treaty-based jurisdiction over crimes of an international character defined by that treaty. Jurisdiction over treaty crimes is essentially based on the consent of participating States. For example, parties to the Geneva Conventions\(^{64}\) have a treaty right to

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63. 1 *Oppenheim’s International Law* 998 (Sir Robert Jennings and Sir Arthur Watts eds., 9th ed., 1992). However, even this conservative view admits that “there are clear indications pointing to the gradual evolution of a significant principle of international law to that effect.” Id.
Prosecute all persons before their own courts, regardless of their nationality, alleged to have committed or to have ordered to be committed, a grave breach of the Conventions. The same principle has been adopted by numerous other multilateral conventions, including the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft, the 1971 Convention on Psychotropic Substances (Article 22), the 1979 International Convention Against the Taking of Hostages (Article 8), the 1984 Convention Against Torture (Article 6) and the 1997 International Convention for the Suppression of Terrorist Bombings (Article 8).

It is not easy to draw a clear distinction between crimes under general international law and crimes of international concern defined by treaties ("treaty crimes"). For example, the crime of genocide may be regarded as a crime under both general law and "treaty crime" as defined by the 1948 Genocide Convention. While in the first case any State which obtains custody of persons suspected of responsibility may punish the accused for the breach of general international law, in the second case only State Parties to a particular treaty enjoy a treaty right to punish individuals in accordance with their national law. In cases where jurisdiction over nationals of Third States is permitted not by general international law but by specific treaties, the relevant jurisdictional arrangement binds only State Parties.

For our purposes, it is important to note that both strands of jurisdiction mentioned above make no distinction between nationals and non-nationals of prosecuting States. All the existing multilateral conventions providing for extraterritorial treaty-based jurisdiction do not require the State of nationality of the accused to be a party to the relevant convention or to consent to prosecution. State Parties exercise criminal jurisdiction with respect to specified offenses regardless of the accused's nationality and do not take into account the position of the

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70. Genocide Convention, supra note 43, at 277.
accused's State of nationality. The general right of all States to create such treaty arrangements has never been challenged. In cases of specific prosecutions Third States do not protest against the actual exercise of jurisdiction over treaty crimes under the extraterritorial treaty-based principle. It is also important to keep in mind that in several instances U.S. courts asserted their jurisdiction over treaty crimes without even asking the question as to whether the State of the nationality of the accused was a party to the relevant convention providing for extraterritorial jurisdiction.  

It may therefore be argued that to the extent that the Rome Statute relies on the generally recognized right of all States to assert extraterritorial jurisdiction to prosecute individuals for a particular category of crime wherever occurring and irrespective of the accused's nationality by concluding a specific treaty, it can still serve as a legitimate new treaty arrangement establishing this type of jurisdiction. The extraterritorial jurisdiction created by a widely ratified multilateral treaty can be asserted by State Parties with respect to any individual, including nationals of Third States.

Because the Rome Statute will serve as a quasi-extradition treaty, an important issue is the right of custodial States to surrender individuals subject to their criminal jurisdiction to another jurisdiction in order to stand trial. Again, international law allows extradition in respect to both crimes under general international law and treaty crimes. As noted earlier, in the Demjanjuk case U.S. courts approved extradition of an alleged Nazi concentration camp to Israel by relying on the principle of universal jurisdiction over offences under general law that are "universally recognized and condemned by the community of nations."

Numerous multilateral treaties defining treaty crimes allow State Parties having custody of the offender either to try the case themselves or to extradite the offender to another interested State. In these situations, "an interested state" is not necessarily the State of the offender's nationality. The requesting State may be the territorial State or any other State having a valid title to exercise criminal jurisdiction.

71. For example, in United States v. Yunis, 861 F. Supp. 896 (N.D. Cal.), the United States prosecuted a Lebanese national for hijacking from Beirut airport of a Jordanian airplane by referring to, among other things, quasi-universal jurisdiction under the 1979 International Convention Against the Taking of Hostages despite the fact that Lebanon was not a party to the 1979 Convention. In United States v. Rezaq, 134 F.3d 1121 (D.C. Cir. 1998), the District of Columbia Circuit also affirmed jurisdiction for hijacking over a national of a non-party to the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft.

72. See supra notes 58–60 and accompanying text.
Treaty arrangements establishing the “extradite or prosecute” system\textsuperscript{73} have been accepted as legitimate by all members of the international community. Under the existing system the State of the accused’s nationality has very few legal grounds for protest if its national is transferred by one treaty participant to another. Legal grounds for complaint exist only in cases where there is a well-founded fear of the violation of fundamental rights of an accused in the receiving State.\textsuperscript{74} This may involve, for example, the transfer of the accused to a State that has no independent judiciary or does not guarantee basic procedural rights. However, these grounds are obviously non-existent in the case of the ICC—a competent, impartial and independent tribunal created by the international community. The Rome Statute includes all the generally accepted procedural guarantees for the accused\textsuperscript{75} recognized in international human rights instruments, such as the International Covenant on Civil and Political Rights.\textsuperscript{76} In view of this, it is difficult to claim that by creating the ICC the participating States violated legal rights or interests of Third States. The Rome Statute grants State Parties the same jurisdictional and extradition powers that they already enjoy under other multilateral conventions.

C. The Power to Create Joint International Tribunals

Under the Rome Statute, the accused will be tried not by an interested State but by an international tribunal created by the interested States. In principle, it could be argued that such an arrangement contravenes the established principles of international criminal jurisdiction which usually envision trials only in national courts. Indeed, an argument has been made that State Parties to the Rome Statute have no legitimate right to transfer to a joint tribunal their sovereign powers to extradite or prosecute. For example, U.S. officials expressed doubts as to whether States “could join together to create a criminal court and purport to extend its jurisdiction over everyone everywhere in the world.”\textsuperscript{77}

This line of argument contravenes well-known precedents supporting the view that States may create joint international tribunals and operate them under the principle of “ceded jurisdiction.” The Nuremberg

\textsuperscript{73} For details, see M.C. Bassiouini & Edward M. Wise, Aut Dedere Aut Judicare: The Duty To Extradite Or Prosecute In International Law (1995).


\textsuperscript{75} See, in particular, Rome Statute, supra note 1, Arts. 19, 20, 22, 23, 24, 26, 55, 61, 63, 65, 66, 67, 81, 82, 85.


\textsuperscript{77} Cf. 1998 Hearing, supra note 3, at 13 (statement of Hon. David J. Scheffer).
The Statute of the International Criminal Court

Tribunal is the most important precedent supporting the legitimacy of the principle of “ceded jurisdiction.” Prominent writers have noted that the Nuremberg Tribunal was the joint exercise by its establishing States of a sovereign right which each of them was entitled to exercise separately on its own responsibility in accordance with existing international law. The Nuremberg Tribunal itself endorsed the principle of “ceded jurisdiction” by stating that

The signatory powers created this tribunal, defined the law it was to administer, and made regulations for the proper conduct of the trial. In doing so, they have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law.

Official U.N. documents fully endorse this view. Commenting on the Nuremberg precedent, the U.N. Secretary-General stated in 1949 that “the Court affirmed that the signatory powers in creating the tribunal had made use of a right belonging to any nation.” In a resolution proposed by the United States and adopted unanimously on December 11, 1946, the U.N. General Assembly affirmed “the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal.”

Although in subsequent years no joint criminal tribunal was created, both the widely ratified 1948 Genocide Convention and the 1973 Apartheid Convention expressly contemplate conferral of criminal jurisdiction on “an international penal tribunal” to be created. There is no doubt that all State Parties to these conventions agreed that they have a sovereign right to combine their jurisdictions and to cede this combined jurisdiction to a future criminal court.

The Rome Statute is also based on the assumption that if State Parties to the Rome Statute may prosecute persons accused of grave international crimes unilaterally, they may also prosecute them jointly. As a result, the ICC will have a legitimate treaty right to exercise jurisdiction.
jurisdiction with respect to all persons accused of crimes under the Rome Statute regardless of their nationality.

D. Nullum Crimen Sine Lege

Article 22 of the Rome Statute states that “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.” The principle of *nullum crimen sine lege* is also a fundamental principle of criminal law recognized in Article 15 of the Covenant on Civil and Political Rights. Nationals of Third States accused of committing a crime under the Rome Statute may claim that the relevant substantive provisions of the Statute did not apply to them because their States failed to ratify the Statute and, as a result, that treaty was not part of the law of their countries. They could thus argue that the ICC’s jurisdictional reach contravenes *nullum crimen sine lege*.

Again, this argument does not take into account the existing principles and rules of international criminal law. The Nuremberg Charter characterized as crimes against humanity certain types of conduct “whether or not in violation of the domestic law where perpetrated.” In its judgment the Nuremberg Tribunal held that “international law imposes duties and liabilities upon individuals.” The Tribunal also noted that “individuals can be punished for violations of international law” and that “individuals have international duties which transcend the national obligations of obedience imposed by the individual state.” This implies that international law has been granted relative autonomy in the criminal characterization of the types of behavior as international crimes. As a result, individuals could incur direct criminal responsibility under international law irrespective of the existence of any corresponding national law. The International Law Commission recognized the general autonomy of international law over national law with respect to the criminalization of certain acts in Principle II of the 1950 Nuremberg Principles which stated: “The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.”

84. *See supra* note 76.
85. Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, Aug. 8, 1945, art. 6(c), 82 U.N.T.S. 279, 288 (hereinafter Nuremberg Charter).
86. *Judgment, supra* note 79, at 223.
87. *Id.*
1954 Draft Code of Offences Against the Peace and Security of Mankind\textsuperscript{89} and the 1996 Draft Code of Crimes Against the Peace and Security of Mankind.\textsuperscript{90}

However, the supremacy of international criminal law over national law is accepted only in respect to crimes under general international law. Treaty definitions of crimes cannot directly govern acts of individuals because these crimes have to be transformed into the domestic law of participating States. If a State Party fails to implement the relevant treaty provision in its domestic law, the mere adoption of a treaty definition of a crime at the international level is insufficient to make the treaty rule applicable to the conduct of private individuals. It is obvious that the failure of a State Party to comply with its treaty obligations should not prejudice the rights of an accused individual. As a result, if a national of a State Party that failed to enact the relevant domestic legislation commits a crime on its territory, an accused cannot be held liable for the treaty crime.

While the application of the principle \textit{nullum crimen sine lege} to crimes under general law and treaty law varies in cases of crimes committed on the territory of State Parties that fail to enact the relevant domestic legislation, there is no difference if treaty crimes are committed on the territory of States that have made treaty provisions part of their domestic law. This applies to both nationals and non-nationals of the territorial State. Nationals of State Parties that have failed to implement the relevant treaty provisions or nationals of non-States Parties accused of committing treaty crimes on the territory of the complying State cannot argue that their prosecution violates the principle of \textit{nullum crimen sine lege}. The International Law Commission considered the validity of the \textit{nullum crimen sine lege} argument in connection with Article 21 of its 1994 Draft Statute for an International Criminal Court. Under Article 21 of the 1994 Draft Statute the proposed Court was able to exercise jurisdiction with respect to universal and treaty crimes if the jurisdiction of the Court with respect to the crime was accepted by “the State which has custody of the suspect with respect to the crime (‘the custodial State’)” and by “the State on the territory of which the act or omission in question occurred.”\textsuperscript{91} In its comment on the applicability of \textit{nullum crimen sine lege} to treaty based crimes the Commission stated:

\begin{itemize}
  \item[89.] See [1954] 2 Y.B. Int'l L. Comm'n. at 149.
  \item[90.] See Report of the International Law Commission on the work of its forty-eighth session, supra note 46, para. 30.
  \item[91.] Report of the International Law Commission on the work of its forty-sixth session, supra note 9, at 41.
\end{itemize}
The *nullum crimen sine lege* principle does not presuppose an exclusively territorial system of the application of treaty provisions. If the treaty was properly applicable to the conduct of the accused in accordance with its terms and having regard to the link between the accused and the state or states whose acceptance is required for the purposes of Article 21, the accused should not be able to deny the applicability of the treaty merely because some third state was not at the time a party to the treaty or because it was not part of the law of that third state. For example, if a person commits a crime on the territory of state X, a party on whose territory the treaty is in force, the fact that the state of the accused's nationality is not a party to the treaty would be irrelevant.\footnote{Id. at 55–56.}

This suggests that any claim based on the principle *nullum crimen sine lege* could succeed only in a situation when a national of a Third State commits a treaty crime under the Rome Statute on the territory of that Third State and the crime in question has no effect on the territories of State Parties to the Statute. In such a situation, the national of the Third State could claim that its conduct cannot be regarded as governed by the Rome Statute because the territorial State has not ratified it and the crimes defined by that treaty cannot be considered as part of the law of that State. However, the claim based on *nullum crimen sine lege* would fail in all cases where a national of a Third State is accused of committing a crime under general international law, such as genocide. In such circumstances, a national of a Third State could be convicted by the ICC even if the same person cannot be tried in his or her national court. This approach is in full accord with the existing human rights treaties which usually provide that the principle *nullum crimen sine lege* is not infringed when the act in question is a crime under general international law. The Covenant on Civil and Political Rights\footnote{International Covenant on Civil and Political Rights, *supra* note 76.} specifically addresses this situation. Article 15(1) of the Covenant provides that “no one shall be guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.” However, Article 15(5) states that “nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was
committed, was criminal according to the general principles of law recognized by the community of nations."\(^\text{94}\)

### IV. Issues of Immunity

Traditional customary law immunities used to serve as an insurmountable bar to the exercise of criminal jurisdiction over heads of states and some other state officials. Because of their status, serving heads of states always enjoyed personal immunity *ratione personae*. Although immunity *ratione personae* was not available to serving heads of governments who are not also heads of states, foreign ministers, military commanders, those in charge of security forces or their subordinates, these state officials were protected by immunity *ratione materiae*.

Treaty arrangements providing for jurisdiction over crimes of international concern do not remove personal immunities recognized by traditional customary law. These immunities must be removed by express agreement or waiver. The Rome Statute includes such a waiver. Article 27 of the Statute states:

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

This provision will have a profound impact on all state officials. Because the Rome Statute denies personal immunity, public officials, including heads of states, accused of international crimes, will have to think twice about traveling abroad, especially to Member States. Not surprisingly, this has raised serious concern in many States, especially in the United States.\(^\text{95}\)

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Our main concern from the U.S. perspective is not that the prosecutor will indict the occasional U.S. soldier who violates our own values and laws and his or her
Issues of immunity may arise not only during the trial but also during the surrender process. As noted earlier, the Rome Statute includes provisions which allow surrender of non-party nationals from custodial States to the ICC. Under Articles 58 and 59 of the Statute, the ICC may transmit a request for the arrest and surrender of a person accused of an international crime to any State Party on the territory of which that person may be found. The custodial State is expected to comply with the ICC's order. Under this provision, a foreign state official, such as Foreign Minister, may be arrested and surrendered to the ICC if he or she visits any country that ratified the Rome Statute.

In these cases, the Rome Statute appears to display a greater degree of recognition of possible claims of immunity under international law. Although the Rome Statute does not define the notion of "custodial state," the available record indicates that it seems to refer to a State that has custody of the accused either because it has jurisdiction over the crime or because it has received an extradition request relating to it. In its comment to the 1994 Draft Statute for an International Criminal Court, the International Law Commission stated that "the term 'custodial state' is intended to cover a range of situations, for example, where a State has detained or detains a person who is under investigation for a crime, or has that person in its control." In the International Law Commission's 1994 Draft Statute the term "custodial state" had replaced another phrase used in an earlier draft. The earlier draft referred to "the state on whose territory the person is to be found." As the Chairman of the Commission's Working Group on the Draft Statute had indicated, the earlier wording "would have given rise to difficulties in a number of contexts, among them cases involving persons temporarily on the territory of a state, visiting forces, or individuals with personal immunity." This means, inter alia, that if a State whose armed forces are visiting another State detains an accused member of its forces under its system of military law, the sending State and not the host State would be the "custodial state."

In addition, Article 98 of the Rome Statute recognizes that compliance with the ICC's request for surrender should not violate the custodial State's obligations under international law. Article 98(1)
provides that the ICC may not proceed with a request which would require the custodial State to “act inconsistently with its obligations under international law with respect to the state or diplomatic immunity of a person . . . of a third state, unless the Court can first obtain the cooperation of that Third State for the waiver of the immunity.” Article 98(2) of the Rome Statute addresses the obligations of host States under the status-of-forces agreements. If there is an international agreement providing for jurisdiction of a sending State over certain matters, the ICC may not proceed with a request for surrender, unless it first obtains the cooperation of the sending State for the giving of consent for the surrender.

An important question for Third States is the impact of these provisions on their heads of states and other public officials. One can argue that although personal immunity of heads of states has already been removed in cases of certain well-established international crimes, there is no general rule denying personal immunity of heads of states or governmental officials with respect to all crimes defined by the Rome Statute. As a result, it could be argued that the provision of the Rome Statute denying immunity of heads of states accused of all crimes included in the Rome Statute cannot bind Third States. Only State Parties can prosecute their heads of states or governmental agents for all crimes under the Rome Statute who, in the exercise of their official functions, may have committed the relevant crimes. Third States may continue to rely on the existing immunities in cases involving the surrender of suspects to the ICC.

State Parties to the Rome Statute will certainly argue that although under general international law heads of states are entitled to immunity in relation to ordinary criminal acts performed in the course of exercising public functions, they do not enjoy immunity for most serious international crimes. In this respect they will rely on the Nuremberg judgment, according to which

The principle of international law, which under certain circumstances, protects the representative of a state, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings.¹⁰⁰

The exclusion of the official position of an individual as possible defense to crimes under international law by the Nuremberg Tribunal,

¹⁰⁰. Judgment, supra note 79, at 223.
some international treaties, such as the 1948 Genocide Convention, and the Statute of the International Tribunal for the Former Yugoslavia has already resulted in a claim that, as a matter of general customary international law, even heads of states are personally liable if there is sufficient evidence that they "authorized or perpetrated serious international crimes." Even if one agrees with this far-reaching proposition, it is far from clear which specific acts constituting genocide, war crimes and crimes against humanity do not allow immunity claims. The Rome Statute not only restated but also developed substantive criminal law. Another area of uncertainty is the position of Third States that persistently objected to specific definitions as representing customary international law.

In any event, to the extent that the Rome Statute codifies the existing general law on the subject, Third States would probably not be able to claim immunity for these persons. Nor will it be easy to assert any immunity in cases of surrender of the accused officials by the custodial State under Article 98(1) of the Rome Statute. Under Article 98(1), the custodial State has to respect with "its obligations under international law with respect to the state or diplomatic immunity of a person... of a third state."

In all these situations, state officials, especially former state officials, who may not claim immunity ratione personae but may try to rely on immunity ratione materiae, will have to prove that existing customary international law protects them from prosecution for their official acts. This may be difficult because international law is moving towards a more restrictive view of immunity ratione materiae. The Nuremberg Tribunal held that "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."

104. For an argument that international practice still does not support the removal of the traditional immunity of heads of states, see M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW, 465–67 (1992).
105. See infra notes 180–81 and accompanying text.
106. See infra notes 182–84 and accompanying text.
Recently, the International Criminal Tribunal for the Former Yugoslavia held that under existing customary international law even heads of state or government are personally responsible for acts of torture.

Domestic courts have adopted the same conceptual approach. The leading case is *Pinochet*, rendered by the British House of Lords. The House of Lords held that under international law torture cannot be part of the functions of public officials, including heads of state. According to this approach, immunity *rationae materiae* requires assessment of the official capacity not only from the point of view of domestic law but also from the point of view of international law. From that perspective, it may be argued that at least in some cases the very criminalization of grave violations of international law of global concern automatically removes them from the list of accepted public functions and therefore excludes immunity *ratione materiae*. Furthermore, in many cases the official or governmental character of the acts which is necessary to found a claim of immunity *rationae materiae* is in fact an essential element which makes certain acts, such as torture, an international crime. Obviously, as one commentator put it, "international law cannot grant immunity from prosecution in relation to acts which the same international law condemns as criminal and as an attack on the interests of the international community as a whole."

Additional arguments against immunity may be found in cases when certain criminal acts violate fundamental community norms of *jus cogens*. *Jus cogens* norms enjoy the highest status in the international legal order. They automatically prevail and invalidate all other rules of international law, including rules concerning head of state immunity.

It will be interesting to see how these considerations will affect future developments. Parties to the Rome Statute can argue that under the Rome Statute they are entitled to exercise jurisdiction over all offenders, including public officials. They can also argue that in all cases under the ICC’s jurisdiction, immunity could be denied to officials of any country, irrespective of whether his or her country has ratified the Rome Statute. Whether such a claim prevails will depend on the subsequent practice and reaction of Third States.

111. *Cf. id.* at 262–65.
It is not entirely clear to what extent the existing status-of-forces agreements provide protection against the ICC’s jurisdiction. It appears that surrender of the accused military personnel to the ICC could be excluded only if a status-of-forces agreement includes a clause providing for complete immunity from prosecution by the host State. The status of forces of the United States and other members of the North Atlantic Treaty Organization (NATO) is governed by the 1951 North Atlantic Status of Forces Agreement. This agreement has long provided the basic legal framework defining immunities of the military personnel stationed abroad. It has served as a model for numerous multilateral and bilateral agreements concluded by the sending States, including the United States, with host States. These agreements do not provide absolute protection with respect to all crimes. The sending State’s military personnel enjoy only partial immunity.

Under Article VII of the 1951 Agreement, visiting forces may be subject to the receiving State’s criminal jurisdiction. The sending State has “the primary right” to exercise jurisdiction over military personnel in relation to “offences arising out of any act or omission done in the performance of official duty.” There are different interpretations of the “official duty” exception. Under an expansive interpretation, favored by the United States, the sending State alone should decide whether an act arose out of “official duty.” Indeed, according to the travaux préparatoires of the 1951 Agreement, the certificate of the military authorities of the sending State would be taken as determinative of whether an act was committed in performance of “official duty.” However, the testimony of the State Department Legal Advisor in the Foreign Relations Committee of the U.S. Senate indicates that the courts of the receiving State may review such certificates and reach their own conclusions about the question. Although in the vast majority of cases the

113. See, e.g., Agreement to Supplement the Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces with Respect to Foreign Forces Stationed in the Federal Republic of Germany, Aug. 3, 1959, 481 U.N.T.S. 262 (a very detailed status of forces agreement with Germany).
115. Id. at 176.
receiving States accept the sending State's "official duty" determination,\textsuperscript{118} there seems to be no legal obligation to do so. In cases of grave international crimes of universal concern, the receiving State could argue that the relevant acts were not within the limits of "official duty" and thus assert its jurisdiction. If the authorities of the host State arrest the accused offender and the "official duty" determination is not resolved through diplomatic channels or arbitration, the courts of the receiving State may make the final determination on whether an offender was acting within the scope of military duty when the offense was committed.

In view of this possibility, complete immunity for military personnel would be guaranteed only if status-of-forces agreements would be modeled on earlier agreements that guaranteed exclusive jurisdiction and absolute immunity for the U.S. forces. Historical precedents include agreements concluded during the First and Second World Wars\textsuperscript{119} and some bilateral agreements concluded with certain countries after the Second World War.\textsuperscript{120} There is no doubt that attempting to reestablish the principle of absolute immunity in any future negotiations will be an extremely challenging task. More importantly, such an arrangement may not provide an absolute guarantee. Theoretically, one cannot exclude the possibility of an argument relying on the \textit{ordre public} of the international community. Domestic courts of host States Parties to the Rome Treaty could argue that they must accord primacy to community norms arising from obligations of \textit{jus cogens}, such as prohibition of genocide or torture, over specific treaty obligations under the status-of-forces agreements.

V. DOMESTIC CRIMINAL PROCEDURES IN THIRD STATES AND COOPERATION IN THE ADMINISTRATION OF CRIMINAL JUSTICE

Under the Rome Statute the ICC will complement rather than replace national courts. The ICC will be able to assert its jurisdiction only when a national criminal system is unwilling or unable to genuinely investigate or prosecute the perpetrators of the most serious crimes of international concern.\textsuperscript{121} Although the ICC will not interfere with

\textsuperscript{118} See \textsc{Lazareff}, supra note 114, at 179–93.
\textsuperscript{119} See id. at 19–29.
\textsuperscript{120} See, e.g., Administrative Agreement Under Article III of the Security Treaty Between the United States of America and Japan, Feb. 28, 1952, U.S.-Japan, 3 U.S.T. 3341. Art. XVII of the 1952 Agreement accorded "exclusive jurisdiction over all offenses which may be committed in Japan by members of the United States armed forces" to the United States.
\textsuperscript{121} Rome Statute, \textit{supra} note 1, art. 17(1)(a).
domestic procedures when a State which has jurisdiction over the case is willing or able to prosecute the accused, it has the power to determine for itself whether this is the case.\textsuperscript{122} If the domestic criminal justice system of any State, including States of the nationality of the accused that may be non-States Parties, fails to function effectively, the accused individuals may be brought before the ICC.

The very existence and operation of the ICC may contribute to a more effective functioning of national justice systems with respect to international crimes. This is an extremely important political legal development. International practice indicates that domestic prosecutors and courts are often poor vehicles for the prosecution of their nationals with respect to international crimes. A good example is the infamous My Lai incident from the Vietnam war, in which U.S. soldiers massacred hundreds of Vietnamese civilians, including women and children. Of the more than 30 soldiers involved, only U.S. Army Lieutenant William L. Calley was convicted for the premeditated murder of 22 infants, children, women, and old men, and of assault with the intent to murder a child of about 2 years of age.\textsuperscript{123} However, Calley was imprisoned for only a short time before having his sentence commuted.\textsuperscript{124} If all persons involved in the My Lai incident had been tried by an impartial international tribunal, they would probably have been convicted and received a harsher punishment. In any future incidents like My Lai, the ICC will have the power to examine domestic decisions made by any non-participating State not to prosecute the offenses within its jurisdiction. From this perspective, the ICC will function as a higher international court of review for national authorities and courts.

Additional pressure may arise from more specific provisions of the Rome Statute. For example, the Statute provides that before a case is taken up by the ICC, the Prosecutor will notify all State Parties as well as all States that would normally have jurisdiction, including Third States, such as the State of nationality of the accused.\textsuperscript{125} These States then have another chance to initiate their own investigations to which the Prosecutor must defer. As a result, even an initial action by the ICC may compel more rigorous domestic investigation and eventual prosecution of international crimes in all countries of the world.

\textsuperscript{122} Rome Statute, supra note 1, arts. 17, 19(1).
\textsuperscript{125} Rome Statute, supra note 1, art. 18(1).
The Rome Statute may affect domestic criminal procedure in Third States in a number of other ways. An interesting issue is double jeopardy in domestic criminal proceedings. Article 20 of the Rome Statute imposes a double jeopardy limitation on national jurisdictions. Under Article 20, no person who has been convicted or acquitted by the ICC for the relevant crimes can be tried again before "another court" even if they happen to be crimes under domestic laws. The phrase "another court" includes both international and domestic courts. As a result, subsequent proceedings in domestic courts of State Parties are barred by a final order issued by the ICC. It is not entirely clear whether a domestic trial after a final ICC order by a Third State would be consistent with the general principle *non bis in idem*. Many States are bound by this principle as a matter of treaty law. For example, the United States is bound by Article 14(7) of the Covenant on Civil and Political Rights. Although the practice of the Human Rights Committee indicates that *non bis in idem* has only domestic application, a question may be raised as to whether it can now be reinterpreted as having international dimensions as well. An additional consideration is that Article 14(7) of the Covenant on Civil and Political Rights has been subject to reservations or understandings by a number of States. Because there was no permanent international criminal court, these reservations and understandings dealt only with domestic aspects of double jeopardy. For example, the understanding formulated by the United States covers only federal and state courts. The new formulation of double jeopardy under the Rome Statute will obviously bind only State Parties. However, a second trial of a person convicted or acquitted by an impartial international tribunal in a domestic court of a non-participating State may be regarded as fundamentally unfair and unjustified. This is particularly true if the Third State involved is not the territorial State which may have good reasons to claim priority of jurisdiction. Although from a legal perspective the United States may refuse to acknowledge the rulings of the ICC, it will be difficult to ignore the validity of the above human rights argument.

128. See *Status of Bilateral Treaties Deposited with the Secretary-General*, UN Doc. ST/LEG/SER.E/14, at 130 (1996).
The Rome Statute will also affect the existing international extradition system. Article 90 deals with situations when a State Party receives a request from the ICC for the surrender of a person accused of a crime under the Statute. If the requested State Party also receives a request from a Third State for the extradition of the same person for the same conduct, the State Party must give priority to the request for surrender from the ICC, if it is not under an international obligation to extradite the person to the requesting State.

From a procedural perspective, an action taken by the ICC is likely to have certain effects via the existing principle *aut dedere aut judicare*. One could argue that if the ICC's prosecutor has established that there is a *prima facie* case against the accused, no State having custody over the accused may simply ignore this finding. Even if there is no legal obligation to transfer the accused person for trial at the international level, there may be an indirect pressure to prosecute in domestic courts. A special situation arises in cases triggered by a referral from the Security Council acting under Chapter VII of the U.N. Charter. In general, only State Parties to the Rome Statute must cooperate with the ICC. Third States may refuse to cooperate and recognize the ICC's rulings. However, Third States must cooperate with the ICC if the proceedings are triggered by a referral from the Security Council. Refusal to cooperate in this case may constitute a violation of the Third State's obligations under the U.N. Charter.

VI. THE ICC PROCEDURE AND THIRD STATES

The Vienna Convention on the Law of Treaties allows State Parties to grant certain rights to Third States. Article 36 of the Vienna Convention provides that "a right arises for a third state from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third state, or to a group of states to which it belongs, or to all states." Under Article 36, there is a presumption of assent to rights for Third States provided by a treaty if these States do not expressly reject rights bestowed on them. It is also presumed that in such a situation non-States Parties accept the conditions for the exercise of rights provided for "in the treaty or established in conformity with the treaty."
In accordance with this generally recognized principle, State Parties to the Rome Statute created several procedural rights in favor of all Third States. Under Article 12 of the Rome Statute, non-States Parties may always accept the ICC’s jurisdiction ad hoc. Article 12 provides that the ICC can exercise its jurisdiction in cases when a non-State Party of the territory where the crime was committed or the State of nationality of the accused has accepted the jurisdiction of the ICC with respect to the crime in question. The ad hoc consent to the ICC’s jurisdiction involves a number of obligations, including the broad duty to provide assistance to the ICC in its investigation and prosecution of the relevant crime. Under Article 15, a non-State Party may trigger investigation through the Prosecutor who has the power to act proprio motu on the basis of information on crimes within the ICC’s jurisdiction submitted by any State. In addition, non-States Parties may always try to trigger investigations or to defer investigations or prosecutions through the U.N. Security Council.

Important procedural consequences arise for Third States from the ICC’s claim to jurisdiction with respect to all persons accused of crimes under the Rome Statute regardless of their nationality. Although non-States Parties will not be legally bound by the relevant provisions per se, in order to protect their nationals they may find themselves in a position where they have to rely on the Statute’s clauses concerning jurisdiction and admissibility. Thus, if a U.S. citizen is arrested in a participating country and transferred to the ICC for alleged war crimes under investigation in the United States, and the United States as a non-Party would wish to challenge the ICC’s jurisdiction, it would have no other choice but to rely, for example, on Article 17(1)(a) of the Rome Statute and argue that the case is inadmissible because it “is being investigated or prosecuted by a State which has jurisdiction over it.” In such a situation, a policy of “total non-cooperation” with the ICC could only be counterproductive.

VII. THE ROME STATUTE AND GENERAL INTERNATIONAL CRIMINAL LAW

During the preparation of the Rome Statute, one of the most serious concerns was the absence of well-defined international criminal law. The chaotic state of international criminal law created apprehensions that the

133. Rome Statute, supra note 1, art. 87(5).
134. Id. art. 13.
135. Cf. supra notes 20–21 and accompanying text.
whole project would violate the principle of legality. Indeed, numerous international conventions on criminal matters contain very vague definitions of crimes. Some of them contain definitions that fail to actually criminalize particular behavior. Some crimes, in particular crimes against humanity, although defined by the Nuremberg Charter and statutes of the recent \textit{ad hoc} criminal tribunals, are generally binding only as customary international law.

The International Law Commission, which had been the principal initial forum for discussions concerning a permanent criminal court, took the position that precise definitions of crimes need not precede the ICC. The Commission’s reluctance to develop a code-centered criminal court was the result of the traditional split between two more or less independent projects discussed by the Commission. One project, which had always been the primary concern, contemplated the development of a Draft Code of Crimes Against the Peace and Security of Mankind. Another project, initiated in 1947 and revived in 1981, dealt with a permanent criminal court. Reflecting the idea of separation between an international criminal code and international criminal court, the 1994 Draft Statute for an International Criminal Court prepared by the International Law Commission did not define crimes. The International Law Commission viewed the proposed Draft Statute as "primarily an adjectival and procedural instrument." One of the major reasons for the disengagement of the controversial international criminal code from the prospective permanent criminal court was the Commission’s concern that governments may be unwilling to support a radical code-centered project. Subsequent negotiations adopted a different approach. The

138. The issue of whether the criminal code must precede a permanent international court is an old one. It was debated, for example, during the 1926 International Law Association meeting. The majority of the members did not think the code need precede the court. \textit{See INTERNATIONAL LAW ASSOCIATION, REPORT OF THE THIRTY-FOURTH CONFERENCE} 179–80 (1927).
139. For details concerning the work of the International Law Commissions on this subject and the proposed Draft Code of Crimes Against the Peace and Security of Mankind, \textit{see} Report of the International Law Commission on the work of its forty-eighth session, \textit{supra} note 46, para. 30.
143. \textit{Id.} at 38.
drafters of the Rome Statute realized that under the modern notions of legality substantive definitions of crimes had to be included in the ICC's Statute. As a result, the Rome Statute includes important definitions of substantive criminal law to be applied by the ICC. These provisions will serve as an important normative framework for future international criminal regulation.

Many drafters of the Rome Statute held the view that their task was not to create new criminal laws, but only restate crimes already prohibited by international customary law. However, it is well-known that any formulation in writing of general customary rules is a complicated process. It is difficult to maintain the thin line between pure codification of pre-existing law and progressive development of the law. As a result, although the Rome Statute's provisions on crimes tend to restate general substantive criminal law, some elements are clear innovations. As a matter of treaty law, these innovations will bind only State Parties. At the same time, to the extent that the adopted definitions of crimes constitute restatement of the already existing body of substantive criminal law, they may bind all States, including Third States, irrespective of their participation in the Rome Statute via customary international law. It is well recognized that in cases where treaties restate general law, the relevant general rules continue to bind all States irrespective of the legal status of specific treaties. In fact, treaties may serve as evidence of

144. The Preparatory Committee for the International Criminal Court indicated the emerging consensus on this issue:

There was general agreement that the crimes within the jurisdiction of the Court should be defined with the clarity, precision and specificity required for criminal law in accordance with the principle of legality (nullum crimen sine lege). A number of delegations expressed the view that the crimes should be clearly defined in the Statute.


145. See Report of the Preparatory Committee on the Establishment of an International Criminal Court, supra note 27, para. 54.

146. The declaratory effect of treaties in regard to existing customary law was described by the International Law Commission in the following manner:

A principle or rule of customary international law may be embodied in a bipartite or multipartite agreement so as to have, within the stated limits, conventional force for the states parties to the agreement so long as the agreement is in force; yet it would continue to be binding as a principle or rule of customary international law for other states.

generally binding law even prior to their entry into force. The International Court of Justice had relied on conventions which have not entered into force as evidence of customary international law in numerous cases. In view of this trend, it is not surprising that both international and domestic tribunals have already started to invoke various provisions of the Rome Statute when ascertaining generally binding international law.

In its present form, the ICC will have jurisdiction with respect to international crimes of genocide, war crimes, crimes against humanity and the crime of aggression. Although the Rome Statute in principle gives the ICC jurisdiction over the crime of aggression, that jurisdiction cannot be exercised until that crime is defined by an amendment to the Statute adopted by the Assembly of State Parties. Other well-established crimes are defined by the present Statute.

A. Genocide

The Rome Statute codifies the definition of the crime of genocide. Genocide has long been recognized as a crime in international law. In this respect, the Rome Statute follows verbatim Article II of the Genocide Convention. The Genocide Convention has not only been widely accepted as treaty law, but is also regarded to reflect customary international law. More than four decades ago, in its advisory opinion concerning Reservations to the Genocide Convention, the International Court of Justice stated that "the principles underlying the Convention are

147. The International Law Commission pointed out that "multipartite conventions signed but not brought into force are frequently regarded as having value as evidence of customary international law." Id.
151. Rome Statute, supra note 1, art. 5(2).
152. Id. art. 6.
principles which are recognized by civilized nations as binding on States, even without any conventional obligation." In its commentary to the 1994 Draft Statute for an International Criminal Court, the International Law Commission stated that "it cannot be doubted that genocide, as defined in the Convention on the Prevention and Punishment of the Crime of Genocide, is a crime under general international law." Not surprisingly, the International Law Commission had no doubt that the future criminal court should have "inherent" jurisdiction over the crime of genocide precisely because "the prohibition of genocide is of such fundamental significance, and the occasions for legitimate doubt or dispute over whether a given situation amounts to genocide are so limited ...."

In general, there is little disagreement over the basic definition of the crime of genocide. Although the Rome Statute adopted the definition included in Article II of the Genocide Convention, there may still be arguments about some elements, in particular the requirement of special or specific intent to destroy a national, ethnical, racial or religious group.

**B. Crimes Against Humanity**

Article 7 of the Rome Statute contains an elaborate definition of crimes against humanity. Although there is no doubt that crimes


156. Id. at 37.

157. See infra note 186.

158. Art. 7(1) of the Rome Statute states:

For 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:

(a) Murder;
(b) Extermination;
(c) Enslavement;
(d) Deportation or forcible transfer of population;
(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
(f) Torture;
(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
against humanity are crimes under international law, there is no generally accepted definition of such crimes. The International Law Commission noted the existence of "unresolved issues about the definition of the crime [against humanity]." During the Rome Conference it was not easy to achieve consensus on a specific list of offenses against humanity over which the ICC should have jurisdiction even though the proposed definition limits such crimes to "a widespread or systematic attack directed against any civilian population, with knowledge of the attack." Nevertheless, the participants in the Rome Conference appear to have acknowledged that at least the majority of specific offenses included in the Rome Statute were also crimes under general international law. Such an approach finds firm support in several precedents, including the Nuremberg Charter and the Statutes of the International Tribunals for the Former Yugoslavia and Rwanda. During the negotiations leading to the Rome Statute, a controversial issue was a connection of crimes against humanity to armed conflict. Both the Nuremberg Charter and the Statute of the International Tribunal for the

(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

(i) Enforced disappearance of persons;

(j) The crime of apartheid;

(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

Rome Statute, supra note 1, art. 7(1).

159. Report of the International Law Commission on the work of its forty-sixth session, supra note 9, at 40.

160. Rome Statute, supra note 1, Art. 7(1).

161. Art. 6(c) of the Nuremberg Charter, provides that the following acts constitute crimes against humanity: murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in connection with any crime within the jurisdiction of the Court, whether or not in violation of the domestic law of the country where perpetrated.

Nuremberg Charter, supra note 85, art. 6(c).

162. Art. 5 of the Statute of the International Tribunal for the Former Yugoslavia lists the following acts as crimes against humanity: "murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecution on political, racial and religious grounds and other inhumane acts." Statute of the International Tribunal for the Former Yugoslavia, supra note 102, art. 5.

163. Art. 3 of the Statute of the Rwanda Tribunal lists the same acts as Art. 5 of the Yugoslav Tribunal. Statute of the Rwanda Tribunal, supra note 137, art. 3.

164. The Nuremberg Charter, supra note 85, art. 6.
Former Yugoslavia\textsuperscript{165} required the nexus to armed conflict. In contrast, Article 7 of the Rome Statute makes no reference to this requirement. The Statute asserts the view that crimes against humanity could take place in either wartime or peacetime. This view of the law finds support in recent judicial practice.\textsuperscript{166}

C. War Crimes.

Article 8 of the Rome Statute deals with war crimes.\textsuperscript{167} In general, Article 8 restates (sometimes with certain limitations) the existing laws and customs applicable in armed conflict codified in the Geneva conventions\textsuperscript{168} and the 1977 Additional Protocol I.\textsuperscript{169} Practice of the International Court of Justice\textsuperscript{170} indicates that Common Article 3 and some other provisions of the Geneva Conventions are to be considered as customary international law. In its Nuclear Weapons advisory opinion, the International Court of Justice emphasized that fundamental rules of humanitarian law "are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law."\textsuperscript{171} Crimes committed in non-international armed conflicts are also included in Article 8 of the Rome Statute. These provisions are based on Common Article 3 of the Geneva Conventions and the 1977 Additional Protocol

\textsuperscript{165}. The Statute of the International Tribunal for the Former Yugoslavia, supra note 102, art. 5.

\textsuperscript{166}. In Prosecutor v. Tadić, the Yugoslav Tribunal held that "[i]t is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed, ... customary international law may not require a connection between crimes against humanity and any conflict at all." Prosecutor v. Tadić No. IT-94-1-AR72, para. 141 (Int'l Crim. Trib. for the Former Yugo. 1996), reprinted in 35 I.L.M. at 72.

\textsuperscript{167}. Under Art. 8 of the Rome Statute war crimes include: (1) "[g]rave breaches of the Geneva Conventions"; (2) "[o]ther serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law"; (3) "[i]n the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions"; and (4) "[o]ther serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law." Rome Statute, supra note 1, art. 8.

\textsuperscript{168}. See supra note 64 (listing the Geneva conventions).


\textsuperscript{171}. Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 257.
Neither of these documents provides for the international criminal responsibility of a person who commits the acts listed as prohibited. However, subsequent developments in the law indicate that criminal sanctions are now attached to the above prohibitions. The Appeals Chamber of the Yugoslavia Tribunal acknowledged criminalization of Common Article 3 and its customary law status in the ruling in the Tadic case.

The majority of States participating in the drafting of the Rome Statute agreed that the substantive criminal law of the Rome Statute essentially restates the existing law. In this respect, it is important to note that all permanent Security Council members, including the United States, had acknowledged that many of these provisions reflect customary international law on earlier occasions, in particular during the negotiations leading to the Statute of the International Tribunal for the Former Yugoslavia. The U.N. Security Council resolution authorizing the establishment of the Yugoslav Tribunal requested the U.N. Secretary-General to produce a report on the statute of the Tribunal. The Secretary-General submitted to the Security Council a draft statute which contained many substantive law provisions similar to those found in the Rome Statute. The Secretary General stated in his report that under the principle nullum crimen sine lege the future tribunal “[s]hould apply rules of international humanitarian law which are beyond any doubt part of customary law.” According to the Secretary General,

the part of conventional international humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflict as embodied in: the Geneva Conventions of 12 August 1949 for the Protection of War Victims; the Hague Convention (IV) Respecting the Laws and

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177. Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808, supra note 175, para. 34.
The Statute of the International Criminal Court

Customs of War on Land and the Regulations annex thereto of 18 October 1907; the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948; and the Charter of the International Military Tribunal of 8 August 1945. 178

Subsequently, the Security Council unanimously approved a resolution which established the Yugoslav Tribunal and approved the Secretary-General's draft statute without any change. 179 In accepting the Secretary-General's report, the Security Council recognized that it was not creating new criminal law. Rather it was restating the already existing law. The affirmative vote of all Security Council members in this case, including all five permanent members, could only mean that they agreed with the Secretary-General's proposals and findings. Official statements made by several State representatives during the debates in the Security Council also seem to indicate that they were willing to accept a broader view of general customary law. In his report the Secretary-General listed only documents concerning international conflicts as those he regarded as clearly being customary law. However, three permanent members of the Security Council, including the United States, declared that they regarded even non-grave breaches of the Geneva Conventions and breaches of additional protocols to be within the Yugoslav Tribunal's jurisdiction. 180

Be that as it may, as far as the Rome Statute is concerned, it not only restates the existing body of law in the field of international criminal law, which is often unclear and unsatisfactory, but also contains many elements of progressive development. This is not the place to analyze all the elements of progressive development. A few examples will suffice for our purposes. An important provision that constitutes progressive development of substantive law is Article 7 of the Rome Statute. It contains a much broader definition of crimes against humanity than those set out in the Nuremberg Charter or in the statutes of the Yugoslav and Rwanda tribunals. 181 Among other things, it includes systematic torture, forced pregnancy, gender persecution, forced disappearance and forcible transfer of population. Many States opposed these provisions and it is not clear to what extent they constitute customary international law.

178. Id. para. 35.
180. See U.N. SCOR, 48th Sess., 3217th mtg. at 11, U.N. Doc. S/PV. 3217 (1993) (statement of the representative of France); Id. at 15 (statement of the representative of the United States); Id. at 19 (statement of the representative of the United Kingdom).
181. See supra notes 160–72 and accompanying text.
Article 8 of the Rome Statute, dealing with war crimes, also contains several innovations. The innovations include, for example, the criminalization of various acts against U.N. peace-keepers and humanitarian organizations, military attacks against “buildings dedicated to ... education” and conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in the hostilities. A rather controversial innovation is the inclusion in Article 8(b)(viii) of the words “directly or indirectly” which expanded the definition of the already existing war crime prohibiting the transfer by the occupying power of its civilian population to an occupied territory. To the extent that these and other definitions of crimes under the Rome Statute constitute progressive development of substantive criminal law, they bind only State Parties. States that persistently objected to these and other provisions, such as Article 8(2)(b)(viii) or certain interpretations of Article 6(b) of the Rome Statute, probably may qualify for the status of persistent objector.

Other innovations follow from general provisions of the Rome Statute dealing with elements of individual criminal responsibility applicable to all crimes within the jurisdiction of the ICC. For example, under Article 25(3)(b) of the Rome Statute a person is criminally responsible and liable for punishment for a crime if that person “solicits or induces the commission of such a crime.” Although, as noted earlier, the definition of the crime of genocide was taken verbatim from Article II of the 1948


183. Art. 8(2)(b)(viii) of the Rome Statute criminalizes “the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory.” Rome Statute, supra note 1, art. 8(2)(b)(viii). Israel and the United States assert that there is no “customary international law yet that attached this kind of activity to individuals for criminal responsibility.” 1998 Hearing, supra note 3, at 24 (statement of Hon. David J. Scheffer). See also the statement of Judge Eli Nathan, Head of the Delegation of Israel (visited Mar. 20, 2000) <http://www.un.org/icc/speeches/717isr>.

184. Art. 6(b) of the Rome Statute criminalizes acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such, including “causing serious bodily or mental harm to members of the group.” Rome Statute, supra note 1, art. 6(b). This provision restates Art. II(b) of the Genocide Convention. When the U.S. Senate approved the Genocide Convention, it attached an understanding limiting the definition of “mental harm” in the Convention to “permanent impairment of mental faculties through drugs, torture or similar techniques.” See Status of Multilateral Treaties Deposited with the Secretary-General, U.N. Doc. ST/LEG/SER.E/14, at 90 (1996). During the negotiations leading to the Rome Statute, it was apparently the United States that expressed the view that “the term ‘harm’ required further clarification.” Report of the Preparatory Committee on the Establishment of an International Criminal Court, supra note 27, para. 61.

Genocide Convention, under the general provisions of the Rome Statute there are now additional acts, such as inducing, which may constitute a basis for criminal responsibility for genocide. 186

Whatever the status of these provisions included in the Rome Statute at this stage, one cannot exclude the possibility that in due time they may gradually pass into the body of generally binding law. It is well recognized that new rules embodied in a treaty may come to be regarded as general standards of behavior even by States that are not parties to the convention. Reflecting this approach, the Vienna Convention on the Law of Treaties provides that a rule set forth in a treaty could become “binding upon a third state as a customary rule of law, recognized as such.” 187 In its judgment in the North Sea Continental Shelf Cases, the International Court of Justice confirmed that a norm of treaty law may pass into the “general corpus of international law” and thus become binding on non-parties. 188 The Court emphasized that “there is no doubt that this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed.” 189 The passage of treaty norms into the body of general law depends on the subsequent practice of States. 190 If the subsequent practice supports innovations in the field of substantive criminal law, the Rome Statute will make an important contribution to the emergence of new customary law, even though Article 10 states that the relevant definitions of crimes cannot limit or prejudice in any way “developing rules of international law for purposes other than this Statute.”

186. The general provisions of the Rome Statute also leave open the possibility of different interpretations of the required intent of the crime of genocide. In defining mental elements of all crimes, Article 30(1) of the Rome Statute states that “a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.” Rome Statute, supra note 1, art. 30. Under art. 30(2), “intent” may be satisfied if a person is aware that the consequences of the crime “will occur in the ordinary course of events.” Id. This means that under the general provisions of the Rome Statute, genocide may occur if the accused knew or should have known that his or her actions would destroy a target group. In contrast to traditional approaches, no specific intent appears to be required. However, in reality there may be no problem because art. 30(1) of the Rome Statute deals with general notions of mental element and expressly states that they apply “unless otherwise provided.” Id. Art. 6 of the Rome Statute provides that genocidal acts must be committed with “intent.” Id. Art. 6; see COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 107-09, 530-532, 533-534 (O. Triffterer ed. 1999).


189. Id. at 41.

190. See Danilenko, supra note 185, at 156-62.
In addition to the above considerations, it is also useful to keep in mind that as a permanent judicial institution, the ICC will facilitate the uniform and consistent application of international criminal law. By rendering judgments in concrete cases and developing a consistent jurisprudence, the ICC may clarify and even develop international criminal law. Although the Rome Statute does not grant the ICC formal authority to develop substantive or procedural law, such an authority is implicitly recognized by Article 21(1). According to Article 21(1), the ICC may "apply principles and rules of law as interpreted in its previous decisions." New developments in criminal law will also result from other provisions of Article 21. The ICC will apply not only the Rome Statute and Elements of Crimes to be adopted by State Parties but also "the established principles of the international law of armed conflict" and "general principles of law derived by the Court from national laws of legal systems of the world." These broad provisions on applicable sources of law will provide ample opportunities for judicial creativity.

VIII. FOREIGN LEGAL POLICY ISSUES

Once established, the ICC will affect the foreign policy of non-participating States in many ways. It is clear that it will limit the willingness of Third States, in particular the United States, to use military force abroad. Future military actions, including humanitarian intervention, such as the 1999 operation in Kosovo, may be scrutinized by the ICC for real or alleged violations of international humanitarian law. The Prose-

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191. Some states submitted proposals to include into the Rome Statute "a general mandating clause whereby the judges of the Court would elaborate the elements of the crimes ... as well as the principles of liability and defense that were not otherwise set out in the Statute." Report of the Preparatory Committee on the Establishment of an International Criminal Court, supra note 27, para. 183. These proposals were rejected because conferring the quasi-legislative power upon the judges of the ICC was considered to contravene the principle of legality.

192. See Rome Statute, supra note 1, art. 9.

193. Id. art. 21(1)(c).

194. Cf. 1998 Hearing, supra note 3, at 13 (statement of Hon. David J. Scheffer) (The Rome Statute "could inhibit the ability of the United States to use its military to meet alliance obligations and participate in multinational operations, including humanitarian interventions to save civilian lives").

195. On April 29, 1999, Yugoslavia filed an application instituting proceedings against several NATO countries, including the United States, accusing them of violating numerous principles and norms of international law. See I.C.J. Press Communique 99/17 (1999). Yugoslavia claims that the defendants, inter alia, violated international law obligations concerning the protection of civilian population and civilian objects in war time. It claims that in bombing Yugoslavia "civilian targets were attacked," "[a] great number of people were killed, including a great many civilians," and "enormous damage was caused to schools, hospitals, radio
The Statute of the International Criminal Court

cutor of the International Criminal Tribunal for the Former Yugoslavia apparently opened at least preliminary or informal investigation into these charges. At the end of 1999 the Prosecutor issued a statement that "there is no formal inquiry into the actions of NATO during the conflict in Kosovo." 196 This carefully worded statement leaves open the question as to whether there was any "informal" inquiry. As a result, the United States may be reluctant to participate in NATO or U.N. operations until other countries agree that the U.S. soldiers would not be subject to the ICC's jurisdiction. 197 The United States may also be compelled to renegotiate status-of-forces agreements with every country, in particular participating host States, when the Rome Statute enters into force to protect U.S. troops serving overseas. 198 The same may apply to bilateral extradition treaties. 199

From a broader political legal perspective, all Third States need to consider carefully whether they would be better off within the ICC or outside the new jurisdictional and institutional arrangement. In this respect, the position of the United States is particularly interesting. As noted earlier, the Rome Statute met with strong resistance in the U.S. Senate. Several U.S. Senators stated that the United States must actively oppose the ICC. 200 Although the United States is the sole remaining superpower, it may not be able to prevent the establishment of the ICC. In contrast to other new international regimes, such as the international regime for the sea-bed, 201 the operation of an international criminal court does not depend on the military, technological or economic power. From this perspective, it must also be noted that the European Union and its Member States are strong supporters of the ICC. The European Union will extend financial support to the ICC as soon as it is set up. 202 When the ICC comes into being and receives all the necessary political and financial support from European and other democratic States, the U.S.

and television stations, cultural and health institutions and to places of warship." For I.C.J. orders and other information about Cases Concerning Legality of Use of Force, see <http://www.icj-cij.org>.

197. Cf. supra notes 20–21 and accompanying text.
198. Cf. supra note 3, at 13 (statement of Senator Jesse Helms) ("The administration will now have to renegotiate our status of forces agreements with Germany and other signatory states.").
199. Id.
200. Cf. supra note 3, at 4 (statement of Senator Rod Grams) ("[T]his court ... is the monster and it is the monster that we need to slay."); id. at 6 (statement of Senator Jesse Helms) ("The United States must fight this treaty.").
human rights foreign policy and cooperation with these States in criminal matters may be compromised or even jeopardized. The United States may become an isolated outsider refusing to join a unique human rights and humanitarian law enforcement mechanism and global system of cooperation in criminal matters of community concern.

In considering different policy options, it is important to keep in mind that the U.S. opposition to the Rome Statute in its present form will not remove the biggest U.S. concern, namely the possibility of prosecution of U.S. nationals by the ICC. In some instances U.S. nationals will be subject to the jurisdiction of the ICC under Article 12 of the Rome Statute regardless of whether the United States chooses to ratify the Statute. No country can fully protect its nationals against the effects of the criminal enforcement mechanism created by the Rome Statute. Political hurdles to amending the Rome Statute appear to be daunting. It is unlikely that States supporting the present ICC would accept any proposal aimed at amending the basic elements of Article 12. Two considerations will continue to play a major role here. First, requiring mandatory consent from often overprotective State of an accused’s State of nationality would severely limit the ICC’s jurisdiction and undermine its efficacy. Such a proposal would permit the accused’s State of nationality to exercise a veto over the ICC’s jurisdiction. Second, such a restrictive formula may be regarded as inconsistent with the established jurisdictional principles of international criminal law.

Recent proposals for “a binding interpretive statement by the states parties participating in the post-Rome Preparatory Commission” aimed at changing the basic jurisdictional scheme of the Rome Statute are likely to fail for the same reasons. There are also technical problems with such an approach. A far-reaching “binding interpretative statement” would amount to an amendment prohibited by the Rome Statute until the first review conference. Under Article 121 of the Rome Statute amendments may be adopted only by the Assembly of State Parties. Another solution, proposed first by the United States during the Rome Conference and now advocated by some writers, involves a declarative statement aimed at suspending third-party jurisdiction where the State of the nationality of the accused is willing to assume responsibility for the criminal conduct as official acts. This approach is also likely to fail primarily because, as the critics of the above proposal have rightly pointed out, it would move “the problem from the level of individual

204. Rome Statute, supra note 1, art. 121.
205. Wedgwood, supra note 203, at 102.
responsibility to that of exclusive state responsibility” and involve “a total change of the parameters of responsibility” envisioned by the Rome Statute.\(^\text{206}\) Again, there are obvious technical problems. If this approach takes the form of an interpretative statement it would amount to a reservation\(^\text{207}\) prohibited by Article 120 of the Rome Statute.

The decision-makers would be much better advised to keep in mind that by remaining outside the Rome Statute non-States Parties will not be able to enjoy many privileges granted only to State Parties. Only State Parties will elect judges of the ICC.\(^\text{208}\) Third States will not be able to participate in the selection of the Prosecutor.\(^\text{209}\) Elements of Crimes, which will assist the ICC in the interpretation and application of the relevant substantive law clauses defining genocide, crimes against humanity and war crimes, and the Rules of Procedure and Evidence will be adopted by the members of the Assembly of State Parties.\(^\text{210}\) One of the remarkable (and highly controversial\(^\text{211}\)) features of the Rome Statute is that only State Parties may shield their nationals from prosecution by the ICC in respect to war crimes by “opting out” of the ICC’s jurisdiction over war crimes for seven years.\(^\text{212}\) Third States may not take part in the amendment process which could lead to the addition of new crimes to the jurisdiction of the ICC or revision of the existing crimes. If new definitions of crimes, such as the crime of aggression, or new crimes, such as drug trafficking and international terrorism,\(^\text{213}\) are placed under


\(\text{207. Under Art. 2(d) of the Vienna Convention on the Law of Treaties, ‘‘reservation’’ means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.’’ The Vienna Convention on the Law of Treaties, supra note 10, art. 2(d).}\)

\(\text{208. Rome Statute, supra note 1, art. 36.}\)

\(\text{209. Id. art. 42.}\)

\(\text{210. Id. arts. 9 and 51. The Rules of Procedure and Evidence will cover extremely important issues, including functions and powers of the Trial Chamber (Rome Statute, Art. 64(1)), evidentiary matters, such as privilege and disclosure of national security information, (Arts. 69, 72(5), 93(8)) and appeal procedure (Arts. 81, 82 and 84). Id. arts. 64(1), 69, 72(5), 81, 82, 84, 93(8).}\)

\(\text{211. Cf. 1998 Hearing, supra note 3, at 14 (statement of Hon. David J. Scheffer).}\)

\(\text{212. Rome Statute, art. 124. Another controversial provision in the Rome Statute which discriminates against non-parties is art. 11(2). Art. 11(2) states: ‘‘If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3.’’ Rome Statute, supra note 1, art. 11(2). Article 12(3) refers to ad hoc acceptances of the ICC’s jurisdiction by third states.}\)

the jurisdiction of the ICC at a later date, all States of the international community will be affected. While State Parties are able to reject the amendments and thus protect their nationals from prosecution for the new or amended crimes,\textsuperscript{214} non-parties will not have this opportunity. As a result, with the ICC becoming a reality, the costs of not joining the new international institution may outweigh the costs of joining.

**CONCLUDING REMARKS**

As a permanent universal institution that focuses on the most serious violations of international law of global concern, the ICC will directly or indirectly affect all members of the international community. When the ICC becomes a reality, Third States will not be immune from the ICC irrespective of whether they ratify the Rome Statute. In particular, non-States Parties will not be able to block prosecution of their nationals. The effectiveness of the ICC and its impact on human rights and humanitarian law enforcement as well as on the existing international criminal justice cooperation system will depend on the degree of support it enjoys among the most influential members of the international community. A credible and compellingly effective international permanent criminal court cannot be the creation of the relatively small group of States required for the Rome Statute’s entry into force. Only if a strong coalition of countries ratifies the Rome Statute, the remaining non-participating States, whatever their individual status and influence, may be forced into a situation where they will have to acknowledge the existence of the ICC as an effective and broadly-represented international criminal judiciary that even non-States Parties have to deal with.

The Rome Statute will have a strong impact on the future development of substantive and procedural international criminal law. Even prior to its entry into force, the Rome Statute has already clarified many elements of the most serious violations of international law that are of concern to the international community as a whole—genocide, large-scale war crimes and crimes against humanity.

\textsuperscript{214} Rome Statute, \textit{supra} note 1, art. 121(5).