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The ICC has jurisdiction where war crimes, crimes against humanity or genocide are committed within the territory of a State Party. Can it also prosecute those who plan or order such crimes, if they do so outside the territory of a State Party and if they are not nationals of a State Party?

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MEMORANDUM FOR THE OFFICE OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT

ISSUE – EFFECTS JURISDICTION: The ICC has jurisdiction where war crimes, crimes against humanity or genocide are committed within the territory of a State Party. Can it also prosecute those who plan or order such crimes, if they do so outside the territory of a State Party and if they are not nationals of a State Party?

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I. Introduction and Summary of Conclusions

a. Issues

The Rome Statute ("Statute) of the International Criminal Court ("ICC") allows for the prosecution of a person who helped to plan or ordered a crime falling under its subject matter jurisdiction. Numerous provisions of the Statute provide for criminal culpability of such individuals.

First, Article 25 states, for example, that a person "shall be criminally responsible and liable for punishment… if that person… [o]rders, solicits or induces the commission of such a crime…" or if that person "aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission."[1]

Second, Article 27 explicitly removes any immunity of government officials and leaders that existed in prior international tribunals by stating that the Statute "shall apply equally to all persons without any distinction based on official capacity."[2]

Finally, Article 28 directly addresses command and superior responsibility by making any military leader, whether official or unofficial, or other civilian superior, culpable for crimes they ordered but did not directly participate in, or knew or should have known about but failed to halt, control, prosecute, or punish.[3]

As international law, and, in particular, the jurisprudence of the ICC, evolves, it will become necessary to determine whether the actions of leaders or others who aid or

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[1] Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/Conf. 183/9 (1998), art. 25. [Reproduced in accompanying notebook Volume I at Tab 5].

[2] Id, at art. 27.

[3] Id, at art. 28.

abet a crime but who have not accepted the jurisdiction of the ICC may be prosecuted. To better explain the issue with an example, an individual who is under jurisdiction of the ICC based not on nationality, but on location of the crime's commission, can be prosecuted under the Statute for committing ethnic cleansing of a population of people in a neighboring nation. Can that same individual, however, who ordered the atrocity while physically present in a nation that is not directly under the jurisdiction of the ICC, be prosecuted as well?

This question is best answered using the principle of effects jurisdiction. First, this memo will discuss the general principle of effects jurisdiction. Next, it will examine the basis for it in the theories of command and superior responsibility. Finally, it will examine the bases for a finding of jurisdiction based on the actions of prior international tribunals and customary international law, the legislative history of the Rome Statute, the principle of universal jurisdiction, and public policy reasons.

b. Summary of Conclusions

There is no direct provision in the Rome Statute providing for ICC jurisdiction over a non-Party national who commands or otherwise aids or abets the commission of a crime from a non-Party State. However, based on the theory of effects jurisdiction, the legislative history of the Statute, current and prior international law, and the prevalence of the principle of universal jurisdiction, a sound legal argument can be made that jurisdiction should thus extend. This argument is further bolstered by examining the spirit and intent of the ICC and public policy grounds for such a finding.

II. Factual Background

As the ICC gains legitimacy as an international judicial body, it is vital to define the boundaries of its jurisdiction. Per the Statute, jurisdiction to prosecute war crimes and crimes against humanity may be exercised where the accused is a national of a State Party, or where the accused, regardless of his nationality, commits the crime on the territory of a State Party.[4] Clearly, then, a citizen of a non-Party State who commits mass genocide by dropping a bomb on a hospital in a Party State, will be liable for his atrocious behavior. But what of the individual who provided financial backing for this heinous act, yet was not physically present in the Party State during the massacre? Clearly, it is desirable to prosecute him along with the bomber. However, the Statute is unclear as to whether this is permissible.

This question is highly relevant for a variety of reasons. Most importantly, the intent of the ICC is to prosecute the most grievous of crimes. The globe is becoming increasingly smaller as technology allows for fast and easy travel and communications across great distances, and this scenario is a likely one. The inability to prosecute in such a situation clearly frustrates the purpose of the ICC. States, in fact, have declined to sign or ratify the Statute due to fears of prosecution in this manner.

At its inception in 1998, 120 states signed the treaty accepting the Rome Statute, while 21 states abstained.[5] Currently, the Statute has 139 signatories and 97 parties, more

[4] Rome Statute, supra, art. 12.

[5] Roy S. Lee, The International Criminal Court: The Making of the Rome Statute (1999) [Reproduced in the accompanying notebook Volume II at Tab 16].

than enough to give force to its creation.[6] The United States, while at first actively promoting the creation of the Court, has conspicuously declined to become party to it,[7] putting it in company with historically "rogue" nations such as China, Qatar, and Iraq.[8] The U.S. has offered multiple reasons for its contention. For purposes of this discussion, the most notable complaint is the Statute's extension of the Court's jurisdiction over non-Party States.

The U.S. Department of State lists that a significant problem with the Court is that it "purports to have jurisdiction over certain crimes committed in the territory of a state party, including by nationals of a non-party. Article 12 of the Statute provides jurisdiction to the Court where "[t]he State on the territory of which the conduct in question occurred" is a party to the treaty.[9] Thus the Court would have jurisdiction for enumerated crimes alleged against U.S. nationals, including U.S. service members, in the territory of a party [under Article 12], even though the U.S. is not a party."[10]

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[6] Ratification status of the Rome Statute of the International Criminal Court, available at http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapter XVIII/treaty10.asp [Reproduced in the accompanying notebook Volume III at Tab 47].

[7] The United States Department of State, Press Statement, International Criminal Court: Letter to UN Secretary General Kofi Annan, available at http://www.state.gov/r/pa/prs/ps/2002/9969.htm [Reproduced in the accompanying notebook Volume III at Tab 50].

[8] Ratification status of the Rome Statute, supra.

[9] Rome Statute, supra, art. 12.

[10] The United States Department of State, Bureau of Political-Military Affairs, The International Criminal Court Fact Sheet, available at http://www.state.gov/t/pm/rls/fs/2002/23426.htm [Reproduced in the accompanying notebook Volume III at Tab 49].

Two major arguments against the ICC are offered. First, that this provision is directly contrary to the Vienna Convention on the Law of Treaties, which provides that a treaty "does not create either obligations or rights for a third State without its consent."[11] By allowing jurisdiction over a non-Party State, the argument is that the Statute is creating obligations on that state which are against customary international law. Second, the U.S. is frequently called upon to act as a peacekeeper, and the Statute, as it stands, would open its leaders and military personnel to prosecution for aggressive acts that are necessarily committed as part of that obligation.[12]

Although the treaty has been ratified by much of the rest of the world, despite protests from the U.S., these allegations are serious ones that must be taken into consideration in Court prosecutions. Though the Statute clearly allows jurisdiction over non-Party nationals who commit grievous atrocities on the soil of a Party State, it is still unclear whether jurisdiction may be asserted over non-Party nationals who order, command, or otherwise aid or abet, from a non-Party State, those grievous atrocities against a Party State.

III. The Theory of Effects Jurisdiction Provides a Basis for Finding Such Jurisdiction

[11] Vienna Convention of the Law of Treaties, July 1969, 8 I.L.M. 679 [Reproduced in the accompanying notebook Volume I at Tab 9].

[12] A. Diane Holcombe, The United States Becomes a Signatory to the Rome Treaty Establishing the International Criminal Court: Why Are So Many Concerned by this Action?, 62 Mont. L. Rev. 301 (2001) [Reproduced in the accompanying notebook Volume III at Tab 33].

Territorial jurisdiction, as is permitted in Article 12 of the Statute, encompasses two sub-types: subjective, also known as ordinary, jurisdiction, and objective, or effects, jurisdiction. The former type is that explicitly allowed by the Statute – where the act is committed on the territory of the state party. The latter type applies "when nearly all of the relevant acts occur outside of the prosecuting state.[13] The Restatement 3rd of the Foreign Relations Law of the U.S. allows that "a state has jurisdiction to prescribe law with respect to… conduct outside its territory that has or is intended to have substantial effect within its territory…[14] The Restatement also introduces a reasonableness limitation, stating that a state may not find jurisdiction where it is unreasonable to do so. "Reasonableness" of jurisdiction is found by evaluating:

(a) "the link of the activity to the territory of the regulating state…;

(b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;

(c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extend to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;

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[13] Captain Bruce T. Smith, Assertion of Adjudicatory Jurisdiction by United States Courts Over International Terrorism Cases, 1991 Army Law 13, 16 (1991) [Reproduced in accompanying notebook Volume III at Tab 44].

[14] Restatement 3rd of the Foreign Relations Law of the United States (1987), at §402 [Reproduced in accompanying notebook Volume III at Tab 48].

(d) the existence of justified expectations that might be protected or hurt by the regulation;

(e) the importance of the regulation to the international political, legal, or economic system;

(f) the extent to which the regulation is consistent with the traditions of the international system;

(g) the extent to which another state may have an interest in regulating the activity; and

(h) the likelihood of conflict with regulation by another state."[15]

A broad reading of Article 12 suggests the allowance of effects jurisdiction. Interpreting this provision, "[s]ince a crime is generally committed wherever an illegal act has a harmful effect, allegedly illegal action by a person in a non-ratifying nation that has an impact in a second, ratifying, nation will subject that person to prosecution – even though that person's nation has not ratified the ICC Statute."[16] "This is an application of the use of the principles and rules of international law and general principles of law existing in national laws as a way to liquidate an ambiguity in the… Statute."[17]

a. Command Responsibility for the Actions of Subordinates

[15] Id, at §403.

[16] John B. Fowles, Compounding the Countermajoritarian Difficulty through "Plaintiff's Diplomacy": Can the International Criminal Court Provide a Solution?, 2003 B.Y.U.L. Rev. 1129, 1162 (2003) [Reproduced in accompanying notebook Volume III at Tab 28].

[17] Kenneth S. Gallant, Jurisdiction to Adjudicate and Jurisdiction to Prescribe in International Criminal Courts, 48 Vill. L. Rev. 763, 812 (2003) [Reproduced in accompanying notebook Volume III at Tab 29].

Before beginning a discussion of whether a non-party leader can be held accountable for acts of his inferiors in a party state, it is necessary to consider whether that leader may be charged in the first place, though he himself did not actually commit the atrocity.

The desirability of prosecuting under the theory of command responsibility became particularly clear after the two World Wars. Building upon decisions coming out of the Hague Conventions IV and X, held in 1907, trials held by the German Supreme Court in Leipzig after World War I "recognized the existence of concrete duties pertaining to military commanders."[18] Following World War II, though the Nuremburg trials dealt only with the direct culpability of high-ranking officials, the tribunal at Tokyo prosecuted both civilian and military leaders for their failure to prevent and punish war crimes and crimes against humanity committed by those under their authority. Subsequent international trials held by the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda only attempted to prosecute direct acts, "because convictions were considered easier to obtain than charges based on omission."[19]

In general, a person is not liable for the actions of another. Under the theory of command, or superior, responsibility, though, "a superior can be punished for the misdeeds of his underlings, provided that he directed, abetted, or aided the immediate

[18] Ilias Bantekas, The Contemporary Law of Superior Responsibility, 93 A.J.I.L. 573, 574 (1999) [Reproduced in the accompanying notebook Volume II at Tab 21].

[19] Id at 575.

perpetrators."[20] Provided that the actual criminal act was committed with the abetment of the leader, and that leader failed to take all necessary and reasonable steps to prevent and punish the crime, he is considered culpable. The command responsibility doctrine is a vital part of international human rights law.[21] Because of historical precedent of command and superior responsibility, it is highly desirable, and even vital, for the ICC to exercise jurisdiction not only over the non-Party national who carried out the act on a Party territory, but also over the non-Party national who commanded or ordered the act, regardless of his physical location when giving the command or order.

b. The Rome Statute Explicitly Provides for Culpability those who Command, Abet, or otherwise Aid the Commission of a Crime

In this spirit, the framers of the Statute decided to explicitly permit command responsibility, as well as joint criminal responsibility. This idea is codified in Article 25, which states in relevant part that:

"In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

(i) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

(j) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

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[20] Mirian Damaska, The Shadow Side of Command Responsibility, 49 Am. J. Comp. L. 455 (2001) [Reproduced in the accompanying notebook Volume III at Tab 26].

[21] Sean D. Murphy, Contemporary Practice of the United States Relating to International Law, 96 A.J.I.L. 706, 719 (2002) [Reproduced in the accompanying notebook Volume III at Tab 39].

(k) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission[.]"[22]

Interpretation of this wording suggests that a leader, whether military or civilian, can be held liable for the crimes of his subordinates or crimes that he ordered in a variety of circumstances. Additionally, even non-leaders who somehow aided or abetted will be liable. Provided, of course, that the eventual crime meets the Statute's provisions for subject matter jurisdiction, one would be culpable for simply ordering his military, for example, to carry out the crime. He could be culpable for providing the fiscal means for the commission of the crime. He could even be culpable for his failure to punish, stop, or report and prosecute the crime.

Clearly, under the Statute of the ICC, one who did not participate in the physical commission of engaging a nuclear weapon could nonetheless be charged and prosecuted based on his role in the eventual crime. Therefore, even though he did not physically fly the airplane carrying the weapon, take the necessary mid-flight steps to arm the weapon, or push the button to drop it, he may be liable for his role as the person who initially loaded the weapon, ordered its dropping, or even provided financial support for its release. Each of these steps is part of the same crime. Clearly, the person who funded the nuclear bombing would be just as culpable as the person who actually dropped the bomb if the two acted from the same location. Because both are culpable, and because they both participated in the commission of the same crime, it is illogical to differentiate on the basis of location of the actor in the crime's commission.

[22] Rome Statute, supra, art. 25.

c. The ICC has Territorial Jurisdiction to Prosecute a Non-Party State National who Commits a Crime in a Party State

Article 12 of the Rome Statute provides that the Court may exercise jurisdiction when the state "on the territory of which the conduct in question occurred…" is a Party.[23] Clearly, the Statute allows for the prosecution of the individual who enslaves a race of people he considers to be inferior. Under this article, the slave master who enslaves nationals of a Party State will be culpable for his heinous action, regardless of his own nationality. Because commanding or otherwise aiding or abetting the enslavement is the same crime as the physical act of enslaving under the Statute, it matters not whether all criminals were physically present in the Party State, as long as the enslavement occurred in the Party State.

d. There Is a Precedent under Current International Tribunals to Recognize Effects Jurisdiction

In such a circumstance, a logical comparative point for analysis is related history in customary international law. It is of greatly significant to note that existing international tribunals have found jurisdiction in just such a scenario.

The International Tribunal for Rwanda bases its jurisdiction on the site of the commission of the crime. Article 1 of the Statute of the ICTR provides the court with "the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda…"[24] Similarly, Article 7

[23] Rome Statute, supra, art. 12

[24] Statute of the International Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, U.N. Doc. S/RES/955 (1994) [Reproduced in the accompanying notebook Volume I at Tab 6].

explicitly allows that the "territorial jurisdiction of the [court] shall extend to the territory of Rwanda including its land surface and airspace."[25]

The Special Court for Sierra Leone, similarly, has "the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone."[26] Such ability to prosecute extends to those who "committed or ordered the commission of [these] serious violations."[27]

Finally, the Statute of the International Criminal Tribunal for the Former Yugoslavia allows for the prosecution of "persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia…"[28] Individuals may be punished for such crimes if they "planned, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime" under the court's jurisdiction.[29]

e. Prior International Law Has Provided for a Finding of Effects Jurisdiction

a. The Case of Charles Ghankay Taylor

[25] Id, at art. 7.

[26] Statute of the Special Court for Sierra Leone (2002), available at http://www.sc-sl.org/scsl-statute.html, art. 1 [Reproduced in accompanying notebook Volume I at Tab 7].

[27] Id, at art. 3.

[28] Statute of the International Criminal Tribunal for the Former Yugoslavia (2002), available at http://www.un.org/icty/legaldoc/index.htm, art. 1 [Reproduced in accompanying notebook Volume I at Tab 8].

[29] Id, at art. 7.

The Special Court for Sierra Leone considered a similar effects jurisdiction issue in the case of Charles Ghankay Taylor. Taylor was the former President of the Republic of Liberia. He was accused of seventeen courts of crimes against humanity, and "grave breaches of the Geneva Conventions."[30] Taylor allegedly provided military training, financial support, weapons, and other forms of encouragement to rebel factions in Sierra Leone in an attempt to gain access to diamond deposits and to politically destabilize the nation. In addition, he either ordered or permitted the use of child soldiers, sexual and physical violence against civilians, slavery, looting, property destruction, and attacks on peacekeepers and relief workers.[31]

The statute of the court states grants it "the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone."[32] No additional provisions are made as to territorial jurisdiction of the court. An interpretation of this statute suggests that citizens of any nationality committing crimes under the subject matter jurisdiction of the Court, that is, serious violations of the humanitarian laws of the international community and Sierra Leone within the specified time period, may be prosecuted.

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[30] Charles Ghankay Taylor, Case No. SCSL-2003-01, Decision on Immunity from Jurisdiction [Reproduced in accompanying notebook Volume I at Tab 11].

[31] Id.

[32] Statute for the Special Court of Sierra Leone, supra.

In Taylor's case, the primary jurisdictional issue, and consequently, the court's primary focus, jurisdiction over Taylor with respect to his status as a head of state, under the customary exemption of such individuals under international law. However, the defense put forth the argument that "a state may prosecute acts committed on the territory of another state by a foreigner but only where the perpetrator is present on the territory of the prosecuting state."[33] In rebuttal, amicus curiae Philippe Sands submitted that "[t]here is nothing in the Special Court Agreement or Statute to prevent the Court from seeking to exercise jurisdiction over offences committed on the territory of Sierra Leone by the Head of State of Liberia."[34] In ultimately deciding it held jurisdiction over Taylor, the court determined that the Special Court was an international, rather than national forum, and thus Taylor's argument could not apply.

Extending this line of logic to the Statute of the ICC, leaders, though from a nation not party to the Statute, may nonetheless be prosecuted. Absent a clear directive from the legislators, the facts that the Court is explicitly granted jurisdiction over non-Party nationals committing atrocities on nationals of State Parties, that command or joint criminal responsibility may be assigned to those who order or assist in those atrocities, and the disregard of citizenship in earlier tribunals, suggest that jurisdiction is legally and logically extended to non-Party leaders or those who otherwise aid and abet.

b. The "Lotus" Principle

The *Lotus* case involved a collision between the S.S. Lotus, a French vessel, and a Turkish ship. The Turkish ship sank, killing eight crew members. After rescuing the

[33] Charles Ghankay Taylor, supra at pg. 6.

[34] Charles Ghankay Taylor, supra at pg. 11.

remaining Turkish crew members, the Lotus sailed to Constantinople whereupon the French captain was charged with murder. The Permanent Court of International Justice heard the case in order to determine Turkish jurisdiction over the French captain.

The court found that "[r]estrictions upon the independence of states cannot… be presumed." The court additionally found that international law allows states "a wide measure of discretion which is only limited in certain cases by prohibitive rules" and France had the burden of proof to show that some rule of international law prohibited Turkey's exercise of jurisdiction.[35] In applying this principle to the ICC, "sovereign states are free to collectively establish an international jurisdiction applicable to the nationals of non-[P]arty [S]tates unless it can be shown that this violates a prohibitive rule of international law."[36] Provided the Party States "have a legitimate interest in establishing such an arrangement, the question is not whether international law or precedent exists permitting an ICC with this type of jurisdictional reach… but rather whether any international legal rule exists that would prohibit it."[37]

Under this principle, the ICC presumptively holds jurisdiction over the non-Party national who provides training in weaponry and military tactics to the group who, using this knowledge, commits genocide on the soil of a Party State. That non-Party national then has the burden of proving that some prohibitive international law exists that would prevent the Party State from delegating jurisdiction to the ICC.

c. The *Congo v. Belgium* Separate Opinion

[35] S.S. Lotus (France v. Turkey), 7 September 1927, P.C.I.J., Series A, No. 10, at 18 [Reproduced in accompanying notebook Volume I at Tab 12].

[36] Scharf at 73.

[37] Id.

In 2002 the International Court of Justice heard the case of *Congo v. Belgium*, in which Belgium exercised universal jurisdiction in issuing an arrest warrant to the incumbent Minister for Foreign Affairs of the Republic of Congo for alleged crimes against humanity and grave breaches of the Geneva Conventions. Ultimately the court found that the minister had immunity based on his status as a head of state.[38] However, as Judges Higgins, Kooijmans and Buergenthal noted in their Joint Separate Opinion, the court pronounced "upon the question of immunity without addressing the questions of a jurisdiction from which there could be immunity…[39]

In discussing whether Belgium had authority to issue such an arrest warrant, the judges note both that "[t]he development of the concept of 'impact jurisdiction' or 'effects jurisdiction' has in more recent years allowed continued reliance on territoriality while stretching far the jurisdictional arm,"[40] and that effects jurisdiction "is embraced both by the United States and, with certain qualifications, by the European Union"[41] The court finally noted that there is already "the beginnings of a very broad form of extraterritorial jurisdiction" and that "[w]hile this unilateral exercise of the function of guardian of international values has been much commented on, it has not attracted the approbation of States generally."[42]

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[38] Case Concerning the Arrest Warrant of 11 April 2000 (Congo v. Belgium) 2002 I.C.J. [Reproduced in accompanying notebook Volume I at Tab 10].

[39] Congo v. Belgium, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, pg. 5.

[40] Id, at pg. 8.

[41] Id, at pg. 12.

[42] Id.

f. The Legislative History of the Statute Indicates an Intent to Provide Such Jurisdiction

No existing records of the legislative history of the Statute describe discussions regarding effects jurisdiction of the ICC. However, the history that is available points to a finding of jurisdiction in such a circumstance. The question regarding whether the Court would have jurisdiction over non-Party States is was discussed at length during the drafting. In the very first session of the United Nations Preparatory Committee on the Establishment of an International Criminal Court, opinions by the drafters were offered as to how to obtain jurisdiction over non-Parties.[43] During the fourth and final session, many states expressed an interest in granting the Court jurisdiction "over all core crimes."[44]

It is significant to note that many states wanted a more robust jurisdictional scope than was achieved. Initially, the "great majority of states wanted the court to have automatic jurisdiction regarding genocide, crimes against humanity, war crimes and the crime of aggression," while few wanted to make jurisdiction consent-based.[45] Germany

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[43] Christopher Keith Hall, The First Two Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court, 91 A.J.I.L. 177, 182 (1997) [Reproduced in accompanying notebook Volume III at Tab 30].

[44] Christopher Keith Hall, The Third and Fourth Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court, 92 A.J.I.L. 124, 131 (1998) [Reproduced in the accompanying notebook Volume III at Tab 31].

[45] Mahnoush H. Arsanjani, Developments in International Criminal Law: The Rome Statute of the International Criminal Court, 93 A.J.I.L. 22, 26 (1999) [Reproduced in the accompanying notebook Volume II at Tab 20].

and South Korea are two examples.[46] Additionally, the majority of a group known as the "Like-Minded Group", described as "a group of over sixty States with a shared commitment to an independent and effective Court," vied for the Statute to explicitly grant the ICC universal jurisdiction, or at least to permit a Party State to delegate its universal jurisdiction to the Court.[47] "[T]his exercise of jurisdiction with respect to the serious crimes defined by the Statute is consistent with long-settled principles of universal jurisdiction and with state jurisdiction over crimes committed within its territory or against its nationals."[48]

Many of the criticisms of the Statute put forth by the U.S. suggest a proper interpretation allows jurisdiction over non-Party State leaders. David Scheffer, the head of the United States' delegation to the drafting conferences, stated that the United States "sought some way to enable the [Court] to act in obvious cases."[49] He also noted that his proposal for modification of the current jurisdictional provisions "remedied the dangerous drift of Article 12 toward universal jurisdiction over non-State parties."[50]

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[46] Seth Harris, The United States and the International Criminal Court: Legal Potential for Non-Party State Jurisdiction, 23 Hawaii L. Rev. 277, 280 (2000) [Reproduced in the accompanying notebook Volume III at Tab 32].

[47] Antonio Cassese, The Rome Statute of the International Criminal Court: A Commentary, Volume I (2002), at 71 [Reproduced in accompanying notebook Volume II at Tab 14].

[48] Marcella David, Grotius Repudiated: The American: Objections to the International Criminal Court and the Commitment to International Law, 20 Mich. J. Int'l L. 337, 370 (1999) [Reproduced in accompanying notebook Volume III at Tab 27].

[49] Scheffer, Staying the Course with the International Criminal Court, 35 Cornell Int'l L.J. 47, 65 (2002) [Reproduced in accompanying notebook Volume III at Tab 43].

[50] Scheffer, supra, at 72.

Additionally, Scheffer notes that the U.S. "readily acknowledged that the Article 13(b) power of the Security Council to refer a situation to the ICC for action could subject non-State Party nationals to the jurisdiction of the Court despite the conditions set forth in [their] proposal."[51] Finally, many treaties in existence, and many of which the U.S. is party to, "are globally binding on nationals of party and non-party states because they reflect the common interests of humanity."[52]

It is telling that many states proposed more inclusive jurisdiction for the Court. Inherent in the development of the Statute is the underlying belief that the Court is the proper and necessary venue to prosecute criminals of the worst kind. The limits to jurisdiction that have been imposed appear to have been inserted in the interest of compromise among all of the states, and with the purpose and effect of protecting state sovereignty where the Court has absolutely no ties to either the criminal or the victim. Nothing in the legislative history indicates that the drafting States intended to allow for prosecution of the man who dropped the bomb on the hospital without also indicting the leader who commanded it in the first place.

g. The Principle of Universal Jurisdiction Suggests that the Rome Statute should be Broadly Interpreted

The term "universal jurisdiction" has been used in different manners. This theory has developed to encompass three different situations, first, when a state prosecutes an individual for violating the state's criminal laws with an act that took place at least partly

[51] Scheffer, supra, at 79.

[52] Remigius Chibueze, United States Objection to the International Criminal Court: A Paradox of "Operation Enduring Freedom", 9 Ann. Surv. Int'l & Comp. L. 19, 34 (2003) [Reproduced in accompanying notebook Volume III at Tab 25].

outside of the state, second, where that conduct took place outside the state based on an international treaty obligation, and third, for breaching international law.[53]

The question at hand involves the last of these situations. International law allows that certain crimes can be punished by any state simply because all nations equally have an interest in the prosecution of them and those who commit them. Under the most common understanding of this theory of universal jurisdiction, neither the nationality of the accused nor that of the victim is relevant.[54] Jurisdiction stems from the belief that certain crimes are universally considered to be atrocious and there is a general international interest in bringing their committers to justice. This interest is reflected in "widely-accepted international agreements and resolutions of international organizations."[55] Two basic principles, then, underlie the idea – first, that crimes subject to the idea are typically "so heinous in scope and degree that they offend the interest of all humanity, and any state may, as humanity's agent, punish the offender,"[56] and second, that such crimes usually "occur in territory over which no country has jurisdiction or in

[53] Mark A. Summers, The International Court of Justice's Decision in Congo v. Belgium: How Has it Affected the Development of a Principle of Universal Jurisdiciton that Would Obligate All the States to Prosecute War Criminals?, 21 B.U. Int'l L.J. 63, 70 (2003) [Reproduced in accompanying notebook Volume III at Tab 46].

[54] Chandra Lekha Sriram, Revolutions in Accountability: New Approaches to Past Abuses, 19 Am. U. Int'l L. Rev. 301, 315 (2003) [Reproduced in accompanying notebook Volume III at Tab 45].

[55] Id, at 556.

[56] Scharf, at pg. 80.

situations in which the territorial state is unlikely to exercise jurisdiction, because, for example, the perpetrators are state authorities or agents of the state."[57]

The argument that the Statute oversteps its bounds by extending the theory of universal jurisdiction to permit prosecution of individuals in non-Party states is frequently made by the Statute's opposition.[58] However, the principle underlying prosecution under the Statute is similar, yet not identical, to the theory of universal jurisdiction. Clearly the Statute imposes jurisdiction restrictions that universal jurisdiction does not – namely, that there still must be some required contact with at least the victim state, in terms of giving its consent to jurisdiction under the ICC. Nevertheless, the principle underlying the jurisdictional theory is the same – some international crimes are so heinous that there must exist a place in which they can be tried without relying upon their own states to prosecute them.

Additionally, it is telling that the United States has continually attacked the ICC for its presumed support of universal jurisdiction. If the drafters did not intend to permit some form of this principle in the Statute, the United States' path to ratification would be a significantly less tenuous journey that it has been.

In conclusion, universal jurisdiction is widely accepted in customary international law, even by the United States, one of the most notable exceptions to the list of those ratifying the Statute. Additionally, that use of the principle is cited as one of the United States' biggest contentions with the statute. However, no move has been made to change

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[57] Id.

[58] Bartram S. Brown, U.S. Objections to the Statute of the International Criminal Court: A Brief Response, 31 N.Y.U. J. Int'l L. & Pol. 855, 873 (1999) [Reproduced in accompanying notebook Volume II at Tab 22].

the language, and there is no legislative history suggesting that this is not the meaning intended. From this, it is likely the Statute purposefully allows a variation of universal jurisdiction – one that is tempered only by the requirement that there be some contact between the "victim" state, or the state in which the crime occurred, and the ICC itself. Assuming the ICC does indeed allow a somewhat tempered version of the principle of universal jurisdiction, it is clear that this would apply equally to the party who actually drops the bomb on the civilian hospital, as well as the leader who orders it.

h. Public Policy Reasons Why Such Jurisdiction Should be Found

There are a myriad of policy reasons for finding that the ICC has effects jurisdiction. "As of December 1999, there were 188 members of the United Nations, a figure including nearly every independent country in the world. Of these 188 countries, all 188 are party to the Four Geneva Conventions."[59] The purpose of the Geneva Conventions, and explicitly of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, is to provide a means of protection for civilians, and indeed to provide some basic level of rules of engagement for any state involved in war.[60] With respect to the U.N. itself, as the founding body of the ICC, its Charter states that its mission is "to save succeeding generations from the scourge of war," and "to unite our [sic] strength to maintain international peace and security."[61] Additionally, the intention

[59] Scharf, at 373.

[60] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287 [Reproduced in the accompanying notebook Volume I at Tab 2].

[61] Charter of the United Nations, June 26, 1945, available at http://www.un.org/aboutun/charter/ [Reproduced in accompanying notebook Volume I at Tab 1].

of the ICC to provide a viable forum in which the most heinous international criminals can be prosecuted.[62]

Given the policy objectives enumerated here, if jurisdiction is not extended to such leaders, the ICC risks being rendered useless. Nations who are not party to the Statute tend to be rogue nations who are more likely to commit acts for which fall under the subject matter jurisdiction of the Statute. An international court that is unable to prosecute the world's worst offenders would be impotent.

If the ICC is not permitted to prosecute commanders in such a situation, there is a great risk that they will go unprosecuted. After all, if the ICC is not permitted to exercise jurisdiction, who is? Under the principles of universal jurisdiction, any state might, however this is likely often impractical due to issues with access to evidence as well as the question of surrender on the part of the nation holding the accused. Under customary international law, the victim state could exercise jurisdiction over the individual. However, victim states will frequently have no means for such an undertaking after subjection to such grievous crimes. The nation of which the criminal is a national may be able to prosecute the crime. This, too, is typically an unlikely scenario, however, as those holding power in the government are quite often those who would be tried. To allow the possibility that some vicious leaders will remain unprosecuted would undermine the entire system and purpose of the principle of establishing such an international body in the first place.

[62] William A. Schabas, An Introduction to the International Criminal Court (2001) [Reproduced in accompanying notebook Volume II at Tab 19].

i. International Response to the United States' Use of Effects Jurisdiction Does Not Preclude its Use in the ICC

The United States, in particular, has exercised effects jurisdiction over non-U.S. nationals who violated its laws, sometimes earning the ire of other nations.[63] An argument could be made against the ICC's application of effects jurisdiction in that some nations are clearly opposed to the principle, therefore the signatories to the Statute did not intend for the ICC to have it.

This argument is short-sighted, however. The most logical concerns of a nation opposed to the United States' exercise of such jurisdiction are differences in national laws and legal systems, and imposition on state sovereignty. The ICC, however, as an international body, has its own, self-imposed laws that all Party States have agreed via treaty to abide by. Additionally, the extension of jurisdiction to a non-Party national committing a crime, from an non-Party State, against a Party State, is no more an imposition on state sovereignty than is the extension of jurisdiction to the non-Party national committing the same crime, against the same Party State, but from that Party State.

IV. Conclusion

Absent amendment to the Statute, the question of effects jurisdiction will not be answered with certainty until the ICC itself makes a ruling on it. However, it seems likely that, when the time comes, the ICC will affirmatively decide this issue. As presented in this memorandum, clearly the Statute provides the means for command as

[63] Robert C. Reuland, Hartford Fire Insurance Co., Comity, and the Extraterritorial Reach of United States Antitrust Laws (1994) [Reproduced in accompanying notebook Volume III at Tab 41].

well as joint criminal responsibility. Many factors strongly weigh in favor of extending this jurisdiction to those individuals who commit crimes against a Party State while acting from a non-Party State, including prior international law, the legislative history of the statute and the likely intent of the drafters, the principles of effects and universal jurisdiction which are present in the Statute, and public policy reasons. The person, therefore, who, from a command post in his own, non-Party State, orders a bomb to be dropped on a civilian hospital, killing hundreds of innocent people is just as culpable under the ICC as the person who actually dropped the bomb.