

CAPTAIN BRIDGEPORT AND THE MAZE OF ICC JURISDICTION

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“There can be no peace without justice, no justice without law and no meaningful law without a Court to decide what is just and lawful under any given circumstances.”

– Benjamin B. Ferencz

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I. INTRODUCTION

The International Criminal Court (ICC) was established with the purpose of ending impunity and ensuring the effective prosecution of war

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crimes, crimes against humanity, genocide, and crimes of aggression.¹ Benjamin B. Ferencz, a former Nuremberg prosecutor has said, “There can be no peace without justice, no justice without law and no meaningful law without a Court to decide what is just and lawful under any given circumstances.”² That Court is the International Criminal Court.

Kofi Annan, Secretary General of the United Nations, has noted, “In the prospect of an international criminal court lies the promise of universal justice. . . . Only then will the innocents of distant wars and conflicts know that they, too, may sleep under the cover of justice; that they, too, have rights, and that those who violate those rights will be punished.”³ However, in order to successfully punish, prosecute, and end impunity, the ICC must have the jurisdiction to prosecute those who perpetrate these crimes *regardless* of where they are found.

The jurisdiction of the ICC is limited by the Rome Statute and was one of the “most delicate issues in the creation of the International Criminal Court.”⁴ The International Criminal Court was established with the idea of consent and, for that reason, it seemed that jurisdiction should be consistent with this notion.⁵ As a result, the ICC’s jurisdiction was defined with regards to “subject matter (jurisdiction *ratione materiae*), time (jurisdiction *ratione temporis*), space (jurisdiction *ratione loci*) as well as over individuals (jurisdiction *ratione personae*).”⁶ This paper sets out to examine how the limited jurisdiction may actually be applied and, what, if any, affect the jurisdiction may have beyond its intended affect. First, here follows a brief history of the establishment of the Court and the Rome Statute.

II. THE ESTABLISHMENT OF THE INTERNATIONAL CRIMINAL COURT

The Court was established and based, in part, upon previous *ad hoc* and international tribunals, like the Nuremberg Tribunals.⁷ The work to establish and draft a statute for the ICC began in 1994.⁸ In June of 1998, the Rome Conference began in Rome, Italy, in which the first draft of the Rome Statute was considered.⁹ “One by one, the provisions of the statute

1. Rome Statute of the International Criminal Court, Preamble, July 17, 1998, 2187 U.N.T.S. 3 (entered into force July 1, 2002) *available at* <http://www.un.org/law/icc/statute/rome.htm> [hereinafter Rome Statute].

2. Rome Statute, Overview, <http://www.un.org/law/icc/general/overview.htm>.

3. *Id.*

4. WILLIAM SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT, 54 (2001).

5. *Id.*

6. SCHABAS, *supra* note 4, at 55.

7. M. CHERIF BASSIONUNI, THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY, 2-10 (1998).

8. SCHABAS, *supra* note 4, at 13.

9. *Id.* at 15.

were adopted 'by general agreement' in the working groups . . . without a vote."¹⁰ On July 17, 1998, the Rome Statute was adopted by the international community.¹¹

On July 1, 2002, the Rome Statute came into force, the date was sixty days after the sixtieth state had ratified the Rome Statute.¹² The Rome Statute has been in effect for nearly five years, but the Court has yet to hear a case.¹³ The Court, itself, predicts that it will take some time for a case to come before it, as the jurisdictional conditions and requirements of the Rome Statute would first have to be met.¹⁴ The International Criminal Court is an independent body and separate from the United Nations.¹⁵

One of the conditions that must be met before the ICC can exercise jurisdiction is complementarity, the idea that it would be complementary to national courts.¹⁶ The concept of complementarity is as follows: A case is not admissible before the ICC if it is being "investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution."¹⁷ Furthermore, if a State with jurisdiction has decided not to prosecute, the ICC may assert its jurisdiction.¹⁸ The doctrine of complementarity applies with regard to State Parties to the Rome Statute, being those States that have consented to the Court's jurisdiction.

Unwillingness and inability are defined in the Statute.¹⁹ In looking at unwillingness, the Court considers what national proceedings are taking place and whether the accused is being shielded from prosecution, whether there is an unjustified delay in the proceedings "inconsistent with an intent to bring the person concerned to justice," and, finally, whether the proceedings are being conducted in an impartial and independent manner, inconsistent "with an intent to bring the person concerned to justice."²⁰

In determining inability, the Court considers whether "due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony . . . to carry out" prosecution.²¹

10. *Id.* at 17.

11. The International Criminal Court Website, <http://www.icc-cpi.int/atag glance/whatistheicc/history.html>.

12. *Id.*

13. *Id.*

14. *See* SCHABAS, *supra* note 4.

15. Rome Statute, *supra* note 1, art. 2.

16. *Id.* arts. 1 & 17.

17. *Id.* art. 17(1)(a).

18. *Id.* art. 17(2).

19. *Id.* art. 17.

20. Rome Statute, *supra* note 1, art. 17(2).

21. *Id.* art. 17(3).

The Court may exercise its jurisdiction in three cases: (1) the State is unwilling to prosecute, (2) the State is unable to prosecute, or (3) the State has decided not to prosecute.²² The Court may also assert its jurisdiction through a referral from the Security Council or through the consent of a State.²³

Complementarity is an important and necessary hurdle for the ICC to cross, but it is not the focus of this paper. For each of the jurisdictional analyses and hypothetical situations that appear within this paper, assume that complementarity is not at issue. Thus, preface each hypothetical with the assumption that *the State Party or a State Party has decided not to prosecute, so complementarity is not at issue and the Court may proceed with prosecution.*²⁴

The Rome Statute is clear, in many areas, but it is also vague. The jurisdictional elements may have been laid out in the statute, but there are many questions as to what the actual application of the Rome Statute in certain specific circumstances may be. Due to the fact that the Court has yet to hear any cases, most of these jurisdictional issues are unresolved. It is also unclear, in actuality, how the Court may handle specific jurisdictional questions. For that reason, the role of the ICC, its authority under its own statute, and how it may proceed are all hypothetical questions with hypothetical answers.

However, through an analysis based upon customary international law, traditional domestic statutory approaches, and the approaches taken by various international tribunals, this paper will discuss and attempt to resolve how the Court *might* address certain jurisdictional issues.

III. THE JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT

This paper is based upon a hypothetical character, Captain Bridgeport, in a number of hypothetical situations. Where possible, these hypothetical situations have been derived from actual cases from actual tribunals, in an attempt to shed light on how the international community has answered such challenges in the past and how they might do so in the future. The specific focus is *jurisdiction*, namely: territorial jurisdiction, objective territoriality jurisdiction, command responsibility, *rationi temporalis*, nationality jurisdiction, and universal jurisdiction, and how the International Criminal Court *may* assert its authority within the scope of the Rome Statute under given circumstances.

22. *Id.* art. 17

23. *Id.* arts. 13 & 17.

24. *Id.* art. 17(2). The assumption is that a State party could have prosecuted but, for whatever reason, has decided against prosecution. Under this assumption, it would then be appropriate for the ICC to assert jurisdiction, as long as the other statutory jurisdictional elements were met.

A. Territorial Jurisdiction

A State has jurisdiction over acts committed within its territory.²⁵ This is a basic principle of both domestic and international law.²⁶ “The ‘territorial principle’ reflects the global community’s recognition that without the power to control acts or things located in its territory, a [S]tate could not exist.”²⁷

Hypothetical A²⁸: Captain Bridgeport, a citizen of Non-Party State, is visiting Party State. While there, Captain Bridgeport commits gross atrocities amounting to *crimes against humanity*, which are crimes under Article 7 of the Rome Statute. Both states agree that the allegations, if true, would amount to war crimes.

Party State and Non-Party State are signatories to the Vienna Convention on the Law on Treaties, but only Party State is a signatory to the Rome Statute.

At the Rome Convention, Non-Party State’s representative to the Convention said, “We, the citizens of Non-Party State do not wish to be bound by the ICC or the Rome Statute. We do not recognize the jurisdiction of this Court. We consciously and purposefully withhold our consent and vote against this Treaty.”

The Rome Statute embodies the requirement of a territorial nexus.²⁹ The ICC has jurisdiction over a crime if it is committed within the territory of a State Party or if the accused is the national of a State Party.³⁰ In order to meet the requirement, a nexus must be established between the actor, the crime, and a State Party.³¹

Hypothetical A is a clear case for the exercise of jurisdiction by the ICC, or so it appears on its face. The Court, acting consistent with Article 12 (2) may assert jurisdiction over crimes that occur on the territory of a State Party.³² In Hypothetical A, the nexus exists because Captain

25. *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 126 (1812); MALCOLM N. SHAW, *INTERNATIONAL LAW* 458 (4th ed. 1997); *See also* American Law Institute, *RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* § (402)(1) (1987).

26. SHAW, *supra* note 25.

27. THOMAS BUERGENTHAL & SEAN D. MURPHY, *PUBLIC INTERNATIONAL LAW IN A NUTSHELL*, 205 (2002).

28. The hypotheticals used as illustrations throughout this paper are the work of the author. Any similarities to actual events are purely coincidental. Where a hypothetical is based, loosely, upon actual facts, the author will attribute properly.

29. Rome Statute, *supra* note 1, art. 12(2).

30. *Id.*

31. *Id.*

32. *Id.*

Bridgeport committed a crime against humanity on the territory of Party State.

However, even in a scenario as simple as Hypothetical A, there is the potential for dispute, especially in situations where the accused is the national of a Non-Party State. The Vienna Convention on the Law of Treaties states that “a treaty does not create either obligations or rights for a third State without its consent.”³³ Generally, this principle means that a third Party State cannot be bound by a treaty unless it consents.³⁴ Under this analysis, if Non-Party State has not consented, the exercise of jurisdiction by the ICC would be improper.³⁵ This would not preclude Party State from exercising its own jurisdiction over Captain Bridgeport in Party State, but Party State could not extradite to the ICC.³⁶

The Rome Statute, under Article 12(2), seems to be in direct conflict with the Vienna Convention on the Law of Treaties.³⁷ There is not any case law on the matter. Michael P. Scharf, an international publicist argues that “it is a distortion to say that the Rome Statute purports to impose obligations on [N]on-[P]arty [S]tates.”³⁸ The only obligations created by the Rome Statute are extradition, providing of evidence, funding, and cooperation; these are only required of State Parties.³⁹ The Rome Statute “simply confirms the recognized principle that individuals are subject to the substantive and procedural criminal laws applicable in the territories to which they travel, including laws arising from treaty obligations.”⁴⁰

There are two policy considerations to take into account: First, when Non-Party State chose *not* to sign the Rome Statute, it made a conscience choice not to be bound by the Rome Statute and the International Criminal Court. Secondly, and contrary to the first point, when Captain Bridgeport traveled to Party State it is a reasonable expectation that he would be subject to the jurisdiction and laws of Party State.⁴¹ Analysis may be as simple as the fact that the crime was committed in Party State so Party State may exercise jurisdiction. On the other hand, it may mean that the Vienna

33. Vienna Convention on the Law of Treaties, art. 34, May 23, 1969, 1155 U.N.T.S. 331 [Hereinafter VCLT].

34. Madeline Morris, The United States and the International Criminal Court: High Crimes and Misconceptions: The ICC and Non-Party States, 64 LAW & CONTEMP. PROBS. 13, 14-15 (2001).

35. *Id.*

36. *Id.*

37. Rome Statute, *supra* note 1, art. 12(2); VCLT, *supra* note 33, art. 34.

38. Michael P. Scharf, The ICC's Jurisdiction Over The Nationals of Non-Party States: A Critique of the U.S. Position, 64 LAW & CONTEMP. PROBS. 67, 98 (2001).

39. *Id.*

40. Scharf, *supra* note 38, at 98 (quoting Philippe Kirsch, *The Rome Conference on the International Criminal Court: A Comment*, (ASIL Newsletter, Wash., D.C.), Nov./Dec. 1998).

41. *Id.*

Convention on the Law of Treaties will be violated and the exercise of jurisdiction by the ICC will not be permitted. There is no definitive answer.

B. Objective Territoriality Jurisdiction

The doctrine of objective territoriality jurisdiction is related to territorial jurisdiction. Under the doctrine of objective territoriality “acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect.”⁴² The doctrine may be applied in cases of “aiding, abetting, ordering, soliciting, inducing, or intentionally contributing to a crime within the subject matter of the Court.”⁴³ Objective territoriality jurisdiction may be asserted where an essential element of a crime and its effects have taken place in a territory.⁴⁴ Under the principle, the crime is considered to have been an evil committed against the territory where the effects of the acts resulted.⁴⁵

Hypothetical B⁴⁶: Captain Bridgeport, a citizen of Non-Party State, is fishing in the Border Zone River. While there, Captain Bridgeport commits gross atrocities amounting to *crimes against humanity*, which are crimes under Article 7 of the Rome Statute, by shooting a gun at and killing several children in Party State. Captain Bridgeport knew that it was likely that the shootings would kill or injure the children. Both states agree that the allegations, if true, would amount to war crimes against humanity.

State Party is a signatory to the Rome Statute.

The Rome Statute does not address the doctrine of objective territoriality directly. Under Article 12(2), the ICC may exercise jurisdiction if the “State on the territory of which the *conduct* in question occurred, or if the *crime* was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft” is a Party to the Rome Statute.⁴⁷

42. *Strassheim v. Daily*, 221 U.S. 280, 285 (1911); *Indictment, Prosecutor v. Charles Ghankay Taylor*, Case No SCSL-2003-01-I March 7, 2003.

43. Kenneth S. Gallant, *Jurisdiction to Adjudicate and Jurisdiction to Prescribe in International Criminal Courts*, 48 VILL. L. REV. 763, 814 (2003).

44. *The S.S. Lotus (France v. Turkey)* 1927 P.C.I.J. (ser.A) No. 10; *See also R. v. Nel*, South Africa Sup. Ct. App. Div. 1953, reprinted in 20 Int'l L. Rep. 192 (1957).

45. *Id.*; Edwin D. Dickinson, *Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 435, 488 (Supp. 1935)(citing *Report on Extraterritorial Crime and the Cutting Case*, 1887, p. 23; U.S. For. Rel. 1887, 757, 771); SHAW, *supra* note 25, at 459.

46. Based on *Simpson v. State*, 17 S.E. 984 (Ga. 1893) (holding that Georgia could exercise jurisdiction over a person who shot a gun from the South Carolina border and the “effects” of the crime occurred in Georgia).

47. Rome Statute, *supra* note 1, art. 12(2)(a).

The language of the Rome Statute is limiting. The term *conduct* is not defined in the Rome Statute. The use of *crime* in the latter part of the statute may provide guidance. Perhaps, it would be helpful to examine when jurisdiction *would* be proper under the language of Article 12(2)(a).

Hypothetical C⁴⁸: Airplane is registered to Party State. Captain Bridgeport, a national of Non-Party State, hijacks an aircraft while flying over Non-Party State and crashes the plane.

State Party is a signatory to the Rome Statute.

Due to the fact that the aircraft, in Hypothetical C, was registered to Party State, the ICC could exercise jurisdiction over Captain Bridgeport consistent with Article 12(2)(a) of the Rome Statute.⁴⁹ What has been the injury to Party State? Its property has been destroyed and its citizens have been injured or killed. The use of the word *crime* seems to mean that one of the defined *crimes* as contained in the Rome Statute must take place aboard the aircraft or vessel for jurisdiction to be proper; not an element of a crime but a *crime*.⁵⁰

The use of the term *conduct* in 12(2)(a) seems more expansive than the use of the word *crime* used in the latter part of the statute.⁵¹ This would be consistent with the concept that certain parts of the crime must be completed on the territory of the State Party.⁵² As long as the effects and one element of the crimes take place on the territory of a state party, jurisdiction is valid.⁵³ As long as the effects and one element of the crime take place on the territory of a state party, jurisdiction is valid.⁵⁴ The crime is not complete until all of the elements have been met.⁵⁵ In *State v. Hall*, a case before the North Carolina Supreme Court, the court pushed the argument one step further and said that when one fires a bullet over the border, the person constructively accompanies the bullet over the border; perhaps the ICC could adopt this rationale.⁵⁶ However, it is unclear whether the ICC or the International Court of Justice would be willing to interpret the Rome Statute that loosely.

48. Based loosely on the *Lockerbie* bombing case, see Case Concerning the Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), 1992 I.C.J. 114, 184 (April 14).

49. *Id.*

50. *Id.*

51. *Id.*

52. Gallant, *supra* note 43, at 814.

53. *Id.*

54. *Id.*

55. *Id.*

56. *State v. Hall*, 19 S.E. 602, 603-604 (1894).

In Hypothetical B, the exercise of jurisdiction by the ICC would be proper. Captain Bridgeport fired his gun at the children of Party State. He knew that his conduct, which began in Non-Party State and was completed in Party State, would lead to the injury or killing of the children. Captain Bridgeport's criminal act, as a whole, was not completed until the crime reached its finality. In short, Captain Bridgeport's crime did not stop at the border. Some conduct took place in Non-Party State and some conduct took place in Party State.

The strongest argument against the exercise of objective territoriality jurisdiction by the ICC involves an interpretation of *conduct* requiring the accused to physically carry out conduct on the territory of a state party. However, the Rome Statute has other provisions that embody the notion that physical presence is not always necessary for the Court to exercise jurisdiction, namely, under the theory of command responsibility, which will be examined further in the next section of this paper.⁵⁷ Furthermore, an interpretation requiring physical presence allows for certain crimes to be beyond the ICC's reach, which is contrary to the purpose of the Rome Statute.⁵⁸

Jurisdiction has been exercised under the "effects" doctrine in other instances. For example, in the *Lockerbie* bombing case, Scotland was able to exercise jurisdiction over two Libyan men who planted a bomb aboard an aircraft that exploded above Scotland.⁵⁹ The only connection to the forum was the fact that the bombing took place there.⁶⁰ The doctrine of objective territoriality is widely accepted in international law.⁶¹

The concept of "effects" jurisdiction was the basis for an indictment by the Special Court for Sierra Leone of President Charles Taylor of Liberia.⁶² Taylor has been indicted by the Special Court for crimes against humanity.⁶³ The indictment alleges that Charles Taylor is individually, criminally responsible for his aid in planning, instigating, and ordering the commission of crimes by Liberian military groups in Sierra Leone.⁶⁴ President Taylor's actions took place in Liberia; however, the crimes were carried out in Sierra Leone.⁶⁵ The "effects" of President Taylor's commands were felt in Sierra Leone.⁶⁶

57. Rome Statute, *supra* note 1, art. 28.

58. *Id.*

59. SHAW, *supra* note 25, at 459.

60. *Id.*

61. *Id.*

62. Indictment in the Case of The Prosecutor v. Charles Taylor, Case No. SCSL-03-I (Sierra Leone, June 4, 2003).

63. *Id.*

64. *Id.* at ¶ 26.

65. *Id.*

66. *Id.*

One distinction between the Special Court for Sierra Leone and the International Criminal Court is the language in the statutes. The Statute for the Special Court of Sierra Leone *clearly* confers objective territoriality jurisdiction on the Court.⁶⁷ Article 6(1) of the Statute reads, “A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime...shall be individually responsible for the crime.”⁶⁸ The Statute for the International Criminal Tribunal for Rwanda has adopted the same language.⁶⁹

The fact that the drafters of the Rome Statute did not adopt similar language may be telling. However, if the term *conduct*, as used in the statute is broader, then perhaps the drafters sought to embody greater jurisdiction for the ICC with regards to crimes within its competence. International publicists, such as Kenneth S. Gallant, have adopted the position that the Rome Statute does extend to objective territoriality jurisdiction.⁷⁰ This view is consistent with the purpose of the Rome Statute – to see the effective prosecution of certain types of war crimes.⁷¹ However, according to Gallant, “This issue of ‘effects’ jurisdiction will probably not be resolved until raised by a case before the Court or by an amendment to the ICC Statute.”⁷²

C. Command Responsibility

Under the doctrine of command responsibility a commander may be liable for the actions of his subordinates.⁷³ The doctrine is based upon a commander’s failure to exercise control where there is an affirmative duty to act.⁷⁴

The United States Supreme Court adopted the doctrine of *command responsibility* in the *Yamashita* case.⁷⁵ The case, similar to the facts in Hypothetical D, below, involved a commander who failed to take affirmative acts to prevent war crimes from being committed by his troops

67. Statute of the Special Court for Sierra Leone, art. 6(1), *available at* <http://www.scs-sl.org/scsl-statute.html>.

68. *Id.*

69. Statute of the International Criminal Tribunal of Rwanda, art. 6(1), U.N. Doc. S/RES/955 (Nov. 8, 1994), *available at* <http://69.94.11.53/ENGLISH/Resolutions/955e.htm>.

70. Gallant, *supra* note 43, at 814.

71. Rome Statute, *supra* note 1, pmb.

72. Gallant, *supra* note 43, at 815.

73. *Yamashita v. Styer*, 327 U.S. 1, 15 (1946); *Indictment in Deputy General Prosecutor for Serious Crimes v. Wiranto, et. al*, UNMISSET, para. 208-215 (United Nations Mission of Support in East Timor in the District Court of Dili, 2003); Beth Van Schaack, *Command Responsibility: The Anatomy of Proof in Romagoza v. Garcia*, 36 U.C. DAVIS L. REV. 1213, 1217 (2003).

74. *Prosecutor v. Delalic*, Case No. IT-96-21-T, par. 378 (1998), *citing United States v. Wilhelm von Leeb et al.*, Vol. XI, TWC, 462, “The High Command Case”; *Yamashita*, 327 U.S. at 15.

75. *Yamashita*, 327 U.S. at 15.

in the Philippines.⁷⁶ The Supreme Court held that there is “an affirmative duty to take such measures as were within [the commander’s] power and appropriate in the circumstances to protect prisoners of war and the civilian population.”⁷⁷

The doctrine of command responsibility has been adopted by the International Criminal Tribunal for Rwanda.⁷⁸ According to the Tribunal, the doctrine of “command responsibility” was not specifically enumerated in the statute, but “its governing principles” were incorporated into the statute.⁷⁹ The Statute of the International Criminal Tribunal for Rwanda embodies the doctrine of command responsibility in Article 6(3), “The fact that any [crimes] of the present Statute [were] committed by a subordinate does not relieve his superior of criminal responsibility.”⁸⁰ The commander must have “[known] or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take necessary and reasonable measures to prevent such acts or to punish the perpetrators.”⁸¹

The ICTR required a showing of “effective control” for command responsibility to be met.⁸² Effective control is determined by the “actual possession, or non-possession, of powers of control over the actions of subordinates.”⁸³ The authority being exercised over subordinates may be *de facto* (authority over persons in fact) or *de jure* (authority over persons by law) and the doctrine extends to civilian and military commanders.⁸⁴

Hypothetical D⁸⁵: Captain Bridgeport is commander of the Party State National Army. His offices and headquarters are located in the largest city in Party State. His troops are fighting a full battle in Party State.

While meeting with his militia leaders Captain Bridgeport stated, “The nuns and priests in Party State are certainly a problem. Our situation would be greatly improved if we were rid of them.”

76. *Id.* at 16.

77. *Id.* at 16.

78. *See Prosecutor v. Delalic*, Case No. IT-96-21-T, (Rwanda, 1998).

79. *Id.* at 331.

80. Statute of the International Criminal Tribunal for Rwanda, art. 6(3).

81. *Id.*

82. *Delalic* at 378.

83. *Id.* at 370.

84. *Id.* at 378.

85. Based loosely on Deputy General Prosecutor for Serious Crimes v. Wiranto, Indictment, The Special Panel for Serious Crimes, United Nations Mission of Support in East Timor (UNMISSET), ¶¶ 22, 208-15 (Dis. Ct. of Dili, 2003), [hereinafter Wiranto Indictment], available at http://socrates.berkeley.edu/~warcrime/Serious%20Crimes%20Unit%20Files/all_documents/Wiranto/Wiranto%20caseEnglish%20National%20Indictment%20Feb%202003.pdf.

Following the meeting, the leaders ordered the regiments to attack churches and diocese buildings to “speed the victory.” As a result of the attacks, 2000 nuns, priests, and children were killed.

At a subsequent meeting, Captain Bridgeport’s Intelligence Officer notified him of the violence. Captain Bridgeport failed to take any action.

Party State is a signatory to the Rome Statute.

Under the Rome Statute, command responsibility is addressed by two provisions of Article 28.⁸⁶ Section (a) sets forth the requirements for command responsibility as related to military commanders or a “person effectively acting as a military commander.”⁸⁷ Section (b) sets forth the requirements for command responsibility as related to “superior and subordinate relationships not described in paragraph (a),” which indicates civilian commanders.⁸⁸

In regards to civilian command responsibility the statute first requires that the superior know or consciously disregard that his subordinates are about to commit or have committed such crimes.⁸⁹ Secondly, the crimes must be committed within the “effective responsibility” and “control” of the superior.⁹⁰ Finally, the superior must have failed to take “necessary and reasonable measures” to prevent the illegal acts or have failed to report the illegal acts to “the competent authorities for investigation and prosecution.”⁹¹

As to military commanders, the statute requires that the military commander “knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes.”⁹² Additionally, the military commander must have “failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.”⁹³

Under Hypothetical D, Captain Bridgeport is a military commander and, for that reason, falls under the military commander portion of the Rome Statute. Captain Bridgeport would be liable for the acts of his subordinates

86. Rome Statute, *supra* note 1, art. 28.
87. *Id.* art. 28(a).
88. *Id.* art. 28(b).
89. *Id.* art. 28(b)(i).
90. *Id.* art. 28(b)(ii).
91. Rome Statute, *supra* note 1, art. 28(b)(iii).
92. *Id.* art. 28(a)(i).
93. *Id.* art. 28(a)(ii).

under Article 28(a) of the Rome Statute.⁹⁴ Captain Bridgeport's men were engaged in fighting, and Captain Bridgeport should have known that a statement like "our situation would be greatly improved if we were rid of them," given to his military commanders, would be perceived as an order. Furthermore, when Captain Bridgeport was notified by his Intelligence Officer that such crimes were taking place, he failed to *affirmatively* act to bring an end to the violence. Moreover, it does not appear that Captain Bridgeport has taken any steps to punish the activity. Under the doctrine of command responsibility, liability attaches for the *failure to act* and not for the order given.⁹⁵ The liability for the order would fall under the doctrine of direct responsibility.⁹⁶

In February 2003, General Wiranto, the Indonesian Minister of Defense and Security, was charged under the doctrine of command responsibility by the United Nations Mission of Support in East Timor in the District Court of Dili.⁹⁷ The charges addressed General Wiranto's failure to exert his command authority over militia members by acting affirmatively to prevent war crimes.⁹⁸ The indictment alleged that Wiranto had been "repeatedly informed of acts of violence" performed by militia groups and that he had "failed to take necessary and reasonable measures to prevent the crimes [from] being committed."⁹⁹

The Rome Statute provides that a superior is charged with the underlying offense that his subordinates commit and not with "command responsibility."¹⁰⁰ Therefore, when a subordinate commits genocide, the commander is charged with genocide.¹⁰¹ As a result, this may further expand the jurisdiction of the ICC. Consider the hypothetical case, below:

Hypothetical E¹⁰²: Captain Bridgeport is commander of the **Non-Party State National Army**. His offices and headquarters are located in the largest city in Non-Party State. However, his troops are fighting a full battle in Party State.

While meeting with his militia leaders he said, "The nuns and priests in **Party State** are certainly a problem. Our situation would be greatly improved if we were rid of them."

94. *Id.* art. 28(a)

95. Beth Van Schaak, *Command Responsibility: The Anatomy of Proof in Ramagoza v. Garcia*, U.C. DAVIS L. REV. 1213, 1217 (2003).

96. *Id.*

97. Wiranto Indictment, *supra* note 85, ¶¶ 208-15.

98. *Id.*

99. *Id.*

100. *See* Rome Statute, *supra* note 1, art. 28.

101. *Id.*

102. *See generally*, Wiranto Indictment, *supra* note 85.

Following the meeting, the leaders ordered the regiments to attack churches and diocese buildings to “speed the victory.” As a result of the attacks, 2000 nuns, priests, and children were killed.

At a meeting, Captain Bridgeport’s Intelligence Officer notified him of the violence. Captain Bridgeport failed to take any action.

Party State is a signatory to the Rome Statute. Non-Party State is not a signatory to the Rome Statute.

The International Criminal Court has jurisdiction over conduct that occurs on the territory of a state party.¹⁰³ The facts in Hypothetical E indicate the actual conduct, the killing of the nuns, priests, and children, took place on the territory of Party State. Because the commander is liable for the actual crime, and not the underlying command, it would appear that the ICC has jurisdiction over Captain Bridgeport.¹⁰⁴ After all, his subordinates committed crimes on the territory of a state party and, under Article 28, this is analogous to the commander having committed the crime on the territory.¹⁰⁵ This analysis ensures that a commander will not escape liability or shield himself from prosecution by commanding in distant forums which are not parties to the Rome Statute.¹⁰⁶

The doctrine of command responsibility seeks to ensure that a commander is held responsible for the acts committed by subordinates.¹⁰⁷ The doctrine seeks to hold commanders liable for failing to act when there is an affirmative duty to do so.¹⁰⁸ By prosecuting commanders for failing to act where there is a duty, commanders will become more aware of their obligations and more active in seeking to prevent war crimes, crimes against humanity, crimes of aggression, and genocide.¹⁰⁹ This type of jurisdiction is clearly established in the Rome Statute.¹¹⁰

D. Nationality Jurisdiction

A state may exercise jurisdiction over its nationals.¹¹¹ This applies to nationals located within the state and outside of the state.¹¹² The Rome

103. Rome Statute, *supra* note 1, art. 12(a).

104. *Id.* art. 28(a).

105. *Id.*

106. *Id.* arts. 12, 28.

107. Van Schaak, *supra* note 95, at 1217.

108. *Id.*

109. Rome Statute, *supra* note 1, pmbl.

110. *Id.* art. 28.

111. CHRISTOPHER BLAKESLEY ET AL, THE INTERNATIONAL LEGAL SYSTEM, 161 (5th ed. 2001).

112. *Id.*

Statute embodies this principle in Article 12(2)(b) of the Rome Statute which provides that the International Criminal Court may exercise jurisdiction over the nationals of state parties.¹¹³

Hypothetical F: Captain Bridgeport is a citizen of Party State. While in Party State, Captain Bridgeport commits crimes against humanity, which are subject to the jurisdiction of the ICC under Articles 5 & 7 of the Rome Statute.

Party State is a state party to the Rome Statute.

The International Criminal Court could exercise jurisdiction over Captain Bridgeport consistent with Article 12 of the Rome Statute.¹¹⁴ Captain Bridgeport is a national of Party State, a state that is a signatory to the Rome Statute, and as such, the ICC has jurisdiction over the war crimes, crimes against humanity, and genocide committed by the nationals of Party State.¹¹⁵

E. Universal Jurisdiction

Under the concept of universal jurisdiction, a state may exercise jurisdiction over a *jus cogens* crime wherever that crime is committed.¹¹⁶ Under international law, *jus cogens* crimes give rise to obligations *erga omnes*, obligations arising from the “higher” status of the crime and may be punished by any state because the offenders are “common enemies of all mankind and all nations have an equal interest in their apprehension and prosecution.”¹¹⁷ This may include the extradition to a state “willing and capable of prosecuting fairly and effectively.”¹¹⁸ The purpose is to ensure that the *jus cogens* crime is punished regardless of where the perpetrator may be.¹¹⁹ When exercising universal jurisdiction, “neither the nationality of the accused . . . nor the location of the crime is significant.”¹²⁰

One of the most recent examples of the exercise of universal jurisdiction is the *Pinochet* case.¹²¹ The case involved an attempt by Spain

113. Rome Statute, *supra* note 1, art 12(2)(b).

114. *Id.* art. 12.

115. *Id.*

116. *See Attorney-Gen. of the Gov't of Isr. v. Eichmann*, 36 I.L.R. 18, 26 (Isr. Dist. Ct. - Jerusalem, 1961).

117. United Kingdom House of Lords: *Regina v. Bartle and the Comm'r of Police for the Metropolis and Others Ex Parte Pinochet*, 38 I.L.M. 581, 590 (1999) [hereinafter *Ex Parte Pinochet*].

118. M.C. BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW*, 220 (2nd ed. 1999).

119. *Ex Parte Pinochet*, *supra* note 117, at 590.

120. *Demjanjuk v. Petrovsky*, 776 F.2d 571, 582 (1985).

121. *Ex Parte Pinochet*, *supra* note 117, at 581.

to extradite Pinochet from the United Kingdom to stand prosecution for crimes committed in Chile.¹²² The Court held that “[i]f the states with the most obvious jurisdiction . . . do not seek to extradite, the state where the alleged torturer is found must prosecute or, apparently, extradite to another country, i.e. there is universal jurisdiction.”¹²³ In *Pinochet*, the United Kingdom must either prosecute or extradite to a country willing to prosecute, which in this case was Spain.¹²⁴ The House of Lords noted that “[t]he jus cogens nature of [certain international crimes] justifies states in taking universal jurisdiction over [those serious crimes] wherever committed.”¹²⁵

The jurisdiction of the ICC is based upon the concept of consent.¹²⁶ Parties consent to the jurisdiction of the ICC by (1) becoming a signatory to the Rome Statute or (2) consenting, on a case by case basis, to allow the Court to exercise jurisdiction over its nationals.¹²⁷ Due to the doctrine of consent jurisdiction, some have argued that the ICC may not exercise universal jurisdiction.¹²⁸ Adding weight to this argument is the fact that the drafting committee specifically rejected a proposal to grant the ICC the authority to exercise universal jurisdiction.¹²⁹ As a result, the provisions embodied in the Rome Statute appear to require a state party to form a nexus with the Rome Statute for the Court to exercise jurisdiction.¹³⁰ Consider the following:

Hypothetical G¹³¹: Captain Bridgeport is a citizen of Non-Party State. While in Non-Party State he orders and participates in the killing of 5000 members of the Zardot Tribe. The killings are based solely on race. The crime qualifies as genocide under Articles 5 and 6 of the Rome Statute.

Captain Bridgeport travels to Another-Non-Party State.

In Hypothetical G, Non-Party State would have jurisdiction over its own citizen, Captain Bridgeport, under the standard territorial basis of

122. *Id.* at 582.

123. *Id.* at 591.

124. *Id.*

125. *Id.* at 589.

126. *See* Rome Statute, *supra* note 1, art. 12.

127. *Id.* art 12(2),(3).

128. Melissa K. Marler, *The International Criminal Court: Assessing the Jurisdictional Loopholes in the Rome Statute*, 49 DUKE L.J. 825, 832 (1999).

129. *Id.* at 833.

130. Rome Statute, *supra* note 1, art. 12.

131. *See generally* Ex Parte Pinochet, *supra* note 117, at 581 (attempting to extradite Pinochet for genocide).

jurisdiction for the crimes committed in its territory.¹³² However, Non-Party State has not prosecuted, nor has Another-Non-Party State. As a result, Party State has requested jurisdiction. Genocide is a *jus cogens* crime giving rise to *erga omnes* obligations and the crimes must be prosecuted.¹³³ If Party State seeks to exercise universal jurisdiction over Captain Bridgeport's crimes, it should be granted consistent with the reasoning in the *Pinochet* case and under customary international law.¹³⁴

Some international publicists have argued that the International Criminal Court has an ability to exercise universal jurisdiction on the basis that nations have delegated their ability to exercise universal jurisdiction to the Court.¹³⁵ Exercising this delegated jurisdiction, the Court can reach out and prosecute the nationals of non-party states.¹³⁶ This type of jurisdiction is considered a limited exercise of universal jurisdiction in the context of Article 12.¹³⁷ Publicists focus on the notion that when a state exercises jurisdiction over the national of a non-party state for acts occurring on the territory of a party state, this qualifies as a type of universal jurisdiction; however, as discussed *supra*, this is merely the exercise of territorial jurisdiction.¹³⁸

Michael P. Scharf and Leila Nadya Sadat, have extended this idea of delegated jurisdiction.¹³⁹ According to Professor Scharf, “[t]he drafters did not view the consent of the state of territoriality or nationality as necessary as a matter of international law to confer jurisdiction on the court;” rather, it was used as a concession to expedite the ratification of the Rome Statute.¹⁴⁰ Professor Sadat has noted that the universality principle is still a feature of the Court.¹⁴¹ Professor Morris summarizes this view best:

Under this theory, each state party, in effect, delegates to the international court its power to exercise universal jurisdiction. Advocates of this view reason that the territoriality requirement

132. *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 126 (1812); SHAW, *supra* note 25, at 458; *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW § 402(1) (1987).

133. IAN BROWNLIE, PRINCIPLES OF INTERNATIONAL LAW 512 (5th ed. 1998); *see also* *Siderman de Blake v. Republic of Arg.*, 965 F.2d 699, 714-15 (9th Cir. 1992) (*citing* *Barcelona Traction, Light and Power Co. (Belgium v. Spain)*, 1970 I.C.J. 3, 32 (1970)); Steven Fogelson, *The Nuremberg Legacy: An Unfulfilled Promise*, 63 S. CAL. L. REV. 833, 847 (1990).

134. *Ex Parte Pinochet*, *supra* note 117, at 589.

135. Scharf, *supra* note 38, at 76.

136. *Id.*

137. *Id.*; Rome Statute, *supra* note 1, art. 12.; *see also* Jordan J. Paust, *The Reach of ICC Jurisdiction Over Non-Signatory Nationals*, 33 VAND. J. TRANAT'L L. 1, 6 (2000).

138. *Schooner Exchange*, 11 U.S. (7 Cranch) at 126-27.

139. Scharf, *supra* note 38, at 77.

140. *Id.*

141. *Id.*

simply reflects a choice that the ICC will exercise only part of the full range of jurisdiction that it legally could exercise under the customary law of universal jurisdiction.¹⁴²

Under this theory, it is suggested, at least, that the court could exercise the full authority of its jurisdiction.¹⁴³ In so doing, it would not be exercising its own universal jurisdiction; rather, it would be exercising the universal jurisdiction of the state that has delegated it to the Court. In Hypothetical G, this means that the ICC could, theoretically, exercise its jurisdiction over Captain Bridgeport. The Court would not be asserting its own jurisdiction; instead, it would be exercising the delegated jurisdiction of Party State. The exercise of this type of jurisdiction would be consistent with the concept of universal jurisdiction and the purpose of the Rome Statute – ensuring prosecution for war crimes, crimes against humanity, and genocide.¹⁴⁴

The theory of delegated jurisdiction has not gained unanimous support. For example, Professor Morris argues that a state cannot delegate its universal jurisdiction to the ICC.¹⁴⁵ She further argues that the entire framework of the Rome Statute might be in violation of international law because of its attempt to obtain jurisdiction over non-party nationals.¹⁴⁶ However, this line of analysis does not adequately consider other forms of jurisdiction, e.g. territorial jurisdiction that would make it proper for the Court to assert its jurisdiction over non-party nations who commit crimes on the territory of a state party. However, if the concept of non-delegation, as argued by Professor Morris, is accepted, it would not only put this basic form of jurisdiction in question, but beyond that, it would also call into question treaty based jurisdiction which is, in its simplest form, delegated jurisdiction.

The exercise of universal jurisdiction is important because it ensures that certain crimes, no matter where they are committed, will be punished.¹⁴⁷ The stated purpose of the Rome Statute is to ensure that the “most serious crimes of concern to the international community as a whole [do] not go unpunished. . . .”¹⁴⁸ As was demonstrated in Pinochet, if certain crimes are not punished under the theory of universal jurisdiction, they may never be prosecuted.¹⁴⁹ The ICC may push its jurisdiction to its limits by

142. Morris, *supra* note 34, at 27-29.

143. *Id.*

144. Rome Statute, *supra* note 1, pmbl; Eichmann, 36 I.L.R. at 26.

145. Morris, *supra* note 34, at 27-29.

146. *Id.* at 66.

147. *Id.* at 31 (*citing* Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on the Defense Motion For Interlocutory Appeal on Jurisdiction ¶ 72 (Yugoslavia, 1995), available at <http://www.un.org/icty/tadic/appeal/decision-e/51002.htm>).

148. Rome Statute, *supra* note 1, pmbl.

149. *See* Ex Parte Pinochet, *supra* note 117, at 627.

exercising universal jurisdiction; however, the Court may show restraint, but either way, the answer lies somewhere in the Court's future.

F. Rationi Temporalis

The Rome Statute embodies the doctrine of jurisdiction *ratione temporis*.¹⁵⁰ This provides that the ICC may only exercise jurisdiction "with respect to crimes committed after the entry into force of [the] Statute."¹⁵¹ With respect to individual states, the Court may only exercise jurisdiction over crimes committed after the Statute enters into force with regard to that state, unless the state consents.¹⁵² However, inchoate offenses may create an exception to this doctrine that provides the Court with the ability to reach beyond the entry into force of the statute.

Hypothetical H¹⁵³: Captain Bridgeport, a citizen of Party State, writes an essay entitled, "Ten Thousand Ways to Wipe Out the Population of ethnic Hooloos." The article lists numerous ways to commit genocide and encourages people to carryout these acts with precision and caution. The article is circulated in Party State. The article was written in 1994, initially published in 1996, and then published annually for five years.

In August 2002, Party State became a signatory to the Rome Statute.

In October 2002, as a result of the articles, 5000 ethnic Hooloos were killed. The killers admitted that they were inspired by Captain Bridgeport's article. Captain Bridgeport is indicted on charges of incitement of genocide under Article 6 & 25(e) of the Rome Statute.

Incitement of genocide is a crime under the Rome Statute.¹⁵⁴ Incitement of genocide must be "direct" and "public."¹⁵⁵ Initially, there may be some question as to whether publications amount to incitement of genocide; however, other criminal tribunals have held that it may. For example, the ICTR found Ferdinand Nahimana, Jean-Bosco Barayagwiza, and Hassan Ngeze guilty of incitement of genocide for articles published in

150. Rome Statute, *supra* note 1, art. 11.

151. *Id.* art. 11(1)

152. *Id.* art 11(2).

153. *See generally*, Prosecutor v. Nahimana, Case No. ICTR-99-52-T, Judgment and Sentence (Rwanda 1999).

154. Rome Statute, *supra* note 1, art. 25(e)

155. *Id.*

newspapers, broadcasts over radio, and speeches made encouraging the extermination of the Tutsi people.¹⁵⁶

Additionally, another question arises as to when the criminal acts occurred. If the incitement occurred when the article was written, in 1994, then the criminal acts are beyond the reach of the ICC.¹⁵⁷ If the crimes took place when the article was published and circulated, then the crime is still beyond the reach of the ICC.¹⁵⁸ However, if the crimes occurred when the acts occurred, then the ICC may be able to exercise jurisdiction consistent with the *ratione temporis* limitation of the Rome Statute.¹⁵⁹

In the Nahimana case, before the ICTR, the Court held that “the crime of direct and public incitement to commit genocide, like conspiracy, is an inchoate offense that continues in time until completion of the acts contemplated.”¹⁶⁰ The Court then held that articles published in the magazine *Kangura* dating back to May 1990, were prosecutable as incitement to genocide because the resulting acts occurred place in 1994.¹⁶¹ Subsequently, the accused were prosecuted and found guilty for incitement of genocide, among other crimes.¹⁶²

Similar to the Rome Statute, the Statute of the International Tribunal for Rwanda has a temporal limitation.¹⁶³ The ICTR was granted jurisdiction over crimes that occurred between January 1 and December 31, 1994.¹⁶⁴ According to Nahimana, this includes inchoate offences that began prior to January 1 but that were not completed until after January 1.¹⁶⁵ By analogy, this could perhaps extend to any crimes that begin before the enactment of a statute but that are not completed until after the statute comes into effect.

Like Nahimana, Captain Bridgeport wrote his article and saw its publication prior to the effective date of the Rome Statute in Party State. The article incited genocide; however, the actual act of genocide did not occur until October 2002. In the interim between publication and the act of genocide, Party State had become a state party to the Rome Statute. Pursuant to a Nahimana analysis, it would be valid for the ICC to exercise jurisdiction, and the *ratione temporis* doctrine would not be violated because the inchoate offence continued until it was completed.¹⁶⁶

156. See Nahimana, Case No. ICTR-99-52-Y, ¶ 1071.

157. Rome Statute, *supra* note 1, art. 11.

158. *Id.*

159. *See id.*

160. Nahimana, Case No. ICTR-99-52-T, ¶ 1017

161. *Id.*

162. *Id.* ¶ 1071.

163. Statute of the International Criminal Tribunal for Rwanda, art. 1 (November 8, 1994), available at <http://www.ohchr.org/english/law/itr.htm>.

164. *Id.*

165. Nahimana, Case No. ICTR-99-52-T, ¶ 1017

166. *See id.*

IV. CONCLUSION

The International Criminal Court was established to ensure that the crimes of genocide, crimes against humanity, and war crimes would not go unpunished.¹⁶⁷ In order to carry out its mission, the ICC must have jurisdiction sufficient to ensure the effective and adequate prosecution of those who commit these grave offenses against mankind. However, the ICC was intentionally established with a limited jurisdiction based on consent.¹⁶⁸ While the ICC's jurisdiction may be limited, jurisdiction is appropriate as long as the exercise of such jurisdiction would not violate the Rome Statute.¹⁶⁹ With regards to territorial jurisdiction, objective territoriality jurisdiction, *ratione temporis*, command responsibility, nationality jurisdiction, and universal jurisdiction, the use of certain types of jurisdiction may give the Court the authority to prosecute individuals who are from non-party states, commit crimes in non-party states, or seek to take refuge in non-party states. While much of this conversation and debate is only in the hypothetical, one thing is clear: the International Criminal Court will be forced to address such issues when (and not if) they arise to ensure that prosecution can take place and impunity ends.

167. Rome Statute, *supra* note 1, pmbl.

168. *Id.* art. 12.

169. *Id.* pmbl.