

2000

## The Reach of ICC Jurisdiction Over Non-Signatory Nationals

Jordan J. Paust

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vjtl>



Part of the [Criminal Law Commons](#), [Human Rights Law Commons](#), and the [International Law Commons](#)

---

### Recommended Citation

Jordan J. Paust, The Reach of ICC Jurisdiction Over Non-Signatory Nationals, 33 *Vanderbilt Law Review* 1 (2021)

Available at: <https://scholarship.law.vanderbilt.edu/vjtl/vol33/iss1/1>

This Comment is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Journal of Transnational Law by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact [mark.j.williams@vanderbilt.edu](mailto:mark.j.williams@vanderbilt.edu).

# VANDERBILT JOURNAL OF TRANSNATIONAL LAW

---

VOLUME 33

JANUARY 2000

NUMBER 1

## COMMENTARY

### The Reach of ICC Jurisdiction Over Non-Signatory Nationals

*Jordan J. Paust\**

A new International Criminal Court (ICC) was created on July 17, 1998 under the Rome Statute adopted by the United Nations Diplomatic Conference on Plenipotentiaries on the Establishment of an International Criminal Court.<sup>1</sup> Under the Statute, the ICC will have jurisdiction over crimes of genocide, certain crimes against humanity, and certain war crimes, leaving the crime of aggression for further definition.<sup>2</sup>

Nonetheless, there are certain preconditions to the exercise of such jurisdictional competence, as noted especially in Articles 12-14 of the Statute. In general, the Court can exercise jurisdiction if a "situation" or case (1) is referred to the Prosecutor by a State Party to the treaty, (2) is referred to the Prosecutor by the U.N. Security Council, or (3) is under an investigation initiated by the Prosecutor *proprio motu*.<sup>3</sup> Article 12 adds that when a State Party has referred

---

\* Law Foundation Professor, University of Houston Law Center.

1. United Nations: Rome Statute of the International Criminal Court, U.N. Doc. No. A/CONF.183/9 (July 17, 1998), *reprinted in* 37 INT'L LEGAL MATERIALS 999 (1998) [hereinafter Rome Statute].

2. *See id.* art. 5.

3. *See id.* art. 13.

investigation, "the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court" by special declaration: "(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft; [or] (b) The State of which the person accused of the crime is a national."<sup>4</sup>

The Executive Branch of the United States apparently considers that a U.S. national could not be tried before the ICC if the United States does not ratify the treaty.<sup>5</sup> Is this a proper interpretation of the treaty or of international law more generally? Assume, for example, that Italy and Yugoslavia have ratified the treaty and the United States has not, and that war crimes within the jurisdiction of the ICC<sup>6</sup> are alleged to have been committed by a U.S. national

---

4. *Id.* art. 12(2)-(3).

5. See David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12, 18 (1999). *But see id.* at 18, 20. The theory is not that the Rome Statute does not reach nationals of non-signatories, it admittedly does, see *id.* at 18, 20, but that it should not do so as a matter of more general international law that supposedly requires state consent for creation of a tribunal to try its nationals. See *id.* at 18.

6. War crimes within the jurisdiction of the ICC are addressed in Article 8, as supplemented by Article 21(1)(b) and 21(3). See Rome Statute, *supra* note 1, arts. 8, 21(1)(b), 21(3). Every violation of the law of war is a war crime. See, e.g., JORDAN J. PAUST ET AL., INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS 24, 84-86, 744, 761, 967-69, 984-94 (1996); DEPARTMENT OF THE ARMY, THE LAW OF LAND WARFARE: U.S. DEPARTMENT OF THE ARMY FIELD MANUAL FM 27-10, para. 499 (1956). Nonetheless, war crimes within the jurisdiction of the ICC are quite limited. Article 8 even states that war crimes "[f]or the purpose of this Statute . . . means," thus indicating that other war crimes are not covered. See Rome Statute, *supra* note 1, art. 8(2); see also *id.* art. 10 ("Nothing . . . shall be interpreted as limiting or prejudicing in any way existing . . . rules of international law for purposes other than this Statute."); *id.* art. 22(3) ("shall not affect the characterization of any conduct as criminal under international law independently of this Statute."). The phrase "in particular" in article 8(1), however, is not a limiting phrase but one emphasizing the fact that jurisdiction will exist especially or particularly when listed factors occur. See *id.* art. 8(1). Crimes against humanity covered by article 7 of the Statute (which also contains the phrase "[f]or the purposes of this Statute," see *id.* art. 7(1)) are also not meant to reflect all customary crimes, see *id.* arts. 5(1), 10, 22(3), and are limited beyond the reach of customary international legal instruments, which, for example, do not contain limiting words such as "widespread" or "systematic" and do not fuse persecution types of crimes against humanity into those concerning attacks on civilians. Compare *id.* art. 7 with PAUST ET AL., *supra*, at 1030-31, 1035-38, 1054-62; Irwin Cotler, *Regina v. Finta*, 90 AM. J. INT'L L. 460 (1996); Jordan J. Paust, *Threats to Accountability After Nuremberg: Crimes Against Humanity, Leader Responsibility and National Fora*, 12 N.Y.L. SCH. J. HUM. RTS. 547 (1995); Leila Sadat Wexler, *The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again*, 32 COLUM. J. TRANSNAT'L. L. 289 (1994); Leila Sadat Wexler, *Prosecutions for Crimes Against Humanity in French Municipal Law: International Implications*, 97 PROC. AM. SOC. INT'L L. 270, 271-73 & n.13 (1997). In any event, as the cited writings demonstrate, the number of direct victims can be small and as few as 3, 7, 11, 30, or 44. See also Prosecutor v. Akayesu, ICTR-96-4-T

(now being held in Italy) while acting within the territory of Yugoslavia. In such a scenario, can either Yugoslavia or Italy properly refer the case to the Prosecutor? Can the Prosecutor rightly initiate an investigation *proprio motu*? Can Italy render the accused to the ICC for prosecution?

Some might assume simplistically that merely because the United States does not ratify the treaty, its nationals cannot be subject to prosecution before the Court. Normally, nonsignatory nationals are not bound by crimes or norms newly created by a treaty.<sup>7</sup> However, that is not what is involved when a new tribunal is established in order to prosecute what admittedly are alleged violations of customary international law—that is, law already extant at the time of an alleged offense and that had created crimes over which there is a universal jurisdictional competence and responsibility.<sup>8</sup>

Under international law a state, such as Italy, that has on its territory<sup>9</sup> a person reasonably accused of war crimes under customary international law has both the competence and responsibility either to initiate prosecution of such a person or to extradite or render such a person to another forum. Universal competence and responsibility pertain whether or not the accused is an Italian national, the victims were Italian, or the crime took place within Italy. Yugoslavia would have the same competence and responsibility under international law, as would the United States.

It is also certain that Italy can agree with another state or group of states to set up a tribunal to carry out such responsibility and can render to such a tribunal any person reasonably accused of a crime under customary international law who is found in territory under its control.<sup>10</sup> That is what happened when the United States agreed with France, Great Britain, and the Soviet Union, but not

---

(Sept. 2, 1998), reprinted in 37 I.L.M. 1401 (1998) (indicating that the number of direct victims were as few as 3, 5, 8 and 8).

7. See, e.g., PAUST ET AL., *supra* note 6, at 95, 102-03, 105.

8. See, e.g., *id.* at 74-84, 95-110; JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 392-93, 405-07 (1996) (concerning such prescriptive and enforcement competence and responsibility).

9. Thus, territorial jurisdiction to enforce pertains. See PAUST, *supra* note 8, at 393, 395 n.9 (concerning enforcement jurisdiction under international law that is often territorially based but can extend into other territory by consent).

10. No known treaty or rule of customary international law precludes such an arrangement for the exercise of jurisdiction. See S.S. Lotus (Fr. v. Turk.), [1927] P.C.I.J. (ser. A) No. 10, at 4, 18-19 ("Restrictions upon the independence of States cannot . . . be presumed. . . . [International law] leaves them. . . a wide measure of discretion which is only limited in certain cases by prohibitive rules. . . . [D]iscretion [is] left to States by international law. . . .").

Germany, to set up the International Military Tribunal at Nuremberg (IMT at Nuremberg).<sup>11</sup> As the IMT at Nuremberg affirmed:

The Signatory Powers [to the London Agreement of 8 August 1945<sup>12</sup> creating the Charter of the IMT at Nuremberg] created this Tribunal . . . and made regulations for the proper conduct of the Trial. In doing so, they have done together what any one of them might have done singly, for it is not to be doubted that any nation has the right to set up special courts to administer the law. With regard to the constitution of the Court, all that the defendants are entitled to ask is to receive a fair trial on the facts and law.<sup>13</sup>

Thus, a German defendant could not complain that the IMT at Nuremberg lacked jurisdiction over crimes that any state could prosecute because each state creating or agreeing to the competence of the IMT had “done together what any one of them might have done singly.” Indeed, they could create such a tribunal with or without the consent of Germany, and the tribunal could, and did, prosecute German nationals even when the accused had not committed crimes within the territory of the United States, France, Great Britain, or the Soviet Union and were not nationals of any of the constituting states.

It is also telling that the U.N. General Assembly has declared with respect to war crimes and crimes against humanity:

3. States shall co-operate with each other on a bilateral and multilateral basis with a view to halting and preventing war crimes and crimes against humanity, and shall take the domestic and international measures necessary for that purpose.

11. See *Demjanjuk v. Petrovsky*, 776 F.2d 571, 582 (6th Cir. 1985) (“these tribunals and their proceedings were based on universal jurisdiction”); see also M. CHERIF BASSIOUNI & PETER MANKAS, *THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 200-01* (1996) (“The [London] agreement imposed the IMT on the defeated power without even the presumption of its acquiescence. In the Far East, US General Douglas MacArthur . . . unilaterally established the IMTFE. . . . There was, in this instance, no treaty and no participation in the institution-creating process by the defeated party.”); MYRES S. MCDUGAL & FLORENTINO P. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION* 126, 163-65 & n.109, 717-20 (1961) (IMT at Nuremberg was an “international” tribunal despite the lack of consent of Germany and other Allied Powers, and it applied international law over which universal jurisdiction pertains); TELFORD TAYLOR, *NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY* 80, 82 (1970) (IMT at Nuremberg was an international tribunal “and exercised a jurisdiction internationally conferred” regarding “international penal law”).

12. Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279. It had been noted that there was a need to create a tribunal especially for the trial of war criminals “whose offenses have no particular geographical location.” The Tripartite Conference in Moscow, *Anglo-Soviet-American Communiqué*, 9 DEPT. ST. BULL. 307, 311 (1943). This point was addressed by the IMT at Nuremberg in its Opinion and Judgment.

13. Opinion and Judgment, International Military Tribunal at Nuremberg (Oct. 1, 1946), reprinted in PAUST ET AL., *supra* note 6, at 900, 904.

4. States shall assist each other in detecting, arresting and bringing to trial persons suspected of having committed such crimes . . . .

....

. . . States shall not grant asylum to any [such] person . . . .<sup>14</sup>

Impliedly, the General Assembly's declaration reflected a general expectation that not only would it be appropriate for states to create bilateral or multilateral institutional processes to assist in prosecuting such international crimes, but also that such action may be required as part of the duty to engage in bilateral and multilateral cooperative efforts to halt, prevent, and prosecute such crimes. Such duties were also tied to obligations under the U.N. Charter.<sup>15</sup>

Given the unassailable competence of Italy to participate in the creation of an ad hoc international criminal tribunal (like the IMT at Nuremberg) to prosecute violations of customary international law and to render to such a tribunal any person accused of such crimes found within territory under its control, it is certain that Italy can participate in the creation of the new ICC by treaty with or without the consent of the United States and that Italy can transfer part of its universal jurisdictional competence and responsibility to the ICC by such a constitutive treaty. It is also certain that Italy could render any such person to the ICC for trial if there is universal jurisdiction over the alleged criminal activity, unless the constitutive treaty precludes Italy from rendering a non-signatory's national to the ICC.

Viewing Article 13 of the Statute again, it is clear from the ordinary meaning of the language of the article considered in context<sup>16</sup> that the Court can exercise jurisdiction if the case has

14. G.A. Res. 3074, U.N. GAOR, 28th Sess, Supp. No. 30, at 79, U.N. Doc. A/9326 (1973).

15. Resolutions recognize that a refusal "to co-operate in the arrest, extradition, trial and punishment" of such persons is contrary to the U.N. Charter "and to generally recognized norms of international law." G.A. Res. 2840, U.N. GAOR, 26th Sess., Supp. No. 29, at 88, U.N. Doc. A/8592 (1971); *see also* G.A. Res. 3074, *supra* note 14; G.A. Res. 96, U.N. Doc. A/64, at 188 (1946).

16. This is a primary basis for proper interpretation of a treaty. For example, the Vienna Convention on the Law of Treaties reads: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." *See* Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 31(1), 1155 U.N.T.S. 331, 340. Also important as aids for interpretation would be relevant international law. *See, e.g., id.* art. 31(3)(c); Rome Statute, *supra* note 1, art. 21(1)(b) & (3). Since customary international law allows a state to create an ad hoc international tribunal with others and to render any accused found in territory under its control to such a tribunal, such customary international law is a necessary background for adequate interpretation of various provisions of the Rome Statute.

been referred to the Court by a State Party, such as Italy or Yugoslavia in the hypothetical.<sup>17</sup> The only qualification under Article 13 involves a reference to Article 14, that is, “[t]he Court may exercise its jurisdiction” if a State Party refers a situation “to the Prosecutor . . . in accordance with article 14.”<sup>18</sup> Article 14 merely requires that the “crimes [be] within the jurisdiction of the Court” and “appear to have been committed.”<sup>19</sup> Indeed, if the Prosecutor investigates *proprio motu*, the Court will also have jurisdiction.<sup>20</sup>

The only limitation on these competencies in Article 12 is the requirement that either the state on whose territory (or the equivalent thereof) the crime has been committed or the state of nationality of the accused be a party to the treaty or must have accepted the jurisdiction of the Court by special declaration to that effect.<sup>21</sup> There is simply no requirement in Article 12 that the state of nationality of the accused be a party to the treaty or accept the jurisdiction of the Court.<sup>22</sup> The alternative expressly set forth in Article 12 is that the state on whose territory the alleged crime was committed must either be a signatory or must agree to the Court’s jurisdiction. Mahnoush Arsanjani, who served as Secretary of the

Professor Cherif Bassiouni has stated that some 5000 delegates broke into some 15 informal working groups during the Rome Conference, that all texts were in English, that there was little or no communication between different working groups, that many states did not have enough people to cover each working group, that portions of text were still being received on July 15th, and that there was insufficient time for review of any drafts, much less the full text. See M. Cherif Bassiouni, Remarks During the Annual Meeting of the American Society of International Law (March 23, 1999); see also Philippe Kirsch & John T. Holmes, *The Rome Conference on an International Criminal Court: The Negotiating Process*, 93 AM. J. INT’L L. 2, 9-10 (1999); M. Cherif Bassiouni, *Negotiating the Treaty of Rome on the Establishment of an International Criminal Court*, 32 CORNELL INT’L L.J. 443, 449-53, 457-59 (1999) [hereinafter Bassiouni, *Negotiating the Treaty*]; Scheffer, *supra* note 5, at 20. It is unlikely then that much authoritative legislative history exists and that any drafts were considered and agreed upon by the full conference prior to agreement on the full document on July 17th.

17. See Rome Statute, *supra* note 1, art. 13(a).

18. *Id.*

19. See *id.* art. 14(1).

20. See *id.* arts. 13(c) & 15(1).

21. See *id.* art. 12(2) & (3).

22. This had been one of the earlier proposals, but such a limitation of ICC jurisdiction “enjoyed limited support” and was rejected. See Kirsch & Holmes, *supra* note 16, at 9. A U.S. proposal was also rejected that would have required consent of “the state of nationality of the alleged perpetrator in the event either [the state on whose territory the crime occurred or the state of nationality] was not a party to the treaty.” Scheffer, *supra* note 5, at 20; see also Bassiouni, *Negotiating the Treaty*, *supra* note 16, at 458 n.64 (“The United States . . . wanted jurisdiction to be subject to the consent of the state of nationality of the prospective defendant but that was opposed by most states.”); Mahnoush H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AM. J. INT’L L. 22, 26 (“The overwhelming majority of states . . . could not agree to requiring the consent of the state of the nationality of the accused as a prerequisite for the court’s jurisdiction. . .”).

Committee of the Whole at the Rome Conference, affirms that Article 12 sets forth this territorial state alternative, adding that, at least when a situation is referred by the Security Council, "the court will have jurisdiction . . . even if committed in non-states parties by nationals of non-states parties and in the absence of consent by the territorial state or the state of nationality of the accused."<sup>23</sup> As David Scheffer, the U.S. ambassador who led the U.S. delegation at Rome, also recognizes, "[u]nder the treaty's final terms, [nationals of] nonparty states would be subjected to the jurisdiction of the court . . . under Article 12,"<sup>24</sup> and

Article 12 of the ICC treaty reduces the need for ratification of the treaty by national governments by providing the court with jurisdiction over the nationals of a nonparty state. Under Article 12, the ICC may exercise such jurisdiction over anyone anywhere in the world . . . if either the state of the territory where the crime was committed or the state of nationality of the accused consents . . . [and thus] the treaty exposes nonparties . . .<sup>25</sup>

In this sense, the ICC will be able to exercise a form of limited universal jurisdiction.

Paragraph 1 of Article 12 provides no further guidance, stating merely that if a state becomes a party it "thereby accepts the jurisdiction of the Court."<sup>26</sup> Thus, there is no requirement that a state be a party in order to accept the jurisdiction of the Court,<sup>27</sup> and, like customary international law, there is no requirement that the state of nationality of the accused be a party or accept the jurisdiction of the Court. For these reasons, it would be improper to assume that Article 12 obviates any universal jurisdictional competence that signatory states have under customary international law and can delegate to a newly created institution. Further, one should not assume that the jurisdictional competence of the Court will only be based either on territorial or nationality prescriptive jurisdiction.<sup>28</sup> Again, Articles 12, 13, and 14 are

23. Arsanjani, *supra* note 22, at 26. Arsanjani also noted that "the court may . . . exercise jurisdiction if either the state where the crime was committed or the state of nationality of the accused is party to the statute or has consented to the court's jurisdiction."

24. Scheffer, *supra* note 5, at 20.

25. *Id.* at 18.

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

27. Article 12(3) provides: "If the acceptance of a State which is not a Party to this Statute is required, . . . that State may, by declaration . . . accept." *Id.* art. 12(3). This phrase, with the word "[i]f," even assures that a non-signatory need not accept in every case.

28. *But see* Jonathan I. Charney, *Progress in International Criminal Law?*, 93 AM. J. INT'L L. 452, 456 (1999) (missing the fact that a limited universal jurisdiction is possible under the Statute). Concerning territorial and nationality prescriptive jurisdiction under customary international law, see, for example, PAUST, *supra* note 8, at 388-91.



consistent with conferral of a limited universal jurisdictional competence.

Importantly also, universal concern and competence are express and implied in the preamble<sup>29</sup> to the Rome Statute, especially the portions “[a]ffirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,” stating that the Rome Conference is “[d]etermined to put an end to impunity for the perpetrators of these crimes . . . ,” and “[r]ecalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,” a duty with respect to international crimes within the jurisdiction of the ICC that is based at least in part on universal jurisdictional competence and responsibility.<sup>30</sup> Also important is the preambular provision stressing that the conferees were “[d]etermined to these ends . . . to establish an independent permanent International Criminal Court . . . with jurisdiction over the most serious crimes of concern to the international community as a whole.”<sup>31</sup> It would entirely thwart these ends, stated affirmations, and determinations to assume that ICC jurisdiction could only occur if the state of nationality of the accused was a signatory or had specially consented to the jurisdiction of the ICC. Indeed, there is no indication that such a policy-thwarting assumption is actually part of the treaty. These recognized ends, affirmations, and determinations, which are consistent with customary international law, are also part of the object and purpose of the treaty, a necessary and significant factor for adequate interpretation of a treaty under the law of treaties.<sup>32</sup> Indeed, such general legal policies are obviously at stake when the international community has made a significant and historic effort to assure adequate prosecution of some of the most serious international crimes in a permanent International Criminal Court.

Article 17 of the Statute does not change this result. Nevertheless, it provides both a signatory and non-signatory with the power to exercise a concurrent jurisdictional competence to which the Court might defer in a given case. Under Article 17,

---

29. The preamble to a treaty is necessarily a part of the treaty for purposes of interpretation of any other part of the treaty. See Vienna Convention on the Law of Treaties, *supra* note 16, art. 31(2).

30. Rome Statute, *supra* note 1, preamble.

31. *Id.*

32. See Vienna Convention on the Law of Treaties, *supra* note 16, art. 31(1). Recall that customary international law is also relevant background for interpretive purposes. See generally *supra* note 16.

the Court shall determine that a case is inadmissible where:

- (a) The case 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; [or]
- (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; [or]
- (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under [other portions of the Statute].<sup>33</sup>

Article 17 expressly refers to “a State” and is not limited to a State Party. As all states have prescriptive jurisdiction over customary international crimes and can enforce that jurisdictional competence when an accused is within their control, it is possible, for example, that a non-signatory state will be investigating or prosecuting a case involving its national at the time when another state refers that matter to the Prosecutor or the Prosecutor is investigating *proprio motu*. In such a circumstance, Article 17 could preclude ICC jurisdiction under the terms of the ICC’s constituting instrument. It is also evident, however, that the ICC can retain jurisdiction if, for example, a non-signatory that is investigating or prosecuting an accused is unwilling or unable genuinely to investigate or prosecute.<sup>34</sup> Additionally, Article 18(1) contemplates investigation by the ICC Prosecutor when a non-signatory state also “would normally exercise jurisdiction over the crimes concerned.”<sup>35</sup>

One problem presented by the hypothetical involves interpretation of the phrase “a State which has jurisdiction” found in Article 17. The United States has nationality and universal prescriptive jurisdiction over the accused U.S. national, but would the United States have enforcement jurisdiction if that individual were in Italy? Is enforcement jurisdiction required under Article 17, or is prescriptive jurisdictional competence sufficient? The United States apparently could conduct an investigation of the accused *in absentia* even though Italy had custody and was exercising enforcement jurisdictional competence because the accused U.S. national was found in Italian territory. If the United States is conducting an investigation, it is a state, among others, that has prescriptive jurisdiction. If prescriptive jurisdiction is sufficient under Article 17, this circumstance is covered by Article 17(1)(a), as long as the investigation is being conducted in good faith. If, under Article 17, enforcement jurisdiction must exist in the United States

---

33. Rome Statute, *supra* note 1, art 17(1); see also *id.* arts. 19(2)(b) & 20(3).

34. This point is admitted by Ambassador Scheffer. See Scheffer, *supra* note 5, at 19.

35. Rome Statute, *supra* note 1, art. 18(1).

at the time of the investigation,<sup>36</sup> then a U.S. investigation would not preclude ICC jurisdiction when Italy is exercising its enforcement jurisdiction and, for example, Italy renders the accused to the Court or the Prosecutor initiates proceedings upon an Italian or Yugoslavian referral or does so *proprio motu*. In view of the fact that human rights law prohibits trials *in absentia*,<sup>37</sup> it is obvious that the United States would not actually be prosecuting the accused U.S. national while such person was in the custody of Italian authorities.

Nonetheless, a circumstance might arise in which an accused U.S. national is actually being prosecuted in a U.S. military court-martial in Italy under the North Atlantic Treaty: Status of Forces Agreement (SOFA)<sup>38</sup> and any other agreements with Italy. In such a case, Article 17(1)(a) of the Statute would be applicable, as the United States would have both concurrent prescriptive and enforcement jurisdictional competencies. When Italy is holding an accused U.S. national, the United States could request pursuant to NATO SOFA that Italy hand over such an individual who is a member of the "force" (including "personnel belonging to the land, sea, or air armed services . . . in the territory . . . in connexion [sic] with their official duties")<sup>39</sup> because, although under customary international law both states have a prescriptive jurisdictional competence, under NATO SOFA Article VII(3)(a)(ii), the United States has primary concurrent jurisdiction over "offences arising out of any act or omissions done in the performance of official duty."<sup>40</sup> It can be recognized that international crime is not properly classifiable under the SOFA as an act or omission done in the performance of "official duty."<sup>41</sup> On the other hand, it might be argued that the

36. Article 18(2) may be relevant. It addresses the circumstance where "a State" (presumably including a non-signatory state) "is investigating or has investigated its nationals or others within its jurisdiction." Yet, this may refer to territorially-based enforcement jurisdiction or forms of prescriptive jurisdiction other than territorial. It is not clear. See *id.* art. 18(2).

37. See, e.g., International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 14(3)(d), 999 U.N.T.S. 171, 177; PAUST ET AL., *supra* note 6, at 379, 769; cf. *id.* at 856-57.

38. Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, 4 U.S.T. 1792 [hereinafter SOFA].

39. *Id.* art. I(1)(a); see also *id.* art. VII(5)(a) (concerning requests for the handing over of an accused).

40. *Id.* art. VII(3)(a)(ii).

41. Several U.S. cases have held that acts in violation of international law are not public acts of a state. See, e.g., *Xuncax v. Gramajo*, 886 F. Supp. 162, 175-76 (D. Mass. 1995); *Letelier v. Republic of Chile*, 488 F. Supp. 665, 673 (D.D.C. 1980). Addressing customary international law with respect to acts that are beyond the scope of lawful authority, the IMT at Nuremberg affirmed:

The principle of international law, which under certain circumstances protects the representatives of a state, cannot be applied to acts which are

phrase “arising out of” might reach beyond acts actually classifiable as “official duty” activities.<sup>42</sup> Yet even then the act or omission out of which the offense arises must be “done in the performance of official duty,” and international criminal acts cannot properly be classified as acts done in performance of official duty.<sup>43</sup> To avoid such a problem, the United States might want to supplement Status of Forces Agreements with a new provision: “The sending State shall have primary jurisdiction over members of its force accused of international crimes committed outside the territorial jurisdiction of the receiving State.” The phrase “outside the territorial jurisdiction of the receiving State” should be added because such a state predictably will be reluctant to waive jurisdiction over international crimes allegedly occurring on its territory, especially when its nationals are the victims of such crimes.

It is also telling that Article 89(1) and 90(4)-(6) contemplate jurisdiction over non-signatory nationals. Article 90 clearly contemplates ICC competence and primacy when a requesting state has a jurisdictional competence but is not a party to the Statute. Such a circumstance could arise when a non-signatory requesting state with nationality jurisdiction uses such a basis for its request for surrender or extradition of its national. Thus, in the hypothetical, if the United States requests Italy to surrender the U.S. national to the United States and not to the ICC, Italy shall give priority to the ICC’s request if the Court has determined that the case is “admissible” and if Italy “is not under an international obligation to extradite the person to the requesting State.”<sup>44</sup> What Article 90 also necessarily recognizes is that the Court has the

---

condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position,” and one “cannot claim immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law.

Opinion and Judgment, IMT at Nuremberg (1946), *supra* note 13. For related recognitions, see PAUST, ET AL., *supra* note 6, at 14, 21-25, 46, 108-10. Since customary international law is a necessary background for proper interpretation of any treaty, *see supra* note 16, international law concerning the scope of public authority or official duty recognized, for example, at Nuremberg must condition the meaning of NATO SOFA.

42. With respect to crimes under domestic law, the scope of the SOFA “official duty” clause has been the subject of debate. *See, e.g.*, *Wilson v. Girard*, 354 U.S. 524 (1957); U.S. DEPARTMENT OF ARMY PAM. NO. 27-161-1, INTERNATIONAL LAW 126-27 (1964), adding: “France maintains that offenses requiring specific intent could not arise out of the performance of official duty.” *Id.* at 126.

43. *See supra* note 40.

44. Rome Statute, *supra* note 1, art. 90(4). This may present an inconsistency with Article 17(a) where Italy is also investigating or prosecuting in good faith, but under Article 17(a) the Court would declare that the case is inadmissible and Article 90(4) should not apply.

power to determine "that the case is admissible" when a non-signatory state (the United States) has requested a signatory state (Italy) to surrender its national.<sup>45</sup> Thus the Court clearly can exercise jurisdiction over the national of a non-signatory in many circumstances. Moreover, there is a significant consistency between, and thematic resonance emanating from, the preamble to and Articles 12, 13, 14, 15, 17, 18(1), and 90 of the Statute. Further, as explained below, nothing in Article 98 changes these recognitions and thematic vibrations.

An interesting problem arises with respect to possible interplay between NATO SOFA and Article 90(4) and 90(6) of the ICC Statute. If the United States has primary concurrent jurisdiction over an offense under NATO SOFA and requests Italy to surrender the accused to the United States pursuant to such treaty, is Italy "under an international obligation to extradite the person to the requesting State" within the meaning of Article 90(4) or (6) of the Statute? NATO SOFA allocates concurrent prescriptive competencies. As between the United States and Italy, the normal consequence of the existence of an agreed primary concurrent jurisdiction in the United States would be that, upon request, Italy would surrender a U.S. accused to the United States. This consequence may even be viewed as an implied obligation to surrender under Article VII(5)(a), which states: "The authorities . . . shall assist each other in the arrest of members of a force . . . and in handing them over to the authority which is to exercise jurisdiction in accordance with the above provisions."<sup>46</sup> Yet, by agreeing to "assist . . . in handing them over," has Italy thereby consented always to hand them over—or merely to assist when handing them over—and not to extradite such an accused to a third country pursuant to an extradition treaty or to an institutional process pursuant to some other treaty?<sup>47</sup> Perhaps, but if not, NATO

---

45. *Id.*

46. SOFA, *supra* note 38, art. 7(5)(a).

47. Indeed, in case of an unavoidable clash among these three types of treaties, which should prevail? Can Italy choose to obey one, but thereby set up a breach of another, leading to normal remedies, if any, for breach? Should the Rome Statute prevail because of its more widespread adherence, its relationship to fundamental humanitarian law and universal jurisdictional competencies and obligations, and its greater significance as an international criminal law treaty? It is preferable that the ICC Statute prevail, especially in view of universal jurisdictional responsibilities based in customary international law that are also a necessary background for adequate and policy-serving interpretation of each treaty. See *supra* note 16.

Further, a mere bilateral extradition treaty should not be interpreted to obviate universal jurisdictional competence and responsibility. Here again, customary international law must condition the meaning of the bilateral treaty. Professor Jonathan Charney has argued, however, that the bilateral extradition treaty between Spain and the United Kingdom, with the doctrine of speciality, would preclude Spain

SOFA does not create an "obligation to extradite" to the United States within the meaning of Article 90(4) or (6) of the Statute. Further, technically the surrender of an accused in Italy pursuant

---

from prosecuting former Chilean dictator Augusto Pinochet for customary international crimes other than those for which he was extradited by the United Kingdom. See Charney, *supra* note 28, at 455 & n.24. The doctrine of speciality has that sort of effect with respect to prosecutions of ordinary domestic crimes. However, the doctrine is itself a principle of customary international law and the full meaning or reach of that principle should be addressed in connection with other customary international legal obligations, especially those pertaining to international crime. Further, the U.N. General Assembly has recognized that a failure to initiate prosecution or to extradite persons reasonably accused of serious international crimes such as war crimes and crimes against humanity and a "refusal to cooperate in the arrest, extradition, trial and punishment" of such persons is tied to a breach of obligations under the U.N. Charter. See *supra* notes 14-15. U.N. Charter obligations clearly override even unavoidably conflicting provisions of other international agreements. See U.N. CHARTER, art. 103. There may also be an issue whether Pinochet as a criminal accused has standing to raise the doctrine of speciality. Courts are split in the U.S., although the preference is for individual standing. See, e.g., PAUST ET AL., *supra* note 6, at 351-52.

With respect to genocide, under customary international law from which no derogation is permitted, the United Kingdom has a duty to either initiate prosecution of or to extradite all persons within its territory who are reasonably accused of genocide. Article I and V of the Genocide Convention expressly require that the United Kingdom enact appropriate legislation "to prevent and to punish" (art. I) and "to give effect to the provisions of the present Convention and, in particular, to provide effective penalties . . ." (art. V). Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, arts. 1, 5, 78 U.N.T.S. 277, 280.

That genocide, a *ius cogens* prohibition, is not prosecutable in the United Kingdom results from its breach of Articles I and V of the Genocide Convention. Thus, a lack of dual criminality (which occurs if genocide or a similar offense, regardless of name, is not a crime in both the United Kingdom and, for example, Spain) results from the U.K.'s breach of the Genocide Convention. For the international community then to accept the claim that it will not extradite Pinochet for genocide because of the doctrine of dual criminality, that it will only extradite for torture, and that under the doctrine of speciality Spain thereafter cannot prosecute for genocide would be to enlarge the functional immunity for genocide that exists under British domestic law merely because of its breach of the Genocide Convention to an unacceptable immunity from prosecution for genocide in Spain (or apparently anywhere) and to preclude Spain from complying with its duties under the Genocide Convention and customary international law. Clearly, dual criminality and speciality must not apply to preclude universal jurisdictional competence and responsibility concerning international crimes. Clearly also, a state must not be allowed to insist on imposing the consequences of its breach of the Genocide Convention on other states. Dual criminality and speciality are also necessarily obviated to the extent that their application would be inconsistent with a peremptory norm, from which no derogation is permitted, such as the duty to either initiate prosecution or to extradite those reasonably accused of genocide.

More generally, a state party to a treaty, such as an extradition treaty, cannot set up its own breach of that treaty or any other international obligation as an excuse for nonperformance or a claimed impossibility. See Vienna Convention on the Law of Treaties, *supra* note 16, art. 61 (2); see also *id.* art. 26 (must perform treaty obligations on good faith). Further, "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." *Id.* art. 27.

to NATO SOFA is not "extradition." If this technical approach is adopted, Article 90 should not be interpreted to allow an exception to the primacy of the ICC in the case of competing requests by the United States and the ICC for surrender of the accused, since NATO SOFA does not create an obligation to extradite.

Another problem involving other international agreements is raised by Article 98(2), which precludes the ICC from proceeding "with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court."<sup>48</sup> No such agreement is known to exist. For example, NATO SOFA does not preclude every sort of rendering of an accused U.S. national to another state or to an international tribunal. It arguably only precludes a rendering when the United States has exclusive or primary concurrent jurisdiction over an offense, but this limitation is unclear because NATO SOFA does not expressly require consent of the sending State concerning extradition or rendering to a third State or to an international tribunal. Further, NATO SOFA makes no mention of "the Court" created by the Rome Statute and thus does not require "the consent of a sending State" "to surrender a person of that State to the Court." More generally, Article 98 does not preclude ICC jurisdiction over the nationals of a non-signatory or require consent of the state of nationality in most cases. It might also be argued that Article 98(1) can preclude such jurisdiction in some cases, for example when the request to surrender "would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person."<sup>49</sup> International law, however, simply does not permit immunity of a person accused of customary international crime.<sup>50</sup>

From the foregoing, the ICC clearly will have jurisdiction over many non-signatory nationals and will be allowed to exercise a form of limited universal jurisdiction. Thus, whether or not the United States ratifies the Rome treaty, ICC jurisdiction over an accused

---

48. Rome Statute, *supra* note 1, art. 98(2).

49. *Id.* art. 98(1).

50. Such nonimmunity has been recognized with respect to heads of state, former heads of state, foreign ministers, diplomats, other government officials, and others. See, e.g., *Prosecutor v. Kambanda*, reprinted in 37 INT'L LEGAL MATERIALS 1411 (Int'l Crim. Trib. for Rwanda, Case No. ICTR 97-23-S, 1998); *Opinion and Judgment, International Military Tribunal at Nuremberg*, *supra* note 13, reprinted in PAUST ET AL., *supra* note 6, at 711-12; Rome Statute, *supra* note 1, preamble ("Determined to put an end to impunity for the perpetrators of these crimes"), arts. 27-28; PAUST, *supra* note 8, at 208, 210-11, 276-79 nn.547-48, 283-84 nn.580-81; PAUST ET AL., *supra* note 6, at 21-25, 32-41, 43, 46, 53, 60-72, 74-78, 108-11, 707-08, 711-12, 765-66, 774, 811-12, 833-44, 889-97, 984, 1082, 1395-96.

U.S. national is generally unavoidable. For this reason, concern about possible prosecution of U.S. nationals is not a valid reason for refusing to ratify the treaty. A way of protecting some, but not all, U.S. nationals from ICC jurisdiction would involve modification of other international agreements allocating concurrent jurisdiction, such as NATO SOFA. When the United States has no such agreements with a state that captures a U.S. national, such as Yugoslavia, the United States may wish to strengthen the primacy of ICC jurisdiction so that a U.S. national can at least be transferred to the ICC and enjoy a panoply of due process guarantees in a neutral forum.<sup>51</sup> Adherence to the Rome treaty could provide greater options for protection of U.S. nationals than nonadherence.<sup>52</sup> It could also provide the United States flexibility with respect to prosecution or extradition of foreign nationals accused of international crimes committed outside the United States.

---

51. An amendment to the ICC Statute might recognize ICC primacy over the jurisdiction of a state on whose territory an international crime within Article 5 has occurred.

52. “[O]n becoming a party,” the United States could even declare that, for seven years, it does not accept jurisdiction with respect to “a crime . . . alleged to have been committed by its nationals.” Rome Statute, *supra* note 1, art. 124. Importantly, this is only an option for signatory states. Further, the conferees, knowing how to use such language, chose not to allow the state of nationality to control ICC jurisdictional competence in such a way in any other portion of the Statute. Concerning other options of parties to the treaty, see, for example, Scheffer, *supra* note 5, at 20.



\* \* \*