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Political Considerations and the Prosecution of International Crimes

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ABSTRACT

When is it proper to consider anything but purely legal considerations in deciding whether or not to prosecute an international crime? Is it ever proper? These two questions will have different answers depending on who it is that is asking them and who it is that is answering them. A sovereign State will respond differently than an International tribunal. They are constrained by different rules that are created and modified in different ways. The two types of institutions also serve different purposes. This article seeks to explore what significances these differences have for responding to the dilemma of choosing between judicial reasons to prosecute a person for breaking the law and political concerns that may require that this person not be prosecuted. The approach taken by the article is mainly an institutional one focusing on the capacity of different actors on the international stage to take certain kinds of actions and legally enforce their decisions. The article starts by exploring the legal capacities of States to make certain kinds of decisions and then moves on to the validity of the different types of international tribunals and the modes of their creation. The entire time the article keeps track of divergent opinions on the significance certain events and legal principles. The main drive in the article is that different institutions have different legal responsibilities and therefore must act in different ways.
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There are two main mechanisms whereby an international crime is prosecuted; trial before National or State courts and trial before an International court or tribunal.¹

Even though they both involve criminal prosecution the two types of institutions, State courts and International courts, are quite different in their function and purpose. Indeed the failure of State courts to act is often cited as the reason for the creation of International courts. Even though a State court may prosecute an “international” crime the relationship of the State court to the international legal regime is different than its relationship to the domestic legal regime. The power of the State to absolve individuals of criminal responsibility may well be different. The State (and as a consequence the court systems, including the prosecutor, as part of the State) is a political actor on the world stage and may make decisions for purely non-juristic reasons. International courts on the other hand are not necessarily political actors in the same sense as States. While an international court may want to expand its jurisdiction (but this is not necessarily true) and may need political cooperation to achieve its goals, its existence is as a juridical instrument, not a governing or political body. The question then is which courts may, and when is it appropriate for, these courts to consider purely political concerns in deciding when to prosecute international crimes? Is what is true for one type of court true for all? And are all treaty or State courts like each other? Before we can even try to answer these questions we must first know what it is that makes a crime “international.”

There are two competing theories for why a crime is “international” as opposed to simply a “national” crime. First and possibly the most intuitive is that “international” crimes are inherently more heinous or more serious than normal “national” crimes and it is for this reason that they deserve to be “international.”\textsuperscript{2} This approach makes considerable sense when you look at the statutes of the International Criminal Tribunal for the Former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR) and the Rome Statue of the International Criminal Court (ICC) that have as their subject matter War Crimes, Crimes Against Humanity and Genocide.\textsuperscript{3} These crimes all bring to mind some of the most horrible massacres of the last century. What this theory of “international” criminality fails to explain is why piracy is an “international” crime.\textsuperscript{4} In truth piracy has been an international crime far longer than any of the triumvirate of crimes within the jurisdiction of the international tribunals.\textsuperscript{5} The very heinousness of murder has even been cited for being the reason it is not an “international” crime.\textsuperscript{6}

The other theory for what makes a crime “international” is that by its very nature if it were not a crime at international law the wrong would most likely go unpunished.

This theory of international criminality puts impunity as the central focus. The

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\textsuperscript{3} Rome Statute of the ICC Articles 6-8, Statute of the ICTY Articles 3-5 and Statute of the ICTR Articles 2-4. Also, London Charter of the International Military Tribunal Article 6.

\textsuperscript{4} Robertson, p. 224; Dixon, p. 139.

\textsuperscript{5} Robertson. 224-5.

circumstances surrounding the commission of these crimes support this second idea. War Crimes, Crimes Against Humanity and Genocide tend to be committed by the very entities that are in charge of prosecuting crimes, namely States. The commission of the crime by a State actor (or person acting on authority of the State) is definitional to the “international” crime of torture however both the ICTY and ICTR have held that at customary international law this is no longer necessary. This shows at least at the time the convention was drafted that accountability of official action was being contemplated. If these were not international crimes it would be the case that when these crimes are committed by a State against its own citizens there would be no judicial recourse for victims but through the courts of the perpetrating State. In essence there would be no jurisdiction under which the crimes could be tried. A similar reasoning holds for why piracy is an “international” crime. Pirates commit their crimes at sea where there is no jurisdiction that will otherwise likely be exercised leaving the crime unpunished. All these crimes infringe upon the rights of individuals (whether it be the right to life or property) and if we are to speak of Human Rights in any meaningfully way there must be a way to vindicate those rights or they are no rights at all.

7 Cassese, p. 232; Schabas, p. 155
8 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res. 39/46, annex, Art. 1(1).
10 Robertson, p. 86, stating, “If the rule against torture… is regularly flouted… can that rule be meaningfully described as ‘law’? That depends on whether the possibility exists… of callings [those who commit the acts] to account.”; Accord, Cassese, p. 155 who speaks about the hypocrisy in a system of rules that lack enforcement mechanisms in relation to the crime of genocide. “Si è scelto di andare avanti sul piano normativo, senza compiere l’ulteriore e necessario passo, consistente nell’accompagnare a quel progresso un eguale progresso sul piano dell’effettività. La Convenzione… resta per molti aspetti un «esercizio diplomatico» viziato da una buona dose di ipocrisia.”
It is important not to be too altruistic in our analysis of the subject. There is another equally powerful reason why States may want to elevate these crimes to the international plain. Piracy gives the clearest example of the reasoning. Pirates act outside of the system of sovereign states and their activities interfere with State commerce through theft and general harassment of shipping lanes. This gives the community of States as a whole an interest in seeing that piratical activities are kept to a minimum.\(^{11}\) The injury in piracy then could be looked at not as injury to the owner of the stolen merchandise but injury to the commercial power and influence of the State. As much as any one State may want to disadvantage another they all have an interest in impeding the growth of powerful entities that threaten the State system. A similar reasoning can be used for outlawing War Crimes, Crimes Against Humanity and Genocide. The Israeli Supreme Court put it best in its judgment against Eichmann saying that all Nations of the world have an interest in deterring and punishing Genocide because by its very nature it threatens the existence of the States and their peoples.\(^{12}\) Following a similar line a U.S. court held that “for the purposes of civil liability, the torturer has become – like the pirate and slave trader before him- hostis humanis generis, an enemy of all mankind.”\(^{13}\) The reasoning, either because of a respect for rights or self-serving, focuses on providing States the ability to prosecute in the name of the whole international community.

\(^{11}\) “The basic reason for which international law recognizes the right of each state to exercise [universal] jurisdiction in piracy offenses… is… that the interest to prevent bodily and material harm to those who sail the seas, and to person engaged in free trade between nations, is a vital interest, common to all civilized states and of universal scope…” Attorney General of the State of Israel v. Adolf Eichmann excerpted in International Law Norms, Actors, Process: A Problem-Oriented Approach. Dunoff, Ratner, Wippman. Aspen Publishing 2006 p 381.

\(^{12}\) “crimes whose evil and murderous effects were so widespread as to shake the stability of the international community to its very foundations.” Id. p 382.

\(^{13}\) Robertson, p. 250 citing Filartiga v. Pena-Irala (1980) 577 F. Supp. 860
PROSECUTION BY STATES

Historically “international” crimes were prosecuted exclusively by States in their national court systems. Jurisdictional competence was granted to states based either on the doctrine of universal jurisdiction or because the “international” crime was committed on the national territory and therefore was also a “national” crime. Today jurisdiction may also be exercised through the related doctrine of aut dedere aut judicare (extradite or prosecute). The two doctrines of Universal Jurisdiction and aut dedere aut judicare are essential for understanding whether or not a State must prosecute a crime or whether there are times when it is allowable at international law for States not to prosecute.

The classic “international” crime is piracy. The rational behind throwing the pirate to the wolves, as it were, was that by engaging in piracy (and violating the law of all nations) the pirate relinquished his citizenship and nationality and therefore the protective shield of his State’s sovereignty. The Latin phrase for acts of this type is hostem humani generis meaning against mankind. Attacking mankind and relinquishing

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14 Robertson, p. 187 “It was in the Nuremberg Charter and judgment, and the war crimes trials that followed… that the rules of war first took on the true meaning of law, namely a rule for the breach of which there is some prospect of punishment.”
15 States can exercise jurisdiction whenever 1. The crime takes place on their territory (Territorial Principle) 2. when the offender is a national of the State (Active Nationality Principle) or 3. when the victim is a national of the State (Passive Nationality Principle). Cassese, p. 218.
17 Pierson v. Post, 3 Cai. R. 175; I would also argue that to commit crimes hostem humani generis is to violate jus cogens, however the context of the two doctrines is not quite the same. Jus cogens applies to the State and State actors and a rule that States cannot violate and therefore is always illegal at international law. Hostem humani generis refers to a class of people who are susceptible to prosecution by any State because by their actions they become enemies of all mankind. Accord, The Case of the S.S. “Lotus”, PCIJ, Ser. A., No. 10, 1927, Dissenting Opinions by Lord Finlay and Mr. Moore; Eichmann supra.
the benefits of citizenship in a member of the community of nations opens the pirate to sanctions and prosecution by any State. The motivation for declaring acts of piracy to be against all states is that otherwise there would be no jurisdiction, or getting the pirate to a place where there would be jurisdiction would be very inconvenient. This is the most basic case of universal jurisdiction that allows a State to prosecute the criminal if he or she should otherwise be found or brought into the jurisdiction of the State.

A State may also exercise jurisdiction over an “international” crime that takes place on its national territory (in a way making it a “national” crimes as well). While a State may have jurisdiction there is no guarantee that it will exercise its jurisdiction. This is because the decision to prosecute is at least in part by its nature a discretionary one. This is both because each individual prosecutor must decide which crimes to focus on and in many systems there is the possibility of political intervention to prevent or start investigations. This discretion of whether or not to prosecute is also implied by the very existence of the doctrine of aut dedere aut judicare.

Therefore it is conceivable that an individual can be hostem humani generis and not violate jus cogens.

18 Supra, p 2. In addition in the past transportation and communication were slow. A Spanish pirate captured by the French who only had English victims would technically in this case be immune from French trial if it were not for universal jurisdiction over piracy.

19 See, generally Davids, Angela, Arbitrary Justice, Oxford University Press 2007, also, Arbour infra p. 22

20 The best example of this in the United States is the ability of the President to pardon a defendant in effect preventing the prosecution and on the other side the recent Congressional activity pushing for an investigation into the firings of several United States Attorneys who were in part fired over their choices of who to investigated (or so it is alleged).
A. AUT DEDERE AUT JUDICARE

The duty to extradite or prosecute for certain international crimes is tightly bound up with treaty law.\(^{21}\) The International Law Commission in 2007 could not come to the consensus that there was a duty under *aut dedere aut judicare* for all international crimes nor that it existed at customary international law.\(^ {22}\) Whatever the status of *aut dedere aut judicare* is at customary international law the duty does exist under many of the central human rights treaties.\(^ {23}\) Most notably the Geneva Conventions grant the power to try any person accused of a “grave breach” no matter what their nationality combining universal jurisdiction with *aut dedere aut judicare*.\(^ {24}\) Provisions like this give full effect to *aut dedere aut judicare* in that any State may choose to prosecute, but that if it does not it must send the accused to a place where he will be prosecuted. The implication is that the State where an accused is found is the first line of defense (or prosecution) for


\(^{22}\) The Commission report only refers to the need to explore the ‘possible customary status of the obligation, at least with respect to some categories of crimes.’ *Id.* p.227

\(^{23}\) Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) Art. 6 provides that “Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.” Art. 7 then speaks to granting extradition for the crime of genocide (emphasis added); The Geneva Conventions all have similar articles that require that parties “shall be under the obligation to search for persons alleged to have committed… grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers… hand such persons over for trial to another High Contracting Party concerned.” Geneva 1 Art. 49, Geneva 2 Art. 50, Geneva 3 Art. 129, Geneva 4 Art. 144; UN Convention Against Torture and other Cruel Inhuman or Degrading Treatment or Punishment (CAT), GA Res. 39/46, annex, art. 5(2), “Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him…” section 3 then states that section 1 does not invalidate any internal law that grants jurisdiction over the offense.

\(^{24}\) Id.
international crimes.\textsuperscript{25} The doctrine also bears directly on the question of impunity and supports the idea that a crime is international because there is less of a chance that it will be prosecuted otherwise in that it requires the transfer of the accused to a jurisdiction willing to prosecute. This analysis of course assumes that a State \textit{may} prosecute whenever the accused is found in their jurisdiction or that there exists a jurisdiction other than that in possession of the accused that may prosecute. It also implies that one State’s decision not to prosecute is not a bar to another State should it choose to prosecute the crime itself.

\textbf{B. Universal Jurisdiction and Sovereign Immunity}

The case of Charles Taylor and the Special Court for Sierra Leone (SCSL) is illustrative of the problem of State immunity and the ability of a State to prosecute. While this case does not deal directly with one State trying the sitting or former head of state of another State, it does deal with the preliminary issue of taking that State official into custody. In 2003 The Prosecutor for the SCSL issued a warrant under seal for the then sitting President of Liberia, Charles Taylor, when he was in Ghana to attend peace talks dealing with the conflict in his own country.\textsuperscript{26} The warrant was for, among other things, several Crimes Against Humanity. Ghana instead of arresting Taylor allowed him to return to Liberia.\textsuperscript{27} This case does not speak directly to the jurisdiction of the State as the SCSL was later decided to be an international tribunal and therefore not subject to the

\textsuperscript{25} This is also consistent with several understandings of the place of international courts, in particular the ICC. See, \textit{Statement made at the ceremony for the solemn undertaking of the Chief Prosecutor of the ICC} by Luis Moreno-Ocampo, Monday, 16 June 2003, http://www.icc-cpi.int/otp/otp_docs.html, accessed 25 November 2007.

\textsuperscript{26} \textit{Immunity from Prosecution for International Crimes: The Case of Charles Taylor at the Special Court for Sierra Leone}, by C. Jalloh, American Society of International Law, www.asil.org/insights/insigh145.html accessed 17/10/2007 10:24 a.m.

\textsuperscript{27} id.
same restrictions as a national court.\textsuperscript{28} Ghana’s actions rather illustrate how a State may choose not to act or extradite either out of respect for sovereignty or for other concerns. At the very minimum it shows that at least one State thinks that it is improper to take a sitting head of state into custody because that would violate sovereign immunity.

The International Court of Justice (ICJ) seems to agree with the position illustrated by Ghana’s allowing Taylor to return home. In 2002 the ICJ decided a case brought before it by the Democratic Republic of the Congo against Belgium where it ruled that the courts of one State could not stand in judgment of a former foreign minister of another State.\textsuperscript{29} As part of this ruling the court also held it illegal and an infringement of the sovereignty of another State to issue an arrest warrant for a sitting foreign minister.\textsuperscript{30} Just in case there was any doubt as to the ICJ’s position the court also held that the arrest warrant must still be rescinded even though the accused was no longer the foreign minister of the Democratic Republic of the Congo.\textsuperscript{31} The ICJ in this case was interpreting customary international law, which is by definition the practice of States.

The ICJ’s decision would seem to be definitive of the law if it were not for an isolated, yet extremely important, case in the 1990’s dealing with head of state immunity and amnesty, in the United Kingdom. General Augusto Pinochet took power in Chile in 1973 and ruled through a repressive regime that employed torture and forced disappearances.\textsuperscript{32} Some of the victims of his regime were foreign nationals.\textsuperscript{33} Pinochet’s

\textsuperscript{28} See, Prosecutor v. Taylor (SCSL-03-01-1), in addition today Taylor is in custody of the SCSL.
\textsuperscript{29} Case Concerning The Arrest Warrant Of 11 April 2000 (Democratic Republic of the Congo v. Belgium), 2002 ICJ LEXIS 5
\textsuperscript{30} Id. This applies by logical extension to a sitting head of state.
\textsuperscript{31} Id.
\textsuperscript{32} Robertson, p. 393-4
rule came to an end in 1990 when a referendum was held and he was voted out of office.\textsuperscript{34} As part of his leaving office Pinochet awarded himself a position of Senator for Life in Chile in 1998 when he stepped down as commander and chief of the military, which comes with a certain level of immunity.\textsuperscript{35} In 1998 Pinochet went to the United Kingdom to have surgery performed on his back.\textsuperscript{36} While he was there the British police took him into custody based on an arrest warrant issued in Spain for torture and conspiracy to commit torture.\textsuperscript{37} The House of Lords eventually ruled that Pinochet did not have immunity for acts of torture made after the rule against torture crystallized in customary international law. One thread running through the opinions of the Lords who voted for jurisdiction and an end to impunity was that a crime that violates \textit{jus cogens} lends itself to universal jurisdiction.\textsuperscript{38} Lord Browne-Wilinson put it best in his judgment saying;

\begin{quote}
The jus cogens nature of the international crime of torture justifies states in taking universal jurisdiction over torture wherever committed. International law provides that offences jus cogens 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’\textsuperscript{39}
\end{quote}

\begin{flushright}
\textsuperscript{33} id. p. 394
\textsuperscript{34} id. p. 393-5
\textsuperscript{35} id. p. 395
\textsuperscript{36} id. p. 395
\textsuperscript{37} R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte, lexis headnote, [2000] 1 AC 147, [1999] 2 All ER 97, [1999] 2 WLR 827
\textsuperscript{38} id. p. 14, 74. Another view expressed by Lord Phillips of Worth Matravers was that torture is not an official act conveying immunity under international law p. 68; See also footnote 17 supra.
He latter goes on to argue that an act in violation of *jus cogens* is not, as a matter of law, an official act that is covered by sovereign immunity.\(^{40}\) Geoffrey Roberts argues in his book *Crimes Against Humanity*, that this is the right result because a Crime Against Humanity is “a crime so black it does not admit of human forgiveness.”\(^{41}\) This is a problem in that part of the definition of torture under the CAT is that it be done by an official under color of law.\(^{42}\) Lord Millet reasoned in a very direct manner that, “International law cannot be supposed to have established a crime having the character of a *jus cogens* [torture by a state official] and at the same time to have provided an immunity which is co-extensive with the obligation it seeks to impose.”\(^{43}\)

Like Taylor in Ghana, Pinochet was to benefit from sovereign immunity. Pinochet was also the subject of an arrest warrant that would then allow him to be extradited like Taylor would have been in Ghana. However two very important points separate Pinochet from Taylor. The first is that Pinochet was not currently the sitting head of state of Chile. Second is that Chile was not currently involved in a bloody conflict as was Liberia and by taking Pinochet into custody there was little chance of killings in Chile. Taking Taylor into custody might have endangered the peace trying to be established by the very conference that Taylor was to attend in Ghana. Also should there have been increased or continued violence in Liberia this would effect Ghana much more directly than possible.

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1468, 776 F 2d 571. He also quotes at length the ICTY in *Prosecutor v Anto Furundzija* (10 December 1998, unreported) p. 10

\(^{40}\) id. For this proposition the Lord cites Sir Arthur Watt (1994) 247 Recueil des Cours p 8

\(^{41}\) Robertson, p. 399

\(^{42}\) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res. 39/46, annex, art. 1(1).

\(^{43}\) *R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte*, lexis headnote, [2000] 1 AC 147, [1999] 2 All ER 97, [1999] 2 WLR 827, opinion of Lord Millett, p. 76
political turmoil in Chile would effect Great Britain.

What this conflicting case law seems to suggest is that States are sometimes the proper venue for the prosecution of “international” crimes although whether the basis for the jurisdiction being under a treaty or customary law is open to debate. This is explicit in the Rome Statute and the ICC’s policy of complimentarity or giving the first crack to the States themselves. The fact that a State need not prosecute (it can extradite, take no action like Ghana or in some circumstances pardon) gives the State a choice of what course to follow that will most likely be made along political lines.

**International Tribunals**

Another option recognized at international law for the prosecution of “international” crimes is trial before an international tribunal. To date international tribunals have been establish by one of two methods, either by Security Council (SC) resolution under Chapter VII or by treaty. These two different methods of creating tribunals carry with them different implications for the workings of the tribunals. For instance the tribunals created by the SC are in the process of their “completion” strategies

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45 This can be seen in the former Yugoslavia where the State courts exhibited “an unwillingness to investigate and prosecute effectively those responsible for international crimes…” The Rome Statute of the International Criminal Court: A Commentary, Cassese, Antonio, Complimentarity: National Courts versus the ICC, John T. Holmes p. 669.
47 The ICTY and ICTR were set up under SC Chapter VII resolutions, SC Res 827 and 955 respectively.
48 The London Charter of the International Military Tribunal set up the Nuremberg Court, the SCSL was set up by a treaty between Sierra Leone and the UN and the ICC was set up by the Rome Statute, which is a treaty.
and are working toward their conclusion as mandated by the SC.\textsuperscript{49} The treaty courts on the other hand do not function at the behest of the SC and at least ICC is envisioned as a permanent court.

\textbf{A. CHAPTER VII TRIBUNALS}

The SC created the ICTY and the ICTR pursuant to its authority under Chapter VII of the Charter of the United Nations (the Charter). The purpose of the UN as a whole is to ‘ensure international peace and security.’\textsuperscript{50} The primary responsibility for achieving this goal is given to the SC.\textsuperscript{51} It is up to the SC to determine when there is a breach of the peace and to recommend actions to deal with that breach.\textsuperscript{52} If measures not involving the use of force prove ineffective (or the SC does not think they will be effective) the SC can authorize the use of force to address the problem.\textsuperscript{53} The language of the Charter is not so specific however, and it is in this same part of the Charter where the authority to create the ICTY and ICTR found. The justification for this is that the history of the Charter,

\begin{quote}
“Indicate[s] that peace is more than the absence of war. These provisions refer to an evolutionary development in the state of International relations which is meant to lead to the diminution of those issues likely to cause war.”\textsuperscript{54}
\end{quote}

\textsuperscript{49} Security Council Resolution 1503 of 28 August 2003 called on the Tribunals to finish their work by 2010. See, also, SC Press release SC/8040.
\textsuperscript{50} Art. 1 Charter of the United Nations
\textsuperscript{51} Art. 24 Charter of the United Nations
\textsuperscript{52} Art. 39 Charter of the United Nations
\textsuperscript{53} Art. 41 Charter of the United Nations
The goal then of the UN is not just to prevent war or armed conflict but also to take actions that will minimize the chance that armed conflict will break out in the first instance (or a new flash of violence), in this case by the creation of the tribunals. The UN achieves its goals both through the political and through the legal. This distinction can be seen in the division of labor between the SC and the ICJ.\textsuperscript{55} When the SC works to resolve a conflict of interests it does so on a political basis.\textsuperscript{56} This is in contrast with the ICJ that cannot take politics into consideration, but is instead to base its decision solely on international law.\textsuperscript{57} The significance of this is that while the \textit{ad hoc} tribunals are judicial bodies they operate under the auspices of the SC. This means that the tribunals exercise a judicial function by specifically applied political will. All the \textit{ad hoc} tribunals have jurisdiction, for all intents and purposes, only over one country, and in principle only for a limited period of time.\textsuperscript{58} Each of the tribunals has a specific purpose in a specific location. This is in great contrast to state courts, which do not have a specific but a general purpose.\textsuperscript{59}

\textsuperscript{55} It should be noted that disputes and conflicts are also settled by arbitration headed by the Secretary General.
\textsuperscript{57} id.
\textsuperscript{58} The ICTY is limited in Art. 1 of its statute to crimes “committed in the former Yugoslavia since 1991”, The ICTR is limited similarly by Art. 1 of its statute to crimes “committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994” or to a calendar year. The SCSL is limited in Art. 1 of its statute to crimes “committed in the territory of Sierra Leone since 30 November 1996”.
\textsuperscript{59} Admittedly there are tax courts, bankruptcy courts etc… However, the situation of the \textit{ad hoc} tribunals would be more analogous to a bankruptcy court created specifically for the bankruptcy of one (or a small group) individual that is dismantled after the case is over.
This specific purpose of the ICTY\textsuperscript{60} is “[solely] to prosecute persons responsible for serious violations of international humanitarian law…”\textsuperscript{61} This was done with the goal of “put[ting] an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them.”\textsuperscript{62} The SC took these actions after it decided that the situation was “a threat to international peace and security.”\textsuperscript{63} The theory goes that if the SC had not decided that the situation in the Former Republic of Yugoslavia (FRY) was not a threat to international peace and security the SC would not have been able to take any action.\textsuperscript{64} This is implicit in the reading of Article 39 of the Charter that states, “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”\textsuperscript{65} The SC must fulfill two requirements under Article 39 namely that there must be a “threat to peace and security” and the actions taken must work to “maintain or restore international peace.”

The purpose then of the ICTY is then not “[solely] to prosecute” but also to “restore international peace and security.” The principle for including this second phrase

\begin{footnotesize}
\textsuperscript{60} The statements made about the ICTY here also broadly follow for the ICTR.
\textsuperscript{61} S/RES/827
\textsuperscript{62} id.
\textsuperscript{63} id.
\textsuperscript{64} Antonio Cassese takes a similar approach when talking about what action the SC can take under the Genocide Convention. He writes, “quegli organi possono intervenire solo nei limiti dei loro poteri (così, ad esempio, eventuali azioni militari contro uno Stato responsabile possono essere adottate dal Consiglio di Sicurezza solo se il genocidio si resolve in una minaccia alla pace, in un atto di aggressione o in una violazione della pace, e solo se sono d’accordo I 5 emebri permanenti.)” The SC is limited then by its institutional competence and the political will of the 5 permanent members. p. 154
\textsuperscript{65} UN Charter Article 39
\end{footnotesize}
in the purpose of the ICTY is that the SC cannot create an institution that can do what it cannot do. The SC cannot knowingly act to destabilize “international peace and security.” Its whole *raison d’etre* is to protect peace, not endanger it. Flowing from this it stands to reason that the tribunal can withhold from taking an action because it would endanger “international peace and security.” Specifically it would not be improper for a prosecutor to decline to pursue an individual because doing so would endanger the stability of the region. This might explain why Milošević was not indicted immediately for his involvement in the Bosnian war, but was first indicted for crimes in Kosovo. The Secretary General considered the ICTY to be a “subsidiary organ within the meaning of Article 29… but of a judicial nature…” Also the choice of the Former Yugoslavia as the first focus of an International Tribunal after the Nuremberg is instructive.

The ICTR functions along similar lines. It was created solely for the “purpose of prosecuting persons responsible for genocide and other serious violations of international

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66 see, footnote 64 supra.
67 Initial indictment for Kosovo was 24 May 1999 and the first for the Bosnian war 22 November 2001 and Croatia 8 October 2001.
68 Schabas p.49 citing, UN Doc. A/RES/47/121 para. 28-9. The Secretary General continues, “[that] would, of course, have to perform its functions independently of political considerations.” While this comment goes against the thesis of this paper, the fact that the Secretary General never clarifies why the tribunal would “of course” not take politics in to consideration severely opens that position up to the opposing opinion as outlined above.
69 “Despite the establishment of the Rwanda Tribunal, it remains politically dubious that, given the veto power of the five permanent members of the Security Council, the decision to set up an international criminal tribunal was, and always will be, an uneven political decision. None of the permanent members would countenance the establishment of an international criminal tribunal to investigate the actions of their own people, nor would they sanction such a tribunal to investigate their political allies. Justice and judicial systems should not depend on these kinds of political decisions. If justice is to be respected it must be even-handed, it must be unbiased, and potential war criminals in countries around the world should know that they are subject to the same international justice.” Id. p. 71, citing Richard J. Goldstone, ‘International Jurisdiction and Prosecutorial Crimes’ (1999) 47 Cleveland State Law Review 473 at 479.
humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States. It did this on the belief that a criminal tribunal would help restore peace and put an end to the crimes being committed in Rwanda. This was a political decision aimed at a political end.

Further evidence of the political nature, and the permissibility of political choices in prosecution, are the completion strategies. The courts are both set to close their doors permanently. This, apart from anything else, was the obvious conclusion as both were said to be ad hoc. However, the fact that their closing can be dictated by a political organ such as the SC shows that the courts, while judicial in practice, are not totally judicial in nature. The SC cannot close down the ICJ or the ICC just as it cannot close down an individual state court. The ICTY and ICTR were creations of the SC and therefore firmly governed by both the council itself and the rules that govern the council. The very jurisdictional competence of the court is focused by specific political will. Political considerations are therefore squarely within the proper considerations for the Tribunals if not in the deciding of cases, at least in what cases to decide.

B. TREATY COURTS

The second kind of international enforcement mechanism for “international” crimes is the treaty court. While today the more familiar type of court is the Chapter VII one, historically the treaty court was the first type to exercise jurisdiction over

70 S/RES/955
71 id.
72 It should be noted here, as it will be later, that the SC does have authority to defer cases from the ICC for one year at a time, see Rome Statute Article 16.
73 See, footnote 69 supra.
international crimes. The International Military Tribunal at Nuremberg (Nuremberg Court) was set up by treaty following the conclusion of World War II in Europe to try the major war criminals of the European Axis (Axis). The latest treaty court, and possibly soon to be the most familiar, is the ICC. Even though these two courts were created by treaty they are very different animals. The very functions they serve are different.

The Nuremberg Court functioned much as the Chapter VII courts function today. It had a specific area of competence and was directed at a specific group of people, namely the Axis, or the losers. This has lead to the characterization of the Nuremberg’s creation as a “political act” and not as “an exercise in law.” In fact the crimes prosecuted and the manner in which they were prosecuted (as well as who was prosecuted) were tailored as not to embarrass any of the judging States or their allies. The Nuremberg Court was also limited in time much as the ad hoc tribunals are. The significance is that the temporary and political nature of the Nuremberg Court makes it significantly different than the ICC preventing direct analogies. Even though they are

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74 London Charter of the International Military Tribunal, chapeau
75 London Charter of the International Military Tribunal, Article 1
76 Id. Article 6 gives jurisdiction only over crimes committed by the European Axis and requires that all Crimes Against Humanity “before or during the war” be connected to the war through their connection to War Crimes or Crimes Against the Peace.
78 Id. p.10-1 Potential Italian war criminals were turned over to the new Italian government, and Admiral Horthy of Hungary was also dropped from the list to be prosecuted. Id. p.24-5 Embarrassing questions or lines of argument were also avoided, such as Soviet aggression and Allied aerial bombing of German cities.
79 The prosecutable crimes had to be associated with the war, see London Charter of the International Military Tribunal, Article 6.
both treaty courts what goes for one does not necessarily go for the other in the same way the nature of the UN must be considered for both the ICTY and the ICTR.

The diversity of treaty courts is further evidenced by the Special Court for Sierra Leone (SCSL). The SCSL like the Nuremberg Court, the ICTY and ICTR is restricted in its jurisdiction to a specific place and from a specific time. Unlike Nuremberg the court is not restricted to prosecuting one side of the conflict that raged in Sierra Leone. The SCSL is not bound by the duty of the SC to “maintain international peace and security” like the ICTY and ICTR. The lack of this limitation on the SCSL is what allowed the prosecutor to issue an arrest warrant for Charles Taylor while he was in Ghana to attend a peace conference to put an end to the conflict in his country of Liberia. The prosecutor in a statement said that his job was “investigate and prosecute” and to do so “based on the evidence.” He supported his position by quoting the prosecutor of the ICTY, who said,

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80 Article 1 of the State of the Special Court for Sierra Leone states “The Special Court shall, except as provided in subparagraph (2), have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.” The court also reasoned that its nature as an international court gave it the power to pierce the barrier of sovereign immunity that gave the State courts so much trouble, see supra; generally, The UN International Criminal Tribunals; The former Yugoslavia, Rwanda and Sierra Leone. William A. Schabas, Cambridge University Press 2006 p. 160 citing, Taylor (SCSL-03-01-I) para. 41.

81 Footnote 70 supra.

82 While the SCSL was created in accordance with a treaty with the UN, approved by the SC in resolution 1315, the SCSL is not a creature of the SC like the ICTY and ICTR created under Chapter VII by the SC. This bars application of the same logic that requires the restrictions of the SC be applied to the other ad hoc tribunals from being applied to the SCSL, see, section A. supra.

83 See section Universal jurisdiction supra.

“I don’t think it’s appropriate for politicians - before and after the fact - to reflect on whether they think the indictment came at a good or bad time; whether it’s helpful to a peace process. This is a legal, judicial process.”

Implicit in this statement is that the legal and the political/peace concerns are not necessarily congruent. The first prosecutor for the ICC has also adopted this position. This position for the SCSL is also supported by the SC’s resolution authorizing the Secretary General to conclude the treaty with Sierra Leone. The SC stated that the SCSL should be “a credible system of justice and accountability for the very serious crimes committed there would end impunity” and that it was important to ensure “the impartiality, independence and credibility of the process, in particular with regard to the status of the judges and the prosecutors.” Political/peace concerns are only mentioned as the motivation of the SC for authorizing the treaty.

The ICC is completely different from the other tribunals in that it is in no way a creation of the international community at large. This fact gains recognition and expression in the ICC’s statute where the exercise of jurisdiction is conditioned on the crime being committed on the territory of a State Party, the accused being a national of a State Party or referral of the situation to the court by the SC under Chapter VII. These preconditions imply the consent of a State that would have jurisdiction giving that

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85 id.
87 S/RES/1315
88 The Chapter VII Tribunals were created by the SC that is an organ of the UN that purports to represent the international community, SCSL was created in conjunction of a treaty with the UN and the Nuremberg Court was declared to be created in the name of the “United Nations.”
89 Rome Statute of the ICC, Article 12 sec 2, 13(b).
jurisdiction to the ICC voluntarily by ratifying the statute.\textsuperscript{90} In case of the Chapter VII referral it is the International Community giving jurisdiction to the ICC through the SC. Giving the State courts primacy in the prosecution of crimes also recognizes this voluntary nature.\textsuperscript{91} Both of these characteristics are lacking in the SCSL and the Nuremberg Court. These two international courts had primacy and did not exercise jurisdiction on a consensual basis.\textsuperscript{92}

This complimentary nature becomes doubly important when it is considered in light of the ICC’s purpose, which is in part spelled out when the States Parties affirm “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” and that they are determined “to put an end to impunity for the perpetrators of these crimes.”\textsuperscript{93} If it is acknowledged that States will make prosecutorial decisions in light of political situations their decision to create a court to take on cases that they do not individually prosecute implies a desire to have the crimes prosecuted in spite of any individual State’s lack of desire to prosecute that crime. This is a position that should seem all the more apparent given the “put an end to impunity” language.

There are additional limits on the exercise of jurisdiction by the ICC. The crime must have sufficient gravity and the prosecution of the crime must serve the ‘interests of

\textsuperscript{90} Also a State can voluntarily accept the jurisdiction of the court for a given situation under Article 12 sec 3.

\textsuperscript{91} Id., Art 17 sec 1.

\textsuperscript{92} The Nuremberg Court could exercise jurisdiction over the Axis even though the Axis did not acquiesce to the court just as the SCSL can exercise jurisdiction over Taylor from Liberia even though Liberia did not waive immunity for him, nor was the power given to the court by the SC, see footnote supra. Primacy for the SCSL is found in Statute of the Special Court, Article 8 sec 2.

\textsuperscript{93} Rome Statute of the ICC, Preamble.
justice’. This is a decision of the prosecutor not based on whether or not the crime falls within the jurisdiction of the court but of whether or not it is the kind of issue that the court should expend its resources on, a seemingly political decision. The prosecutor’s decision on these matters is then subject to review by the pre-trial chamber, a seemingly judicial decision. This problem is better understood in light of comments made by Louise Arbour, prosecutor for the ICTY, to the Preparatory Committee on the Establishment of an International Criminal Court,

“[T]he discretion to prosecute is considerably larger, and the criteria upon which such Prosecutorial discretions is to be exercised are ill-defined, and complex. In my experience, based on the work of the two Tribunals to date, I believe that the real challenge posed to a Prosecutor is to choose from many meritorious complaints the appropriate ones for international intervention, rather than to weed our weak or frivolous ones.”

The issues that will be arriving at the door of the ICC are those that are worthy of judicial attention but that State courts are not willing or not able to take on. It will be from those cases that the Prosecutor will have to choose.

The three requirements for the ICC to adjudicate a case are that the situation falls within the jurisdiction of the court (based on the jurisdictional competency given to it by its statute and the power of the States Parties to convey), the situation is serious enough to demand the attention of the court and that (if acting pursuant to a referral, and as

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94 Id. Article 53.
95 Id. sec 3.
reviewed by a pre-trial chamber) the prosecutor feels that pursuing the case will be in the interests of justice.97 The final question then is what “the interests of justice” means.

There are those that have argued that “the interests of justice” establishes an entirely discretionary power in the prosecutor and that this is based on a similar authority often found in prosecutors at the State level both in civil law and common law countries.98 This position must be wrong, as the decision of the prosecutor not to proceed with an investigation or to prosecute based on “the interests of justice” is open to judicial review by the pre-trial chamber.99 If this review is to have any meaning outside of the judges substituting their majority vote of arbitrary decision on prosecution the meaning of “justice” has to be more than “discretion.”

There are primarily two schools of thought on the meaning of “the interests of justice.” The first states that justice and peace are substantially related and the one cannot be separated from the other. The opinion of this school would not approve of the SCSL’s prosecutor issuing the arrest warrant for Taylor while he was on his way to a peace

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97 Giuliano Turone in his chapter (Powers and Duties of the Prosecutor) for Antonio Cassese’s book on the Rome Statute breaks the requirements for action down into 4 categories; 1. There being reason to believe the crime has been committed 2. The crime being within the jurisdiction of the court 3. The case being admissible under Article 17 (That a State is not investigation or in the process of trial and the case is of sufficient gravity) and 4. That the investigation be in the interests of justice. The Rome Statute of the International Criminal Court: A Commentary, Cassese, Antonio, Powers and Duties of the Prosecutor, p. 1151. For the purposes of the discussion above it is assumed that the crime has taken place and that no State is investigating.

98 Id. 1153
99 In cases where the situation was referred by a States Party or the SC this is done by request from the referrer (Article 13) or in case of a situation taken on by the prosecutor proprio motu by the chambers own initiative (Article 53). Id. 1156. Also while this kind of review may exist in State legal systems there is still the political power to give pardons is missing in this context.
conference.\footnote{Universal jurisdiction \textit{supra}.} Since this action may have prolonged the conflict in Liberia, thus leading to more deaths, it did not “further justice” as more innocents were likely killed or harmed. The failure of this theory can be found in one of two places. First, it assumes its own ends. This approach assumes that the peace talks would lead to peace or were at least an increased chance for peace. There is no way to know what would transpire at a peace conference, or that what was decided at the conference would not have been just as bad for the common person on the ground.\footnote{At this stage I am thinking of the Munich conference where Germany was given the Sudetenland and effective control over Czechoslovakia.} Second there is the risk that this approach in holding the conference the leaders, or those most responsible, for War Crimes, Crimes Against Humanity and Genocide will be offered amnesties and that they will accept them. Signing such an agreement in turn raises the issues of amnesty\footnote{Amnesty while an interesting and related issue has more to do with the competency of States to bar prosecution by other States, or international actors, given the doctrine of Universal Jurisdiction. The ICC itself would rule such an amnesty irrelevant under Art 17(2)(a) and would be able to prosecute anyway. The breadth of this issue is best saved for a more full discussion elsewhere.} and perfidy, itself a War Crime.\footnote{Perfidy, as codified in U.S. law is, 32 CFR 11.6, sec 14: Use of treachery or perfidy -- (i) Elements. (A) The accused invited the confidence or belief of one or more persons that they were entitled to, or were obliged to accord, protection under the law of war; (B) The accused intended to betray that confidence or belief; (C) The accused killed, injured, or captured one or more persons; (D) The accused made use of that confidence or belief in killing, injuring, or capturing such person or persons; and (E) The conduct took place in the context of and was associated with armed conflict.} The issue with perfidy is that you lull the soon-to-be defendant into a false sense of security by insuring that they will not be prosecuted for their actions during the armed conflict (which will undoubtedly be a condition for the cessation of hostilities) and then you prosecute them anyway. Not only might this be perfidy but even if it is not it
would clearly undermine any future peace negotiations or lead straight back to the issue of amnesty. In either case the decision being made will not be based on juridical but on political standards.

The second theory for the meaning of “the interests of justice” is that found in the addresses of the prosecutors for the various tribunals. This approach requires that considerations of peace and considerations of justice not be forced into a congruent space. In agreement with this position is the idea that you cannot have a right (or law) if it is not enforced. Also addressed by this position is the idea of equal justice. Under this theory all those who break the law are open to prosecution and punishment, not just those who are not in a position to negotiate a peace settlement or that do not have powerful friends with political pull. In fact the word “peace” appears only once in the Rome Statute. Unfortunately this theory falls victim to the criticism that it loses sight of the whole point of having international tribunals to begin with, namely to protect innocent life “through the prevention of such crimes.” The logic then follows that the best way is to prevent such crimes is to conclude peace.

WHAT DOES IT ALL MEAN?

The considerations taken into whether or not to prosecute War Crimes, Crimes Against Humanity and Genocide are as numerous and varied as the means used to prosecute them. There does not seem to be any way to prohibit a State from taking politics into consideration when it decides whether or not to prosecute. This seems to be a fact well accepted by the international community, or at least those that participated at the

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104 Footnotes 84-86, supra.
105 See supra, footnote 10.
106 It is in the third paragraph of the preamble.
107 Rome Statute of the ICC, preamble.
Rome Conference and in drafting the ICC’s statute.\textsuperscript{108} The SC and its subsidiary organs, including the Chapter VII \textit{ad hoc} tribunals, seem equally bound to take political considerations into account. As for the treaty courts it seems to vary from one to the next depending on the conditions of their creation. The Nuremberg Court obviously had a very politicized agenda while the SCSL, under its first prosecutor, seems to have adopted a more juridical approach. The ICC was created with full knowledge that the other types of international prosecution are politicized. The Rome Statute itself makes hardly any reference to “peace.” This coupled with the prosecutors’ statements about the role of international courts indicates that this court of last resort should not take political considerations into account. However this could change at any time, as the Judges at the ICC have not yet ruled on the meaning of “the interests of justice.

\footnote{\textsuperscript{108} See supra, discussion on complimentarity.}