

Potential for Future Growth of the International Criminal Court: Possible Expansion Towards Universal Jurisdiction

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Introduction

Having an intact legal system to prosecute serious criminal offenses is a luxury taken for granted in many parts of the developed world. While comprehensive domestic legal systems are preferable to the far more complex international legal system, an unfortunate reality of the contemporary world is that where many of the most shocking and large-scale violent crimes take place, there is no domestic legal system to speak of. The International Criminal Court was created to meet the need of prosecuting these offenses. Limited in its jurisdiction on a variety of levels, the ICC nevertheless has on its current docket the prosecution of some of the worst atrocities to take place in recent years. By providing a brief background on the ICC, describing the limits of the ICC's jurisdiction as well as an overview of the cases currently on the ICC's docket, this paper sets the stage for an analysis suggesting how the ICC can work within the limitations of customary international law and remaining true to its purpose as a court of last resort while expanding its jurisdiction to make a meaningful step towards the exercise of universal jurisdiction.

I. A Brief History on the Formation of the International Criminal Court

The roots of the movement that ultimately led to the formation of the ICC can be traced back to 1948, when following the Nuremburg and Tokyo trials after the Second World War, the United Nations General Assembly first realized the need for an international court to adjudicate the type of atrocities that occurred during the war.¹ The idea for such a court was discussed sporadically by the UN.² Shortly thereafter, in the 1950s, the International Commission began

¹ See U.N. Dept. of Public Info., *The International Criminal Court* (December 2002), available at <http://www.un.org/News/facts/iccfact.htm>.

² See *Id.*

work on potential statutes to form such a court.³ This work was ultimately short lived as the state of global politics during the height of the Cold War made the international cooperation necessary for the institution of such a court a political impossibility.⁴

The idea for an international court made its way back onto the world stage in the late 1980s when the then Minister of Trinidad and Tobago, Arthur Napoleon Raymond Robinson, revived the idea as a possible means of dealing with the thriving international drug trade.⁵ Minister Robinson's idea gained credence when the international community had to rely on ad hoc tribunals to try war crimes committed in Rwanda and the former Yugoslavia, thus highlighting the need for a permanent international court.⁶ This idea became a reality in July 1998 when the General Assembly overwhelmingly adopted the Rome Statute establishing the International Criminal Court.⁷ The Rome Statute subsequently became binding in April 2002 when it had been ratified by the required 60 countries, and came into legal force on July 1 of the same year.⁸ Unfortunately for Minister Robinson, to this day the ICC lacks jurisdiction over the drug trade.⁹ The jurisdiction of the Court is addressed in section II below.

³ Gary T. Dempsey, *Reasonable Doubt: The Case Against the Proposed International Criminal Court*, Cato Policy Analysis No. 311 (July 16, 1998), available at <http://www.cato.org/pubs/pas/pa-311.pdf>.

⁴ *Id.*

⁵ See International Criminal Court (ICC), *Election of Mr. Arthur N.R. Robinson to the Board of Directors of the Victims Trust Fund* (June, 20 2006); see also *Reasonable Doubt*, *supra* note 3.

⁶ See Coalition for the International Criminal Court, *History of the ICC*, available at <http://www.iccnw.org/?mod=icchistory>.

⁷ Michael P. Scharf, *Results of the Rome Conference for an International Criminal Court*, The American Society of International Law (ASIL) (August 1998), available at <http://www.asil.org/insigh23.cfm>.

⁸ Amnesty International Press Office, *The International Criminal Court: A Historic Development in the Fight for Justice*, Amnesty International (April 11, 2002), available at <http://www.amnesty.org/en/library/asset/IOR40/008/2002/en/13d7a383-fafa-11dd-9fca-0d1f97c98a21/ior400082002en.pdf>.

⁹ See U.N. Dept. of Public Info, *supra* note 1.

II. Limits on the Scope of Jurisdiction

While the scope of the ICC's jurisdiction is far reaching, it is by no means universal.¹⁰ In general, the Court is designed to be used only as a last resort where a state is either unwilling or unable to conduct genuine proceedings under domestic law.¹¹ Beyond being a court of last resort, the scope of jurisdiction of the ICC is further limited in a number of ways. These limitations fall into the three categories of temporal jurisdiction, jurisdiction of states, and jurisdiction of crimes.

a. Temporal Jurisdiction

The Court is limited temporally by Article 11 of the Rome Statute, regarding "Jurisdiction *ratione temporis*."¹² Article 11 provides that the Court's jurisdiction is limited to crimes committed after the Rome Statute entered into force for states parties that had ratified by the time the Statute came into force¹³ on July 1, 2002.¹⁴ For states parties that ratified after the Rome Statute was already in force, temporal jurisdiction is limited to crimes that transpired after the state party had ratified the Statute.¹⁵

b. Jurisdiction of States

Where crimes meet the requirements of temporal jurisdiction, they still must meet the jurisdictional requirements of states and category of crimes before they can be tried by the ICC. In regards to states, while the ICC maintains a cooperative relationship with the United Nations,

¹⁰ See Elizabeth Wilmhurst, *Jurisdiction of the Court*, p. 136; see also Roy S Lee, *The International Criminal Court: The Making of the Rome Statute*, Kluwer Law International (1999).

¹¹ Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9, Article 17, available at <http://untreaty.un.org/cod/icc/statute/romeofra.htm>.

¹² *Id.* at Article 11.

¹³ *Id.* at Article 11(1).

¹⁴ Amnesty International Press Office, *supra* note 8.

¹⁵ Rome Statute, *supra* note 11, Article 11(2).

it remains an independent institution.¹⁶ The consequence is that not all parties to the United Nations are parties to the Rome Statute and therefore the ICC.¹⁷ All states parties to the Rome Statute, as the founding document of the ICC, implicitly accept the jurisdiction of the Court.¹⁸ Consequentially, the Court meets its jurisdictional requirement in regards to states where the situation falls under the purview of Article 12 of the Rome Statute regarding preconditions to the exercise of jurisdiction of states.¹⁹ Article 12 extends the jurisdiction of the Court where crimes transpired on the territory of a state party to the Rome Statute,²⁰ the person accused of committing the crime is a national of a state party,²¹ or if a state which is not a party accepts the exercise of jurisdiction by the Court.²²

c. Jurisdiction of Crimes

Even where the ICC meets the Rome State Article 11 preconditions for time²³ and Article 12 preconditions for exercise of jurisdiction over States parties,²⁴ the Court's jurisdiction is limited to four crimes considered to be "the most serious crimes of concern to the international community as a whole."²⁵ These four crimes include genocide,²⁶ crimes against humanity,²⁷ war

¹⁶ See ICC, *Structure of the Court*, available at <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/>.

¹⁷ See ICC, *The States Parties to the Rome Statute*, available at <http://www.icc-cpi.int/Menus/ASP/states+parties/>.

¹⁸ See Rome Statute, *supra* note 11.

¹⁹ See *Id.* at Article 12.

²⁰ *Id.* at Article 12(2)(a).

²¹ *Id.* at Article 12(2)(b).

²² *Id.* at Article 12(3).

²³ *Id.* at Article 11.

²⁴ *Id.* at Article 12.

²⁵ *Id.* at Article 5(1).

²⁶ *Id.* at Article 5(1)(a); see also *Id.* at Article 6 (defining "genocide" as any of a number of acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group).

²⁷ *Id.* at Article 5(1)(b); see also *Id.* at Article 7 (defining "crimes against humanity" as any of a number of acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack).

crimes,²⁸ and the crime of aggression.²⁹ These already narrow four sets of crimes are further narrowed to three sets as the Court can only exercise jurisdiction over the crime of aggression once a provision is created to define the crime and set out the conditions under which the Court shall exercise jurisdiction; an event that has not yet happened.³⁰

III. Current Docket

Restricted in the ways described above, the Court nonetheless has a number of cases currently on its docket. Its current caseload involves the prosecution of the leaders of some widely publicized criminal offenses falling under the Court's Article 5 jurisdiction of crimes.³¹ These include crimes occurring during situations in Uganda, the Democratic Republic of the Congo, Sudan, and the Central African Republic.³²

a. Uganda

The ongoing ICC case in Uganda³³ is focused on the prosecution of what were once the top five members of the Lord's Resistance Army³⁴ in the case The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen.³⁵ This case was reduced to the top four members as a result of the death of one of the original defendants, Raska Lukwiya,³⁶ whom the

²⁸ *Id.* at Article 5(1)(c); *see also Id.* at Article 8 (defining "war crimes" as any of a number of acts committed as part of a plan or policy or as part of a large-scale commission of such crimes).

²⁹ *Id.* at Article 5(1)(d).

³⁰ *See Id.* at Article 5(2); *see also* U.N. Dept. of Public Info., *supra* note 1.

³¹ *Id.* at Article 5.

³² ICC, *Situations and Cases*, available at <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/>.

³³ ICC, *Situation in Uganda*, ICC-02/04, available at <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0204/Uganda.htm>.

³⁴ *Situations and Cases*, *supra* note 32.

³⁵ *Id.*

³⁶ Pre-Trial Chamber II, *Warrant of Arrest for Raska Lukwiya* (July 8, 2005), ICC-02/04-01/05-55, available at <http://www2.icc-cpi.int/iccdocs/doc/doc97193.PDF>.

Pre-trial chamber decided to remove from the case.³⁷ The currently named defendants include Joseph Kony,³⁸ alleged Commander-in-Chief,³⁹ Vincent Otti,⁴⁰ alleged Vice-Chairman and Second-in-Command,⁴¹ Okot Odhiambo,⁴² Alleged Deputy Army Commander,⁴³ and Dominic Ongwen,⁴⁴ alleged Brigade Commander of the Sinia Brigade,⁴⁵ all of the Lord's Resistance Army.

b. The Democratic Republic of the Congo

The ongoing case regarding the Democratic Republic of the Congo was originally referred to the prosecutor of the ICC, Luis Moreno Ocampo, by the President of the Democratic Republic of Congo in regards to crimes committed within the territory of the state.⁴⁶ Charges were filed following an investigation by the Office of the Prosecutor, particularly in regards to the jurisdiction and admissibility requirements of the Rome Statute.⁴⁷ The prosecution was ultimately broken up into three separate cases including The Prosecutor v. Thomas Lubanga

³⁷ Pre-Trial Chamber II, *Decision to Terminate the Proceedings Against Raska Lukwiya* (July 11, 2007), ICC-02/04-01/05-248, available at <http://www2.icc-cpi.int/iccdocs/doc/doc297945.PDF>.

³⁸ Pre-Trial Chamber II, *Warrant of Arrest for Joseph Kony* (September 27, 2005), ICC-02/04-01/05-55, available at <http://www.icc-cpi.int/iccdocs/doc/doc97185.PDF>.

³⁹ ICC, *Case The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, ICC-02/04-01/05, available at <http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200204/related%20cases/icc%200204%200105/uganda?lan=en-GB>.

⁴⁰ Pre-Trial Chamber II, *Warrant of Arrest for Vincent Otti* (July 8, 2005), ICC-02/04-01/05-54, available at <http://www.icc-cpi.int/iccdocs/doc/doc97189.PDF>.

⁴¹ ICC-02/04-01/05, *supra* note 38.

⁴² Pre-Trial Chamber II, *Warrant of Arrest for Okot Odhiambo* (July 8, 2005), ICC-02/04-01/05-56, available at <http://www.icc-cpi.int/iccdocs/doc/doc97197.PDF>.

⁴³ ICC-02/04-01/05, *supra* note 38.

⁴⁴ Pre-Trial Chamber II, *Warrant of Arrest for Dominic Ongwen* (July 8, 2005), ICC-02/04-01/05-57, available at <http://www.icc-cpi.int/iccdocs/doc/doc97201.PDF>.

⁴⁵ ICC-02/04-01/05, *supra* note 38.

⁴⁶ ICC Press Release, *Prosecutor receives referral of the situation in the Democratic Republic of Congo* (2004), ICC-OTP-20040419-50, available at <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2004/prosecutor%20receives%20referral%20of%20the%20situation%20in%20the%20democratic%20republic%20of%20congo?lan=en-GB>.

⁴⁷ ICC Press Release, *The Office of the Prosecutor of the International Criminal Court opens its first investigation* (June 23, 2004), ICC-OTP-20040623-59, available at <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2004/the%20office%20of%20the%20prosecutor%20of%20the%20international%20criminal%20court%20opens%20its%20first%20investigation?lan=en-GB>.

Dyilo, The Prosecutor v. Bosco Ntaganda, and The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui.⁴⁸

The Prosecutor v. Thomas Lubanga Dyilo is currently in trial as of January 26, 2009.⁴⁹

Lubanga Dyilo is the alleged founder of *Union des Patriotes Congolais* (UPC) and *the Forces patriotiques pour la libération du Congo* (FPLC) and alleged former Commander-in-Chief of the FPLC.⁵⁰ Specifically, Mr. Lubanga Dyilo is allegedly responsible for war crimes including the enlistment and conscription of children under the age of 15 years.⁵¹

The case of The Prosecutor v. Bosco Ntaganda is at the pre-trial stage⁵² as Ntaganda remains at large.⁵³ Ntaganda is the alleged Deputy Chief of the General Staff of the *Forces Patriotiques pour la Libération du Congo* (FPLC) and alleged Chief of Staff of *the Congrès national pour la défense du peuple* (CNDP) armed group, active in North Kivu in the DRC.⁵⁴ Similarly to Mr. Lubanga Dyilo, Mr. Ntaganda is accused of conscripting and using in combat children under the age of 15.⁵⁵

⁴⁸ *Situations and Cases, supra note 32.*

⁴⁹ ICC, *Case The Prosecutor v. Thomas Lubanga Dyilo*, available at <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0104/Related+Cases/ICC+0104+0106/Democratic+Republic+of+the+Congo.htm>.

⁵⁰ *Id.*

⁵¹ Pre-Trial Chamber I, *Warrant of Arrest for Thomas Lubanga Dyilo* (February 10, 2006), ICC-01/04-01/06, available at <http://www.icc-cpi.int/iccdocs/doc/doc191959.PDF>.

⁵² ICC, *Case The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-02/06, available at <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0104/Related+Cases/ICC+0104+0206/ICC+0104+0206.htm>.

⁵³ *Situations and Cases, supra note 32.*

⁵⁴ ICC, *Case The Prosecutor v. Bosco Ntaganda*, available at <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0104/Related+Cases/ICC+0104+0206/ICC+0104+0206.htm>.

⁵⁵ Pre-Trial Chamber I, *Warrant of Arrest for Bosco Ntaganda* (August 22, 2006), ICC-01/04-02/06, available at <http://www.icc-cpi.int/iccdocs/doc/doc305330.PDF>.

The case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui began trial on November 24, 2009.⁵⁶ Germain Katanga is an alleged commander of the *Force de résistance patriotique en Ituri* (FRPI),⁵⁷ and Mathieu Ngudjolo Chui is the alleged former leader of the *Front des nationalistes et intégrationnistes* (FNI). The defendants are alleged to have jointly committed a number of both war crimes and crimes against humanity.⁵⁸

c. Darfur, Sudan

The ongoing cases regarding Darfur, Sudan were referred to Prosecutor Ocampo by the UN Security Council pursuant to Security Council resolution 1593 (2005).⁵⁹ Charges were then filed following an investigation by the Office of the Prosecutor considering issues of jurisdiction, admissibility, and interests of justice.⁶⁰ The prosecution was broken up into the three separate cases of The Prosecutor v. Ahmad Muhammad Harun (“Ahmad Harun”) and Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”), The Prosecutor v. Omar Hassan Ahmad Al Bashir, and The Prosecutor v. Bahr Idriss Abu Garda.⁶¹

The Prosecutor v. Ahmad Muhammad Harun (“Ahmad Harun”) and Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”) remains in the pre-trial stage as both defendants remain at large.⁶² Ahmad Harun is the former Minister of State for the Interior of the Government of

⁵⁶ ICC, *Case The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, available at <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0104/Related+Cases/ICC+0104+0107/Democratic+Republic+of+the+Congo.htm>.

⁵⁷ *Id.*

⁵⁸ Pre-Trial Chamber I, *Warrant of Arrest for Germain Katanga* (July 2, 2007), ICC-01/04-01/07, available at <http://www.icc-cpi.int/iccdocs/doc/doc349648.PDF>.

⁵⁹ U.N., *Press Release SG/SM/9797 AFR/1132* (March 31, 2005), available at <http://www.un.org/News/Press/docs/2005/sgsm9797.doc.htm>.

⁶⁰ ICC Press and Media, *The Prosecutor of the ICC opens investigation in Darfur* (2005), available at <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2005/the%20prosecutor%20of%20the%20icc%20opens%20investigation%20in%20darfur?lan=en-GB>.

⁶¹ *Situations and Cases*, *supra* note 32.

⁶² *Id.*

Sudan, as well as Minister of State for Humanitarian Affairs of Sudan, and Ali Kushayb is the alleged leader of the Janjaweed Militia.⁶³ The defendants are alleged to have acted together, as part of a counter-insurgency campaign, in carrying out a number of attacks on civilian populations devoid of any rebel activities and not taking part in the hostilities.⁶⁴

The Prosecutor v. Omar Hassan Ahmad Al Bashir remains in the pre-trial stage as Bashir remains at large.⁶⁵ Al Bashir is currently the President of the Republic of Sudan⁶⁶ and is accused of seven criminal counts on the basis of his individual criminal responsibility including five counts of crimes against humanity and two counts of war crimes.⁶⁷

In the case of The Prosecutor v. Bahr Idriss Abu Garda, the defendant voluntarily appeared for a confirmation hearing from October 19-29, 2009, and is not currently in custody.⁶⁸ Abu Garda is the Chairman and General Coordinator of Military Operations of the United Resistance Front, and is criminally responsible as a co-perpetrator or as an indirect co-perpetrator for three war crimes under including murder, directing attacks against a peacekeeping mission, and pillaging.⁶⁹

⁶³ ICC, *Case The Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")*, ICC-02/05-01/07, available at http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases/icc%200205%200107/darfur_%20sudan?lan=en-GB.

⁶⁴ Pre-Trial Chamber I, *Warrant of Arrest for Ahmad Harun* (April 27, 2007), ICC-02/05-01/07-2, available at <http://www.icc-cpi.int/iccdocs/doc/doc279813.PDF>; Pre-Trial Chamber I, *Warrant of Arrest for Ali Kushayb* (April 27, 2007), ICC-02/05-01/07-3, available at <http://www2.icc-cpi.int/iccdocs/doc/doc279858>.

⁶⁵ *Situations and Cases*, *supra* note 32.

⁶⁶ ICC, *Case The Prosecutor v. Omar Hassan Ahmad Al Bashir*, available at <http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases/icc02050109/icc02050109?lan=en-GB>.

⁶⁷ Pre-Trial Chamber I, *Warrant of Arrest for Omar Hassan Ahmad Al Bashir* (March 4, 2009), ICC-02/05-01/09, available at <http://www.icc-cpi.int/iccdocs/doc/doc639078.pdf>.

⁶⁸ ICC, *Case The Prosecutor v. Bahar Idriss Abu Garda*, ICC-02/05-02/09, available at <http://www.icc-cpi.int/Menu/ICC/Situations+and+Cases/Situations/Situation+ICC+0205/Related+Cases/ICC02050209/ICC02050209.htm>.

⁶⁹ *Id.*

d. The Central African Republic

The final case in the ICC's current docket regards the situation in the Central African Republic. The case was referred to the Court by the sitting government of the CAR.⁷⁰ After reviewing information provided by the government in its referral, NGOs, international organizations, and other highly knowledgeable sources, the Office of the Prosecutor ultimately filed charges in the case of The Prosecutor v. Jean-Pierre Bemba Gombo.⁷¹

The case The Prosecutor v. Jean-Pierre Bemba Gombo underwent a confirmation of charges hearing from January 12-15, 2009,⁷² with the decision on the confirmation of charges announced on January 15.⁷³ Bemba Gombo is the alleged President and Commander-in-chief of the *Mouvement de libération du Congo* (Movement for the Liberation of Congo), and is being charged with two counts of crimes against humanity and three counts of war crimes.⁷⁴

IV. Analysis and Proposal Regarding Potential for Future Growth: Possible Expansion Towards Universal Jurisdiction

While the jurisdiction of the ICC is limited in the ways described in section II above, it has proved a useful mechanism in the prosecution of offenses appearing under Article 5 of the Rome Statute, as described in section III above. Nonetheless, considering the extent of jurisdictional

⁷⁰ ICC, Press Release: *Prosecutor receives referral concerning Central African Republic* (2005), ICC-OTP-20050107-86, available at <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2005/otp%20prosecutor%20receives%20referral%20concerning%20central%20african%20republic?lan=en-GB>.

⁷¹ ICC, Press Release: *Prosecutor opens investigation in the Central African Republic* (2007), ICC-OTP-20070522-220, available at <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2007/prosecutor%20opens%20investigation%20in%20the%20central%20african%20republic?lan=en-GB>.

⁷² ICC, *Case The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, available at <http://www.icc-cpi.int/Menu/ICC/Situations+and+Cases/Situations/Situation+ICC+0105/Related+Cases/ICC+0105+0108/Case+The+Prosecutor+v+Jean-Pierre+Bemba+Gombo.htm>.

⁷³ Pre-Trial Chamber III, *Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, available at <http://www.icc-cpi.int/iccdocs/doc/doc699541.pdf>.

⁷⁴ Pre-Trial Chamber III, *Warrant of Arrest for Jean-Pierre Bemba Gombo* (May 23, 2008), ICC-01/05-01/08, available at <http://www.icc-cpi.int/iccdocs/doc/doc513605.PDF>.

limitations, there is significant potential for the Court to grow. Whether the Court will ever exercise universal jurisdiction is yet to be seen, but a Review Conference scheduled to take place in May-June of 2010 will consider amendments to the Rome Statute that may very well broaden the scope of the Court's jurisdiction.⁷⁵

a. Areas in Which the ICC's Jurisdiction Can Potentially Expand

If the Court is to move in the direction of expanding towards universal jurisdiction, this jurisdictional expansion will need to occur in the two areas of jurisdiction of crimes and jurisdiction of states. These two areas are addressed in sections II (b) and(c) above, and come from the Rome Statute Article 12 preconditions for the exercise of jurisdiction.⁷⁶ For the reason that there is no way to backdate the coming into force of the Rome Statute, it is not possible to modify the current temporal jurisdiction limitation described in section II (a) above.

b. Review Conference

In regards to modifying and expanding the Rome Statute, Article 123 provides that there is to be a Review Conference seven years after the Statute comes into force.⁷⁷ While Article 123 leaves open the possibility of review of any amendments to the Statute, it specifically lists Article 5 crimes as an item to be reviewed.⁷⁸ As urged by Trinidad and Tobago at the formation of the original Rome Statute, the crimes of terrorism and drug trafficking will be considered for addition to the current Article 5 crimes.⁷⁹

⁷⁵ ICC, *Assembly of States Parties Calendar*, available at <http://www.icc-cpi.int/menus/asp/asp%20events/asp%20calendar%202010/review%20conference?lan=en-GB>.

⁷⁶ Rome Statute, *supra* note 12 at Article 12.

⁷⁷ *Id.* at Article 123(1).

⁷⁸ *Id.*

⁷⁹ Amnesty International, *Concerns at the fifth session of the Assembly of States Parties* (November 2006), OR 40/037/2006, available at <http://www.amnesty.org/en/library/asset/IOR40/037/2006/en/b1c733c7-d3e0-11dd-8743-d305bea2b2c7/ior400372006en.pdf>.

c. Potential for Expanding the List of Crimes Under the ICC's Jurisdiction

Expanding the list of crimes falling under the jurisdiction of the ICC would not alone create universal jurisdiction for the Court, but it would nonetheless be a substantial move in that direction. I suggest that one way to greatly expand the crimes falling under the purview of the Court would be to supplement the Article 5 crimes with the domestic criminal law of the state party in question. Under Article 12 preconditions to the exercise of jurisdiction, the Court exercises its jurisdiction over individuals through a particular state. This exercise occurs where the Court gains jurisdiction over an individual defendant because the defendant committed a crime on the territory of a state party, the individual defendant is a national of a state party, or through the declared acceptance of a state that is not a party to the Statute.⁸⁰ As the Court's jurisdiction to prosecute an individual defendant therefore attaches only through a state, it would theoretically be possible for the Court to identify a particular state whose domestic law can be applied in situations where a defendant did not violate an Article 5 offense, but nonetheless violated a domestic law of the state in question where the state is either unwilling or unable to conduct genuine proceedings under domestic law in domestic courts. Under such a framework, the ICC would greatly expand the crimes under its jurisdiction while remaining true to its purpose as a court of last resort.⁸¹

d. Potential for Expanding the States Under the ICC's Jurisdiction

Moving beyond the Court's potential expansion in the field of jurisdiction of crimes, in order to have universal jurisdiction, or at least make a meaningful move in that direction, the Court must also expand its jurisdiction of states. As the Court can only exercise jurisdiction over

⁸⁰ Rome Statute, *supra* note 11 at Article 12.

⁸¹ *Id.* at Article 17.

states that are either parties to the Rome Statute or that officially lodge a declaration of acceptance of jurisdiction, expanding its jurisdiction of states is a much more difficult problem than expanding its jurisdiction of crimes. Expanding its jurisdiction of states is more difficult as the Court only has jurisdiction over states that volunteer jurisdiction.⁸²

Given the reality of the limitations, the Court can theoretically expand its jurisdiction by expanding the Article 12 preconditions to the exercise of jurisdiction to include a category for states parties to the Rome Statute that are effected by a crime, Article 5 or otherwise, committed by a prospective defendant. The idea here would be to give standing to states parties that suffer the international adverse effects implicit in the commission of large-scale crimes in a globalized world. An example would be to extend jurisdiction when an individual in a state that is not a party to the Rome Statute commits such large-scale and violent crimes that it causes refugees to spill into a neighboring country that *is* a state party. This suggestion strives to respect the customary international law concept of state sovereignty, while simultaneously working to expand the jurisdiction of the ICC in regards to states. It does so by operating under the basic premise of Article 12 preconditions to the exercise of jurisdiction whereby the Court may exercise its jurisdiction, specifically under Article 12(2)(a), which permits the Court to exercise jurisdiction when the conduct in question occurred within the territory of a state party.⁸³ This exercise is permissible whether or not the person accused of the crime(s) is a national of a state party. As the Court therefore currently has jurisdiction over individuals who are not nationals of a state party, the suggestion merely expands the Court's jurisdiction from crimes whose commissions occur within the territory of a state party, to crimes whose effects occur within the territory of a state party.

⁸² *See Id.* at Article 12.

⁸³ *Id.* at Article 12(2)(a).

e. Limits of the Proposal

While this proposal is limited in that it provides the ICC jurisdiction in an indirect fashion and only where a state party is adversely effected by a crime committed within the national boundaries of a non-state party by a defendant who is not a national of a state party, it nonetheless would be a step in the direction of expanding the Court's jurisdiction of states towards universal jurisdiction while simultaneously respecting the fundamental principles of state sovereignty.

Conclusion

Having examined the current jurisdictional limitations of the ICC, this paper sought to navigate the intricacies of customary international law and the Court's stated purpose to operate only as a court of last resort in order to expand its jurisdiction towards the universal prosecution of the most serious human rights abuses the world over. While the suggestions regarding the expansion of the Court's jurisdiction in regards to crimes and states are admittedly limited, they are merely designed to operate as a foundation from which the Review Conference set to take place in May-June 2010 can work towards the goal of creating a more comprehensive system for the prosecution of international criminal offenses.