How Serious are International Crimes?  
The Gravity Problem in International Criminal Law

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Modern international criminal law was born out of the Holocaust—the systematic extermination of millions of people. It was the gravity of those crimes that provided the theoretical and political justifications for the first international criminal trials at Nuremberg. Yet today, the International Criminal Court’s Office of the Prosecutor is considering situations involving as few as six killings and an international tribunal has been established to address the assassination of a single political leader. This Article explains how the ambiguity of international criminal law’s foundational concept of gravity has facilitated this expansion and exposes some problematic consequences of the expansionist trend for state sovereignty and individual rights. Finally, the Article suggests a solution that moves beyond ambiguous gravity to interrogate the interests at stake in decisions about international criminal adjudication.

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INTRODUCTION

Until Nuremberg, criminal justice was considered the province of states. The Nazi atrocities gave rise to the idea that some crimes are so grave as to concern the international community as a whole and therefore to warrant international adjudication.  

1. Some commentators argue that the Nuremberg tribunal was not truly international since it was established by agreement among a limited number of nations. See, e.g., Makau Mutua, From Nuremberg to the Rwanda Tribunal: Justice or Retribution? 6 BUFF. HUM. RTS. L. REV. 77, 79–80 (2000) (quoting Kenneth Anderson, Nuremberg Sensibility: Telford Taylor’s Memoir of the Nuremberg Trials, 7 HARV. HUM. RTS. J. 281, 289 (1994)) (describing Nuremberg tribunal as “fundamentally an expression of a peculiarly American legal sensibility” and as an “orchestrated and highly manipulated forum”); Jonathan
controversial at the time, this idea has come to be widely accepted. The gravity of international crimes is thus the primary conceptual foundation of international law’s authority to administer criminal justice.

Important consequences flow from the determination that a “grave” international crime has occurred—consequences that can both limit the authority of states and constrain the rights of individuals. Most importantly, such a crime can be prosecuted in an international forum even over the objections of concerned states. International law may also require certain states to prosecute the crime and arguably authorizes any state to do so. An official prosecuted for such a crime, even a head of state, has no immunity before an inter-

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Turley, *Transformative Justice and the Ethos of Nuremberg*, 33 Loy. L.A. L. Rev. 655, 658 (2000) (“Nuremberg can easily be viewed as an American proceeding due to its heavy reliance on American prosecutors and trial process rules.”). However, the tribunal was international in the sense that it asserted the authority to interpret and apply international law, including the newly minted crimes against peace and crimes against humanity.


3. See, e.g., Pablo Castillo Diaz, *The ICC in Northern Uganda: Peace First, Justice Later*, 2 EYES ON THE ICC 17 (2005) (“It is widely acknowledged that the moral commitment to protect the most fundamental human rights at a global scale trumps state sovereignty and the legal pillars that sustained classic international law.”).

national court nor will a national amnesty protect her. A defendant charged with such a crime can expect to be detained for a long period of time before trial, denied bail although she poses no flight risk, and perhaps subjected to a lower burden of proof.\textsuperscript{5}

In light of the serious repercussions of labeling an international crime “grave,” one might expect the concept of gravity to have reasonably well-defined and accepted content in international law. In fact, the opposite is true. Individuals who craft, apply and write about international criminal law invariably reference the seriousness of the crimes at issue but rarely specify what they mean.\textsuperscript{6}

Prior to the adoption of the Rome Statute, there was no multinational treaty delineating the subject matter of international criminal law and very little relevant practice.\textsuperscript{7} Only four tribunals had exercised international criminal jurisdiction: the Nuremberg and Tokyo tribunals and the International Criminal Tribunals for Former Yugoslavia and Rwanda (respectively, “ICTY” and “ICTR”). In each of these cases, the international community, or at least significant parts of it, acted in response to situations involving hundreds of thousands or even millions of victims of horrible crimes. The gravity of the crimes was invoked as the primary justification for establishing the tribunals,\textsuperscript{8} but no one saw a need to explain what made the crimes se-

\textsuperscript{5}. See infra Part III.B.

\textsuperscript{6}. See, e.g., M. Cherif Bassiouni, \textit{From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court}, 10 \textit{Harv. Hum. Rts. J.} 11, 61 (1997) (declaring, when arguing for establishment of permanent international criminal court that “[i]mpunity must no longer be the reward of those who commit the most egregious international crimes and violations of human rights” without defining how to determine which crimes are “the most egregious”); Quincy Wright, \textit{Proposal for an International Criminal Court}, 46 \textit{Am. J. Int’l L.} 60, 63 (1952) (discussing proposals for an International Criminal Court that would “assur[e] the punishment of individuals for acts which world opinion regards as peculiarly destructive of international peace and order, peculiarly shocking to the conscience of mankind, and peculiarly likely to escape punishment by national authority” without describing what characteristics of an international crime would place it within the Court’s jurisdiction).

\textsuperscript{7}. Indeed, the Rome Statute does not purport to establish the contours of international criminal law for any purpose other than the work of the ICC. Rome Statute, supra note 2, art. 10.

\textsuperscript{8}. For example, in the Security Council Resolutions that created the ICTR and the ICTY, the Security Council invoked gravity rhetoric. See S.C. Res. 827, U.N. Doc S/RES/827 (May 25, 1993) (“Expressing . . . grave alarm at continuing reports of widespread and flagrant violations of international humanitarian law occurring within the territory of the former Yugoslavia”); S.C. Res. 955, U.N. Doc S/RES/955 (Nov. 8, 1994) (“Expressing . . . grave concern at the reports indicating that genocide and other systematic, widespread and flagrant violations of international humanitarian law have been committed in
rious enough for international jurisdiction—it was simply obvious.

When the permanent International Criminal Court (“ICC” or the “Court”) was established it was no longer possible to rest the legitimacy of international adjudication on ex post collective judgments about the gravity of crimes committed. The Court’s prosecutor and judges needed ex ante guidance about what sorts of crimes the international community considers appropriate for international adjudication. The Rome Statute thus enshrines in the ICC’s admissibility regime the idea that some crimes are “of sufficient gravity” to merit international adjudication.9

But the statute does not define the term. This was not a mere oversight on the part of the drafters. Rather, the decision to leave gravity ambiguous facilitated establishment of the Court by mediating between states with an expansive vision of the Court as a vehicle for human rights promotion and states that preferred to limit the Court’s reach in the name of preserving sovereignty.10 The vagueness of gravity enabled states on each side of the human rights/sovereignty debate to support the creation of the Court even though they did not share a vision of the Court’s role in the world.

While the ambiguity of gravity served a creative purpose at the ICC’s inception, it has become increasingly problematic at the operational stage. I have argued elsewhere that international criminal law’s reliance on the concept of gravity threatens the legitimacy of the ICC11 and undermines the Court’s ability to justify its decisions about which situations and cases to prosecute.12 This Article elaborates a third consequence of gravity’s central role in international criminal law: that as the regime expands, its justifications for curtailing state sovereignty and limiting defendants’ rights become more and more attenuated.

International criminal law is no longer exclusively focused on crimes like the Holocaust or the Rwandan genocide. The ICC prosecutor is currently considering whether to act with regard to situations involving as few as six deaths and violence that occurred on a single day. There has also been a gradual expansion of the definitions of

9. Rome Statute, supra note 2, art. 17.
12. deGuzman, Choosing to Prosecute, supra note 10.
crimes and modes of responsibility in international criminal law. Moreover, there are good reasons to believe that international criminal law will continue to expand. These include, in particular, the breadth of goals attributed to international courts and the incentives of international prosecutors and judges.

This Article challenges the conventional wisdom that the reach of international criminal law is limited to crimes of exceptional gravity. It shows that international criminal law is expanding and exposes the consequences of that expansion for states and defendants. Part I demonstrates how the concept of gravity has facilitated the establishment and development of international criminal law by remaining indeterminate and thus sufficiently flexible to mediate between the competing claims of state sovereignty and human rights. Part II shows how international judges and prosecutors have used doctrine and discretion to broaden the types of harms and perpetrators international criminal law encompasses, thereby diluting the gravity requirement. It further elucidates the forces that make international criminal law’s continued expansion highly probable, if not inevitable. Part III explains why the expansion of international criminal law should concern even the regime’s supporters. When vague notions of gravity are deployed to justify adjudicating borderline cases other important interests are sometimes sacrificed. The use of gravity to expand jurisdiction impinges on the interests of states in maintaining authority within their territories; and its use to expand modes of liability and curtail defenses threatens defendants’ interests in due process. The conclusion therefore suggests a solution to international criminal law’s gravity problem: rather than using gravity to mask the important interests at stake in decisions about international adjudication, decision makers should surface and balance those interests. By engaging rather than avoiding conflicting interests, decision makers can help to ensure that international criminal law serves to promote global justice.

I. A Vague Concept Propels the Development of International Criminal Law

As early an authority as Hugo Grotius believed that sovereignty was not absolute with regard to “injuries [that] excessively violate the law of nature or of nations.”13 The idea and rhetoric of

13. HUGO GROTIUS, DE JURE BELLI AC PADS, LIBRI TRES (1646), bk. II, ch. XX, para. XL.1, in 2 THE CLASSICS OF INTERNATIONAL LAW 504 (F. W. Kelsey trans., Clarendon Press 1925) (emphasis added) (“[K]ings, and those who possess rights equal to those kings, have
gravity have played a pivotal role in justifying the elaboration of international crimes and the creation of institutions to adjudicate them. Yet despite the pervasive invocations of the concept, little effort has been made to define gravity. This was not inevitable—like the 12-mile nautical sea, states could have placed clearer gravity-based parameters on international criminal jurisdiction. For example, international crimes could be limited to crimes affecting a certain number of victims, or involving cross-border harm, or perpetrated by government actors. Instead, the creators of international criminal law have chosen to leave the concept ambiguous.

The failure to elaborate what is meant by gravity is not mere-

the right of demanding punishments not only on account of injuries committed against themselves or their subjects, but also on account of injuries which do not directly affect them but excessively violate the law of nature or of nations in regard to any persons whatsoever.”). But see FRANCISCO SUAREZ, SELECTIONS FROM THREE WORKS 817, reprinted in 2 THE CLASSICS OF INTERNATIONAL LAW 814 (G. Williams, A. Brown & J. Waldron trans., Clarendon Press 1944) (quoted in Theodor Meron, Common Rights of Mankind in Gentili, Grotius, and Suarez, 85 AM. J. INT’L L. 110, 113 (1991) (“[T]he assertion made by some writers, that sovereign kings have the power of avenging injuries done in any part of the world, is entirely false, and throws into confusion all the orderly distinctions of jurisdiction.”).


ly a consequence of the difficulty of the definitional task—although that is certainly an important factor. Rather, the concept has been left undefined because its ambiguity has served a productive function in the regime’s development: to mediate between the competing pulls of state sovereignty and the burgeoning human rights movement. The evolution of international criminal law has been part of the larger movement to limit or redefine state sovereignty to accommodate increasingly powerful norms of universal human rights. What follows demonstrates how gravity’s indeterminacy has enabled the development of international criminal law at the political level by simultaneously reassuring states concerned about sovereignty and providing space for human rights promotion.

A. The Birth of International Criminal Law at Nuremberg

After World War I, there was some discussion of establishing a court to prosecute crimes against humanity, but the world was not yet ready for the necessary limitation of sovereignty and the effort was abandoned. World War II proved to be the turning point. After the Nazis ruthlessly slaughtered millions of people the Allies saw fit to conduct a trial jointly—the first international criminal trial. Gravity provided the primary justification for the creation of the International Military Tribunal at Nuremberg. When the defendants objected that some of the charges violated the principle of legality,

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18. But see supra note 1 (analyzing whether Nuremberg was truly “international”).

19. The International Military Tribunal (IMT) was the first court to adjudicate “crimes against peace,” which are the precursors to the crime of aggression, and “crimes against humanity,” which were included to enable the IMT to prosecute crimes the Nazis had
the judges demurred, invoking the gravity of the crimes.\textsuperscript{20}

No one felt a need to explain what made the crimes of the Holocaust grave. But the opposing tug of sovereignty was felt even in the face of the worst crimes the world had ever seen. For example, in defining “crimes against humanity,” the drafters did not simply include all large-scale murders, rapes and other crimes of violence.\textsuperscript{21} Instead, they limited crimes against humanity to crimes committed in connection with the war.\textsuperscript{22} This “war nexus” provided at least an arguable link to the preexisting international law that respected state sovereignty.\textsuperscript{23} The gravity of the crimes committed in World War II thus solidified the idea of international criminal jurisdiction, but the implementation of that idea still evidenced considerable respect for the principle of state sovereignty.

After World War II, the UN General Assembly asked the International Law Commission (“ILC” or the “Commission”), an expert group under its aegis, to study the possibility of establishing a

\textsuperscript{20} Judgment, 22 Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945–1 October 1946, 462 (1948) [hereinafter Nuremberg] (focusing on crimes against peace); see also Beth Van Schaack, Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals, 97 GEO. L.J. 119, 126 (2008).

\textsuperscript{21} The definition did require that the crimes be committed against a “civilian population.” Nuremberg Charter, supra note 14, art. 6(c). This might be interpreted to include some notion of scale even though the Nuremberg judgment did not reflect that understanding.

\textsuperscript{22} See Nuremberg Charter, supra note 14, art. 6(c) (defining crimes against humanity as “murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated”); NUREMBERG, supra note 20, at 468 (determining that, for acts to constitute crimes against humanity, they must be made “in execution of, or in connection with” the war).

\textsuperscript{23} See Beth Van Schaack, The Definition of Crimes Against Humanity: Resolving the Incoherence, 37 COLUM. J. TRANSNAT’L L. 787, 791 (1999) (“The war nexus allowed the drafters of the Charter to condemn specific inhumane acts of Nazi perpetrators committed within Germany without threatening the entire doctrine of state sovereignty.”); see also WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES 10–11 (2000) (arguing that the war nexus was included because “the great powers that drafted [the Nuremberg Charter] were loathe to admit the notion, as a general and universal principle, that the international community might legitimately interest itself in what a State did to its own minorities.”).
permanent international criminal court\textsuperscript{24} and to prepare a “draft code of offences against the peace and security of mankind” (“Draft Code”).\textsuperscript{25} The ILC was thus supposed to consider the feasibility of an international criminal jurisdiction and to try to figure out what crimes might be the subject of such jurisdiction.\textsuperscript{26} The ensuing ILC deliberations provide further evidence of the human rights/sovereignty tension that has characterized the development of international criminal law and of gravity’s role as mediator.

In his first report on the “Question of International Criminal Jurisdiction,” Special Rapporteur Ricardo Alfaro noted that a member of the Commission had objected that such jurisdiction would be contrary to the principle of sovereignty.\textsuperscript{27} Alfaro responded, first, that international jurisdiction was necessary to address crimes committed by or at the instigation of governments. Second, he claimed that sovereignty must yield to the need “to prevent crimes against the peace and security of mankind and crimes against the dictates of the human conscience, including therein the hideous crime of genocide.”\textsuperscript{28} In other words, sovereignty should not shield from international law crimes that either stem from abuses of that sovereignty or are especially serious.

The same rationales dominated the early discussion of the Draft Code. At first, in seeking to identify the essence of crimes to be included in the Draft Code, the ILC looked to their “highly political nature.”\textsuperscript{29} Crimes were international when they were committed or tolerated by a state and threatened international peace.\textsuperscript{30} The Commission therefore initially limited crimes against humanity to

\begin{itemize}
\item 28. Id. at 17.
\item 30. Id.
\end{itemize}
crimes committed by or with the toleration of the State. 31 The abuse of sovereignty was thus what made crimes against humanity of concern to the entire world. Indeed, this idea remains central in some of the scholarship and jurisprudence of international criminal law today. 32

But in the 1980s, when the ILC deliberations resumed after a long hiatus, the new Special Rapporteur, Doudou Thiam, moved to change the focus of the ILC’s work from politics to gravity. 33 The Commission agreed and voted unanimously to reject the 1954 Draft Code’s political element and focus instead on the criterion of “seriousness.” 34 Crimes against humanity would now be defined as “systematic or mass violations of human rights” 35 and all but “excep-


32. See, e.g., M. Cherif Bassiouni, International Crimes: Jus Cogens and Obligatio Erga Omnes, 59 L. & CONTEMP. PROBS. 63, 69 (1996) (asserting implicit requirement that for conduct to be considered a crime that “affect[s] the interests of the world community as a whole” it must be product of “state-action or state-favoring policy”); William A. Schabas, State Policy as an Element of International Crimes, 98 J. CRIM. L. & CRIMINOLOGY 953 (2008) (arguing that a state policy is an essential requirement of international crimes).

33. In his first report, Thiam noted that certain crimes may become international due to State complicity but others “are committed on such a scale that it is reasonable to ask whether they have not made the shift from internal law to international law and become international crimes by their nature.” Doudou Thiam, First Report on the Draft Code of Offences Against the Peace and Security of Mankind, [1983] 2 Y.B. Int’l L. Comm’n 137, 143, U.N. Doc. A/CN.4/364. He lamented, “[i]n any event, it is clear that the distinction between crimes under internal law and crimes under international law is relative and at times arbitrary.” Id. Thiam was not satisfied with the 1954 Draft Code’s reliance on politics as the defining feature of international crimes, feeling that it did not adequately capture the essence of Nuremberg. He wrote: “It may be that the authors of the Charter of the Nürnberg Tribunal were struck not so much by the political content of the crimes with which they were concerned as by their gravity, their atrociousness, their scale and their effects on the international community.” Id.


tionally serious” war crimes would be omitted.\textsuperscript{36} Although the ILC had numerous discussions about what “serious” would mean for purposes of defining international crimes,\textsuperscript{37} it ultimately gave up, concluding that many factors could be relevant.\textsuperscript{38}

The ILC’s discussions of a potential international criminal court in the 1990s also show this increased emphasis on gravity. Although the immediate impetus for the renewed interest in an International Criminal Court (ICC) was a plea from Trinidad and Tobago for help with its problem of transnational drug trafficking,\textsuperscript{39} the General Assembly asked the ILC to look into the matter not just for such transnational crimes but for the crimes in the Draft Code as well.\textsuperscript{40} The ILC’s draft statute for the ICC (ILC Draft Statute) thus stated in the preamble that the court would “exercise jurisdiction only over the most serious crimes, that is to say, crimes of concern to the international community as a whole.”\textsuperscript{41} Although the ILC Draft Statute abandons the Draft Code’s heading of “systematic or mass violations of human rights” in favor of the more traditional “crimes against humanity,” the commentary emphasizes that such crimes are defined


\textsuperscript{39} See Permanent Representative of Trinidad and Tobago, Letter dated Aug. 21, 1989 from the Permanent Representative of Trinidad and Tobago to the Secretary-General, U.N. Doc. A/44/195 (1989).


by reference to their gravity.  

In sum, over time the ILC’s work, responding to the burgeoning human rights movement, showed decreasing concern for state sovereignty and heightened reliance on gravity to justify international jurisdiction. International criminal law thus became a means of punishing and preventing serious human rights violations rather than merely a response to abuses perpetrated by state actors.

B. Phase II: The Ad Hoc International Criminal Tribunals

Another turning point in the development of international criminal law came in 1993. By then, the post-Soviet geo-political climate had accelerated the human rights movement, making it possible for the Security Council to establish the ICTY to address the atrocities perpetrated during the dissolution of Yugoslavia. The following year, the ICTR was created in response to the Rwandan genocide.

State actors and representatives of international and non-governmental organizations that participated in creating these institutions employed gravity rhetoric to justify international jurisdiction. Moreover, the jurisdiction of those institutions was limited to “serious” crimes, namely war crimes, crimes against humanity and genocide. Like after World War II, no one saw a need to explain or define gravity in any detail—the crimes in the former Yugoslavia and Rwanda qualified under any interpretation.

The creators of the ad hoc tribunals were not especially con-
cerned about respecting sovereignty because the states in question were weak or non-existent. Nonetheless, the drafters of the ICTY statute included the Nuremberg Charter’s war nexus in the definition of crimes against humanity, which had the effect of protecting sovereignty by excluding crimes unconnected to armed conflict from the tribunal’s jurisdiction.\footnote{ICTY Statute, \textit{supra} note 14, art. 5; Van Schaack, \textit{supra} note 23, at 792 (noting that because the Nuremberg Tribunal required an armed conflict nexus, tribunals and international law drafters after Nuremberg treated the armed conflict nexus as a substantive element of crimes against humanity).} But this reticence to expand crimes against humanity was short lived.

When the ICTR’s statute was drafted the following year in response to atrocities that were not all connected to an armed conflict, the drafters had little trouble jettisoning that requirement. They defined crimes against humanity instead by reference to the widespread or systematic nature of the crimes.\footnote{ICTR Statute, \textit{supra} note 14, art. 3 (“The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes committed as part of a widespread or systematic attack against any civilian population . . . .”).} These elements essentially reflect gravity: that is, the quantity and quality of harms inflicted. The ICTR statute also reflects a gravity-inspired expansion in the definition of war crimes, as they are no longer limited to crimes committed in international armed conflict.\footnote{See id. art. 4 (criminalizing violations of Additional Protocol II, which applies to non-international armed conflicts).} Gravity thus served both to justify the creation of the \textit{ad hoc} tribunals and to expand the substantive law they applied beyond that used at Nuremberg.

\textbf{C. Phase III: The ICC}

Gravity played its most important constructive role at the Rome Conference where the ICC statute was adopted. There, gravity served repeatedly to mediate conflicts between states seeking to establish a strong court in the service of human rights promotion and states focused on protecting the traditional prerogatives of sovereignty.\footnote{This dichotomy simplifies the complex web of policy objectives states sought to further by supporting or opposing the ICC. Nonetheless, the rough division of delegations to the Rome Conference into human rights-promoting and sovereignty-protecting camps represents an important theme in the negotiations and helps elucidate the important role gravity played in producing the Court.} When states in these camps could not agree on a statutory provision, the solution adopted was often to insert a reference to gravity or seek to reassure the sovereignty-focused states by reiterating that
the Court would deal only with crimes of exceptional gravity.

In defining war crimes, for example, the human rights-promoting states wanted the ICC to have jurisdiction over all war crimes no matter how minor, but for other states this was considered too great an incursion on sovereignty. The latter group of states preferred to limit the Court’s jurisdiction over war crimes to those “committed as part of a plan or policy or as part of a large-scale commission of such crimes.” In other words, they wanted the Court’s jurisdiction to be limited to war crimes made particularly grave by their scale or level of organization. The issue could not be resolved in the negotiations. Instead, in the waning hours of the conference, the United Nations officials managing the process presented states with a take-it-or-leave-it “final package” that reflected a compromise: the Court would have jurisdiction over war crimes “in particular” when committed as part of a plan or policy or on a large scale.

This provision contains a double ambiguity. First, the reference to “plan or policy or on a large scale” is uncertain in the way that most efforts to expound gravity are uncertain. What degree of organization is required for a plan or policy? What number of victims or breadth of geographic spread qualifies as “large scale”? In


52. Rome Statute, supra note 2, art. 8. See also Mahnoush H. Arsanjani, The Rome Statute of the International Criminal Court, 93 AM. J. INT’L L. 22, 33 (1999) (discussing debate about which war crimes were so serious as to be of “concern to international community” and describing language of Article 8(1) as compromise).
addition, the use of the term “in particular” leaves it unclear when, if ever, the Court should exercise jurisdiction over war crimes that do not meet this gravity-based threshold. Leaving these questions open was constructive—it enabled some sovereignty-focused states to support the Court while reassuring the human rights-focused states that the Court would have the ability to adjudicate all war crimes.

The outcome of the war crimes debate in Rome probably represents the most significant expansion of international criminal jurisdiction to date. Prior international tribunals had exercised jurisdiction over war crimes only in contexts where such crimes were committed on a widespread and systematic basis: the Holocaust, ethnic cleansing in the former Yugoslavia and the Rwandan genocide. The statutes of those courts did not require such a context because they were set up in response to the obviously massive nature of the crimes in each situation. By including only a suggestive rather than a mandatory gravity-based threshold for war crimes, the Rome Statute provides the first international jurisdiction over situations that involve only war crimes at the low end of the gravity spectrum.

A similar debate took place in the context of crimes against humanity. The sovereignty-focused states wanted to limit crimes against humanity to crimes that are particularly serious because they are both widespread and they are committed systematically. In contrast, the human rights-promoting states wanted these gravity markers to be alternatives. After heated discussions, the Canadian delegation brokered a compromise: the alternative formulation would be used but an additional provision would be added defining “attack” as “a course of conduct involving the multiple commission of [the enumerated] acts against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.”

Although the gravity markers are thus spelled out in greater detail for crimes against humanity than for war crimes, the language remains ambiguous. How many acts qualify as “multiple” and what degree of organization is required for an “organizational policy”? Again, this ambiguity was constructive. A delegation seeking to convince its legislature that a high bar had been set for crimes against humanity could read the requirements of “multiple” acts and a “policy” as performing that function. At the same time, a human rights-focused delegation could claim victory on the grounds that the gravi-


54. Rome Statute, supra note 2, art. 7(2)(a).
ty markers of “widespread” and “systematic” were listed as alternat-
atives.

In addition to these ambiguous gravity references in the defi-
nitions of crimes, the statute contains an explicit gravity limitation on
the exercise of the Court’s jurisdiction: it requires the Court to deem
inadmissible cases “not of sufficient gravity to justify further action
by the Court.”55 Given the importance of this provision in determin-
ing when the Court can act, one might expect that the drafters en-
gaged in lengthy debate about what gravity should mean in this con-
text. In fact, there was virtually no discussion of this issue56 and ten
years into the Court’s life it remains unclear what the gravity thresh-
old requires.57 This failure to elaborate the meaning of gravity has
helped to enable the Court’s establishment and development. It has
allowed states to support the Court without having to share a vision
of its role in the world. Human rights-promoting states can see the
ICC as an institution that broadly seeks to promote human rights and
humanitarian law while sovereignty-focused states can maintain a
much more limited vision of the Court’s work.

The gravity threshold for admissibility also enabled the hu-
man rights-focused states to expand the lists of war crimes and
cri mes against humanity included in the Rome Statute compared to
prior statutes.58 When sovereignty-focused states expressed concern
over the inclusion of less serious types of crimes, they were reassured
that the gravity threshold would ensure that the Court exercises juris-
diction only over sufficiently serious instances of those crimes.59

55. Rome Statute, supra note 2, art. 17(1)(d).
56. For a more detailed discussion of the legislative history of this provision see
Margaret M. deGuzman, Gravity and the Legitimacy of the International Criminal Court,
57. Although the Appeals Chamber has made statements about what the gravity
threshold does not require, it has yet to explain what it does require. See Prosecutor v.
Ntaganda Dyilo, Case No. ICC-01/04-169, Judgment on the Prosecutor’s Appeal, ¶¶ 73–75
(July 13, 2006), http://www.icc-cpi.int/iccdocs/doc/doc183559.pdf (Appeals Chamber
rejecting Pre-Trial Chamber’s factor-based gravity test).
58. Rome Statute, supra note 2, art. 7, 8. With regard to war crimes, the Rome Statute
includes a long list of crimes applicable in both international and non-international armed
conflicts, including some crimes that are relatively low on the gravity spectrum like making
improper use of a flag of truce resulting in serious personal injury. Id. art. 8(2).
59. See Arsanjani, supra note 52, at 31 (noting “opening clause of Article 7 setting
forth the general threshold for crimes against humanity should be read together with its
subparagraph 2(a). This approach provides a basis for compromise on several other acts
listed in Article 7 as crimes against humanity.”). Arsanjani notes that the use of the
disjunctive (“as part of a widespread or systematic attack”) was only accepted because the
D. The post-Rome Conference International Tribunals

The momentum created by the *ad hoc* tribunals and the adoption of the Rome Statute fueled further institutional expansion as several additional international and quasi-international—or “hybrid”—tribunals were established.\(^{60}\) Most of these dealt with situations where the crimes were undeniably grave in terms of both the quantity and quality of harm inflicted, including the “auto-genocide”\(^{61}\) in Cambodia and the large-scale and systematic massacres, rapes and tortures in Sierra Leone and East Timor.

One institution stands out, however, as a remarkable expansion of international criminal jurisdiction—the Special Tribunal for Lebanon (STL). The STL was established by the Security Council to prosecute essentially the killing of one person—former Lebanese Prime Minister Rafiq Hariri.\(^{62}\) Unlike the Security Council resolutions establishing the other *ad hoc* tribunals, the STL’s founding document says nothing about the serious nature of the crimes at issue.\(^{63}\) Indeed, the STL’s subject matter jurisdiction is limited to crimes under Lebanese law rather than international crimes. The es-

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\(^{61}\) The atrocities of the Khmer Rouge have been termed “auto-genocide” because, although they do not meet the technical definition of genocide, they involved massive killing of ethnic Khmer by ethnic Khmer.


\(^{63}\) Id.
establishment of the STL thus seems to manifest, at least among some Security Council members, a new understanding that international criminal jurisdiction can be employed even without reference to gravity.

The history of international criminal jurisdiction thus demonstrates that gravity—a vague idea about the nature of crimes—has played a key role in mediating between concerns about human rights and state sovereignty. In so doing, it has facilitated the establishment of international courts and tribunals as well as the expansion of the laws they apply.

II. THE EXPANSIONIST TREND IN INTERNATIONAL CRIMINAL LAW

In their exploration of the history of international criminal law, Beth Van Schaack and Ronald Slye write that “the history of international criminal law is marked by greater and greater incursions into arenas that were historically the exclusive province of sovereign states.”

The preceding Part showed how that expansion took place at the political level through the creation of tribunals with increased power over a broadening subject matter. What follows demonstrates how these institutions have also expanded from within through judges’ interpretation of their subject matter jurisdiction and the ICC prosecutor’s exercise of discretion to decide what situations and cases to investigate and prosecute.

Specifically, this Part argues that the judges and prosecutors have interpreted their tasks so as to bring more and more kinds of crimes and defendants within the purview of international criminal law. Again, the ambiguity of gravity has been helpful, with judges and prosecutors frequently invoking the concept to justify their actions. Judges explain broad interpretations of crimes by reference to the gravity of those crimes and the ICC prosecutor invariably invokes the gravity of crimes committed to justify his decisions about what situations to investigate and which cases to prosecute. The indeterminacy of the concept of gravity has thus facilitated expansion not just at the political level but at the institutional level as well.

Ironically, by invoking gravity to justify expansion, interna-

tional judges and prosecutors have diluted the gravity of the crimes they investigate and adjudicate. While gravity is an elusive concept, as already discussed, commentators generally agree that the gravity of a case, or cases within a situation, requires some kind of evaluation of the harms inflicted and the culpability of perpetrators—a task that is both quantitative and qualitative. The notion of harm thus includes consideration of such factors as the number of victims affected, the nature of the crimes, the way they were committed and their impact beyond the immediate victims. Culpability relates to the mental state of the defendant, including his or her role in the crimes. The evidence presented below suggests that international criminal law is expanding along these dimensions in ways that tend to decrease the gravity of the crimes adjudicated.

After demonstrating that international criminal law is expanding in ways that dilute gravity, this Part explains why such expansion is likely to continue. It is possible that states—particularly sovereignty-focused states—will stem the tide. States could resist expansion either directly by amending the Rome Statute to define more strictly the jurisdictional requirements or indirectly by putting pressure on the Court to adopt a narrow view of its jurisdiction. Alternatively, the Court’s prosecutor or its judges or both could themselves adopt a more conservative approach to their work. But for the reasons elaborated in Section B below, it is significantly more likely that the expansionist trend will continue for the foreseeable future.


A. Evidence of Expansion

i. Broadening Harms

The most dramatic judicial broadening of the harms subject to international adjudication was the ICTY’s decision to extend individual criminal responsibility to war crimes committed in internal armed conflicts. Until that decision, the prevailing view was that international law extended individual liability only to crimes committed in international armed conflicts. This judicial act significantly transformed international criminal law, helping to ensure the inclusion in the Rome Statute of war crimes committed in non-international armed conflicts.

The ICTY judges used gravity rhetoric to justify this expansion, stating: “No one can doubt the gravity of the acts at issue, nor the interest of the international community in their prohibition.” The extension of international criminal law to non-international armed conflict does not necessarily represent a diminution in gravity. War crimes committed in internal armed conflict arguably can be just as serious as those committed in international armed conflict. Nevertheless, this lateral expansion—the extension of international jurisdiction to more kinds of crimes—increased the potential for less serious crimes to be adjudicated in international courts. By eliminating the requirement of cross-border harm, it became more difficult to determine what conflicts are sufficiently serious to be termed “armed conflict” at all. Armed conflict for purposes of international crimi-

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68. See Theodor Meron, International Criminalization of Internal Atrocities, 89 AM. J. INT’L L. 554, 559 (1995) (noting that until the mid-1990s, it was generally accepted that customary international law applicable to non-international conflicts did not include war crimes); Kenneth W. Abbott, International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts, 93 AM. J. INT’L L. 361, 378 (1999) (“The ICTY appellate chamber decision in Tadic, for example, expanded its own jurisdiction and that of other tribunals by enunciating a customary law of war crimes in internal conflicts.”).


70. Tadic Decision, supra note 67, ¶ 129.

71. See, e.g., Prosecutor v. Boskoski & Tarculovski, Case No. IT-04-82-T, Judgment
nal law was no longer limited to conflict between national forces but now had to be distinguished from “banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law.” 72 Reasoning that international humanitarian law should apply as broadly as possible, judges have taken a fairly expansive approach to that distinction, thereby effectively diminishing the gravity required for international adjudication of war crimes. 73

Courts have also taken an expansive view of what constitutes a crime against humanity. In particular, judges have interpreted broadly the requirement that the crimes be part of a widespread or systematic attack. Crimes have been found to be “widespread” when they covered geographic areas as small as twenty kilometers, two communes and a single prison camp. 74 Former ICTY judge Patricia Wald has noted that “[i]n practice . . . the ‘systematic or widespread’ chapeau of crimes against humanity presents no great obstacle to prosecution,” 75 and Payam Akhavan has written that “[r]ecent [ICTY] decisions reveal a temptation to dilute the laws of war in order to criminalize civilian suffering by invoking the broader concept of crimes against humanity.” 76 Akhavan cites the expansive ICTY interpretation of the crime against humanity of deportation, which he argues criminalizes combat. According to the ICTY reading of the crime, even a lawful attack could result in criminal liability if the

72. Id. at ¶ 175 (quoting Prosecutor v. Tadic, Case No. IT-94-1-T, Judgment, ¶ 562 (Int’l Crim. Trib. For the Former Yugoslavia May 7, 1997)).

73. See, e.g., Boskoski & Tarculovski, Case No. IT-04-82-T, ¶¶ 197, 239, 292 (stating that Common Article 3 reflects basic humanitarian protections such that a party to an armed conflict “only needs a minimal degree of organization to ensure their application” and finding that armed conflict existed despite low number of casualties and limited organization of one party); Prosecutor v. Gotovina, Case No. IT-06-90-PT, Trial Chamber, Decision on Several Motions Challenging Jurisdiction, ¶ 31 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 19, 2007) (“Moreover, the ‘in armed conflict’ requirement has been interpreted broadly in the jurisprudence of the Tribunal. While requiring, for the purposes of Article 5, the existence of an armed conflict at the time and place relevant to the indictment, the jurisprudence does not require a ‘material nexus’ between the armed conflict and the acts of the accused.”).


75. Id. at 630.

combatant should have foreseen that the attack would cause civilians to flee. William Schabas has even suggested that according to the ICTY's approach the crimes committed during the London riots of August 2011 would meet the definition of crimes against humanity.

The ICTR and ICTY have also taken a broad approach to interpreting the catchall crimes of “other inhumane acts” and the crime of persecution. For example, the ICTR has controversially ruled that hate speech can constitute persecution as a crime against humanity. All of these developments at least arguably reduce the gravity required for crimes against humanity.

Although the ICC’s jurisprudence is limited, early indications suggest that ICC judges may hew to the expansionist example set by the other tribunals. For example, in its first effort to interpret the Rome Statute’s requirement that crimes against humanity be committed pursuant to a state or organizational policy, the court held that groups of loosely coordinated political leaders and businessmen qualified as “organizations.”

One judge, however, took the view that organizations must be “state-like” to fulfill the contextual requirement for crimes against humanity. Claus Kress writes that the decision “follows a tendency in the more recent international case law to downplay the significance of the contextual requirement of crimes against humanity.” Interestingly, not only have the ICC judges taken an expansive view of the organizational policy requirement, but the judges of other tribunals have refused to adopt the requirement at all, even after it was enshrined in the Rome Statute.

77. Id. at 22–23.
83. See, e.g., ICTY Statute, supra note 14, art. 5 (not requiring organizational policy element for crimes against humanity); see also Prosecutor v. Kunarac, Case No. IT-96-23/1-A, Appeals Chamber Judgment, ¶ 98 (Int’l Crim. Trib. for the Former Yugoslavia June 12,
Even the definition of genocide, the crime spawned by the Holocaust, has been broadly interpreted in some respects. In the *Jelisic* case, the ICTY Appeals Chamber judges held that no plan or policy to commit widespread or systematic crimes is required for a genocide conviction—a lone madman can be convicted of genocide.\(^8\) This expansive view of the crime led the ICTY to conclude controversially that genocide was committed in the city of Srebrenica even though there was little evidence of a plan or policy to destroy a group in whole or in part.\(^8\)

In holding the Srebrenica massacre to be genocide, the ICTY judges appear to have expanded the meaning of genocide in another way as well: they seem to contemplate that genocide can be committed through “the partial destruction of a relatively small community.”\(^8\) The ICTY’s approach to genocide seems to have been influenced by the gravity of the crimes committed at Srebrenica, which the judges describe as an “unspeakable human evil.”\(^8\) In another judgment, the ICTY further expanded the scope of genocide by holding that it can be committed when there is only forcible transfer of a population, rather than its physical destruction.\(^8\)

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85. *See* Schabas, *supra* note 32, at 957–58 (citing and discussing Prosecutor v. Krstic, Case No. IT-98-33-T, Judgment (Int’l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001); Prosecutor v. Krstic, Case No. IT-98-33-A, Judgment (Int’l Crim. Trib. For the Former Yugoslavia Apr. 19, 2004); Prosecutor v. Blagojevic, Case No. IT-02-60-T, Judgment (Int’l Crim. Trib. for the Former Yugoslavia Jan. 17, 2005); and Prosecutor v. Blagojevic, Case No. IT-02-60-A, Judgment (Int’l Crim. Trib. for the Former Yugoslavia May 9, 2007)). In his discussion, Schabas notes that the ICTY concluded that the massacre at Srebrenica was part of a “plan” formulated by a State or quasi-state entity. *Id.* However, Schabas goes on to note that the evidence actually presented in the Srebrenica cases failed to establish anything approaching a state plan or policy; instead, the evidence showed that the execution plan was a last-minute, hastily organized action, created and implemented by a single general and his closest cohorts. *Id.* at 958.


Although the ICC judges have yet to rule on the meaning of genocide, some have criticized their decision to allow genocide charges against Sudanese president Al Bashir as contemplating a low evidentiary threshold for the specific intent requirement of the crime. These developments at the ICTY and ICC evidence a tendency to include within the definition of genocide crimes that are less serious than the crimes previously given that label.

The contours of international criminal law’s subject matter have also been developing through the actions of the ICC prosecutor. Luis Moreno-Ocampo, the Court’s first prosecutor, took a generally broad view of the types of situations that the Court can investigate and prosecute. In so doing, he extended the ICC’s reach beyond situations like those that formed the backdrop for the Court’s creation: the Holocaust, the Rwandan genocide and the conflict in former Yugoslavia.

Moreno-Ocampo declined to act on the basis of insufficient gravity in only one situation: the war crimes of British soldiers in Iraq. In all others, the prosecutor either opened an investigation or left unresolved the question of exercising jurisdiction either by letting the matter simmer at the “preliminary examination” stage or remaining silent. Moreover, the Office of the Prosecutor has articulated a policy of opening a “preliminary examination” of any situation brought to its attention by any source.

Of the fourteen situations the Prosecutor’s office is currently prosecuting, investigating or examining, several involve a much
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more limited scope of harm than that addressed by prior international tribunals. One situation in South Korea concerns the shelling of an island that resulted in the death of four people and the sinking of a warship that killed forty-six. Another situation pertains to a coup d’état in Honduras that caused six deaths and two instances of sexual violence. The situation in Guinea involved dozens of rapes and between 150 and 200 killed. Given that these situations remain at the preliminary examination stage, the prosecutor may yet conclude that they are not sufficiently serious to warrant ICC prosecution. Nonetheless, the fact that the prosecutor considers these situations potential candidates for international adjudication indicates an expansive approach to the exercise of international jurisdiction. Moreover, in two of the situations where the Court has opened an investigation—Libya and Kenya—the numbers of people directly harmed are also significantly lower than in situations that had previously been deemed legitimate subjects of international criminal adjudication.

seventeen situations, that number includes those that have led to the opening of investigations (Uganda, DRC, CAR, Darfur, Kenya, Cote d’Ivoire and Libya), and those dismissed (Venezuela, Iraq and Palestine). See OTP-ICC, Communications, Referrals and Preliminary Examinations, INTERNATIONAL CRIMINAL COURT (last visited Sept. 6, 2012), available at http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Comm+and+Ref/.


94. ICC-OTP, supra note 93.


97. Compare Kress, supra note 82, at 856 (describing violence in Kenya as resulting in over 1,000 killings, almost 1,000 rapes and between 3,000 and 4,000 acts of serious injury),
Finally, as already mentioned, the U.N. Security Council created the Lebanon Tribunal to adjudicate the killing of essentially one person.\textsuperscript{98} While the number of victims is but one indicator of gravity, neither the prosecutor nor anyone else has attempted to argue that these situations are as serious as their predecessors by, for example, referencing other potential indicators of gravity such as the broader impact of the crimes beyond the immediate victims.

\textbf{ii. Decreasing Culpability}

International criminal courts have also adopted expansive approaches to grounds of liability. Two doctrines have been particularly controversial: joint criminal enterprise (JCE) and superior responsibility. In the \textit{Tadic} case, the ICTY Appeals Chamber declared that liability for international crimes can be based on participation with others in a common criminal purpose.\textsuperscript{99} The idea of such common purpose liability is not in itself remarkable since it is found in many criminal justice systems, but the ICTY judges went further, asserting that common purpose liability extends to the foreseeable crimes of co-conspirators—the so-called “extended” form of JCE or JCE Three.\textsuperscript{100}

\textsuperscript{98} S.C. Res. 1757, Annex, U.N. Doc. S/RES/1757 (May 30, 2007) (establishing “a tribunal of an international character to try all those who are found responsible for the terrorist crime which killed the former Lebanese Prime Minister Rafiq Hariri and others”).


\textsuperscript{100} Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment, ¶¶ 204, 228 (Int’l Crim. Trib.
This mode of liability, although permitted in some national systems,\textsuperscript{101} has been widely criticized as departing from well-accepted principles of culpability.\textsuperscript{102} Under JCE Three, a defendant who shared in a criminal purpose can be convicted of a vast number of crimes flowing from that purpose even if the defendant was completely unaware of the crimes themselves. Additionally, the common criminal purpose is often defined in very general terms,\textsuperscript{103} which means that a defendant can be convicted of a crime requiring a high level of culpability such as genocide without possessing the required specific intent.\textsuperscript{104}

Indeed, the doctrine has the effect of lowering the \textit{mens rea} for many international crimes to recklessness or, in some situations, negligence.\textsuperscript{105} In adopting this doctrine, the ICTY judges appealed to the gravity of the crimes within their mandate. They reasoned that the ICTY statute aimed to bring to justice “all those who have engaged in serious violations of international humanitarian law, whatever the manner in which they may have perpetrated, or participated in the perpetration of those violations.”\textsuperscript{106}

Although JCE originated with the ICTY, it is now widely applied by international courts and a related doctrine is available to the ICC.\textsuperscript{107} In fact, a growing number of international criminal convic-

\begin{itemize}
\item \textsuperscript{101} Danner & Martinez, \textit{supra} note 99, at 109; Pinkerton v. United States, 328 U.S. 640 (1946) (permitting attribution of liability for one conspirator’s criminal acts to all members of a conspiracy).
\item \textsuperscript{103} See Danner & Martinez, \textit{supra} note 99, at 107–09 (describing expansive definition often given to JCE by prosecutors and courts).
\item \textsuperscript{104} Robinson, \textit{supra} note 102, at 941.
\item \textsuperscript{105} Turner, \textit{supra} note 64, at 561.
\item \textsuperscript{106} Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment, ¶¶ 189–190 (Int’l Crim. Trib. For the Former Yugoslavia July 15, 1999). \textit{See also} Danner & Martinez, \textit{supra} note 99, at 132 (noting that the Appeals Chamber essentially determined that punishment should extend to all those who have “perpetrated especially serious violations of victims’ human rights, since all of the crimes within international criminal law constitute serious violations of international human rights law”).
\item \textsuperscript{107} Prosecutor v. Karemera, Case No. ICTR-98-44-I, Amended Indictment (Aug. 24, 2005); Prosecutor v. Taylor, Case No. SCSL-2003-01, Indictment, ¶¶ 23–25 (Mar. 7, 2003); Danner & Martinez, \textit{supra} note 99, at 156 (describing use of “common purpose language” in East Timor indictments). The Extraordinary Chambers in the Courts of Cambodia recently rejected the doctrine on the grounds that it was not part of customary international law at the time the Khmer Rouge crimes were committed. \textit{See} Decision on the Appeals
tions rely on this theory of liability.\textsuperscript{108} In a particularly controversial decision, the Special Court for Sierra Leone convicted defendants based on a JCE theory even though the common purpose was not criminal.\textsuperscript{109} The judges held that it was sufficient that the defendants contemplated committing crimes as a means of obtaining the legal objective of regime change.\textsuperscript{110} Defendants convicted under such theories of liability are almost certainly less culpable than the typical international defendant who has perpetrated or ordered the commission of crimes.

Another controversial form of liability that international courts apply permits conviction of superiors who knew or should have known their subordinates had committed or were committing crimes and failed to prevent the crimes or punish the perpetrators.\textsuperscript{111} The superiors are thus held liable for crimes in which they took no

\textsuperscript{108} See Danner & Martinez, supra note 99, at 107–08; Turner, supra note 64, at 561 (noting 64\% of ICTY indictments filed between June 15, 2001 and January 1, 2004 explicitly relied on JCE and 81\% relied on it implicitly). Turner went on to note that as of December 2007, 48\% of all ICTY indictments explicitly relied on JCE. \textit{Id}. At the ICTR, as of December 2007, though only thirteen out of eighty-five indictments were grounded in JCE, fifty-five of these indictments (65\%) included a conspiracy count. \textit{Id}. at 561–62.

\textsuperscript{109} Prosecutor v. Brima, Kamara & Kanu, Case No. SCSL-2004-16-A, Appeals Chamber, Judgment, ¶ 80-82 (Feb. 22, 2008). Commentators have criticized the SCSL for extending the doctrine this far. See Wayne Jordash & Penelope Van Tuyl, \textit{Failure to Carry the Burden of Proof: How Joint Criminal Enterprise Lost its Way at the Special Court for Sierra Leone}, 8 J. INT’L CRIM. JUST. 591, 603 (2010).

\textsuperscript{110} Prosecutor v. Brima, Kamara & Kanu, Case No. SCSL-2004-16-A, Appeals Chamber, Judgment, ¶ 80 (Feb. 22, 2008) (reasoning “that the requirement that the common plan, design or purpose of a joint criminal enterprise is inherently criminal means that it must either have as its objective a crime within the Statute, or contemplate crimes within the Statute as the means of achieving its objective”).

\textsuperscript{111} See, e.g., Rome Statute, supra note 2, art. 28.
part on the grounds that they had a duty they failed to perform. Such liability for omissions is controversial and generally requires at least recklessness on the part of defendants, yet some international courts have extended the doctrine, suggesting that even negligent failures to prevent or punish may be international crimes.

Some international judges have also taken an expansive approach to the actus reus element of superior responsibility. For example, in the Oric case, an ICTY Trial Chamber interpreted the term “committed” to allow superior liability for a subordinate’s acts or omissions that aid or abet crimes. International courts have also extended this theory beyond military superiors to civilian leaders. Commentators have thus expressed concern that international courts

112. See Danner & Martinez, supra note 99, at 121 (“Liability for serious crimes based on omissions, let alone negligent omissions, is unusual in criminal law.”).

113. See Jenny S. Martinez, Understanding Mens Rea in Command Responsibility: From Yamashita to Blaskic and Beyond, 5 J. Int’l Crim. Just. 638, 650–53 (2007) (citing post-World War II cases in which courts appeared to establish negligent failure to obtain knowledge as the mens rea of command responsibility). For example, in the Tokyo War Crimes Trial, in which twenty-eight Japanese military and civilian officials were tried, the International Military Tribunal for the Far East held that liability for command responsibility would attach if a superior either “had knowledge that such crimes were being committed, and having such knowledge [he] failed to take such steps as were within [his] power to prevent the commission of such crimes in the future,” or “should, but for negligence or supineness, have had such knowledge . . . .” Id. at 652 (citing 20 THE TOKYO WAR CRIMES TRIAL, THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST, Judgment, Official Transcript, Annex A-6, 444–48 (1981)) (emphasis added). The ICC statute also contains language indicating negligence may suffice. Rome Statute, supra note 2, art. 28 (imposing criminal responsibility upon a military commander where the commander “either knew or, owing to the circumstances at the time, should have known” that forces under his command and control were committing, or were about to commit, crimes within the ICC’s jurisdiction).


may be basing convictions for crimes that are considered especially heinous on the lowest form of culpability. Such convictions reflect a dilution of the culpability aspect of gravity.

In sum, there is ample evidence that international criminal law has expanded since its inception, largely in a direction of diminished gravity, however that concept is understood. Ironically, due to its malleability, the concept of gravity has often been employed to justify the very doctrines that tend to dilute the gravity of international crimes.

B. Predicting Continued Expansion

Many of the judicial developments discussed above reflect the work of the ICTY and, to a lesser extent, the ICTR. Indeed, the ICTY claims as one of its accomplishments that it has “expanded the boundaries of international humanitarian and international criminal law.” Now that the ad hoc tribunals are completing their work one might be tempted to conclude that such expansion will diminish or even stop. But there are reasons to predict continued growth: specifically, the broad goals international criminal courts seek to pursue and the professional and institutional incentives operating at such courts. Unless political actors curtail expansion by, for example, imposing a narrow definition of the gravity required for international adjudication, these forces are likely to continue to push international courts to adjudicate less and less serious violations.

i. The Broad Goals of International Criminal Courts

The broad goals that international criminal courts pursue foster the expansion of their mandates. The ICC, for example, is said to be an instrument of deterrence and prevention, peace and reconciliation, retribution, and restorative justice. Deterrence or, more broadly, prevention is usually cited as the principal goal of the

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116. See, e.g., Ambos, supra note 114, at 176; Martinez, supra note 113, at 642.


Court. But what is the Court supposed to try to prevent? Certainly it is intended to prevent crimes as serious as the atrocities that motivated its creation—the Holocaust, the Rwandan genocide and ethnic cleansing in the former Yugoslavia in particular.

But why stop there? If international prosecution can prevent even a small number of killings, why not include such killings in its jurisdiction? Without a clear conceptual or doctrinal limitation, whether in the form of gravity or otherwise, the goal of preventing crimes pushes in favor of expansion. International courts can, for example, deter more crimes by interpreting expansively the requirements of “armed conflict” for war crimes and the “widespread or systematic” elements of crimes against humanity.

Likewise, if international prosecutions can serve to promote peace and to reconcile communities, it makes sense to stretch doctrines to include any prosecutions necessary to accomplish these goals. For example, since many people believe reconciliation requires prosecuting both sides of a conflict even when one side has committed significantly less serious crimes, a court may be tempted to interpret its jurisdiction broadly to reach the lesser crimes.

Finally, restorative justice goals mitigate in favor of prosecuting a wide range of crimes emerging out of a conflict, no matter how serious. Through exemplary prosecutions of the various types of crimes committed, such courts can attempt to restore large numbers of victims despite the inability of such courts to prosecute large numbers of perpetrators.

Moreover, the ICC does not merely seek to accomplish these goals directly but also indirectly by stimulating national prosecutions. Moreno-Ocampo has interpreted his mandate to include so-called “positive complementarity”: taking proactive steps to encourage na-

119. Errol P. Mendes, Peace and Justice at the International Criminal Court: A Court of Last Resort 143 (2010) (noting that the Rome Statute’s preamble is often “interpreted as meaning that deterrence as a fundamental principle of international criminal justice is a goal of the ICC”); Mirjan Damaksa, What is the Point of International Criminal Justice?, 83 Chi.-Kent L. Rev. 329, 344 (2008) (noting that deterrence has been accorded “pride of place” among the objectives of international criminal courts).


121. Turner, supra note 64. See Damaška, supra note 119, at 332 (“It is believed that retribution exacted from a few individuals will promote group reconciliation.”).
tional courts to prosecute. This vision of the ICC’s complementarity function also encourages a broad view of its jurisdiction since the obligation of national governments to prosecute is not restricted to war crimes, crimes against humanity and genocide. Instead, human rights law increasingly mandates that national courts prosecute all serious violations of human rights. The Inter-American Court of Human Rights has held that states must investigate and prosecute serious human rights violations such as killings and forced disappearances.

That court has even gone so far as to order states to take particular steps to fulfill this obligation. The European human rights system, though more deferential to national governments in terms of compliance, has also seen an increase in efforts to ensure national prosecutions of human rights violations. Positive complementarity therefore suggests that the ICC should interpret its jurisdiction broadly to encourage national prosecutions of as many crimes as possible.

ii. Identities and Incentives of International Judges and Prosecutors

Additional reasons to predict the continued expansion of international criminal law include the identities and incentives of its primary actors. Many judges and prosecutors at international courts view themselves as functionaries of the broader human rights movement. Indeed, experience in human rights law is an important quali-


fication for these jobs. This is not surprising since international criminal law grew out of the human rights movement.

As Darryl Robinson has persuasively argued, the human rights-promoting identities of the regime’s actors have fostered an expansionist approach to international criminal law. Indeed, he points out that the human rights agenda not only helps to explain why international criminal law shows expansive tendencies, it provides a means for such expansion. Judges justify expansive doctrines through interpretive approaches borrowed from the human rights context and conflate human rights norms with international criminal law norms.

International prosecutors and judges are also connected to human rights advocacy networks that influence their work. Such networks often push strongly for expansion. For example, activists and politicians have labeled a variety of activities “crimes against humanity,” including the failure to reduce greenhouse gas emissions and the production of biofuel. Others have advocated for expan-

126. See Rome Statute, supra note 2, art. 36(3)(b)(ii); Allison Danner & Erik Voeten, Who is Running the International Criminal Justice System?, in WHO GOVERNS THE GLOBE? 37 (Deborah D. Avant, Martha Finnemore & Susan K. Sell, eds., 2010) (“[I]t appears that governments have arrived at a common understanding of what the background for an international criminal judge should be: a national-level appellate judge with extensive international human rights experience.”).
127. See Robinson, supra note 102.
128. Id. at 946.
129. Id. at 946–47.
130. See Daniel Terris et al., Toward a Community of International Judges, 30 LOY. L.A. INT’L & COMP. L. REV. 419, 460 (2008) (“For judges with a human rights background, th[e] pressure [to convict] comes with a considerable irony. Many of them spent earlier parts of their careers protecting the rights of defendants in national courts, holding military organizations, police departments and justice systems accountable for their violations of fairness and justice. Now, as judges on international criminal courts, they can find themselves pressured by erstwhile colleagues to give primary attention to the rights of victims, rather than those in the dock.”).
sive interpretations of crimes against humanity to include opportunistic harms perpetrated by individuals, such as violence against female forced migrants and crimes by peacekeepers.132 Such efforts undoubtedly influence actors at international courts at least some of the time. For example, Moreno-Ocampo’s decision to seek a genocide charge against President Bashir in the face of significant expert opinion that the conflict in Darfur did not meet the legal requirements of the crime133 was likely affected by the many advocacy efforts to label the Darfur situation “genocide.”134

In addition to their identification with the human rights movement, international judges and prosecutors experience various incentives to interpret their mandates broadly. First, there are emo-
tional incentives. Faced with defendants who have killed, raped, or tortured others and the knowledge that an acquittal means likely impunity judges are understandably tempted to stretch the definitions of crimes to include the evil before them. Second, international judges and prosecutors experience desires for prestige, career advancement or even pecuniary gain that may motivate them to approach their mandates liberally. Expansive jurisdiction can contribute to a judge or prosecutor’s sense of the importance of her work. As one author wrote in the similar context of federal prosecutors encroaching on state jurisdiction: “Like Nature, the federal prosecutor abhors a vacuum. Given a statutory grant of jurisdiction, he will seek to bring within it any offense he finds unattended or even, in his view, inadequately attended.”

These incentives, along with the broad goals of international courts, will likely continue to foster the expansion of international criminal law, at least in the absence of firm contrary pressure.

III. THE CONSEQUENCES OF EXPANSION

To the extent commentators have remarked upon the expansion of international criminal law, their reactions have tracked the broader debates about the value of the regime. Those debates tend to revolve around absolutes. Proponents assert that international criminal courts deter atrocities, while opponents vilify them as anti-

135. Relatedly, studies indicate that the greater the harms, the stronger the pull toward conviction. Robinson, supra note 102, at 929 (citing J.K. Robbennolt, Outcome Severity and Judgments of “Responsibility”: A Meta-Analytical Review, 30 J. APPLIED SOC. PSYCHOL. 2575 (2000); J. Lucas, C. Graif & M. Lovaglia, Misconduct in the Prosecution of Severe Crimes: Theory and Experimental Test, 69 SOC. PSYCHOL. Q. 97 (2006)).


democratic\textsuperscript{140} and counter-productive.\textsuperscript{141} The regime’s expansion is therefore cited by one side as a victory for human rights over sovereignty\textsuperscript{142} and by the other as a threat to international order and democracy.\textsuperscript{143}

This Article takes a more nuanced position, arguing that the expansion of the regime raises concerns related to both sovereignty and defendants’ rights that should worry even its most ardent supporters. When international courts adjudicate marginal situations and cases they may unjustifiably privilege the international community’s interest in accountability over states’ interests in exclusive authority and defendants’ interests in fairness.

A. Expansion’s Consequences for Sovereignty

International criminal law comes into conflict with state sovereignty in several ways. First, and most importantly, it sometimes permits criminal prosecutions despite the objection of the states where the crimes were committed and had their most significant impact.\textsuperscript{144} Second, when such prosecutions proceed, states are sometimes required to execute arrest warrants issued by international...
courts. Third, international courts do not respect the immunity of sovereigns or apply amnesties adopted under domestic law. Finally, there is some authority suggesting that international courts can exercise jurisdiction over defendants abducted from non-compliant states under the theory of male captus bene detentus. In justifying these practices, judges and prosecutors explicitly or implicitly rely on the gravity of the crimes at issue.

The conflict between accountability and sovereignty is most dramatic when the ICC adjudicates a situation in the territory of an objecting non-party state. When the Court acts in a situation involving an objecting state party the tension between these values is less significant because the state relinquished some of its decision-making authority when it joined the Court. Nonetheless, even under those circumstances international criminal law is privileging accountability over the desires of (sometimes) democratically-elected representatives of a political community.

Thus far, the ICC has proceeded in three situations over the objection of the states where the crimes occurred: Kenya (a state party), Sudan and Libya (non-party states). In each case, the prosecutor and judges invoked the gravity of the situation to justify the decisions to proceed without engaging in substantial analysis or balancing competing interests.

145. Rome Statute, supra note 2, art. 89 (state parties shall comply with ICC requests for arrest and surrender); ICTY Statute, supra note 144, art. 29 (states shall comply with requests for assistance issued by a trial chamber of the ICTY, including the arrest or detention of persons); ICTR Statute, supra note 144, art. 28 (states shall comply with requests for assistance issued by a trial chamber of the ICTR, including the arrest or detention of persons); see also Zhu Wenqi, On Co-operation by States Not Party to the International Criminal Court, 88 INT’L REV. RED CROSS 87, 108 (2006) (claiming that cooperation with the ICC by both party and non-party states is now obligatory due to customary international law).

146. ICTR Statute, supra note 14, art. 6(2); ICTY Statute, supra note 14, art. 7(2); Rome Statute, supra note 2, art. 27.


148. Under this doctrine, a defendant may be detained and tried even though the defendant’s capture was illegal. Prosecutor v. Nikolic, Decision on Interlocutory Appeal Concerning Legality of Arrest, Case No. IT-94-2-PTAR73, ¶ 24, 26 (Int’l Crim. Trib. for the Former Yugoslavia June 5, 2003).

149. See Morris, supra note 1400 (explaining how ICC efforts to extend jurisdiction over non-party states is more problematic than similar efforts for state parties).

150. Id. at 596.

151. See Situation in the Republic of Kenya, Case No. ICC-01/09, Decision Pursuant to
The determination that the Darfur situation was sufficiently serious for international adjudication was uncontroversial given the scope of atrocities there, which some commentators had labeled genocide. The matter was somewhat more complex for Libya where the numbers killed were estimated to be in the hundreds, but the decision was bolstered by Gaddafi’s threats to commit additional crimes.152

The appropriateness of international adjudication is most questionable in the Kenya situation, which involved a relatively brief episode of post-election violence. The numbers harmed were much lower than in situations previously subjected to international adjudication153 and one ICC judge concluded that the crimes were not sufficiently organized to constitute crimes against humanity.154 Moreover, the objecting government purports to be democratic and asserts that it intends to pursue national prosecutions as soon as the relevant institutions can be put in place.155 Indeed, the government of Kenya has established a truth commission that investigated the crimes.156

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152. Decision on the “Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi,” Situation in the Libyan Arab Jamahiriya, Case No. ICC-01/11, ¶ 94 (June 27, 2011) (concluding that Gaddafi’s arrest was necessary to “prevent him from continuing to use his power and absolute control over the Libyan State apparatus to continue the commission of crimes within the jurisdiction of the Court”).

153. See supra note 97 and accompanying text (comparing the number of people harmed in Kenya and Libya with the number of people harmed in Darfur and the DRC).


The Kenya situation thus illustrates the sovereignty problems that can result from an expansive approach to the exercise of international jurisdiction. It is at least arguable that the Kenyan government’s interest in retaining exclusive jurisdiction to investigate and prosecute the crimes (or perhaps choose an alternate path such as a truth commission) should have outweighed the international interest in ICC prosecution. Such conflicts between the interests of sovereign states and those of the international community in international prosecution will increase in intensity if the expansion of international criminal law discussed above continues.

The conflict with sovereignty also arises when international courts invoke the concept of gravity to reject defenses based on sovereign immunity. In explaining the decision to deny former Liberian president Charles Taylor immunity, the SCSL relied in part on “the nature of the offenses for which jurisdiction was vested in these [ad hoc international] tribunals”—an implicit reference to gravity. As Charles Jalloh has written, the Taylor decision is seen as proof that the “long arm of international criminal law [can] extend to reach the most powerful state official, so long as that person commits crimes that shock the conscience of the international community.”

In rejecting a similar claim in the case of former Yugoslav president Milosevic the ICTY quoted the House of Lords’ decision in the Pinochet case that “[i]n future those who commit atrocities against civilian populations must expect to be called to account if fundamental human rights are to be properly protected.” The anti-immunity doctrine is thus rooted in the widely accepted view that no one should be exempt from punishment for the sorts of crimes that have typically concerned international courts in the past—large-scale

157. Prosecutor v. Taylor, Case No. SCSL-03-01-I, Decision on Immunity from Jurisdiction, ¶ 49 (May 31, 2004) (“The nature of the offences for which jurisdiction was vested in these various tribunals [i.e. the ICTY, ICTR, ICC, and Tokyo and Nuremberg International Military Tribunals] is instructive as to the circumstances in which immunity is withheld.”).


human rights abuses often labeled “atrocities.”

As the subject matter of international courts expands, however, it becomes less clear that accountability should trump concerns related to international order. As the ICJ has explained, sovereignty immunity is rooted in the need for state officials to be able to perform their functions without fear of arrest.\textsuperscript{160} It is in the interest of the international community as a whole and of individual states that persons representing states be able to travel freely. But when an official is suspected of committing genocide or other widespread human rights abuses, the value of enabling that person to conduct state business pales in comparison to the need to hold them accountable for their crimes.

The balance may tip the other way for less serious crimes, however. Imagine, for example, a head of state accused of superior responsibility for a single war crime of disproportionately destroying enemy property. Assuming the state is a party to the ICC Statute and the other jurisdictional requirements are met, the Court may adjudicate the crime. But it is far from clear that the ICC \textit{should} adjudicate the crime rather than respecting the state’s right to conduct its business through its elected representatives. In general, then, as gravity decreases, other values may outweigh the value of international prosecution.

Similarly, the developing norm that international courts disregard domestic amnesties is justified largely by reference to the gravity of the crimes such courts adjudicate. Although still controversial,\textsuperscript{161} international law increasingly supports the view that amnesty is not permitted for international crimes and that when national systems grant such amnesties, international courts will ignore them.\textsuperscript{162} The anti-amnesty norm limits state sovereignty by constraining the tools available to political leaders seeking to transition from conflicts and represents a significant shift from long-standing state practice. As Ronald Slye points out, “[a]mnesties of one form or another have been used to limit the accountability of individuals responsible for gross violations of human rights in every major political transition in the twentieth century.”\textsuperscript{163} The Rome Statute does not explicitly address the legality of amnesties but declares in its preamble that all

\textsuperscript{160} Arrest Warrant of 11 April 2000, supra note 159, ¶¶ 54–55.

\textsuperscript{161} \textsc{Antonio Casse}se, \textit{International Criminal Law} 315 (2003).

\textsuperscript{162} See infra notes 162–167 and accompanying text.

states have an obligation to prosecute perpetrators of international crimes.\textsuperscript{164}

Courts applying the anti-amnesty norm rely heavily on the gravity of international crimes as justification. Thus, for example, the SCSL has held that there is a “crystallizing international norm that a government cannot grant amnesty for serious violations of crimes under international law . . . ”\textsuperscript{165} In refusing to respect an amnesty that the government of Sierra Leone had granted to defendants, the SCSL Appeals Chamber noted that several treaties, including the Genocide Convention, require states to prosecute international crimes.\textsuperscript{166} Moreover, while the court recognized that “the grant of amnesty or pardon is undoubtedly an exercise of sovereign power,” it held that

[w]here jurisdiction is universal, a State cannot deprive another State [or an international or hybrid tribunal] of its jurisdiction to prosecute the offender by grant of amnesty. It is for this reason unrealistic to regard as universally effective the grant of amnesty by a State in regard to grave international crimes in which there exists universal jurisdiction.\textsuperscript{167}

In a similar decision, the ECCC refused to respect a pardon granted to one of its defendants.\textsuperscript{168} Again, the court relied on the gravity of the crimes to justify its decision. It stated: “Cambodia . . . continues to have an obligation to ensure that victims of crimes against humanity which, by definition, cause serious violations of human rights, were and are afforded an effective remedy.”\textsuperscript{169} The U.N. Secretary General has also weighed in, rejecting amnesty for serious international crimes.\textsuperscript{170}

\textsuperscript{164} See Rome Statute, supra note 2, art. 3 (“[T]he most serious crimes of concern to the international community as a whole must not go unpunished and . . . their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.”).


\textsuperscript{166} Id.

\textsuperscript{167} Id. at 28.

\textsuperscript{168} Prosecutor v. Ieng Sary, Criminal Case File No. 002/19-09-2007-ECCC/OCIJ (PTC75), Decision on Ieng Sary’s Appeal Against the Closing Order, ¶ 201 (Apr. 11, 2011).

\textsuperscript{169} Id.

Like the denial of immunity in international courts, the ex-
pansion of international crimes raises concerns about the tendency of
such courts to disregard amnesties on the basis of categorical state-
ments of gravity. If international crimes encompass less and less seri-
ous harms and forms of responsibility, it becomes increasingly
problematic to limit the strategies available to states seeking to re-
cover from conflicts.

Take, for example, a situation where both sides have commit-
ted war crimes of the reckless or negligent varieties; that is to say,
they have not intentionally violated the laws of war but have failed
adequately to abide by the principles of proportionality and distinc-
tion. Although such crimes are within the jurisdiction of the ICC, it
is not clear that a state should be required to prosecute their perpetra-
tors rather than granting them amnesty in an effort to secure peace.

A similar problem arises in the context of the legal rules sur-
rounding arrest of defendants. International law generally does not
allow states to abduct residents of other states, even those who have
committed crimes. Nonetheless, the ICTY Appeals Chamber applied
the legal maxim *male captus bene detentus* (wrongly captured,
properly detained) in the *Nikolic* case to justify its exercise of juris-
diction over a defendant who had been abducted. The Appeals
Chamber held that the international community’s interest in adjudicat-
ing serious crimes outweighs the state’s sovereignty interest, stat-
ing:

> [T]he damage caused to international justice by not
> apprehending fugitives accused of serious violations
> of international humanitarian law is comparatively
> higher than the injury, if any, caused to the sovereign-
> ty of a State by the limited intrusion into his territory,
> particularly when the intrusion occurs in default of the
> State’s cooperation. Therefore, the Appeals Chamber
does not consider that in cases of universally con-
demned offences, jurisdiction should be set aside on
the ground that there was a violation of the sovereign-
ty of a State when the violation is brought about by
the apprehension of fugitives from international jus-
tice, whatever the consequences for the international

Concerning Legality of Arrest, ¶¶ 24, 26 (Int’l Crim. Trib. for the Former Yugoslavia June
5, 2003). The U.S. Supreme Court upheld this rule in *Alvarez-Machain v. United States*, 504
responsibility of the State or organization involved.\textsuperscript{172}

The Appeals Chamber based this policy declaration, in part, on state practice, citing the \textit{Eichmann} and \textit{Barbie} cases for support.\textsuperscript{173} In \textit{Eichmann}, the Supreme Court of Israel justified its decision to exercise jurisdiction over a Nazi war criminal abducted from Argentina partially on the grounds that he was charged with “crimes of an universal character . . . condemned publicly by the civilized world.”\textsuperscript{174}

Similarly, in \textit{Barbie}, the French Court of Cassation asserted jurisdiction over the defendant partially because of the “special nature of the crimes ascribed to the accused, namely, crimes against humanity.”\textsuperscript{175} Thus, the ICTY Appeals Chamber identified the seriousness of genocide, crimes against humanity and war crimes as a cognizable basis for refusing to set aside jurisdiction in forcible abduction cases.\textsuperscript{176}

The \textit{Nikolic} judgment has been criticized for elevating the prosecution of “core international crimes” above other considerations, such as abuse of process.\textsuperscript{177} This concern is magnified if one considers that international crimes are expanding. Even assuming international criminal courts should exercise jurisdiction over cases involving abductees responsible for large-scale harm, the same may not be true for those who commit isolated crimes or crimes that inflict relatively minor harms.

\textbf{B. Increased Risk of Substantive Unfairness to Defendants}

The concept of gravity is also invoked to justify relaxing the

\begin{itemize}
  \item[173.] \textit{Id.} ¶ 9.
  \item[174.] Attorney-General of Israel v. Eichmann, 36 I.L.R. 277 (Sup. Ct., 1962).
  \item[176.] \textit{Id.} ¶ 24. The ICTY Appeals Chamber may have misconstrued the \textit{Eichmann} and \textit{Barbie} courts’ invocation of the nature of the alleged offenses in their respective cases. In Robert Currie’s view, the courts looked to the seriousness of the crimes in question to justify their exercise of \textit{substantive}, not personal, jurisdiction over extra-territorial offenses. Robert J. Currie, \textit{Abducted Fugitives Before the International Criminal Court: Problems and Prospects}, 18 CRIM. L.F. 349, 370 (2007).
  \item[177.] \textit{E.g.}, Currie, \textit{supra} note 176, at 356, 370 (describing this expansion of international criminal law as “truly break[ing] new ground”).
\end{itemize}
legal rules that protect defendants. Indeed, a Latin maxim holds that “in delictis atrocissimis jura transgredi liceat” (with atrocious crimes, legal rules can be relaxed). Thus, for example, courts have invoked gravity to reject defenses based on the principle of legality—or *nullum crimen sine lege*. That principle is designed to provide notice to defendants of the types of conduct that are punishable and thus ensure the fair application of the law.

International courts have repeatedly denied defendants’ legality defenses at least partly on the grounds that the crimes at issue were so serious that the defendants should have known of their illegality. For example, in the *Tadic* case, the ICTY Appeals Chamber stated that defendants could be held liable under the newly minted theory of joint criminal enterprise because “the moral gravity of such participation is often no less—or indeed no different—from that of those actually carrying out the acts in question.” Similarly, when defendants at the ICTR objected that applying the new doctrine in the context of internal armed conflicts violated the principle of legality, the trial chamber replied that “any potential perpetrator was able to understand that the criminalization of acts of such gravity did not depend on the international or internal nature of the armed conflict.”


179. *See, e.g.*, NUREMBERG, *supra* note 20, at 444 (“[I]t is to be observed that the maxim ‘*nullum crimen sine lege*’ is not a limitation on sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring States without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished.”); Prosecutor v. Milutinovic, Sainovic & Ojdanic, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanic’s Motion Challenging Jurisdiction: Joint Criminal Enterprise, ¶ 37–42 (Int’l Crim. Trib. for the Former Yugoslavia May 21, 2003) (rejecting defense of *nullum crimen sine lege*, in part, because of grievous nature of accused’s actions). *See* Van Schaack, *supra* note 20, at 134–35 (2008) (citing, among other authorities, Prosecutor v. Delalic, Mucic, Delic & Landzo, Case No. IT-96-21-T, Judgment, ¶ 403 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998)).


The SCSL used similar reasoning in convicting defendants retroactively of the newly codified crimes of enlisting child soldiers and forced marriage.\textsuperscript{182}

In an important article on the principle of legality in international criminal law, Beth Van Schaack defends the tendency of international courts to elide the principle of legality on the grounds that defendants are not deprived of notice because international crimes generally have analogues in national law.\textsuperscript{183} She argues that defendants are not prejudiced as long as courts follow national sentencing practices for analogous crimes.\textsuperscript{184} But as international criminal law expands it increasingly reaches conduct that is not criminal in most domestic systems including, for example, the crime of enlisting child soldiers and liability under the expanded theory of joint criminal enterprise.\textsuperscript{185} Indeed, Kai Ambos has argued that the ICTY’s expansive interpretation of superior responsibility has denied defendants fair notice of the law.\textsuperscript{186} Moreover, as Shahram Dana has noted, international sentences do not always comport with national practice.\textsuperscript{187} Finally, even when a domestic analogue exists, international conviction may be unfair to defendants in that it may carry a substantially greater moral stigma.

Even more troubling than concerns about the principle of legality are recent findings that judges at international criminal courts tend to apply a standard of proof below the conventional “beyond a reasonable doubt.” Professor Nancy Combs conducted a large-scale review of transcripts from proceedings at the ICTR, SCSL and Special Panels for East Timor and discovered that those courts routinely convict defendants on the basis of highly unreliable evidence.\textsuperscript{188} In particular, such convictions often rest on witness testimony that is riddled with inconsistencies. Combs presents evidence that over fifty

\textsuperscript{183.} Van Schaack, supra note 20, at 168.
\textsuperscript{184.} \textit{Id.} at 124.
\textsuperscript{185.} \textit{See supra} notes 98–110 and accompanying text.
\textsuperscript{186.} Ambos, supra note 114, at 178.
percent of prosecution witnesses at these courts testified in ways that were inconsistent with their pre-trial statements.189 In fact, her findings suggest that a shockingly high number of such witnesses may be lying.190 Combs concludes that the reliance of international courts on such questionable evidence indicates they are applying a burden of proof lower than “beyond a reasonable doubt.”191

Although clearly concerned about the implication of her findings for defendants’ rights, Combs nevertheless suggests that the lower burden of proof at international courts may be acceptable when such courts convict leaders of organizations committing serious crimes.192 Proof of leadership in a criminal organization responsible for serious crimes may substitute for evidence that a particular defendant committed a particular crime on a particular date. As international criminal law expands, however, international courts will not limit their exercise of jurisdiction to leaders of criminal organizations. Indeed, in the Kenya situation one of the judges has questioned whether any such organization existed.193 If international judges become accustomed to applying loose standards of proof there is reason to be concerned about their fairness to at least some defendants.

Finally, judges justify relaxed criminal procedures by invoking the gravity of the crimes at issue.194 For example, defendants are subject to lengthy pre-trial detention and denied provisional release in part based on the gravity of the crimes alleged.195

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189. Id. at 5.
190. Id. at 6.
191. Id. at 364.
192. Id. at 244.
193. See Situation in the Republic of Kenya, Case No. ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Dissenting Opinion of Judge Hans-Peter Kaul, ¶ 150 (Mar. 31, 2010) (“While I accept that some of the violence appears to have been organized and planned in advance, I fail to see the existence of an ‘organization’ behind the violent acts which may have established a policy to attack the civilian population within the meaning of article 7(2)(a) of the Statute.”). Moreover, at least for the ICC, there are good reasons to argue that the exercise of jurisdiction should not be limited to leaders of criminal organizations. See generally deGuzman, Choosing to Prosecute, supra note 10 (arguing that the ICC’s focus should be on expressing moral norms through a small number of illustrative prosecutions).
195. Id. at 33. See also Johan David Michels, Compensating Acquitted Defendants for Detention before International Criminal Courts, 8 J. INT’L CRIM. JUST. 407, 415 (2010) (citing Prosecutor v. Delalic, Case No. IT-96-21-A, Decision on Motion for Provisional
Damaška has written that such “departures by international criminal tribunals from domestic standards of fairness” may be justified in part by “the atrocity of crimes they process.” Damaska’s stance is premised on his view that the jurisdiction of international courts “is reserved for some of the most horrendous crimes imaginable, and... these tribunals are specifically charged with ending the impunity of the most responsible perpetrators of these crimes.” As this paper has sought to demonstrate, however, international criminal jurisdiction is not as limited as Damaška presumes, and is likely to expand further in the future. As such, ambiguous invocations of gravity to justify incursions on defendants’ rights are becoming increasingly problematic.

International criminal law’s expansion since Nuremberg and its likely continued expansion thus raise concerns about whether the regime adequately respects the sovereignty interests of states and the fairness interests of defendants.

CONCLUSION

International criminal law is expanding in ways that potentially undermine legitimate sovereignty and individual interests. This is in part because judges and prosecutors employ gravity imprecisely to justify expansive doctrines and practices. With little or no analysis, they declare crimes grave and thus “international,” admissible before the ICC or exempt from the usual rules protecting state or individual interests. Such uses of gravity enable decision makers to avoid addressing the conflicts of interests at stake in their decisions.

The history of international criminal law helps to explain this phenomenon. International criminal law has always been marked by a tension between, on the one hand, international interests—particularly the need for accountability to promote human rights norms—and, on the other hand, sovereignty interests. Gravity has

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197. Id. at 370.
been a convenient tool for mediating this tension. Thus, for example, the international community used gravity’s ambiguity to build the consensus needed to create the ICC.

In many past situations the ambiguity of “gravity” was not problematic because most people agreed that the balance tipped strongly in favor of accountability. As the international criminal law regime expands to address situations and cases closer to the margins, however, it becomes increasingly important to surface the interests at stake in decisions about international adjudication rather than masking them with this ambiguous concept. The process of identifying fully the relevant interests and developing a procedure for balancing them will require substantial effort from the regime’s prosecutors and judges, as well as its various stakeholders, including political leaders.

Part of that process will be to refine the regime’s use of the concept of gravity. Current efforts to understand gravity in the context of decisions about international adjudication focus on identifying factors that, considered collectively, are said to be constitutive of gravity. The problem with such factor-based tests is that when the factors are conceived broadly the test is almost infinitely malleable and when they are narrowed the test constrains the regime in ways that undermine its intended goals.

Thus far, most articulations have been loose. The ICC prosecutor and judges have included in their gravity analyses broadly conceived factors such as the scale of the crimes, the nature of the crimes, the means of their commission and their impact. Such factors do little to alleviate gravity’s ambiguity because they are easily manipulated to reach a desired outcome—usually prosecution. If the number of victims is low the decision-maker can emphasize the broader impact. Likewise, if the impact is unclear the decision-maker can highlight the means of commission. There is almost always some aspect of an international crime that can be reasonably labeled grave.

One pretrial chamber proposed a narrower factor-based test. It declared that to be sufficiently grave for ICC adjudication, cases must involve widespread or systematic criminality and target the most responsible organizational leaders. The Appeals Chamber

198. See supra notes 66–68 and accompanying text.


200. deGuzman, Choosing to Prosecute, supra note 10, at 295–96.

201. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision Concerning
rejected the test, however, in part on the grounds that it would undermine the Court’s ability to deter crimes—non-leaders would have nothing to fear from the ICC.202

The Appeals Chamber was right. In fact, virtually any effort to narrow the gravity factors would undermine some goal of international prosecution. For example, limiting international adjudication to crimes resulting in large numbers of victims would undermine the Court’s ability to prevent crime by prosecuting attempt or early-stage crimes. It would also exclude from the regime conduct with limited numbers of direct victims but substantial ancillary harm such as the killing of a political leader.

Even more importantly, a narrowly conceived factor-based test would reduce the ICC’s ability to stimulate national prosecutions. Although there is significant debate about the ICC’s ability to accomplish directly its various goals,203 many commentators agree that the Court’s most significant potential impact lies in stimulating national prosecutions of international crimes. A narrow gravity test would reduce the Court’s reach and thus its ability to spur accountability at the national level.204 In sum, a broad gravity test fails to resolve the problem of ambiguity and a narrow interpretation resists expansion at the cost of the regime’s key objectives.

The solution to this dilemma lies, at least in part, in acknowledging the relationship between gravity determinations and the interests at stake in decisions about international adjudication. When gravity is used to determine the appropriateness of international adjudication it has little meaning in the abstract. In this context, the purpose of gravity is to identify the extent of the international com-

Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case Against Mr. Thomas Lubanga Dyilo, Annex I, ¶¶ 46, 50 (Feb. 24, 2006). This decision was overturned on appeal. See infra note 203.


203. See deGuzman, Choosing to Prosecute, supra note 10, at 301–320.

204. Additionally, the controversial principle of universal jurisdiction holds that any state can adjudicate international crimes. The expansion of these crimes may therefore encourage a broader application of universal jurisdiction. See Maximo Langer, The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes, 105 AM. J. INT’L L. 1, 1 (2011) (citing Restatement (Third) of the Foreign Relations Law of the United States §§ 402 & cmts. c–g, 404 & cmts. a–b, 423 (1987)); see also Bruce Broomhall, Towards the Development of an Effective System of Universal Jurisdiction for Crimes under International Law, 35 NEW ENG. L. REV. 399, 401–02 (2001) (stating that the rationales underpinning international criminal law also support the application of universal jurisdiction).
munity’s interest in accountability. The extent of that interest depends on the goals international prosecution would likely accomplish (such as deterring crimes, promoting reconciliation, encouraging national prosecution, or expressing norms) balanced against other competing interests, in particular those associated with sovereignty and individual rights.

The weaker the international community’s interest the more likely it should cede to such competing interests. It is therefore unsatisfying for prosecutors, judges or political leaders to declare a case or situation sufficiently grave in the abstract to merit international adjudication. Instead, they should explain why the interests of the international community in adjudicating the case or situation are sufficiently strong to overcome whatever interests mitigate against such adjudication.

If international criminal law is to serve as an instrument of justice, it can no longer permit gravity to mask the tensions between global human rights promotion on the one hand, and sovereignty and individual rights on the other. Instead, gravity should be reconceptualized to account for the competing interests at stake in decisions about international adjudication.