

**Forum:** Sixth General Assembly

**Issue:** The Question of Universal Jurisdiction and National Sovereignty and the Role of the International Criminal Court

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## Introduction

There is significant debate within the political world concerning universal jurisdiction and the extent of which crimes the International Criminal Court (ICC) has the right to exercise their power. It is important to note that the idea of universal jurisdiction occurred for the first time in history on 17 July 1998 – the Rome Statute - however only crimes by individuals post July 1<sup>st</sup> 2002 can be prosecuted by the ICC as that was when the aforementioned Rome Statute came into effect.

Universal jurisdiction is perceived by many to give nations the power to punish crimes against humanity even if, from the outset, is none of the prosecutor's business. The idea develops from the basis that universal jurisdiction will act as a deterrent for current leaders to continue heinous crimes, stimuli for citizens to face judgement by their own nation before facing foreign courts, and deliver justice to some of humanity's worst criminals who may escape prosecution by fleeing to a neutral ground or other means.

The ICC themselves are advocating by a significant number of member states as a necessary step in a successful implementation of the 'Draft Code of Crimes against the Peace and Security of Mankind'. While these states believe that such a system can guarantee objective jurisdiction, it needs to be understood that such a belief is also difficult to achieve. Conversely, detractors of universal jurisdiction such as Henry Kissinger points out that pushing universal jurisdiction to its extremes may lead to 'inquisitions and even witch hunts'. The ICC is independent of the United Nations, however the Security Council of the United Nations can refer cases to the ICC. As of now, the court acts complementarily with nation's national courts therefore it is essential for delegates to note that these courts take priority over the ICC

Sovereignty and the prosecution of international violations remain closely intertwined in this debate. Many objections of universal criminal jurisdiction stem from the sovereignty principle as the basis of the refusal. With the increasing recognition of the need of international cooperation but a prevalent stigma of the majority – if not all – states, is the insurance other states will not override their sovereignty.

Ultimately, many feel that the concept of an international legal regulating body such as the ICC brings many benefits. The implementation of such a system is far harder to integrate due to the varying legal standards across systems in different states. Even the jurisdiction of the International Criminal Court may only come into effect whether the accused party was a citizen of a state who recognizes the court.

## Definition of Key Terms

### Universal Jurisdiction

Universal jurisdiction refers to the ability of a state and/or international organization to prosecute a person irrespective of the geographical location of the supposed crime. States may invoke universal jurisdiction if the crime falls under the categories of: genocide, war crimes, torture, forced disappearances, extrajudicial executions, and crimes against humanity.

### National Sovereignty

Everything essential for a nation to govern itself such as applying laws, taxes, inciting war and peace, forming treaties and/or buying or selling goods between foreign nations. State sovereignty encompasses four key aspects: territory, population, authority, and recognition.

### Rome Statute

A treaty adopted in Rome in July 17<sup>th</sup> 1998. The treaty is only binding to states that are signatories of the treaty therefore countries that have not ratified or signed onto the treaty are not subject to the conditions in the Rome Statute. Furthermore, the ICC may intervene only when the states are 'unwilling' or 'unable' to follow out the legal procedure.

### Statute of Limitations

A time limit for the prosecution of criminal charges to be valid. This statute can be extended or reduced depending on nature of the crime and have been implemented to assist the creation of a resolution within a reasonable period. Different nation's statute may vary or in some cases have no statute of limitations. Of the four core international crimes, signatories of the Rome Statute cannot apply their statute of limitations on the crime.

### Ad-hoc Tribunals

"Ad-hoc" are special particular trials to address the criminal cases against individuals who violate the core international crimes.

### Impunity

Impunity is the protection against crime or misdemeanor an individual may commit.

## Background Information

### Sovereignty

As a means to grow autonomy and independence of individual member states, sovereignty is essential to establish and enforce laws within a society. It allows states to appropriately prosecute crimes taken on their territory or against their people. Sovereignty is a key component of international law created to protect civilians and preserve the authority of governments.

#### *Universal Jurisdiction and Sovereignty*

Concerning the issue, the concept of universal jurisdiction almost juxtaposes a nation's own sovereignty and has caused considerable debate over the International Criminal Court's parameters. Universal jurisdiction does not allow states to circumvent the authority of a nation's court nor intervene in their own judgement of crimes within their dominion. Foreign courts may step in when – and only when – the country in question is unwilling and/or unable to prosecute its own for crimes like human rights abuse. Universal jurisdiction is meant to act as a backup or last resort for justice to be delivered even if state sovereignty "allows" certain crimes. A goal of the universal jurisdiction is to prevent the impunity of individuals to avoid justice.

### Impunity

Impunity is arguably the biggest role that the ICC and universal jurisdiction need to tackle. Due to powerful individuals sometimes a nation is unable to act against them fairly therefore the ICC acts as an external body capable of delivering a fair trial to these individuals. Currently, sixty-six war criminals reside in the former Yugoslavia despite ad-hoc tribunals that occurred; prosecutors are uneasy about attempting to apprehend suspects in question as political leaders may intervene and unbalance an already tense political climate.

Governments that capture war criminals have the choice to either return to state where crime was committed or an alternative would be to hand over to the ICC - the latter abetted by universal principle.

### Issues Preceding Universal Jurisdiction

Preceding the introduction of the ICC and universal jurisdiction on a global scale, former dictators like Augusto Pinochet had the ability to travel freely around nations in luxury due to the impunity they held. Another example that illustrates the need of for an international body is the case of Blackbeard, a famous pirate who could attack other indiscriminately; the sea which no one state had control of gave rise to the question – who has the authority to prosecute criminals like Blackbeard?

It is essential that international criminals like Blackbeard or more modern equivalents have the threat of prosecution irrespective of their location, should they only be liable to be prosecuted by the region where crime was committed then it would be far too easy to escape to another area and avoid prosecution.

More modern dictators have more often chose to cloak themselves in state sovereignty and diplomatic immunity to protect themselves.

### **Detractors of Universal Jurisdiction**

Universal jurisdiction is not without it's own flaws. From a perceived infeasibility to a potential encroachment on sovereignty to even potential bias against certain nations/individuals. Factors such as these have led to some

#### ***Henry Kissinger***

Influential analysts such as Henry Kissinger argues that universal jurisdiction realistically has little to no legal foothold and cannot realistically be implemented into practice.

Henry Kissinger believes a dangerous precedent may be set with universal jurisdiction giving magistrates to technically be able call for the extradition of any individual in the world therefore perhaps causing the magistrate to use their own judgement in the place of procedures of nations. He calls upon the fairness of such a procedure where the accused must stand trial in a foreign country away from witnesses and evidence supporting the accused.

It should be noted that many criticism quote the lack of concrete structure in the current framework of universal jurisdiction.

### **“African Court”**

Within the first ten years of the ICC's inception, all prosecutions have occurred in Africa resulting in two arrest warrants for two African heads of state. During this period, the court has fought against efforts made by African governments to limit the court's involvement and simultaneously the court has not investigated similar crimes in Venezuela and Iraq. Expectedly, this has led to claims of bias and targeting of the African continent.

On the outset, a ten year period appears to a large time period that may justify the claims of bias however closer analysis blurs the morality of the situation. The ICC has only once invoked its own jurisdiction in only one situation, other situations have come via referral directly from concerned states and the Security Council.

### **Abstract Concept**

In some eyes, universal jurisdiction is considered a desirable principle in life but too abstract to ever be successfully implemented into modern society. This may be due to an unwillingness of member states as it may result in a loss of political power and may leave them open to abuse of flaws in the system that may negatively affect their country, coupled alongside a fear of other states using the universal jurisdiction as a political device to inhibit nations and promote agendas that may not be of a neutral standing. With no guaranteed way of ensuring this can be stopped or countries will use trials to undermine and clog up to the limited number of cases, the ICC may take it is expected that some are apprehensive.

A daunting obstacle in achieving the desired principle is the conceptualizing the idea of justice into a tangible, feasible legal framework to standardize laws across nations. As of writing this, there are no internationally accepted moral standards that the ICC - and by extension universal jurisdiction - may work towards nor can a country's court reasonably claim what they are about.

## Major Countries and Organizations Involved

### International Criminal Court

The court is made up of four key components. Administration and public perspective of the court and the enactment of sentences responsibility falls to The Presidency. The Presidency comprises of two vice-presidents and the President themselves elected by the majority of the second component of the court – the eighteen judges titled the Chambers. The Presidency may serve for a maximum of two three year periods. The Chambers are further sub-divided into three divisions, Pre-Trials, Trials, and Appeals. The third component is the Office of the Prosecutor who decides whether there is enough evidence or cause to begin an investigation. Finally the Registry is responsible for the protection of victims, witness, and the defence as per the Rome Statute alongside duties pertaining to the operational support to the Prosecutor and Chambers hence ensuring fair, impartial trials.

The ICC has been a medium and symbol for universal jurisdiction to operate within. The ICC are a force and external body to enact universal jurisdiction in a fair manner and helped form an internationally recognised body that may act and be able to claim neutrality of their issues.

### African Nations

Three African nations Burundi, Gambia, and South Africa put forth a formal application to leave the ICC and currently there is a fear that more countries from the region shall follow. This has occurred after years of criticism of the current standard of the ICC. Some African nations have submitted withdrawal notices for the reason that there may be a bias within the ICC.

### *African Union*

During several meetings of the African Union, it was reported that called and agreed upon a strategy for a group withdrawal from the court, however, there has been no further movement in this political direction. Within the Union there is uncertainty due to civil society organizations lack of confidence in their own government's capacity to prosecute crimes. Some members of the union are pushing for the creation of an African court to try international crime as an alternative to international criminal court.

### **South Africa**

In the African Union summit in June 2015, Sudanese President Omar al-Bashir held an ICC warrant on charges which include genocide. South Africa however, were unable to detain him and was condemned on the international field. Coupled alongside a belief of bias against African states led to withdrawal from the ICC however this may be challenged as action was taken with no broad public debate.

### **International Military Tribunal in Nuremberg**

The Nuremberg tribunal was the first joint declaration by the Allies to judge the Germans for their crimes against humanity during World War II. This was a key moment that lay the seeds of an idea of a regulating international body concerning crimes that threaten the international security of the world and was the first occurrence of the application of universal jurisdiction. The trials were considered a success and brought closure to many victims of the atrocities committed by certain German nationals but past closure it sent out a strong message for political leaders of other countries to be wary of their actions in fear of alienation and prosecution of themselves if they ever leave their country.

### **Ad-hoc Tribunals of Rwanda and Yugoslavia**

After a period of almost 50 years, ad-hoc tribunals were conducted over crimes committed in Rwanda and the former Yugoslavia. The statutes of both international tribunals caused important developments in international humanitarian law and demonstrated to the world that international criminal law had the ability to prosecute to a significant extent. Regardless of the perceived victory and advancements in this area, the trial outcomes when compared to public opinions show a gap because respondents felt uninformed about the trials goals and objectives alongside different perspectives of the trials across a variety of ethnic groups.

Various effects underwent due to these tribunals. Firstly, there was a clear prevention of impunity of high ranking officials as they were prosecuted during these trials, however, there is debate about the success of the trials concerning "impunity"; even today, many Rwanda figureheads of the 1994 genocide are still at large. Secondly, during the trials an outreach program ran simultaneously where the international

judgements were conveyed to national governments therefore increasing transparency of operations and fostering trust between the tribunals and the government.

## Timeline of Events

Date	Description of event
1945	Following the aftermath of the second world war (1939 – 1945), international level prosecution was required to judge high level individuals complicit in some of atrocities committed during WW2. First ever documented case of an ad hoc tribunal used to prosecute individuals.
1993/1994	Tribunals for the former Yugoslavia and Rwanda to respond to acts committed in the Rwanda Genocide and Yugoslav wars. Revival of idea of the need of a statute for a permanent court.
July 17 <sup>th</sup> 1998	Rome Statute of the International Criminal Court was voted upon with 120 to 7 with 21 countries abstaining.
July 1 <sup>st</sup> 2002	60 ratifications of Rome Statute enabled statute to come into effect.
2012	Court issues first judgement in relation to Thomas Lubanga Dyilo use of child soldiers.
October 2016	Claims of bias against African nation's leads to withdrawal notifications of significant number of states. Currently, total withdrawal of many states is still pending with some nations withdrawing their notice such as Gambia due to introduction of new president.

## Relevant UN Treaties and Events

- The scope and application of the principle of universal jurisdiction, 13 January 2012, **(A/RES/66/103)**
- Establishment of an International Criminal Court, 28 January 1998 **(A/RES/52/160)**
- Formulation of Nurnberg Principles, 12<sup>th</sup> December 1950, **(A/RES/485(V))**
- Rome Statute, 17 July 1998
- Geneva Conventions, 1949

## Previous Attempts to solve the Issue

### Rome Statute of 1998

The Rome Statute of 1998 led to the establishment of the ICC. The Rome Statute was essential in creating a system that allowed citizens of states with low confidence in national institutions to refer to another law body to enact justice.

While the effects of Rome Statute has been appreciated by countries, more is needed to create a sizeable impact in “situation countries”. Many victims inhabit remote areas of their countries and are unaware of their rights and even the involvement of the ICC.

Limitations of the current statute are as follows:

- Dependency on States to execute arrest warrants and are not permitted to control a military force of their own.
- Procedures take a long time.
- Prosecutor requires evidence for judges to be allowed to issue an arrest warrant.
- No death penalty.
- Only prosecute individuals bearing greatest responsibility for most serious crimes.

### Augusto Pinochet

An issue that previously plagued the application of universal jurisdiction was that lack of legal precedent. The former dictator was arrested by London police acting upon a Spanish warrant for his human rights violations committed in Chile.

Previously unable to be convicted due to the legal structure granting him an infallible impunity. Spanish courts allowed the case to be pursued in Spain invoking universal jurisdiction – a rare occurrence.

Pinochet challenged his arrest as he was a ‘former head of state’ therefore enjoyed diplomatic immunity however the House of Lords in Britain rejected his claims twice quoting his crimes as duties not of a head of state. Pinochet arrest is considered an example that victims can bring other similar tormentors to arrest abroad.

The case however showed the legal framework and potential loopholes that may be exploited to avoid trial. Furthermore, the length of time of the case evidenced another obstacle of universal jurisdiction.

### Geneva Convention



The four Geneva Conventions of 1949 for protection of war victims was the assertion of universal jurisdiction. The conventions themselves do not explicitly state that irrespective of place of offence, prosecution is to be executed. Due to the obligatory nature of the Geneva Convention, states are required to take an active involvement to ensure that individual in question is prosecuted; states as such must have a criminal legislation to try the accused regardless of their nationality.

In 1977, the Geneva Conventions of 1949 extended the parameters of the universal jurisdiction relating to conduct of hostilities.

## Possible Solutions

### Rework Principle of Universal Jurisdiction

A clear definition of universal jurisdiction and the parameters of which it may operate in is essential for the successful implementation of universal jurisdiction. Furthermore, such a framework requires the ability to give international prosecutors the ability to traverse political pitfalls such as the claim of impunity as protection.

Representatives of member states within the United Nations would like to ambiguities within the current principle to be addressed to reduce or eliminate the manipulation of judicial processes. Doing so would reduce political influences and hence foster further trust between member states as currently there is a sense of an underlying distrust concerning universal jurisdiction.

### International and National Court Cooperation

Currently, the ICC operates separately from the domestic courts which creates a barrier and further increases ambiguity of the issue resulting in low confidence of the ICC. Training programs and communication channels are required to be opened up between both the ICC and national courts across multiple states to ensure that a fair, effective framework that will lead into the ICC gaining repute and be considered a viable, last resort that nations can trust.

An example of this occurring in the past is the ICC hearing for Dominic Ongwen in Uganda. The government and the ICC - primarily the ICC - worked together to trial Ongwen for crimes against humanity in May 2004. This helped reinstate civic trust in the national court and shows the mutually beneficial aspect of international and national courts working together.

### P5 Nations

As of writing this research report, China has not even signed onto the Rome Statute, the United States of America and the Russian Federation have signaled their intention to not ratify the Rome Statute, hence, three of the five permanent members of the United Nations have withheld their support from the

Rome Statute quoting the contradiction of their sovereignty and the lack of clarity within the clauses as their reasons.

Yet despite this, the Security Council can refer issues to prosecutors without following up. For example, the case of Syria has seen members of the Security Council veto even when crimes that fall under universal jurisdiction are the ones questioned. One of the answers to this problem is that every state of the world must sign onto the ICC yet this is would be incredibly utopian thinking. A more practical solution would be to address the question of sovereignty that's limiting the power of the ICC.

### Ad-hoc Tribunals

Due to the Rome Statute only coming into effect in 2002, there is need within the international community to address crimes preceding 2002. More so, the decisions and methods used during these tribunals can be important references for the ICC to affect future decisions invoking universal jurisdiction.

Ad-hoc tribunals for incidents before 2002 will create accountability and create a data store for future references that can be used to further improve the current legal framework considering universal jurisdiction. Actions taken by the ICC in this direction may bring them into more repute and encourage countries who have not already done so to sign and ratify the Rome Statute.

### Bibliography

Cryer, Robert. "International Criminal Law vs State Sovereignty: Another Round? | European Journal of International Law | Oxford Academic." *OUP Academic*, Oxford University Press, 1 Nov. 2005, <https://academic.oup.com/ejil/article/16/5/979/496087/International-Criminal-Law-vs-State-Sovereignty>.

"Principle of 'Universal Jurisdiction' Again Divides Assembly's Legal Committee Delegates; Further Guidance Sought from International Law Commission | Meetings Coverage and Press Releases." *United Nations*, United Nations, 12 Oct. 2011, [www.un.org/press/en/2011/gal3415.doc.htm](http://www.un.org/press/en/2011/gal3415.doc.htm).

"Draft Code of Crimes against the Peace and Security of Mankind with Commentaries ." [legal.un.org/ilc/texts/instruments/english/commentaries/7\\_4\\_1996.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/7_4_1996.pdf)

"The Scope and Application of the Principle of Universal Jurisdiction - Seventy-First Session - Sixth Committee (Legal) - UN General Assembly." *United Nations*, United Nations, [www.un.org/en/ga/sixth/71/universal\\_jurisdiction.shtml](http://www.un.org/en/ga/sixth/71/universal_jurisdiction.shtml).

James Paul - Global Policy Forum. "Global Policy Forum." *The Limitations of Universal Jurisdiction*, [www.globalpolicy.org/component/content/article/97/32133.html](http://www.globalpolicy.org/component/content/article/97/32133.html).

Leander. "The International Criminal Court: Origins, Jurisdiction and the 'African Bias'." *South African History Online*, 24 Oct. 2016, [www.sahistory.org.za/article/international-criminal-court-origins-jurisdiction-and-african-bias](http://www.sahistory.org.za/article/international-criminal-court-origins-jurisdiction-and-african-bias).

History.com Staff. "The Rwandan Genocide." *History.com*, A&E Television Networks, 2009, [www.history.com/topics/rwandan-genocide](http://www.history.com/topics/rwandan-genocide).

"Ad Hoc Tribunals." *ICRC*, 29 Oct. 2010, [www.icrc.org/eng/war-and-law/international-criminal-jurisdiction/ad-hoc-tribunals/overview-ad-hoc-tribunals.htm](http://www.icrc.org/eng/war-and-law/international-criminal-jurisdiction/ad-hoc-tribunals/overview-ad-hoc-tribunals.htm).

Anton, Sondra (2016) "Examining Universal Jurisdiction," *Washington University Undergraduate Law Review*: Vol. 1. <http://openscholarship.wustl.edu/wuulr/vol1/iss1/6>

"Three Challenges for the International Criminal Court." *OUPblog*, 14 Nov. 2015, [blog.oup.com/2015/11/three-challenges-international-criminal-court/](http://blog.oup.com/2015/11/three-challenges-international-criminal-court/).

"Analysing the Concept Of Universal Jurisdiction, Its Problems And Prospects." *LawFarm*, [www.lawfarm.in/blogs/analysing-the-concept-of-universal-jurisdiction-its-problems-and-prospects](http://www.lawfarm.in/blogs/analysing-the-concept-of-universal-jurisdiction-its-problems-and-prospects).

"Legal Committee Is Told 'Principle of Universal Jurisdiction' Needs to Be Defined, to Avoid Possible Abuses, Politicization | Meetings Coverage and Press Releases." *United Nations*, United Nations, [www.un.org/press/en/2009/gal3372.doc.htm](http://www.un.org/press/en/2009/gal3372.doc.htm).

"Impact of the Yugoslav and Rwanda Tribunals: Lessons for the ICC." *International Center for Transitional Justice*, 5 Dec. 2011, [www.ictj.org/news/impact-yugoslav-and-rwanda-tribunals-lessons-international-criminal-court-0](http://www.ictj.org/news/impact-yugoslav-and-rwanda-tribunals-lessons-international-criminal-court-0)

"Colombia: Impact of the Rome Statute and the International Criminal Court." *International Center for Transitional Justice*, 28 Apr. 2011, [www.ictj.org/publication/colombia-impact-rome-statute-and-international-criminal-court](http://www.ictj.org/publication/colombia-impact-rome-statute-and-international-criminal-court).

"Ad Hoc Tribunals." *ICRC*, 29 Oct. 2010, [www.icrc.org/eng/war-and-law/international-criminal-jurisdiction/ad-hoc-tribunals/overview-ad-hoc-tribunals.htm](http://www.icrc.org/eng/war-and-law/international-criminal-jurisdiction/ad-hoc-tribunals/overview-ad-hoc-tribunals.htm).