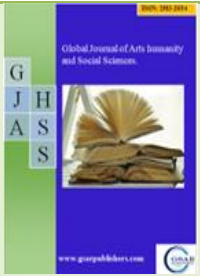


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Universal Jurisdiction and International Criminal Court: a shared pursuit of justice

By

Nedi A Mwaikololo

LL.M candidate, St. Augustine University of Tanzania



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Corresponding author

Nedi A Mwaikololo

Abstract

This study is centered on examining how lack of universal jurisdiction to the International Criminal Court (ICC) affects the maintenance of the International Criminal Justice. Lack of the Universal jurisdiction to the court affect the primary purpose of introducing the International Criminal Court because it acts as a shield to nationals from non-state parties to the court jurisdiction, from prosecution. In order to curb this, the Rome Statute of the International Criminal Court grant the UN Security Council to refer situation to the court. Where the cases can be referred by state party to the Rome Statute or by the UN Security Council, acting under chapter VII of the United Nations Charter, or by non-state parties when making declaration to accept the jurisdiction of the court, or by prosecutor of the ICC initiating investigation proprio motu. This rise the important question about the effectiveness of the UN Security Council referrals in maintaining international criminal justice. Manifestly the issue is controversial. This study concluded by proposing the way forward in order to make sure the ICC serve its purposes of establishment accordingly.

Keywords: Universal Jurisdiction, the International Criminal Court, International Criminal Justice, UN Security Council.

1.0 Introduction

The Rome Statute of the International Criminal Court (ICC) 1998 grant the jurisdiction of the court over four core international crimes namely; crimes against humanity, war crimes, genocide and crime of aggression.ⁱ There are several criteria which must be established before the ICC to take action of prosecuting the perpetrators, the Rome Statute provide three jurisdictional requirements and three admissibility requirements. The three jurisdictional requirements include, subject matter jurisdiction (the acts which constitute the international crime), territorial or personal jurisdiction (where or who committed the crime), and temporal jurisdiction (when the crime was committed).

In order for the court to be able to prosecute individual, either territorial jurisdiction or personal jurisdiction must be established. This means the court can prosecute individual for committing international crime only if he or she has either committed the crime within the territory of the state party to the Rome Statute, or the Crime committed by nationals of state party to the Rome Statute.ⁱⁱ This means that nationals from non-state parties to the Rome Statute are excluded from the court jurisdiction unless the UN

Security Council a political charged body refers the situation, when acting under chapter VII of the Charter of the United Nations.

The ICC was introduced for the purposes of ending impunity and maintaining International Criminal Justice.ⁱⁱⁱ Since the court deals with the prosecution of serious crimes, there is a need to grant powers to the court to prosecute the said crime regardless of who are where the crime was committed. This have been the rationale behind the general principle of international law that is, states are accorded universal jurisdiction which empowers them to prosecute individuals responsible for international crimes regardless of their nationality, pace of the commission of the crime, or the nationality of the victims.

This study examines the reason why ICC lack Universal jurisdiction and how lack of universal jurisdiction to the International Criminal Court (ICC) affects the maintenance of the International Criminal Justice

2.0 The International Criminal Court (ICC)

The International Criminal Court (ICC) was established as a consequence of the Rome Statute in 1998 with a purpose of prosecution of persons who committed war crimes, crimes against



humanity and genocide. The proceedings of the court, being the first permanent international criminal court with its headquarter in The Hague, Netherlands can take place anywhere in the world. Before the establishment of ICC, criminal courts were functioning on ad hoc basis.

According to Luis Moreno-Ocampo,^{iv} the first chief and first Prosecutor of the ICC and an Argentinean lawyer, the Rome Statute guarantees that everybody has access to international justice and also ensures that victims get justice and criminal are punished for their criminal acts.

As enriched in the preamble of the Rome Statute and its article 1, the ICC is meant to complement rather than to replace national jurisdictions. According to article 5 of the Rome Statute, the jurisdiction of the court is limited to the most serious crimes of concern to the international community as a whole. This category includes the crime of genocide, crimes against humanity, war crimes and the crimes of aggression. However, the ICC has jurisdiction over these crimes only if committed on the territory of a state party to the Rome Statute or by its national.^v States not parties to the Rome Statute may accept the ICC's jurisdiction over the crimes listed in article 5 by means of a special declaration if the conditions set out in article 12 of the Rome Statute are met. Cote d'Ivoire was the first to do so in 2003 followed by Ukraine in 2014. With regard to the crime of aggression, according to Article 15 and 16 of the Rome Statute^{vi} the ICC can only exercise its jurisdiction when the situation concerned is referred to it by the UN Security Council or by the state itself.^{vii}

The International Criminal Court (ICC) has jurisdiction over individuals who committed serious international crimes, from state parties and non state parties to the Rome Statute.^{viii} The ICC jurisdiction is subject to complementary to the national criminal jurisdiction.^{ix} This means that the ICC will not be able to exercise jurisdiction if the case is being investigated or prosecuted by the state which has competent jurisdiction over it unless it is proved that the state is unwilling or unable to carry out investigation or prosecution.^x Or the case has been investigated by the state which has competent jurisdiction over it and the state has decided not to prosecute the person concerned, or the individual concerned has already been tried for the case concerned by the court not permitted under article 20(3)^{xi} and the case is not sufficient to justify further action by the court.^{xii}

3.0 Universal Jurisdiction

Starting with the term jurisdiction, which under international law has several meanings, including the power of state to affect people, property, and circumstances and reflects the basic principle of state sovereignty, equality of state and non-interference in domestic affairs.^{xiii} Or the power of state to establish, enforce and adjudicate rules of law within its territories.^{xiv} Jurisdiction can also mean a territory within which political or judicial power may be exercised.^{xv} Jurisdiction can be categorized into five principles including territorial principle, nationality principle, passive personality principle, protective principle and universality principle. This study based on the universal criminal jurisdiction

which grant powers to all state to prosecute international crimes.^{xvi} This principle enables any state to exercise jurisdiction over a crime committed in foreign state, which violates international law.^{xvii}

Under universal jurisdiction, international crimes may be prosecuted by any state which obtain custody of culprits.^{xviii} It is not necessary for the prosecuting state to have a traditional connection with crimes committed.^{xix} This may be proved in the case of Re Pinochet,^{xx} where the case was tried in England regardless that the crime was committed by Chilean President (General Augustino Pinochet) in Chile, against the Chilean people.

The doctrine of universal jurisdiction establishes that, international crimes should not go unpunished due to the sovereign immunity or any other reasons.^{xxi} This is because international crimes are kinds of crimes that are very atrocious that their perpetrators should be prosecuted.^{xxii} The precedent which was set by the English court in the case of Pichonet was the landmark reasoning in establishing just principle.^{xxiii} It has proved that invoking universal jurisdiction has played a great role in obtaining international criminal justice. Therefore universal jurisdiction has become an important controversial issue in international law. The international movements on protection of humanity suggest universal jurisdiction as a good way for promoting accountability for serious violations of human rights and humanitarian.^{xxiv} A rejection of universal jurisdiction to the International Criminal Court is an obstruction towards promoting accountability under international law.

Therefore, universal jurisdiction promotes a chance of obtaining justice by enabling any state to prosecute perpetrators of international crimes regardless of the nationality, territoriality between the state seeking to protect its security.^{xxv} Universal jurisdiction depends on the powers of the state to enforce international law. This doctrine fills the gap left where other basic doctrine fail to introduce the basis for national proceedings.^{xxvi}

3.1 Crimes Under Universal Jurisdiction

The doctrine of universal jurisdiction cannot be invoked by all crimes, but only the serious crimes that likely to affect the whole international community. Universal jurisdiction covers the heinous crimes. These crimes are considered as international crimes because they are affecting the whole international community.^{xxvii} The Geneva Conventions of 1949 provide certain grave breach to be of universal concern including, willful killing, torture or inhuman treatment, especially biological experiments, willful causing great suffering or severe injury to body or health and extensive destruction of property not justified by military necessity and carried out unlawfully.^{xxviii}

The doctrine of universal jurisdiction is applicable only to the crimes under international customary law, in respect of which all states have the right to prosecute. Such crimes include, war crimes, crimes against humanity, genocide, crime of aggression and piracy.^{xxix} The main principle in invoking the application of universal jurisdiction in relation to international crimes, suggest that, it is not necessary for the traditional nexus to be established.

Any state may prosecute the alleged crimes subject to universal jurisdiction.^{xxx}

4.0 Universal Jurisdiction and the International Criminal Court

The Rome Statute of the International criminal Court does not reflect universal jurisdiction of the core international crimes listed under article 5 which is the war crime, crimes against humanity, genocide, and crime of aggression.^{xxxi} The ICC does not enjoy full universal jurisdiction, where by its jurisdiction are subject to limitations.

Under the Rome Statute the court may investigate and prosecute the crime only when the crime is committed on the territory of the state party to the Rome Statute,^{xxxii} the perpetrator is a national of a state party,^{xxxiii} the situation is referred by the UN Security Council acting under chapter VII of the UN Charter^{xxxiv} and when the declaration made by non-state party to accept jurisdiction of the court^{xxxv} where this limitations reflects the requirement of state consent in order for the court to be able to investigate and prosecute crimes outside the referral of the UN Security Council.

Historically, the proposal was made by German during Rome preparatory committee to grant the International Criminal Court, form of the universal jurisdiction. The Germany proposal was based on assumption that, there existed universal jurisdiction under international law for the crimes under the jurisdiction of the court, and the court should be given the same favor like states to exercise the jurisdiction.^{xxxvi} The USA was among the states which was against the idea of universal jurisdiction to the court as they believed that the Rome Statute contradict USA laws on protection of individual human rights as it does not provide same level of methods of operating (modus operandi) in dealing with the protection of individuals, as it required by the US bill of rights.^{xxxvii}

The German proposal was dropped and replaced by the South Korean proposal, which would have given the ICC jurisdiction when any of the state are parties to the Rome Statute. These were the states with territorial, nationality, or passive nationality, or the state with custody of the perpetrator. If the Korean proposal was accepted, it would have reflected a delegation of conditional universal jurisdiction. Though, the proposal was not accepted at Rome and the final negotiation become article 12 and 13 of the Rome Statute.^{xxxviii}

However, there are some elements which reflects the universal jurisdiction on the International Criminal Court. This includes, **firstly**, the action of the UN Security Council to refer the situation when acting under chapter VII of the UN Charter gives the court universal jurisdiction. This is because, the Security Council referrals give powers to the court to prosecute both state parties and non-state parties to the Rome Statute of the International Criminal Court, without considering the traditional nexus of the crime committed.^{xxxix} Although, it is proved that the UN Security Council referrals is subject to some weakness especially when the referrals affect the interest of the permanent members UN Security Council with veto powers.

Consequently, in order for the International Criminal Court to be able to serve the purpose of its creation which is to end impunity, there is a need to accord universal jurisdiction to the court. The ICC crimes are under universal jurisdiction and these strengthen the doctrine of universality.^{xl} **Secondly**, when state party to the Rome Statute refers the case committed within its territory by the nationals from non-state party. When states ratified the Rome Statute means they are confirming jurisdiction over the crimes listed under article 5 of the act.^{xli}

5.0 Conclusion and Recommendations

5.1 Conclusion

Generally, if the UN Security Council fails to act under chapter VII, and with absence of the universal jurisdiction to the court, means the international crimes will go unpunished. This contradict the purpose of the establishment of the ICC, which is to make sure that the perpetrator brought to justice and to end impunity.

5.2 Recommendations

It is therefore this study recommended that, the International Criminal Court should be accorded with universal jurisdiction in order to be fully effective. This will give powers to the court to administer international criminal justice to all perpetrators regardless the crime committed in the territory of state parties, the crime committed by the nationals from state parties or not. Also, will gives chance to the United Nations Security Council to deal with other matters of international peace and security effective. This also will ensure that the International Criminal Court serve the purpose of its establishment effectively, which is to make sure that no crime will go unpunished

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