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Universal Jurisdiction: The Oxymoron of International Law

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UNIVERSAL JURISDICTION: THE OXYMORON OF INTERNATIONAL LAW

By

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of the Requirements for
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Thesis Summary

The topic of universal jurisdiction is one that is unknown to many people because of its uniqueness. The oxymoronic nature of its title reveals the inconsistency in current international prosecution. Universal jurisdiction allows states to claim criminal jurisdiction over an accused party regardless of where the alleged crime was committed and regardless of the nationality of the accused party. States invoked the principle of universality during the Nuremberg trials, initiating the modern take on international war crimes such as crimes against humanity and genocide. The politicization of universal jurisdiction does not allow for an independent judiciary and so the system of international law becomes broken. This thesis makes a case for the use of the International Criminal Court for prosecution of international war crimes as a third party mediator.

The history of universal jurisdiction begins over piracy disputes. Piracy affected all states and they were all eager to prosecute the pirates. Universal jurisdiction became an effective way for a state to lead a trial in its own courts. Customary international law now recognizes this prosecution, codifying it in the 1958 Convention on the High Seas and the 1982 Convention on the Law of the Sea. Modern international criminal law begins with the trials at Nuremberg as states invoked “universality,” increasing the scope of universal jurisdiction and ultimately leading to temporary tribunals and the International Criminal Court.

The Nuremberg trials provided the base for the definitions of war crimes, crimes against humanity, and genocide that judges and prosecutors currently use. The Geneva Conventions of 1949 inaugurated the treaty obligation of *aut dedere aut judicare*. This clause obligated states to extradite individuals accused of grave breaches of the Conventions or try them in their own courts. Crimes against humanity include any serious crime against civilization including murder,

extermination, enslavement, deportation, and other inhumane acts or persecutions on political, racial or religious grounds. The Eichmann trial used the postwar trials as precedent and furthering this precedent by citing universality. Genocide is unique because states can perpetrate genocide against their own citizens. The Geneva Conventions require an international component to get involved to avoid violating sovereignty. This applies extraterritorial jurisdiction to internal conflicts.

The Rome Statute established precedent for tribunals, the next step in widening the scope of international prosecution. Temporary tribunals are set up to prosecute war crimes, crimes against humanity, and genocide in certain situations when the international community deems necessary. The International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda are two temporary tribunals charged with prosecuting war criminals for their acts of ethnic cleansing and genocide. The principle of universal jurisdiction hinders the ability of the tribunals to effectively prosecute these criminals. Politicians control prosecutors and international law then takes a backseat to national jurisdiction and the self-interested nation-state.

The establishment of the International Criminal Court provides hope for a more uniform view of international law. A single court handling the prosecution of all international war crimes seems to solidify the rulings and opinions. A third party mediator that includes independent prosecutors and judges is necessary to eliminate the politicization of universal jurisdiction and establish an independent international judiciary.

Introduction

Law is such a simple word to encompass such a broad and complex topic. The law is not simply a straightforward set of guidelines, but can manifest itself in an investigation and subsequent court case lasting for decades. Not only do countries have different laws, but countries adopt different forms of law, practicing either common law, civil law, or Sharia law. One can see a problem that may arise when countries with dissimilar forms of law clash in the international arena. While domestic law seems to have firm footing to stand on, international law is often left with a title and no real application to international conflict. Entities such as the International Court of Justice and the International Criminal Court are losing what little power and authority that was present in the first place. Consent and sovereignty always work against international law as states are inherently self-interested, especially when it comes to trying crimes in an international court. The softness of international law is very evident in the international claims tribunals currently set up in The Hague, Netherlands. It appears evident that the International Claims Tribunal for the Former Yugoslavia and the U.S. Iran Claims Tribunal in The Hague, Netherlands, seem to be all bark and no bite, with no real major support to enforce their decisions. A few major wrongdoings that violated international law led to the establishment of both of these tribunals, such as the ethnic cleansing of many Bosnians and the Iranian invasion of a U.S. embassy. Although the concept of universal jurisdiction is one that is not very new, it is also not explicitly stated in any doctrine of law. Universal jurisdiction allows a state to claim criminal jurisdiction over an accused person regardless of where the accused committed the crime, and regardless of the accused party's nationality. Universal jurisdiction gives sovereign states the authority to prosecute and try individuals for the major international crimes, such as genocide, war crimes, or any crime against humanity without any national interest or territorial link. The modern application stems from the Nuremburg trials as a direct result of Nazi

persecution for the involvement in the ethnic cleansing of the Jewish people. Universal jurisdiction applies to the universal crimes that all states have a shared interest in protecting; however, the prosecution of such crimes in countries following the doctrine of universal jurisdiction is not effective due to the politicization of the law. An International Criminal Court is the most appropriate way to prosecute accused parties for war crimes as a third party mediator leaves no need for countries to utilize universal jurisdiction. The history and subsequent progression and strengthening of jurisdictional convictions is evident in the evolution of the aforementioned claims tribunals and the newly developed International Criminal Court. It is important to discuss the effectiveness of the law as it is applied today and analyze such results to determine if greater strides can be made towards improvement.

Types of Domestic Law

Before diving into the complexity of international law, a discussion of the three different types of domestic law shows why a uniform system of international law is unrealistic. There are three major legal systems in the world today: civil law, common law, and Islamic law; within each domestic legal system characteristics like precedent, good faith, and fulfilling contracts distinguish the three. Civil law is perhaps the oldest form of law, as the Romans established *ius civile*. The principle of *bona fides* also emerged from the idea of civil law, as contracts are upheld in good faith and people are discouraged from dishonesty. Upheld by the three elements of honesty, fairness, and reason, judges use *bona fides* as an overarching theme when deciding each individual case. *Pacta sunt servanda*, which literally means “agreements must be kept,” is a major part of Islamic law as the Qur’an allows for trade only if it is carried out honestly and in

good faith. Common law principles are much different from those of civil and Islamic law and originate in England, spreading to English colonies. Common law tradition follows the principle of stare decisis or legal precedent; judges use past cases and historical decisions to decide present and future cases. Although cases are not identical, the use of precedent allows judges and citizens to follow a rather clear progression of the law as it evolves. A basic premise of common law is that if good faith contracts are used in common law, individuals might use this in an inherently bad way, causing more injury than good. Even the most subtle of differences in domestic legal systems can persuade or even force a country to denounce an international legal decision. The nature of the *bona fides* and *pacta sunt servanda* principles in common law systems produce very vague contracts. Unpredictable circumstances may render contracts null and void, thus common law lawyers will be careful to draft contracts that specify precise contractual terms. In addition, there are no codes that detail all of the general principles applicable to a contract under common law, so the two contracting parties must make sure that all of the principles and rules that are to apply to their agreement are explicitly addressed in their agreement. Principles of good faith back contracts in civil law and although less precise, they will take place more frequently. Written codes explain legal principles that are not explicitly spelled out in the contracts themselves. For example, in a civil law state, it would be unnecessary for parties entering into a contract to include good faith as one of the obligations because contractual relations in civil law systems are automatically governed by *bona fides*. Islamic law is firmly rooted in religious principles and so parties enjoy limited contractual freedom, which should result in a smaller number of contracts. The norms of *pacta sunt servanda* produce expectations that contracts negotiated under Islamic law will be upheld, even as circumstances change. Islamic states will also be much more careful about signing contracts on the international

arena because of their spiritual obligations; however once an Islamic state does agree, they will be very loyal to their word (Powell and Mitchell 2007).

There are even further differences in all of these legal systems because of how the system operates. The common law system is an adversarial system, which means lawyers go head-to-head and present their case to a judge or a jury. The judge decides the case based on how well each lawyer presented his/her case and advocated for his/her client. The common law system is very much more judge –oriented than the civil law system or the Islamic law system. The judge decides the case for the parties in a dispute using precedent. Precedent grounds laws in the common law system and usually holds for decades before a court may need to change it.

In contrast, the civil law system contains a few differences to the common law system. The civil law system is an inquisitorial system, which makes judges much less of a player. The judge is more of a mediator in the civil legal system, fostering productive conversation between the parties in dispute. The major tenet of civil law is the codification of laws to form a set of guidelines that judges may follow. This is different from the decisional power of a judge in the common law system.

Islamic law is different still because of the religious implications that pertain to an Islamic law system. A set of beliefs characterizes one's adherence to religion, which differs from the law in a common law system or a civil law system. Islamic law nations strictly follow the practices of the Qur'an and sharia law. Laws come from religious documents and so judges in these legal systems undergo religious training. The court system in an Islamic law state is subordinate to sharia and the Qur'an, differing from an independent judiciary in common law and civil law systems.

A brief introduction of these legal foundations highlight why universal jurisdiction is sometimes necessary to prosecute certain individuals accused of war crimes. The doctrine of universal jurisdiction applies because countries do not share domestic law principles, and so there is no cooperation on the international level. If states cannot agree on which principles of law to use, they take it upon themselves to prosecute an international criminal in their own courts on their own terms. The move from universal jurisdiction to an International Criminal Court should lead to more cooperation amongst states on the international level.

History of Universal Jurisdiction

Jurisdiction is the means by which law becomes functional; in other words, law is carried out through rules of jurisdiction based on state sovereignty. Any interference from a player outside of the territorial bounds of a state could result in a dispute; however, that is exactly what universal jurisdiction is. It is jurisdiction across any state boundary, making many states hesitant to enter into the international arena. Most legal scholars define the Nuremburg trials and subsequent Geneva conventions as the birthplace of modern universal jurisdiction with ties that go all the way back to the Alien torts claims act of 1789 and piracy disputes. Piracy goes back over 500 years and the importance of naval trade on the high seas called for an immediate remedy to obstacle of pirates. The ability of pirates to flee territorial waters or commit these serious crimes on the high seas made them notoriously difficult to capture and prosecute. Pirates are punishable in the tribunals of all nations because they are universally reviled. Piracy affected all states, and so consequently, they were all eager to prosecute the pirates. Universal jurisdiction became an easy way for any state to step in and lead a trial within its courts. This is customary

international law and subsequent conventions codified it, including the 1958 Convention on the High Seas and the 1982 Convention on the Law of the Sea. In the modern context, hijacking is similar to piracy, and the relevant provisions of the Law of the Sea Convention includes aircraft as well as ships on the high seas. Article 4 of 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft explicitly provides universal jurisdiction over hijacking (Kraytman 2005). Prosecution of pirates for crimes committed on the high seas is hardly a justification for the intense prosecution against war crime that is used today. Modern international criminal law begins with the trials at Nuremberg, where the International Military Tribunal prosecuted individuals who committed international crimes during World War II. Afterwards, it fell on individual states to prosecute and try international crimes by relying on their own traditional jurisdictional principles. Shortly after World War II, several states gave their own courts universal jurisdiction over certain international crimes. According to Langer, states rely on a couple sources of legal authority to assert universal jurisdiction over the core international crimes. The first being treaties, and more specifically, the Convention Against Torture of 1984, the Geneva Conventions of 1949 and Additional Protocol I of 1977, the Genocide Convention, and the ICC Statute. None of these treaties explicitly establishes universal jurisdiction, but they lead municipal courts to assert universal jurisdiction over one or more of the core international crimes, such as crimes against humanity and other war crimes. The second source of authority for universal jurisdiction is customary international law, which at least does not prohibit the exercise of universal jurisdiction over these same core international crimes (Langer 2011).

One can see the inconsistency of universal jurisdiction's history on the law because of how liberally countries use it. It is not explicitly stated anywhere, therefore it is an assumption of how to execute its application. Scholars wish to cite Nuremberg as the origin of our current form

of universal jurisdiction, but the term “universality” does not appear once in the Nuremberg Charter and very little in the judgments of the International Military Tribunal. There are clearer references to universality in the trials conducted in Nuremberg by individual countries and within the different military zones. When universality is listed as a basis for jurisdiction, the defenses of it compare the war crimes and crimes against humanity to piracy or the tribunals claimed the crimes are universal in customary and treaty law. It seems universality applies when the interpretations of territorial nationality were more questionable. Further arguments that Nuremberg represented little more than reparations for the victors muddy the credibility of universal jurisdiction’s initial precedent (Kraytman 2005). Piracy occurs on the open seas where no one nation possess jurisdiction, while war crimes in World War II, for example, take place on land in territories where states control their own jurisdiction. If a hijacking crime occurs on the high sea where no one claims territorial jurisdiction, one could argue that it seems quite inconsistent for a state to then use the same principle of law to prosecute a general who commits a war crime on its very territory as they would on the hijacker.

Since the trials at Nuremberg and the Geneva Convention, the scope of universal jurisdiction expanded to incorporate “war crimes, crimes against humanity, genocide, torture, slavery, terrorism, narcotics, crimes against peace, apartheid,” (Kraytman 2005). The use of universal jurisdiction to prosecute individuals for war crimes has little to no treaty basis. Kraytman argues that international customary laws ground universal jurisdiction, rather than treaties. It is the duty of a country to prosecute an individual who violates *jus cogens*, or a peremptory norm, and ensure the protection of the international community. The creation of the International Criminal Court (ICC) hindered the progression of universal jurisdiction the most in recent years. The establishment of the ICC further fuels the debate, as it is the first international

court whose jurisdiction is not limited to a particular conflict as the rest of the ad hoc tribunals. It is the first such treaty to house jurisdiction over the most notable *jus cogens* crimes. The ICC applies only to crimes committed after 2002 on the territory of member states or by their nationals, and most importantly Kraytman claims, it does not actually exercise true universal jurisdiction as the state where the accused commits the crime or the state of which the accused is a national gets priority. States have had to reexamine their own criminal codes; this ongoing process has the potential to help enact some domestic human rights treaties that are already in place nationally.

An analysis of the relationship between universal jurisdiction and the ICC is coming in a greater capacity later on, but an important introduction of the newest international court shows the complexities of extradition and universal jurisdiction. A state may use universal jurisdiction as a basis to extradite a person accused of an international crime. The historical background to universal jurisdiction principle joins the more traditional, abridged historical explanation given above for a fuller and more convincing case that universal jurisdiction is far from a recent invention and extends with much greater confidence to a wide range of crimes beyond piracy getting caught by the structural flaws discussed earlier or by the lack of specific treaties for certain crimes (Kraytman 2005). The link between universal jurisdiction and extradition creates blurred the lines of prosecution even more, and bringing the two concepts together provides the negative connotation associated with universal jurisdiction and its limitless application. Scholars believe universal jurisdiction should be a last resort in circumstances where nothing else works. The ICC garners much notoriety, but in a way, forces the universality doctrine to take a back seat by requiring member states to change their legal codes to mirror those of the ICC (Kraytman 2005). The penalty of not conforming might be losing the ability of being the first to try

criminals whose crimes fall under their domestic principles. It can be argued that universal jurisdiction is more successful as a secondary tool where countries protect their citizens in a world of competing sovereignties. Extradition is a controversial topic, but an argument made later will discuss its use as a tool to lighten the workload for the ICC. Upon introducing the ICC and the crimes that fall under universal jurisdiction's grasp, it is important to better define these crimes and their place in international courts.

War Crimes, Crimes Against Humanity, Genocide

The initial foundations of universal jurisdiction for war crimes obtained during the Nuremberg trials was suspect due to the murky relationship between international politics and legal processes. With the subsequent UN affirmation of the principles and the Geneva Conventions of 1949, the policy of universal jurisdiction received a stronger boost. The Geneva Conventions, codification of the laws of war, inaugurated the treaty obligation of *aut dedere aut judicare*. Signatory states have an obligation to extradite individuals accused of grave breaches of the Conventions or else try them in their own courts. The principle of *aut dedere aut judicare* became the standard of bringing justice to the perpetrators that committed war crimes. The incorporation of this principle into several treaties on hijacking means the concept of terrorism is almost synonymous with the definition of a war crime. The principle in the Conventions allowed some states to declare themselves competent to prosecute individuals accused of war crimes even though foreigners committed them abroad on other foreigners. Since their drafting, the Geneva Conventions have become the cornerstone of the laws of war, international criminal law, and humanitarian law. Most judges agree that their provisions in the Conventions, including those of

the International Court of Justice (ICJ) constitute customary international law. The *aut dedere aut judicare* clauses lead many to assume that the Conventions provide for universal jurisdiction. Kraytman claims that this high status enjoyed by the Geneva Conventions masks a more complicated and less pleasant truth that, despite the near universal ratification, nowhere near as many states implement the necessary domestic legislation in order to make prosecution possible. For example, French courts ruled that the Geneva Conventions do not create a basis for the exercise of universal jurisdiction because it does not enact specific legislation and the Conventions do not have direct effect in the national legal systems because “their provisions have too general a character to be able directly to create rules on extraterritorial jurisdiction in criminal matters” (Stern 1999, pg. 527).

The crimes against humanity discussed in the Nuremburg Charter are enormous, including any crime against a human civilization. This means murder, extermination, enslavement, deportation, and other inhumane acts or persecutions on political, racial or religious grounds. The Charter aims to encompass crimes so heinous that they are crimes characterized not only against the victims but against all humanity. If these are crimes against all humanity, then the concept of universal jurisdiction would certainly apply and the criminals would become amenable to the jurisdiction of any country in the world (King Jr. 2000). There have not been any conventions or treaties to specifically discuss the definitions of crime against humanity. Only history in the unfortunate cases of Rwandan genocide and Bosnian genocide are frames of reference to define crimes against humanity until they were more properly defined by the International Criminal Court. Individual crimes often listed under the rubric of crimes against humanity, such as the aforementioned genocide and torture, are now addressed individually to create a system of humanitarian law. One of the milestones in the prosecution of crimes against

humanity is the famous Eichmann trial in Jerusalem in 1962, based on the principle of universality; the Eichmann court used the postwar trials as precedent. While the establishment of the ICC may correct the deficiency in codification, domestic trials basing jurisdiction for crimes against humanity on the universality principle are still often stymied by lack of specific domestic legislature in conjunction with general judicial discretion to rely on universal jurisdiction. Spain and Belgium adopted the doctrine of universal jurisdiction and seem to be the two countries that use it very liberally (Kraytman 2005).

Genocide is the final major crime defined using the doctrine of universal jurisdiction. It is especially interesting in the fact that a state perpetrates acts of genocide on its own citizens, and the serious breaches outlined in the Geneva Conventions required an international component, where the nationality of the victim and the perpetrator were not the same. Therefore, the application of extraterritorial jurisdiction to internal conflicts, such as genocide, remains controversial as states decide whether to adopt universal jurisdiction in their domestic courts. States are inherently self-interested, making selfish choices over cooperation. Extraterritorial jurisdiction to internal conflicts is yet another way for states to intervene in an area that does not directly benefit their cause, meaning states may be hesitant to get involved. It applied under the rubric of war crimes or crimes against humanity until the drafting of the 1948 Genocide Convention. Although genocide is a crime that goes against humanity and mankind, several countries voiced opposition to adopting universal jurisdiction for genocide, including the United States, France, the Soviet Union, the Netherlands, and the United Kingdom (Kraytman 2005). The US became the main proponent of not including genocide with universal jurisdiction because it would create obligations on states to involve themselves in conflicts that do not concern them. Consequently, the strong opposition resulted in the omission of universal

jurisdiction for crimes of genocide, instead prosecuting the crime where the state commits it or by a tribunal that obtains jurisdiction through the agreement of member states. Despite a General Assembly invitation to the International Law Commission to investigate the possibility of establishing such an international tribunal almost immediately after the adoption of the Convention, a tribunal did not come into existence until the adoption of the Rome Statute on the ICC (Kraytman 2005). This situation and the opinions on genocide transformed with the end of the Cold War and the events in Yugoslavia and Rwanda. The International Criminal Tribunal for Rwanda (ICTR) rendered the first ever modern genocide conviction against an individual in *Prosecutor v. Akayesu*. The status of the crime of genocide in customary international law gives rise to universal jurisdiction despite the lack of an explicit call for such jurisdiction. The most common rationale was the one first used in the Eichmann trial, where the court argued that the Convention's jurisdictional clause was permissive and not prohibitive; it did not state that universal jurisdiction could not be used, it merely did not mention it at all. The ICTR and the International Criminal Tribunal for Yugoslavia (ICTY) affirmed the application of universal jurisdiction. It seems that there is major overlap among the universal jurisdiction and the domestic jurisdictions of some nations. In order for prosecution to happen, it requires the presence of the defendant, but if every nation does not adopt the principles laid out in the Genocide Convention, then reliability and consistency will be next to impossible, a problem that universal jurisdiction has yet to solve (Kraytman 2005).

International Claims Tribunals

A conflict in the former Yugoslavia was underway for almost two years in 1993 when the first signs of international crimes began to spring up in Bosnia with mass executions, sexual assaults, rapes, concentration camps, and an overarching policy of ethnic cleansing. The Security Council set up a commission to investigate and research the events that occurred in the former Yugoslavia. The breaches of international law called for immediate intervention but the political and legal factors made setting up a tribunal much more difficult than the public understood. The conflict was still ongoing so a tribunal had to function without control over a volatile situation. There was not an international criminal tribunal and there was no set international criminal code, so establishing either one of these through a treaty would take years. The Secretary-General wrote a report and thus established a tribunal that contained both temporal and territorial jurisdiction pertaining to the war crimes committed in the former Yugoslavia. The jurisdiction of the tribunal did not extend beyond the borders of the former Yugoslavia and began on January 1, 1991. The Security Council has no legislative jurisdiction so the tribunal that it created cannot establish new international law principles; therefore, provisions that are definitely a part of customary international law empower the tribunal. This list of violations that definitely are a part of international law include: grave breaches of the 1949 Geneva Conventions, violations of the laws or customs of war, genocide, and crimes against humanity. These grave breaches of international law must occur within the proper territorial bounds as previously mentioned, but it is also only over individuals and not organizations, political parties, or any other administrative body. Any person accused of planning, ordering, instigating, or committing one of the war crimes that the tribunal possess jurisdiction, assumes individual criminal responsibility. Many

individuals commit such acts and so the tribunal adopts a customary international law principle known as command responsibility. Any and all superiors take responsibility for the war crimes committed, even if it is due to the actions of their subordinates. War crimes investigators are still prosecuting political leaders and former military generals such as Radovan Karadzic and Ratko Mladic for their role as leaders in the movement of ethnic cleansing (Shraga 1994).

The power of the international tribunal to prosecute individuals for war crimes and the power of national courts to exercise universal jurisdiction creates a conflict that is not very easy to resolve. Due to the sovereignty of states, considerations of law and practicality seem to favor the concurrent jurisdiction of the claims tribunal and national courts over exclusive jurisdiction for the tribunal. The universal jurisdiction that national courts can exercise provides for the concurrent jurisdiction; however this does not mean that the jurisdictional balance between the national courts and the tribunal is equal. The International Claims Tribunal for the Former Yugoslavia exercises its primacy over the national courts and can intervene at any stage of the legal process. The tribunal can intervene at any time beginning in the investigative stage and can request national authorities to comply with the rule of the tribunal. The Security Council elaborates on this in the rules of the tribunal and intervention by the tribunal is necessary to ensure impartiality and objectivity of the national courts. The goal of the national courts is most likely to intervene in such a way that impedes the ability of the tribunal with the intent of protecting the accused party from international criminal consequences (Shraga 1994). With the tribunal having jurisdiction over the national courts, there are some principles that hold true in international law that do not apply to national courts. The concept of double jeopardy, or *non bis in idem*, means that one cannot try a person for the same crime twice. This may hold true in the national courts, but not in the claims tribunal. The International Claims Tribunal for the Former

Yugoslavia has the ability to retry a case if the accused party is not convicted, and especially if the national courts were not impartial. To date, the tribunal indicted 161 people including the former president of Serbia Slobodan Milosevic, former president of Republika Srpska Radovan Karadzic, and former commander of the Bosnian Serb Army Ratko Mladic. Of the 161 indictments, cases closed on 141 of them and there are ongoing court proceedings for 20 of the accused. Of these 161 accused international criminals none of them will receive the death penalty because it is not provided in the statute of the claims tribunal. The death penalty was the principal form of punishment in Nuremberg, but was not included to prevent recourse to the national law in the former Yugoslavia that may still use capital punishment in their national law (Shraga 1994).

Richard J. Goldstone is a former judge from South Africa and the first chief prosecutor of the United Nations International Criminal Tribunal for the former Yugoslavia and for Rwanda from August 1994 to September 1996. Goldstone prosecuted all of the aforementioned Serbian criminals in the tribunal, eventually writing a book about his exploits. The intricacies of the tribunal are fascinating and the testimony of a former prosecutor is beneficial to understanding how the tribunal functions in such a special situation. Prior to World War II, the subjects of international law were not individuals but nations. The largest and most naïve assumption that Goldstone made about the tribunal was that it was well supported, and consequently well-funded. This was not the case at all; Goldstone even had to pay airfare to fly to and from The Hague out of his own pocket. Goldstone does much to provide reasoning as to why the Security Council chose to involve itself in Yugoslavia and not Cambodia or Iraq where similar crimes of genocide occurred. The description of the ethnic cleansing in Bosnia combined with photographs of emaciated Bosnian camp inmates recalled terrible memories of the

Holocaust and concentration camps. Politically abhorrent events took place again in Europe, something the European powers assumed was never going to happen again. National and international human rights groups gained greater power over public opinion, forcing governments to respond to the reports on human rights violations. The Security Council researched the events occurring in Serbia and determined the situation to be a threat to international peace and security, triggering peremptory peace-keeping powers under Chapter 7 of the United Nations Charter (Goldstone 2000). The Cold War somewhat delayed the establishment of this tribunal as strained relations made agreement on a tribunal impossible. The end of the cold War allowed agreement with Russia and China to establish this ad hoc war crimes tribunal. The official way to establish an international criminal tribunal is through treaty, but that was too time consuming for the immediacy of a resolution. The treaty would not bind countries that refused to sign it, particularly those countries with constituents in the former Yugoslavia (Goldstone 2000). Goldstone's commentary on the inefficiencies of the tribunal speak volumes as to how tough it is to marry international law with international cooperation. On Goldstone's first day, he arrived to twenty-three members already working in the office, from lawyers and computer technicians to police investigators. All twenty-three of them were Americans, sent to the tribunal by the U.S. government. According to United Nations rules, a cash subvention equal to 13 percent of the cost of the grant by the donor nation must accompany any kind of gift. This arbitrary percentage is supposed to cover the unbudgeted costs that the U.N. may incur due to the grant. It is unfair for a member state to cost the U.N. more money after voting on a previously established budget. In this case, the United States now owed the United Nations more than \$1 million to support the travel costs and wages for these employees. Not unexpectedly, the United States refused to do so and cited this to be a special situation,

requiring the UN to waive the fee. The United Nations funding paid for these employees, which other member states did not authorize. Once the United States refused to pay the arbitrary grant, the UN spent no more money on U.S. employees and so they were left with no more work to do. Goldstone was lead prosecutor for less than 24 hours and already has to deal with in-fighting between nations over money. The future of the tribunal was in question and so the United Nations quickly decided to waive the fee for the United States. The inefficiencies of the nations to get on the same page means that support from nongovernmental organizations is incredibly important. From the use of CNN footage, to the heightened awareness of gender-related war crimes, NGOs helped play a role in reminding the prosecutors and their teams the importance of their work on the tribunal. Goldstone writes that the ICTY was so doomed due to the unfortunate financial position of the United Nations at the time, attributed mostly to the United States being substantially delinquent in its dues (Goldstone 2000). The International Claims Tribunal for the Former Yugoslavia is still prosecuting war criminals today, a process ongoing for over 20 years now. Richard Goldstone's reflections prove that not only was there inefficiency on the legal side, but inefficiency on the administrative side due to uncooperative nations. The inability of nations to cooperate with one another, even after signing agreements to support a tribunal leads to unnecessary inefficiency. For universal jurisdiction to function properly as an international legal process, states must serve others. This is done through appropriate and timely extradition, funding, or even as an unbiased third party. The International Criminal Court is the best option as a mediator between states that cannot provide the level of cooperation required in international law. Later on, we will revisit Goldstone, as he talks about a future International Criminal Court and makes a few predictions about how it should work.

Established shortly after the International Claims Tribunal for the former Yugoslavia, the International Claims Tribunal for Rwanda (ICTR) addressed the particulars of genocide in the face of international law, specifically pertaining to Dutch Courts. Suspects of the crimes committed during the Rwandan genocide committed these crimes around 1994, the same year that the United Nations Security Council established the ICTR. While this seems like a quick response by the Security Council to prosecute Rwandan leaders, the ICTR referred many cases to the Dutch courts bringing jurisdiction into question. Pursuant to Articles 2 and 3 of the Dutch International Crimes Act, Dutch courts have universal jurisdiction; however, they did not enact this until 2003. Dutch courts did not have universal jurisdiction back in 1994 and so the Hague District Court rendered a decision that Dutch courts have no universal jurisdiction when it comes to genocide. The only way Dutch courts could take over prosecution of the cases in the ICTR is through a formal treaty. The District Court dismissed the case due to lack of statutory domestic law, not even really considering the area of customary international law that could afford a remedy. The customary norm in this case is a permissive norm authorizing the exercise of universal jurisdiction, not an obligatory one; therefore, Dutch courts are not required to prosecute the criminals for genocide. The dismissal of the ICTR cases is another instance where domestic sovereignty and domestic law trumps international law for the purpose of self-interest (Ryngaert 2007). Further, Dutch courts did not have original jurisdiction over crimes of genocide committed in 1994, but it could have subsidiary jurisdiction according to Article 4a, al. 1 of the Dutch Criminal Code. This article states that “Dutch criminal law applies to anyone against whom the criminal prosecution has been transferred to the Netherlands by a foreign State on the basis of a treaty which grants the Netherlands jurisdiction to prosecute,” (Ryngaert 2005). The ICTR referred this case to the Dutch courts, which is clearly not a State, because of the

Tribunal's Completion Strategy requiring it to finish its activities by 2010. The Dutch District Court defined the ICTR as a State, but maintained the necessity of a treaty to establish statute to take their cases.

What is the purpose and the goals of an international claims tribunal? The answer is retribution, some sort of retribution for the wrongs of others. In most cases, the retribution is through customary international law, which sentences criminals and violators of war crimes to serve time and pay for their actions. Discussing the means of tribunals provides the opportunity to touch on the unique Iran – U.S. Claims Tribunal, another mode of mediation that has not been effective. The Iranian storming of a U.S. embassy in Tehran in 1979 directly led to the response of establishing this tribunal. The Shah implemented modernization programs with the support of the U.S. and followers of Ayatollah Khomeini overthrew the Shah and forced him out of Iran. An embassy possesses the sovereignty of a state and so the storming of an embassy can cause a major international conflict. With the seizure of the embassy, the criminals held 52 American hostages for months. The U.S. froze all Iranian assets in response to the hostage crisis and so they needed a resolution immediately. Iran proposed four conditions for the release of the American hostages: U.S. could not intervene in Iranian affairs, Iran gets access to all frozen accounts, claims against Iran must be cancelled, and the properties of the Shah have to be given back to Iran. The General Declaration and the Claims Settlement Declaration formed an agreement known as the Algiers Accords. The Iran – U.S. Claims Tribunal would decide the \$12 billion in outstanding claims with the deadline to file a claim being set on January 19, 1982 (Social Science Post 2014). The Claims Settlement Declaration set up the tribunal to consist of nine members; three members appointed by the U.S., three members appointed by Iran, and three third party arbitrators appointed by the previous six. The tribunal's jurisdiction encompasses

claims of U.S. nationals against Iran and vice versa, claims between the two governments, and disputes concerning the execution of the Algiers Accords. Iran must maintain a security account of at least \$500 million for U.S. claims and to date the US received \$3 billion and Iran received only \$1 billion. What seems like an inherently unequal balance between claims is only scrutinized further when one sees that so little money changed hands in over 30 years (Social Science Post 2014). Universal jurisdiction and the want for each country to apply their own principles and rationale to the negotiations and subsequent decisions. If a non-biased and neutral third party negotiated the exchange of money, the tribunal could be more effective. While the establishment of a claims tribunal is a good start, there will be no progress without an agreed upon third party mediating the discussions. This third party mediator can serve a similar role as the judges in the International Criminal Court.

Reflection on the ad hoc tribunals and their influence on the future development of universal jurisdiction helps understand the emergence of a single international criminal court. The special prosecutor hired to do the job of bringing justice to citizen populations must have complete and effective independence. These politically charged war crimes accusations and investigations make an independent prosecutor necessary to demonstrate equality for all nations involved in the process. Politicians controlling prosecutors is dangerous because international law would then take a backseat to national jurisdiction. These ad hoc tribunals are incredibly inefficient and are unacceptable at providing the necessary justice for the crimes. Investigators are still prosecuting Mladic today for crimes committed in the early 1990s. It takes too long to establish these tribunals to be an effective avenue for prosecution, making the delay unfair to the people subjected to the war crimes as they deny an accused party the right to a speedy trial. The participation of member states is crucial to the success of these ad hoc tribunals. States must be

willing to provide resources to the United Nations, and obstacles such as a tax on “gifts” will only deter state participation. Finally, it seems to be that the creation of ad hoc tribunals is unfair in and of itself. The Security Council picks and chooses when to establish an international criminal tribunal and when not to. It is inherently unfair to allow a political institution to decide when to prosecute war crimes and when not to. If the prosecution of war criminals occurred under one roof, it would have a better chance of success and would also be more just. Despite the inefficiencies and negative aspects of the ad hoc tribunals, the principle intent of resolution is a positive takeaway. These tribunals are a good start, but they are just too political to be effective. The United Nations is selecting which cases to hear based on their own interests and then self-interested states are determining when to assist based on their political benefits. The impartial and neutral judges provided by the International Criminal Court is the most effective way to prosecute international war criminals.

International Criminal Court

After the establishment of the ICTY and the ICTR, it became evident that a permanent court that prosecuted exclusively war crimes is necessary. A single court could help to create a more uniform view of international law, certainly strengthening the impact of rulings. Richard Goldstone wrote his memoir during the creation of the International Criminal Court (ICC) because there was a movement to establish a single court for prosecution of war crimes at the time. The clear obstacle to the ICC was, and will remain to be, the national sovereignty of all nations. No nation wants an international tribunal to rule over its own citizens; the whole premise behind sovereignty is to eliminate foreign control over your own citizens. It took the horrors of

the ethnic cleansing in Yugoslavia to lead the Security Council to form a temporary tribunal, establishing precedent to create another one to seek justice for the genocide in Rwanda.

Goldstone offers a few opinions and makes a couple predictions about what an international criminal court should look like to be most effective. Exploring these precursors to the ICC are important to analyzing how effective it is only a few short years after its creation. A prosecutor of a permanent international criminal court cannot be inhibited by national amnesties. These amnesties do not have standing in international law and would not afford a proper defense to criminal or civil proceedings in front of a judge in an international court. States cannot try to pardon criminals, so the prosecutor of the ICC has the ability to fairly investigate and try any accused party. The essential idea of justice is the universality and equality of punishment, both nationally and internationally. Certain countries and certain situations may call for special circumstances, but one must prosecute all crimes. In the past, the inconsistencies of universal jurisdiction and international law led to confusing questions about standards. The United Nations established a tribunal to prosecute war crimes in the former Yugoslavia and Rwanda, but did not attempt to do this for places such as Iraq, and Cambodia. There is no good reason why the United Nations did not take these other war crimes seriously, and this cannot happen in the future. This court must prosecute all large scale war crime situations or acts of genocide, or the establishment of an international criminal court is frivolous. The work of the tribunals has done much to eliminate the imaginary differences between international war and internal war, an accomplishment that the International Criminal Court must continue to expand upon. War criminals torture, rape, and kill thousands of people due to internal wars within one single nation, something that the international community was hesitant to intervene in because of the national sovereignty principle. It is counterintuitive to think that protecting people from these horrors is

not possible because it is not an international conflict. If a country protects people from discrimination in international conflict, this aid should not stop because the warring parties did not cross any borders. In the *Tadic Jurisdiction Motion* case, the appeals chamber of the ICTY ruled that no one can sustain the distinction between international war and internal war (Goldstone 2000), making it the duty of international prosecutors to intervene in internal conflicts to protect civilian populations when necessary. A resurgence of humanitarian law is the result of the rulings of the tribunals, something carried on by the ICC. The uphill battle that an international criminal court faces is because of charges led by the United States. A dominant power in the international arena, the United States fears a court with unbridled power over the international community might decide to unjustly prosecute its citizens and place political provisions on them. According to Goldstone, this cannot happen because any prosecutor hired by an international criminal court must have the appropriate credentials and majority of the states must elect the prosecutor. A panel of three trial judges must approve any decision to initiate an investigation made by a prosecutor. A majority of two-thirds vote by the member states elect these trial judges. The court can implement another concept of complementarity, so that an international criminal court does not investigate any person or case already thoroughly investigated by the country of the person's citizenship. Several precautions are in place so that the criminal court does not even imagine looking too powerful, yet nations such as the United States are still hesitant to sign the necessary treaty (Goldstone 2000).

There is much discussion about the impact that the International Criminal Court has on international law and universal jurisdiction, despite its relatively young life as a single entity. The International Criminal Court does not have universal jurisdiction, a matter at which the conference in Rome could not reach consensus (Bekou 2007). The International Criminal Court

has jurisdiction over war crimes, genocide, and crimes against humanity in a couple situations explicitly stated in the Rome Statute:

- (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft
- (b) The State of which the person accused of the crime is a national.

The International Criminal Court only has jurisdiction over matters in which a State that has nationality or territorial jurisdiction over the offense is a State that signed the Rome Statute. It allows states to exercise universal jurisdiction in the international arena, but special circumstances only call for an outside situation to be referred by the Security Council (Bekou 2007). One could argue that this referral is universal jurisdiction, which is a valid argument. The problem is that the ICC does not have explicit control over any international crime committed between State actors or any internal war. If one studies the reason why the International Criminal Court exists, it is because of the internal conflicts that occurred over the past half century. If the State persecutes its own citizens and the ICC does not possess universal jurisdiction to prosecute the corrupt and malicious leaders, then what do these countries have to fear? What is stopping a country from committing acts of genocide again? Countries will certainly not agree to an ad hoc tribunal to have themselves prosecuted and if no referral comes from the Security Council, then the war criminals will never meet justice. The Rome Statute created cases that the ICC has no jurisdiction over, which could be a dangerous precedent in the future. The preamble of the Rome Statute claims, international crimes are said to 'threaten the peace, security and wellbeing of the world' and 'the most serious crimes of concern to the international community as a whole must not go unpunished,' (Bekou 2007). Therefore, the refusal of the drafters of the Rome Statute to

grant the ICC universal jurisdiction leads to criticism not only on the basis that the jurisdictional regime of the Statute means that some offenses may go unpunished, but also that the creators of the ICC failed to endow it with the mandate it needs in relation to assisting in the maintenance of international peace and security. As previously mentioned, the opposition by the United States and other strong world powers probably greatly influenced the drafters of the Rome Statute to not include universal jurisdiction. The United States is currently against universal jurisdiction, and so having them to turn their attention to the ICC is not the type of publicity it needs.

The ICC will not be effective unless States cooperate with the ICC. Unlike the Security Council tribunals where cooperation was mandatory, the ICC's cooperation is limited. Practically speaking, investigations would be extremely difficult, and, in essence, no trial can take place at the ICC if States do not provide assistance. No trial can take place without the defendant being surrendered by States to the custody of the Court, and no convictions will occur unless States assist it by collecting evidence, serving documents, and protecting victims and witnesses (Bekou 2007). A strong cooperation regime is crucial for the Court's success. The general obligation to cooperate is found in Article 86 of the Rome Statute. This Article is the first of a total of 17 provisions dealing with cooperation contained in Part 9 of the Statute. The general obligation to cooperate is supplemented by a reminder of this in Articles 89(1) and 93(1), which deal with arrest and surrender and other forms of cooperation respectively (Bekou 2007). Cooperation in the Statute is State-oriented, which may be explained by the Court's origins in a multilateral treaty and characterized by detailed definitions of the relevant obligations, to give clear guidance on what States may and may not do in the course of cooperation with the Court (Bekou 2007). Deference given to States when deciding how to handle situations lead States to incorporate its own domestic policies to assist the investigation.

The cooperation of States carries a significant relevance for the jurisdiction of the International Criminal Court; it is immensely important. The majority of direct evidence relating to crimes and suspects is most likely found in their State. If neither of those States agree to cooperate, then the possibility of the ICC obtaining the people and evidence it needs to run a serious trial will be in States which would not be obliged to cooperate. The ICC may attempt to pass on a request to a non-State party that is not obliged to cooperate, but this would only very rarely prove useful in the absence of a designated authority or an obligation to even listen to the ICC's requests. A refusal to cooperate will not be unlawful in domestic law, unless there is some form of domestic implementation legislation, which non-party States are unlikely to have, thus eliminating the possibility of any real domestic law challenge in such a State. Indeed, even for non-State parties willing to cooperate without domestic implementing legislation, any form of cooperation may be difficult to provide within the parameters of domestic law. Furthermore, it is difficult to see how a non-party would share the sense of ownership vital to the Court, and would assist the ICC even if it nominally had 'universal' jurisdiction. For universal jurisdiction in the ICC to work, cooperation of non-parties to the Court is necessary and this is very unlikely to even occur (Bekou 2007).

The greatest opponent of universal jurisdiction is the United States, who are very active in opposing passionate proponents of the doctrine. Henry Kissinger warns against the dangers of universal jurisdiction, calling the universal jurisdiction doctrine judicial tyranny. The fear here is in the judges abusing power by putting states at a major disadvantage by targeting their citizens. Kissinger and his policy of *realpolitik* sought power for the United States; therefore, any threat of an institution, a court using universal jurisdiction for example, might cause Kissinger some distress. The United States is a country always fighting against the tyranny of the majority,

beginning with the Declaration of Independence. Kissinger takes a stance that seems to describe a world that is resorting back to primitive ways. Human rights violations, war crimes, genocide, and torture have disgraced the current global community. The closest analogy is *hostes humani generis*, or enemies of the human race, which are originally dedicated to pirates, hijackers, or other roaming criminals. All of these past criminals committed their crimes outside the territory of any state, and so this notion of treating state officials similarly to an outlaw can seem astounding. Kissinger warns that universal jurisdiction can establish a dangerous precedent, and so he asks four questions: “What legal norms are being applied? What are the rules of evidence? What safeguards exist for the defendant? And how will prosecutions affect other fundamental foreign policy objectives and interests?” (Kissinger 2001). In 1998, the British detention of former Chilean president Augusto Pinochet at the request of a Spanish judge, who sought to try the former President for crimes committed against Spaniards on Chilean territory. The 16th month detention of Pinochet is a positive because of his acts of indecency. A threat to right-wing, capitalist politics, Pinochet’s coup is a terrible threat to stability in world politics. Just because the act is egregious, Kissinger does not believe that all precedent and standards should be ignored. The judiciary committee of the British House of Lords, or the United Kingdom's Supreme Court, concluded that “international law has made it plain that certain types of conduct... are not acceptable conduct on the part of any one,” (Kissinger 2001, pg. 90). This principle did not oblige the lords to endow a Spanish magistrate and consequently other magistrates elsewhere in the world. Kissinger believes there is no authority to enforce it in a country where the accused had committed no crime, and then to cause the restraint of the accused for 16 months in yet another country in which he was equally a stranger. It could hold that an international tribunal specifically established for crimes committed in Chile on the model

of the courts set up for heinous crimes in the former Yugoslavia and Rwanda was the appropriate forum (Kissinger 2001).

Justice for victims of war crimes or genocide make it very important that those criminals who commit international crimes are held accountable. Kissinger seems to argue that the nation struggling with a rough past deserves the chance to redeem itself. Domestic peace and a representative government should have the ability to prosecute their own citizens in their own courts. The United States has a system of checks and balances because it is the appropriate constitutional and democratic process. Therefore, a system of checks and balances should apply to international law to ensure the expansion and survival of democracy (Kissinger 2001). The process of extradition is a major issue for Kissinger. If the Pinochet case becomes a precedent, magistrates anywhere will be in a position to put forward an extradition request without warning to the accused party and regardless of the policies the accused's country might already practice for dealing with the alleged charges. The country asked to extradite the accused then faces a seemingly technical legal decision that, in fact, amounts to the exercise of political discretion whether to entertain the claim or not. Extradition procedures develop a momentum of their own and cannot be stopped once they power through State lines. The accused is not allowed to challenge the substantive merit of the case and instead is confined to procedural issues. Kissinger gives the example of some technical flaw in the extradition request, that the judicial system of the requesting country is incapable of providing a fair hearing, or that the crime for which the extradition is sought is not treated as a crime in the country from which extradition has been requested, thereby conceding much of the merit of the charge (Kissinger 2001).

The establishment of the ICC will certainly help the cause of maintaining sovereignty in the international arena. Kissinger believes the goal of the ICC is to criminalize certain types of

military and political actions to bring about a more humane conduct of international relations. The ICC has the ability to replace the claim of national judges to universal jurisdiction, it greatly improves the state of international law. Not without its flaws, the prosecutorial discretion exercised in the ICC is quite vague. Definitions of the relevant crimes are highly susceptible to politicized application; due process does not apply to defendants as it does in the United States. Any signatory state has the right to trigger an investigation. Kissinger and the United States rely on previous experiences to form their opinions on this new policy. As the U.S. experience with the special prosecutors investigating the executive branch shows, such a procedure is likely to develop its own momentum without time limits and can turn into an instrument of political warfare. "The extraordinary attempt of the ICC to assert jurisdiction over Americans even in the absence of U.S. accession to the treaty has already triggered legislation in Congress to resist it. The independent prosecutor of the ICC has the power to issue indictments, subject to review only by a panel of three judges," (Kissinger 2001).

Conclusion

In making an argument for the International Criminal Court, it is very evident that the United States has to be a part of the ICC for it to be effective. For the ICC to make an impact and have legitimate power in the global system, the United States must support and contribute to the prosecution of all war criminals in this one court. During international conflicts in the past, the contribution of the United States is the reason for the eventual end of fighting. In the current unipolar world, the United States seems the most powerful and most capable nation in assisting the International Criminal Court; however, the United States put the obstacles in place that the

ICC must overcome. An institution that is powerful enough to prosecute anyone they see fit is not something that the U.S. will support according to their current stance. The United States withdrew from signing the Rome Statute only 24 hours before the participating nation-states signed the document. The International Criminal Court must provide incentives to the United States to join in support of the court and contribute to its cause. Possible control of the court is something that may interest the United States enough to want to cooperate. A two-thirds vote by the member nations elect the justices of the ICC; however, an American chief justice that has more power than the others could be a viable incentive. The United States is fearful of the court prosecuting an American citizen or official without their permission, and so control of a justice that can help determine an investigation provides the United States with immense control of the court. If this is too much control, the nations can settle on a compromise in which the United States nominates their choice of justices and the member states vote on these choices. Although the United States still possesses the control they need, the member states can have a say in the justices they believe to be best fit for the position. All of the justices are on equal terms, with no one judge possessing more power than the others. This process includes the member states in the election of all justices, while giving the United States the power to control the election. In order for these changes to come into effect, the member states must reconvene and sign a new statute. This statute would include the United States, as member states would sign off the control of the election process to the United States. The involvement of the United States has to be one of cooperation and support for the International Criminal Court to have any power in the international arena. Providing the United States with a hand in the election process of justices, or even an American chief justice as the face of the court, presents the incentives needed to encourage participation in signing a new statute. A strong and powerful International Criminal

Court is in the best interest of all nations because the prosecution of most, if not all, international criminals serves the betterment of the international community.

It is tough to argue against the progression and impact universal jurisdiction had on the development of international law. Beginning with the Nuremberg Trials, universal jurisdiction saw a major uptick in implementation as the world called for justice for the victims of war crimes. International Criminal Tribunals for the former Yugoslavia and Rwanda were quick fixes to prosecute war criminals; however, the tribunals proved to be inefficient. International leaders used the tribunals as a foundation for the Rome Statute and the formation of the International Criminal Court. It is necessary to join the prosecution of war criminals in one court so that international law can be strengthened and built upon. Universal jurisdiction is not used by the International Criminal Court, which is the proper way to foster cooperation. The advocates for universal jurisdiction believe that nation-states are the inherent cause of war, and so the international community cannot trust these states to deliver justice. International law needs cooperation between signatory states to be effective, and if States can prosecute criminals across State boundaries, then the self-interested State will be hesitant to participate in the international arena. The International Criminal Court will continue to improve as prosecutors gain more experience in mediating compromises between countries and public officials. The progression of universal jurisdiction to the establishment of the ICC is a victory for law and justice in the global community.

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