CHAPTER – 6

JURISDICTIONAL ISSUES

“The Rome Statute establishes an overarching goal: to contribute to the prevention of future crimes. The work of the Court will help to end the culture of impunity but this is just a piece of the goal”.

- Moreno- Ocampo, Prosecutor of the International Criminal Court

6.1. Introduction

By Jurisdiction, we mean the power or authority of the court to render a binding decision on the substance, or merits, of a case placed before it. The International Criminal Court (ICC) derives its jurisdiction from the Rome Statute. Jurisdiction refers to the legal parameters of the Court’s operations, in the following terms:

1. Subject-matter jurisdiction (Jurisdiction *ratione materiae*)
2. Temporal Jurisdiction (Jurisdiction *ratione temporis*)
3. Territorial Jurisdiction (Jurisdiction *ratione loci*)
4. Personal Jurisdiction (Jurisdiction *ratione personae*)

6.2. Principles of Jurisdiction

The jurisdiction of the international criminal court is based on the following principles:

1. **Subject-matter (ratione materiae) Jurisdiction** - The subject-matter jurisdiction refers to the crimes within the jurisdiction of the court. According to Article 5 of the Rome Statute, the Court shall have jurisdiction over the following crimes:
   
   (i) The Crime of Genocide
   
   (ii) Crimes Against Humanity

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(iii) War crimes  
(iv) The Crime of Aggression

The subject-matter jurisdiction of the Court is limited to the above four categories of crimes. Although for the time being, the Court cannot exercise its jurisdiction over the crime of aggression, as the Rome Statute has not defined it. Article 5 (2) of the Statute provides that the Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime.

Thus, the Statute provides for the Court’s jurisdiction over the most heinous crimes. It has been discussed in the last chapter that there is a need to widen the subject-matter jurisdiction of the Court to include the contemporary crimes and other transnational crimes, for example, terrorism, cyber terrorism, drug trafficking, use of nuclear weapons, some other economic crimes, environmental harm, etc.

The Court has jurisdiction over the crimes that are specifically provided under the Statute and its jurisdiction cannot go beyond what is provided under Article 5, as it is the general principle of criminal law. The Statute also recognizes ‘Nullum crimen sine lege’ which means that a person shall not be criminally responsible under the Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.

2. **Temporal (ratione temporis) Jurisdiction** - The Statute shall not have retrospective effect with respect to the crimes committed prior to the entry into force of the Rome Statute establishing the ICC. The Statute provides under Article 24 that no person shall be criminally responsible under this Statute for his conduct prior to the entry into force of the
Statute. Articles 11 and 24 are to be read together. Even with respect to a particular State, the Court will exercise jurisdiction over the crimes committed on the territory of a State when that State becomes party to the Statute and the jurisdiction of the Court shall be with respect to the crimes committed after the State becomes party to the Statute.

The Statute has been criticized for its inability to reach into the past and prosecute atrocities committed prior to its coming into force. But it is the general principle of criminal law, which is also recognized in the Statute, that a conduct should be recognized as crime before it could be prosecuted by the Court. A conduct cannot be prosecuted as criminal unless at that particular time, it has already been defined so.

The Nuremberg Trials were also condemned on this ground that the crimes, which were prosecuted by the Nuremberg and Tokyo Tribunals, were defined only in London Charter (which was adopted after the World War II). The Tribunal exercised its jurisdiction over acts which were committed prior to the entry into force of London Charter. Though the Nuremberg Tribunal pointed out that it was exercising jurisdiction over acts, which have already, bee recognized as crimes in some conventions and in customary international law. The Hague Convention IV of 1907 declared certain acts as the war crimes and the Kellogg- Briand Pact discussed what amounts to Crimes Against Peace. Though these texts did not provide for individual criminal liability for commission of these crimes, but the said acts have also been condemned by the international community as the most serious crimes. For these crimes, even the states can exercise jurisdiction on basis of the principle of universal jurisdiction.

3 Rome Statute, Article 11 (1) provides that the Court shall have jurisdiction only with respect to the crimes committed after entry into force of this Statute. Article 24 (1) provides that no person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.

4 Supra note 2 at 55
Similar question was raised in *Erdemovic case* in International Criminal Tribunal for former Yugoslavia (ICTY). The crimes that ICTY was prosecuting were defined so in the Statute of the ICTY, the tribunal has jurisdiction over the acts committed prior to coming into force of the Statute that defined those acts as crimes under international law. Therefore, the need was felt to have a permanent court under a Statute where the crimes and jurisdiction of the Court should be specified. To counter such criticisms of the earlier tribunals, Rome Statute elaborately laid provisions regarding the acts that will be prosecuted by the Court after coming into force of the Rome Statute.

3. **Territorial (ratione loci) Jurisdiction** - The Court will have jurisdiction as provided under Article 12 (2) (a)⁵, over crimes committed on the territory of State parties, regardless of the nationality of the offender. This kind of jurisdiction is based on the principle of territoriality, i.e. the Court shall have jurisdiction over the crimes as mentioned under Article 5, in case they are committed within the territory of a state that is party to the Rome Statute. In fact, the Court will also have jurisdiction on the territory of those states that accepts the jurisdiction on ad-hoc basis, and also on territory so designated by the Security Council. To explain it further, the Court will exercise its jurisdiction even in the territory of States who are non-parties to the Rome Statute. It is possible in the following circumstances-

1. **On consent basis** - A State being a non-party to the Statute may give consent by declaration lodged with the Registrar of the Court

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⁶ See Rome Statute, Article 12 (2). It provides that the Court may exercise its jurisdiction if one or more of the following States are parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3 (mentions about acceptance of jurisdiction by non-State parties):

(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.
and accept the exercise of jurisdiction by the Court with respect to the crime in question.  

(ii) **On referral by the Security Council**- The Court may exercise jurisdiction over crimes committed within the territory of a non-party state, if the situation is referred to by the Security Council, acting under Chapter VII of the UN charter. If the Security Council is of the opinion that a situation in a State is posing a threat to international peace and security, it may pass a resolution under Chapter VII and refer the matter to the Prosecutor, thereby enhancing the ICC’s jurisdictional limit.

The crimes committed on territory under the Statute include crimes committed on board vessels or aircrafts registered in the State party. This is a rather common and widely accepted extension of the concept of territorial jurisdiction.

It is pertinent to mention here that the nationality of the offender will be of no significance if the offender has committed acts in the territory of a State party to the Statute. With this provision, the Court gets a good hold over the nationals of those countries who are not signatories for the simple reason that they want to shield their own nationals for their offences abroad. The concern over this was shown even by the U.S. because of which the U.S. prompted the Security Council to adopt resolution 1422. The U.S. feared that its soldiers (on peacekeeping mission in Bosnia and Herzegovina) could be prosecuted by the ICC, since Bosnia and Herzegovina is a party to the Statute and any crime committed on its territory would be covered within the ambit of ICC’s

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7 Rome Statute, Article 12 (3) provides that if the acceptance of a State, which is not a Party to this Statute, is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

8 See Rome Statute, Article 13 (b). It provides that the Court may exercise its jurisdiction with respect to a crime referred to in Article 5, if a situation in which one or more of such crimes appears to have been committed is referred to the prosecutor by the Security Council, acting under Chapter VII of the charter of the United Nations.

9 See Rome Statute, Article 12 (2) (a).
jurisdiction. Had Iraq also been party to the Rome Statute, the US soldiers could also have been prosecuted by the ICC for the prison atrocities in Abu Gharib. Therefore, it is important for states to become party to the Rome Statute so that the culture of impunity comes to an end.

4. **Personal (ratione personae) Jurisdiction.** The ICC will have jurisdiction over nationals of a State party who are accused of a crime, in accordance with Article 12 (2) (b). The Court can also have jurisdiction over nationals of a State not party to the Statute on ad-hoc basis that is when the State by declaration accepts jurisdiction of the Court for that particular crime. The Court’s jurisdiction over nationals of a non-party State could also be in case the situation is referred to by the Security Council under Article 13 (b), provided referral is made by resolution adopted under Chapter VII of the UN charter.

As regards nationality, international law only partially regulates States’ granting and removing of nationality and therefore a number of questions remain unanswered, those concerning- who is a National? Crimes can obviously be committed by Stateless persons or by those having dual nationality. In case of stateless persons, State of nationality can be equated to a State of permanent residence. But the problems may arise where an offender has dual nationality and one of the states of his nationality is a party to the Statute and the other one is not. In such cases, the ICC should look at whether a person’s link with a given State is genuine and substantial, rather than it being governed by some formal and perhaps even fraudulent grant of citizenship.

There will be no immunity from prosecution in favor of the Head of the State or a commander in case of a crime committed within the

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10 See Rome Statute, Article 12 (3)
jurisdiction of the Court. The official capacity of the offender is rendered irrelevant under Article 27 of the Statute. And the Court shall exercise its jurisdiction over all persons alike without any distinction based on official capacity.

As already mentioned, the Court will have jurisdiction only if the territorial state where the crime is committed or the state of nationality of the offender is a party to the Statute or has specifically accepted the jurisdiction of the Court with regard to the crime in question. At the drafting Conference, there were States (like the U.S. in particular) that attempted to insist that the consent of both the territorial State and the State of nationality should be required. It did so in order to prevent the risk involved in case of territorial state giving consent to prosecute U.S. troops on peacekeeping and peace-enforcement operations. In the end, the Conference accepted that the consent of either the territorial state or the state of nationality was sufficient. This was a decision, which was undoubtedly necessary to maintain the integrity of the treaty, but it has also been directly responsible for the subsequent fierce U.S. opposition to it.

Another important provision regarding personal jurisdiction under the Statute is that the Court shall have no jurisdiction over any person who was under the age of 18 years at the time of the alleged commission of a crime. The provision highlights the inability of the Court to exercise jurisdiction over persons committing crime who are less than 18 years of age. Therefore it becomes important in that case to make provisions to deal with such juvenile offenders. In fact it has been noticed that children were recruited in various armed conflict, though such recruitments are against the provisions of the Geneva Conventions but

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13 ibid
14 See Rome Statute, Article 26
it is important to deal with such situations where juveniles are committing war crimes, as part of armed forces or a volunteer corps trying to overthrow power in a State thereby threatening international peace and security. The youth of such targeted third world poor countries are targeted for conducting such operations. If deterrent punishment is not given, then provisions be made for their rehabilitation and reformation.

The world has already seen the acts of brutality and savagery committed by children on a large scale in the last phase of a conflict in Freetown in January 1999\textsuperscript{15}. These brutal acts committed in the civil war of Sierra Leone needs to be addressed. Mindful of the moral dilemma of prosecuting child victims who were transformed into perpetrators through abduction, drugs, physical and psychological abuse and slavery of all kinds, the General Secretary proposed that a process of judicial accountability be in principle provided for in the Special Court for Sierra Leone, but it was also declared by the General Secretary that the Prosecutor be instructed that in exercising his discretionary power to prosecute juvenile offenders, he should "ensure that the child rehabilitation programme is not placed at risk and that, where appropriate, resort should be had to alterative truth and reconciliation mechanism\textsuperscript{16}. This suggestion of Secretary General can also be implemented in case of the Rome Statute, where we can make such provisions for rehabilitation of juvenile offenders rather than sentencing them to imprisonment under the Statute.

It is apparent that the territoriality and nationality conditions have the potential to restrict the ICC jurisdiction considerably.

\textsuperscript{15} Cesare P.R. Romano, Andre Nollkaemper and Jann K. Kleffner, \textit{Second Generation UN Based Tribunals}, Internationalized Criminal Courts (Sierra Leone, East Timor, Kosovo & Cambodia) in International Courts and Tribunals Series, Oxford University Press, p 25

\textsuperscript{16} ibid at 26
6.3. Jurisdictional Issues: Concurrent Jurisdiction of the ICJ & the ICC

It is possible that similar questions of law will be raised in cases before both the ICC and the ICJ. For instance, the ICJ has jurisdiction to decide disputes between states concerning—whether a State has violated the Genocide Convention by committing acts amounting to genocide on its territory or on the territory of another State. Now assuming that the States are also party to the Rome Statute, the ICC will have the duty of determining whether a given person has committed genocide as defined in the ICC Statute. The rules of decision in these two international tribunals permit different results to be reached on similar facts. In case of crime of genocide, it is understood that both State as well as an individual can be made responsible in different courts. State can be made responsible for having violated the Genocide Convention of 1948 in the ICJ since only States can be parties in cases before the Court17. Similarly, an individual accused of crime of genocide may be held liable by the ICC for the acts under Article 6, for committing genocide. The jurisdiction of the ICC and the ICJ run parallel over certain crimes, though making two different entities liable for the same crime. Since their decisions will be based on different principles of international law, there may be a situation where ICJ can hold that no case of genocide is made out in that state, in which State the ICC holds a person liable for having committed genocide in the same State. Their decisions will not be dependent on each other, but there may arise such conflict situation. As both the courts are independent and their decision will be based on individual fact-finding, therefore a situation may arise where both the courts may give inconsistent judgments. The ICC is not bound to apply the law determined by the ICJ either as a matter of its own statute or because of the place of the two tribunals in the UN system18. The courts may arrive at different results based on same facts. The jurisdiction of the ICC and the ICJ may overlap each other in such cases. Both the tribunals have to run smoothly to avoid such concurrent jurisdiction. There is a need to develop some relationship

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17 See ICJ Statute, Article 34
18 Kenneth S. Gallant, The International Criminal Court in the system of States and International Organizations, Leiden Journal of International Law, 16(2003), p 576
between each other and in such cases, the ICC should be allowed to directly approach the ICJ for its advisory opinion.

There is one provision of the ICC Statute that could, if used properly, prevent ICC from creating a definition broader than that adopted by the ICJ while holding an individual criminally liable for his acts. The ICC provides that definition of crimes shall be strictly construed and in case of ambiguity, the definition shall be interpreted in favor of the person being investigated, prosecuted or convicted. This can be used to prevent the ICC from criminalizing conduct that has been considered not within the definition of crime by the ICJ. Though it does not prevent inconsistencies from arising where the ICC is more lenient in describing criminal activity than the ICJ. Nor does it prevent the ICJ from later making a declaration of law more lenient than previous judgment of the ICC.

Furthermore, at the present time, if an inconsistency were to arise between statements of law made by the ICC and the ICJ, there is no mechanism in place for promptly liquidating the inconsistency. The ICC and the ICJ must endeavor to harmonize the rules of law that are overlapping and covered within the jurisdiction of the ICC and the ICJ.

Similar situation may arise in case of crime of aggression. Pursuant to Article 5 (1) (d) of the Rome Statute, the ICC has jurisdiction with respect to the crime of aggression. However, Article 5 (2) of the Statute further provides that the ICC shall exercise jurisdiction over this crime once a provision is adopted in accordance with Articles 121 & 123 defining the crime and setting out the conditions under which the ICC shall exercise its jurisdiction with respect to this crime.

The Rome Statute has not yet defined the crime of aggression, as there was lack of consensus among the international community regarding the definition.
of aggression. But the Security Council may refer a situation, acting under Chapter VII of the charter, to the Prosecutor in case of an act of aggression in a particular State. Once the Security Council refers the act of aggression to the Prosecutor, after the initial investigation by the Prosecutor, the ICC will exercise its jurisdiction over crime of aggression. But before such a situation is referred to as crime of aggression by the Security Council, it will first consider the situation in that State whether it amounts to aggression or not. For that, the Security Council may be guided by the Definition of Aggression adopted by the General Assembly Resolution in 1974. The G.A. Resolution on Definition of Aggression defines Aggression as; "...use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the charter of the UN, as set out in this definition."

Further Article 2 of the Resolution provides that the first use of armed force by a State in contravention of the charter shall constitute prima facie evidence of an act of aggression. Analyzing the definition of aggression under the G.A Resolution\textsuperscript{21}, we find out that it implies State responsibility of the act of aggression, i.e. a State that uses force against the sovereignty, territorial integrity or political independence of another State which is also against the principle of UN as mentioned under Article 2 (4) of the charter. Such use of force is prohibited as \textit{Jus ad bello}, and a State can bring an action against another State for such use of force in the ICJ. One may find number of cases decided by the ICJ in which use of force is there against the sovereignty, territorial integrity and political independence of another State.

\textbf{Nicaragua's Case}\textsuperscript{22} - In 1979, the right wing Somoza Government in Nicaragua was overthrown by revolution by the left wing Sandinista Government in 1981. President Reagan terminated economic aid to Nicaragua on the ground that it had aided guerrillas fighting against the El Salvador Government, which enjoyed good relations with the U.S., by

\textsuperscript{21} G.A. Resolution 3314 (XXIX) of 1974
\textsuperscript{22} Nicaragua v. U.S., ICJ Reports 1986, p 14
allowing U.S.S.R. arms to pass through its ports and territory *en route* for El Salvador. Nicaragua, in this case, claimed that the U.S. had contrary to customary international law used direct armed force against it by laying mines in Nicaraguan internal and territorial waters causing damage to Nicaraguan and foreign merchant ships and attacking and damaging Nicaraguan ports, oil installations and a naval base. This use of force by the U.S., as the allegations purports, is against the sovereignty and territorial integrity of Nicaragua, which may also be termed as act of Aggression, as per the Definition of Aggression adopted by the General Assembly Resolution of 1974.23

In para 228 of the judgment, the Court finds that “the U.S. has committed a *prima facie* violation of that principle [principle of non-use of force] by its assistance to the contras in Nicaragua by organizing or encouraging the organization of irregular forces or armed bands... for incursion into the territory of another state”24. The court observed that the support given by the U.S. up to the end of Sept. 1984, to the military and paramilitary activities of the contras in Nicaragua, by financial support, training, supply of weapons, intelligence and logistic support, constitutes a clear breach of the principle of non-intervention. In this case the ICJ decided the use of force as a violation of principle of non-intervention by the U.S. against Nicaragua. This use of force may also be said to be crime of aggression committed by the U.S. The ICJ decided by twelve votes to three25 that the United States of America, by training, arming, equipping, financing and supplying the contra forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua has acted against the Republic of Nicaragua, in breach of its obligation under customary international law not to intervene in the affairs of another state26. It further decided that United States of America by directing or authorizing over-flights of Nicaraguan territory, and

23 G.A. Resolution 3314 (XXIX) of 1974
24 D.J. Harris, *Cases and Materials on International Law* (Fifth Edition), Sweet & Maxwell (1998), p 877
25 Judges Oda, Schwebel and Sir Robert Jennings dissented
26 Supra note 24 at 883
by certain other acts imputable to the U.S. has acted against the Republic of Nicaragua in breach of its obligations under customary international law not to violate the sovereignty of another state\textsuperscript{27}. Hence, the use of force in this case was against the sovereignty, territorial integrity or political independence of Nicaragua, which can be termed as aggression as it was the first use of force which is a violation of Article 2\textsuperscript{28} of Resolution on Definition of Aggression.

The use of force in Nicaragua was in 1981, when the ICC had not come into force. Had ICC been in place at that time, the issue would have been regarding the choice of right forum to determine the situation, i.e. whether ICC or the ICJ is the right forum to determine aggression and hold individual criminals liable?

The Security Council, in many cases had taken notice of the situation and had taken enforcement action against the act of aggression committed by a state. For instance, the Security Council reacted at an armed aggression by Iraq against Kuwait on August 2, 1990, by adopting Resolution 660 (1990).

**Invasion of Kuwait by Iraq:** In the resolution\textsuperscript{29}, the SC condemned the invasion of Kuwait by Iraq and it further demanded Iraq to withdraw immediately and unconditionally all its forces to the positions in which they were located on August 1, 1990.

The Security Council passed another Resolution 661 on August 6, 1990, as it was deeply concerned that the earlier resolution had not been implemented. The SC took measures under Chapter VII of the charter for maintaining and restoring international peace and security. Further, economic sanctions were

\textsuperscript{27} ibid at p 884
\textsuperscript{28} G.A. Resolution 3314 (XXIX) of 1974, Article 2 provides that, ‘the first use of armed force by a State in contravention of the charter shall constitute prima facie evidence of an act of aggression, although the Security Council may, in conformity with the charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.’
\textsuperscript{29} Security Council Resolution 660 (1990)
imposed under Chapter VII, by the SC against Iraq. Security Council played a very important role in Kuwait at the time of armed aggression by Iraq over it. Had ICC been in place even at that time, SC would have got power also under the ICC statute to refer the situation to the Prosecutor, under Article 13 (b) of the Statute, for necessary action by the ICC. But while referring the situation amounting to aggression, the Security Council would again be guided by definition of aggression adopted by 1974 G.A. Resolution. It needs to be highlighted here that the definition of aggression adopted by the G.A. only mentions about the State Responsibility for the act of aggression, whereas when we talk about the ICC’s jurisdiction, we must remember that the ICC has jurisdiction only over individuals, and not over States. Only individuals will be made liable for their acts that are covered within the courts’ jurisdiction. But since the States can be parties in a case before the ICJ, therefore, the appropriate forum for deciding crime of aggression and the responsibility for the same is with the ICJ, which has decided matters earlier. But since Rome Statute also covers the crime of aggression within the jurisdiction of the ICC, so it needs to be defined. Even if we depend on SC referrals to the ICC in case of crime of aggression until it is defined, still SC will have to be guided by some definition of aggression as to when it could determine a situation as aggression. And for that SC will have to refer back to the definition adopted by the General Assembly.

Article 4 of the G.A. Resolution provides that the acts as enumerated [in the resolution] are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the charter, therefore it is open to the SC which may also determine certain acts to be aggression that may have been committed by individuals or for which individual responsibility can be imputed.

Article 5 further mentions that a war of aggression is a crime against international peace. And also aggression gives rise to international responsibility. Therefore, if we analyze Article 5, we may state that since war of aggression is a crime against international peace, obviously then it is also a
crime, which is against the state. And further when the article provides that it gives rise to international responsibility, again the provision is left open for the discretion of the SC and the international community to interpret as to what kind of international responsibility is it giving rise to? Is it state responsibility or is it individual responsibility for the war of aggression? The Resolution distinguishes between aggression and war of aggression. War of aggression seems more serious as per the resolution. The war of aggression characterizes as having criminal responsibility. The understanding would seem to have been that a war of aggression results in individual responsibility under international law (as at Nuremberg and now at ICC) but that other, lesser forms of aggression give rise only to State responsibility of a civil kind, with an obligation only to make reparation30.

There is a very thin line of distinction as to when ICC will have jurisdiction and when will the ICJ exercise its jurisdiction over similar acts that can be defined as crime of aggression. The jurisdiction seems to be overlapping.

6.4. Universal Jurisdiction of the State versus International Criminal Jurisdiction

The most heinous crimes that are regarded as, particularly offensive, to the international community as a whole must not go unpunished. To achieve this end, i.e. of punishing the perpetrators of these serious crimes, there are two alternatives for trying such offenders- either a universal criminal jurisdiction of national courts or a criminal jurisdiction of an international criminal court. Until now, the states were following the principle of universal jurisdiction over the most serious crimes known to the international community.

Concept of Universal Jurisdiction- The principle of universal jurisdiction implies jurisdiction of a state (national courts) over acts of non-nationals, where the circumstances, including the nature of the crime, justify repression of some types of crimes as a matter of international public policy. The basis of the principle of universal jurisdiction is that the offenders committing such

serious crimes under international law must not go unpunished, and in that case any state can have jurisdiction over a person accused of genocide, crimes against peace, war crimes, crimes against humanity, etc, if the person is found in the territory of that particular state, regardless of his nationality or the place of commission of that offence. The State is empowered with such jurisdiction because of the serious nature of the crime.

As pointed out by Starke, "An offence subject to universal jurisdiction is one which comes under the jurisdiction of all states wherever it is committed in as much as by general admission the offence is contrary to the interests of the international community, it is treated as a delicate "jure gentium" and all states are entitled to apprehend and punish the offenders. Clearly the purpose of conceding universal jurisdiction is to ensure that no such offence goes unpunished"31.

The principle of universal jurisdiction was propounded first in respect to crime of piracy since pirates were considered enemies of whole mankind. Such jurisdiction would enable States to apprehend, try and punish pirates wherever they were found whether or not piracy was committed within the jurisdiction of the State concerned, it could try such pirates if they were found in their territory or were apprehended in High Seas. Universal jurisdiction over piracy has been accepted under international law for many centuries and constitutes long established principle of world community. All states may arrest and punish pirates, provided of course that they have been apprehended on the High Seas32 or within the territory of the State concerned.

As regards war crimes, it is now generally agreed that states have universal jurisdiction to apprehend, arrest and try the persons accused of war crimes33. The breaches of the laws of war, especially of the Hague Convention of 1907

32 See 1982 UN Convention on the Law of the Sea, Article- 105
33 Dr. S.K. Kapoor, International Law and Human Rights (Fourteenth Edition), Central Law Agency, p 223
and the Geneva Convention of 1949, may be punished by any State which obtains custody of persons suspected of crimes\textsuperscript{34}.

The General Assembly in 1968 adopted a Convention on the Non-Applicability of Statutory Limitations to War crimes and Crimes Against Humanity. It reinforced the general conviction that war crimes form a distinct category under international law, susceptible to universal jurisdiction, while the Four Geneva 'Red Cross' Conventions of 1949 also contain provisions for universal jurisdiction over grave breaches\textsuperscript{35}. Such grave breaches include wilful killing, torture or inhuman treatment, unlawful deportation of protected persons and the taking of hostages.

The principle of universal jurisdiction was applied to some extent in \textit{Eichmann Case}\textsuperscript{36}. Eichmann, a German national, was the Head of the Jewish office of the German Gestapo. He was the administrator incharge of "the final solution" – the policy that led to the extermination of between 4,200,000 and 4,600,000 Jews in Europe. Eichamnn was found in Argentina in 1960 by persons who were probably agents of Israeli Government and he was the abducted to Israel without the knowledge of the Argentinean Government. There he was prosecuted under \textit{Israeli Nazi & Nazi Collaborators (Punishment) Law of 1951} for war crimes, crimes against Jewish people, the definition of which was modeled upon the definition of genocide in the Genocide Convention of 1948, and crimes against humanity. He was convicted and sentenced to death. His appeal to the Supreme Court of Israel was dismissed\textsuperscript{37}.

The District Court in its judgment observed that the abhorrent crimes defined in the law [of 1951] are not crimes under Israeli law alone. These crimes,

\textsuperscript{34} Ian Brownlie, \textit{Principles of Public International Law} (Sixth Edition), Oxford University Press, p 303


\textsuperscript{36} Attorney- General of the Government of Israel v. Eichmann (1961) 36 I.L.R. 5 District Court of Jerusalem

\textsuperscript{37} The Supreme Court Judgment is at (1962) 36 I.L.R. 277. The Supreme Court affirmed the reasoning of the District Court.
which struck at the whole of mankind and shocked the conscience of nations, are grave offences against the law of nations itself (delicta juris gentium). The Court quoted from a number of authors who take the view that "crimes against international law" generally or war crimes in particular give rise to universal jurisdiction.

The Court further observed that the State of Israel's "right to punish" the accused derives in our view from two cumulative sources- a universal source (pertaining to the whole of mankind), which vests the right to prosecute and punish crimes of this order in every State within the family of nations and a specific or national source, which gives the victim nation the right to try any who assaults its existence.

The Court also based its jurisdiction partly on the basis of principle of universality wherein it could prosecute and punish crimes of such serious nature in their State even though they were committed outside its jurisdiction, by a person who was not even a national of their State.

The objective of recognizing the principle of universal jurisdiction is to overcome traditional limitations placed on State's criminal jurisdiction, i.e. limitations tied to issues of territory and citizenship. The aim is to draw criminal law more closely under the protection of common international interests.

It is to be noted that in the Gen. Augusto Pinochet case, the issues of jurisdiction were raised in House of Lords. Lord Millet, dissenting analyzed and observed, "In my opinion, crimes prohibited by international law attract

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39 Judgment of the Court, Para 30 in D.J. Harris, Cases and Materials on International Law (Fifth Edition), Sweet & Maxwell (1998)
40 Bernhard Graefrath, Universal Criminal Jurisdiction and International Criminal Court, European Journal of International Law at http://www.ejil.org/journal/voll/o1/art4-02.html#Topofpage
41 [1999]2 WLR 825 at 911-912, in Ian Brownlie, Principles of Public International Law (Sixth Edition), Oxford University Press at page 304
universal jurisdiction under customary international law if two criteria are satisfied. First, they must be contrary to a peremptory norm of international law so as to infringe *jus cogens*. Secondly, they must be so serious and on such a scale that they can justly be regarded as an attack on the international legal order". He further observed that every state has jurisdiction under customary international law to exercise extra-territorial jurisdiction in respect of international crimes which satisfy the relevant criteria. He opined that the systematic use of torture on a large scale and as an instrument of state policy had joined piracy, war crimes and crimes against peace as an international crime for which U.K. has jurisdiction to try and prosecute Gen. Augusto Pinochet.

The principle of universal jurisdiction is not very well received by many states because of the obvious reasons that it interferes with the State Sovereignty. Many states would prefer to prevent the interference with their state sovereignty than support the need for coordinated struggle and cooperation in the fight against international crimes. An alternative is to give jurisdiction to an international criminal court to try such offences, with which the ICC has been empowered under the Rome Statute. Since many issues will be resolved by giving such jurisdiction to an independent permanent international criminal court. The issues involved in exercising universal jurisdiction are-

1. The states object to exercising the principle of universal jurisdiction as they fear that it will affect their sovereignty, because it gives jurisdiction to other States to try their nationals or to try offences committed on their territory. Such an objection was raised by Argentina in case of *Eichmann trial*. It was also objected to by Spain in case of *Pinochet’s prosecution* in the U.K. in the House of Lords.

2. Different States have differing degrees of punishment. Therefore, if any State exercises its jurisdiction over such crimes on basis of universal jurisdiction, they may impose different punishment based

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42 *Supra note 40*
on their national laws than the punishment that may be imposed by other states according to their national laws.

(3) If universal jurisdiction is accepted as the rule, there is a possibility that defendant will suffer dual punishment or be unfairly punished by the State prosecuting.

This set up would rather lead to more complexities and conflicts among the nations rather than bringing justice to the victims. Therefore, the need is to develop international standards aimed at ensuring that the peaceful co-existence of the States be protected through criminal law. It is possible if the international community supports the international criminal jurisdiction of the ICC.

**International Criminal Jurisdiction**- The ICC will have jurisdiction over the most serious crimes under international law, i.e. Crime of Genocide, Crimes Against Humanity, War crime and Crime of Aggression. The ICC shall have jurisdiction over individuals committing such offences. In case of commission of any such crime, the matter will be referred to the Prosecutor as following-

(i) Situation may be referred by the State party to the Rome Statute,
(ii) Situation may be referred by the Security Council acting under Chapter VII, or
(iii) The Prosecutor may *proprio motu* take notice of the situation

The jurisdiction of the Court, over such heinous crimes, is limited with regard to subject-matter (over the crimes specifically mentioned in the statute), and with regard to the state parties to the Rome Statute, i.e. it will have jurisdiction only in case the crimes are committed on the territory of the state party or committed by nationals of the state party.

The jurisdiction is further limited under the principle of complimentarity, i.e. it will have jurisdiction over crimes only if the territorial state or the state of nationality of the offender is unable or unwilling to try and prosecute the case.
The jurisdiction of the ICC as per this principle is complementary to the national jurisdiction.

A source of difficulty concerns the impact of the Statute on third states. As far as State's criminal jurisdiction is concerned, it is perfectly normal for states to exercise their criminal jurisdiction in respect of the nationals of other states, if certain conditions are satisfied, i.e. on the basis of the principle of territoriality (in case nationals of other state commits crime on their territory), principle of passive personality (when the nationals of other state commits crimes that affects their citizens as victims) or principle of protective jurisdiction (which merely affect state interests or security of the state). In such cases the consent of the foreign national's state is not required.

Similarly if a national of a non-state party (of Rome Statute) commits crime on the territory of a state party to the ICC, the ICC may have jurisdiction to prosecute the national of third party state. Therefore the fear of certain states [the U.S.] that their nationals will be prosecuted by the ICC is unfounded because even otherwise, the territorial state can exercise jurisdiction over such offenders on the principle of territoriality or universal jurisdiction.

The provision of complimentarity principle creates more of confusion, because even without this principle a State will always have a right to try and prosecute such an offender on the basis of principle of universal jurisdiction. The proposal is that the ICC should have been empowered with exclusive jurisdiction over such offences.

While following the principle of complimentarity as provided under the Rome Statute, there is a possibility that such criminals after having committed such heinous crimes roam about freely. For instance, if a state is exercising jurisdiction over such offenders [as per the principle of complimentarity], after prosecuting them and holding such persons guilty, the State may grant them amnesty. In such cases, where the states are holding prosecutions and after prosecution when the guilt is proved, the states grant amnesty under their
national laws— in that case 'will the ICC have the power to re-open such a prosecution?' Can the ICC purport that the State was unable or unwilling to prosecute an offender, whereas the prosecution had actually been conducted by the state? According to my view, since the state had conducted prosecution, the ICC has no power to re-open such a case. And if a State is allowed to grant amnesty to such criminals, that would mean justice undone. Therefore, the proposal is to give exclusive jurisdiction to the ICC, which is not complementary to the national jurisdiction and the need is to support the rule of international law. The ICC can strive for universality only by persuading more and more states to accede to the Rome Statute43.