



Jurisdictional Universality: Combating Impunity and Seeking Justice for Atrocities

- Anuradha Lawankar (I B.A.LL.B.)

Universal jurisdiction is a crucial legal principle that ensures accountability for international crimes, irrespective of the nationality of the perpetrators or the location of the crimes. Recently developments regarding crimes against the Rohingya population provide an opportunity to examine the relationship between the jurisdiction of the International Criminal Court (ICC), the principle of complementarity, and the exercise of universal jurisdiction.

Universal jurisdiction is firmly rooted in international legal frameworks, like the 1949 Geneva Conventions, the 1973 Convention against Apartheid, and the 1984 Convention against Torture. These treaties impose a duty on State parties to prosecute or extradite individuals accused of war crimes. It applies to serious offences such as war crimes, crimes against humanity, genocide, and torture.

The ICC's interpretation of the Rome Statute allows States to

exercise universal jurisdiction, permitting them to establish international jurisdiction collectively for nationals of non-party States, provided prohibitive rules under international law are not violated. This application is derived from the Lotus principle, as applied within the ICC. The Lotus Principle states that unless there is a specific prohibition in international law, States are free to exercise jurisdiction over acts outside their territory. It emphasizes the absence of a rule that prohibits jurisdiction rather than requiring explicit permission.

The complementarity principle applies when national jurisdictions genuinely lack the ability or willingness to investigate and prosecute core international crimes, serving as an admissibility principle for the Court's intervention. Conversely, universal jurisdiction extends beyond territorial boundaries.

However, concerns arise over the sovereignty of third States when applying the admissibility test of Article 17 comprehensively. The argument is that since these States never explicitly accepted the authority of the ICC or the Rome

News at a Glance

The UN Human Rights Monitoring Mission in Ukraine released a report detailing the arbitrary detention, torture, and occasional killing of civilians by Russian armed forces in the context of the Russian invasion of Ukraine. It documented 864 cases of arbitrary civilian detention by Russian forces, and 75 cases by Ukrainian armed forces. For more information, see [here](#).

A panel of the International Criminal Court (ICC) authorized the ICC prosecutor's office to continue its crimes against humanity investigation in Venezuela over Venezuela's objections. This decision comes after Venezuela asked ICC prosecutors to defer their investigation in favor of its own. For more information, see [here](#).

The EU agreed to issue their 11th sanctions package against Russia for the war in Ukraine. The new package aims to prevent countries and companies from circumventing sanctions already in effect. For more information, see [here](#).



Statute to assess the effectiveness of their domestic legal systems, any ICC decision on admissibility indirectly violates the principle of "*par in parem non habet iurisdictionem*."

Several challenges hinder its effective implementation. Firstly, the lack of consensus on its definition and scope leads to conceptual ambiguity, resulting in inconsistencies and potential for abuse. Clear definitions and agreed-upon parameters are necessary for consistent application. Secondly, the exercise of universal jurisdiction can strain diplomatic relations between States, observed in the case of South Africa issuing an arrest warrant against Sudanese President Omar al-Bashir, despite his indictment by the ICC. Thirdly, logistical challenges arise when dealing with universal jurisdiction cases: gathering evidence from foreign jurisdictions, protecting witnesses, and ensuring an impartial trial, particularly when crimes occurred in a different country. The trial of Hissène Habré in Senegal exemplifies this.

Despite these obstacles, efforts can be made to improve the

implementation of universal jurisdiction through specific amendments to the Rome Statute. Clarity can be achieved by amending Article 12(2), to provide clearer guidance on jurisdictional reach. Strengthening complementarity can be accomplished by amending Article 17, emphasizing the primacy of national jurisdictions. Regional initiatives and capacity-building programs offered by international organizations further contribute to the effective application of universal jurisdiction. These measures collectively foster global justice and accountability, reinforcing the importance of universal jurisdiction in addressing international crimes.

Equity and Ex Aequo Et Bono under ICSID Arbitrations

- Tanishq Mishra (II B.A.LL.B.)

The Washington Convention of 1965 grants private individuals and corporations who are "investors" in a foreign State the right to bring legal proceedings against the host State. These proceedings are in the form of an Investor-State arbitration before the International Centre for Settlement of Investment Disputes (ICSID).

News at a Glance

The UN released two reports, citing increases in deaths by improvised explosive devices (IED) and rising rates of drug trafficking in Afghanistan. The first report shows a steep increase in deaths by IEDs in Afghanistan since the Taliban took over in 2021. The second report alleges that a Taliban ban on poppy harvesting for opium may lead to a surge in the trafficking of synthetic drugs, such as methamphetamine, in 2023. For more information, see [here](#) and [here](#).

The UN refugee agency (UNHCR) said that the estimated number of people fleeing from the ongoing conflict in Sudan is expected to surpass one million sooner than previously projected. UNHCR is particularly worried about the situation along the Chad-Sudan border, as ongoing rains and cross-border attacks pose significant challenges to the delivery of essential humanitarian aid. There have been no official reports of a ceasefire in the conflict, indicating that the fighting continues unabated. For more information, see [here](#).



Article 42(3) gives the parties the ability to settle the dispute *ex aequo et bono* (“according to what is equitable and good”), allowing the Tribunal to disregard the rules of law otherwise applicable under Article 42(1) and base its award on considerations that it regards as equitable. This ability is contingent on the parties’ prior agreement, de hors which the application of this principle risks the award being annulled under Art. 52(1)(b) for excess of powers. It is the ratio formed in these annulment proceedings that constitute our current understanding of how principles of equity can be applied by an ICSID tribunal.

In Klockner v. Cameroon, the claimant alleged that the Tribunal’s decision was an application of *ex aequo et bono* instead of the substantive law agreed upon by the parties. Based on this allegation, the Ad Hoc Committee scrutinized the Tribunal’s award, particularly the Tribunal’s statement that the principle of confidence “(...) is a basic principle of French civil law, as is indeed the case under other national codes which we know of.” The Committee observed that the Tribunal had failed to distinguish such a principle

under the provisions of either the substantive or international law, ultimately concluding that the Tribunal had “manifestly exceeded its powers” within the meaning of Article 52(1)(b).

When a similar misapplication was alleged in MTD v. Chile, the Ad Hoc Committee noted that consideration of fairness in the application of the law did not amount to *ex aequo et bono*. It further reiterated the legal stand taken in Amco v. Indonesia that a mere reference to equal consideration does not amount to *ex aequo et bono*.

Thus, the present jurisprudence differentiates two applications of equity by ICSID tribunals - equity within the applicable law and equity as a source of law on its own (i.e. *ex aequo et bono*). Since the latter constitutes an autonomous source of law, its application de hors the agreement of the parties is rightly considered beyond the powers of the Tribunal.

News at a Glance

The Organization of American States (OAS) announced that it approved a resolution urging Nicaragua to “cease all human rights violations, release political prisoners, and respect religious freedom and freedom of expression, as well as the rule of law.” The OAS’s Inter-American Commission on Human Rights (IACHR) additionally made several requests to extend protections for political prisoners and indigenous peoples. For more information, see [here](#).

The Financial Action Task Force (FATF) decided to add Croatia to its “grey list,” along with Cameroon and Vietnam. Countries on the “grey list” are the “jurisdictions under increased monitoring.” The move makes Croatia the only EU member on the list, and the stated reason is the country’s deficiencies in preventing money laundering and terrorism financing. For more information, see [here](#).



CBAM: Environment Protection or Smokescreen For Trade Protectionism?

- Tanushree Pateriya (I B.A.LL.B.)

Eight years have passed since the Paris Agreement on climate change was brought into force, but global mitigation commitments fail to meet the temperature limitation targeted. Against this backdrop, unilateral carbon pricing policies have surfaced.

The major carbon policy brought forth is the Carbon Border Adjustment Mechanism (CBAM), claiming to avert “carbon leakage.” This issue occurs when a manufacturer in the EU outsources the manufacturing of carbon-intensive items to countries outside the region with laxer environmental regulations. CBAM is a tool to put a fair price on carbon during the production of carbon-intensive goods entering the European Union (EU).

Its opponents argue that it is unjust because it places the onus of combating climate change on nations that are developing, who, in the past, have done considerably less to cause it. While carbon pricing is important, subjecting

exports from developing countries to additional fiscal burden through a carbon tax is in direct contravention of another foundational principle: 'Common but Differentiated Responsibility and Respective Capabilities' (CBDR). The CBDR is anchored in Article 3 of the United Nations Framework Convention on Climate Change which points to the historic variation among countries contributing to climate change, as well as the deep inequality in their financial capacities to combat the same.

Furthermore, CBAM infringes Article III of GATT which aims to maintain the effective equality of competitive opportunities in the market for foreign products as compared to the same category of domestic products. Yet, there may be a claim for its justification under the General Exceptions provision found in Article XX, which allows countries to take actions that might be in violation of GATT agreements if they fulfill the criteria of "conservation of exhaustible natural resources," which CBAM would fall under. It is unlikely, though, that it would fulfill the chapeau, which asks nations to avoid applying policies in a way that creates unjustified distinctions

News at a Glance

Serbian Army Commander, General Milan Mojsilovic, is urging NATO peacekeepers to increase efforts to protect minority Serbs who are in Kosovo. The call for protection follows the failure of peacekeeping negotiations between the EU, Serbia and Kosovo. The EU hosted emergency talks on Friday with the aim of defusing tensions around the borders of Serbia and Kosovo following a Kosovo police seizure of a Serb-majority municipality. For more information, see [here](#).

Amnesty International (AI) accused Spain and Morocco of covering up and failing to investigate the deaths of migrants at the border of Melilla. In June 2022, Spanish and Moroccan authorities were reported to have committed crimes under international law by employing anti-riot equipment—like tear gas and rubber bullets—to violently disperse about 2,000 Black migrants seeking to cross from Morocco to Melilla. For more information, see [here](#) and [here](#).



between nations where similar elements exist. As critics claim, the CBAM only takes into account "explicit" carbon prices rather than implicit costs incurred by goods coming from certain nations. As a result, it makes arbitrary distinctions between nations with similar ecological circumstances.

Developing nations also express concerns regarding the allocation of revenue obtained from CBAM. Certain developing countries suggest that the collected revenue should be directed towards implementing cleaner technology in the developing world, aiming to enhance the efficiency of the mechanism.

Considering that the developing countries have accused the EU of protectionism, it is resolving the issue by conducting bilateral discussions with its trade partners. China, for one, proposed to conduct multilateral discussions on CBAM at the World Trade Organisation (WTO) where the EU should give a specific presentation at the meeting on the subject, concentrating on its international legal foundation and its assistance in addressing any environmental problems. This proposal

received widespread attention from developing nations.

Taliban's Ban on Afghan Women Employees of The UN: A Disturbing Trend

- Shravani Revankar (I B.A.LL.B.)

On 4th April 2023, the Afghan women employees working for the UN in Jalalabad were prohibited from going to their offices by the Taliban de facto authorities. This ban is one of the many imposed by the insurgent group since August 2021. There has been a slew of violations of fundamental rights with the Taliban government restricting women from having any access to public life, universities, and schools.

For women and girls in Afghanistan, education and employment has become a distant dream. This ban will severely affect the United Nations Assistance Mission in Afghanistan (UNAMA). Afghan women, the backbone of UNAMA's humanitarian response, are proficient and distinctively placed to reach the population their male co-workers cannot. For instance, the Taliban forbids male doctors from treating females therefore Afghan women

Upcoming Activities

Call for Papers: Global Constitutionalism and Supranational Adjudicative Bodies – Global South Experiences vis-à-vis Hegemony Seminar

The Norwegian Centre for Human Rights, University of Oslo is hosting the webinar on 16th -17th November, 2023. Participants are invited to submit an abstract (max. 300 words) and a short bio by 21st August, 2023. Selected papers will be published in a special issue of a peer-reviewed international journal and/or in an edited book. For more information, see [here](#).

Call for Papers: Groningen Journal of International Law

The journal is open to all papers on international law. The word limit for accepted articles is 7,000 to 15,000 words (excluding footnotes) and the deadline is 1st August, 2023. For more information, see [here](#).



physicians are necessary so that females get adequate medical care.

This ban violates the UN [Charter](#), the Universal Declaration of Human Rights ([UDHR](#)), and the other international human rights treaties to which Afghanistan is a party. This [embargo](#) on women's right to work targets the heart of the UDHR, which is, gender equality. It violates Article 2 and Article 23. The former provides certain rights and freedom to every individual without gender-based distinction and the latter affirms the right to work, freedom of employment choice, and non-discriminatory protection against unemployment. Article 8 and Article 101 of the UN Charter also stipulate that there shall be no barriers preventing men and women from participating equally and in all capacities in its principal and subsidiary organs.

The calls of Roza Otunbayeva, head of the UNAMA, urging the Taliban to [uplift](#) the despotic measures were rejected by those who considered this an interference in their country's internal affairs. They remarked that the Taliban was committed to international norms

and obligations which do not infringe on the principles of Islamic law. These acts make their recognition as a legitimate government nearly impossible.

By increasing the support and prioritizing women in all their engagements with the insurgent group, the international community can strengthen the women and civil societies in Afghanistan. The global community has the political and economic leverage to compel Taliban to stringently adhere to the international human rights treaties including CEDAW and ICCPR which Afghanistan has ratified, and demand a reversal of the aforementioned misogynistic policies creating [gender apartheid](#). The situation in Afghanistan begs greater articulation, we must not miss the woods for the trees in lieu of the [political](#) slugfest and stand in solidarity with Afghan women, and protect the country from its impending catastrophe.

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Upcoming Activities

Call for Papers: China and Europe in the African Continent – Economic, Legal, and Political Perspectives

Sant'Anna School of Advanced Studies has announced a call for papers for the Conference on 'China and Europe in the African Continent: Economic, Legal and Political Perspectives.' This event will take place from 30th November - 1st December, 2023. The deadline for submitting an abstract is 15th July, 2023. For more information, see [here](#).

Trade, Law & Development – Call for Submissions

The Board of Editors is pleased to invite original, unpublished manuscripts for publication in the General Issue of the Journal (Vol. XV, No. 2). The submission deadline is 5th August, 2023 for manuscripts pertaining to any area within the purview of international economic law. For more information, see [here](#).