THE MEANINGLESS EXISTENCE OF UNIVERSAL JURISDICTION

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INTRODUCTION

Pirates. Pirates have been around for centuries. They have been made popular by movies and television shows. There are action figures and Halloween costumes made after them. However, the true legacy that pirates leave behind has been diminished. Their legacy has been ratified to downplay their monstrosities. They were marauders of sorts, pillaging lands and raping women.¹ Sometimes pirates would be seized overseas, but there was no way to punish them for the crimes committed abroad because that country had no jurisdiction, no right, to penalize them. Within this gap in the justice system is where universal jurisdiction was created. Pirate crimes were committed in international waters, where no country had territorial jurisdiction. Universal jurisdiction was created to allow countries the opportunity to prosecute this set of crimes. There are two main types of universal jurisdiction. The traditional, or “customary,”² universal jurisdiction that was first established is exercised over crimes committed in international waters, where no country has jurisdiction. The other form of universal jurisdiction is exercised by

². Statute of the International Court of Justice, art. 38, ¶ 1(b), June 26, 1945 (“Customary” in international law is a form of states acting in a way that is “of a general practice accepted as law.”), available at http://legal.un.org/avl/pdf/ha/sicj/icj_statute_e.pdf.
international tribunals or through Conventions, where the tribunal or state has jurisdiction by becoming a party to the treaty. The traditional universal jurisdiction will no longer be necessary because the universal jurisdiction exercised through Conventions will soon cover all aspects of the overarching principle.

The creation, development, and deterioration of universal jurisdiction for international crimes have an apparent maturity level that will not be sustainable for an extended period of time. It will not be sustainable because the customary type of universal jurisdiction will be rendered meaningless once enough countries become parties to multilateral conventions, allowing countries jurisdiction to prosecute. The existence of universal jurisdiction, in its customary fashion, is limited because tribunals, like the International Criminal Court, and Treaties, like the Hague Convention, have replaced many traditional universal jurisdictional functions, and will likely replace all of them in time.

The legitimate assertion of authority by a state or country to affect its legal interest is the meaning of the term “jurisdiction.” The legitimacy of this principle depends on international law jurisdiction principles established to create more compatible and cooperative relations amongst nations. This process will resolve conflicting assertions of domestic penal authority, as each country wants to have an opportunity to penalize law violators in its own land.

Universal jurisdiction builds upon the traditional jurisdiction principle. It is an international policy that allows one country to have jurisdiction over an individual who has broken laws in another, wholly separate, country or in international seas within no country at all. It is defined in *The Princeton Principles on Universal Jurisdiction* as a “criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other

4. *Id.*
5. *Id.* at 787.
6. See *id.* at 788.
connection to the state exercising such jurisdiction.”

Under international principles, domestic jurisdiction rests on “reconciling a state’s interest in a particular offense with other states’ interests in the offense.” There are five main principles:

the territoriality principle (when an offense occurs in the prosecuting state’s territory); the nationality principle (when the offender is a national of the state); the passive personality principle (when the victim is a national of the state); the protective personality principle (when an extraterritorial act threatens the state’s security or a basic governmental function); as well as the universality principle (when the offense is categorized as a generally recognized universal concern).

This note will focus on the final principle, universality, and the policy of universal jurisdiction originating from it.

The need for universal jurisdiction was apparent at its inception. Erga omnes describes legal obligations and rights toward every person. There are certain norms of behavior that are erga omnes. Some offenses can easily be categorized as morally wrong and unacceptable to virtually any nation—unacceptable as erga omnes—such as piracy, slave trading, and torture. Another term articulating the need for and acceptance of universal jurisdiction is jus cogens, meaning “compelling law,” which stands for a law that should be followed by all countries. Crimes such as genocide or slave trading are considered as going “against jus cogens, due to peremptory norms.” The 1986 Vienna Convention on the Law of Treaties affirmed jus cogens as an accepted doctrine in international

8. Randall, supra note 3.
9. Id. at 787-88.
12. Id.
Most nations have their own laws against such acts. However, prior to the creation of the universality principle, there was no remedy for these types of international crimes once the offenders left the land. The universal jurisdiction policy was established through this principle with the assumption that every state has an interest in exercising jurisdiction to combat these egregious offenses that states have universally condemned.14

The purpose of this student note is to discuss the evolution of universal jurisdiction and the historical universal jurisdiction’s eventual deterioration and demise. Part I of this note will discuss the inception of universal jurisdiction and its practical function. Part II of this note will discuss the policies of jurisdiction across the world that perform similar functions to universal jurisdiction. Part III will address the opposition to universal jurisdiction and the concerns of its critics. Part IV will analyze how current foreign policies, particularly Conventions and the International Criminal Court, affect the customary universal jurisdiction policy. Part IV will explain why the types of jurisdiction in part II is making the type of universal jurisdiction described in Part I unnecessary.

I. APPLICATION OF UNIVERSAL JURISDICTION

“Universal jurisdiction is an exceptional basis of jurisdiction . . . .”15 What makes it exceptional is that it is “exercised unilaterally by a state” where the crime did not take place and may either “involve a third state or an international organization” or be exercised over crimes committed in international waters.16 There are four major categories of crimes that fall under the customary universal jurisdiction principle: piracy; war crimes; genocide and crimes against humanity; and terrorism.17 These are

16. Id.
17. Randall, supra note 3, at 788-89.
the crimes that have been recognized worldwide as unacceptable acts punishable by law. In addition to customary law, the second type of universal jurisdiction is exercised through different treaties, which will eventually overtake the customary law’s function. A treaty may have a clause that allows for universal jurisdiction between all signed parties. The type of universal jurisdiction exercised through a treaty will be further discussed in Part II of this note. However, the treaty’s jurisdiction application is the same as the customary universal jurisdiction application.

In the introduction of this note, I first discussed pirates and how they are subject to universal jurisdiction. In order for piracy to be established, one of the elements is that the crime must be related to vessels that are pirated while on the high seas. If the crime were to occur in territorial waters, then it would not be subject to universal jurisdiction as a crime of piracy, but instead will be left to the state that controls the territory in which the crime took place. The United Nations Convention on the Law of the Sea is a widely accepted convention that establishes where a territorial sea extends and the sovereignty over said territory. Article 2 provides coastal state sovereignty over the territorial sea. Article 3 allows the territorial sea to extend up to 12 nautical miles from inland.

There are modern day examples of how piracy is still very much alive, and still subject to universal jurisdiction. In United States v. Shi, Lei Shi, a Chinese crewmember for a Taiwanese fishing vessel, was beaten by the Captain and First Mate of the ship while on the high seas. On March 14, 2002, Shi responded to these vicious beatings by fatally stabbing the two men. For the next two days, Shi controlled the entire ship. He ordered the crewmembers to throw the captain’s body

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18. See Bottini, supra note 15, at 520.
19. See id.
22. Id. at art. 2, ¶1.
23. Id. at art. 3.
24. United States v. Shi, 525 F.3d 709, 718 (9th Cir. 2008).
25. Id.
26. Id.
overboard.\textsuperscript{27} He then ordered the Second Mate of the ship to steer the ship toward China.\textsuperscript{28} Finally, he told the crew that he would “kill anyone who disobeyed him” and did not allow anyone to use the radio to communicate with any person outside of the ship.\textsuperscript{29} The totality of these acts was defined as piracy.\textsuperscript{30}

The Court determined that universal jurisdiction applied to this case.\textsuperscript{31} The court determined that international law principles, while not binding, could be persuasive when used as a “rough guide.”\textsuperscript{32} The Court stated that “universal jurisdiction is based on the premise that offenses against all states may be punished by any state.”\textsuperscript{33} The Court further articulated that piracy is an offense against all states and even further stated that piracy is “an enemy of the human race.”\textsuperscript{34} The universal condemnation of a piracy offender’s conduct puts him on notice that he will be prosecuted in any state in which he is found.\textsuperscript{35} Therefore, no nexus between the state and the offender’s act is required for due process to apply.\textsuperscript{36} The Court determined that the United States had jurisdiction to prosecute Shi.\textsuperscript{37}

Another case exemplifying how universal jurisdiction is applied is \textit{United States v. Shibin}.\textsuperscript{38} \textit{Shibin} was unique in that it established that the United States could still charge a person with crimes of piracy even though the individual is not actually on the high seas during the commission of his criminal acts.\textsuperscript{39} In \textit{Shibin}, Somali pirates seized a German merchant ship and an American sailing ship, respectively, within a year’s span of time.\textsuperscript{40} The pirates who seized the German ship pillaged

\begin{itemize}
\item 27. \textit{Id.}
\item 28. \textit{Id.}
\item 29. \textit{Id.}
\item 30. \textit{Id.} at 723.
\item 31. \textit{Id.} at 722.
\item 32. \textit{Id.} (quoting United States v. Davis, 905 F.2d 245, 249 n.2 (9th Cir. 1990)).
\item 33. \textit{Id.} at 722.
\item 34. \textit{Id.} at 723 (quoting United States v. Smith, 18 U.S. 153, 176 (1820)).
\item 35. \textit{Id.}
\item 36. \textit{Id.}
\item 37. \textit{Id.} at 724.
\item 38. United States v. Shibin, 722 F.3d 233 (4th Cir. 2013).
\item 39. \textit{Id.} at 241.
\item 40. \textit{Id.} at 235.
\end{itemize}
the ship, tortured the crew, and extorted $5 million ransom from the owner.\footnote{Id.} The negotiator regarding the German ship on behalf of the pirates was Mohammad Saaili Shibin.\footnote{Id.} Shibin boarded the vessel in Somali territorial waters after it was taken over by the pirates.\footnote{Id.} After pirates seized the American ship months later, the pirates told the Navy negotiators that Shibin was negotiating on their behalf.\footnote{Id.} The pirates gave the Navy a phone number that matched the sim card on Shibin’s phone at the time.\footnote{Id.} However, the Navy never attempted to contact Shibin.\footnote{Id.} During the seizure of the American vessel, Shibin was in Somalia.\footnote{Id.} Shibin was later arrested in Somalia and turned over to the FBI.\footnote{Id.} The FBI then flew him to Virginia where he stood trial for his participation in both piracies.\footnote{Id.}

Shibin was charged with several counts related to piracy, including aiding and abetting piracy.\footnote{Id.} Shibin argued that he was not guilty of aiding and abetting piracy because his acts were performed on Somali territory.\footnote{Id.} When Shibin boarded the German vessel, the vessel was in the territorial waters of Somalia.\footnote{Id.} This territory is defined as the waters within 12 nautical miles off the coast.\footnote{Id.} However, Shibin’s argument lacked any legal citation or basis. The Court in Shibin ruled that aiding and abetting in piracy does not have to be carried out on the high seas.\footnote{United States v. Shibin, 722 F.3d 233, 241 (4th Cir. 2013).} The Court stated that aiding and abetting in piracy is still jurisdictionally covered under universal jurisdiction.\footnote{Id.} Therefore, Shibin was subject to

\begin{itemize}
  \item \footnote{Id.}{Id.}
  \item \footnote{Id.}{Id.}
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  \item \footnote{Id.}{Id.}
  \item \footnote{Id. at 237.}{Id. at 237.}
  \item \footnote{Id. at 236.}{Id. at 236.}
  \item \footnote{See id. at 237.}{See id. at 237.}
  \item \footnote{Id. at 235.}{Id. at 235.}
  \item \footnote{Id.}{Id.}
  \item \footnote{Id. at 238.}{Id. at 238.}
  \item \footnote{Id. at 239-40.}{Id. at 239-40.}
  \item \footnote{Id.}{Id.}
  \item \footnote{Id. at 239; see also UNCLOS, supra note 21, at 1272.}{Id. at 239; see also UNCLOS, supra note 21, at 1272.}
  \item \footnote{United States v. Shibin, 722 F.3d 233, 241 (4th Cir. 2013).}{United States v. Shibin, 722 F.3d 233, 241 (4th Cir. 2013).}
  \item \footnote{Id. at 239.}{Id. at 239.}
\end{itemize}
universal jurisdiction as a pirate, which is considered an enemy “of all humankind.”

There are other examples of cases tried under the umbrella of universal jurisdiction besides piracy. United States v. Josef Alstötter and Israel v. Adolf Eichmann, are two classic examples of universal jurisdiction cases.

The Nuremberg trials are arguably the most prominent cases displaying the substantive use of universal jurisdiction. In United States v. Josef Alstötter, an American military tribunal tried 15 individuals from the Reich Ministry of Justice and jurists as well as prosecutors of the Volksgericht People’s Court and Sondergericht Special Court. U.S. prosecutors demonstrated “judicial and prosecutorial support for the Nazi programs of persecution, sterilization, extermination, and other gross violations of human rights.” Prosecutors showed that the defendants consciously furthered these human rights abuses in efforts to prove each individual defendant guilty. Laws were adopted in Nazi Germany, forced and created by the Nazis, which imposed different levels of punishment for the same crime, depending on whether or not the accused was Jewish. A harder punishment was designated for Jews, and a lighter one for other Germans. The Defendants in Alstötter imposed and enforced these laws and their penalties.

In Alstötter, the Judges, jurists, and prosecutors who enforced and promulgated the laws that supported and mandated the prejudicial

56. Id. at 239-40.
60. Id.
61. Id.
62. Id.
punishments were tried for crimes against humanity. The Defendants were accused of “judicial murder and other atrocities, which they committed by destroying law and justice in Germany and then utilizing the emptied forms of legal process for the persecution, enslavement, and extermination on a large scale.” Prosecutors argued that these so-called laws were actually crimes against humanity under Control Council Law No. 10 and the UN Charter because the “threat or use of force” is illegal in international relations under the United Nations Charter. Under these statutes “murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population” are crimes against humanity and these “atrocities” are criminal “whether or not in violation of the domestic law of the country where perpetrated.”

Typically, genocide and torture (crimes against humanity) are the only two crimes prosecuted under universal jurisdiction where domestic law is used as an excuse to perform heinous acts. The German laws, and enforcement of them, were classified as crimes against humanity. Universal jurisdiction gives third party nations the right to prosecute crimes against humanity regardless of whether a nation’s law allows for the crimes. Therefore, the United States had universal jurisdiction and compliance with German law was no defense.

Jurisdictional precedent was also set in a time that was not war-plagued. In Attorney General of Israel v. Eichmann, Adolph Eichmann was prosecuted for crimes against humanity, war crimes, and crimes against Jewish people. Eichmann was in charge of Gestapo’s Jewish Section as a leader of the Nazi regime. His responsibility was to persecute, deport, and exterminate the entire Jewish population in

63. Id.
64. Background: Jurists’ Trial Verdict, supra note 58.
67. Id.
68. Id.
69. Id. at 811.
70. Id. at 810.
Germany and other territories.\textsuperscript{71} Israel prosecuted Eichmann in Jerusalem after kidnapping him in Argentina and moving him to Israel.\textsuperscript{72} Israel argued jurisdiction under the universal jurisdiction principle because Eichmann’s crimes directly affected Jewish people.\textsuperscript{73} The government argued that they had the right to prosecute him in their own country based on his crimes being categorized as war crimes and crimes against humanity.\textsuperscript{74}

The district court agreed with the government, stating in part, “[t]he State of Israel’s ‘right to punish’ the accused derives, in our view, from . . . 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 . . . .”\textsuperscript{75} The Court further opined “that Israel’s jurisdiction over Eichmann ‘conforms to the best traditions of the law of nations.’”\textsuperscript{76} The Supreme Court agreed, stating that the “reason for which international law recognizes the right of each State to exercise such jurisdiction in piracy offences—notwithstanding the fact that its own sovereignty does not extend to the scene of the commission of the offence . . . applies with even greater force to the above-mentioned crimes.”\textsuperscript{77} The Court determined that it was a suitable jurisdiction based on the crimes that Eichmann was charged with, how those crimes affected its people, and the recognized severity of the crime worldwide.

Both Altstötter and Eichmann demonstrate how a country may assert jurisdiction over an individual, or multiple individuals, without its own sovereignty extending to the place of the offense or the offenders being a citizen of that country. Universal jurisdiction is a legal fiction that gives nations rights they would not otherwise have in efforts to bring the accused to justice. For instance, Eichmann was found in Argentina. However, Argentina would not have had a right to bring him to trial without universal jurisdiction and Germany would likely not have

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{71} Id.
\item \textsuperscript{72} Id. at 811.
\item \textsuperscript{73} Id.
\item \textsuperscript{74} Id.
\item \textsuperscript{75} Id.
\item \textsuperscript{76} Id.
\item \textsuperscript{77} Id.
\end{itemize}
\end{footnotesize}
prosecuted its own military personnel for following orders. It is with this scenario, and those similar to it, that this policy was created and accepted amongst nations.

An interesting exercise of universal jurisdiction involved the arrest of Augusto Pinochet. This is the most well-known case of universal jurisdiction in contemporary history. Pinochet ruled Chile from 1973-1990. He gained control of the country through a military coup that overthrew then current president, Salvador Allende. Pinochet’s official title was President; however, he was widely considered a dictator. In 1998, he was arrested in London, U.K. for crimes he was accused of committing in Chile during his tenure as President. Pinochet was arrested on the orders of a Spanish judge, Judge Baltasar Garzón for charges of torture, kidnapping, and genocide. The judge “ordered the pretrial detention of Pinochet and issued an international arrest warrant charging him with the crimes of genocide and terrorism for the murder of Spanish citizens in Chile—though the extradition request would later be expanded to cover universal jurisdiction offenses against non-Spanish victims.” Judge Garzón requested that Pinochet be extradited to Madrid, Spain to stand trial for his accused crimes. This was the first time in history a former head of state was charged for a crime committed during his term based on the principle of universal jurisdiction.

80. Id.
81. Id.
82. Langer, supra note 78, at 4.
84. Langer, supra note 78, at 35.
85. Id. at 34.
Pinochet’s arrest was widely debated amongst nations. Chile themselves did not want Pinochet to be extradited to Spain, but instead released and allowed to return to Chile.\(^87\) There were nations, including the United States and the United Kingdom, that actively advocated that Pinochet be released from custody and be allowed to return to Chile, where he had amnesty for the crimes he was accused of.\(^88\) Former President George W. Bush sent a letter to the leaders of London requesting that Pinochet be freed and allowed to return home.\(^89\) There were several policy decisions that were influenced by Bush’s decision to advocate for Pinochet’s release. The United States has been an ally of Chile since Chile’s coup in 1973, which the U.S. supported.\(^90\) The two countries mutually benefit from their alliance and have agreed on several international issues including areas of trade, multilateral diplomacy, security, culture, and science.\(^91\) Furthermore, they depend on each other’s collaboration on environmental issues concerning sustainable development, climate change, energy efficiency, environmental law enforcement, and more.\(^92\) Bush’s letter came at a time where the United States’ relationship with Chile was at an all-time high in history.\(^93\) He described the case against the former dictator as a “travesty of justice.”\(^94\) Bush further stated that “General Pinochet should be returned to Chile as soon as possible.”\(^95\) British public opinion was also divided over the

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87. Langer, supra note 78, at 49.
90. Kandell, supra note 79.
92. Id.
93. Compare id. (the ties between the two countries were flourishing from the late 1980’s through the 1990’s) with Bush Urges Pinochet Release, supra note 88 (the letter was sent in 1999).
95. Id.
issue. Conservatives severely criticized the arrest, stating that it is improper and contrary to customary law, as no former head of state has ever been arrested on these grounds.

On the other hand, Liberals in Britain supported the notion. The Blain administration previously vowed to implement an “ethical foreign policy.” Liberals believed that the arrest and extradition would be a step toward that direction. Generally, an immunity clause would prohibit charges against government officials for actions made while acting in their capacity. However, if the acts by that official are crimes against humanity, then immunity may be overridden by the universal jurisdiction principle to protect the world against such heinous crimes, as evidenced in Altstötter. There was widespread agreement in Europe that Pinochet deserved to be prosecuted for his actions as president. Proponents of Pinochet’s extradition used this principle as a justification and a tool to prosecute gross human rights violations by Pinochet in order to subject Pinochet to a trial in Spain.

In the end, extradition was never performed. Pinochet was released from England’s detention after more than sixteen months of captivity. In England, it is the Home Secretary who decides whether to grant an extradition request. The Home Secretary of the Blair Labour government, Jack Straw, was not consulted before Pinochet was arrested. Shortly after the arrests, Home Secretary Straw initially issued authorizations to proceed with the extradition. However, before Pinochet’s extradition, the Chilean government switched from protesting the arrest of Pinochet to promising that he would be tried for the crimes

96. Langer, supra note 78, at 35.
97. Id.
98. Id.
99. Id.
100. See id.
101. See Randall, supra note 3, at 812.
102. See Langer, supra note 78, at 49.
103. Kaleck, supra note 86, at 954-56.
104. Langer, supra note 78, at 18.
105. Id.
106. Id.
107. Id. at 35.
in Chile.\textsuperscript{108} Thus, returning him to Chile would have been “less politically costly for the Labour government.”\textsuperscript{109} Furthermore, Pinochet was medically examined and determined to be unfit to stand trial and that “no change in his condition could be expected.”\textsuperscript{110} Pinochet was thus released and allowed to return to Chile, where he had over 300 pending charges against him until the day he died.\textsuperscript{111}

Although Pinochet was never extradited nor tried for his crimes on the basis of universal jurisdiction, it is an important case that paved the way for others, as it was the first attempt to charge a former head of state for crimes committed during his tenure in a third country under the universal jurisdiction principle. Since then, there have been several cases brought in countries, such as Switzerland, that have tried to file criminal complaints against former heads of states. A criminal complaint was filed against then United States president, George W. Bush, in Switzerland in March of 2003.\textsuperscript{112} President Bush was charged with “crimes against humanity, genocide, and war crimes,” along with several other U.S. officials.\textsuperscript{113} The case against Bush was dismissed, although it established that Swiss courts have the ability to exercise universal jurisdiction over the crime of genocide.\textsuperscript{114}

An example of a successful exercise of universal jurisdiction against a country leader was the case against a military general of Mauritania, Ely Ould Dah.\textsuperscript{115} In 2005, France charged Ely Ould Dah with torture.\textsuperscript{116} The case arose from his tenure as a General in the Mauritania military between 1990 and 1991.\textsuperscript{117} Dah was accused of torturing African

\begin{thebibliography}{9}
\bibitem{108} Id. at 36.
\bibitem{109} Id.
\bibitem{110} Id.
\bibitem{112} Kaleck, \textit{supra} note 86, at 940.
\bibitem{113} See id.
\bibitem{114} Id.
\bibitem{115} Id. at 937.
\bibitem{116} Id.
\bibitem{117} See id.
\end{thebibliography}
members of the Mauritania military in the Jreïda death camp. There was a trial held in absentia, in which he was convicted and the conviction was upheld. Dah was sentenced to ten years imprisonment. However, he fled to Mauritania in 2000. He has been protected there by the Mauritanian authorities, whom refused to approve the international arrest warrant issued against Dah.

Although the exercise of universal jurisdiction was upheld, the Dah case outlines a clear issue within the principle: extradition to bring the criminal to justice for their crimes may not be practical. There are times when an accused or a convict will not serve the imprisonment time given by a third party state because the country that the convict is seeking refuge in refuses to extradite. Sometimes it is their home state, as in the case of Dah. In other cases the country refusing to extradite may be another party, as in Pinochet. In these cases, there are often political reasons for the hesitation or rejection to extradite; in others, there are national amnesty or immunity clauses that allow for the refugee to stay in the current country. However, for whatever reason that is given by the host country, the fact remains that it is sometimes impossible to bring every criminal to justice under the customary universal jurisdiction principle.

II. POLICIES SIMILAR TO UNIVERSAL JURISDICTION

Since the recognition and acceptance of universal jurisdiction, other similar policies have been set in place. International criminal tribunals, including the most prominent, the International Criminal Court (ICC), and conventions are two different bodies of law that can subject an individual to jurisdiction under specific conditions similar to universal jurisdiction.

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118. Id.
119. Id.
120. Id.
122. Id.
jurisdiction. However, they are still distinct from universal jurisdiction in significant ways that are discussed throughout this part.

A. International Criminal Tribunal

An international criminal tribunal is an international body to which states or countries have “expressly agreed to delegate the power to enforce [] parts of the international criminal law.”\(^{123}\) It is important to understand the meaning of universal jurisdiction as it relates to international criminal tribunals. An international criminal tribunal has international jurisdiction. This is not to be confused with universal jurisdiction. International jurisdiction is jurisdiction that is expressly given to it by states that have agreed to its use.\(^{124}\) Sometimes the tribunal may base its international jurisdiction to conduct the trial on universal jurisdiction, but that is not dispositive.\(^{125}\) While the international criminal tribunal can exercise jurisdiction based upon the universality principle, and often times must establish its jurisdiction through universal jurisdiction and other abstract policies, it is still distinct from a nation asserting universal jurisdiction.\(^{126}\) This is because the nations still have to agree to delegate the power to enforce this jurisdiction, and, in effect, give up their own jurisdictional priority.\(^{127}\)

However, “jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction.”\(^{128}\) This means that universal jurisdiction does not “enable states to deny diplomats immunity for [their] crimes.”\(^{129}\) When an accused has already been granted immunity, universal jurisdiction will not allow for them to be prosecuted in another land. Also, the treaties that have a universal jurisdiction clause do not override “jurisdictional immunities under international law,” which depend upon each specific country’s domestic law.\(^{130}\)

\(^{123}\) Bottini, supra note 15, at 513.
\(^{124}\) Id.
\(^{125}\) Id. at 513-14.
\(^{126}\) See id.
\(^{127}\) See id.
\(^{128}\) Id. at 519.
\(^{129}\) Id.
\(^{130}\) Id. at 519-20.
The ICC is the most similar to universal jurisdiction in its overall purpose and application. It is also what will likely lead to the eventual death of the legal fiction. The ICC is also an international criminal tribunal.\textsuperscript{131} It was founded within the Rome Statute to bring to justice the perpetrators from around the world that have committed the most heinous acts.\textsuperscript{132} There are 139 signatories, countries that signed the statute, and 122 parties to it, those that gave final approval or acceptance. It is important to note that the United States is one of the countries that have not approved this particular treaty, showing that it is not universally accepted based on the particular language of how it is articulated.\textsuperscript{133} However, the U.S. has similar laws that enable universal jurisdiction, namely the War Crimes Act and the Anti-Torture Act.\textsuperscript{134}

The ICC statute addresses the crimes it has jurisdiction over.\textsuperscript{135} Article 5 of the ICC statute outlines the types of crimes that the ICC has jurisdiction over.\textsuperscript{136} The ICC may extend its jurisdiction to any individual who has been accused of any of the following four categories: genocide; crimes against humanity; war crimes; and crimes of aggression.\textsuperscript{137} However, the clause governing crimes of aggression will not be in effect until 2017.\textsuperscript{138} The category of crimes the ICC governs partially overlaps with the categories that universal jurisdiction exercises its jurisdictional powers over. However, they are not perfectly mirrored. Piracy and terrorism, both subject to universal jurisdiction, are not crimes that the ICC has jurisdiction over.\textsuperscript{139} The crime of aggression, which will be

\begin{flushleft}
\begin{enumerate}
\item See Mark D. Kielsgard, \textit{War on the International Criminal Court}, 8 N.Y. C\textsc{ity} L. R\textsc{ev.} 1, 1 (2005).
\item \textit{Id.}
\item \textit{Id.}
\item See \textit{generally} Bottini, \textit{supra} note 15, at 510.
\item \textit{Id.}
\item Kielsgard, \textit{supra} note 131, at 7.
\item See ICC Statute, \textit{supra} note 136, art. 5.1; \textit{see generally} Bottini, \textit{supra} note 15, at 523.
\end{enumerate}
\end{flushleft}
subject to the ICC’s jurisdiction, is not a crime that universal jurisdiction gives nations power to prosecute accused.\textsuperscript{140}

There is a clear reasoning for this type of overlap between the two regimes. Both are ways to bring those who have committed atrocities to justice. The types of crimes that both the Rome Statute and the general universal jurisdiction principle exercise jurisdiction over are some of the most heinous crimes against mankind this world has seen on a grand, international scale, such as genocide and war crimes. They are simply different approaches to, mostly, the same problems. Universal jurisdiction enables any country to exercise jurisdiction over the accused of such crimes, given the fact that every state would have an interest in bringing those who are guilty of these types of crimes to justice. Conversely, the ICC is not a part of any specific country, but instead a tribunal created through a treaty among several countries whose interest is also to bring individuals guilty of the aforementioned crimes. It is important to keep in mind that universal jurisdiction is actually a form of jurisdiction in and of itself. On the other hand, the ICC is a tribunal that gains its jurisdictional power through a statute that participating countries have signed, giving up their individual opportunity to prosecute the accused of said crime.

Another distinction between universal jurisdiction and the ICC are the crimes themselves, even the overlapping ones. For instance, both establish jurisdiction over genocide. However, the ICC statute has specific elements the prosecutor must prove to prevail on the case, which are outlined in Article 6 of the ICC statute.\textsuperscript{141} According to the ICC, “genocide” means any of the following acts committed with “intent to destroy, in whole or in part, a national, ethnical, racial or religious group,” such as:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

\textsuperscript{140} Id.
\textsuperscript{141} ICC Statute, \textit{supra} note 136, art. 6.
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(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.\textsuperscript{142}

The ICC then takes this crime and charges the accused of it through the jurisdiction it has been granted. On the other hand, universal jurisdiction, in and of itself, does not have a law against genocide and only conforms to what the domestic state applying it has already established in its land. The definition of genocide and its specific elements will customarily vary between countries, while it will always stay the same with the ICC tribunal. This rings true for every crime listed.

This is important because the ICC has placed limits on its jurisdiction over war crimes and crimes against humanity. The ICC has jurisdiction over war crimes that specifically furthered “a plan or policy or as a part of a large-scale commission of such crimes.”\textsuperscript{143} A single war crime may still be considered, however, as long as it is consistent with the purpose of the ICC Statute.\textsuperscript{144}

The crimes against humanity provision has limitations because the attack must be “directed against any population” which, therefore, leaves widespread, yet unrelated crimes out of the jurisdiction of the ICC.\textsuperscript{145} The civilian population being attacked must also have “knowledge of the attack.”\textsuperscript{146} These are limitations that not all nations have for their definition of a crime against humanity. For instance, in the U.S., prosecutors need only prove that the accused committed “a widespread or systematic attack directed against any civilian population.”\textsuperscript{147} There is

\textsuperscript{142.} \textit{Id.}  
\textsuperscript{143.} \textit{Id.} art. 8(1).  
\textsuperscript{144.} Bottini, supra note 15, at 526.  
\textsuperscript{145.} \textit{Id.} at 525.  
\textsuperscript{146.} \textit{Id.}  
\textsuperscript{147.} Cabello v. Fernandez-Larios, 402 F.3d 1148, 1161 (2005).
no requirement that the population being attacked must have knowledge as part of the language defining “a crime against humanity.” 148 However, these differences are not material to the overall issue that both principles seek to address, which is punishment and deterrence of attacks against mass populations. Therefore, the need for both is unnecessary because they accomplish the same goal.

C. Universal Jurisdiction and Conventions

There are also treaties that utilize universal jurisdiction as a basis for subjecting an accused to prosecution. Treaties are also known as conventions. Conventions contain multilateral principles obligating parties involved to either prosecute or extradite those committing offenses. 149 To “prosecute or extradite” is a common inclusion in most conventions; generally, the provision will enable the country where the offender was found to choose whether to prosecute or extradite, as they have a provision that substantially resembles the following:

The State Party in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. 150

Conventions use universal jurisdiction in both its historical sense (subjecting the accused to jurisdiction for genocide, crimes against humanity, and piracy) and for unique crimes specific to the convention’s purpose.

Each convention will add or subtract crimes that the customary universal jurisdiction would apply to from its regulations. Conventions generally address a specific type of international crime. The Geneva
Conventions, for instance, do not explicitly refer to war crimes and crimes against humanity.\textsuperscript{151} However, they do focus on a substantially similar crime that is articulated slightly differently. The “breaches that the conventions condemn partly overlap with the definitions of war crimes and crimes against humanity.”\textsuperscript{152} Each Geneva Convention addresses the “willful killing, torture or inhuman treatment” as “grave breaches.”\textsuperscript{153} The “grave breaches” that the conventions describe overlap with the definitions of crimes against humanity and war crimes in other conventions, such as the Control Council Law No. 10 referred to in the discussion of the Nuremberg Trials, although the Geneva conventions do not explicitly refer to war crimes or crimes against humanity.\textsuperscript{154} In fact, in the \textit{Eichmann} case referred to previously, Israel applied one of the Geneva Conventions, which enabled universal jurisdiction to subject Eichmann to jurisdiction.\textsuperscript{155} In \textit{Eichmann}, Israel relied on Geneva but still charged Eichmann with war crimes and crimes against humanity based on universality principles.\textsuperscript{156}

Other conventions will add similar, but unrelated, crimes to which they feel are severe enough for universal jurisdiction to apply. Conventions like the well-known Hague Convention and The Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation included offenses regarding hijacking and sabotage of aircraft as offenses that a country is obliged to prosecute if the offender is found within that country, regardless if the offense was committed in

\begin{itemize}
\item \textsuperscript{151} Id. at 13.
\item \textsuperscript{152} Randall, \textit{supra} note 3, at 817.
\item \textsuperscript{154} Randall, \textit{supra} note 3, at 817.
\item \textsuperscript{155} Id. at 814-15.
\item \textsuperscript{156} Id.
its territory.\textsuperscript{157} The Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents gives participating countries jurisdiction to prosecute crimes against internationally protected persons,\textsuperscript{158} while the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment gives its participating countries jurisdiction to prosecute offenders of torture crimes under those same circumstances, and mandates that they do so.\textsuperscript{159}

\section*{III. Opposition of Universal Jurisdiction}

Universal jurisdiction does not come without opposition and hesitation. Proponents of universal jurisdiction praise the principle because it allows for a remedy to prosecute and deter heinous crimes that may otherwise go unpunished.\textsuperscript{160} However, challengers of the principle believe that universal jurisdiction unduly subjects heads of states to the mercy of a judiciary and deprives the accused of due process, a cornerstone in democracy.\textsuperscript{161}

\begin{footnotesize}
\begin{enumerate}
\item[158.] Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents art. 2(3), Dec. 14, 1973, 1035 U.N.T.S. 167 [hereinafter Internationally Protected Persons Convention]. The Convention To Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance, Feb. 2, 1971, 1438 U.N.T.S. 195 [hereinafter OAS Convention], is a precursor to the Internationally Protected Persons Convention. The OAS Convention provides that, when extradition for a convention crime is not in order, the requested “state is obliged to submit the case to its competent authorities . . . as if the act had been committed in its territory.” OAS Convention, at art. 5. The OAS Convention obliges the parties to prosecute only if extradition is not in order, as compared to the type of jurisdictional provision that obliges the parties either to extradite or prosecute.
\item[159.] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, art. 7, (Dec. 10, 1984).
\item[160.] Randall, \textit{supra} note 3, at 788.
\end{enumerate}
\end{footnotesize}
In the United States, in order for due process to be obtained, generally, the accused must have committed a crime that has a "jurisdictional nexus" with the state that will conduct the trial.\(^\text{162}\) Additionally, defendants that have never stepped foot in a state’s territory may be located and extradited from their homeland and “found,” for the purposes of jurisdiction and due process, in the foreign land that wishes to prosecute.\(^\text{163}\) Examples of this include the aforementioned Shibin case, where the defendant was in Somalia and, at the request of the United States, was arrested by “Host Nation Defense Forces” of Somalia.\(^\text{164}\) Shibin was then transferred to the Bosasso Police, and in turn, transferred into the custody of the FBI.\(^\text{165}\) Shibin was then transported to Virginia, where he was eventually prosecuted and found guilty of piracy.\(^\text{166}\) Essentially, the United States went to his country and, with the help of the host country’s armed forces, arrested Shibin, “forcibly” transported him across countries, constructed jurisdiction (of which the FBI created by transporting him to the U.S.), and forced him into a court proceeding in a foreign country of peers not of his own. In the opinion of those opposing universal jurisdiction, the issue here is that universal jurisdiction creates loopholes around due process and bypasses that right, which is solidified in our constitution under the Fifth Amendment.\(^\text{167}\)

There was a similar, and even greater, concern for reliance on universal jurisdiction in the arrest of Pinochet. Pinochet was arrested in the U.K., where he had committed no crimes, at the request of an international arrest warrant from a magistrate judge in Spain, where he had also not committed any crimes. Spain then asked for him to be extradited to Spain in order to be tried in court for possible crimes that were committed in another, wholly separate country, Pinochet’s home country, Chile. The crimes he was accused of purportedly happened while he was president of Chile. The concern this time is that not only

\(^{162}\) United States v. Shibin, 722 F.3d 233, 239 (4th Cir. 2013).
\(^{164}\) Shibin, 722 F.3d at 237.
\(^{165}\) Id.
\(^{166}\) Id. at 237-39.
\(^{167}\) See Kissinger, supra note 161, at 86-96.
was there a lack of any process granted to Pinochet, but there is also a danger now that all former heads of states are at the whim of any judge, in any country, that wants to challenge the way a president runs his own sovereign country. Oppositionists argue that the original intent of universal jurisdiction was not to allow national judges to use it as a “basis for extradition requests regarding alleged crimes committed outside their jurisdictions.”

Oppositionists to universal jurisdiction do not argue against the entire idea of a principle that enables a criminal, who has committed a heinous crime, be brought to action when there is otherwise no remedy for the crime based on a procedural jurisdiction loophole. Instead, the concern is control and constraint. How broad may a principle that punishes the wicked be? What procedures are there in place that constrains the righteous judiciary committee? The fear is that universal jurisdiction will eventually turn into a green light of sorts for judicial tyranny. Currently, critics argue, there are no safeguards in place to protect against this danger. They argue that, as it stands, universal jurisdiction could move into a political move that could be used to improperly promulgate foreign policy interests. These procedures would in effect “arm any [judge] anywhere in the world with the power to demand extradition, substituting the [judge’s] own judgment for the reconciliation procedures of even incontestably democratic societies where alleged violations of human rights may have occurred.”

Critics of universal jurisdiction want policies and procedures put in place that will mitigate the opportunity of corrupt governmental politics taking over the application of universal jurisdiction. The worries are primarily against the customary jurisdiction principle that is simply understood and agreed upon amongst most nations, the principle that is only codified from “international law principles” and not codified into a statute that provides restriction for its use.

168. Id. at 88.
169. Id. at 86.
170. Id.
171. See id. at 88.
172. See id.
173. Id. at 90.
Universal jurisdiction was created as a legal fiction. The purpose of universal jurisdiction at its inception was clear: there are holes in current jurisdictional processes that allow for crimes to go unpunished due to procedural steps that cannot be satisfied. However, those crimes that are the worst known to mankind, such as genocide and piracy, needed to have a form of punishment and justice. This idea and policy is so widely accepted that many countries have codified the principle into formal law and agreed to abide by it when dealing with crimes of large magnitude that occur out of their country. 174 These codifications are imprinted into treaties that expressly state each individual country’s right to prosecute such crimes. 175 They are also imprinted inside international tribunal agreements, such as the Rome Statute, which states that countries that have signed the statute that decide not to prosecute for jus cogens crimes shall allow jurisdiction for the prosecution to take place within the ICC. 176 These new forms of law diminish the importance of the customary universal jurisdiction necessity, but in their current form, do not abolish it.

The simple reason that the conventions and tribunals encompassing universal jurisdiction do not abolish the current need for the customary principle is because there are countries that refuse to sign and agree to them as currently written. For instance, President Bill Clinton signed the ICC treaty due to a cutoff date; however, Clinton declined to submit the treaty to the Senate for approval. 177 He also indicated that he would advise his successor not to do so as well. 178 The reason Clinton declined to fully ratify this treaty as a law the U.S. would abide by was simply because he did not agree with its language in its present form. 179 This is

175. See generally Kielsgard, supra note 131.
176. Id. at 7.
177. See Kissinger, supra note 161, at 87.
178. Id.
179. Id.
the primary reason that countries have supported the universal jurisdiction doctrine, but declined to sign a treaty or become a part of a tribunal that encompasses the principle. The rise of the concept of universal jurisdiction was very recent, and its widespread support was just as rapid.\textsuperscript{180} The thought that every country in the world would be on board with a specific way to articulate and exercise this notion in such a short time frame is simply unfathomable; even the Congress of the United States is measured, deliberate, and calculated in its development of laws. There is no reason to expect that every country across the world would not be as well. The shift to recognize and exercise universal jurisdiction was rapid; the shift to codify it and agree on its true meaning between nations will not be.

It is my belief that eventually countries will agree on one or more treaties that encompass and completely articulate the universal jurisdiction doctrine. The universality principle of which the doctrine stands is accepted in virtually every country. Countries agree upon several treaties every decade, many of which encompass universal jurisdiction. Alternatively, those countries that refuse to agree to conventions are likely to agree with a tribunal that involves international criminal trials, such as the ICC. For example, while the U.S. is not a part of the ICC, the U.S. has signed and made law the Genocide Convention Implementation Act,\textsuperscript{181} which is a treaty agreed on by multiple countries that enables each country to use universal jurisdiction in a limited manner in order to punish crimes of genocide. This is one of many examples of treaties containing the universal jurisdiction principle.

The fears of universal jurisdiction critics will also be resolved once this process has evolved. Oppositionists of universal jurisdiction are not against the general principle of holding those who commit egregious and heinous crimes accountable for their actions, but instead of allowing any judge of any nation to determine what will then constitute as heinous or egregious. This is because of possible political bias or eventual tyranny.

\textsuperscript{180} \textit{Id. (“[S]ixth edition of Black’s Law Dictionary, published in 1990, does not contain even an entry for the term . . . . The notion that heads of state and senior public officials should have the same standing as outlaws before the bar of justice is quite new.””).}

\textsuperscript{181} \textit{See 18 U.S.C. § 1091(e) (2009).}
of judges of an affluent country. These fears can be alleviated by limits and procedures that are starting to be put in place through the conventions and the ICC. In terms of the due process of a defendant, any defendant committing the egregious acts against mankind should know that they would be subject to stand trial in a given state in which they were found. There is essentially no need for the standard process as with non-egregious crime. The language articulated through the treaties detail how and when an accused will be subject to a country’s jurisdiction and allowed to be prosecuted.

In time, every country will establish some codified form of universal jurisdiction through written agreements with other countries. It is clear, based on the way the nature of the principle relies on international acceptance and also the nature of the crimes the doctrine seeks to punish and deter, that most, if not all, counties in the world are in agreement that universal jurisdiction is important. The difficult part is finding a way to agree upon the language of what crimes it will apply to and how long of a leash the tribunals have to punish citizens of other countries.

CONCLUSION

The principle that the universal jurisdiction policy was based on is an important one: offenders of the most heinous crimes known to mankind should be brought to justice in a penal system no matter where that offender is eventually located. Creating universal jurisdiction and allowing a country to prosecute an offender, whether or not the offense was in any way related to the country, was imperative to bring many offenders to justice once they tried to flee the country the offense was committed in. However, the customary universal jurisdiction doctrine is becoming unnecessary and is quickly starting to be replaced. Universal jurisdiction was somewhat of a legal fiction that courts adhered to for the purposes of justice—to prosecute individuals when there was no other way to establish jurisdiction. There was no legal precedent prior to courts creating the law within its opinions.

Presently, however, there are binding precedents and bodies of law that mandate, or at least allow for, the prosecution of those offenders under the same circumstances universal jurisdiction would. International law tribunals, like the ICC, and Conventions, are different laws most
countries have a connection to in some form. To have this legal fiction be the sole standing with which to hold an accused to jurisdiction within a state will no longer be necessary to accomplish justice. Instead, the conventions and international criminal tribunals will give the accused that due process and still allow for the prosecution and justice for victims around the world.

The universality principle enabled universal jurisdiction to be created and evolved into a widely accepted principle that exposed a gap in international law and closed that gaping hole. Universal jurisdiction has now become so accepted that it is included in written agreements amongst nations. This general principle is now a cornerstone to international law. It is for these reasons that universal jurisdiction principle will evolve into being applied only by treaties and tribunals, and the customary principle will become null-and-void.