

BOFAXE

Unanchoring Universality

A Case for Extending the Jurisdiction of the International Criminal Court over Unregistered Vessels in International Waters

— Since early September 2025, the United States (US) has been attacking vessels allegedly carrying drugs, killing at least 57 people to date. These extrajudicial killings raise numerous questions under both domestic and international law and appear to be illegal in just as many ways. One might wonder whether they could eventually reach the threshold of a widespread or systematic attack against a civilian population and thus constitute crimes against humanity, falling within the jurisdiction of the International Criminal Court (ICC). Beyond material considerations, the attacks raise interesting questions regarding the ICC's territorial jurisdiction, as it is claimed they occurred in international waters against vessels flying no State's flag (see, e.g., note to Congress regarding the attack on September 15). Starting from the finding that the ICC lacks territorial jurisdiction over such attacks when committed by non-States Parties, this post argues that the Rome Statute should be amended to extend the Court's jurisdiction over unregistered vessels in international waters.

De Lege Lata: The ICC's Territorial Jurisdiction and Its Limits at Sea

If a natural person aged at least 18 (jurisdiction *ratione personae*) commits one of the core crimes listed in Article 5 of the Rome Statute (jurisdiction *ratione materiae*) after its entry into force (jurisdiction *ratione temporis*), this alone is not sufficient for the ICC to exercise jurisdiction. Absent a Security Council referral, one of two preconditions set out in Article 12(2) must additionally be met: Either the conduct in question must have occurred on the territory of a State Party or a State that has accepted the Court's jurisdiction (subparagraph (a)), or the accused must be a national of such State (subparagraph (b)). The jurisdictional bases are therefore, alternatively, the territoriality and the active personality principles (Pre-Trial Chamber II, para. 49; Werle/Jeßberger, para. 320). If the requirements of active personality are not met, the question arises whether the ICC can exercise jurisdiction in international waters by virtue of the territoriality principle.

The ICC's Office of the Prosecutor (OTP) examined this question in 2019 following allegations that Chinese officials had committed crimes in the exclusive economic zone (EEZ) of the Philippines. China is not an ICC State Party, the Philippines was at the time of the alleged crimes. The OTP distinguished between the territorial sea and the maritime areas beyond it, which can be described as "international waters" (para. 49), a terminology adopted in this post. While the territorial sea is subject to the coastal State's sovereignty under Article 2(1) of the United Nations Convention on the Law of the Sea (UNCLOS), in the zones beyond it may exercise only certain sovereign rights (Articles 33(1), 56(1), 77(1) UNCLOS; OTP, paras. 48-49). On the high seas, there is no territorial sovereignty at all (Article 89 UNCLOS). Drawing on the distinction between full sovereignty and functional sovereign rights, the OTP held that the EEZ cannot be treated as territory within the meaning of Article 12(2)(a) (paras. 49-50). Although this decision has been criticized, it represents the most authoritative position on the issue. It follows that if a crime occurs in international waters, the first alternative of Article 12(2)(a) cannot be satisfied.

However, the second alternative of Article 12(2)(a) stipulates that the ICC may also exercise jurisdiction if the crime was committed on board a vessel or aircraft whose State of registration is an ICC State Party or has accepted the Court's jurisdiction. Thus, the Rome Statute equates such vessels and aircrafts with national territory for jurisdictional purposes (Bourgon, p. 568; Heller), consistent with the principle of flag State jurisdiction (Oxman, para. 30). While it is outdated to view registered vessels and aircrafts as part of the registering State's territory (Gallant, p. 188), the principle remains central in avoiding jurisdictional gaps (Ambos, p. 216-217). Unregistered vessels, however, lack a flag State by definition. Consequently, if a crime is committed on board such vessels, jurisdiction cannot be established under the second alternative of Article 12(2)(a) either.

As the US attacks show, in addition to the unregistered vessel, there will often be another vessel or aircraft from which the attack is launched.

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In such cases, while the conduct (e.g., firing a missile) occurs on the registered vessel or aircraft, the consequence (e.g., the death of individuals) does not. It is generally accepted in international law that a State may exercise jurisdiction over a crime if one of its constituent elements occurs on its territory (Maillart; Rastan, 17-19). The ICC's Pre-Trial Chambers I and III have interpreted Article 12(2)(a) accordingly (PTC I, para. 72; PTC III, para. 61). Therefore, the ICC can exercise jurisdiction if either the conduct or the consequence of a crime takes place on the territory of a State Party. Notably, this finding required considerable interpretative effort, as Article 12(2)(a) provides that the "conduct in question" must occur on a State Party's territory. Yet, for crimes committed on board vessels or aircrafts, the Statute uses the broader formulation of the "crime" being committed there (Vagias, p. 93). In this case, it is even clearer that jurisdiction exists if either the conduct or the consequence occurs on board the registered vessel or aircraft. Hence, if a vessel or aircraft registered in a State Party attacks an unregistered vessel in international waters, territorial jurisdiction exists. In the case of attacks by non-States Parties, however, the ICC lacks jurisdiction.

De Lege Ferenda: Extending Jurisdiction over Unregistered Vessels?

Scenarios of possible ICC core crimes, especially crimes against humanity, committed on or against unregistered vessels in international waters extend beyond the US attacks giving rise to these considerations. Countless people travel on unregistered vessels in search of refuge, facing increasingly hostile attitudes from destination States. It is not inconceivable that some might regard it easier to eliminate these individuals in international waters before they reach land. The jurisdictional vacuum in international waters could also be exploited for crimes such as torture or enforced disappearance. While the requirement of a widespread or systematic attack sets a high threshold for jurisdiction *ratione materiae*, it is not impossible that such crimes could occur in that context. Unregistered vessels are often viewed negatively as evading flag State control (Bennett, p. 461; König, para. 1), yet those aboard are particularly vulnerable. It would therefore be desirable to amend Article 12 to grant the ICC jurisdiction over unregistered vessels in international waters (for alternative proposals addressing the lack of jurisdiction over stateless vessels, see Nguyen, p. 350). The remainder of this post aims to demonstrate that such an amendment would be both legally possible and consistent with the jurisdictional regime of the Rome Statute.

The legal basis of the ICC's jurisdiction lies in the jurisdiction of its Member States, which delegate part of their own competence to the Court (Cormier, p. 47). A State's jurisdiction is not limited to crimes committed on its territory or by its nationals. Under the principle of universal jurisdiction, every State may prosecute certain grave crimes that are deemed to violate the interests of the international community, independent of any territorial or personal link (Lagerwall/Hébert-Dolbec, para. 1; Werle/Jeßberger, para. 259). Crimes within the ICC's jurisdiction *ratione materiae* are subject to the universality principle (Ambos, p. 228-229).

Accordingly, if such crimes are committed on unregistered vessels in international waters, any State would be entitled to prosecute them. This jurisdiction, which exists by virtue of the universality principle, could be transferred to the ICC by its Member States (see Kaul, p. 586-592, and Scharf, p. 79-110, demonstrating that delegating universal jurisdiction to the ICC would be permissible). Consequently, as a matter of law, it would be possible to extend the ICC's jurisdiction over unregistered vessels in international waters.

In fact, Germany proposed to let the ICC operate on the basis of universal jurisdiction at the Rome Conference (Kirsch/Holmes, p. 8-9). The US, by contrast, demanded the cumulative consent of the territorial State and the accused's State of nationality as a precondition for the exercise of jurisdiction (Orina/Christensen, para. 4). The negotiations on the Court's jurisdiction ultimately ended in "a compromise between State sovereignty and the needs of international justice" (Bourgon, p. 560).

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This compromise is Article 12, which enshrines the principles of territoriality and active personality as alternative jurisdictional bases (Rastan, p. 142). Universal jurisdiction can only be exercised in the case of Security Council referrals (Vagias, p. 2). However, despite its recourse to the universality principle, granting the ICC jurisdiction over unregistered vessels in international waters would not contradict the compromise reached in Rome but rather align with it.

Although Article 12 is positively worded—stating that jurisdiction exists when the preconditions are met—it essentially performs a negative function, as it limits the jurisdiction that would exist everywhere under the universality principle (Sadat, p. 570ff., 594f.). Its underlying rationale is the protection of State sovereignty (Scharf, p. 77; Wagner, p. 484; Zimmerman), which the ICC affects when it exercises jurisdiction over a State's territory or its nationals (Orina/Christensen, para. 3). Yet, in accordance with the law of the sea, no State possesses territorial sovereignty in international waters or over unregistered vessels therein. Consequently, the ICC does not infringe upon territorial sovereignty when exercising jurisdiction over unregistered vessels in international waters, as there is none to be affected in the first place.

In situations where an unregistered vessel is attacked from a registered vessel or aircraft, while there is no territorial sovereignty, exercising jurisdiction over conduct occurring on board nevertheless affects the flag State's sovereignty. This is because, under Article 92 UNCLOS, the flag State enjoys exclusive jurisdiction over its vessels on the high seas (König, para. 25). Following the OTP's view, exclusive flag State jurisdiction applies throughout all international waters with respect to ICC core crimes. However, no such exclusive jurisdiction exists over the unregistered vessel that is attacked. On the contrary, Article 110(1)(d) UNCLOS grants all States jurisdiction over stateless vessels to a certain degree (König, para. 22). As discussed above, it is accepted that jurisdiction may be exercised where conduct in a non-State Party produces consequences beyond its territory. It does not constitute a more significant interference with a State's sovereignty to exercise jurisdiction over such conduct occurring in a place under its exclusive jurisdiction.

Turning to the exercise of jurisdiction over nationals of non-States Parties, it was agreed in Rome that the ICC may exercise jurisdiction over such individuals when they commit crimes outside their own State's territory. As the territoriality and active personality principles are applied disjunctively, the concession to State sovereignty in the Rome compromise was that crimes committed by a State's nationals on its own territory would be excluded from the ICC's jurisdiction, but not those committed beyond it.

On unregistered vessels in international waters, where neither States Parties nor non-States Parties possess territorial sovereignty, the default rule should not be that jurisdiction is absent but that it exists, since there is no territorial sovereignty to be respected. The absence of territorial jurisdiction *de lege lata* results from the positive application of the territoriality and active personality principles, which, however, in the context of the Rome Statute, serve a negative, limiting function. This deficiency should be remedied through an amendment to the Statute, using the universality principle. Indeed, the universality principle was originally developed to prosecute pirates (Citroni, p. 4)—that is, to ensure accountability in situations where no territorial State exists.

Concluding Remarks

Despite its consistency with the Rome compromise, the political feasibility of an amendment expanding the ICC's jurisdiction is more than questionable. Yet, granting the ICC universal jurisdiction independent of Security Council referrals would, even with the very limited scope of unregistered vessels in international waters, send a powerful signal in support of international criminal justice. This approach could also become relevant with regard to jurisdiction over potential crimes committed in other areas outside the territorial sovereignty of States, such as outer space. And perhaps, one day, it could help steer the Court towards true universality.

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