
UNIVERSAL JURISDICTION IN ‘INTERNATIONAL CRIMINAL LAW’: LEGAL FOUNDATIONS, STATE PRACTICE, AND THE CHALLENGE OF POLITICAL SOVEREIGNTY

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ABSTRACT

Universal jurisdiction is one of the most important and, at the same time, controversial concepts in international criminal law. The doctrine was formed on the realization that some of the crimes are so severe that they pose a threat to the entire international community and cannot be left unpunished. Nonetheless, the extension of universal jurisdiction has caused a lot of legal and political controversy especially over the issue of state sovereignty, biased application and diplomatic strains.

The paper explores the legal basis of universal jurisdiction, its development by treaty and customary international law, and the way in which domestic courts are implementing universal jurisdiction. It examines the landmark court rulings that have contributed to the development of the doctrine and reviews the conflicts between the obligation to punish international crimes and the aspects of state sovereignty. The paper also addresses the problems related to misuse of power by politicians, jurisdictional issues and limitations to the enforcement. Finally, it claims that although universal jurisdiction is still a key tool in fighting impunity, its legality should be exercised judiciously and selectively in the context of the international law.

Introduction

Universal jurisdiction came out as a legal tool that can be used to help surmount these issues. According to this doctrine, national courts have the authority to hear some international crimes regardless of their territorial or nationality connection. The principle reminds us of the fact that some types of offenses are so serious that they affect the entire international community and should thus be prosecuted by any state. The idea has received growing concern in recent decades, especially after attempts of prosecuting those who have perpetrated atrocities during conflicts all over the globe. A number of the domestic courts have tried to use universal jurisdiction over matters concerning foreign officials who have committed serious international crimes. Those developments have led to both the spread of international accountability mechanisms and the generation of a serious debate on the extent of state authority and the security of sovereign equality.

Critics believe that universal jurisdiction might be politically inclined and may interfere with diplomatic relationships between states. There is also a doubt that domestic courts have the right to pass a verdict on crimes that have a weak tie with their country. Meanwhile, advocates also note that universal jurisdiction is a vital remedy to impunity in cases where international courts or local states fail to provide. The present paper also discusses the development, legal foundations, and modern use of the universal jurisdiction. It initially examines the principles of the doctrine in international law. It subsequently examines state practice and major judicial rulings that have influenced the evolution of the practice. Lastly, it analyses the obstacles of sovereignty and political abuse concerns and opinion on the future significance of universal jurisdiction in enhancing international criminal responsibility.

Juridical Prerequisites of Universal Jurisdiction

Concept and Definition

International jurisdiction is a principle that allows a state to prosecute certain types of crimes without regard for the location of the crime or even the perpetrator's and victim's countries of origin. The doctrine is an exception to the traditional rules of jurisdiction in international law, which are usually based on territoriality, nationality, protecting interests, or passive personality. International jurisdiction is theoretically justified by the idea that some types of crimes pose a

threat to the basic values of the international community.¹ Since the said offences are a violation of international order and human dignity, each state is interested in seeing to it that the perpetrators are brought before the court of justice. Universal jurisdiction is thus inextricably linked to the *Erga omnes* obligations principle, i.e., obligations to the international community.² These offenses against mankind, as well as genocide, are widely regarded as violations of collective responsibilities.

Beyond its technical definition, universal jurisdiction denotes a shift in normative commitment in international law to ensure that the most serious crimes are not left unpunished. The doctrine is based on the recognition that some violations, such as genocide, atrocities against human dignity, offenses against war, and perjury, constitute crimes against the entire international community. Because such crimes are typically committed in situations where the state of residence is unwilling or unable to prosecute the perpetrators, international jurisdiction provides an additional accountability mechanism. In this regard, it serves as both a jurisdiction norm and a moral and legal remedy to impunity, thereby supporting the overall goals of criminal international law, which are to uphold justice, deterrence, and the preservation of fundamental human rights.

Historical Origins

Piracy was previously recognized as a crime committed on the high seas, and thus not subject to the jurisdiction of any particular state.³ It was a first step toward the realization of universal jurisdiction, which will eventually be applied to other serious international crimes. The horrors of World War II increased international law's awareness of the importance of having a mechanism for holding individuals accountable for crimes that cross national.

Although not expressly stated in terms of universal jurisdiction, these provisions gradually improved the legal foundation of the concept that states could have authority over international offenses in the absence of a direct territorial or national linkage. Over time, the concept of universal jurisdiction became more widely recognized as a justifiable tool for enforcing international criminal law.

¹ Malcolm N Shaw, *International Law* (8th edn, 2017)

² *Barcelona Traction Light and Power Company Ltd (Belgium v Spain)* [1970] ICJ Rep 3

³ Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (CUP 2009)

Treaty-Based Foundations

International treaties on serious international offences involve the inclusion of jurisdiction. These treaties usually compel states to convict wrongdoers who are caught or extradite them to another state that was ready to convict. This duty is usually known as the *aut dedere aut judicare* (extradite or prosecute).⁴ Among the most notable is the The International Convention Opposition to Punishment, which requires states to have established jurisdiction over torturing acts if the would-be criminal is in their territory. The Geneva Conventions require states to prosecute individuals who have committed serious violations of international humanitarian law. These provisions of the treaty indicate the global community in the prevention of impunity of particularly serious offences. They strengthen the general rule that those who commit international crimes must not have safe haven by obliging the States to practice in their jurisdiction under some conditions.

The Convention to the Protection of All Persons against Enforced Disappearance is another significant treaty framework that supports the concept of international jurisdiction. It commits states to provide jurisdiction in cases of enforced disappearance if the alleged perpetrator is within their territory. On the same note, 'the International Convention on the Prevention and Punitive Action of the Crime of Genocide.' It imposes obligations on states to avert and condemn genocide, demonstrating the collective global interest of the community of nations in the prosecution of genocide crimes. In spite of the fact the main focus of the Genocide Convention is prosecution of the perpetrators before the competent national or international tribunals, it has helped in the further realization that genocide is a crime of universal interest. These treaty frameworks together with legal architecture to ensure that serious crimes against international law enjoy universal jurisdiction by enhancing the obligation of states to make sure that offenders of severe international crimes do not get away by merely crossing international boundaries.

Customary International Law

Besides the treaty law, universal jurisdiction has also evolved under customary international law. Customary norms develop through a vein of practice of the state over a period of time with the perception that the practice is legally binding (*opinio juris*).⁵ Over the years, the

⁴ M Cherif Bassiouni, 'The Duty to Prosecute International Crimes', 59 Law and Contemporary Problems 63.

⁵ International Law Commission, Draft Code of Crimes against the Peace and Security of Mankind (1996) UN

international community has come to agree that these are the crimes that will be given universal jurisdiction because of its severity and implications for world peace and security.

However, the exact scope of customary law's universal jurisdiction is up for debate. Although some scholars believe it is a broad term that encompasses all core international crimes, others argue that it should be limited to a smaller array of charges where state practice is widespread. Judicial decisions and state practice have both had an impact on universal jurisdiction's customary status. A number of national courts have used conventional international law to justify the prosecution of individuals accused of serious international crimes, despite the fact that there is no explicit treaty to which they should be bound.

Courts in other countries, such as Spain and Germany, have interpreted customary norms to mean that 'the exercising of sovereign immunity in crimes such as terrorism, genocide, and criminal offenses against mankind was allowed'. Furthermore, international courts have acknowledged that some of the prohibitions, such as torture and genocide, obtained the status of *Jus Cogens*, which means they cannot be derogated.⁶

State Practice and Judicial Application

Expansion of Domestic Legislation

Many states' domestic laws contain provisions for universal jurisdiction. Other countries, such as Germany, Spain, Belgium, and France, have passed legislation allowing their courts to bring criminal charges for international crimes regardless of territorial connections. Specifically, the 'Code of Crimes against the the International Law of Germany' grants national courts global jurisdiction over acts of genocide, crimes against the mankind, and charges of war crimes. Likewise, Spain once had a quite broad strategy which enabled its courts to investigate crimes which had been committed anywhere in the globe. The fact that such legislation is formulated is an indication that the national courts are increasingly realizing that they can be very crucial in the enforcement of international criminal law.

The Pinochet Case

Among the biggest legal developments, which have ever occurred in the history of universal

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⁶ Prosecutor v Furundžija (Judgment) IT-95-17/1-T (ICTY, 10 December 1998)

jurisdiction, is the case against the former Chilean president, Augusto Pinochet.⁷ The case is one that received significant global coverage and which is significant in developing the discourse surrounding the responsibility of state officials in relation to great international crimes. In 1998 a Spanish investigating magistrate issued an international arrest warrant on Pinochet, accusing him of taking part in tortures and crimes against humanity during his reign in Chile. Pinochet had gone, under this warrant, to the United Kingdom, where he had been detained, during the time he was there seeking medical treatment.

The case presented difficult legal issues, especially on whether a former state leader was entitled to immunity against prosecution in other countries and whether the universal jurisdiction could be enforced under such a condition. This case was eventually heard in the House of Lords who held that any torture act could not be seen as an official action that had protection after the states had ratified the Convention against Torture. Even though Pinochet later received permission to visit Chile on medical matters, the case was a pivotal case in the international criminal law since it ruled that former presidents of state could, in theory, be subject to international criminal prosecution in other countries regarding serious crimes against international law.

The Arrest Warrant Case

The Arrest Warrant case at the International Court of Justice is another significant decision on the limits of universal courts.⁸ The conflict arose after Belgium issued a warrant for his arrest for the Democratic Republic of the Congo's foreign minister in connection with alleged war crimes and crimes against humanity.

The Court ruled that foreign states cannot subject foreign officials in high positions, such as foreign ministers, to criminal jurisdiction while they are in office. This protection applies even in cases where the accusations involve serious international crimes

But the Court made it clear that this immunity does not offer a complete immunity against prosecution which is long term. After an official is out of office, he or she can still be prosecuted in the international tribunal or by a foreign court. This judgment underscores the constant conflict between the objectives of international justice on the one hand and the provisions of

⁷ R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 3) [2000] 1 AC 147 (HL)

⁸ Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) [2002] ICJ Rep 3

diplomatic immunity and sovereign equality on the other.

European Recent Developments

Some of the European states have recently brought to justice those who have engaged in international crimes outside of their own borders. In Germany, one example of such a case has been prosecuted by the courts.

The cases have shown how universal jurisdiction can be applied practically on a crime when it cannot or is unwilling to be charged by the state where the crime occurred. They also demonstrate how the domestic courts can play a part in achieving the global accountability efforts. The rising readiness of the European courts to prosecute mid-level and lesser perpetrators who have taken refuge in their territories has also been another major development. These are common cases of those who were involved in atrocities in other countries and moved into Europe as refugees or residents. Through criminal prosecution of such persons, national courts have proved that universal jurisdiction can also be used as an effective mechanism to carry out impunity even in those situations when high-level officials are out of the reach of prosecution.

Besides, a number of European prosecutions have been extensively dependent on evidence collected by international collaboration and efforts of the civil society organisations. Non-governmental organisations, victim advocacy groups, and investigative bodies have been instrumental in recording crimes, witness testimonies, and helping the prosecutors.⁹ This is a joint effort that has reinforced the factual basis of universal legal jurisdiction proceedings and has helped courts to recreate the events that took place in remote conflict regions.

Lastly, new trends show that universal jurisdiction is slowly turning into a permanent element of the European model of international criminal justice. In other countries like Germany, France and the Netherlands, courts have been becoming more aware of their role to play in global accountability where other mechanisms have failed. Despite these obstacles, the cases demonstrate how universal jurisdiction is becoming a valid and essential instrument on the criminal law enforcement and the protection of the victims of mass atrocities.

⁹ European Center for Constitutional and Human Rights, *The Koblenz Trial on Syrian State Torture* (ECCHR Report 2021)

Sovereignty and Political Challenges

Tension with Sovereignty of States.

The fact that universal jurisdiction can encroach upon the concept of state sovereignty is considered to be one of the greatest criticisms of the concept. The sovereignty is another principle of international law which is a manifestation of equality and independence of states. In cases when the domestic courts prosecute people who committed crimes that are absolutely extraterritorial, the territorial state might consider such a practice to have intruded into its internal matters. The same fear is especially high when the accused is a government official.

Opponents claim that permitting states to exercise universal jurisdiction without any apparent limits may create politically-driven prosecution and foreign tensions. Moreover, the question of universal jurisdiction exercise can give rise to concerns of judicial overreach of all the national courts. When courts that are based in a certain country are adjudicating a crime that had wholly taken place in the territory of another country, issues of legitimacy, competence, as well as the politicisation of the criminal justice process, are also at stake. Other states argue that such prosecutions could undermine the concept of non-interference in domestic affairs, which has long been a cornerstone of international law. As a result, the expansion of universal court jurisdiction remains a contentious issue, with some questioning whether it will strengthen international justice or undermine traditional norms of sovereign-state relationships.

Allegations of Selective Enforcement

The other issue is that there is a perceived application of universal court jurisdiction selectively. As a matter of fact, a majority of the cases that have been prosecuted under the universal jurisdiction relates to a crime that has been committed in a developing or politically less powerful state. The trend has resulted in claims that the mighty states can even turn universal jurisdiction into a political instrument. All this has the danger of delegitimizing the doctrine and can deter states to enhance its application on a larger scale.

In order to have credibility, there is a need to ensure that universal jurisdiction is upheld throughout and in accordance with well-defined legal standards as opposed to political factors. Scholars and international organisations have, in their turn, pointed out the necessity of ensuring an adequate procedural protection and objective legal criteria in cases of universal

jurisdiction in the face of such criticism. The doctrine must be free of misuse and to ensure this, transparent prosecutorial policies combined with independent judicial oversight and observing internationally recognised fair trial standards are necessary.

By making sure that the decisions to instigate the investigations are collected on the basis of credible evidence instead of political reasons, it can contribute to the enhancement of the validity of universal court jurisdiction and the increase of the confidence in the purposes and functions of the latter as the means of unbiased international justice.

Practical Limitations

Even with legal authority, prosecuting international crimes under universal jurisdiction is difficult. These have problems with evidence collection, witness testimony, and fair trials. Crimes which took place in remote conflict regions can lead to a lot of international collaboration to investigate. Prosecutions can be highly challenging without any access to such evidence or witnesses. Also, political factors can deter governments to take up cases that can put into jeopardy diplomatic ties. The other important limitation is associated with the accessibility of the accused and ruling of arrest warrants. The issue of universal court jurisdiction is frequently determined by the probability that the suspect is present on the official territory of the prosecuting state, because in many jurisdictions, physical custody of the suspect is required before a court of law can proceed. Prosecutions can be more symbolic without the cooperation of other states in extraditing suspects. As a result, the implementation of universal court jurisdiction frequently relies on state cooperation, extradition, and diplomatic coordination.

Universal Jurisdiction and International Criminal Court

With the establishment of the UN's International Criminal Court (ICC), the question of universal jurisdiction has taken on a new dimension. The ICC was established to prosecute individuals who have committed committing genocide and crimes against humanity, acts of terrorism, and the crime of aggression. The judiciary has its own complementarity principle, which states that national courts are responsible for the majority of international criminal prosecutions. When states are unable or unwilling to conduct legitimate investigations, the ICC steps in. In this regard, national tribunals can play a complementary role in the ICC's effort by administering cases that would otherwise have gone unpunished by taking on the role of

universal court jurisdiction.¹⁰

Additionally, universal court jurisdiction can help in the enhancement of the larger system of international criminal justice by enhancing the idea that the duty to charge international crimes that are common between states. Although, this court is in the middle of dealing with atrocities of large magnitude, it cannot deal with all the cases that arise due to conflicts taking place worldwide. Universal jurisdiction domestic prosecutions can thus be used to supplement the work of the Court by covering those cases that would otherwise go uninvestigated. This vested partnership between international institutions and national courts is an expression of a more decentralised form of international criminal law enforcement in order to minimise impunity and enhance accountability across different levels.

Emerging Trends and Future Developments

It has been pointed out in the recent developments that universal jurisdiction is still developing as a significant instrument of criminal law. To start with, a number of states have reinforced their national legal systems to facilitate prosecution of international crimes. Such changes are indicative of the increasing realization of the fact that accountability should not be based entirely on international tribunals.

Second, universal jurisdiction cases have become more effective with transnational cooperation between prosecutors and the agencies of investigation. International organisations coupled with the collaboration with the authorities of the countries have simplified the process of evidence collection and assisting the victims.

Third, civil society organisations have become more and more involved in the documentation of atrocities and in facilitating the prosecution. Their case has aided the development of universal jurisdiction cases.

Regardless of such positive changes, the future of universal legal jurisdiction will be based on the factors of reconciling the responsibility with attention to the principle. It will be essential to make sure that it is legitimate by ensuring transparency, fairness, and consistency in its application. The second new development is the increased use of technological developments

¹⁰ Mohamed M El Zeidy, *The Principle of Complementarity in International Criminal Law* (Martinus Nijhoff 2008)

and digital evidences in prosecutions of universal jurisdiction cases.¹¹

The availability of smartphones, satellite imagery, and open-source investigations has allowed the prosecutors to accumulate and authenticate evidence of international crimes committed by conflict zones thousands of miles apart increasingly. Online records and photographs, videos, and geolocation information have been significant contributors to the support of the evidence ground in cases presented to national courts. These advances have eased the process of investigators to recreate the events and create patterns of behaviour to a great extent, which makes universal jurisdiction an efficient tool of accountability.

Also, there is growing focus on participation and recognition of the victims in the universal jurisdiction proceedings.¹² Most legal systems in domestic ability have started to offer avenues in which the victim and the communities impacted can present testimonies, attend to proceedings and reparation.

This victim-focused practice has been in line with the larger trends in the international criminal justice, where the experience and rights of victims are taken to be a vital ingredient in the process of justice. The universal jurisdiction prosecutions can help achieve not only legal accountability but also other larger objectives of justice, recognition, and historical documentation by engaging the perspectives of the victims and giving them a platform to be heard.

Conclusion

The doctrine of universal jurisdiction is one of the greatest tools of combating impunity in the international criminal law. The doctrine demonstrates the wider role of the international community in defending fundamental human rights and enforcing humanitarian values since it permits domestic courts to prosecute persons who commit major international offenses irrespective of the place of commission of the crime. Universal jurisdiction has developed over time as influenced by historical developments, treaty commitments and state practice trends. Cases like the Pinochet litigation judicial ruling and the Arrest Warrant judicial ruling have been important in elucidating the potential scope of the doctrine as well as the legal constraints

¹¹ Alexa Koenig, 'Digital Evidence and 'International Criminal Justice' (2019) 17 *Journal of International Criminal Justice* 909.

¹² Luke Moffett, *Justice for Victims before the International Criminal Court* (Routledge 2014).

thereof. These are the examples of the contribution of the national and international courts to the establishment of the limits of responsibility in the international criminal law.

Meanwhile, the implementation of the universal jurisdiction still involves the problematic legal and political issues. Arguments concerning the sovereignty of the state, claims of discriminatory prosecutions, and the danger of international disputes demonstrate the difficulty of applying this doctrine to an international system that still is more or less state-centred. Nonetheless, the concept of universal jurisdiction can be regarded as a significant addition to the national criminal system and the international one, in spite of these concerns. Under circumstances where territorial states do not or cannot prosecute suspected criminals, the doctrine offers a different route of accountability and assists in not letting offenders of grave international offenses to evade justice. In perspective, the universality of jurisdiction will still be determined in future as to how states will execute this power.

The validity of the doctrine demands that the doctrine be enforced in a consistent, transparent, and within the existing principles of the international law such as the respect of due process and the sovereign equality of states. When used in a politically discriminative way, it is likely to destroy the faith in international justice. On the other hand, in cases that it is applied thoughtfully and in liaison with international institutions, universal jurisdiction can serve to strengthen a wider system of responsibilities in international criminal law. In this kind of approach, serious offenses like genocide, war crimes and crimes against humanity are not only identified as contraventions of domestic law, but also as international offenses since they involve the entire international community. In this regard, the proper application of universal jurisdiction can help people to tighten the belt to fight impunity and maintain the rule of law in the world.