Page 2811 - 2819 **DOI:** *https://doij.org/10.10000/IJLMH.114262*

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 6 | Issue 2

2023

Universal Jurisdiction Over Crimes against Humanity

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ABSTRACT

The paper "Universal Jurisdiction Over Crimes Against Humanity" examines the concept of jurisdiction in international law over crimes against humanity, with a specific focus on the universality principle. This principle provides a means for addressing the gravest of crimes that appeal to the "universal concern" - especially crimes against humanity when domestic avenues of justice are not available. The paper explores the origins and nature of such 'crimes against humanity', distinguishing them from other types of crimes, and presents arguments for why the universality principle is an appropriate means of addressing them. The paper also discusses the legal sources of authority that support the universality principle, including treaties, conventions, and customary international law to present an academic account of the evolution of the principle itself, with brief case descriptions to connect it to the broader domain of legal research. Finally, the paper presents arguments both for and against the implementation of universal jurisdiction, highlighting its potential benefits and shortcomings. The paper concludes with recommendations for further research and policy development in this area. Overall, the paper contributes to a growing body of scholarship on the use of universal jurisdiction as a tool for combating impunity and promoting accountability for the gravest of crimes.

I. INTRODUCTION

If one flips through the pages of modern history, the problem of impunity appears to be the root cause behind much of the red on these pages. Egomaniac autocrats often seem to get away with severe human-rights violations, because they know in the back of their minds that they could easily wipe their hands clean off them. Often the wrong people in power shut down or restrict the very domestic structures and institutions that are responsible for bringing them to justice. Impunity in these situations often becomes the one and same as Immunity. In such a case, does justice go unserved? For such cases and situations, the regime of International Law operates on the universality principle of jurisdiction - often referred to as **Universal Jurisdiction**.

Jurisdiction, quite simply understood in terms of Public International Law, refers to the powers

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 [ISSN 2581-5369]

of the state to regulate (or impact) upon people, property and circumstances[2]. Jurisdiction can be achieved in two primary ways - **Enforcement & Prescription**. As the names suggest, the former primarily deals with making laws or drafting judicial or executive action, the latter is responsible for bringing compliance to the said laws through the means of the judiciary and executive machineries. When it comes to International Law, two things are important to note - first, the jurisdiction of civil matters are often left to domestic law, and **questions of criminal law are primarily addressed**[3] ; second, while the enforcement of jurisdiction is primarily locked down by territorial factors, the prescription of it is often not. It is only logical to assume that the territorial restrictions imposed upon enforcement jurisdiction make sense - since a regime of absolutely no control over extraterritorial enforcement of jurisdiction would lead to anarchy.

To have an effective implementation in International Law, jurisdiction operates on certain inter-operable and intersecting principles - of which one is the **Principle of Universality.** Under the principle of universality, each and every state has jurisdiction to prosecute and try certain categories of international crimes[4], without any territorial, personal or national-interest link to the crime in question when it was committed[5]. This special category of crimes[6] over which there is accepted universal jurisdiction, are known as the **core international crimes**[7] - crimes against humanity (including torture and genocide), war crimes, crimes of aggression and piracy[8].

For the purpose of this essay, we shall be **focusing on the application of the universality principle of jurisdiction towards crimes against humanity**, in order to address the research question. Also, in the spirit of addressing the essay question, it becomes important to define crimes against humanity. While there is no codification of the ultimate extent of constitutive crimes that fall under this category, generally in terms of international law the Rome Statute is considered to be the latest source which reflects consensus on this. Crimes against Humanity

[2]Shaw, M. N. (2008). International Law. In (p. 651). Cambridge University Press [Hereinafter - Shaw].
[3].International law - Jurisdiction. (n.d.). Britannica. Retrieved December 3, 2022, https://www.britannica.com/topic/international-law/Jurisdiction#ref795059
[4] Langer, M. (2011). The Diplomacy of Universal Jurisdiction : The Political Branches and Transnational Prosecution of International Crimes (Cambridge University Press, Ed.). The American Journal of International Law, 105(1), 1-49. JSTOR. , p-1 [hereinafter - Langer].
[5] The Princeton Principles of Universal Jurisdiction. (2003). In Universal Jurisdiction - National Courts and the Prosecution of Serious Crimes under International Law (Revised). University of Pennsylvania Press.
[6] Article 6 - Charter of the International Military Tribunal, 1945
[7] UN General Assembly. (1998). Rome Statute of the International Criminal Court. International Criminal Court. [Hereafter - Rome Statute]
[8] **While Piracy is not part of the Core International Crimes, it has been included for convenience of use and because its prosecution based on universal jurisdiction presents similar issues to that of the other crimes.** For an examination of a broader list of crimes, see Report of the Secretary-General,The Scope and Application of the Principle of Universal Jurisdiction,UNDoc.A/65/181 (July 29, 2010)

consists of the following crimes [9] - **murder**, extermination, **enslavement,** deportation, **imprisonment** or severe deprivation of physical liberty, **torture**, rape or enforced prostitution / sterilization, **persecution**, enforced disappearance, crime of apartheid and other inhumane acts that are committed as part of a widespread or systematic attack directed against any civillian population, with knowledge of the attack. While **genocide** forms a separate category of core international crimes according to the Rome Statute, for all possible means of understanding and enforcement - genocide essentially is a crime against humanity[10] and would be considered so in this paper. Now, while the categories of crimes that call for universal jurisdiction are presented, two questions arise - on what claims are these crimes considered for universal jurisdiction, and what are the sources behind such jurisdiction?

Starting at the logic behind the claim for universal jurisdiction, these crimes are considered core because they appeal to an 'universal concern'[11], by which the atrocious nature of the crimes clearly triumphs national interests and borders - and bringing such criminals to justice becomes an interest of the international community as a whole. This also includes historical references to existence of universal jurisdiction (or, partial/quasi-universal jurisdiction) since the very beginning of law in Thomas Aquinas' divine law, John Stuart Mill's utilitarianism, Jackques Maratain's natural law and the ancient principle of *aut dedere aut judicare* (Latin for "either extradite or prosecute")[12]. The claim behind universal jurisdiction pertaining to crimes against humanity becomes even strengthened further by realizing that through the unanimous adoption of the Universal Declaration of Human Rights in 1948, international consensus was reached over the existence of universally recognised rights, and the ball was rolled towards the enforcement of such rights and the need for a system of punishment for gross violations of those rights that need not be restricted through the principle of territoriality. Thus the principle of universality, or its many points of derivation is not certainly a new idea - and has been the answer of jurisprudence to fill gaps of impunity and restrictions of domestic law.

Now, if one has to look at the sources behind asserting universal jurisdiction, especially those pertaining to crimes against humanity, states have relied on two legal sources of authority - treaties & conventions and customary international law (with evidences from case laws)[13]. For the purpose of this paper, the present section on the analysis of sources would also serve as an overall understanding of how there lies an established basis for criminal authorities of a state to

[9] Article 7 - Rome Statute
[10] See *Shaw (*pp. 670-671)
[11] Randall, K. C. (1985). Universal Jurisdiction under International Law. Texas Law Review, 66, 785.
[12] Weiss, P. (2008). Universal Jurisdiction : Past, Present and Future. Proceedings of the Annual Meeting (American Society of International Law), 102(April 9-12), 406-409. [Hereafter - Weiss]
[13] See *Langer* (p.4)

 [ISSN 2581-5369]

try someone present in its territory with crimes against humanity even if the crime did not take place in that territory.

Looking at treaties and conventions first, it is important to mention that while none of the treaties and conventions explicitly establish universal jurisdiction in its complete definition, they serve as an internationally agreed-upon grounding for states to interpret them as authorizations for their municipal courts in asserting universal jurisdiction over crimes against humanity (and other core international crimes)[14]. The idea of universal jurisdiction for crimes against humanity begins at the initiation point for much of modern international criminal law - Nuremberg. The post-world war II trials, primarily Nurmeberg and Tokyo, and the declaration of the London Charter were embedded in the idea that international law had established certain international crimes for which the individuals would be held responsible. Based on this precedent, the United Nations General Assembly unanimously approved such principles recognised by the London Charter and the judgment of the IMT through a landmark resolution[15]. The four Geneva Conventions of 1949[16] went on to establish the provision that states would have universal jurisdiction over cases of 'grave breaches'[17] of the Conventions - which include willful killing, torture or inhuman treatment, unlawful deportation of protected persons and taking of hostages. The Additional Protocol I (1977)[18]of the Geneva Conventions added to this index of grave breaches, crimes such as attack on civilian populations. As we have already seen before, the 1998 Rome Statute of the ICC provides the extent to which universal jurisdiction is applicable - namely to the core international crimes that are considered to be 'serious crimes of concern to the international community as a whole' - one of which are crimes against humanity. The statute also provides that a person who commits a crime within the jurisdiction of the International Criminal Court, 'shall be individually responsible and liable for punishment' in accordance with the Statute[19]. This provides an important characteristic to universal jurisdiction over crimes against humanity - it operates on the principle of 'Individual Criminality'[20].Another

[14] See Bassiouni, M. C. (n.d.). The History of Universal Jurisdiction and its Place in International Law. In *Princeton Principles* (supra note 2 ed., 39, 50, 55-56).
[15] UNGA Resolution 95 (I)
[16] Convention [No. 1] for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12 1949, 6 UST 3314, 75 UNTS 31 **;** Convention [No. 2] for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 UST 3217, 75 UNTS 85 **;** Convention [No. 3] Relative to the Treatment of Prisoners of War, Aug.12, 1949, 6 UST 3516, 75 UNTS 287 **;** Convention [No. 4] Relative to the Protection of Civilian Persons in Time of War, Aug, 12, 1949, 6 UST 3516, 75 UNTS 287. **[Hereinafter - First. Second, Third & Fourth Geneva Conventions respectively]**
[17] See Art. 49 of the First Geneva Convention ; Art. 50 of the Second Geneva Convention : Art. 129 of the Third Geneva Convention & Art. 146 of the Fourth Geneva Convention
[18] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 UNTS 3 [Hereinafter - Add. Protocol I]
[19] Art. 25 - Rome Statute
[20] See, London Charter, Nuremberg Trials

widely accepted source for universal jurisdiction on cases concerning crimes against humanity is the Draft Code of Crimes against Peace and Security of Mankind, adopted by the International Law Commission in 1996[21]. Article 9 of the Draft, alongside its commentary establishes that a state in whose territory an individual alleged to have committed a crime against the peace and security of mankind[22] (of which one is crimes against humanity) shall either extradite or prosecute the individual, where in case of prosecution - the national courts would be entitled to exercise the 'broadest possible jurisdiction' over the crimes 'under the principle of universal jurisdiction'[23]. The Draft Code not only provides a broad definition of universal jurisdiction, it also effectively gives states an accepted basis for trying someone present in its territory with crimes against humanity - even if the crime did not take place in its territory. To add to this, treaties and conventions have provided establishment for universal jurisdiction over crimes against humanity in another very effective way - creating obligation for states parties to establish a sort of quasi-universal jurisdiction in domestic law itself[24]. Quite simply understood, the treaties and conventions that follow the quasi-universal model, provide for certain categories of crimes (which are internationally recognised) to be made criminal offenses within the domestic order of states parties. In such cases, alleged offenders who are found within the territory of such a state, get prosecuted on other principles of jurisdiction in International law - such as passive personality or territoriality. While this is not an absolute universal jurisdiction, this in supplement to the universal jurisdiction that states enjoy - increases the establishment for overall universal jurisdiction over certain crimes, primarily crimes against humanity. One of the most important conventions of this model includes the UN Torture Convention of 1984[25], which provides that **each state party shall ensure all acts of torture are offences under domestic criminal law[26] and shall take all measures as may be necessary to establish its jurisdiction over torture offences** where committed in any territory under its jurisdiction (or on board a vessel registered in the state concerned)[27]. As we already know, Torture is one of the most important Crimes against Humanity, and through these provisions this convention creates an unique international-domestic understanding for establishing a sort of universal jurisdiction for this crime against humanity. Quite similarly, some other notable conventions and treaties such

[21] Report of the International Law Commission, A/51/10, 1996, p.9 [Hereinafter - ILC Report]
[22] Includes genocide, crimes against humanity, crimes against UN and associated personnel and war crimes (crimes against aggression, which is a part of the list of Crimes against the Peace and Security of Mankind - does not qualify for universal jurisdiction according to the Draft)
[23] Commentary to Art.9, ILC Report, p.9
[24] See *Shaw (*p. 673)
[25] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, United Nations, Dec. 10, 1984, 1465 UNTS 85 [Hereinafter - Convention against Torture]
[26] Art. 4 - Convention Against Torture
[27] Art. 7 - *ibid*

as the Immunity Convention[28], the Hostage Convention[29] and the Genocide Convention[30] sets the **obligation for states to make the relevant crimes against humanity (incriminating diplomatic agents, taking of hostages and committing genocide respectively) punishable as per their domestic law** - creating quasi-universal jurisdiction over these crimes against humanity.

Now, we shall be looking at the second source of authority for universal jurisdiction in cases of crimes against humanity - customary international law, which is built up by landmark cases and judgements. The logic of establishing a foundation of universal jurisdiction from this source is primarily in two ways - states either argue that certain judgements and precedents have authorized universal jurisdiction over crimes against humanity, and if not - at least they do not prohibit the exercise of universal jurisdiction over the same[31]. The latter part of the argument, which we will also see being used as a justification in many cases, is the most unique feature of establishing the basis for universal jurisdiction through customary international law. One of the best evidences of such a case where **universal jurisdiction is derived not by explicit authorisation, but through lack of restrictions thereof**, is a case which sets the very foundations of Public International Law - the *Lotus Case*[32]. The facts of the case are as follows - In 1926, a French steamer *S.S. Lotus* bound for Constantinople collided with a Turkish vessel *Boz-Kourt* on the high seas, leading to the sinking of the latter, causing the death of 8 Turkish souls on board. Once the *S.S. Lotus* reached the port, Turkish authorities placed under arrest one Demons, the officer on watch on the Lotus at the time of the accident. Demons was put on trial for involuntary man-slaughter - but at the trial Demons objected on the grounds of Turkish courts lacking jurisdiction. Despite the protest, Demons was delivered a sentence - which led to the involvement of the French government in protest against unfair jurisdiction. The two countries took the case to the PCIJ to find an answer to the question - was the action of Turkey in conflict with the principles[33] of international law. France demanded to know on what precedents of international law did Turkey exercise jurisdiction over this case, and Turkey's response to it was a 'fundamental take', wherein it stated that states may exercise jurisdiction over crimes whenever the exercise of 'such jurisdiction does not come into conflict with a

[28] Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, United Nations General Assembly, 1973.
[29] International Convention against the Taking of Hostages, United Nations General Assembly, 1979
[30] Convention on the Prevention and Punishment of the Crime of Genocide, United Nations General Assmebly, 1948
[31] See *Arrest Warrant* of 11 April 2000 (Dem. Rep Congo v. Belg.) 2002 ICJ REP.3 (Feb. 14)
[32] *S.S. Lotus (France v. Turkey),* 1927 PCIJ - 9A-10 [Hereinafter - *Lotus*]
[33] *Lotus*, p.5

principle of international law'[34]. The PCIJ held in favor of Turkey, and also put forward some very important precedents for the establishment of universal jurisdiction[35] - giving states a freedom to act in matters where international law is not prohibiting them, and that existence of restriction is established only by a prohibitive rule of international law that already exists. The holding therefore gave an independent state the legal power to vest jurisdiction in its courts to hear and decide upon any criminal matter which is not restricted by an existing rule in international law. To establish our point of focus, we can state that the Lotus Case set forward the precedent that **an independent state has legal power to vest jurisdiction in its courts to hear and determine alleged crimes against humanity unless it is prohibited from doing so by international law**. While the Lotus case set the initial precedent for domestic courts having international jurisdiction, the *Eichmann* case[36] went on to become the established point for domestic courts manifesting universal jurisdiction over the core international crimes, including crimes against humanity. In 1961, the Intelligence organizations of Israel tracked down and located Adolph Eichmann, hiding in Argentina. Eichmann was a Nazi General during the second world war, and considered a mastermind behind the systematic extermination of Jews. Israeli intelligence apprehended Eichmann and brought him back to Israel, where the domestic criminal authorities put him up for trial. The domestic criminal court of Israel exercised universal jurisdiction to sentence Eichmann to the death penalty on multiple counts of crimes against humanity, war crimes, crimes against the Jewish people and other crimes deemed so by the Nuremberg Trials. Two facts have to be kept in mind while analyzing the case - Eichmann was a German national, and he was apprehended on Argentinian soil, and he was tried in an Israeli court after he was brought to Israeli territory - for crimes that did not take place in Israeli territory (and in fact took place before the very birth of Israel). It is also important to note, that Israel was one of the few countries at this time which had defined and codified 'crimes against humanity' by national law, and this allowed for easier quasi-universal jurisdiction as well. When international criticism arose over breach of international law exhibited by Israel, the judgment of the case was used to set a precedent, of which one particular section became a crucial source of establishment for universal jurisdiction against core international crimes in recent time -

"**These crimes … are grave offenses against the law of nations itself** … International law is, in the absence of an international [criminal] court, in need of the judicial and legislative organs of every country to give effect to its criminal interdictions and to bring the criminals to trial.

[34] *Ibid,* p.18
[35] *Ibid,* pp. 20, 26 & 29
[36] AG of Israel v. Adolf Eichmann, 36 ILR (1961) [Hereinafter - *Eichmann*]

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Jurisdiction to try crimes under international law is universal."[37]

Such a precedent gave way for the future codification of core-international crimes, and the international consensus of universal-jurisdiction over them. Another important case relevant for this discussion is the *Pinochet* case[38]. General Augusto Pinochet was the former dictator of Chile between 1973 to 1990, and his regime was known for multiple human rights crimes and violations - from enforced disappearances, to torture and killings. After the restoration of democracy in Chile, Pinochet fled the country, but made sure that there was an elaborate legal structure of absolute impunity for him and his accomplices so that Chile would never be able to incriminate his wrongful actions. In 1996, multiple criminal complaints against Pinochet were filed in courts of Spain on behalf of victims of oppression during the military dictatorship in Chile. Identifying clear instances of breach of core international crimes (as identified and defined by international law and domestic courts) , the courts of Spain allowed the proceedings of these cases, by using the principle of universal jurisdiction. When Pinochet was in Britain in October of 1998, a Spanish judge requested the British authorities to arrest him, and extradite him to Spain. While this request of extradition was supported by other European countries, Pinochet challenged the arrest and extradition on grounds of immunity as a former head of state. The British Parliament cited that on grounds of being signatories of the UN Convention against Torture, Britain would not be able to provide immunity to Pinochet from Torture, which is a Crime against Humanity - and a British magistrate determined that Pinochet could be extradited to Spain on grounds of being signatories of the same convention. This case is perhaps one of the strongest points of the establishment of universal jurisdiction over crimes against humanity - as we see Spanish courts trying an individual for crimes committed in Chile, and ordering arrest and extradition of that individual from the UK. Also, we saw how **conventions become points of precedent itself in customary international law**, for cases to deliver their holdings, and how that allowed for a state to overlook immunity. The Pinochet case set forward something called the 'Pinochet precedent' in terms of the application of universal jurisdiction over crimes against humanity, and upon such precedent other important cases such as *Arrest Warrant* Case[39] & *To Prosecute or Extradite Case*[40] have created an established basis for criminal authorities of a state exercising universal jurisdiction to try someone present in its territory with crimes against humanity even if the crime did not take place in that territory.

Therefore we were able to provide all substantial evidence surrounding the establishment of

[37] *Eichmann* - p.43
[38] R v Bow Street Magistrate ex-p Pinochet (no 3) [2000] 1 AC 147 [Hereinafter - Pinochet]
[39] *Arrest Warrant* of 11 April 2000 (Dem. Rep Congo v. Belgium) 2002 ICJ REP.3 (Feb. 14)
[40] *Obligation to Prosecute or Extradite* (Belgium v Senegal) ICJ Rep 2012

 [ISSN 2581-5369]

universal jurisdiction over crimes against humanity. Universal jurisdiction is decentralized, unlike the jurisdiction enjoyed by the **International Criminal Court** - but the establishment of the ICC itself is a testament to the evolution of universal jurisdiction over certain kinds of crimes, such as crimes against humanity. The world agrees that pursuit of some criminals can simply not be dropped because of national borders and limited sovereignty - and therefore based on such consensus universal jurisdiction exists over the same. The regime of universal jurisdiction is not without criticisms, but its need in the world is constantly felt. While there is much scope of improvement and reform - with more assessment mechanisms and international regulation of the same, that is beyond the scope of this essay. To essentially conclude we could say that the existence of universal jurisdiction creates an international criminal enforcement environment where the most serious of offenders face a certain cliched consequence - they **can run, but they cannot hide** for long.

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 [ISSN 2581-5369]