Page 1669 - 1678 **DOI:** *https://doij.org/10.10000/IJLMH.116280*

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 6 | Issue 6

2023

Universal Jurisdiction under International Criminal Law Problems and Prospects

ANWESHA PATI[1]

ABSTRACT

The principle of universal jurisdiction has been a contentious issue amongst the international community, despite receiving recognition under the Geneva Convention of 1949. It refers to the ability of states to prosecute criminals irrespective of the territory in which the crime was committed or their nationality. The principle remains saddled with numerous challenges as its application is seemingly narrowed down to only grave crimes like genocide, war crimes, coupled with the reluctance of individual nations to formulate adequate provisions at the domestic level. Further the principle is also met with scepticism by several nations as an endangerment to their sovereignty and sometimes resulting in abuse of it. Though the principle has been accepted as an important international norm, its frequent intermingling with realpolitik and the lack of guiding principles as to its definition, scope and limitation has created impediments in its proper application. This article analyses the various challenges that thwart its effective implementation and ways in which the international community and individual nations must come together to lay down uniformity in practices so that the universal jurisdiction can become potent principle to tackle transnational crimes.

Keywords: *universal jurisdiction, impunity, International Criminal Court, prosecution, genocide, war crimes, international community*

I. INTRODUCTION

International law allows for five types of jurisdiction, at present namely territorial jurisdiction (based on the territory in which the crime was committed), national jurisdiction(based on the nationality of the offender), protective jurisdiction (based on protecting the interest of the state), active nationality (based on the nationality of the victim) and universal jurisdiction.[2] Among these five, universal jurisdiction is the most debated topic in the international forum. Over the years debates have surfaced regarding its applicability and failure to come up with an appropriate definition. Universal jurisdiction means the ability of a state to prosecute crimes which are grave in nature irrespective of the place of commission of the crime, the nationality

[1] Author is a Practicing Advocate at Calcutta High Court, India.

[2] Noora Arajarvi, *Looking back from nowhere; Is there a future for universal jurisdiction over international crimes,* 16 TILBURG L.R.5, 5-9 (2011).

 [ISSN 2581-5369]

of the offender or the victim.[3] Under this principle every state is empowered to assert jurisdiction over crimes committed which are considered to be a threat to the international community by virtue of its heinousness, even though the state does not have a direct link to the offence committed.[4] Cheriff Bassiouni states that the principle of universal jurisdiction is a means of allowing every state to assert its jurisdiction over crimes which has an effect on the international community as a whole and such a state shall act on behalf of the international community.[5] According to him, this principle is similar to the Roman doctrine of actio popularis, where every member of the society had the power to bring an action as "a defence to public interest".[6] The main purpose of developing this kind of jurisdiction was to prevent criminals from taking refuge in those countries which did not have the jurisdiction to try the offence committed or the "crime" was not regarded as a crime in those countries. Previously in the Arrest Warrant Case, Judge Van den Wyngaert had observed in her dissenting opinion that, "there is no generally accepted definition of universal jurisdiction in conventional or customary international law".[7]Though the definition of universal jurisdiction has not been concretised, various scholars and international documents have attempted a definition of the same in recent years. According to the Princeton's Principle, Paragraph 1(1) defines universal jurisdiction as "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 connection to the state exercising such jurisdiction."[8] Noted scholar Kenneth Randall states that "the theory of universality provides every state with jurisdiction over a limited category of offenses generally recognized as of universal concern, regardless of the situs of the offense and the nationalities of the offender and the offended."[9]

II. DEVELOPMENT OF THE CONCEPT OF UNIVERSAL JURISDICTION

Modern universal jurisdiction is applicable to crimes which are grave in nature, which includes the crime of genocide, war crimes, crimes against humanity, crimes against peace and torture. Further if any treaty obligates the state parties to exercise jurisdiction for crimes which are a violation of erga omens or jus cogens norms, then such states are bound to exercise jurisdiction

[3]Bibiana Bonilla Barrios, *Universal Jurisdiction: A threat to state sovereignty?*, http://arno.uvt.nl/show.cgi?fid=106281.
[4] *Id.*
[5] Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81,88 (2005).
[6] *Id.*
[7] Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), Judgment, I.C.J. Reports, 2002, p. 3, 166, http://www.icj-cij.org/docket/files/121/8126.pdf.
[8] The Princeton Principles on Universal Jurisdiction, Principle 2, paragraph 2, https://lapa.princeton.edu/hosteddocs/unive_jur.pdf.
[9] Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEXAS L.R. 785, 788 (1988).

 [ISSN 2581-5369]

irrespective of the place of commission or the nationality of the offender.[10]However, originally the reason for development of the concept of universal jurisdiction was not the gravity of the nature of crimes. The rationale behind this principle was to make possible the prosecution of those crimes which would go unpunished because the crimes were committed outside the jurisdiction of any state for example on the high seas or any place which was not under the jurisdiction of any state. Thus universal jurisdiction was particularly made applicable for crimes of piracy, slavery. The United Nations Convention on the Law of the Seas defines piracy as "any illegal acts of violence, detention or any act of depredation committed for private ends by the crew or the passengers of a private ship or private aircraft."[11]Further Article 105 of the Convention allows any state to seize a pirate ship and the courts of that state can adjudicate upon the penalties and also the action that is to be taken with respect to the ship, aircraft or property subject to the right of third parties acting in good faith.[12]It is evident from these provisions that the states were entitled to exercise jurisdiction for acts of piracy under international law. But the authority to exercise jurisdiction over acts of piracy have been in practice under customary international law since the 16th century. The problem with the crime of piracy was that it was mostly committed outside the territorial jurisdiction of any state particularly on high seas and also the perpetrators of such act were stateless persons or persons belonging to different nations. Thus it became increasingly difficult to prosecute these individuals on the basis of territoriality or the nationality of the offender. In order to mitigate the problem of non-prosecution which resulted in criminals going scot free even after committing dangerous crimes and prevent the misuse of the high seas, this principle was developed to address the loophole created by the territoriality and the nationality principle. In addition to this, pirates were branded as hostis humani generis that is "enemies of the human kind".[13]For all these reasons it seemed important to extend the universality of jurisdiction to such crimes which affected the states detrimentally and the need to impose legal sanctions since such crimes were a concern for the international community. Subsequently the principle of universal jurisdiction came to be extended to other crimes which were considered to be grave in nature. There can be seen a change in the context of applicability of the principle. Previously the principle found its applicability only when it was not possible to assert a single jurisdiction

[10] ARAJARVI, *supra* note 1.
[11] U.N Convention on the Law of the Sea, Dec 10, 1982, arts. 101, 102, U.N Doc. A/CONF. 62/122. 21 I.L.M 1261(1982).
[12] U.N Convention on the Law of the Sea, Dec 10, 1982, art. 105 U.N Doc. A/CONF. 62/122. 21 I.L.M 1261(1982).

[13] ARAJARVI, *supra* note 1.

 [ISSN 2581-5369]

because of the nature of the crime committed. But later on the scope of applicability of the principle was increased to include crimes by virtue of its gravity and was not only restricted to the notion of preventing criminals from taking refuge in states which did not have jurisdiction to try the offense.

Post World War II, it is possible to notice developments related to the principle of universal jurisdiction. One of the most important events relating to prosecution of war crimes and crimes against humanity was the Nuremberg Tribunal. Although the jurisdictional basis of the Tribunal is considered to be ambiguous, but the fact that it did base its jurisdiction on the principle of universality can be confirmed from the U.N Secretary General's Report on the Nuremberg Tribunal:[14]

"The Court, however, also indicated another basis for its jurisdiction, a basis of more general scope. "The Signatory Powers" [the Tribunal said], "created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the trial. In doing so, they have done together what any nation has the right thus to set up special courts to administer law." The statement is far from clear, but, with some hesitation, the following alternative interpretation may be offered. It is possible that the Court meant that the several signatory Powers had jurisdiction over the crimes defined in the Charter because these crimes threatened the security of each of them. The Court may, in other words, have intended to assimilate the said crimes, in regard to jurisdiction, to such offences as the counterfeiting of currency. On the other hand, it is also possible and perhaps more probable, that the Court considered the crimes under the Charter to be, as international crimes, subject to the jurisdiction of every state. The case of piracy would be the appropriate parallel. This interpretation seems to be surrounded by the fact that the Court affirmed that the signatory Powers in creating the Tribunal had made use of a right belonging to any nation."[15]

However it is important to note that the principle of universal jurisdiction as applicable for the crime of piracy had been extended for prosecution conducted in the post war trials. It failed to analyse that the crime of piracy was concerned with only acts done for private gains whereas the war crimes and crimes against humanity included acts which were carried out in official capacity.[16] Thus an application of this principle to war crimes analogous to that which was applied for the crime of piracy would not be appropriate as it could breed interstate conflicts,

[14] Madeline H. Morris, *Universal Jurisdiction in a Divided World: Conference Remarks*,35:2 ENGLAND L.R. 337, 337-361(2001).
[15] Secretary-General of the United Nations, The Charter and Judgement of the Nuremberg Tribunal: History and Analysis at 80, U.N Doc A/CN.4/5, U,N Sales No. 1949V.7(1949).
[16] MORRIS, *supra* note 13.

 [ISSN 2581-5369]

something which was sought to be curbed by the application of the principle to piracy.[17]While dealing with the Eichmann case, the Israeli Supreme Court had observed that there exists conflicting opinions regarding the applicability of the principle. In its judgement it reached the conclusion that the court was right in applying the principle of universal jurisdiction to the present case. The court was of the opinion that if the principle was restrictively applied only to the crime of piracy, the principle would lose its significance and held that its applicability extended to crimes "which damage vital international interest, they impair foundations and security of the international community, violate universal moral values and humanitarian principles that lie hidden in the criminal law systems adopted by civilized nations."[18] Despite the confusion regarding the legal status of the principle its applicability has been extended to war crimes, genocide, crimes against humanity and it has been established as part of customary international norms. The International Criminal Court lacks the authority to exercise universal jurisdiction. However, this principle finds mention in paragraph 4-6 in the following words- "states parties affirm that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation, determine to put an end to impunity for the perpetrators of such crimes, and recall the it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes."[19]

III. PROBLEMS OF PROPER IMPLEMENTATION OF UNIVERSAL JURISDICTION

There are a number of problems which hinder the effective implementation of the principle of universal jurisdiction. Firstly there is the problem of inadequate legislation.[20] Often states fail to include the international crimes in their domestic legislation and since universal jurisdiction basically functions on the basis of national courts' ability to prosecute international crime, hence in such situations where a state does not have the adequate means to enable the prosecution of such grave crimes it acts as an advantage for the criminals who can escape prosecution by fleeing to such states. Further there is the problem of not including all kinds of crime within the national legislation over which universal jurisdiction of such courts extend. For example, Italian courts have the authority to exercise universal jurisdiction for war crimes only to a limited category. The penal provisions extend to a number of crimes which qualify as crimes against

[17] *Id.*
[18] A-G Israel v Eichmann , Supreme Court Judgment of 29 May 1962, (1968) 36 International Law Reports 291, para 11 (b).
[19] BARRIOS, *supra* note 2.
[20] *Universal jurisdiction: The duty to enact and enforce jurisdiction: Chapter 14,(2001)* https://www.amnesty.org/en/documents/IOR53/017/2001.

humanity but it does not extend to the crime of torture. Also the inadequacy and slow pace of the arrest procedures act as an impediment to proper realisation of the principle, because the time taken by the authorities to complete the procedural requirements and arrest a person gives him sufficient time to flee thus avoiding prosecution. Added to this is the issue of nonchalance of the states to enact legislation in their countries. Although international instruments urge countries to legislate at the national level so that universal jurisdiction can be extended for the grave crimes like genocide, war crimes and the like, it is often observed that countries lack the political will to legislate as well as implement such laws because of a variety of reasons like indolence of parliamentary procedures and failure to realize the urgency of the matter.

Universal jurisdiction also entails the probability of potential political abuse because this principle is most of the times enforced by the national courts hence they are likely to reflect the political motivations and interests of states.[21] According to renowned scholar Cheriff Bassiouni- "Unbridled universal jurisdiction can cause disruptions in the world order and depravation of individual human rights when used in a politically motivated manner or for vexatious purposes. Even with the best intentions, universal jurisdiction can be used imprudently, creating unnecessary frictions between states, potential abuses of legal processes and undue harassment of individuals prosecuted or pursued for prosecution under this theory. Universal jurisdiction must therefore be utilized in a cautious manner that minimizes negative consequences, while at the same time enabling it to achieve its purposeful purposes."[22]

Immunity of heads of states is another issue which effects the proper implementation the principle of universal jurisdiction. However Article 27(2) of the Rome Statute does not allow immunity to heads of state. The decision of the ICJ in the Arrest Warrant Case is a clear departure from this law. In this case the Belgian court had issued an arrest warrant holding Foreign Minister of Congo liable for commission of grave crimes like war crimes and crimes against humanity. But ICJ held that in issuing a arrest warrant against the Foreign Minister, the Belgian courts had violated the immunity that is granted to heads of states.[23]

Absence of extradition laws or inadequacy in such laws can lead to a delay in exercise of this principle.[24]The Pinochet case and the Hissene Habre case are befitting examples of how

[21]Dalila V Hoover, *Universal Jurisdiction not so Universal: A Time to Delegate to the International Criminal Court*, Cornell Law School Inter-University Graduate Student Conference Papers. Paper 52.(2011) http://scholarship.law.cornell.edu/lps_clacp/52.
[22] Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81, 82 (2001-2002).
[23] HOOVER, *supra* note 20.
[24] HOOVER, *supra* note 20.

extradition laws at the national level can affect the application of universal jurisdiction.

Lastly, there lies the problem of lack of a strong system of monitoring at the international level which will ensure that norms relating to international criminal law are effectively complied with by states.[25] It would be useful if the various committees formed to overlook the implementation of the Conventions are vigilant enough to address issues of non-compliance by states and at the same time urge them to upgrade their laws in consonance with the international conventions so that international crimes do not go unpunished because of lack of jurisdiction or inability to prosecute.

IV. WHAT SHOULD BE THE WAY FORWARD

Although the exercise of universal jurisdiction is limited by various factors as mentioned above, it is important to take a stand for its effective implementation, to fulfil the purpose for which it was designed that is, to end impunity against the commission of heinous crimes. So it is necessary to formulate ways in which the application of universal application can be strengthened and develop a robust mechanism which ensures that its application is given effect. It may be also possible to develop certain alternative methods to this principle since uniformity in the application of universal jurisdiction seems a far-fetched dream in times to come. It has been suggested by some scholars that the creation of ad hoc tribunals similar to ICTR and ICTY can help solve the problem to a certain extent.[26]Also the proposition of mixed tribunals are considered a viable option for prosecution of grave crimes which threaten the international community.[27]But these mechanisms cannot be considered as the ultimate solution to the problem of non- application of universal jurisdiction. There may arise situation where universal jurisdiction can be the best and last resort to enable prosecution for crimes committed. In addition to this is the problem of nations not willing to prosecute criminals as the alleged crimes are carried out under official capacity. So in order to protect its heads of state, states may be reluctant to give effect to the principle of universal jurisdiction. Often situations may arise that the state where the crime was committed is unable to prosecute the criminal because of lack of definition of the crime or the judicial infrastructure may not be competent enough to enable prosecution. In such cases, there is increased chances of the criminals escaping punishment.

In light of this situation, it seems necessary and has also been the view point of some scholars that the ICC should assume the responsibility of applying the principle of universal jurisdiction and this might be an appropriate way to ensure its applicability and will in turn help in achieving

[25] *Id.*
[26] ARAJARVI, *supra* note 1.
[27] *Id.*

 [ISSN 2581-5369]

the goals of fighting impunity. At present the ICC has not been bestowed with the power of universal jurisdiction. The ICC can exercise its jurisdiction over certain crimes only on certain circumstances. Article 12 of the Rome Statute lays down the pre conditions for exercise of jurisdiction by the court. The court can exercise its jurisdiction over those states that have become party to the Rome Statute or has accepted the jurisdiction the Court. Also the Court has the jurisdiction to prosecute those crimes which are committed (a) on the territory of the state party or (b) in case the crime is committed on board a vessel or aircraft, the state of registration of the aircraft or vessel who is a state party to the Rome Statute and (c) by the national of a state party to the Statute.[28]Additionally under Article 13 of the statute states that where crimes mentioned in Article 5 namely war crimes, genocide, crimes against humanity, crimes of aggression have been committed the Court is entitled to exercise its jurisdiction when (a) a state party refers the commission of such crimes to the Prosecutor (b) a situation where such crimes are committed and is referred by the Security Council to ICC and (c) the Prosecutor initiates an investigation proprio motu on the basis of information received regarding the commission of such crimes.[29]

Many non-state parties are quite apprehensive regarding the delegation of universal jurisdiction to the ICC. They base their concern particularly in relation to Article 1, 12, 13 and 17 of the Rome Statue. They fear that the application of ICC jurisdiction will lead to a compromise of their state sovereignty.[30]Article 1 of the Statute speaks about complementarity of jurisdiction whereby both the national courts and ICC are empowered to exercise their jurisdiction in respect of crimes enumerated under the Statute. However this argument has been rightly countered by Robert Cryer as -"[T]he idea behind complementarity can also be seen as a use of state sovereignty for international ends."[31] A similar view has been put forward by Cheriff Bassiouni – "[It] is not a supranational body, but an international body similar to existing ones… The ICC does not more than what each and every State can do under existing international law…. The ICC is therefore an extension of national criminal jurisdiction …. Consequently the ICC… [does not] … infringe on national sovereignty."[32]The complementarity rule was created to facilitate national courts in the prosecution of heinous crimes, and where such courts would fail, the ICC would step in.

Also under Article 12 of the statute gives the ICC the power to exercise jurisdiction over

[28] Rome Statute of the International Criminal Court, Article 12, https://www.icc-cpi.int.
[29] *Id* Article 13.
[30] HOOVER, *supra* note 20.
[31] Robert Cryer, *International Criminal Law vs State Sovereignty: Another Round?,* 16 EUR. J. INT'L L. 979, 985 (2005).
[32] BASSIOUNI, *supra note* 21, at 983, 84.

 [ISSN 2581-5369]

nationals of a non-state party who has committed a crime in the territory of a state party. Thus non state parties consider this as a compromise of is national sovereignty.[33] Also under Article 17(2) of the Rome Statute, ICC can exercise its jurisdiction in cases where states fail to or are unable to prosecute international crimes. This can be regarded as an implied form of allowing the ICC to exercise universal jurisdiction as the states have delegated their power to prosecution by virtue of unwillingness or inability to prosecute.[34]In this aspect the non-state parties contend that if their inability or unwillingness to prosecute results in delegating the exercise of universal jurisdiction, then the whole purpose of states ratifying the Rom Statute seems futile.[35]However it can be said that the purpose of ratifying the Statute was to uphold their joint decision of fighting impunity for international crimes. Hence, the Court's power to exercise its jurisdiction in case of failure of national courts to catch hold of the perpetrator and punish him is nothing but a reaffirmation of the principles on which the Rome Statute is based that is to ensure that international justice is served.

Lastly, concerns regarding the impartiality of the Prosecutor has been questioned by the non - state parties as delegating universal jurisdiction to the ICC will allow the Prosecutor is start a prosecution of international crimes where the consent or authority of the non-state parties will not be required.[36]This situation can also be remedies because the Rome statute allows the Prosecutor to be removed or disciplinary action can be taken against him if it is found that his actions constituted a misconduct or a breach of his duties.[37]

V. CONCLUSION

In the present scenario, it seems pertinent that the international community should acknowledge the problems that are associated with the principle of universal jurisdiction which ultimately results in a failure to achieve the goals of fighting impunity and to prevent the criminals from finding a safe haven to hide and escape from prosecution. The principle of universal jurisdiction is fraught with many difficulties which prevents it from achieving its true purpose and also undermines the justice system at the international level. States must take steps to remedy the flaws and ensure a more effective application of the principle. Non-State parties must realize that their reluctance to ratify the Rome Statute creates a hindrance in the path to delivery of justice because the ICC cannot exercise its jurisdiction if the criminals flee to such states. Thus in order to make application of universal jurisdiction a success, it is required that uniformity be

[33] HOOVER, *supra* note 20.
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *supra* note 27, Article 28.

 [ISSN 2581-5369]

brought in the laws and also allowing the ICC to exercise universal jurisdiction can help to combat the problems which deter the prosecution of grave crimes committed across the world which often involves the heads of state and by virtue of their immunity escape punishment.

*****

 [ISSN 2581-5369]