

Universal Jurisdiction: The Complex Implementation

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Abstract

The article discusses the concept of universal jurisdiction and its implementation in international law. It explores the relationship between universal jurisdiction and treaty law, as well as customary international law. The author emphasizes the importance of universal jurisdiction in holding individuals accountable for serious international crimes, even when they flee to another country. The article also discusses the concept of hot pursuit and its connection to universal jurisdiction. Real-life geopolitical events are presented to illustrate the complexities and challenges of implementing universal jurisdiction. The author argues that universal jurisdiction can contribute to peace and security by redefining international relations and moving away from traditional approaches. The article draws on various primary and secondary sources to support its arguments.

Keywords: Jurisdiction, Universal, International law, Treaty Law, Community, Criminal.

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INTRODUCTION

Where there is a concept of serious international crimes universal jurisdiction plays a vital role. All states have jurisdiction in respect of such crimes, accordingly. Here, 'community interest prevails over 'national interest'. Crime of Piracy is the standard example of a crime which gives rise to universal jurisdiction. Furthermore, on the high seas, as piracy normally occurs, no state can have territorial jurisdiction, over the acts of piracy. Within the territory of a single state, most crimes occur and the territorial principle is the primary principle of jurisdiction. Nevertheless, what will happen when a state does not want to prosecute an offender present in its territory? What if the accused flees to another state? The global community is shifting towards a more universal world order, requiring a shift from traditional norms. As threats to humanity increase, states must collectively act. Universal jurisdiction, focusing on human rights and accountability, can foster peace and security by redefining international relations and abandoning traditional approaches.

The matter of Universal jurisdiction can be divided into customary international law and treaty law.

TREATY LAW

Under treaty law, the positivist international lawyer argues that objectification can be observed in international law. Section 134 of the Criminal Justice Act

is not a creation of the British Parliament, but rather a measure to fulfill the UK's responsibilities under the Convention against Torture. Various treaties, such as those addressing counterfeiting, drug trafficking, the safety of UN personnel, financing of terrorism, and torture, impose an obligation on member states to either prosecute or extradite individuals found within their territory for specific offences, regardless of the offender's nationality or the location of the crime. The States have recognized that by simply crossing state boundaries offenders cannot dodge justice. To prosecute certain severe crimes multilateral treaties have been agreed upon which concern the jurisdiction, consequently. Treaties have been ratified by many states and universal application has been adopted by some states as well.

- UN convention on the prohibition against torture (1984), which underpinned *R vs. Bow*
- *Street Metropolitan Stipendiary Magistrates, ex parte Pinochet Ugarte* (No. 3) [2000] 1 AC 147
- Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aircraft (1971), which underpinned the *Lockerbie* case.

CUSTOMARY INTERNATIONAL LAW

The positivist analysis of universal jurisdiction is limited in justifying its exercise and determining its lawfulness. In cases of genocide and crimes against humanity, treaty codification gaps exist, necessitating

alternative sources of law. Customary international law serves as the general default rule. Judges like Higgins, Kooijmans, and Buergenthal, as a common knowledge, conducted a textbook positivist review of national legislation, case law, treaties, and the writings of eminent jurists in the Arrest Warrant case before the ICJ to determine whether the principle of universal jurisdiction existed under customary international law.

Israel had the right to prosecute Eichmann because these offences were crimes of such a scale that they gave rise to universal jurisdiction as an issue of CIL as per the decision of the Israeli court. In the nonexistence of an international court, international law needs the judicial and legislative organs of every state to give effect to its criminal interdictions and to bring the culprit to trial.

Three judges considered Belgium's claim of universal jurisdiction in a joint separate opinion delivered in the Arrest Warrant Case. Whether universal jurisdiction could be exercised *in absentia* there was silence on the part of international law as the Joint opinion noted. The joint opinion by reference justified its observation of the 'Lotus Principle' - freedom of action unless it can be revealed that such freedom has been constrained by international law.

In the case of universal jurisdiction, the question of customary international law causes at least two issues. To begin, using universal jurisdiction is already a default jurisdiction, so it shouldn't be common. It should be very rare. According to this, universal jurisdiction is not meant to help states. Instead, it is meant to mess up state processes when officials break basic rules. Since universal jurisdiction is usually used against state officials, state officials will not want to allow it to be used and will fight it when it is. Both of these things make the paradox that already exists about how customs are made even stronger. Any rule trying to make the hard journey from "becoming" to "being" has to deal with the paradox that customary legal rules will only be recognized when a certain number of states are willing to follow them. Until that happens, the practice is not supported by the law. This paradox is made even more difficult by the fact that we depend on the courts to carry out state policy. Until courts do the practice, it will not be legal, but courts will not do the practice as long as it is not legal.

UNIVERSAL JURISDICTION, HOT PURSUIT AND THE REAL SCENARIO

Universal jurisdiction gives the states license to execute the right of hot pursuit. Hot pursuit is one kind of military action that states take to eliminate the threat which emanates from another country. A popular example of hot pursuit is the 2011 navy seal operation in Pakistan's Abbotabad to eliminate Osama bin Laden. Before that USA tried to eliminate bin Laden in 1998 and 2004. In 1998, the USA attempted to target bin Laden

through a Cruz missile from the Arabian Sea. However, it missed the target. Now, the USA took the Pakistani establishment on board. In 1998/99, when General Zia Uddin was the ISI chief, he visited Mollah Omar (Taliban chief). Mollah Omar agreed upon the trial of Osama bin Laden. He proposed that the judges will be from Pakistan, Afghanistan, Saudi Arabia, and UAE and the other judge will be of Pakistan's choice. However, the USA was not okay with the whole matter. In September 2016, Indian para commandos stormed into the line of control and killed 35-40 Jem (Jaish e Muhammad), Let (Laskar e taiba) and Hum (Hizbul mujahedin). Jem, Let and Hum are international terrorist organizations. They are banned by the European Union, United States and United Nations. The governments of Afghanistan, Bangladesh, Bhutan and Germany supported this surgical strike. In February 2019, the Indian Air Force bombed the Jem camp in Balakot in the Northwest frontier province. It was the first-ever airstrike by India inside mainland Pakistan since 1971. The attack was welcomed by the USA. However, the attack was condemned by the OIC (Organization of Islamic Conference). In the past, Pakistan was warned by the USA, European Union and India regarding the terrorist attack in India. However, Pakistan failed to take concrete action against terrorist organizations that target India and USA. Every state preserves the right to take action against those who use the force of aggression. UN Charter expressly recognizes a state's right to self-defence. Article 51 of the UN Charter says that no other provision of the Charter shall "impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations." The Ministry of External Affairs of India stated that the strike was not against the state of Pakistan. In June 2015, India launched an attack inside Myanmar to bomb a Maoist hideout. However, the Myanmar government denied India's crossing over the border.

Nevertheless, we are used to facing some real-life situations. Baloch sympathizers and rebel leaders are based in Afghanistan and Switzerland. Baluchistan Liberation Army (BLA) and Baluchistan Revolution Army (bra) have caused huge losses to the state of Pakistan. Now will the Pakistan Special Forces be allowed to enter into the territory of Switzerland and Afghanistan to eliminate bra and bla? The reality is it is virtually impossible to launch such kind of surgical strike in Switzerland. However, such kind of attack can be possible to carry out in Afghanistan. India is demanding the prosecution of Masood Azhar and Dawood Ibrahim. Both Masood Azhar and Dawood Ibrahim are hiding in Pakistan. Another terror lord Hafiz Saeed was arrested by Pakistan Police in 2019. These three people harmed India with their notorious activities in the past. In the past, Indian authorities wanted to eliminate Dawood Ibrahim. However, at the very last moment due to intelligence failure, it was shelved. After the 2008 Mumbai attack by Laskar e Taiba, the then-Indian government tried to attack Muridke (the headquarters of

Laskar e Taiba). Nonetheless, it was found that the attack could lead to a fully-fledged war. Both India and Pakistan are nuclear powers so it may be unwise on the part of India to attack mainland Pakistan to eliminate those fugitives in the given scenario. India and Pakistan do not have an extradition treaty. However, there is a convention called the SAARC Regional Convention on Suppression of Terrorism which both India and Pakistan are signatories. The 2016 and 2019 surgical strikes by India were disputed by the state of Pakistan. However, on both occasions, the prime ministers of Pakistan called high-level meetings with the supreme military command of the country. Bangladesh is demanding the extradition of some fugitives who were responsible for the killing of Bangabandhu Sheikh Mujibur Rahman and atrocities during the liberation war of Bangladesh in 1971. These fugitives are hiding in the United States, Canada and the United Kingdom. Now will Bangladeshi Special Forces be allowed to enter those countries and smoke out those culprits? In the practical situation, it is virtually impossible. The current Bangladesh government is working with those countries to extradite the fugitives through diplomatic channels.

Theoretically, the strongest cases for universal jurisdiction are those involving highly militarized states with well-functioning intelligence agencies capable of conducting operations abroad.

CONCLUSION

The purpose of this article is to highlight the claim of power that comes with domestic courts exercising their universal jurisdiction. By doing so, we are highlighting the fact that domestic criminal prosecutions and trials conducted under universal jurisdiction are based on completely different sources of judicial authority. An overly narrow and unconvincing positivist assertion of power by the prosecuting authority based solely on its domestic law is made when an alien is tried for a crime that is unrelated to the state that is bringing the case. Going about "business as usual" also puts domestic courts in danger of losing sight of the trial's unique purpose and the normative groups whose lives will be most directly impacted. This article puts many arguments in favor of exercising universal jurisdiction, including state sovereignty, international cooperation, and the common good.

The article concludes by pointing out the conflict that exists between customary international law and universal jurisdiction. To establish the presence of universal jurisdiction under customary international law, the judges in one particular case heard by the ICJ combed through several different legal proceedings. There is a need for investigation of the link between these two ideas.

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