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Universal Jurisdiction in International Criminal Law with Emphasis on the International Criminal Court

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ABSTRACT

Crimes under the jurisdiction of the International Criminal Court, crimes are in the under norms and principles of international law. Therefore, is in under the principle of universal jurisdiction. On the other hand, the International Criminal Court, which is the Objective element of international criminal law. Therefore, crimes under of jurisdiction of international criminal court in custom of international law is on the have universal jurisdiction. The fact that the International Criminal Court has not been granted universal jurisdiction exercisable *proprio motu* has often been criticized on the basis that it will leave some offences beyond its power to prosecute. It concludes that to have given the Court universal jurisdiction would have been lawful under current international law and would have provided a welcome reaffirmation of the concept. Still, the nature of the cooperation regime and of the Prosecutor's investigatory remit would mean that such jurisdiction would be difficult, if not impossible, for the Court to use. As the Court has to operate in a world of sovereign States, not all of whom are sympathetic to it, the drafters' choice was a prudent one. The theory of universal jurisdiction is extraneous to the concept of national sovereignty, which is the historical basis for national criminal jurisdiction. Universal jurisdiction transcends national sovereignty. The Rome Statute of the International Criminal Court provides in its preamble that the jurisdiction of the court is complementary to national criminal jurisdictions. Thus, the International Criminal Court will have jurisdiction if States prove unable to try, on their own, authors of international crimes or if they refuse to do so. However, the Statute does not specify which States are concerned: those under whose jurisdiction the crimes have been committed (jurisdiction based on classic criterions).

Keywords: Complementary, International Criminal Court, International crimes, Jurisdiction, Sovereign States

Abbreviations: ICC: International criminal court; ICTY- the International Criminal Tribunal for the Former Yugoslavia; ICTR- the International Criminal Tribunal for Rwanda; IMT -International Military Tribunal at Nuremberg

INTRODUCTION

Universal jurisdiction allows states or international organizations to claim criminal jurisdiction over an accused person regardless of where the alleged crime was committed, and regardless of the accused's nationality, country of residence, or any other relation with the prosecuting entity. Crimes prosecuted under universal jurisdiction are considered crimes against all, too serious to tolerate jurisdictional arbitrage. The concept of universal jurisdiction is therefore closely linked to the idea that some international norms are erga omnes, or owed to the entire world community, as well as the concept of jus cogens – that certain international law obligations are binding on all states [1]. The concept received a great deal of prominence with Belgium's 1993 law of universal jurisdiction, which was amended in 2003 in order to reduce its scope following a case before the International Court of Justice regarding an arrest warrant issued under the law, entitled Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) [2]. The creation of the International Criminal Court (ICC) in 2002 reduced the perceived need to

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create universal jurisdiction laws, although the ICC is not entitled to judge crimes committed before 2002.According to Amnesty International, a proponent of universal jurisdiction, certain crimes pose so serious a threat to the international community as a whole, that states have a logical and moral duty to prosecute an individual responsible for it; no place should be a safe haven for those who have committed genocide, crimes against humanity, extrajudicial executions, war crimes, torture and forced disappearances.

Opponents, such as Henry Kissinger, argue that universal jurisdiction is a breach on each state's sovereignty: all states being equal in sovereignty, as affirmed by the United Nations Charter, "Widespread agreement that human rights violations and crimes against humanity must be prosecuted has hindered active consideration of the proper role of international courts. Universal jurisdiction risks creating universal tyranny - that of judges" [3]. According to Kissinger, as a practical matter, since any number of states could set up such universal jurisdiction tribunals, the process could quickly degenerate into politically driven show trials to attempt to place a quasi-judicial stamp on a state's enemies or opponents. The United Nations Security Council Resolution 1674, adopted by the United Nations Security Council on 28 April 2006, "Reaffirm[ed] the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity" and commits the Security Council to action to protect civilians in armed conflict.

HISTORY

"All nations", says the Institutional Treatise published under the authority of Roman Emperor Justinian (c. 482-565)" ...are governed partly by their own particular laws, and partly by those laws which are common to all, [those that] natural Reason appoints for all mankind" [4]. Expanding on the classical understanding of universal law accessible by reason, in the Seventeenth Century the Dutch jurist Grotius laid the foundations for Universal Jurisdiction in modern international law, promulgating in his De Jure Pradae (Of Captures) and later De jure belli ac pacis (Of the Law of War and Peace) the Enlightenment view that there are universal principles of right and wrong [5].

At about the same time, international law came to recognize the analogous concept of hostes humani generis ('enemies of the human race'): pirates, hijackers, and similar outlaws whose crimes were typically committed outside the territory of any state. The notion that heads of state and senior public officials should be treated like pirates or outlaws before the global bar of justice is, according to Henry Kissinger, a new gloss on this old concept. From these premises, representing the Enlightenment belief in trans-territorial, trans-cultural standards of right and wrong derives Universal Jurisdiction [6]. Perhaps the most notable and influential precedent for Universal Jurisdiction were the mid-20th century Nuremberg Trials. U.S. Justice Robert H. Jackson then chief prosecutor famously stated that the International Military Tribunal could prosecute Nazi "crimes against the peace of the world" even though the acts might have been perfectly legal at the time in Fascist Germany. Indeed, one charge was that the Nazis distorted the law itself into an instrument of oppression [7]. Kenneth Roth, the executive director of Human Rights Watch, argues that universal jurisdiction allowed Israel to try Adolf Eichmann in Jerusalem in 1961. Roth also argues that clauses in treaties such as the Geneva Conventions of 1949 and the United Nations Convention Against Torture of 1984, which requires signatory states to pass municipal laws that are based on the concept of universal jurisdiction, indicate widespread international acceptance of the concept.

THE THEORETICAL FOUNDATION OF UNIVERSAL JURISDICTION

The theory of universal jurisdiction is extraneous to the concept of national sovereignty, which is the historical basis for national criminal jurisdiction. Universal jurisdiction transcends national sovereignty. In addition, the exercise of universal jurisdiction displaces the right of the accused to be tried by the "natural judge," a hallmark of the traditional exercise of territorial jurisdiction. The rationale behind the exercise of such jurisdiction is: (1) no other state can exercise jurisdiction on the basis of the traditional doctrines; (2) no other state has a direct interest; and (3) there is an interest of the international community to enforce. Thus, states exercise universal jurisdiction not only as national jurisdiction, but also as a surrogate for the international community. In other words, a state exercising universal jurisdiction carries out an actio popularis against persons who are hostis humani generis.

Two positions can be identified as the basis for transcending the concept of sovereignty. The first is the Universalist position that stems from an idealistic weltanschauung. This idealistic Universalist position recognizes certain core values and the existence of overriding international interests as being commonly shared and accepted by the international community and thus transcending the singularity of national interests. The second position is a pragmatic policy-oriented one that recognizes that occasionally certain commonly shared interests of the international community require an enforcement mechanism that transcends the interests of the singular sovereignty.

These two positions share common elements, namely: (a) the existence of commonly shared values and/or interests by the international community; (b) the need to expand enforcement mechanisms needed to counter the more serious transgressions of these values/interests; and (c) the assumption that an expanded jurisdictional enforcement network will produce deterrence, prevention, and retribution, and ultimately will enhance world order, justice, and peace

outcomes. Under both positions, the result is to give each and all sovereignties, as well as international organs, the power to individually or collectively enforce certain international proscriptions. This theory applies when the proscription originates in international criminal law and not in the national law of a given state. In other words, crimes under exclusive national law cannot give rise to universal jurisdiction.

The universalist and the policy-oriented positions differ as to: (a) the nature and sources of the values/interests that give rise to an international or supranational prescription; (b) what constitutes the international community and its membership; and (c) the nature and extent of the legal rights and obligations incumbent upon states.

UNIVERSAL JURISDICTION IN INTERNATIONAL CRIMINAL LAW

The primary sources of substantive international criminal law are conventions and customs that resort to general principles of law and the writings of scholars essentially as a means to interpret conventions and customs. Conventional international law is the better source of substantive international criminal law insofar as it is more apt to satisfy the principle of legality, nullum crimen sine lege, nulla poena sine lege. But that does not exclude customary international law or general principles of law as sources of substantive international criminal law, provided they meet the standard of specificity equivalent to that of conventional international law.

The inquiry into universal criminal jurisdiction and its application must be made by reference to: (1) national legislation to determine whether it exists in most national legal systems representing the families of the world's major criminal justice systems; and (2) conventional international criminal law to determine the existence of international legal norms that provide for the application of universal jurisdiction by national criminal justice systems and by internationally established adjudicating bodies [8].

The research of scholars as to national legislation evidences that very few states have provisions allowing their legal systems to exercise universal jurisdiction over anyone who has committed a jus cogens international crime, irrespective of the time and place of the crime's occurrence, its impact upon the territory of the enforcing state, its commission by one of its nationals, or its commission against one of its nationals. The judicial practice of states is also limited. To the knowledge of this writer, no state practice presently exists whereby states have resorted to universal jurisdiction without the existence of national legislation, even when international treaties provide for such a jurisdictional basis.

The collective practice of states in establishing international judicial organs since the end of WWI, including five international investigating commissions and four international ad hoc criminal tribunals, evidences that none of them has been based on the theory of universal jurisdiction [8].

The Statute of the ICC also does not establish universal jurisdiction for “situations” referred to it by states but only a universal scope as to the crimes within the jurisdiction of the Court. These crimes are: genocide, crimes against humanity, and war crimes, which are just cogens international crimes. Since “referrals” to the ICC are made by a state party, or by a non-party state, it is difficult to argue that the ICC's jurisdiction flows from the theory of universal jurisdiction. However, “referrals” by the Security Council for the crimes within the jurisdiction of the Court constitute universal jurisdiction because they can transcend the territoriality of a state party. Such a provision could be interpreted as allowing the Security Council to refer a “situation” to the ICC, even when it applies to crimes occurring outside the territory of a state party and involving the responsibility of nationals from non-parties.

International criminal law evidences the existence of twenty-seven crime categories. These twenty-seven categories are evidenced by 276 conventions concluded between 1815 and 1999. Some of these conventions include penal provisions that distinguish them from other conventional international law. These international crimes are: aggression, genocide, crimes against humanity, war crimes, crimes against the UN and associated personnel, unlawful possession and/or use of weapons, theft of nuclear materials, mercenarism, apartheid, slavery and slave-related practices, torture, unlawful human experimentation, piracy, aircraft hijacking, unlawful acts against civil maritime navigation, unlawful acts against internationally protected persons, taking of civilian hostages, unlawful use of the mail, nuclear terrorism, financing of international terrorism, unlawful traffic in drugs and dangerous substances, destruction and/or theft of national treasures and cultural heritage, unlawful acts against the environment, international traffic in obscene materials, falsification and counterfeiting of currency, unlawful interference with submarine cables, and bribery of foreign public officials. Among the penal provisions contained in these conventions there are provisions on criminal jurisdiction, and, of these, only thirty-two conventions contain a reference to a jurisdictional theory and among them only a few, discussed below, can be construed explicitly or implicitly as reflecting universal jurisdiction. Conversely, ninety-eight provisions reflect the obligation to prosecute and sixty-eight to extradite, evidencing the legislative choice of this enforcement technique over that of conferring universal jurisdiction to any and all states.

Because conventional and customary international criminal law overlap with respect to certain crimes, it is useful to examine whether universal jurisdiction vis-à-vis jus cogens international crimes arises under any of the sources of international criminal law. What follows is an assessment of

the evolution of universal jurisdiction with respect to jus cogens international crimes based on conventional and customary international law sources. These jus cogens international crimes are: piracy, slavery and slave-related practices, war crimes, crimes against humanity, genocide, apartheid, and torture.

It is noteworthy that several international criminal law conventions that apply to crimes that have not risen to jus cogens contain a provision on universal jurisdiction. This evidences the recognition and application given to this theory.

The jus cogens international crimes discussed below in the order of their emergence in international criminal law are: (1) piracy; (2) slavery; (3) war crimes; (4) crimes against humanity; (5) genocide; (6) apartheid; and (7) torture (8).

UNIVERSAL JURISDICTION AND THE INTERNATIONAL CRIMINAL COURT

The Rome Statute of the International Criminal Court provides in its preamble that the jurisdiction of the court is complementary to national criminal jurisdictions. Thus, the International Criminal Court will have jurisdiction if States prove unable to try, on their own, authors of international crimes or if they refuse to do so. However, the Statute does not specify which States are concerned: those under whose jurisdiction the crimes have been committed (jurisdiction based on classic criterions).

At the same time, the implementation of the Rome Statute into national legislations of States Parties constitutes a real breakthrough for the evolution of universal jurisdiction. Indeed, even if States Parties are not compelled by the Statute to adopt universal jurisdiction for the targeted crimes, several States have chosen to give universal jurisdiction to their national jurisdictions in order to prosecute the authors of those crimes on the basis of the principle of universal jurisdiction by integrating them in their national legislation. Universal jurisdiction has become the preferred technique by those seeking to prevent impunity for international crimes. While there is no doubt that it is a useful and, at times, necessary technique, it also has negative aspects. The exercise of universal jurisdiction is generally reserved for the most serious international crimes, such as war crimes, crimes against humanity, and genocide; however, there may be other international crimes for which an applicable treaty provides for such a jurisdictional basis, as in the case of terrorist. Universal jurisdiction is not as well established in conventional and customary international law as its ardent proponents, including major human rights organizations, profess it to be. These organizations have listed countries, which they claim rely on universal jurisdiction; in fact, the legal provisions they cite do not stand for that proposition, or at least not as unequivocally as represented. Universal jurisdiction has been infrequently relied upon in national judicial decisions; its relationship with other international legal issues has yet to be clarified. Among them, for example, is the question of whether heads of state and diplomats can invoke immunity as a bar to the exercise of universal jurisdiction. With respect to certain international crimes, the substantive defense of immunity has been eliminated since the Nuremberg Charter and the judgments of the International Military Tribunal at Nuremberg (IMT). Such removal of substantive immunity means that a defendant cannot rely on his or her status as a head of state or diplomat to interpose as a substantive defense resulting in exoneration from criminal responsibility for these crimes. However, so far, there is no treaty or customary law practice that removes the temporal immunity of heads of state or diplomats while they are in office, with the exception of the indictment of Slobodan Milosevic by the ICTY while he was head of state.

For example, Article 27 of the Rome Statute of the International Criminal Court (ICC) provides:

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Article 7(2) of the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY) states: “The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment”. It was pursuant to this provision that Slobodan Milosevic was indicted by the ICTY while he was head of state of the Federal Republic of Yugoslavia. Article 6(2) of the Statute of the International Criminal Tribunal for Rwanda (ICTR) utilizes the same language as that contained in Article 7(2) of the ICTY Statute.

The statutes of the ICTY and ICTR, however, do not address the issue of procedural immunity, viz., whether heads of state or diplomats may still benefit from procedural immunity while in office and, for the latter, while accredited to a host country. Under existing customary international law, heads of state and diplomats can still claim procedural immunity in opposition to the exercise of national criminal jurisdiction. However, if brought to trial, they cannot raise immunity as a substantive defense to the crime charged if it is one of the crimes listed above or if it is a crime for which a treaty specifically disallows such a defense, as is the case with respect to the ICC's Article 27. As to diplomats accredited to

a host country, they have the benefit of the Vienna Convention on the Law of Diplomatic Immunity, which provides them with procedural but not substantive immunity. It is for these reasons that the statutes of the ICTY and ICTR probably do not address these questions.

Notwithstanding Article 27 of the ICC Statute, Article 98 of the Statute provides for the primacy of other multilateral treaties in assessing immunity:

1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.
2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender. Presumably, this language applies to Status of Forces Agreements and to diplomats covered by the Vienna Conventions on Diplomatic Relations and Consular Relations. Thus, pursuant to Article 98, a head of state, diplomat, or other official covered by immunity under a treaty or pursuant to customary international law could still invoke procedural immunity, if applicable [9].

CONCLUSION

Crimes under the jurisdiction of the International Criminal Court, crimes are in the under norms and principles of international law. Therefore, is in under, the principle of universal jurisdiction. On the other hand, the International Criminal Court, which is the Objective element of international criminal law. Therefore, crimes under of jurisdiction of international criminal court in custom of international law is on the have universal jurisdiction. The fact that the International Criminal Court has not been granted universal jurisdiction exercisable *proprio motu* has often been criticized on the basis that it will leave some offences beyond its power to prosecute. Universal jurisdiction allows states or international organizations to claim criminal jurisdiction over an accused person regardless of where the alleged crime was committed, and regardless of the accused's nationality, country of residence, or any other relation with the prosecuting entity. Crimes prosecuted under universal jurisdiction are considered crimes against all; too serious to tolerate jurisdictional arbitrage. The theory of universal jurisdiction is extraneous to the concept of national sovereignty, which is the historical basis for national criminal jurisdiction. The Rome Statute of the International Criminal Court provides in its preamble that the jurisdiction of the court is complementary to national criminal jurisdictions. Thus, the International Criminal Court will have jurisdiction if States prove unable to try, on their own, authors of international crimes or if they refuse to do so. However, the Statute does not specify which States are concerned: those under whose jurisdiction the crimes have been committed (jurisdiction based on classic criterions).

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