Proceedings of the International Conference on Global Politics and Socio-Humanities
DOI: 10.54254/2753-7048/22/20230265

Basic Concepts of Universal Jurisdiction and Determination of Its Development

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Abstract: The exercise of universal jurisdiction came to the stage of debate after the opinion given by the Court of *Lotus*. Judges in Arrest Warrant did not discuss the issue of universal jurisdiction on account of a clear consensus on the basis of universal jurisdiction. Thus the basic definition of universal jurisdiction is ambiguous for people who are fresh to this concept. This paper is written for explaining the basic concepts of universal jurisdiction based on the case study, convention analysis, and reference research. Researching informative papers written by reputable scholars could be fully helpful in clarifying the basic concepts of universal jurisdiction. And referring to treaties and States' practices can contribute to determining if there is a legal ground for universal jurisdiction and how universal jurisdiction has been developed over decades.

Keywords: universal jurisdiction, prescriptive, customary international law

1. Introduction

The principle of universal jurisdiction refers to the fact that when a State is neither the State in which the crime was committed, nor the State of nationality of the perpetrator or the victim, nor even the State of the victim of the crime, it has criminal jurisdiction over the case solely on the basis that the crime committed by the perpetrator is a serious international crime. According to *Princeton Principles*, the promulgation of the universal jurisdiction mainly emphasizes avoiding impunity for not building a safe haven in third countries for perpetrators who commit heinous crimes [1].

By referring to the *Arrest Warrant* case, which is one of the most significant cases that occurred during the development of universal jurisdiction, Judges' opinions introduced the discussion of universal jurisdiction to the public concern [2]. However, the definition of universal jurisdiction is still vague by solely looking into the judgement of *Arrest Warrant* given by International Court of Justice (ICJ), because ICJ did not directly make the response to whether universal jurisdiction is lawful or justifiable after Congo withdrew the request of challenging Belgium's claiming of exercising universal jurisdiction in this case, and debates between judges are not based on a consensus on the definition of universal jurisdiction [3]. In this case, the paper is written to determine the definition of universal jurisdiction based on its subject, distinction, and legal sources. Clarifying the definition can strongly help construct the subsequent perspective without any ambiguity for claiming the justice of the universal jurisdiction by so far it lacks enough evidence in the customary international law, treaties, and practices by States. The main idea of the paper will be

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subject to the opinion in Roger O'Keefe's research, which clearly divides the universal jurisdiction to prescribe and enforce, as the grounding to focus on the prescription [4]. However, since judicial chaos could be engendered by powerful nations who desired to avoid being investigated, intervene in political issues between other countries, and, as Judge Guillaume mentioned in his opinion in *Arrest Warrant*, act as an agent for "an ill-defined 'international community'" [5]. The scope of States' universal jurisdiction to prescribe their criminal law should be limited to heinous international crimes for instance as crimes are regulated in *Rome Statute* [6].

After this section, the paper will be discussing on the phenomenon that there are increasing supporters of universal jurisdiction in recent years by referring to some States' practices. To determine the development of universal jurisdiction, whether it has the legal ground in customary international law and treaties need to be analyzed.

2. Universal Jurisdiction Is Indeed the Jurisdiction to Prescribe

2.1. The Basic Definition of Universal Jurisdiction and Its Subject

Generally, the jurisdiction of a State can be divided into two different parts as prescriptive and enforced. The jurisdiction to prescribe -- sometimes called legislative jurisdiction -- indicates the scope of the State's legality under international law to assert conduct as the crime in its criminal law. While the jurisdiction to enforce means the power of the State to apply its criminal law under international law through executive actions. According to Roger O'Keefe's concept of universal jurisdiction, he offered a straightforward clarification: "Jurisdiction to prescribe" signifies a state's right to classify specific behavior as criminal, while "jurisdiction to enforce" entails the power to apprehend, confine, prosecute, and impose penalties on individuals for engaging in the actions designated as criminal [4]. In this case, legislative jurisdiction and enforcement jurisdiction are logically independent. Most cases covered in the current universal jurisdiction report were all tried in their own countries (for example, defendants had fled to the territory of the State concerned as refugees) and did not involve the arrest of criminals in other countries, so they did not violate law enforcement jurisdiction [7]. In this case, the paper initially defines universal jurisdiction precisely as universal prescriptive jurisdiction. As long as the state's practice does not involve law enforcement in other country's territories, which violates the international principle that strictly regulates the bases of enforcement jurisdiction as, except the piracy, the territoriality, national courts can conduct trials based on universal jurisdiction by its legislative jurisdiction [5].

Under the consensus of the international community for formed principles, the applicability of jurisdiction usually appeals to territoriality, nationality, passive personality, and protective principle. In other words, before exercising jurisdiction upon committing crimes, the most significant element that entitles the State the legitimacy to apply its jurisdiction is the nexus (link or connection) that exists between the perpetrator and the State. The jurisdiction of the State must be linked to the State where the offense took place, the State where the perpetrator and victim hold citizenship, or the State where the victim of the crime is located. This nexus serves as the foundation and rationale for exercising its jurisdiction. While the existence of universal jurisdiction is so special that it is applied to the circumstance that all sorts of nexus are absent, and it allows the State to exercise its jurisdiction based on absolute substantive justice.

To be mentioned, in the perspective of this paper, the subject of universal jurisdiction has to be nations. For explaining the claim, the first stage is to deny recognizing ICC as the main subject of exercising universal jurisdiction. Based on Article 12 of *Rome Statute*, the jurisdiction of ICC solely comes from the jurisdiction that State Parties agreed to confer upon which cannot be referred to ICC since nations' jurisdiction is mainly on account of nationality and territoriality [6]. Whereas under the authorization of the investigation being conferred by United Nations Security Council (UNSC),

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the jurisdiction that ICC exercised is somewhat similar to universal jurisdiction regardless of the dependent's nationality or place of the act. But the jurisdiction is derived from UNSC rather than universal jurisdiction that all nations are entitled to. In addition, according to Article 12, the scope of jurisdiction for ICC to accept the case is limited on crimes that have been taken place on the territory of State Parties. Hence, taking into consideration of the amount of State Parties, limits of jurisdiction does not worthy of the term "universal". On the second stage, as scholars defined in their researches, Randall mentioned "This principle provides every state with jurisdiction over a limited category of offenses…" and Roger wrote "…, note that universal jurisdiction is often said to mean that 'any' state or 'every' state is permitted to criminalize the conduct in question", the subject of exercising universal jurisdiction is mainly deemed as States in the international community [4,8].

2.2. Universal Jurisdiction in Absentia

Inevitably, universal jurisdiction in absentia must be concerned whenever the concept of universal jurisdiction needs to be clarified. As President Judge Guillaume mentioned in his Separate Opinion of Arrest Warrant, apart from the piracy, international law does not endorse universal jurisdiction, and even more so, it does not endorse the concept of universal jurisdiction in cases where the accused is absentia [5]. However, "absentia" should be considered as a condition of practicing universal jurisdiction when the universal jurisdiction, the same as nationality and territoriality, is enforced. In other words, "absentia" is independent of the definition of universal jurisdiction, and it corresponds to the claim above which suggested universal jurisdiction is a prescriptive jurisdiction. In this case, even though some States regulated the presence of the accused as the pre-request of the universal jurisdiction doctrine in their statutes, the determined connection between the absentia with the basis of universal jurisdiction still cannot be proved as valid. Roger suggested that the approach, which is partly related to nations' practices, that Guillaume applied to prove the unlawfulness of universal jurisdiction is not "logically compelling" since he conflates the jurisdiction to prescribe and jurisdiction to enforce [4]. The statement, which indicates the unknown of exercising universal jurisdiction in absentia, that judges in Arrest Warrant employed to claim against the justifiability of universal jurisdiction does not make sense, because states under the legal system of common law regulated the pre-request for encouraging maximum participation in particular treaties [2]. By referring to H. Ascensio, those nations' practicing provision contains the "absentia" does not mean that the presence of the accused serves as a connection in terms of establishing jurisdiction, but it solely acts as a procedural requirement for the implementation of universal jurisdiction [9].

2.3. The Scope of Exercising Universal Jurisdiction

Nonetheless, President Guillaume in his Separate Opinion in *Arrest Warrant* points out the other important view that should be emphasized during the exercise of universal jurisdiction. He mentioned that judicial chaos will be engendered if universal jurisdiction has been conferred upon the courts of every State in the world, and universal jurisdiction is even encouraging the arbitrary to intervene in the legal process, which should be deemed a backward development of international law. Based on the different recognition, which has been clarified above, upon universal jurisdiction of the study by President Guillaume, this paragraph is written to claim the scope of crimes in universal jurisdiction. In this scenario, intending to prevent the safe haven for individuals who have committed heinous international offenses like crimes against humanity, genocide, war crimes, torture, etc., and to prevent powerful nations from exploiting universal jurisdiction to disrupt the global order and evade accountability, it is essential to restrict the application of universal jurisdiction. This limitation should be as narrow as feasible, focusing solely on heinous crimes that

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gravely undermine the security of the international community. For domestic law, the scope of crimes that appeal to universal jurisdiction can be subject to treaties and conventions in which the state itself is one of the Party States. For instance, in Articles 607-614 of the 1995 Spanish Criminal Code, the nation confined the condition of "crimes against protected persons and assets in the event of armed conflict" barely to crimes that are prohibited by International Humanitarian Law, or treaties to which Spain is a Party. Simultaneously, the act of the crime should have taken place during the armed conflict; the crime should have been committed against people who are protected under Article 608; the damage result must have been caused [10].

3. The Legal Ground of Universal Jurisdiction and Its Development

3.1. Treaties and Provisions

The judgment of *Lotus* by Permanent Court of International Justice (PCLJ) significantly influenced universal jurisdiction in the International community. For rejecting France's opinion, which suggests Turkey has the burden of proof of the legal ground under international law for invoking passive personality, PCLJ stated that international law did not establish a prohibition on countries broadly extending the jurisdiction of their laws and courts to encompass individuals, property, and actions beyond their territorial boundaries. And international law grants nations considerable discretion in this regard, with limitations on the exercise of this power applying only in certain circumstances. In other situations, each country remains free to adopt the principles it considers best and most appropriate [11].

Traditionally, piracy is the earliest evidence of universal jurisdiction recognized by customary International law. Article 19 of the Geneva Convention on the High Seas of April 29, 1958, and Article 105 of the Montego Bay Convention of December 10, 1982, have ratified the universal jurisdiction of piracy [5]. Also, international law explicitly allows the application of universal jurisdiction in cases of war crimes and crimes against humanity by the argument in Dissenting Opinion of Judge ad hoc Van den Wyngaert in *Arrest Warrant* [12]. Wyngaert thinks that even though there is no clear treaty provision for crimes against humanity, States are entitled to assert extraterritorial jurisdiction [12]. And for war crimes, the provision of Article 146 of the IV Geneva Convention 128 regulated the principle aut dedere aut judicare for war crimes committed against civilians [13]. Furthermore, he also claimed that 1970 Convention for the Suppression of Unlawful Seizure of Aircraft (Articles 4 and 7 respectively), signed at The Hague on 16 December 1970, and the 1984 Convention against Torture (Articles 5 and 7 respectively) can represent the permissibility of universal jurisdiction assessed by international law.

3.2. Universal Jurisdiction under Customary International Law and Its Development

Nevertheless, by referring to Jinmo Zheng's research and definition in the paper, up to 2017, there are six cases successfully appealed to universal jurisdiction regarding crimes against humanists, and eight cases successfully appealed to universal jurisdiction regarding war crimes [14]. In addition, several inquiries have identified a combined total of 52 concluded trials involving universal jurisdiction globally since the Eichmann trial in 1961 [15]. Out of these, universal jurisdiction trials have reached completion in merely 16 countries, with 15 of them falling within the category of "Western European and other regional" states. Therefore, in practice, universal jurisdiction is mostly exercised by powerful States so that equality between States is not established. Hence, with the ill-founded *opinio juris* and a small number of States' practices, the existence of universal jurisdiction under international law is still ambiguous by lacking the sound grounding on international customary law. However, universal jurisdiction is not appearing, and it can be well-explained by introducing Máximo Langer's study [16]. It is worth mentioning that after the

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amendment to the Belgian statute in 2003 and the Spanish statute in 2009, which is a mark of the elimination of provisions of universal jurisdiction, the amount of cases of universal jurisdiction exercised upon core international crimes is not decreased [16].

In recent decades, Spain, in Article 23.3 in *Ley Organica 6/1985*, and Belgium have widely promulgated universal jurisdiction in their domestic statutes [17,18]. Even though the effect of the provision has been virtually eliminated by the pressure imposed by powerful nations, the promulgation of the domestic statute and its receding have successfully contributed to creating an incentive mechanism during the development of universal jurisdiction from "global enforcer" to "no safe haven" [16]. For example, in Spain, some cases were tried with perpetrators absentia based on Article 23.4 of the *Ley Orgánica del Power Judicial* against Senator Pinochet and other South American suspects whose extradition was requested [19]. The examples above complied with considering universal jurisdiction as a role of "global enforcer", which conflicts with the basic concepts the paper claimed above for which universal jurisdiction is a prescriptive jurisdiction, and definitely violated the principle that a State may not enforce its criminal law in the territory of another nation without the nation's "consent". However, by investigating reports of cases in recent years, the "global enforcer" has transformed into "no safe haven", because nations that are the most active in exercising universal jurisdiction have formulated that the pre-request of the jurisdiction is the presence of offenders. For instance, prosecutions that are run by the United Kingdom, Canada, and Australia can be effectively revealed as cases of "no safe haven" [20].

Undeniably, according to the consensus of the international community nowadays, universal jurisdiction still lacks the sound basis of customary international law, State practices, and enough treaties to prove its legality. Whereas, for combating impunity for core international crimes, protecting justice for victims, and filling accountability gaps, there are more and more supporters for universal jurisdiction. According to Eurojust, the number of newly opened cases involving core international crimes in Europe increased by 44% between 2016 and 2021 [7]. Universal Jurisdiction Annual Review 2023 has revealed that there is a multiplication of cases, indicating renewed legitimacy for universal jurisdiction [7].

4. Conclusions

This paper roughly introduced the concept of universal jurisdiction and incompletely determined its legal ground and development based on the author's limited recognition. Laying down the definition through the research based on reputable scholars could help with clarifying the basic concepts of universal jurisdiction, which could slightly contribute to constructing a consensus for the discussion over universal jurisdiction in the future. Also, the paper ensured the justifiability and necessity of practicing universal "prescriptive" jurisdiction.

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