Universal Jurisdiction and its Interplay with Sovereign Immunity

*Yashika Jain

Universal jurisdiction has not been defined precisely under customary international law or in any convention and therefore there are numerous opinions as to its exact meaning. It generally refers to the prescriptive jurisdiction over crimes that are committed in a foreign land by a person or persons who do not reside in the territory of the prescribing state against those whose interest the prescribing state is not bound to protect. Therefore, universal jurisdiction confers jurisdiction over such states whose interests as a state is not affected by the offences for which the prosecution is instituted in its national court. Courts can exercise universal jurisdiction over a limited category of heinous offences termed as universal crimes and require certain source in terms of a convention, treaty or custom to confer such jurisdiction on them.

This paper aims to delve into the study of universal jurisdiction and shall be divided into three parts. First part shall seek to understand in detail the nature and meaning of universal jurisdiction and analyze its various aspects. It shall trace the development of the concept of universal jurisdiction and then delve into its various limitations in terms of category of offences, prescriptive law and non-uniformity in its application. Second part undertakes to comprehend the interaction between doctrine of universal jurisdiction and principle of sovereign immunity. It first explains the meaning of sovereign immunity and subsequently throws light on the incongruous jurisprudence that has been built by non-uniform rules and conflicting judgments of numerous national and international courts. Finally, the third part shall further try to provide a solution to the contemporary position of contradictory jurisprudence by proposing conferment of exclusive jurisdiction over an international court with specific set of rules so as do away with problem of incompatible decisions.

* 3rd year, BA.LLB (HONS), National Law University, Delhi.
DEVELOPMENT OF UNIVERSAL JURISDICTION

“Jurisdiction” as a term refers to regulation of behavior of natural and legal persons and ownership and management of property according to prevailing law. The limit of legal jurisdiction over disputes has been traditionally understood as “coextensive with the outlines of Westphalian sovereignty”. This means that jurisdiction is the prerogative of a sovereign state and therefore only domestic courts of each nation are competent to exercise territorial jurisdiction over all the civil disputes and criminal acts committed within the national boundaries. Apart from being connected to territoriality, jurisdiction of national courts also stands in nexus with nationality of victims and offender. So even if an act is committed beyond territory of the state and yet it adversely affects citizens of that state or a national of particular state commits any crime beyond its geographical boundary, in both the cases, the state would have jurisdiction over the matter on account of nationality nexus.

However, with the development of the international community jurisdictional concepts expanded and new doctrines emerged. Impunity became one of the gravest evils in international law. Various instances were witnessed where heinous crimes were committed in different parts of the world that shook the soul of entire globe’s population and yet the nation states failed to take appropriate action against the offender. If a grave crime was committed by someone occupying a position, as high as head of state, the judiciary of the state was found either unwilling or unable to initiate adequate action against the offender owing to power dynamics and other political reasons. It became necessary to provide competency to other nation states to initiate prosecution for certain category of crimes. This led to the development of a principle called “protective principle” under which the nation states could penalize actions committed by aliens outside the boundaries of the state if such an action leads to severe damage to essential security interests or integrity of sovereign functions of the prosecuting state. Through this principle the state could punish extra-territorial conduct of foreigners only because of an indirect harm caused within its

1Roger O’Keefe, Universal Jurisdiction: Clarifying the Basic Concept, 2 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 735, 737 (2004).
3IAN BROWNlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 303 (5th Ed. 1998).
4Ibid.
6Supra Note 3 at 394.
territory. This principle further developed and shaded into a concept which is today called Universal jurisdiction.

Universal jurisdiction developed as a significant and effective tool to fight against impunity since more avenues became available to prosecute the offender in international arena as a result of which the likelihood of prosecution and punishment increased. Preamble of Rome Statute states that failure to prosecute severe offences is as appalling as the offence itself. And to prevent such failure dilution of jurisdictional requirements was required. Universal jurisdiction confers jurisdiction on the courts that otherwise have no jurisdictional nexus, territorial or nationality based, with the offence so committed at the time of commission. It means that even if the prosecuting state has no link of nationality with the offender or the victims, no relation of geographical territoriality with the place of commission, and no motive of territorial protection or security, it could still exercise its jurisdiction.

LIMITATIONS OF UNIVERSAL JURISDICTION

Universal Crimes

This jurisdiction is however limited to certain category of offenses called “universal crimes”. Universal crimes, different from international crimes, are those crimes that offend and affect the international community as a whole because of their outrageousness and therefore all states across the world are made competent to prosecute the alleged wrongdoer regardless of the place of offence or nationality of the wrongdoer or the sufferers. “Universal Crime” is an expanding doctrine and has varied based on the stage of development of societies and currently crimes such as piracy, slavery, genocide, crimes against humanity, war crimes, torture, and terrorism are included under its ambit. Other offenses such as human sex trafficking, nuclear arms smuggling, and other transnational offenses are also being envisaged by the international community so as to be included under the ambit of universal crimes. Proscribing such offences

---

7 Ibid.
8 Supra Note 1 at 746.
11 R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No.3) [119 ILR 135].
is in the benefit of all states and therefore so as to symbolize their condemnation, authority to take action against them is bestowed on every state.

**International Prescriptive Law**

Jurisdiction involves two aspects: prescriptive jurisdiction, which is the authority of a state to forbid certain crimes and make its law applicable to conduct leading to such crimes\(^\text{14}\) and adjudicative jurisdiction, which is the competency of a state to actually prosecute the offender committing such crimes under its judicial process or through executive order.\(^\text{15}\) A state cannot extend its prescriptive jurisdiction (domestic law) to another state unless there is some nationality or territoriality link between the offence committed and the state proving its competence to prosecute the offender.\(^\text{16}\) This is because if a state’s domestic law is unilaterally extended into territory of another law it would infringe sovereignty of the latter state. The solution lies in application of international law, derived from international customs and conventions, as the prescriptive law while exercising universal adjudicative jurisdiction. International law is deemed to be universally accepted and thus courts of prosecuting state apply universally accepted definitions of crimes and adjudicate on the basis of internationally accepted principle, else their exercise of jurisdiction would contradict certain principles of the very international law on which it is based.\(^\text{17}\)

**Non-Uniformity in its Application**

Implementation of universal jurisdiction has been problematic since it forms not just a part of international law but also that of national law. Based on national consensus and authoritative approval, nations grant universal jurisdiction to their domestic courts over variety of crimes due to which the doctrine of universal jurisdiction is not uniformly applied among different nations.\(^\text{18}\) The scope of universal jurisdiction differs from state to state as a result of which no homogeneity in decisions as well as processes used is maintained. For instance certain states follow narrow conception of universal jurisdiction while others follow the broad conception. The narrow conception allows the state to prosecute the alleged offender for a crime only when that person is

\(^{14}\) Supra Note 1 at 736.

\(^{15}\) Supra Note 13 at 154.

\(^{16}\) Supra Note 13 at 153.

\(^{17}\) Ibid.

present inside the territory of the prosecuting state and so that his physical presence in the court is possible.\textsuperscript{19} On the other hand, broad conception entails the prospect of prosecuting the offender even in his absence from territory of the state.

**Requirements of Universal Jurisdiction**

To establish universal jurisdiction within a state there are three major requirements that must be fulfilled. First, there must be a source that provides national court the authority to exercise universal jurisdiction such as national legislation, treaty or international agreement.\textsuperscript{20} Second, there must be commission of crime and existence of all elements of the crime which is included in the instrument providing authority.\textsuperscript{21} Third, there must be an enforcement mechanism such as judicial system comprising of courts and tribunals for exercise of such jurisdiction within the state.\textsuperscript{22} Three forms of sources can be identified that provide authority to any judiciary to exercise universal jurisdiction: domestic law\textsuperscript{23}, international conventions\textsuperscript{24} and international customary law.\textsuperscript{25} International agreements are usually entered with regards to universal crimes that reach the pedestal of jus cogens and grant jurisdiction to nations that are parties to it to punish breach of such crimes. These agreements do not specify the means that must be utilized to prosecute and punish the offender and therefore each state enforces its obligation under the agreement based on its domestic mechanism.\textsuperscript{26} Similarly, when the source is traced to customary international law broad principles are culled out and again it depends upon the states to draft the precise guidelines for exercising universal jurisdiction.\textsuperscript{27} Thus irrespective of where the source of universal jurisdiction is traced, there is a lack of precise conditions and nature of obligations prescribed for the nations, as a result of which the principle fails to adequately translate into practice.

\textsuperscript{19} Article 7, The Convention against Torture \& The four Geneva Conventions of 1949.
\textsuperscript{21} Supra Note 18.
\textsuperscript{22} Ibid.
\textsuperscript{24} Supra Note 19.
\textsuperscript{25} Supra Note 18 at 385.
\textsuperscript{26} Supra Note 18 at 386.
\textsuperscript{27} Ibid at 387.
SOVEREIGN IMMUNITY VIS-À-VIS UNIVERSAL JURISDICTION

Meaning of Sovereign Immunity

In international law, the doctrine of sovereign immunity is well established. It relates to the official status of offender and therefore diplomatic agents and holders of high rank offices in states such as “head of the state, leader of the government, minister of foreign affairs”\(^ {28} \), enjoy immunity from civil suits and criminal prosecution under foreign jurisdictions. Rationality of sovereign immunity lies in the traditional belief that head of state is the “personification of its representative state” and therefore his prosecution would interfere in the internal matters of the state amounting to breach of non-intervention in state affairs and sovereign equality principle.\(^ {29} \) Where judiciary of one sovereign nation or head of one state decides the fate of head of state, in whom sovereignty of representative nation lies, through judicial prosecution or executive order, principle of sovereign equality is breached.\(^ {30} \) Although contemporary constitutions have clearly resided the sovereignty of state in people rather than the head\(^ {31} \), the doctrine of sovereign immunity is still cited as defense against prosecution in a foreign state. There is no treaty or custom in international law through which temporal immunity of heads of state or diplomats can be taken away\(^ {32} \). Therefore as long as an alleged offender holds sovereign office, foreign courts are restricted from his or her prosecution. These questions regarding interplay of universal jurisdiction and limitation imposed on it by sovereign immunity have often crept up in the courts and require examination.

CONTRADICTORY JURISPRUDENCE

The jurisprudence regarding the interplay of sovereign immunity vis-à-vis universal jurisdiction has not been streamlined. There is a long list of cases where immunity was rejected as a shield and public officials were not absolved from their liabilities.\(^ {33} \) At the same time numerous


\(^ {30} \)Ibid.


\(^ {32} \)Supra Note 5 at 220.

judgments of various national courts can be found where official position of the offender was the main justification for non-prosecution or mitigation of punishment. This part shall undertake close analysis of two landmark cases under the subject of universal jurisdiction and certain other instruments and past judgments and depict that courts have not been able to construct a conclusive answer regarding application of sovereign immunity available to heads of state and other diplomats for offences committed during their term of office and such contradictions become problematic while deciding subsequent cases.

The question of sovereign immunity came to the International Court of Justice in the landmark judgment of Democratic Republic of the Congo v. Belgium, commonly referred to as the Arrest Warrant case, whereby it opined that the diplomats and heads of state enjoy absolute sovereign immunity from criminal responsibilities in other states and in international arena as a whole and this immunity is available only till the time of their tenure in office. According to the case as long as alleged offender holds an office of significant importance in a state, no other state can exercise its universal jurisdiction and prosecute such person for his actions amounting to universal crimes. The judgment dismissed the claim that sovereign immunity acts as a facilitator of impunity for diplomats or heads of the states. The court explained that “Immunity from criminal jurisdiction and individual criminal responsibility” are two separate concepts. Immunity from criminal jurisdiction is procedural in nature and therefore does not absolve the person on whom it applies from his criminal liability completely for an indefinite period.

It explained four circumstances where either sovereign immunity would not be applicable or would be expressly or impliedly barred. First, the court opined that under circumstances in customary international law where the alleged crimes can be classified as war crimes or crimes against humanity, sovereign immunity becomes unavailable and fails to exonerate the leaders from their liabilities. Second, sovereign immunity is ratione materiae, which means that it is

35 Supra Note 28.
36 Supra Note 28 at Para 52.
37 Supra Note 5 at 221.
38 Supra Note 28 at Para 60.
39 Supra Note 5 at 220.
only restricted to the acts that are done in official capacity and not in personal capacity.\textsuperscript{40} It operates for a limited time and the person can be made answerable for his actions after his term in state office comes to an end.\textsuperscript{41} In such situations the time of committing the offence is not relevant and alleged offender can be prosecuted after termination of immunity even for the crimes that were done during his period of office when immunity was available.\textsuperscript{42} Third, while generally irrespective of the nature of the act, private or official, representatives enjoy immunity till their term of office, in certain states unless the action is done in furtherance of official duty, representatives do not have any immunity and can be prosecuted according to the domestic law.\textsuperscript{43} Fourth, the judgment explained the principle of respect for political acts of that state. In certain situations when the representative’s national state intimates an intention of prosecution to other states irrespective of the immunity, other states refrain for exercising their jurisdiction because of respect for political acts of the representative’s state. So even though other courts would have the competency to prosecute under universal jurisdiction they would not exercise this authority and the nation state would ensure that ends of justice meet. Lastly, the court stated that if any state decides to abandon immunity from their heads or diplomats, other states become competent to exercise their universal jurisdiction even during the term of office of that person.\textsuperscript{44} Thus even though the case gave primacy to sovereign jurisdiction, it also enlisted for clarity various situations where such immunity would be lost.

However, contrary to the Arrest warrant case, there are various other instruments in the form of conventions, treaties and judgments that declare official position of alleged offender and immunity attached to that position inadequate to free him from liability for any offence. While certain conventions consider such immunity to be a relevant factor while considering only the quantum of punishment\textsuperscript{45} and not the responsibility for the crime itself, there are others which explicitly proclaim official position of the offender to be an impertinent factor\textsuperscript{46} and assert that irrespective of whether the offender is “constitutionally responsible ruler, public official or

\textsuperscript{40} Prosecutor v. Tadic, Decision on Jurisdiction (Appeals Chamber), Judgment of 2 October, 1995, (105 ILR 419), at 483.
\textsuperscript{41} Supra Note 5 at 220.
\textsuperscript{43} Supra Note 5 at 220.
\textsuperscript{44} Supra Note 41.
\textsuperscript{45} Article 6, The Tokyo Charter of the International Military Tribunal for the Far East 1948.
private individual”⁴⁷, he must be subjected to the jurisdiction of courts on same terms without any mitigation of punishment.⁴⁸

Nuremberg Charter explains that if the offender claims immunity on the ground that he was performing a sovereign function or acting under a government mandate, then rather than absolving him of his responsibilities due to immunity, the state itself must be prosecuted for the offence.⁴⁹ Nuremberg tribunal following the charter also opined that the authors of universal offences cannot shield themselves from the punishment behind their position because there are certain international obligations attached to each person which surpass national obligations.⁵⁰ And so even if the acts committed in obedience of representative state, if they breach international obligations, individual is to be punished.⁵¹ If the official under question had a “reasonable opportunity” to avert the act and yet no action was taken under his authority to prevent it or if the official himself was the perpetrator of the offence, no “blanket immunity” from prosecution can be granted.⁵²

These principles were followed by another watershed case in the history of international law, which is Prosecutor v. Anto Furundzija,⁵³ commonly known as Pinochet case which further contradicted Arrest Warrant case. Pinochet, the Chillean dictator, was accused of genocide, murder and torture and when he left his office he was bestowed sovereign immunity based on his official position. Spanish authorities issued warrant against him for the crimes committed against Spanish citizens in Chile during his tenure. While the warrant was issued, he was in the UK on account of certain medical reasons and on the basis of warrant was arrested therein. It was in this case that for the first time a former head of the state was prosecuted in domestic court of a foreign nation for the offences committed during his tenure as head of state.⁵⁴ On one hand House of Lords had to consider the common law which supported granting immunity for the offences committed by head of state in official capacity and on the other hand there were series

---

⁴⁷ Ibid.
⁴⁹ Supra Note 41 at 317.
⁵⁰ Trial of the Major War Criminals before the International Military Tribunal, Volume 3, 466 (1949).
⁵¹ Ibid.
⁵³ Prosecutor of Tribunal v. Anto Furundzija, Case IT-95-17/1, Judgment, 10th December 1998, Trial Chamber of the ICTY, 153 (1998).
⁵⁴ Supra Note 41 at 320.
of cases which laid down that every person irrespective of official capacity must be held responsible for the acts committed in any capacity, private or official.

It was first made clear in the case by Lord Millet that immunity for a sitting head of state is absolute and no action can be taken against him since such immunity is necessary to allow the official to carry out the functions without intervention in official capacity and this case was only being taken up because the alleged offender is former and not sitting head of state. The House of upheld his extradition to Spain for the offence of torture and did not allow immunity to rescue him from the punishment. It was held that sovereign immunity in the current jurisprudence is limited by the concept of international crimes. There may be various instances where the functions of head of state entail illegal or wrongful acts, but certain category of behavior which includes crimes against humanity cannot be justified as official acts. There are no laws or customary doctrines that justify acts of torture, genocide and other such offences as functions of sovereign heads. While performing such acts, Pinochet cannot be said to be performing his functions as the head of Chile. It was further stated that where the offence under consideration is so grave that it has been placed at the pedestal of jus cogens, mere immunity or an order from public authority must not be allowed to save the person responsible for it. Based on the previous cases Lord Saville put forth another principle where he stated that immunity must be allowed to protect the official in cases involving civil litigation irrespective of the behavior of the tortious offender, but wherever criminal proceedings are involved, no head of state or any other officer or diplomat must be allowed to hide behind the prospect of immunity and must be held accountable for their conduct. This case was further followed in another case wherein President of the Federal Republic of Yugoslavia, Slobodan Milosevic who was still in office, was indicted by the Prosecutor of the Criminal Tribunal for the former Yugoslavia for crimes against humanity. In another case popularly known as the Kambanda case, International Criminal Tribunal of Rwanda convicted the former Prime Minister of Rwanda, on account of committing genocide and participating in conspiracy and incitement to commit genocide and other crimes against humanity. ICTR stated that as the head of the state he was accountable for maintaining peace and

57 Supra Note 41 at 321.
58 Ibid.
59 Supra Note 29 at 121.
harmony and yet he could not prevent his subordinates from committing crimes against people and in-fact actively participated in them. Such a behavior cannot be bypassed through sovereign immunity.

These instruments and decisions under them have been ratified through resolutions by the General Assembly of the United States. Such principles can also be located under the Rome statute and also under statutes of various international tribunals such as Statute of the International Tribunal for Rwanda and that of Yugoslavia. Therefore these principles can be validly stated to hold authoritative value and gradually a consensus in the international community can be seen to have been built on them. In order to prevent impunity, which is one of most pertinent goals of the courts across the globe, adequate consideration must be given to such principles by the international and national courts while deciding upon the issue of universal jurisdiction and protection of humanity against crimes must be given paramount importance rather than upholding the political decisions of granting immunities to heads of states. The precedents established through judgments like Pinochet, Kambanda and Milosevic have the capacity of restraining impunity while at the same time encouraging the “promotion of human values, observance of human rights, the rule of law and democratic governance”.

THE WAY AHEAD

According to a research conducted at international level, more than 125 countries have national laws for universal jurisdiction and none of these laws are completely adequate. Since the primacy to exercise universal jurisdiction currently vests with national courts, such inadequacy often leads to impunity. Lack of uniformity in recognition of crimes and the processes utilized, uncertainty as to the results of prosecutions and conflicting judgments act as haven for the offenders and therefore even the laws fail to act as deterrent. In such a situation, the solution for high transaction costs of the present system and lack of similar rules across the nations that have lead to haywire jurisprudence lies in centralization of entire system. Rather than allowing each nation having the competency of prosecuting the offender, jurisdiction over such offences must

61 Resolution A/1/95, United Nation General Assembly Resolution, (11 December 1946).
63 Supra Note 29 at 158.
be bestowed exclusively to an international forum and particular set of principles must be laid down that shall be followed by these courts so as to maintain uniformity.

One such international forum that can be considered is International Criminal Court. International Criminal Court derives its jurisdiction from Rome Statute, which confers power on ICC to proceed against the individuals alleged for committing “the most serious crimes of concern to the international community as a whole.” The statute puts down the principles based on which universal jurisdiction can be exercised and also enlists universal crimes as genocide, crimes against humanity, war crimes, and the crime of aggression. Further Article 27 of the Statute makes it clear that no distinction must be made in the process and result of trial merely because of the official capacity of the alleged offender. Official capacity of the person shall neither excuse an individual from criminal responsibility nor result in mitigation of sentence. It is nobody’s challenge that ICC has no legitimate interest in prosecution of universal crimes irrespective of their place of occurrence and further to entrench this point preamble of the Rome statute states that the primary objective of ICC lies in putting an end to impunity. ICC can act as the delegate of all states to put an end to perpetration of international crimes, which currently is a universal concern.

However, currently ICC has no exclusive jurisdiction and its competency is in addition to the jurisdiction of other states. Jurisdiction of ICC has been barred by a principle called complimentarily principle. Its jurisdiction does not transcend the jurisdiction of national courts and is complementary to the jurisdiction of national courts. Only when the national courts are either unwilling or unable to prosecute or investigate the case, then ICC becomes competent to initiate prosecution. National courts are thus given primacy and ICC gets jurisdiction only in case of inefficiency or non-availability of the national courts to do so. It is imperative that primacy must be given to the jurisdiction of ICC so that contradictory decisions can be done away with and justice can be served in a uniform manner. To ensure that sovereignty of non-party States is not breached, implied delegation must be allowed whereby such states can confer jurisdiction upon ICC by declaring themselves unwilling or unable to initiate prosecution in all

68 Supra Note 2 at 418.
69 Article 17(1)(a), Rome Statute of ICC 2002.
subsequent cases. Further, provisions must also be made to allow ICC to embrace certain principles as decided by such states while dealing with cases related to such states as long as these principles are in line with Rome statute and allow maintenance of uniformity. This would give further legitimacy to ICC to ensure an inclusive and uniform structure of justice to battle dreadful crimes.

ICC while exercising its jurisdiction must ensure that public officials and heads are not allowed to shelter themselves under their position and immunity that comes with the position so as to avert prosecution and punishment. International law cannot be said to accept immunity for those crimes that the international community as a whole condemns. The perpetrators committing crimes that have been recognized as jus cogens or universal crimes cannot be easily let off by a shield of sovereign immunity which more than often facilitates impunity. Therefore, any act that falls under the category of universal crime must not be covered by state immunity for the very reason of it being given the pedestal of a universal crime and universal jurisdiction is used as a principle to ensure peace around the world and not as a tool for intervention in the sovereign functions as a state.

---


71 Ibid.