

Universal Jurisdiction:
Friend or Foe of Criminal Justice System

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Abstract

The principle of universal jurisdiction has been recognized as a tool in the assistance of criminal justice, especially in the area of international justice for victims of international crime. The principle has long been established and widely incorporated into many international treaties as a customary international law. In the wake of the Holocaust, war crime and terrorism, the principle has gained greater attention and recognition for the role of an assistant to international crime suppression. Despite its significant role in the international criminal justice system, there are certain practical limits in the application of the principle that are worth explored and noted. These limits include the issues concerning due process of law, democratic accountability, availability of evidentiary resources and the maintenance of foreign relations.

Keywords: universal jurisdiction, criminal justice, international crime

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Received 11 November 2018, Revised 20 November 2018, Accepted 21 November 2018.

1. Introduction

On the evening of August 17, 2015, the streets around Erawan Shrine, Ratchaprasong intersection was covered with dust and debris along with human parts scattered across the street as a result of the explosion. The bombing killed at least eighteen people consisting of Thai, Chinese and Filipinoethnics, and injured over a hundred of bystanders. The horrific scene of the medics collecting body parts hours after the incidence still haunts people's memories, but most important of all the victims of the bombing, who are still waiting for justice to be served. Many received victims' compensation package in the form of a financial assistance from the Ministry of Justice, which to them, is inadequate to bring their lives back. Physical scars and damage will always remind them of the terror attack. Many are still longing for mental supports desiring to see perpetrators arrested and punished by the law.¹ Despite the denial of the Thai authorities, the incidence, in the eye of the international community, was considered an act of terrorism, of which problem could be linked to the Uighurs - a Turkic-speaking Muslim minority in the far west of China.²

The event described is just one of the examples that presents terrorism as a serious issue that needs to be carefully addressed due to the degree of its social impact. Thailand may be perceived as a designated hub or haven for terrorists possibly due to its friendly immigration policy as part of its efforts to attract foreign tourists to the country.³

¹Sasiwan Mookhasen, **Angry Victims and Families of Erawan Shrine Bombing Still Wait for Justice 1 Year Later** [Online], available URL: <http://www.khaosodenglish.com/news/crimecourtsclamy/2016/08/17/1-year-erawan-bombing-victims-families-still-wait-justice/>, 2016 (August, 17).

²Jonathan Head, **The Surreal Investigations into Thailand's Unresolved Bombing** [Online], available URL: <https://www.bbc.com/news/world-asia-37091825>, 2016 (August, 17).

³ผู้จัดการออนไลน์, **ก่อการร้ายข้ามชาติ วิเคราะห์จุดอ่อนเมืองไทยในการรับมือ** [Online], available URL: <https://mgronline.com/live/detail/9550000008560>, 2555 (มกราคม, 20) (providing cases in which Thailand has been served either as a haven or a transit for terrorists due to its lax policy)

Terrorists, of course, take advantage of such an opportunity which enables them to become more mobile and less visible to the authorities of the territory in which the crime was committed. Thus, for instance, in the event that crime took place elsewhere, and Thailand became a shelter sought by perpetrators, it will give rise to a very important question as to whether it is appropriate for the country to invoke universal jurisdiction. The answer “yes” might seem to make sense if we relate back to the above-mentioned event, when trying to seek justice for those victims within Thailand to ensure that the perpetrators will not go free regardless of their presence. However, this may not be an easy answer for a country where the perpetrators are present of which universal jurisdiction can potentially be invoked.

This article aims at analyzing the application of universal jurisdiction principle and its limits in the suppression of crime and the upholding of criminal justice. The article provides a historical perspective, the emergence of the principle as customary international law and its practical limits that pose challenges to the rule of law and the maintenance of a democratic society. The article is not intended as an attack against the application of universal jurisdiction, but only to suggest potential issues that need to be taken into consideration when a foreign court opts to exercise its jurisdiction based upon the novelty of the principle.

2. Brief Historical Perspective

Universal jurisdiction refers to the concept which allows a national court to prosecute individuals for serious crime against international law in the absence of its connection whether in terms of the nationality of the defendant or the victim, or the location of crime. This principle can generally be invoked when “traditional bases of criminal jurisdiction do not exist.” (International Justice Resource Center)

See also ไทยรัฐ ออนไลน์, ผบ.สส.เชื่อไทยไม่ใช่เป้าก่อการร้ายแต่ยังมีช่องโหว่ [Online], available URL: <https://www.thairath.co.th/content/231563>, 2555 (มกราคม, 18) (citing Thailand’s former chief of defense forces, Thanasak Patimaprakorn. statement suggesting Thailand’s open policy which created a loophole in the anti-terrorism strategy).

⁴This concept can be traced back in the 17th century as an attempt of states to prosecute piracy and slave trade overseas.⁵ In the aftermath of World War II, international community had searched for a judicial standard with efforts to address the Holocaust and atrocities. Several international principles and conventions were invoked to indict violators.⁶ Although, the concept of universal jurisdiction was not formally recognized at a time as no one could foresee that national judges would use these principles as a basis for trying a crime committed outside their territories, it was technically established.

Today, the concept has grown to cover other types of “international crime”⁷ such as crimes against humanity, war crimes, genocide, and torture, including pirates, hijackers, and similar outlaws whose crimes are generally committed outside the territory of the state, while many believe that it can go beyond the Rome Statute’s definitions.⁸ The scope of the list of crimes (of which universal jurisdiction can be asserted) has been broadened in response to the rise of political and social factors. And due to political implications in allowing foreign jurisdictions to be asserted over the cases they have little domestic interests involved, this principle was perceived to be less popular among conservative states during the negotiation of the Rome

⁴International Justice Resource Center, **Universal Jurisdiction** [Online], available URL: <https://ijrcenter.org/cases-before-national-courts/domestic-exercise-of-universal-jurisdiction/#gsc.tab=0>, 2009 (December, 20).

⁵Bartram S. Brown, “The Evolving Concept of Universal Jurisdiction,” **New England Law Review** 35 (2) (January 2001): 384.

⁶Henry A. Kissinger, “The Pitfalls of Universal Jurisdiction,” **Foreign Affairs** 80 (4) (July/August 2001): 87-88.

⁷Rome Statute has defined “international crime” as the most serious crimes of concern to the international community as a whole which cover the following types of crime, namely (i) The crime of genocide, (ii) Crimes against humanity, (iii) War crimes, and (iv) the crime of aggression. See Rome Statute of the International Criminal Court, **2187 U.N.T.S 90 art. 5-8 (1998)** [Online], available URL: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-10&chapter=18&lang=en.

⁸Supra note 5, p. 384.

Statute. Countries were divided in terms of the Court's (International Criminal Court-ICC) subject matter jurisdiction and the basis of its exercise of criminal jurisdiction (whether it should be purely universal or state's consent required).⁹ Many conservative states opted for the requirement of state's consent as opposed to no condition attached. The unsettled debate resulted in the undercut of application of the universal jurisdiction requiring instead the state's consent to every case to be tried by the ICC's based upon its territorial or national jurisdiction, except for those referred under the authority of the United Nations Security Council.¹⁰ Thus, from the historical perspective, the principle of universal jurisdiction, despite its long establishment, still faces limited application as it has been perceived to undercut the state's ability to exclude others from exercising a criminal jurisdiction over an event that occurred outside the latter's territory.

3. Embracing the Principle

Universal jurisdiction refers to the concept which allows a national court to prosecute individuals for serious crime against international law in the absence of its connection whether in terms of the nationality of the defendant or the victim, or

⁹While Germany supported the ICC's broad and independent universal jurisdiction, the U.S., on the other hand, preferred state's consent as the basis of the ICC's exercise of criminal jurisdiction. The U.S. government has questioned the application of universal jurisdiction to war crimes and crimes against humanity, and it also objects to the transfer to the ICC of any rights enjoyed by States to prosecute those responsible for universal jurisdiction crimes. See David J. Scheffer, "Developments at the Rome Treaty Conference," statement by the Ambassador at Large for War Crimes Issues and Head of the U.S. Delegation to the UN Diplomatic Conference on the Establishment of a Permanent International Criminal Court before the Senate Foreign Relations Committee, Washington, DC; July 23, 1998, Department of State Dispatch, August, 1998, p. 20.

¹⁰Rome Statute of the International Criminal Court, **2187 U.N.T.S 90 arts. 12 (2), 13 (1998)** [Online], available URL https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-10&chapter=18&lang=en, 2002 (July, 1).

the location of crime. This principle can generally be invoked when “traditional bases of criminal jurisdiction do not exist”. (International Justice Resource Center)

Universal jurisdiction would not have been created, had it not been known for its positive functions. As mentioned in section II, universal jurisdiction is a principle that allows a state to bring criminal proceedings over certain types of crime. It is a special exception to the rule that requires some link of the nationality or territory or affected national interest to a crime as a basis for a state to exercise criminal jurisdiction.¹¹ This “principle of universality recogni[z]es that certain crimes are of such an atrocious and dangerous nature that all states have a responsibility or a legitimate interest to take action”.¹² Thus, arguably, the principle can help seal up an impunity loophole for serious violation of international law.¹³ The benefit of universal jurisdiction principle is proven to be valuable for proceedings before a foreign court or an international criminal court that may have little connection with the affected parties or the defendant. Hypothetically, the perpetrator can be anywhere in the world, but can never escape the eyes of the law of the global community.

It is, however, must be understood that there are two approaches of applying this principle. The first one is procedural, which means applying the domestic of criminal justice such as using extradition treaty, and the second one is substantive in nature meaning domestic legislation of a state also criminalizing such

¹¹*Supra* note 5, 383, Yuna S. Kraytman, “Universal Jurisdiction: Historical Roots and Modern Implications,” **Brussels Journal of International Studies** 2 (2005): 94.

¹²*Ibid.*

¹³The failure of investigation on the US’ part in the case involving serious abuse of detainees in Guantánamo Bay by its high-level government officials brought a coalition of international lawyers to pursue justice for the detainees under universal jurisdiction laws in Germany in 2004 and 2006, and in France in 2007. For instance, the German Code of Crimes against International Law (CCAIL) which incorporates provisions of international criminal law provides a legal basis for the complaint, with the primary objective to fight impunity for international crimes by solidarity in prosecution which is not limited to crimes linked with the German territory. See Katherine Gallagher, “Universal Jurisdiction in Practice,” **Journal of International Criminal Justice** 7 (5) (November 2009): 1089, 1102.

act committed outside its territory, thus providing criminal jurisdiction for a State to prosecute the wrongdoer. Against the traditional prosecution practice, such a concept opens up the possibility of the accused to be tried by any other state based solely on where he or she can be found. Because of its association with crimes supported by the doctrine of “jus cogens” which refers to “certain fundamental, overriding principles of international law, from which no derogation is ever permitted”,¹⁴ universal jurisdiction can provide a legitimate ground for a foreign state to prosecute those responsible for serious international crimes. Such rationale derives from the fact that certain international crimes “are serious enough as to warrant collective sanctions”¹⁵ since the injuries can be suffered and felt by the global community as a whole.

Because of its long historical connection with piracy in the high seas, applying universal jurisdiction to cases that involve hijacking of airplanes or ships which may fall under the category of terrorism can be easily assumed. In fact, it has been argued that subjecting the act of terrorism to the universal jurisdiction principle should not only be encouraged but required due to the nature of harm inflicted upon innocent people and the degree of social impact that share similar characteristics with other serious international crimes upon which universal jurisdiction can be asserted.¹⁶

¹⁴Seelan Brownlie, **Principles of Public International Law**, 5th ed. (Oxford: Oxford University Press, 1998), *See also Draft Article on State Responsibility* [Online], available URL: http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf, 2008. (defining “international crime” as “an internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interest of the international community that its breach is recognized as a crime by the community as a whole”)

¹⁵Jarat Chopra, “Establishing Universal Jurisdiction,” **The Brown Journal of World Affairs** 6 (1) (Winter/Spring 1999): 4, (quoting Lyal S. Sunga, **Individual Responsibility in International Law for Serious Human Rights Violations** (Dordrecht, The Netherlands: MartinusNijhoff Publishers, 1992), p. 128.

¹⁶Win-chiat Lee, “Terrorism and Universal Jurisdiction,” in **Intervention, Terrorism, and Torture: Contemporary Challenges to Just War Theory**, ed. Steven P. Lee (Dordrecht, The Netherlands: Springer, 2007).

Although subjecting terrorism to the principle of universal jurisdiction is still a matter of controversy, state's ability to exercise universal jurisdiction based on international crime committed by an offender is arguably a customary international law. And this is a matter of international public policy because of the gravity of the crimes together with the need of their repression in the view of international community. Current international conventions that relate to suppression of terrorism, such as the International Convention for the Suppression of the Financing of Terrorism (1999), and the United Nations Convention against Transnational Organized Crime (2000) do not necessarily limit themselves to the jurisdictional principle of nationality and territoriality, but also open the possibility for the application of universal jurisdiction principle. The objectives of the UN Convention against Transnational Crime (2000) clearly include combating against terrorism as there is a growing link between this type of crime and transnational crime. Terrorists are taking advantages of open borders, free markets and technological advancement that help facilitating their illegal actions across the globe rendering the national means for fighting such a crime inadequate and unsatisfactory.¹⁷ And to bridge the gap in the differences in global legal enforcement, the Conventions extend the opportunity for the contracting states to criminalize terrorist acts based upon the universal jurisdiction principle. In this respect, both Article 7 (4) of the International Convention for the Suppression of the Financing of Terrorism (1999) and Article 15 (4) of the United Nations Convention against Transnational Organized Crime (2000) require the contracting states to establish their jurisdictions over the designated offenses where the offender is present in their territories, and the contracting states do not wish to extradite the offender, whereas Article 7 (6) and 15 (6) of both

¹⁷In the forward of the UN Convention against Transnational Crime (2000), the former Secretary General, Kofi A. Annan suggested "the uncivil society" which includes "...terrorists, criminals, drug dealers, traffickers and others who undo the good works of civil society". UN General Assembly (a), **United Nations Convention against Transnational Organized Crime: resolution adopted by the General Assembly, A/RES/55/25** [Online], available URL: <http://www.refworld.org/docid/3b00f55b0.html>, 2001 (January, 8).

Conventions encourage the contracting states to freely exercise their criminal jurisdictions in such cases, without prejudice to the norms of international law, where their domestic laws allow to do so.¹⁸ Thus, a state can adopt a wide range of methods to provide for universal jurisdiction under their national law to ensure that there exists a specific ground for exercising the jurisdiction. With over 180 signatory parties for both Conventions, the growing number of the contracting parties provides significant legal implication for the implementation of the universal jurisdiction principle. Not only does it serve as a customary international law, but also a benchmark for a requirement of asserting a criminal jurisdiction over an offender whose only connection with a state is his or her presence in its territory.

Likewise, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1948) and the Geneva Conventions (1949) also provide ground for a state to establish its criminal jurisdiction over an offender who committed crime stipulated in the Conventions elsewhere.¹⁹ The language used in Article 5 (2) of Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) requires a state to take “measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite

¹⁸See art. 7 (4), (6) of the International Convention for the Suppression of the Financing of Terrorism (1999). UN General Assembly (b), **International Convention for the Suppression of the Financing of Terrorism** [Online], available URL: <http://www.refworld.org/docid/3dda0b867.html>, 1999 (December, 9); art. 15 (4), (6) of the United Nations Convention against Transnational Organized Crime (2000). UN General Assembly (a), op. cit.

¹⁹“While the relevant treaty law provisions are restricted to grave breaches, universal jurisdiction in customary international law may be regarded as extending to all violations of the laws and customs of war which constitutes war crime. This would include certain serious violations of applicable law, in particular Article 3 common to the Geneva Conventions and Additional Protocol II of 1977 committed in non-international armed conflict.” See International Committee of the Red Cross (ICRC), **Universal Jurisdiction over War Crimes** [Online], available URL: <https://www.icrc.org/eng/assets/files/2014/universal-jurisdiction-icrc-eng.pdf>, 2014 (March, 14).

him pursuant to article 8 to any of the States...”,²⁰ while Article 5 (3) of the Convention allows “any criminal jurisdiction exercised in accordance with internal law”.²¹ And under the relevant article of each Geneva Convention (Arts 49, 50, 129 and 146, respectively), states are required to search for alleged offenders “regardless of their nationality,” and either bring them before their own courts or hand them over for trial by another State Party.²² Considering the treaties’ language, a state may have a mandatory duty to exercise its jurisdiction over international crimes imposed on it (mandatory universal jurisdiction), rather than merely having an optional right (permissive universal jurisdiction), especially in the case where it does not wish to adjudicate the case itself.

Today, several states with a civil-law system provide a jurisdictional ground for criminal offense based on universal jurisdiction, including Thailand. The universal jurisdiction principle has also been incorporated under the Thai Penal Code. In this respect, Section 7 of the Penal Code provides that “anyone committed the following offences outside the Kingdom shall be punished in the Kingdom...”²³ These are (1) offences relating to the security of the Kingdom (as provided in Sections 107 to 129), the offence in respect of terrorization (as prescribed by Section 135/1, Section 135/2, Section 135/3 and Section 135/4), (2) offences relating to counterfeiting and alteration (as provided in Section 240 to Section 249, Section 254, Section 256, Section 257 and Section 266), (3) and (4); (2 bis)), offences relating to sexuality (as provided in Section 282 and Section 283), (3) offence relating to robbery (as provided in Section 339), and offence relating to gang-robbery (as provided in

²⁰ UN General Assembly (c), **Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment** [Online], available URL: <http://www.refworld.org/docid/3ae6b3a94.html>, 1984 (December, 10).

²¹ Ibid.

²² *Supra* note 18.

²³ **Criminal Code of Thailand (Pramuankoahtmai aa ya) [Th CrimC] art. 7. Vol. 73 Sec. 95** [Online], available URL: <http://web.krisdika.go.th/data/law/law4/%BB06/%BB06-20-9999-update.pdf>, 1956 (November, 15).

Section 340), which is committed on the high seas. In light of this Article, the concept of universal jurisdiction under the Thai law has been extended beyond traditional crime like piracy on the high seas to include terrorism and sex crimes that are committed abroad. Although arguably, these are the types of crimes that could have territorial impacts on the country, the Article of the Code does not necessarily require any specific link to the country whether in terms of nationality or territoriality. And the fact that this principle has gained wide support with an attempt to strike impunity, and to prevent offenders from seeking a safe haven in third countries, universal jurisdiction is perceived to be one means of facilitating the repression of serious crimes.

Despite, the legitimate rationales behind the principle of universal jurisdiction, including vigorous demand for justice for victims of international crimes, the concept is not without criticism, which is mainly on the issue of state's interest in protecting its sovereignty (the right to criminal prosecution and adjudication within its territory where crime occurred) as well as its citizens from being prosecuted outside the territory. This is a widely recognized argument that explains why the negotiating countries could not come to terms with a full-blown application of universal jurisdiction in the Rome Statute. However, such a position has been questioned as to how valid the state's "legitimate interest" is in "shielding its nationals from criminal responsibility for genocide, crimes against humanity or the most serious war crimes"²⁴ as argued by Bartram S. Brown. And if the state interest should not be "the be-all and end-all of international law" as suggested by Brown, what is more important is that justice must be served. And for this goal to be achieved, it does not only require a criminal justice system to punish the wrongdoers, but also that the process must be fair and warranted to the accused and the victims to ensure restoration of peace and reconciliation to the local community.

²⁴Supra note 5, 391 (also arguing the state's desire to protect its narrow national interest in dismissing the application of the Universal Jurisdiction evokes a colonialist concept of exclusive extraterritorial rights, which has little relevance to modern practice).

Thus, the claimed “state interest” should not be viewed solely as a personal pursuit to protect either its own prosecution process or its national from the intrusion of criminal proceedings by the outsiders, but should also be understood in a broader context, that is in the promotion of social and political justice. And this is due to the fact that, in the process of securing state’s interest in protecting its own criminal prosecution, the understandings of cultural, social and historical contexts are required, which can be overlooked by the assertion of universal jurisdiction of other foreign states. The next section will discuss some of the practical limits of universal jurisdiction application.

4. Practical Limitations: Brutal Truths for Addressing a Brutal Past

Despite that fact that the principle of universal jurisdiction has recently gained its role as a vital tool for addressing international and transnational crimes, the international community still finds itself struggle to resolve the unsettle issues in terms of the scope and application of the principle. These issues, many of which concern the integrity of domestic criminal justice system, and the potential violation of the doctrine of state immunity, have been widely discussed and debated within the United Nations sixth committee. These concerns suggest the potential risks that could be posed by the principle which could involve the abuse of political manipulation of the principle itself.²⁵

From these legal and political perspective, it is, therefore, important to understand and acknowledge some limited aspects of the concept when applying it since it involves balancing individual liberty interest (the offender or the accused) against governmental objectives, such as combating against terrorism and other types of heinous crimes, and securing the restoration of the victims’ rights. These are elements to be taken into consideration when undertaking the decision to apply

²⁵United Nations, General Assembly, **The Scope and Application of Universal Jurisdiction Principle: report of the Secretary-General, A/72/112** [Online], available URL: http://www.un.org/ga/search/view_doc.asp?symbol=A/72/112, 2017 (June, 22).

universal jurisdiction. There are certainly both legal and political implications for the state to undertake a criminal proceeding against the offender presented within its territory. These issues may concern the democratic principle, due process of law, resources and foreign policy.

4.1 Democratic Accountability

Democratic accountability in the judicial process can be easily overlooked by international law scholars who are the main proponents of a uniform, global community law with a structured political community.²⁶ The focus on suppressing crime and ensuring the avoidance of impunity may divert our attention away from certain important democratic values such as inclusiveness, autonomy and accountability. These are concerns also shared by the engagement of the International Criminal Court (ICC) in the criminal cases that took place in the distant territories permitted under the Rome Statute as “...the ICC cannot simply rely on the skill of its judges to resolve contested legal, moral and political questions. Furthermore, the court is not a part of a [domestic] structured system of checks and balances.”²⁷ While foreign courts can exercise its power to prescribe and adjudicate crime beyond their territories, the process may also demand that the affected community and the parties involved accept a handed-down decision from a distant court and foreign judges in order to come to terms with their brutal past.

An example of potentially controversial determination to be addressed by a foreign court is a constitution of an act of “torture” that might happen during the political or internal conflicts in pursuant to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) to which the concept of universal jurisdiction applies. Furthermore, the court will have to determine what kind of applicable sentencing to be made to ensure the restoration of the victims’ and affected community’s rights to the maximum extent. While

²⁶ Jenia Lontcheva Turner, “Nationalizing International Criminal Law,” **Stanford Journal of International Law** 41 (1) (December 2005): 17.

²⁷ Ibid.

international law can require states to punish the same crime, but how the states will punish it is still left within their discretion depending on moral and cultural values held in that particular society. “Criminal law itself is full of trying moral questions that are difficult to decide outside the frame of reference that a political community and its norms provide.”²⁸ These are not simply a matter of legal, but also moral and cultural issues that require a certain level of insight perspective. Thus, whether a foreign court can handle a criminal case to the satisfaction of the affected individuals and community to achieve social justice and fairness is a question that needs to be taken into consideration.

The distance of a foreign court’s prosecuting a case from the community directly affected by the crime that occurred may face a democratic dilemma. While ensuring the punishment and criminal liability of the wrongdoer, the process can potentially impair the political acceptability of the concerned community.²⁹ For example, in the case of the internal conflict in the former Yugoslavia, indicted Serbs and Croats have been perceived as heroes and freedom fighters rather than “terrorists”. Most Serbs and Croats viewed the decision of the Tribunal as being “biased against their communities, and as more than willing to turn a blind eye to atrocities committed by Bosniaks.”³⁰ Although this case was handled by an ad hoc international Tribunal, similar concern can be perceived if a foreign court attempts to undertake a criminal proceeding against an offender found in its territory in the absence of any other link with its jurisdiction. And as a result, this process of remote adjudication can undermine the legitimacy of the decision, especially by the court that is not directly accountable to the affected individuals and weakens the relationship with the local community. An absence of an understanding of historical and political context may run the risks of arbitrariness on prosecutors and

²⁸ Jenialontcheva Turner, *Ibid.*, p. 18.

²⁹ *Ibid.*, p. 24.

³⁰ *Ibid.*, p. 25 (citing Sandra Coliver, “The International of Criminal Tribunal for the Former Yugoslavia to Reconciliation in Bosnia and Herzegovina,” in **International Crime, Peace, and Human Rights**, ed. Dinah Shelton (Ardsley, NY: Transnational Publishers, 2000), pp. 19-20.

judges.³¹ Judging or making decision by some foreign judges who are not accustomed to the culture, tradition and history of the country where international crime took place can be far from restoring peace and reconciliation to the local community since the process requires a government of the territory in conflict or where violent crime happened to address its own pasts as a way of building towards national peace and reconciliation.

4.2 Due Process of Law

Due process in the international criminal justice is another area to be taken into consideration when applying the principle of universal jurisdiction since the concept of due process links closely to the issue of human rights. The concept refers to the requirement of a proper legal process to ensure the individuals' fundamental fairness and justice.³²

Although the exercise of universal jurisdiction by foreign courts may promote justice in the sense that it has been used to suppress impunity, and bring offenders to justice, it sometimes comes at the expense of human rights violation. "By vesting individual nations with worldwide prosecutorial power...the universal jurisdiction is subject to potential manipulation and abuse...[as] [t]here is also no assurance that the prosecuting nations will apply fair standards of criminal procedure in adjudicating these cases."³³

³¹Supra note 6, p. 93.

³²Although the concept of due process has been widely interpreted in the common law system, the term used in this article is limited to "procedural due process" used in the American common law to refer to "a course of formal proceedings (as judicial proceedings) carried out regularly, fairly, and in accordance with established rules and principles." Due process guarantees that there is a fair-decision making process before official action is taken which directly impairs a person's life, liberty or property. *In re Singh*, 123 F.R.D. 108, 125 (D.N.J. 1987)(emphasis added).

³³Curtis A. Bradley, "Universal Jurisdiction and U.S. Law," **University of Chicago Legal Forum** 2001 (1): 325.

The issue of a violation of a fundamental due process required for an individual reflected in the prosecution case of the former Chilean President Augusto Pinochet. In 1998, Britain detained the former Chilean President Augusto Pinochet due to the extradition request of Spain for a crime he committed against the Spanish in the territory of Chile. The former president was accused of perpetrated systematic human rights abuse. Thus, in 1998, the British Supreme Court rendered its decision against the former President based on the principle of international law.

³⁴ However, such a decision was a subject of criticism due to the way his trial was handled which allowed a prolonged detention of the accused without probable cause in the violation of due process of law.³⁵ The arguments against the exercise of universal jurisdiction by a third country concerning the issues of due process include the unfamiliar criminal system the offender must face, the selection of rule of evidence and legal norms to be applied, and the way the defendants' rights will be safeguarded. In such a case, the universal jurisdiction principle can subject the accused to the possibility of prosecution by the third country national judge without due process safeguard and institutional restraints.

The issue of a potential violation of due process can also be present in the extradition procedure that is to say “[o]nce extradition procedures are in train, they develop momentum on their own. The accused is not allowed to challenge the substantive merit of the case and instead is confined to procedural issues...”³⁶ This restriction has something to do with the determination of “dual criminality”, as a standard requirement for extradition treaty, by the court which refers to a conduct that must be a crime in both requested and requesting countries. In a certain common law country such as the U.S., a mirror image analysis will be performed to

³⁴ Supra note 6, p. 90.

³⁵ “But that principle did not oblige the lords to endow a Spanish magistrate, and presumably other magistrates elsewhere in the world - with the authority to enforce it in a country where the accused had committed no crime, and then to cause the restraint of the accused for 16 months in yet another country he was equally stranger.” Curtis A. Bradley, *Ibid.*

³⁶ *Ibid.*, p. 91.

determine whether the conduct would have been a crime if committed in the U.S.³⁷ Once, double criminality is established, the chance for the accused to contest his or her guilt will be limited in the process. Furthermore, while waiting for the consideration of the claim by the judicial system of the country from which the extradition is sought, the accused can remain in a prolonged detention without charge.³⁸

4.3 Resources

Another area of challenge is the issue of the availability of resources. The prosecution process in the remote jurisdiction oftentimes require access to or transfers of witnesses, documents and evidence from somewhere else to establish the accused's criminal liability. In the case of the International Criminal Tribunal of the former Yugoslavia (ICTY), the prosecutor chose not to pursue the charge "on the ambiguous ground of an inability to collect evidence".³⁹ And due to the distance of crime, the tribunal had trouble pinpointing individual responsibility of people who were involved in the atrocity.⁴⁰ The tribunal also faced similar difficulty in securing first-hand accounts of crimes in Rwanda cases. Lawyers were then required to travel abroad to see the witnesses in person to secure evidence.⁴¹ Access to witnesses and evidence can be limited. And the way foreign investigators and prosecutors approach the witnesses must be carefully done to avoid cultural and personal offenses as well as to accommodate their personal safety. And because of the prosecution on the foreign soil, witness protection cannot be fully enforced or

³⁷ Jacques Semmelman and Karen Snell, **Defending the International Extradition Case** [Online], available URL: <https://www.curtis.com/siteFiles/Publications/82E63C70F97081C764CA7C35F3837222.pdf>, 2006 (June).

³⁸ *Supra* note p. 33 at p. 92.

³⁹ *Supra* note 6, p. 94.

⁴⁰ *Ibid.*, p. 93.

⁴¹ International Federation of Human Rights, **Universal Jurisdiction Trial Strategies: Focus on Victims and Witnesses** International Federation of Human Rights [Online], available URL: https://www.fidh.org/IMG/article_PDF/article_a8886.pdf, 2009 (November, 9-11).

guaranteed for the witnesses who still remain in the country where violent crime took place. In Rwanda cases, the concern of witness protection turned foreign prosecutors to obtain witnesses either in their territory, Europe or America to overcome the witnesses' fear and suspicion.⁴² Their reasons for suspicion which can be political climate, intimidation and other reasons inadvertently become obstacle to the administration of criminal justice. The costs of prosecution abroad under the universal jurisdiction principle, thus, do not only involve the expenses of accessing to and transferring witnesses, victims and evidence, but also other areas of sensitivity such as the respect of culture or personal safety which must be factored in the restoration of justice to the global society.

4.4 Foreign policy

Upholding the universal jurisdiction principle also has a significant implication on foreign relations and foreign policy since jurisdiction is a manifestation of state sovereignty. Therefore, any extraterritorial application of foreign jurisdiction can potentially lead to international disputes between states.⁴³ Several international treaties that incorporate the notion of universal jurisdiction as part of an enforcement mechanism provide the right for the state where the alleged offender is found to take up the case, if it does not wish to extradite the person. In such a situation, the clause automatically excludes the others that may have an interest in asserting their jurisdictions, whether based upon nationality or protective principles. There is, thus, a potential rivalry of asserting state jurisdiction, which can be for several reasons, especially for a political one. History has also shown that the danger of a foreign court in an attempt to prosecute an offender, especially in the case of foreign leaders, will undermine international foreign relations.⁴⁴ And when the exercise of universal jurisdiction is driven by a political motive, the cost of upholding the principle of fairness in the criminal justice is certainly higher.

⁴² International Federation of Human Rights, *Ibid.*, p. 29.

⁴³ Kraytman, *supra* note 11, p. 95.

⁴⁴ *Supra* note 33, 325.

In light of its perception as a threat towards national sovereignty and the interference of domestic affairs, the principle of universal jurisdiction is oftentimes believed to create hostility among states, especially on the issue of state immunity which had generated concerns over its legal and political implications. Under certain circumstances, the principle could operate to circumvent the doctrine of state immunity under which foreign government officials, despite acting in their official capacities while committing a wrongful act, can be overhauled to be tried by an international court or a special foreign court, in an absence of the court's traditional jurisdiction, such as in the cases in which foreign leaders were tried by the Special Court for Sierra Leone (SCSL), the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda.⁴⁵

Although, having an implication of foreign relations does not always mean a negative impact, and in many cases, international treaty framework provides a basis for state cooperation and mutual legal assistance, states still find that the state cooperation framework is not effective in practice and can pose a challenge to the maintenance of international relations. The discretionary loopholes in the international treaty framework usually permit the requested state to deny cooperation on several inappropriate grounds, such as the dual criminality requirement or insufficiency of human rights safeguards.⁴⁶ This reaction can send out a negative message to the requester in terms of the distrust in the capability of their criminal justice administration.

5. Summary

Universal jurisdiction can serve as a tool to achieve international justice for victims of international crime. And as terrorism is recognized as a type of international crimes, namely crime against humanity due to its degree of social,

⁴⁵ Cesare P.R. Romano and André Nollkaemper, **The Arrest Warrant Against the Liberian President, Charles Taylor** [Online], available URL: <https://www.asil.org/insights/volume/8/issue/16/arrest-warrant-against-liberian-president-charles-taylor>, 2003 (June, 20).

⁴⁶ Supra note 41, p. 9.

political and economic impacts on the global community, one can easily argue why the principle of universal jurisdiction is appropriate and should be invoked to apply to such a case to restore social justice, especially for the victims of violent crime. But the question we are dealing with is not only whether the perpetrator is being brought to trial, but also how justice is being done to ensure that the parties at stake receive their fair shares of justice. Universal jurisdiction might not practically be as good as it sounds principally. There are, of course, limitations to be taken into consideration in the application of the principle. The exercise of a national court jurisdiction pursuant to the principle should be done with careful consideration. The objective of this article is not intended to discourage the invocation of the universal jurisdiction principle, but only to raise potential issues and challenges that we must overcome for the maintenance of criminal justice.

Whether universal jurisdiction is a friend or foe of the criminal justice system, it may depend on how we define criminal justice. In a narrow interpretation, if criminal justice refers only to the process for suppression or deterrence of crime, then universal jurisdiction can certainly be counted on as a “friend”. On the other hand, in a broader interpretation, if the criminal justice is recognized as the process to deliver and restore social justice by upholding the principle of fairness for all the parties at stake, then it might have to work harder to fit in that term. Thus, universal jurisdiction can be applied complementarily and should not be excessively relied on as it has been suggested by Christopher Hall that “[a]long with international criminal courts and national courts exercising territorial active or passive personality jurisdiction or protective jurisdiction, universal jurisdiction must not be seen as operating in a vacuum. It has a dynamic relationship with the other forms of jurisdiction and it is almost always used only when national and international courts have failed to exercise these other forms of jurisdiction”.⁴⁷

⁴⁷ Christopher Hall is Senior Legal Adviser, Internal Justice Project at the International Secretariat of Amnesty International. Supra note 41, 8.

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