Pakistan Journal of Criminology
Vol. 15, No. 03, July-September 2023 (183-195)

An Analytical Study on the Conflicts Regarding the Exercise of Universal Jurisdiction by States over Crimes against Humanity

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Abstract

This article analyses the conflicts regarding the exercise of universal jurisdiction by states over crimes against humanity. The universal jurisdiction of a State over crimes against humanity is divided into two types: absolute universal jurisdiction and limited one. The former will bring about severe international conflicts. The international community has been working to coordinate or resolve these conflicts. In 2019, the Commission completed the second reading of the Draft Articles on Prevention and Punishment of Crimes against Humanity and submitted it to the United Nations General Assembly, but its role in addressing the above problems was limited. In the future convention, five points are worth: to specify the time conditions under which a State has universal jurisdiction on the crime; to determine that the defendant's country has limited universal jurisdiction instead of granting absolute universal jurisdiction to states; according to the principle of complementarity in international criminal law, only when the relevant country cannot exercise universal jurisdiction over this criminal, other countries or international organizations can replace the exercise of that jurisdiction; to add liability clause when a country fails to fulfil its jurisdictional rights, to clarify whether senior officials of a country have immunity when committing this crime.

Keywords: Crimes against Humanity, Universal Jurisdiction, Jurisdiction Immunity, Rome Statute, International Criminal Law

1. Introduction

On October 15, 2020, at the general debate on crimes against humanity held by the Legal Committee of the 75th United Nations General Assembly, ambassador Geng Shuang set forth China's principled position on the issue of whether to formulate a convention on crimes against humanity. Ambassador Geng Shuang stated that the draft articles on preventing and punishing crimes against humanity are an essential achievement of the International Law Commission's work in recent years. China is grateful for the Commission's hard work and

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realises the significance of preventing and punishing crimes against humanity. As for whether to form a specialised treaty on the foundation of draft articles, China's principled position includes the following: Firstly, a clear conception of crimes against humanity is a prerequisite for formulating a treaty. Secondly, the formulation of the convention should also thoroughly consider the state's practice. Thirdly, the formulation of the convention should be carried out in the context of unity and cooperation as well. Therefore, China believes that the conditions for formulating a treaty on this crime are not sufficient in the current situation.

From April 10 to 14, 2023, the Sixth Committee (Legal Committee) of the 77th United Nations General Assembly held a resumed session in New York. At this resumed meeting, all parties agreed to work together to combat crimes against humanity, but there are still significant differences on whether to formulate a convention. The Chinese delegation actively participates in discussions and reiterates its consistent position supporting the fight against serious international crimes. It welcomes substantive discussions on the legal issues related to the draft articles and points out that the draft articles are not a zero text for convention negotiations, and whether and when to conclude a treaty is up to the Sixth Committee of the UN General Assembly to decide two resumed sessions. The Chinese delegation mainly clarifies the following views: firstly, any measures to combat crimes against humanity, including exercising jurisdiction, conducting extradition, judicial assistance, etc., should comply with international law, particularly important to respect the sovereignty of other countries and not interfere in their internal affairs, respecting the criminal jurisdictional immunity enjoyed by foreign officials under international law, and opposing political manipulation. The second is that the Rome Statute is far from a universal convention, and its definition of crimes against humanity is too broad to copy, and contracting parties to the Rome Statute cannot impose this definition on non-contracting parties. Thirdly, countries should combat crimes against humanity, but the requirements imposed by the draft articles are too broad. Based on achieving the goal of effectively preventing and punishing crimes against humanity, it is necessary to consider each country's national conditions and legal systems and distinguish relevant requirements into mandatory and non-mandatory requirements. Countries should be allowed to decide whether and how to implement non-mandatory requirements independently. Fourthly, there is no international consensus on whether universal jurisdiction, the principle of non-refoulement, can be applied to crimes against humanity and whether legal persons must bear criminal responsibility. Further research is needed on related issues.

Currently, China supports all parties to review and analyze the experience of relevant conventions, fully exchange views, coordinate the political demands of

all parties, and strive for maximum consensus. Therefore, this article believes it is necessary to strengthen research on crimes against humanity from an aspect of international practice.

2. Recent Developments in Crimes against Humanity and Universal Jurisdiction

Although there is still controversy in the academic community regarding the beginning of crimes against humanity, the first legal document that introduced its definition was the 1945 Nuremberg International Military Tribunal Charter ("Nuremberg Tribunal Charter"). Subsequently, in 1998, after decades of development in public international law, the Rome Statute of the International Criminal Court(abbreviated as the Rome Statute) defined crimes against humanity as "widely or systemic" criminal acts committed intentionally by the perpetrator against "any civilian". Article 7, paragraph 2 of this statute also lists 11 specific charges and crimes recognized as crimes against humanity. However, there is still controversy over the interpretation of specific terms in these definitions, such as the requirement to establish a connection between "attack" and "policy", as well as the mental elements that constitute "discrimination" against a specific type of person.

The concept of universal jurisdiction can be traced back a long time, and its definition is still debated in scholarly circles. However, scholars have identified common elements in their definitions of universal jurisdiction from different perspectives:

1. The applicable entities include States, as in most cases of international crimes, sovereign States carry out prosecution in international judicial practice.
2. The crimes in question are international and carry significant implications for the collective well-being of the global community.
3. There is no requirement for a "connection" with the state.

Universal jurisdiction aims to supplement the inadequacies of territorial, personal, and protective jurisdiction based on State sovereignty to prosecute international crimes that violate the collective well-being of the global community. Thus, a "connection" with the state is not necessary. There is a trend towards broadening the scope of universal jurisdiction from being a prerogative of States to becoming a binding duty. For example, the International Criminal Court (ICC) has expanded its jurisdiction to encompass non-contracting parties and provides concrete evidence supporting this claim.

4. The Basis and Nature of Exercise of Universal Jurisdiction by States over Crimes against Humanity

When a country exercises jurisdiction over crimes against humanity, such as murder, extermination, slavery, etc., the country has legislative, law enforcement, and judicial power over the individuals, entities, and matters involved in such crimes. This power of States is not subject to interference or infringement by any other State (Malcolm N. Shaw, 2006). However, the application of universal jurisdiction is constrained by relevant provisions of international law, mainly when it involves the territorial sovereignty of other States.

Currently, there are two primary approaches through which States exercise universal jurisdiction over perpetrators of this crime. The initial measure involves the incorporation of provisions on this crime from international law into domestic legislation. The second approach entails directly invoking relevant provisions from international law sources, including international treaties and customary international law. In short, international law is the legal fundamental for countries to exercise universal jurisdiction over this crime, and countries promote the exercise of universal jurisdiction through domestic legislative procedures.

The most important sources of law of this crime come from international treaties and customary international law. Whether States exercising universal jurisdiction over these crimes can be elevated to customary international law is still debated in international legal theory and practice. Following the Second World War, the *Nuremberg Charter* and the *Tokyo Charter* provided that each country had jurisdiction over criminals who committed serious international crimes. Multilateral treaties such as *the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* all have legal provisions that more or less define crimes against humanity and specific crimes, explicitly conferring universal jurisdiction on State parties and imposing obligations to "either extradite or prosecute" (*aut dedere aut judicare*) those crimes. However, this does not imply that the conventions mentioned above directly confer jurisdiction on States over "crimes against humanity" as an entirety; instead, they confer it over specific crimes in the respective conventions.

The inclusion of Crimes against Humanity in international documents marks a significant milestone in human history. It represents the first time that such crimes were explicitly recognized and codified within the system of international law. Article 7 of the Rome Statute clearly defines this crime, including 11 acts of murder, extermination, enslavement, expulsion, or forced relocation of populations committed as part of a vast or systemic assault against

any civilian. The proposal of crimes against humanity has a value-based concept; everyone is equal and should enjoy fundamental human rights, such as life, health, and development. The birth of crimes against humanity signifies that human civilization has broken through the limitations of centralization and nationalism.

However, the *Rome Statute* only affirms the right of territorial jurisdiction of a country over one whose conduct was committed inside its territory. It affirms the personal jurisdiction of a state over those charged with severe international crimes who have the nationality of that country without addressing the conception of universal jurisdiction. Furthermore, in 2006, the plenary session of the Rome Statute voted to adopt a resolution urging States parties to provide relevant provisions for grave international crimes in their domestic legislation to ensure the complementary jurisdiction of the ICC (ICC-ASP/5/Res.32006). However, the term 'urge' indicates that exercising jurisdiction over grave international crimes is not an obligation of the contracting parties but rather a voluntary choice.

In conclusion, states exercise universal jurisdiction over this crime based on international treaties rather than customary international law. Based on relevant conventions, the performance of universal jurisdiction by States over specific crimes under the umbrella of crimes against humanity is not only a right but also an obligation. However, this does not mean that the performance of jurisdiction by the state over the crime is a general obligation. This indicates that the characteristic of crimes against humanity is closely related to politics. Due to this distinctiveness, the legislative enactment of crimes against humanity by State parties to relevant conventions is considered a right rather than an obligation. Perhaps, as a result, there are significant differences in the provisions of this crime in domestic legislation among countries.

4. Legislative Landscape of Exercise of Universal Jurisdiction by States over Crimes against Humanity

Unlike the specialized convention on genocide, the specialized treaty on crimes against humanity has been under discussion. No international legal provisions mandating countries to provide relevant provisions on crimes against humanity in their domestic laws have not yet been introduced. A survey conducted by the George Washington University Law School in July 2013 revealed that out of 193 United Nations member States, 104 States had identified crimes against humanity as offences under their domestic laws, while 80 out of 121 contracting states to the *Rome Statute* have stipulated relevant provisions in their domestic legislation (UNILC, 2015). States such as Israel and Belgium introduced crimes against humanity into their domestic legal system, and States like Australia, Finland, and Norway have explicitly expressed to the United Nations that their

domestic courts can exercise universal jurisdiction over this crime (M. Cherif Bassiouni, 2004). Currently, domestic law provides for two types of universal jurisdiction. These are absolute universal jurisdiction and limited universal jurisdiction. The former allows the exercise of jurisdiction over criminals who have not entered a country's borders from the perspective of the harmful consequences of the crime. Examples of such provisions are the Italian Criminal and *German Penal Code*. The latter model requires the occurrence of the criminal within a country's borders, jurisdiction can only be exercised, and prosecution can only be conducted once the state has gained actual control over the individual responsible for the crime. *Canadian Crimes Against Humanity and War Crimes Acts typically represent this type*. The exercise of limited universality is regarded as a constraint on the sovereignty of other States, aimed at upholding international order and everyday interests rather than encroaching upon the sovereignty of other States.

5. Conflicts Happen in the Exercise of Universal Jurisdiction by States over Crimes against Humanity Conflict with the Sovereignty of Other States in the Exercise of Universal Jurisdiction by States: (The Eichmann Case)

In Eichmann's case, despite the UN Security Council tacitly endorsing Israel's exercise of jurisdiction (Li, 2013), it also acknowledged that Israel's actions infringed upon Argentina's sovereignty. Adolf Eichmann, a leading figure in the Hitler government during World War II, participated in the large-scale massacre of Jewish people and was accused of crimes against humanity. Eichmann managed to evade the Nuremberg International Military Tribunal trial through various hiding tactics. In 1960, when the Israeli intelligence department learned that Eichmann was hiding in Argentina, its staff secretly infiltrated Argentina to kidnap and transport him back to Israel in order to put him on trial. Ultimately, Israel and the Argentine government made a joint declaration in which Israel recognized that it violated the principle of sovereignty in international law, infringed on Argentina's sovereignty and apologized to the Argentine government. The Eichmann case illustrates that allowing absolute universal jurisdiction to exist would inevitably impact the sovereignty of other States.

6. Conflict with Other Jurisdictions in the Exercise of Universal Jurisdiction by States: (The Simbikangwa Case)

In the Simbikangwa case, the Rwandan and French governments actively asserted jurisdiction over Simbikangwa, leading to a positive conflict of jurisdictions. The conflict arose from two main reasons over the exercise of universal jurisdiction and or concurrent jurisdiction. Rwanda had territorial

jurisdiction over the perpetrator, while France had actual control over Simbikangwa, allowing it to exercise limited universal jurisdiction. Both Rwanda's and France's jurisdictions had legal bases in international law. Rwanda perceived France's refusal to extradite the accused as support for the former Hutu government, leading to a deterioration of bilateral relations (Arrêt criminel, 2014). Although United Nations General Assembly Resolution 3074 indicated that the territorial state's jurisdiction over the case takes precedence over other States' jurisdiction and that other States should assist in extraditing the perpetrator, such resolutions do not have binding legal force. There is currently no clear hierarchy of jurisdictional precedence internationally, so France's refusal to extradite Simbikangwa does not violate international law.

7. Conflict with Jurisdictional Immunity in the Exercise of Universal Jurisdiction by States: (The Cases of Arrest Warrant, Bashir, and Pinochet)

Sovereign equality is an essential principle of international law. Jurisdictional immunity is born based on this principle. It originates from the customary international law rule that "equal sovereigns have no jurisdiction over one another" and implies that foreign courts or tribunals cannot exercise jurisdiction over the acts or property of other sovereign States. Since the "State" is an abstract entity and State actions are carried out by specific individuals, customary international law considers individuals representing the state in a series of actions should also enjoy jurisdictional immunity (Zhu, 2015).

In the Congo v. Belgium Arrest Order case, the Brussels Court of First Instance in Belgium made a warrant for apprehension for Minister Ndombasi of Foreign Affairs of Congo based on absolute universal jurisdiction for his alleged involvement in inciting violence and planning genocide on April 11, 2000 (Ye, 2018). Soon after, Congo sued Belgium in the International Court of Justice (ICJ), stating that Belgium's domestic law allowed it to bring charges against Congolese government officials, thereby extending the effect of Belgian domestic law extraterritorial. On April 14, 2002, the ICJ issued a court decision partially affirming the Congo's position and ordering Belgium to revoke the arrest warrant against Congolese officials. In the final judgment rendered by the court, it was not explicitly determined whether Belgium could exercise jurisdiction over this crime, but the judgment held that the Minister of Foreign Affairs had jurisdictional immunity. Belgium's apprehension of Ndombasi went against the provisions of customary international law (Arrest Warrant, 2000).

On March 4, 2009, the ICC issued an apprehension warrant for Sudanese President Bashir on suspicion of committing war crimes and crimes against humanity in the Darfur region of Sudan. This is the first time the ICC has made a

presidential apprehension warrant for current leaders of sovereign countries. (The Prosecutor v. Omar Al Bashir, 2009). In July 2010, the ICC issued a supplementary arrest warrant (Second Decision, 2010). Despite these arrest warrants, Bashir made several State visits to countries contracting States to the Rome Statute, such as the Congo and Jordan, without being arrested or extradited. For the same reason, both Congo and Jordan believed that Bashir, as the head of state, could not be prosecuted in international law because of his diplomatic immunity (Prosecutor v. Omar Al Bashir, 2014).

In September 1998, former Chilean president and senator for life Pinochet travelled to the United Kingdom for medical service using a diplomatic passport. The London police arrested Pinochet based on an international arrest warrant issued by a Spanish judge and an Interpol notice, leading to protests from Chile. After a series of twists and turns, considering Pinochet's poor health, the British court ultimately refused Spain's extradition request and allowed him to return to Chile. This case caused a major controversy in the world community. The ICC found that Sudan was negligent in exercising its jurisdiction over this case and therefore issued an international warrant for apprehension against an on March 4, 2009. In July 2010, the ICC issued a supplementary arrest warrant requesting that Bashir be arrested and handed over. Since receiving two arrest warrants, Bashir has visited countries contracting states to the Rome Statute, such as the Democratic Republic of Congo and Jordan, but these countries have not arrested or handed him over. In that case, the State party questioned whether al-Bashir enjoyed immunity from jurisdiction. Congo proposes that according to Article 98 of the Rome Statute, the head of state of a non-contracting state enjoys jurisdictional immunity, while Sudan is not a party and therefore al-Bashir still enjoys jurisdictional immunity and the ICC has no right to arrest him. Jordan maintains that the ICC's issuance of an arrest warrant signifies an intention to bring the al-Bashar case to trial, but the ICC should also regard the situation of the state parties. The arrest of al-Bashir means that Jordan is exercising domestic criminal jurisdiction over him, and the exercise of domestic jurisdiction still considers al-Bashir's diplomatic immunity as head of state.

In the cases of Bashir and Pinochet, jurisdictional immunity was not recognized even when the criminals of crimes against humanity were heads of state. Although the jurisdictional entities in these two cases differed, and the circumstances were not identical, they both demonstrated that jurisdictional immunity is not an absolute barrier. Furthermore, States in practice may deny jurisdictional immunity to the "Three Separate Heads of Immunity" (Michael Wood, 2012, pp. 35-98.) accused of serious international crimes. However, these

breakthroughs in practice are unstable and still require the affirmation and guarantee of relevant international law.

8. The Approaches to Resolving Conflicts from the Perspective of the Draft Articles

As of 2019, the ILC has completed the second reading of the Draft Articles on the Prevention and Punishment of Crimes against Humanity, followed shortly by the adoption of commentaries on the Draft Articles. The current draft clarifies that States have the right to jurisdiction over cases of crimes against humanity and imposes obligations on States to define them as criminal offences in domestic law and establish jurisdiction. However, the existing provisions have limited effectiveness in addressing the mentioned issues.

Firstly, Article 7(2) of the Draft Articles stipulates that if the state where the criminal is located refuses to extradite or surrender the offender, it should establish jurisdiction over the crimes described in this draft. However, it does not specify the time conditions under which a country can exercise universal jurisdiction. In practice, some States initiate investigations into the case before the criminal enters their territory, which can conflict with the sovereignty of other States.

Secondly, Article 7(3) of the Draft Articles allows contracting States to establish other bases of jurisdiction to prosecute accused offenders, provided that the establishment of such jurisdiction does not violate any rules of international law. However, since there is no prioritization among various jurisdictional principles, it is inevitable that conflicts of jurisdiction will arise.

Thirdly, there is a theoretical contradiction regarding whether jurisdictional immunity applies to offenders of this crime, and disputes exist in practice. Article 6(5) of the Draft Articles states that each country should stipulate in its criminal law that holding public office cannot be a reason for criminals not to bear criminal responsibility. Although this article clarifies the "official position irrelevance", it does not necessarily negate the jurisdictional immunity of foreign senior governmental officials. Therefore, it remains unclear whether the non-immunity of senior officials would encroach on the sovereignty of other States. Furthermore, while the Draft Articles impose several obligations on States, they do not explicitly specify the responsibilities when States fail to fulfil their corresponding obligations.

In the 3499th meeting held in 2019, the committee recommended that the General Assembly or *Special Committee* introduce a specialized convention based on the draft articles. According to the Draft Articles, Drafting a convention presents an excellent opportunity to address the issues mentioned above.

Firstly, when investigating relevant cases, States should fully respect the sovereignty of other States and exercise jurisdiction over cases only when there are sufficient connections to their jurisdiction while also considering the limits of exercising power. The convention's preamble should explicitly state that "contracting members shall abide by the principle of respecting other country's sovereignty."

Secondly, during the deliberations on the Draft Articles, Argentina argued that the relevant articles of the draft limit the broader concept of "universal jurisdiction." At the same time, France believes that States should be granted procedural freedom when establishing national jurisdiction" (United Nations, ILC, 2019). This article believes that granting States excessive extraterritorial jurisdiction may be used for political purposes. It is reasonable for the Draft Articles to grant limited universal jurisdiction to the state where the criminal is present, and it should also clarify the specific time when the state conducting the investigation can conduct an investigation, the prosecution, and the trial of the case, only after the offender is indeed present within its territory.

Thirdly, there have been different opinions in the academic community regarding whether a principle of priority jurisdiction should be established for international crimes (Zhang, 1999, p.97). Some scholars argue that establishing a hierarchy of jurisdiction can resolve jurisdictional conflicts and maintain international order. However, other scholars believe that even if a priority jurisdiction order is stipulated, it may not be implemented in practice. Regarding this crime, the Draft Articles explicitly specify the obligation of contracting States to extradite and include detailed extradition articles. Therefore, it is necessary and possible to establish a clear priority order of jurisdiction for crimes against humanity. As for establishing the priority order of jurisdiction, some scholars propose that the country where the crime occurred, the nationality of the criminal, and the state whose interests are harmed and have the closest connection to the case should enjoy priority jurisdiction. At the same time, other States can exercise jurisdiction according to the theory of universal jurisdiction only when the States, as mentioned above, cannot do so (Gao, 1993). Some scholars argue that the state exercising actual control over the perpetrator should have priority jurisdiction (Zhang, 1999). This article believes that when establishing the hierarchy of jurisdiction, the following factors should be considered: first, territorial jurisdiction takes priority, and second, universal jurisdiction supplements it. This article entirely agrees with M. Cherif Bassiouni's proposed order of jurisdiction in his *A draft international criminal code and draft statute for an international criminal tribunal*, which is the state where the elements of the crime occur, the criminal's nationality State, the nationality of the suffering, and the State where the

perpetrator is present. Chinese scholars have also proposed similar priority jurisdiction theories (Lv, 2004). This article suggests that Article 7 of the Draft Articles should be amended: "The order listed in this article represents the priority order of jurisdiction. The country where the accused criminal is present must extradite them to the requesting state. Only when none of those mentioned above States can or are unwilling to exercise jurisdiction, can the state where the accused criminal is present exercise jurisdiction."

Fourthly, a legal system without accompanying responsibilities may become mere empty words. Therefore, the Draft Articles should stipulate the responsibilities that States should bear when they fail to fulfil their corresponding obligations, urging States to voluntarily assume their national responsibilities and fulfil their international legal obligations. Some States may be "unable to" exercise jurisdiction over crimes against humanity due to objective conditions. Therefore, this section mainly focuses on the responsibility of countries "unwilling" to exercise jurisdiction. The criteria for determining whether a State is "unable to or unwilling to" can refer to the relevant legal provision of the Rome Statute.

Fifthly, in future conventions, it should be explicitly stated that, given the heinous nature of crimes against humanity, including any government officials, including the "Three Separate Heads of Immunity" (Michael Wood, 2012,) and individuals involved in diplomacy and particular tasks, they do not enjoy jurisdictional immunity when committing crimes against humanity. Moreover, when conflicts arise between the obligations stipulated in the convention and those stipulated in bilateral treaties between States, the obligations specified in the convention should take precedence. This is because explicitly excluding jurisdictional immunity for crimes under the context of crimes against humanity coincides with the development direction of International humanitarian and international human rights causes. Similar international legal documents, such as the convention on the Prevention and Punishment of the Crime of Genocide, stipulate that the country's chief and other government administrators cannot enjoy prosecution immunity if they violate treaty articles (Ye, 2018). Secondly, clarifying that the criminals of crimes against humanity do not enjoy jurisdictional immunity will help reduce communication disorder between countries and between countries and the ICC and improve the effectiveness of cooperation.

9. Conclusion

Keeping in view the above analyses it is understandable that the 3499th session, held in 2019, the ILC recommended that the General Assembly must prepare a treaty on the foundation of the draft articles, which provided an excellent opportunity to resolve the abovementioned problems. There is still a long way to

go to implement adequate jurisdiction over these severe international crimes against humanity to punish criminals and protect fundamental human rights, which requires continuous efforts in both theory and practice. The five points of view of this article puts forward hope that it could contribute to this issue and invite more discussion on the problem. In the end, punishing crimes against humanity and effectively promoting and defending fundamental human rights depends on the active participation and cooperation of all sovereign States.

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