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The Legitimacy and Rationality of Universal Jurisdiction

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Abstract: In March, the ICC issued an arrest warrant for Putin, meaning that International Criminal Court (ICC) member states, including South Africa, are obliged to arrest him and transfer him to The Hague for trial if he sets foot on any of their territories. But the recent indictment of the South African government for its public refusal to execute an arrest warrant as a member of the International Court of Justice has again raised questions about international crime and the willingness of states to get involved in it. This paper attempts to discuss the relevant issues of universal jurisdiction from the perspective of case studies, normative analysis and social effects of legal norms, and finally concludes that universal jurisdiction lacks the necessary elements to form customary international law at the level of legal norms, and universal jurisdiction fails to achieve its purpose at the level of practical effects, and lacks the rationality of existence. At the same time, given the current reality of the exercise of universal jurisdiction, this paper suggests that the types of international crimes should be strictly limited, the universal jurisdiction should be separated from states, and the authority of the exclusive jurisdiction of the international court for international crimes should be established.

Keywords: universal jurisdiction, opinio juris, positivist hermeneutics, enforcement jurisdiction

1. Introduction

Criminal jurisdiction is an important part of national sovereignty and belongs to the exclusive right of the state. Territorial jurisdiction arises because the sovereign has the supreme disposition of the affairs within the territory of a State; Personal jurisdiction arises from the right to rule over citizens of the same nationality; And because of the exclusive right to national interests, protective jurisdiction arises. All the above types of criminal jurisdiction can be naturally derived from the function of sovereignty. However, there exists a special type of jurisdiction which asserts that an act can be brought under the criminal jurisdiction of a State even if it has no connection with the element of sovereignty -- that is, it did not take place in the territory of the sovereign and was not committed by a citizen subject to the sovereign or against the interests protected by the sovereign -- and this jurisdiction is called “universal jurisdiction”. Universal jurisdiction has attracted people’s attention because it represents an ideal of pursuing justice beyond the boundary of sovereignty.

An early idea of universal jurisdiction can be found in Grotius’s work: “Kings and those with the highest authority have the right not only to punish acts which cause direct harm to themselves or to

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their subjects, but also to punish acts which are committed against other nations and their subjects, and which seriously violates the laws of nature and nations [1].” The practice of universal jurisdiction first appeared for specific types of crimes. This kind of crime is difficult to be punished by a single country because of the characteristics of its conduct - it is outside the national jurisdiction, so any country that arrests suspects is allowed to prosecute it as a remedy for the lack of punishment mechanism, such as piracy. Later, international conventions provided for universal jurisdiction over piracy and slave trafficking, and universal jurisdiction became a culture for the first time. After World War II, with the deepening of international exchanges, closer ties between countries and the rise of human rights theory, the theory and practice of universal jurisdiction made breakthroughs. Its scope of application has expanded to include not only core international crimes of a different nature from ordinary crimes, such as war crimes and crimes of torture, which are mainly carried out by public power and have the nature of acts of state, but also various new crimes incorporated by the international community through international conventions in accordance with the needs of The Times, such as drug trafficking crimes, terrorist crimes, the crime of organized crime and so on. Unlike the punishment of piracy, universal jurisdiction over core crimes faces a challenge to the principle of state sovereignty. Since crimes are committed directly or indirectly by States, their jurisdiction is tantamount to State sanctions against the conduct of another State and has significant implications for the State concerned and the existing international order. Universal jurisdiction thus takes on great significance and requires caution on the part of the international community.

This paper mainly discusses the legality and rationality of universal jurisdiction. The first part of the definition of universal jurisdiction, from the various elements of universal jurisdiction, including the subject, the exercise conditions, the object, as well as the crime against the view of universal jurisdiction. In the second part, the author explores the illegality of universal jurisdiction according to the two founding requirements of customary international law (whether it is universally practiced by the state and whether it constitutes legal conviction). In the third part, the author analyzes the irrationality of universal jurisdiction from the time value, the crime it targets, the legitimacy of execution, and the cost of execution. And how to adjust to this situation in the future.

2. The Concept of Universal Jurisdiction

“A worker must sharpen his tools before he can do a good job.” To study universal jurisdiction, it is necessary to clarify what universal jurisdiction is. The current international law literature lacks definition and its concepts are mainly derived from the views of scholars and international academic organizations. However, different perspectives and stances on analyzing things will naturally have different definitions of a certain thing. As a result, there are various differences in the specific definition of universal jurisdiction, which makes people confused. If the concept of universal jurisdiction is not consistent, other follow-up issues cannot be studied. It was therefore necessary to unify and clarify the concept of universal jurisdiction.

2.1. Debate on the Concept of Universal Jurisdiction

In order to show the disputes arising from the diversification of concepts, the author lists several representative definitions here. According to Kenneth C. Randall, an earlier researcher on universal jurisdiction, “Universal jurisdiction is the jurisdiction that each State has over a particular crime of general concern to the international community, regardless of the place of the crime, the nationality of the perpetrator and the victim [2].” Amnesty International, which has long followed the subject, has observed that “Universal jurisdiction is the ability of any State to impose justice on suspects who have committed crimes outside its own territory, who is not of their own nationality, whose victims are not of their own nationality, and whose crimes are not in the interests of the State [3].” According

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to Professor Shao Shaping, a Chinese scholar, "Universal jurisdiction is the jurisdiction specifically aimed at international crimes. It is the power of national and international criminal courts to exercise jurisdiction and try international crimes and criminal suspects in accordance with international law [4]." The above does not cover all the views on universal jurisdiction, but a general overview is sufficient to show that, different concepts differ on the subject of universal jurisdiction, the nature of crimes and the relationship between universal jurisdiction, and whether to emphasize the ways and conditions of exercising power. The concept of universal jurisdiction directly affects the relevant practice and normative determination, and different concepts will lead to the deviation of the determination conclusion.

2.2. Universal Jurisdiction in the Context of This Study

The author believes that the subject of universal jurisdiction should be considered as a state rather than an international court, the crime should be an international crime rather than an ordinary crime, and the applicable conditions should be different from other jurisdictions. Based on the subject of universal jurisdiction, the conditions applied and the crimes targeted, the author puts forward the following concept of universal jurisdiction: Universal jurisdiction refers to the exercise of criminal jurisdiction by a State over a crime committed outside its territory by a person who is not a citizen of that State at the time of the act against other non-citizens of that State, which is not against the specific national interests of that State. This is clear and appropriate, grasps the essential elements of universal jurisdiction, can avoid theoretical disputes, and can explore the legality and rationality of universal jurisdiction in a comprehensive and orderly way.

3. Views on the Illegality of Universal Jurisdiction

In order to establish the legitimacy of universal jurisdiction in customary international law, two essential elements must be satisfied: widespread state practice and opinio juris. Therefore, this paper will examine the legality of universal jurisdiction from these dual perspectives.

3.1. From a Widespread State Practice Perspective

It is not easy to explore whether there is widespread state practice, and it is necessary to examine whether the majority of States recognize universal jurisdiction and are willing to carry it out in practice. According to the available information, to be precise, universal jurisdiction trials have run to completion in only 16 States, 15 of which are in the "Western European and other regional groupings". More than half of the completed trials, specifically 30 out of 52, pertaining to the prosecution of war crimes and torture under domestic laws that implement a treaty obligation to do so, rather than relying on opinio juris [5]. It is difficult to determine how much State participation constitutes universal jurisdiction and how extensive State practice is formed. It is also difficult to measure with figures, which will take a longer time to investigate, but from the current practice, 16 countries cannot make the condition of widespread national practice valid. Thus universal jurisdiction has not developed into widespread State practice.

3.2. From Opinio Juris Perspective

In the context of international law, opinio juris is a term used to refer to the subjective belief of a State that it is obligated to carry out a particular action based on legal principles. This belief is crucial in determining whether the State's actions are motivated by a sense of legal obligation. Customary international law is formed when the law is convinced to exist and is consistent with almost all State

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practices. Opinio juris essentially means that the state must comply with norms, not simply out of convenience, habit, coincidence, or political expediency, but out of a sense of legal obligation.

Proving the existence of opinio juris can be challenging as it pertains to the psychological state of a state as a subject of behavior. However, various sources may be used to demonstrate it in practice. These include diplomatic correspondence, government policy statements, legal advice, official manuals, legislation, judicial decisions, legal briefs endorsed by states, ratified treaties with similar obligations, and United Nations resolutions and statements, etc. To establish the existence of opinio juris of universal jurisdiction, it is necessary to conduct research and gather information on the beliefs and practices of States regarding the legal obligations associated with specific international crimes. This entails examining State practice in relation to international criminal law, such as the exercise of jurisdiction and the prosecution of individuals for crimes such as genocide, war crimes, and crimes against humanity. By analyzing the actions and statements of States, along with relevant international legal instruments and jurisprudence, it may be possible to determine whether there is a widespread belief among States that the commission of these crimes gives rise to an obligation to exercise universal jurisdiction. The issue of jurisdiction over genocide is complex, as illustrated by the differing outcomes in cases such as the Pinochet trial, where some courts recognized universal jurisdiction, and the Javor and Munyeshyaka trials in France, which highlighted the limitations of jus cogens in establishing jurisdiction without specific treaty provisions. Additionally, victims often rely on states to adopt international laws in their domestic codes to ensure accountability for international crimes. The establishment of the ICC has addressed the lack of codification for crimes against humanity, but only a few countries, such as Spain and Belgium, have implemented universal jurisdiction laws [6,7]. Even in countries with such legislation, there can be political controversy, as evidenced by Belgium's repeal of its universal jurisdiction law. In the case of war crimes, the lack of a specific war crimes convention referencing universal jurisdiction has led to academic debate [8]. Jurisdiction in states that criminalize war crimes is usually limited to crimes committed during specific conflicts, such as the Australian War Crimes Act, which is applicable only to crimes committed by Australian citizens or residents during the Second World War in Europe. As a result, establishing opinio juris in these specific crimes can be difficult.

There have been many attempts to use the crime of piracy to justify the existence of universal jurisdiction [9,10]. Because of the need to combat the crime of piracy, States should have the power of universal jurisdiction, and on the surface, the crime of piracy is the most reliable link to establish the effectiveness of universal jurisdiction. There are, however, two points worth considering. First, the crime of piracy does not involve states or regimes. Piracy may only be an unauthorized act of violence, which does not involve the politics and sovereignty of a State, from which it is inappropriate to deduce the rationality of universal jurisdiction for a series of other international crimes related to sovereignty. Secondly, starting from a single crime, it is not strict to prove the legitimacy of a universal power. If universal jurisdiction is only universally recognized in the crime of piracy, and is always disputed in other crimes, it just shows that the existence of this power is flawed. In the case of piracy, a more effective approach could be establishing regional cooperation among coastal states to combat piracy, rather than relying on the exercise of universal jurisdiction to address all piracy-related crimes. This approach would involve States working together to develop and implement coordinated strategies to prevent and respond to piracy, such as conducting joint patrols of shipping lanes and sharing intelligence and resources. While the exercise of universal jurisdiction may be necessary in some instances to ensure accountability for piracy-related crimes, it can be challenging to apply in practice due to issues such as jurisdictional conflicts and the difficulty of apprehending and prosecuting pirates. In contrast, regional cooperation can provide a more practical and effective means of addressing piracy, as it allows States to pool their resources and expertise to combat this common threat. By promoting regional cooperation and collaboration, States can work towards

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addressing the root causes of piracy and creating a more stable and secure maritime environment. This approach would not only help to combat piracy but also contribute to the development of stronger relationships between coastal States and the promotion of international peace and security.

4. Arguments about the Unreasonableness of Universal Jurisdiction

The practical value of jurisdiction, as a power to determine whether the court can try a case, should be considered in the first place. Therefore, the purpose and ultimate practical effect of the establishment of universal jurisdiction are the important basis for judging its legitimacy. Accordingly, this paper considers that there is some unreasonableness in the establishment of universal jurisdiction.

4.1. The Unreasonableness of Universal Jurisdiction Based on Legal Sources

From the perspective of legal sources, it is difficult for positivist hermeneutics to justify universal jurisdiction. Positivist hermeneutics refers to the interpretation of a principle or concept in accordance with existing laws. Inquiry into the source of law is an important way to study the reasonableness of a provision. Some scholars have proved the objectivity of inquiry into the source of law by investigating the existence of the principle of universal jurisdiction in domestic positive law, because it is formulated with the agreement of domestic legislatures (domestic law) [10]. As H.L.A. Hart put it, the sources of law are finite and are determined by a particular legal system, which is comprised of diverse social facts that exist within a specific country or region and a particular social group [11]. Therefore, the social facts that underpin the validity of laws vary across different countries, making it difficult to simply transfer or convert laws from one legal system to another. This creates challenges in explaining universal jurisdiction through the lens of positivist hermeneutics. In other words, Hart's view suggests that laws are not universal and are instead shaped by the unique social and cultural contexts in which they are created. As a result, the concept of universal jurisdiction, which seeks to hold individuals accountable for international crimes regardless of their nationality or the location of the crime, does not fit neatly within Hart's positivist framework. This highlights the need for a more nuanced understanding of the relationship between law, social context, and jurisdiction in the context of international crimes. In addition, the basis for the establishment of universal jurisdiction is different from that of other jurisdictions (territorial jurisdiction and personal jurisdiction), which are established based on national sovereignty and have natural legitimacy, while universal jurisdiction is established based on a specific purpose, which is to protect the international public interest and punish serious international crimes. It is hard to argue that the state's role as an enforcement agent is justified, as the philosopher Karl Jaspers put it: "Only a judicial court representing all mankind can decide."

4.2. Disputes over Legislative Jurisdiction and Enforcement Jurisdiction

From the point of view of the application, there are many difficulties in the implementation of universal jurisdiction. In order to circumvent this problem, Professor Roger O'Keefe cleverly subsumed universal jurisdiction into legislative jurisdiction, regardless of the dilemma of its enforcement. He said that there is no inherent link between a State's jurisdiction to prescribe criminal law and its jurisdiction to enforce that law. The legality of a State's enforcement of its criminal law is not necessarily dependent on the scope of its jurisdiction to prescribe that law, and vice versa [12]. The author believes that there are several points worth thinking about in this view. First, this view only argues that the scope of application of a certain law does not need to consider the problem of the specific implementation, but it does not explain what kind of law stipulating criminal acts should be stipulated as universal jurisdiction. To some extent, the form of expression "serious harm to the interests of the international community or serious international crime" is too vague, requiring an effective standard and careful judgment of whether a crime meets this standard. Due to the different

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legislative skills and levels of each country, the power of this judgment should not be enjoyed by the State. Second, just as the jurisdiction mentioned above exists to enforce the prescribed law, it becomes meaningless to prove its legality on a theoretical level, leaving aside the question of practical enforcement.

4.3. Problems of Universal Jurisdiction During Implementation

Therefore, when examining the rationality of universal jurisdiction, it is important to take into account how it will be implemented in practice. Firstly, the application of universal jurisdiction lacks the legitimacy of jurisdiction. According to Rousseau's social contract theory, the basis of legal jurisdiction is that the perpetrator should be aware of the existence of the law and express the willingness to accept the law to regulate his behavior [13]. Such justification is often absent in universal jurisdiction, as in the Pinochet case, where the House of Lords did not pay attention to when or whether Chile had ratified the Convention against Torture. Of course, if it is a serious international crime, it should be assumed that the perpetrator knows and accepts the punishment, but how to identify an international crime goes back to the previous question of how to determine the standard of international crime. Secondly, from the perspective of domestic judicial practice, the exercise of universal jurisdiction also imposes additional obligations on States, and the judicial burden often makes many States unwilling to voluntarily undertake this additional obligation. The issue of the lack of links between international and domestic crimes can complicate the collection of evidence and trial procedures. Stephen Ratner analyzed the Belgian universal jurisdiction prosecution of the Butare Four and concluded that the trial's benefits for human rights and public order outweighed its costs. Ratner identified several factors that contributed to the trial's success, including the presence of the accused, the strength of the evidence against them, and the absence of effective judicial institutions in the places where the atrocities occurred [14]. Since the landmark Eichmann trial in 1961, there have been a total of 52 completed universal jurisdiction trials around the world. However, only 16 states have seen universal jurisdiction trials through to completion, with 15 of these states located in the "Western European and other" regional grouping. These statistics highlight the challenges associated with the exercise of universal jurisdiction. As such, the study of universal jurisdiction must take into account the specific legal, political, economic, and social factors that shape its implementation and effectiveness. Most countries exercising universal jurisdiction are relatively developed European regions, so it can be seen that cost is indeed an important factor restricting the exercise of national universal jurisdiction. This makes a right that is legally defined as equal for sovereign States unequal in reality and the exclusive right of certain economically developed countries, which is incompatible with the purpose of the system. Therefore, although the exercise of universal jurisdiction by developed countries may provide more perfect judicial remedies and better protect human rights, it does not conflict with the reluctance of other countries to exercise universal jurisdiction considering the cost.

5. Conclusion

Through the definition of universal jurisdiction, the discussion of many cases involving universal jurisdiction and the study of different judges' and scholars' views on universal jurisdiction, this paper conclusively believes that universal jurisdiction cannot be established at the level of legality due to most crimes corresponding insufficient proof of domestic statutory and international treaty basis, as well as two elements of customary international law, and the lack of rationality due to various difficulties at the level of enforcement. The conclusion that universal jurisdiction cannot be established at the level of legality has important implications for the study of international criminal law and the development of legal principles governing the exercise of jurisdiction. By providing a

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critical assessment of the legal and practical challenges associated with universal jurisdiction, this research contributes to a more nuanced understanding of the scope and limitations of this legal principle. Moreover, this research highlights the need for further exploration of alternative approaches to addressing international crimes that are more practical and effective. This could include promoting regional cooperation and collaboration, strengthening national legal frameworks, and exploring the potential of international criminal tribunals and other international mechanisms for ensuring accountability for international crimes.

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