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ADDRESSING THE PRINCIPLE AND CHALLENGES OF ENFORCEMENT AND PROSECUTION UNDER UNIVERSAL JURISDICTION: CHARTING NEW PATHWAYS FOR INTERNATIONAL JUSTICE

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Abstract

Remarkably, the principle of universal jurisdiction is increasingly gaining traction in the international justice system as a key aspect of the prosecution of crime globally. Driven primarily by efforts to combat crime, this paper examined the relevance of universal jurisdiction in order to determine its adequacy as a system of international justice. Contextually, the principle of universal jurisdiction emerged as a supplemental component of the international justice system. This paper adopts the doctrinal approach by identifying and analyzing the relevant provisions and challenges of universal jurisdiction. It argues that if regular enforcement is a goal of the emerging international justice system, then universal jurisdiction will be an essential part of the system. The paper found out that the application of universal jurisdiction is saddled with challenges, not because of its reliance on national authorities to enforce international norms but due to the reluctance of those authorities to play this role. It concludes that universal jurisdiction will not become a reliable pillar of the international rule of law until these challenges are properly addressed.

Keywords: *Enforcement, International, Prosecution, Universal Jurisdiction, Principle.*

I. INTRODUCTION

The urgent need for an international justice system account of addressing international crimes has necessitated the ability of the domestic judicial systems of the State to investigate and prosecute certain crimes, even if they were not committed on its territory by one of its nationals or against one of its nationals. However, in light of the controversies the principle of universal jurisdiction has provoked, this principle of universal jurisdiction on certain grievous crimes in violation of the provisions of international law is not a new international legal system. The important factor to be noted is that it was codified in an international treaty many years ago in the Geneva Conventions on the Laws of War in 1949,[1] which provided that State parties must prosecute or extradite persons suspected to have committed grave breaches of any aspect of the Conventions.

The need to understand that international treaties such as the Geneva Conventions of 1949, the Convention against Apartheid of 1973,[2] the Convention against Torture 1984[3] , and the Convention against Enforced Disappearance of 2006[4] is important because it provides strong premises for appreciation of the relevance of universal jurisdiction to State parties. It is agreed that international customary law allows the use of universal jurisdiction for crimes against certain crimes viewed as weighty by the global community, which may be in the form of crimes against humanity and/or genocidal crimes. However, this paper aims to enrich our understanding of some of the critical issues associated with the principle of universal jurisdiction as an international justice system. This accounts for why the global community agitated for a standard international justice system over the years. Now, the ultimate question is premised on how do we guide against political manipulations of this international justice system in order to safeguard the rights and freedom

[1] Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention). 75 UNTS 287 (adopted on 12 August 1949, entered into force on 21 October 1950).

[2] International Convention on the Suppression and Punishment of Crime of Apartheid, adopted on 30 November, 1973, (entered into force 18 July 1976).

[3] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted on 10 December 1984, (entered into force 26 June 1987).

[4] International Conventions for the Protection of All Persons from Enforced Disappearance, adopted on 17 July, 1998 (entered into force 1 July 2002).

of the people oppressed? Before going into the different measures of guiding against dictatorship and/or political manipulations by super powers, understanding the basic principles of universal jurisdiction is important. The rest of the paper is structured as follows: Section 2 is on the concept of and overview of the principle of universal jurisdiction, Section 3 presents the evaluation of the principle of universal jurisdiction under the Statute of International Criminal Court. Section 4 is on the challenges of prosecution and enforcement, Section 5 focused on the need to strengthened the international criminal law enforcement mechanisms through the understanding of the changes and challenges, while Section 6 gives concluding remark and policy implications. It is therefore based on this that, this paper will attempt to advance the relevance of universal jurisdiction and analyze the compelling need to inculcate it our respective criminal procedure laws.

II. PRINCIPLE OF UNIVERSAL JURISDICTION

The dire need to ensure that international crimes are prosecuted and offenders are punished according to the provisions of the law informed the emergence of the principle of universal jurisdiction. In this sense, the principle of universal jurisdiction is simply defined as a legal principle that allowed or required a State to commence a criminal proceedings with regards to certain crimes committed by individual and/or State irrespective of the location of the crimes and the nationality of perpetrator or the person who may be affected by the act.[5] A thorough understanding of the meaning of universal jurisdiction, and the complicated processes through which it is applied and realized, would seem to link the ability of the domestic judicial systems of a State to investigate and prosecute certain crimes, even if such crimes are not committed on its territorial borders by one of its nationals, and or against one of its nationals. Thus, it is important to note that this principle is dependent on the notion that some crimes are so injurious to global interest in such a manner that States are empowered to commence any criminal proceedings against the perpetrator (s) irrespective of where the crimes was committed and or the nationality of the crimes offenders or persons who are injured by

[5] K.C. Randall, "Universal Jurisdiction under International Law," *Texas Law Review* 66, (1988): 785-788.

the commission of the crimes.[6]

While the positive aspects of the perspectives of universal jurisdiction principle is not claimed to have the sole answer to ensuring that the advancement of international justice is assured, it provides a veritable basis for comparison and the choice for best practices. What is important therefore is that universal jurisdiction can be traced back to the writings of the early scholars who had advocated for a better mechanisms that will be applicable around the globe that will achieve global Justice for victims. Research has shown that early scholars like Grotius,[7] have in his book wrote on universal jurisdiction bordering on the prosecution and or punishment of the crime of piracy that was found to be prevalent at that material time.[8] Historically, one of the successful attempt made after the second world war was the establishment of an International Military Tribunal[9] and the adoption of several Conventions embedded with some clauses bordering on universal jurisdictions principle which sought to fine-tune its applications. In all of this, regards are placed on the Geneva Conventions of 1949 in ensuring clarity on the applications of universal jurisdiction on heinous crimes in the Conventions.[10]

Indeed, for the purpose of promoting international Justice system, it must be emphasized that universal jurisdiction are to fill the gap where basic doctrines of jurisdiction did not provide any basis for national proceedings, establishing what constitutes offences that States are obliged to investigate in application of universal jurisdiction; determining offences committed outside the territorial or protective principle jurisdiction, and establishing how legal rights, such as the right to life[11] are extended to persons outside the territorial

[6] Mary Robinson, *The Princeton Principles of Universal Jurisdiction* (Princeton: Princeton University Press, 2001), 16.

[7] Grotius, Hugo, *De Jure Belli ac Pacis.* Paris, 1625: Chap. XX1, 3, 1-2.

[8] United States v. Smith, US Supreme Court, 18 U.S. 5 Wheat. 153 153, (1820): 161-2.

[9] Agreement on the application of Article 65 of the Convention on the Grant of European Patents (London Agreement), (opened for signature 17 October 2000, entered into force 1 May 2008), Article 1.

[10] Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention). 75 UNTS 287 (adopted on 12 August 1949, entered into force on 21 October 1950), Article 50, GC 111, Article 129, GC 1V, Article 146.

[11] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. 217 A (111), (adopted on 10 December 1984), Article 3.

boundaries. The thematic focus of universal jurisdiction is wide and all-encompassing. The scope of universal jurisdiction to a large extent represents a situation where States have in effect acknowledged that any other State may or must investigate and prosecute a given crime, even in the absence of the usual jurisdictional links. Notwithstanding the significance of universal jurisdiction under international law, it must be emphasized that 'universal jurisdiction comprises both permissive and mandatory forms, where a State may or may not exercise jurisdiction. Thus, this argument was reinforced and sustained by the treaties setting out a regime of universal jurisdiction by the constitutional provisions which practically define a crime or better still expected all persons to investigate and/or prosecute it, or to extradite accused persons to those willing to do so.[12] Moreso, in line with the treaty basis for the assertion of Universal jurisdiction, the Convention[13] provides that:

State parties will outlaw torture in their national legislation but notes explicitly that no order from a superior or exceptional circumstance may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment. No exceptional circumstances whatever, whether a state of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

In a similar manner, it is unquestionable that universal jurisdiction was first introduced by the four Geneva Conventions of 1949 for the protection of war victims in relation to those violations of the conventions ascribed as grave breaches. Notably, it should be borne in mind that under the relevant article of each Conventions,[14]States are obliged to search for alleged offenders regardless of their place of origin, and either arraign before their own Courts or submit them for trial to the prosecuting State who has made out a substantial case. However, it can also be argued that while the Conventions do not expressly state that jurisdiction is to be asserted regardless of the place of the offence, they

[12] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted on 10 December 1984, (entered into force 26 June 1987), Art. 1, 2 & 3.

[13] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted on 10 December 1984, (entered into force 26 June 1987).

[14] Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention). 75 UNTS 287 (adopted on 12 August 1949, entered into force on 21 October 1950), Art. 49, 50, 129 and 146.

have generally been interpreted as providing for mandatory universal jurisdiction. In this context, it can therefore be said that given that extradition to another state may not be an option, states must in any event have in place criminal legislation enabling them to try alleged offenders, regardless of their nationality or the place of the offence.

In addition, this view, which holds that universal jurisdiction is more accurately applied where it arises as a matter of custom than when used to describe the jurisdiction that arises only *inter partes* through convention has set out a rationale for determining the application of universal jurisdiction at any given situation seems to have been endorsed by the international council on Human Rights Policy.[15] The council based its analysis on the rationales underlying international criminal law in general and also support universal jurisdiction. Thus, it is submitted here that given that the alleged offence committed is a serious crime of universal concern and other bases of jurisdiction are insufficient to prosecute the alleged offender, the functional approach in this sense, would thus be a reliance on the normative and pragmatic rationales since universal jurisdiction does not arise with respect to any and all crimes, but only with respect to particular offences.[16]

The notion of pragmatic and normative rationales has played various roles with respect to crimes such as privacy on the high seas, slavery, terrorism and crimes against humanity or war crimes. Given the premise above, it has, however, conceded that Additional Protocol 1 of 1977 to the Geneva conventions of 1949[17] also extends the principle of Universal Jurisdictions to grave breaches relating to the conduct of hostilities. More so, it has qualified all grave breaches as war crimes.[18]

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[15] International Council on Human Rights Policy, "Thinking ahead on Universal Jurisdiction," Report of a Meeting on 6-8 May 1999 (1999): 14-21.

[16] International Law Association, Committee on International Human Rights Law and Practice, the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences: Final Report (London: Report of the 69th International Law Association Conference, 2001), 11.

[17] Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention). 75 UNTS 287 (adopted on 12 August 1949, entered into force on 21 October 1950).

[18] Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention). 75 UNTS 287 (adopted on 12 August 1949, entered into force on 21 October 1950), Additional Protocol 1 of 1977.

Aside from being a tool for the expansion of international justice system, other instruments relevant to international humanitarian law, such as the Hague convention of 1954[19] for the protection of cultural property in the event of armed conflict and its second protocol, provided for a similar obligation, requiring states parties to repress serious violations of these instruments on the basis of the principle of universal jurisdiction. Also, it is interesting to note that the 2006 international convention for the protection of all persons from enforced disappearance[20] requires states to take measures in order to exercise universal jurisdiction over the offence of enforced disappearance, when the alleged offender is present in their country and they do not extradite him. From the holistic view of the foregoing, it is important to note that States have adopted a wide range of measures to provide for universal jurisdiction under their national laws.

III.THE PRINCIPLE OF UNIVERSAL JURISDICTION AND THE STATUTE OF INTERNATIONAL CRIMINAL COURT (ICC)

Basically, the common conception is that International Criminal Court (ICC) was founded on a Treaty of the Rome Statute[21] which granted the ICC jurisdiction over four main categories of crimes ranging from genocide, crime against humanity, war crimes and crime of aggression. In this regard, it must be emphasized that the ICC's legal process may function differently from that in one's national jurisdiction. For the purpose of promoting international justice, it shall be the duty of the Court to exercise jurisdiction in situations where genocide, crime against humanity or war crimes are committed on or after 1 July 2002, and in this case, such crimes may have been committed by a State party national, or in a State that has submitted itself to the jurisdiction of the Court, and or such crimes was referred to the ICC Prosecutor by the United Nations Security Council pursuant to a resolution adopted under Chapter VII of the United Nations Charter.[22] This is advanced on

[19] Convention for the Protection of Cultural Property in the Event of Armed Conflict, adopted on 14 May 1954 (entered into force 7 August 1956).

[20] International Conventions for the Protection of All Persons from Enforced Disappearance.

[21] Rome Statute of the International Criminal Court (adopted 18 July 1998, entered into force 1 July 2002).

[22] Charter of the United Nations 1 UNTS XVI, opened for signature 26 June 1945,

the basis that the ICC offers a complementary function in the universal jurisdiction processes, and not to assumed the function of national criminal system in this regard. In addition, this argument is premised on the obvious fact that ICC only prosecutes cases where States are not willing or incapable of doing so to a large extent.

That said, the history of its adoption is a reminder of how States aimed at prohibiting and criminalizing certain crimes in a manner that confirms with international rules and standards, and act as primary players, not as spectators showing their concern for respect of the principle of sovereignty.[23] However, the emergence of universal jurisdiction and the movement towards the entry into force of the Rome Statute has been viewed as part of the movement for national law reform explicitly recognized as the core crimes of international criminal law after the second world war. Also, it has been observed in this study that the above assertion hardly formed the exclusive basis of prosecutions that took place after the war.[24] Moreso, it should be noted that international law rules under the principle of universal jurisdiction prohibiting and criminalizing certain crimes remain dead letters if they are not properly implemented at the national level. In addition, it is therefore clear that the Rome Statute is premised on a desire to remove impunity in crimes that are heinous in nature. Recognizing that the State has the primary responsibility of guaranteeing compliance with international standards on the desired respect for the provisions of the Rome Statute. However, it is important to highlight that through the complementarity mechanism, national courts will bear the greater burden of ensuring accountability.

It is acknowledged that within the context of this research that States with the primary aim of ensuring that their courts complements with the provisions of International Criminal Court are therefore open to the arguments that they must be ready to submit themselves to the universal jurisdiction on cases bordering on genocide, crimes against humanity and or war crimes. In light of the above development, it may be argued that there exists a gap between the international interest in the rule of

(entered into force 24 September 1973), Chapter VII.

[23] Antonio Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2003), 285.

[24] *Ibid*, 805.

law and the immediate interests of an individual state or government that sometimes affects the proceedings of the Court. Similarly, with the current advances in the understanding of the principle of universal jurisdiction, such as the compatibility of the International Criminal Court Statutes with constitutional provisions on the immunity of Heads of States and or amnesty laws, there exists the notion that certain crimes are so harmful to international interests that States are obliged to bring proceedings against the perpetrator, regardless of where the crime was committed and or the nationality of the perpetrator of the crime. Of even greater concern is the emerging cross-border crimes which highlights that universal jurisdictions allows for the trial of international crimes committed by anybody, anywhere around the globe.[25]

In addition, it is important to note that the preamble to the International Criminal Court (ICC) Statute contains the universal jurisdiction principle which provides that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.[26] That said, there are however, three necessary steps to get the principle of universal jurisdiction more efficient: Firstly, the existence of a specific ground for universal jurisdiction, secondly, a sufficient clear definition of the offence, and thirdly, the constitutive elements and national means of enforcement that allows the national judiciary to exercise their jurisdiction over these crimes.[27] Thus, it should be noted that with the above three ingredients being proactive, it will then imply that such a Country has set up an efficient mechanisms for the prosecution of criminal matters within the ambit of universal jurisdiction.

Indeed, while it is true that the Rome Statute forms the international bedrock that underpins the domestic enactment of the international crimes act, and the engagement of the judiciary in handling cases that are injurious to humanity in general, irrespective of their location or place of commission, it may be argued that serious crimes that attract

[25] Robinson, *The Princeton Principles*, 16.

[26] Preamble, Rome Statute of International Criminal Court.

[27] Xavier Phillipe, "The Principles of Universal Jurisdiction and Complementarity: How do the two Principles Intermesh?" *International Review of the Red Cross* 68, no. 862 (2006): 379.

the application of universal jurisdiction are captured within the principle of *jus cogens. In this regard, there* will be no derogation by any State. This view is predicated on the fact that persons who are alleged to have committed serious crimes like genocide,[28] crime against humanity;[29] or a war crime[30] cannot be allowed to thrives at the expense of the other fellow human beings.

Against this background, it is important to recall that Article 8 (2) of the Rome Statute of International Criminal Court[31] bestows competent jurisdiction on the High Courts of the State in prosecuting any person under this Act. According to Article 8(2)(1) of the Rome Statute of International Criminal Court: "*The Court shall have jurisdiction in respect of war crimes in Particular when committed as part of a plan or policy or as part of a large scale commission of such crimes.*"

However, there is a strong argument that the wordings of Article 8(2)(1) makes it clear that the principle of complementarities will serve as a nexus that will enable universal jurisdiction to be more pragmatic in terms of enforcement. While this might seem reassuring at first sight, it has also been argued that this principle is said to derogate from the ordinary rules of criminal jurisdiction requiring a territorial or personal link with the perpetrator of the crime or the victim as the case may be.[32]

On the other hand, it must be emphasized that at the end of the second world war, International Military Tribunal was established as well as the adoption of new Conventions that contained several clauses on universal jurisdiction. These developments suggest that international crimes will no longer remained unpunished. In this sense, in order to established criminal liability, other international conventions and or rules of customary international law will expand the scope of the principle of universal jurisdiction in terms of its application. Greater clarity on the applicable legal regime along with restraints was confirmed by notable

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[28] Rome Statute of the International Criminal Court, art. 6.
[29] *Ibid.*, art. 7.
[30] *Ibid.*, art. 8.
[31] *Ibid.*, art. 8(2).
[32] This Territorial Link has been overcome by two criteria allowing for extra territorial jurisdiction i.e. active personality jurisdiction and passive personality.

cases such as the Demanjule case in 1985,[33] Pinocet case in 1999[34] and the Butare Four Case in 2001[35] respectively where the above cases raised fundamental issues of public international law and its interactions with the domestic law of the Country. It must be emphasized that in these cases, international justice has reached a new stage that other Countries around the globe should emulate or be encouraged. However, there is a strong argument that despite the relevance of the principle of universal jurisdiction, it might be argued that the implementation of the general principle has remained an intractable problem as it is an issue not only of international, but also of national law concern. Given these realities, States are obliged to grant their own Courts universal jurisdiction over certain crimes arising from a national decision, and not only of rule or principle of international law.

IV. CHALLENGES IN PROSECUTION AND ENFORCEMENT

The notion of principle of universal jurisdiction is one that should be of enormous concern given the political and practical problems that have arisen while trying to put universal jurisdiction into practice. In addition, under the principle of universal jurisdiction, the nature and scale of international crimes such as genocide, crime against humanity and war crimes make them amongst the most complex to prosecute. However, these difficulties are multiplied when investigations or trials are taken place beyond the Country where the said crimes are committed.

Be that as it may, the question of the legislative basis for the exercise of universal jurisdiction by national authorities to a large extent still remains an intractable problem. It is therefore paramount to say that for universal jurisdiction to fulfil its potential as part of an international justice system in the suppression of impunity, such legislation should also be of adequate scope and not subject to temporal, spatial, and or other restrictions.[36]Acknowledging a wide range of beneficial applications of

[33] Demanjuk v. Petrovsky, US Court of Appeal, 6thcir, 31.co, ILR 79, 546, (1985).

[34] House of Lords, 2 WLR 827, UK, (1999) https://www.rechtbanken-tribunaux.be/fr/cour-dassises-de-larrondissement-administratif-de-bruxelles-capitale/info

[35] Cour D'Assises Bruxelles, "Quatre Rwandais condamnés pour génocide à Bruxelles," accessed https://www.rechtbanken-tribunaux.be/fr/cour-dassises-de-larrondissement-administratif-de-bruxelles-capitale/info, 1 June 2022.

[36] Jurisdictional Decision of the International Criminal Tribunal for the former

universal jurisdiction, particularly in addressing international priority issues such as genocide crimes against humanity and war crimes as well as strong interests in the development of international justice system, it should be pointed out that the adoption of Rome Statute, with its reasonably comprehensive definitions may likely lessen dispute within the scope of universal jurisdiction at customary law. Taking into consideration that the principle of universal jurisdiction is well regulated by acceptable norms as well as customary laws which remained an essential components of international criminal Justice system. In this context, it may be argued that the jurisdictional basis of customary law oftentimes are strongly contested.

The above dominant view suggests that full implementation of universal jurisdiction into national law requires the adoption of similar areas of law that are related to the exercise of such jurisdiction. It is posited that these areas of law included laws related to immunity, mutual legal assistance and or extradition. Given the rapid pace of development of international justice system and the pressing dangers that genocide, crime against humanity and war crimes have posed to global peace and security, it is worth mentioning that without a comprehensive system of laws at the national level being adopted by sufficient number of States, universal jurisdiction cannot be expected to function in practice as a working pillar of the international justice system around the globe.

Furthermore, it goes without saying that the exercise of universal jurisdiction has raised special evidentiary challenges which is predicated on the challenges of mutual legal assistance. In light of the specificities of these offences, particularly in terms of gathering and recording evidence, the principle's application does not cast any doubt on the traditional jurisdictional links based on territoriality or personality. However, in the absence of a truly universal framework for mutual legal assistance and the lack of universal acceptance of the Rome Statute of International Criminal Court, universal jurisdiction remains an important guarantee against impunity. This is in spite of the fact that international institutions have been called upon a number of times for a high degree of cooperation in this regard.[37] However, it is

Yugoslavia, No. IT-94-1, *Prijedor Dusko Tadic*, 2000.

[37] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted on 10 December 1984, (entered into force 26 June 1987), art.

often assumed that States legislating for universal jurisdiction should as a matter of necessity review their mutual assistance arrangements taking into consideration the exercise of this doctrine with respect to international crimes, and furthermore, review it's laws or agreements in such a manner that it will be capable of addressing relevant issues bordering on investigation, obtaining evidence, protection of victims and witnesses. Most fundamentally, this paper suggests that a systematic amendment to mutual legal assistance arrangements will further strengthened the operations of universal jurisdiction around the globe.

In a similar vein, another notable challenge is on the issue of extradition. It may be added that the emergence of international criminal jurisdictions increases the possibility of individual and state accountability for actions resulting to war crimes or crimes against humanity. Additionally, and crucially, a notable short-comings of extradition with respect to crimes under international law has been lack of comprehensive and express treaty obligations. In light of the above situation, necessity could be invoked to justify the assertion that as international laws perceived cases of extraditions as a matter of comity that is subject to the discretion of the requesting State in the absence of treaty obligation.[38] In this sense, it may be submitted that specific obligations to extradite must emerged from either through a treaty or a rule of customary law.

From a global legal point of view, it is widely accepted that the emergence of an obligation to extradite or prosecute at customary international law would represent an important development in international criminal law.[39] That being said, it may be argued that as the obligation to extradite or prosecute is found in numerous treaties; there are different viewpoint as to whether there is such an obligations in Customary International Law. One commonly asserted explanation on the above subject matter is that there are several multilateral treaties combining extradition and prosecution as alternative measures of

9(2).

[38] I.A. Shearer, *Extradition in International Law* (Manchester: Manchester University Press, 1971), 23.

[39] M. Cherif Bassiouni, "International Crimes: Jus Cogens and Obligations in Erga Omnes," *Law of Contemporary Problems* 59, no. 4 (1996): 67.

actions in bringing suspects to justice.[40] In that respect, it is submitted that core crimes bordering on the obligations *aut de dere aut judicare* relates only to those war crimes that constitutes 'grave breaches' of the Geneva Conventions and Additional Protocol 1.[41]

In a different context, it is noted that the Genocide Convention does not incorporate the obligations, but does provide that persons charged with genocide are to be tried by the Court of the State in the territory where the crime was committed, or by an International Court that has jurisdiction to entertain the matter.[42] From this viewpoint, there is therefore no treaty-based obligation *aut de dere aut judicare* for genocide crimes against humanity and, except in cases of grave breaches, or serious violations of the laws and customs applicable in armed conflicts of an international or non-international character. However, it has sometimes been argued that a common feature of this different treaties embodying the obligations to extradite or prosecute is oftentimes predicated on the duty imposed on States to ensure the prosecution of the offender either by extraditing the individual to a State that will exercise criminal jurisdiction or by enabling their own judicial authorities to prosecute the accused persons. Beyond the above, the provisions greatly vary in their formulations, content and or scope particularly with regards to the conditions for extradition, prosecution and or the relationship between these two possible cause of actions.[43] This position is applicable to situations where the treaty applies to those States that are parties to them.

On the other hand, and on the basis of customary international law, the above approach is particularly relevant as it has raised questions on whether there is an obligations to extradite or prosecute under customary international law binding on all States. If so, the question in this regard

[40] The Obligation to Extradite or Prosecute: (Study by the Secretariat, 18 June, 2010) UN Doc A/CN4/630, 4.

[41] Geneva Convention (GC 1) 1949, Art. 49; Geneva Convention II (GC II) 1949. Art. 50 Article 129 of the Geneva Convention (GC III) 1949; Article 145 of the Fourth Geneva Convention (GC IV) 1949 and Article 85 of the Additional Protocol I (AP I) 1977.

[42] United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the UN Res 39/46 of 10 December, 1984 (entered into force 26 June, 1987), Article 6.

[43] *Ibid.*, 126, 150.

is: Does it apply in respect of all or merely on certain crimes under international law? Also, while it has been argued that prohibition of certain crimes under international law, such as genocide, crimes against humanity and war crimes derived their powers from a pre-emptory norm (*ius cogens*) from which derogation are not permitted. It is then necessary to point out that violations of such a norm gives rise to a corresponding obligations *erga omines* which is an obligation owed by States to the global community as a whole either to institute criminal proceedings or to extradite the suspect to be tried in another Court of competent jurisdiction in that State.[44] In addition, it would not be far-fetched, however, to imagine that the above views relied on the Trial Chamber's conclusion in the Furundzija Case[45] in the International Criminal Tribunal for the Former Yugoslavia (ICTY) wherein one of the consequences of the *jus cogens* character bestowed by the international community on the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture who are present in a territory under its jurisdiction.[46] In these circumstances, it must be emphasized that the above submission have been criticized on the argument that the *erga omnes* and *jus cogens* nature of the prohibitions does not as such give rise to the formation of customary international law and also does not imply the recognition of a customary nature for the obligation to extradite or prosecute.[47] However, it has been argued that the accumulation of multilateral treaties containing the obligations to extradite or prosecute, and their wide acceptance by States, signifies the existence of rule of customary international law.[48] Indeed, it must be noted that while such treaties can

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[44] Guy S. Goodwin-Gill, "Crime in International Law: Obligations Erga Omnes and the Duty to Prosecute," in *The Reality of International Law: A Collection of Essays in Honour of Ian Browlie*, Guy S. Goodwin-Gill and Stefan Talmon eds., (Oxford: Clarendon Press, 1999), 2-3.

[45] Prosecutor v. Furundzija. Case No. IT-95-17/I-T, Judgment Trial Chamber, International Criminal Tribunal for the Former Yugoslavia 1998: 156.

[46] *Ibid.*

[47] Raphael Van Steenberghe, "The Obligation to Extradite or Prosecute, Clarifying its Nature," *Journal of International Criminal Justice* 9, 2011: 1092.

[48] Enache-Brown Colleen and Ari Fried, "Universal Crime, Jurisdiction and Duty: The Obligation of Aut Debere Aut Judicare in International Law," in *The Reality of International Law, Essay in Honour of Ian Browlie,* Guy S. Goodwin-Gill and Stefan Talmon eds., (Oxford: Clarendon Press, 1999), 629-630.

assist in the crystallization of emerging rules in customary international law, there is no presumption that they will do so.[49] This notwithstanding, it is only in exceptional cases that a multilateral treaty can give rise to a new customary rules or assist in the creation of its own impact, if it is widely adopted by States and it is the clear intention of the parties to create customary law.[50]

V. INTERNATIONAL CRIMINAL LAW ENFORCEMENT MECHANISM: UNDERSTANDING CHANGES AND CHALLENGES

As has been discussed above, a legal framework for the enforcement of international criminal law issues under the principle of universal jurisdiction should aim at addressing cases ranging from genocide, crime against humanity, war crimes and host of others. In addition, the international criminal law enforcement mechanism should be able to provide the highest attainable standard of protection and institutionalization of human rights norms. Aside from being a tool for the expansion of international justice system, it should be noted that the failure of enforcement undermines progress towards the realization of these goals. It is interesting to note that for international criminal law to have any deterrent effect, or for it to achieve any of the other goals of justice, attention needs to be paid on its enforcement at the national level of operations. However, recognizing that there are a number of challenging issues associated with the enforcement of international criminal law, this paper suggests that further broadening of the conceptual coverage of international customary and treaty laws regarding atrocity crimes, immunities, extra-territorial jurisdiction, or expansion of the geographical coverage of international criminal law should be seen as a priority issue amongst State parties. Also, the ratification and implementation of the Rome Statute of the International Criminal Court; or by extension, increasing the temporal coverage of the law through retrospective applications of the jurisdiction of tribunals and national Courts over acts which are illegal under customary international law, and should be seen as a matter of urgent concern. In light of domestic legal provisions improvement on the ability of the National Judicial Systems to investigate and try suspected war criminals as well as the

[49] International Law Commission Report on Customary International law, 2011: 49.
[50] *Ibid.*, 50.

establishment of specialist war crimes units and or judicial chambers will help in strengthening the international criminal law enforcement mechanisms.

Notably, attention must also be given to the Genocide Conventions[51] which had significant weaknesses ranging from the very specificity of the Nazi Crimes. One specific challenge which often comes to the fore is that Genocide Convention's practical understanding of the definition of a crime that can be used to prosecute individuals suspected of orchestrating mass atrocities of course, has limited the convention usage of the definition of a crime. Also, the Convention provides that such a crime had to be committed with the intent to destroy in whole or in part,[52] the protected group. However, it is important to bear in mind that the controversy arising from how to infer intent from patterns of events, and the confusion over whether intent is the same as motive has raised several questions. It has also been observed that the Genocide Convention's focus on intent and protected groups has limited its applicability.

It must be taken into account that a wider use of extra-territorial jurisdiction is an important part of any strategy aimed at improving the enforcement of international criminal law. In a similar vein, it must be emphasized that the position with regards to immunities before National Courts is clear. In this sense, whilst it is commonly accepted that State officials are immune in certain circumstances from the jurisdictions of foreign States, there has been uncertainties about how far those immunities remained applicable where such an official is accused of committing international crimes. The judgment of the United Kingdom House of Lords in Pinochet[53] was hailed by many as a new dawn in the struggle by victims, non-governmental organization, human rights activists and others to bring former leaders to account for international crimes committed while in office. It can thus be argued that questions regarding the immunities of foreign leaders and other high officials arise more frequently now than they once did because of the development of

[51] Convention on the Prevention and Punishment of the Crime of Genocide (adopted by the UNGA 9 December, 1948 and entered into force 12 January, 1951).
[52] *Ibid*., art. 2.
[53] R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3), UK, AC 147, (2000).

universal jurisdiction for international crimes.[54]

It is nonetheless worth noting that the United Nations Convention against Torture[55] provides a system of extra-territorial criminal jurisdiction to torture, as defined in Article 1, but makes no mention of State immunity.[56] But by definition, the international crime of torture must be committed by or with the acquiescence of a public official or other persons acting in a public capacity. In this sense, all defendants will therefore be State officials or former State officials or agents, and would have carried out the torture as an official act for which they will relied on immunity clause. By these provisions, it appears to have been the tension between this fact and the object and or purposes of the Convention that informed the majority opinion that there could be no immunity for the international crimes of torture and conspiracy to torture. Even more noteworthy, several jurists have referred to the *ius cogens*[57] status of the prohibition against torture, arguing that such a prohibition, by reason of its pre-emptory and supreme nature, must override any immunity. However, in Ferrini v. Germany[58] the Italian Supreme Court of Cessation held that Germany was not entitled to immunity for serious violations of human rights carried out by Germans occupying forces during the Second World War. In the circumstances, the Court relied heavily on the *ius cogens* norms supremacy principle.

It should be noted that the rules on State immunity, which are only procedural in character, cannot conflict with substantive *ius cogens* norms prohibiting international crimes.[59] Similarly, the common theme underlying the judgment of the majority of the Pinochet case was that it would be absurd and inconsistent with the United Nations Convention against Torture to allow an immunity that was virtually co-extensive

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[54] Louise Arimatsu, "Universal Jurisdiction for International Crimes: African's Hope for Justice", *Chatham House Briefing Paper, ILBP 2010/01*, April, (2010).

[55] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted on 10 December 1984, (entered into force 26 June 1987).

[56] *Ibid*, art. 1.

[57] Vienna Convention on the Law of Treaties, adopted 23 May 1969 (entered into force 27 January 1980), art. 53.

[58] Ferrini v. Federal Republic of Germany, Italian Court of Cessation, 128ILR 659, (2004).

[59] Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia case no. 2, UKHL 26, House of Lords, 2006.

with the offence created by the Convention.[60] In this regard, a similar situation may take place in the case of enforced disappearance, which, like torture, is committed by or with the acquiescence of a public official.[61] At the same time, the paper noted that in the Pinochet Case,[62] Lord Phillips went a little further in stating that functional immunity cannot co-exist with international crimes where a system of extra-territorial jurisdiction applies as the latter must necessarily override the principle that one State should not interfere with the internal affairs of another. Thus, this argument was reinforced and sustained on the basis that it has been suggested that the true rationale for an exception to immunity in the case of certain international crimes lies in the development of international conventions providing for the exercise by State parties of extra-territorial jurisdictions over such crimes and demonstrating that international law now accepts that States may exercise jurisdiction over certain official acts of foreign States in the context of assigning individual criminal responsibility for such acts.[63] This progressive ideology is explicit and has informed the argument that the exception identified by the law Lords in the Pinochet case with regards to torture should also extend to other international crimes. Indeed, it is submitted that, while genocide, war crimes and crimes against humanity may be committed by private individuals, their primary focus is still State conducts.[64]

VI.CONCLUSION

This paper has attempted a survey of the nature of the principle of universal jurisdiction vis-a-vis the challenges confronting the principle of universal jurisdiction. The challenges and changing trends in our national criminal law legislations and scope of international criminal law necessitates the inclusion of hitherto perspectives that the difficulties in prosecuting perpetrators of atrocities arose from the complications in

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[60] *Ibid.*

[61] International Conventions for the Protection of All Persons from Enforced Disappearance.

[62] *Ibid.*

[63] Dapo Akande and Sangeeta Shah, "Immunities of State Officials, International Crimes and Foreign Domestic Courts," *European Journal of International Law* 21, no.4 (2011): 821.

[64] *Ibid.*

the national judicial system around the globe. Thus, it is not wrong to submit that an in-depth and thorough analysis as well as objective view of the problems that have arisen from its application stems from the fact that there is a compelling need for reforms in the area of creation of a new treaty on crimes against humanity, and an Optional Protocol to the Genocide Convention, as well as full participation of the International Criminal Court in catalyzing domestic convictions which could improve the enforcement of international justice system.

Be that as it may, the establishment of international courts has so far lessened the burden of resort to universal jurisdiction by national courts. The paper has also looked at an array of questions such as: Are there ways of solving the problems? and Can the disagreements be resolved by legal principles? Moreso, the paper noted further that the development of international treaties providing for the exercise by States parties on extra-territorial jurisdiction over crimes that are themselves defined as official acts, or that are linked closely with such acts, suggests that international law now contemplates the prosecution in national courts of foreign officials accused of such crimes.

Given that these international legal frameworks comprehensively addressed these various challenges, the focus should be on the adoption of new treaties that will expressly provide for wide jurisdictional basis. Thus, such a provision could be included, for example, within a new treaty on crimes against humanity. In this regard, there is a need to develop or where they already exist, strengthened domestic normative frameworks, policy and operational practices, and sharing of good practices to that effect. It must also be emphasized that a strict application of the principle of *aut dedere aut judiciare under* relevant international treaties working alongside the application of universal jurisdiction under customary international law could contribute to deterring the most serious crimes. It would as well have enhanced the fight against immunity. Alternatively, it will be safer to limit the exercise of universal jurisdiction to occasions where there is a link to the State concerned, including where the victims have acquired the nationality of the forum State, albeit after the commission of the offence, or where the offender is resident in the State.

In light of the above examinations, what is urgently needed are not

more international law rules to be incorporated under the principle of universal jurisdiction, but rather a better implementation of the existing rules at the domestic level as well as effective prosecution of perpetrators of such crimes at the domestic and international levels. Basically, considering how important this aspect of international justice system is, the paper has highlighted some of the notable challenges and submitted that by prohibiting and criminalizing such crimes in the domestic legal frameworks in such a manner that it will conform with international rules and standards that will make the application of the principle easier and better. Ultimately, on the argument that the principle of universal jurisdiction rules could be in applicable in non- State parties Countries or where there is no mutual legal assistance has made it impossible for this principle to be effective and universally applicable in all States. The paper however submitted that for this principle to have unlimited application on State parties, it must be incorporated into the domestic laws of member States as well as having a new binding treaties that will guarantee its enforcement. Thus, it is anticipated that this deliberations will be useful to policy makers and as well contribute to the development of international criminal law jurisprudence as this is the only means through which perpetrators of international crimes will be brought to justice irrespective of his or her locations around the globe.

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