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UNIVERSAL JURISDICTION ENSURING THE RULE OF LAW IN INTERNATIONAL CRIMINAL PROCEEDINGS

Summary

This article explores the essential role of universal jurisdiction in enforcing state responsibilities under the '*aut dedere aut judicare*' mandate, which requires the integration of international crimes into national laws. It posits that universal jurisdiction is a fundamental requirement, not merely an option, for states to effectively meet their international obligations. This necessity extends beyond criminalizing international offences, providing the jurisdictional foundation for international criminal cooperation. The paper examines how universal jurisdiction reflects states' prescriptive jurisdiction, enabling adjudicative jurisdiction in accordance with due process principles. By emphasizing the critical role of universal jurisdiction in domestic law, the article illustrates how it aids states in adhering to their '*aut dedere aut judicare*' obligations. This adherence is crucial for national criminalization of international crimes and facilitating effective cross-border legal cooperation, reinforcing justice, accountability, and the rule of law globally. Ultimately, incorporating universal jurisdiction into domestic legislation is vital for states to uphold international legal standards and due process, for operationalizing international cooperation in adjudicating international crimes, and fulfilling state responsibilities in line with the general theory of legal process.

Keywords: *aut dedere aut judicare*, international crimes, general theory of legal process, universal jurisdiction, state international jurisdiction.

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UNIVERZALNA JURISDIKCIJA KAO GARANCIJA VLADAVINE PRAVA U MEĐUNARODNIM KRIVIČNIM POSTUPCIMA

Sažetak

Ovaj članak istražuje suštinsku ulogu univerzalne jurisdikcije u sprovođenju državnih obaveza prema načelu „*aut dedere aut judicare*", koje zahteva integrisanje međunarodnih zločina u nacionalne zakone. Autor je stava da je univerzalna jurisdikcija osnovni zahtev, a ne samo opcija, kako bi države efikasno ispunile svoje međunarodne obaveze. Ova potreba se proteže dalje od kriminalizacije međunarodnih delikata, obezbeđujući osnovu za jurisdikcijsku saradnju u međunarodnom krivičnom pravu.

Rad ispituje kako univerzalna jurisdikcija odražava propisnu jurisdikciju država, omogućavajući sudsku jurisdikciju u skladu sa principima pravičnog postupka. Naglašavajući ključnu ulogu univerzalne jurisdikcije u domaćem pravu, članak ilustruje kako ona pomaže državama da se pridržavaju svojih obaveza prema načelu „*aut dedere aut judicare*". Ovo pridržavanje je ključno za nacionalnu kriminalizaciju međunarodnih zločina i omogućavanje efikasne prekogranične pravne saradnje, jačajući pravdu, odgovornost i vladavinu prava na globalnom nivou. Na kraju, uključivanje univerzalne jurisdikcije u domaće zakonodavstvo je od vitalnog značaja za države da poštuju međunarodne pravne standarde i pravičan postupak, omogućavajući međunarodnu saradnju u suđenju za međunarodne zločine, i ispunjavajući državne obaveze u skladu sa opštom teorijom pravnog postupka.

Ključne reči: *aut dedere aut judicare*, međunarodni zločini, opšta teorija pravnog postupka, univerzalna jurisdikcija, međunarodna državna jurisdikcija.

1. Introduction

Universal jurisdiction is a fundamental principle in international law that empowers national courts to prosecute grave international crimes – such as genocide, war crimes, and crimes against humanity – regardless of where these crimes were committed or the nationality of the perpetrators. This principle ensures that perpetrators of grave offences find no safe haven, thus reinforcing global commitments to justice and accountability.[1]

At the same time, the principles of legality and due process are fundamental to both national and international legal systems, ensuring that legal proceedings are conducted fairly and in accordance with established laws, which are central to upholding the rule of law. Adhering to these principles is vital for preserving the legitimacy of judicial outcomes, particularly in the prosecution of international crimes, which often involve complex legal and ethical considerations.

These principles are framed within the broader context of the general theory of legal process, providing a comprehensive understanding of how legal principles operate within societal governance. This theoretical framework is instrumental in exploring how universal jurisdiction, legality, and due process interact to enforce international laws and facilitate global cooperation in legal processes.

This paper seeks to explore the intricate relationship between universal jurisdiction, legality, and due process, as fundamental elements of the rule of law, examining their roles as key mechanisms in fulfilling international legal obligations and enhancing legal cooperation.

To systematically explore this relationship, the paper is structured into three sections. Initially, the paper lays the groundwork by defining state jurisdiction and its various forms (*prescriptive, adjudicative, executive jurisdiction*), examining how the State can manifest its power as an attribute of sovereignty. It explores legislative activity as a means of determining jurisdictional grounds, with the universal jurisdictional principle serving as a key example.

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[1] Disclaimer: It is not the intention of this paper to explore fundamental issues such as the development and acceptance of the concept of universal jurisdiction, the conventional basis for this jurisdiction and the deeper analysis of universal jurisdiction *in absentia*. Rather, this paper aims to provide a focused analysis of universal jurisdiction within the context of the research objectives. A compransive bibliography and references are provided for readers seeking a deeper understanding of these fundamental concepts (see: Van Schaack & Slye, 2007; Vešović, 2020, pp. 7-30; Randall, 1988, pp. 785-839; Reydams, 2003; Schaack, 2014; Shaw, 2008; Ssenyonjo, 2005, pp. 405-434; Teitel, 2000; La Rosa, 2003; Henckaerts & Doswald-Beck, 2005; Henzelin, 2000, p. 29; Fernandez-Jankov, 2009; Ambos, 2001; Bassiouni, 1996; Bassiouni, 2001-2002, pp. 81-162; University of Princeton, 2001).

After that, universal jurisdiction is explored as a mechanism of state responsibility, analysing how it enforces state obligations under international law and promotes adherence to the '*aut dedere aut judicare*' obligations. It further explores how universal jurisdiction acts as a critical mechanism for states to fulfil their international obligations, highlighting its role in ensuring due process and advancing the prosecution of international crimes. This section shifts focus to universal jurisdiction as an enforcement tool of international norms, ensuring accountability for grave offences that transcend national boundaries. This analysis explores how universal jurisdiction serves not only as an instrument for bringing perpetrators to justice but also as a means of upholding international legal order.

The final section discusses the role of universal jurisdiction in strengthening international legal cooperation. It highlights its impact on mutual legal assistance and extradition processes, emphasizing how universal jurisdiction facilitates broader collaboration among states in tackling crimes of a universal nature. Additionally, the paper explores the complexities and implications of universal jurisdiction *in absentia*, highlighting the inaccuracies of the term, while reinforcing the rule of law in international crime proceedings, particularly when applied by national courts and authorities. Through these discussions, the paper aims to illustrate the vital interconnectedness of universal jurisdiction with the broader framework of international legal practice and governance, underscoring its collective importance in ensuring effective and just global legal cooperation.

Arguably, this structured approach enables a comprehensive assessment of how universal jurisdiction upholds the rule of law in international criminal proceedings. In critically examining the application and implications of universal jurisdiction within national legal systems, the paper emphasizes its practical impact on enhancing legal certainty and consistency.

2. Universal Jurisdiction - Theoretical Framework

2.1. Defining Jurisdiction

In approaching universal jurisdiction, considered as a manifestation of state jurisdiction deeply rooted in the principles of sovereignty, jurisdiction is considered 'a form of legal power or competence' (Capps, Evans & Konstadinides, 2003). As a result, state jurisdiction is essentially understood as the 'judicial, legislative and administrative competence of a state under international law to govern persons and property' (Akehurst, 1972-1973, pp. 145-258).

In international public law theory, the direct relationship between 'sovereignty' and 'jurisdiction' provides basis of its structural framework. The term 'jurisdiction' is intricately linked to the concept of state sovereignty, embodying the judicial, legislative, and executive competencies that a state holds over persons and property within its domain. In doing so, the notion of jurisdiction is a cornerstone for understanding the scope and limits of state power in the international legal order (Akehurst, 1972-1973, pp. 145-258).

This comprehensive view of state jurisdiction underscores the authority of states, grounded in international law, to govern within their territorial confines. Lord MacMillan's observation in the case *Compania Naviera Vascongado* v *SS Cristina* highlights the intrinsic link between sovereignty and jurisdiction, noting that sovereignty inherently encompasses jurisdiction over all persons and things within a state's territorial limits (see: Lord MacMillan, 1938; Triggs, 2006).

The interconnected relationship between sovereignty and jurisdiction is further elucidated by Professor Ian Brownlie, who argues that jurisdiction is an extension of state sovereignty, encompassing the rights, liberties, and powers that define statehood (Brownlie, 2019). This perspective underscores the direct correlation between sovereignty and jurisdiction, with the latter being contingent upon the former. Finally, Professor Antonio Cassese echoes this sentiment and regards jurisdiction as a derivative of sovereignty, integral to the state's ability to assert its authority and fulfil its functions within the international legal framework (Cassese, 2003).

In terms of the correlation between jurisdiction in municipal law and international public law, the broad application of the concept of jurisdiction reveals a distinction between its interpretation in municipal law and its application in international public law. F.A. Mann (1990) emphasizes that international public law experts conceive jurisdiction as the right of a state, based on international law, to regulate conducts that are not exclusively domestic (Mann, 1990, pp. 1-83). This delineation of 'international jurisdiction' encompasses the state's right to establish rules, adjudicate specific cases, and enforce laws, highlighting the essential role of jurisdiction in defining and limiting state competence in the international arena.

2.2. State International Jurisdiction: Forms of Expression

In international law, the concept of 'jurisdiction' encompasses the state's legal authority to specify, enforce, and adjudicate rights and obligations. This multifaceted notion is expressed through three primary dimensions: prescriptive, adjudicative, and executive/enforcement jurisdiction.

Prescriptive jurisdiction pertains to the state's capacity to establish norms and laws, while adjudicative jurisdiction involves the legal processes designed to

determine norm violations and assess the ensuing consequences. Executive or enforcement jurisdiction, on the other hand, relates to the implementation of sanctions, which may include the deprivation of liberty or property. Within the realm of criminal law, prescriptive and adjudicative jurisdictions are intrinsically linked, as states typically do not enforce foreign criminal laws (Akehurst, 1972-1973, pp. 145-258). When a court asserts jurisdiction over a matter, it inherently applies its domestic law (*lex fori*), emphasizing the principle that jurisdictional authority invokes the application of the state's own legal framework. Consequently, this paper narrows its focus to the exploration of prescriptive and executive/enforcement jurisdictions within the context of state criminal jurisdiction, highlighting the integral role these dimensions play in the administration of justice at the international level.

Prescriptive, or legislative jurisdiction, is a concept that, while related to state sovereignty, operates within the scope of a state's legislative authority. This form of jurisdiction addresses the conditions under which a state may enact laws, particularly concerning international matters (Cassese, 2003). The principle that jurisdiction inherently belongs to a state, yet is constrained by the norms of international law, is well-established (Lowe, 2003, pp. 327-385). This principle serves to allocate legislative powers among states, playing a pivotal role in resolving conflicts of laws and defining the relationship between different legal systems (Higgins, 2010).

The concept of conflict of laws, primarily associated with international private law, emerges as a critical tool in public international law, facilitating the resolution of legal disputes that span multiple jurisdictions. The limits of a state's right to impose its laws, including the determination of persons and events subject to such laws, are central to understanding prescriptive jurisdiction (Mann, 1990, pp. 1-83).

While a state's prescriptive jurisdiction may extend to crimes committed abroad, it does not inherently grant the authority to enforce such laws extraterritorially, such as arresting and extraditing the accused without due process or international cooperation. Executive or enforcement jurisdiction is thus limited to the state's territorial bounds, emphasizing the principle that a state may only exercise its enforcement powers within its own territory (O'Keefe, 2004, pp. 735-760).

This type of jurisdiction concerns the legality of a state's actions in enforcing its laws, particularly those regulating conduct beyond its borders. It examines the circumstances under which a state may exercise sovereign authority to implement its regulations, emphasizing the distinction between sovereign acts (*jure imperii*) and those undertaken in a private capacity (*jure gestionis*) (O'Keefe, 2004, pp. 735-760).

2.3. Exercising Prescriptive Jurisdiction: The Universality Principle as a Jurisdictional Grounds

The classical foundations of jurisdiction in international law have been anchored traditionally in the principles of territory and nationality. These grounds establish a direct link between the state and the conduct or act it seeks to regulate or adjudicate. However, the evolving landscape of international law has seen states expanding their jurisdictional reach beyond these traditional bases, incorporating principles such as national protection and passive personality, where jurisdiction is claimed based on the nationality of the victim of a wrongful act (Triggs, 2006).

Recent developments have introduced the concept of international criminalization into the jurisdictional discourse, particularly through the lens of international crimes and the universality principle. This indicates a structural shift from jurisdictional grounds that require a direct link to the state asserting jurisdiction towards a model where the mere classification of conduct as an 'international crime' suffices for jurisdictional purposes, irrespective of any direct connection to the state (Yokaris, 2000, pp. 897-904).

This paper argues for a clear distinction between traditional jurisdictional grounds, which are predicated on a state's direct link to the conduct or act deemed criminal under its domestic law, and the mechanism of international criminalization, which operates independently of such direct links. The latter presupposes the concept of 'international crime', employing the principle of jurisdiction as a fundamental jurisdictional ground for incorporating such crimes into domestic criminal law frameworks (Fernandez-Jankov, 2020a, pp. 161-169).

International criminality, within the system of national repression, may arise through either customary or conventional means (Fernandez-Jankov, 2020b, pp. 95-109). The latter can be direct, as established by international conventions, or indirect, where domestic law criminalizes conduct based on international obligations. In civil law countries, the customary origin of international criminality typically requires legislative action to incorporate these international legal norms into the domestic legal system, highlighting the ongoing debate between monism and dualism in international law (Triggs, 2006).

Moreover, international criminalization can also arise from institutional acts of international organizations, including international criminal courts, or through international custom, as observed in the case of piracy. In instances of direct conventional criminality, the constitutive elements of the crime are specified within the convention itself, eliminating the need for states to enact substantive legislative measures beyond establishing procedural rules and jurisdictional competence of domestic authorities (United Nations, 1984).

An illustrative example of this obligation is found in Article 4 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), which requires states to criminalize all acts of torture under their criminal law and impose appropriate penalties reflective of the grave nature of such offences. The obligation to criminalize and prosecute, as articulated by international conventions or institutional acts, emphasizes an obligation of means, compelling states to undertake necessary legislative measures to fulfil their international commitments (Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984).

The term 'international crimes' frequently emerges in discussions on jurisdiction, necessitating clarification of its application. This paper adopts the view that international crimes are those defined by the evolution of international criminal law, distinguishing them from common crimes with international ramifications. Contrary to some interpretations, the universality principle does not solely underpin the jurisdiction over these crimes. Rather, the violated norm belongs to international law, which categorizes the act as a crime, diverging from national law norms that derive from the freedom granted to states by international law (Kress, 2006, pp. 561-585). In this context, this research adopts the understanding that the subject-matter jurisdiction, following the phenomena of 'international criminalisation', with the Rome Statute as a key guideline, establishes the state's obligation to qualify these conducts as crimes with the requisite *mens rea* under its national legislation.[2]

This research adopts the understanding that 'subject-matter competence', as specified in Article 5 of the Rome Statute of the International Criminal Court (ICC), along with the entire '*corpus juris*' constituting international criminal law, are fundamental pillars in establishing boundaries for the interplay between the rights and obligations of states to incorporate the principle of universal jurisdiction into their criminal legislation. This will be further explored later in this paper.

This study is therefore in disagreement with the view that the classification of a crime is a necessary and irreplaceable component of universal jurisdiction and concludes is that this should not be the case, as the core issue regarding the principle of jurisdiction lays on its close relationship with the concept of international crimes, which serves as a key tool for its prosecution.

[2] Therefore, the paper does not follow the understanding that universal jurisdiction is not linked to the phenomena of 'international criminalization' as suggested in the following paper: Bu, 2023, pp. 6-15.

2.4. Understanding Universal Jurisdiction

From the perspective of the states' criminal jurisdiction, universal jurisdiction, or more precisely, the principle of universal jurisdiction, is defined as the possibility for a state to exercise prescriptive jurisdiction in the absence of any other valid jurisdictional link at the time of the crime in question.

Therefore, under to the universality principle, a state asserts its jurisdiction without any direct connection criterion with the offence, including without the need for the perpetrator to be present in its territory. Following this reasoning, concerns related to universal jurisdiction *in absentia*, could be addressed arguably, as legislators, while upholding the fundamentals of due process, could establish the presence of the accused in the territory as a prerequisite for exercising adjudicative jurisdiction.

Roger O'Keefe (2004) further emphasizes that the term 'universal jurisdiction' is a shorthand for 'universal jurisdiction to prescribe (legislate)' or 'prescriptive universal jurisdiction'. The reference point for applying this to a specific case is the 'moment when the alleged conduct was committed'.

When the legislator opts for this jurisdictional ground, defined in an exclusive manner, i.e., by the impossibility of applying any other grounds as previously discussed, he exercises 'prescriptive universal jurisdiction'. Some authors distinguish this principle, applicable to specified crimes, from the principle of conditioned universality (*principe de l'universalité conditionnelle*), which requires the satisfaction of certain conditions, *inter alia*, the presence of the alleged perpetrator in the territory of the state (*judex loci deprehensionis*), in order for jurisdiction to be exercised, as a response to this person's non-extradition to another country. In this context, the term subsidiary jurisdiction (*subsidiaire; subsidiary universality principle*) is often used. Some also refer to quasi-universal (*quasi universelle*) or alternative (*alternative*) jurisdiction, given that the state holding the accused can choose between prosecuting – through due legal process – or extraditing (*aut dedere aut judicare or aut dedere aut prosequi*).

According to this reasoning, one must distinguish the principle of absolute universality (*principe de l'université absolue*), applicable to all states, from the principle of conditioned universality (*principe de la compétence relative, délégue*), applicable to states that are parties to an international agreement or treaty.

For the purposes of this research, it is postulated that all states possess the inherent right to suppress certain behaviours and that they establish a minimum standard based on the exercise of this right. This standard, in turn, creates a perpetual obligation under international agreements characterized by the principle of '*aut dedere aut judicare*'.

3. Universal Jurisdiction as a Mechanism of State Responsibility

3.1. State Duty to Criminalize as 'Jus Cogens'

To explore the state duty to criminalize within the framework of '*jus cogens*' and its '*erga omnes*' obligations, we will examine in depth the theoretical underpinnings of international public law. '*Jus cogens*' norms are peremptory principles of international law from which no derogation is permitted. These norms are recognized by the international community of states as a whole as being fundamental to maintaining international legal order, and include *inter alia* prohibitions against genocide, slavery, torture, and aggression. The concept of '*erga omnes*' obligations, on the other hand, refers to obligations that a state owes towards the international community as a whole, emphasizing the collective interest in protecting and enforcing these fundamental norms.

The state duty to criminalize under '*jus cogens*' requires states to implement national legislation that criminalizes conduct constituting violations of peremptory norms. This duty emphasizes the principle that certain international crimes, by their very nature, threaten the values and interests that are fundamental to the international community, thereby requiring universal condemnation and penalization.

The implementation of '*jus cogens*' as '*erga omnes*' obligations requires states not only to refrain from acts that violate these norms but also to actively legislate against such conduct and prosecute offenders within their jurisdiction. This proactive stance is a manifestation of the collective responsibility held by states to uphold the integrity of international law and universally protect human rights.

The theoretical foundation for the state duty to criminalize as '*jus cogens*' and its '*erga omnes*' obligations is deeply rooted in international public law. This field provides the legal and moral rationale for the universal protection of fundamental human rights and the prevention of crimes that infringe upon these rights. The recognition of '*jus cogens*' norms and '*erga omnes*' obligations reflects a consensus among states on the imperative to uphold certain universal values, transcending individual state interests in favour of the collective good.

The practical application of the state duty to criminalize under '*jus cogens*' norms faces several challenges, including variations in national legal systems, political reluctance, and the complexities of international cooperation in law enforcement. Despite these challenges, the principle remains a cornerstone of international efforts to combat impunity and ensure accountability for grave human rights violations.

3.2. Enforcement Mechanisms: 'Aut Dedere Aut Judicare' as 'Erga Omnes' Obligations

The principle of '*aut dedere aut judicare*' – to extradite or prosecute – is a cornerstone in the enforcement of international criminal law, embodying 'erga omnes' obligations that states owe to the international community as a whole. This principle is intricately linked to the state duty to criminalize, emphasizing the necessity for states to have enabling legislation that criminalizes conduct constituting serious international crimes within their territories. Such legislation is a precondition for the effective implementation of the '*aut dedere aut judicare*' obligation, reinforcing the need for compliance to ensure that perpetrators of international crimes are held accountable.

The '*aut dedere aut judicar*' obligation is based on the existence of national laws that recognize and criminalize specific conducts as international crimes. Without such legislation, states face significant hindrances in fulfilling their '*erga omnes*' obligations, potentially leading to impunity for perpetrators of grave offences. The requirement of enabling legislation is not merely procedural; it is fundamental to ensuring that states can either prosecute offenders within their jurisdiction or extradite them to a jurisdiction willing and able to do so.

A critical challenge in the enforcement of '*aut dedere aut judicare*' arises from constitutional guarantees and fundamental rights, which may protect individuals from being surrendered to international tribunals if the conduct is not criminalized in the host state's territory. This challenge emphasizes the importance of universal jurisdiction within national criminal legislation, allowing for the prosecution of individuals even in the absence of direct links between the criminal conduct and the state hosting the accused person.

Incorporating universal jurisdiction into national legislation addresses the potential protection individuals might have against extradition. It ensures that states can exercise adjudicative competence to prosecute serious international crimes, regardless of where they were committed or regardless of the nationality of the perpetrators or victims. This approach is essential for overcoming obstacles that may prevent the fulfilment of the '*aut dedere aut judicare*' obligation and ensuring that states contribute to the global fight against impunity.

The application of universal jurisdiction and the '*aut dedere aut judicare*' principle has been demonstrated in several notable cases, for example, in the case of *Hissène Habré,* the former President of Chad, who was tried and convicted for crimes against humanity, torture, and war crimes (*Prosecutor v. Hissène Habré,* Case No. 002/2013/EAC). His case, which represents a significant instance of universal jurisdiction, as it was prosecuted by the Extraordinary African Chambers

within the Senegalese court system, highlights the effectiveness of national legislation in enabling the prosecution of international crimes, in line with the '*aut dedere aut judicare*' obligation. Similarly, the prosecution of Somali pirates under universal jurisdiction showcases the international community's commitment to addressing crimes that pose a threat to international peace and security, irrespective of the perpetrators' nationality or the location of the crime.

3.3. Challenging the Concept of State Sovereignty: Domestic Implementation Obligation as 'Conditio Sine Qua Non'

Universal jurisdiction is a distinctive and imperative mechanism within international law, setting itself apart from other jurisdictional grounds such as nationality, territoriality, and the protective principle. Unlike these grounds, which are predicated on specific connections to the prosecuting state, universal jurisdiction is not merely an option within the discretionary power of states; it is an obligation emanating from the very fabric of international public law, more specifically international criminal law. This obligation is particularly pertinent in the context of prosecuting conduct that violates '*jus cogens*' norms, subject to the '*aut dedere aut judicare*' principle, as analysed above.

The principle of universal jurisdiction in transcending traditional jurisdictional bases by mandating state action against certain international crimes, irrespective of any direct link to the state, is grounded on the international criminalization of specific conducts. Following the reasoning of this study, universal jurisdiction is considered an '*erga omnes*' obligation of the state, which must be distinguished from the understanding that it is a discretionary state power to choose its jurisdictional basis as part of its prescriptive jurisdiction.

This is grounded in the recognition that crimes such as genocide, torture, and crimes against humanity are offences against the international community as a whole, and require a universal response. Universal jurisdiction, therefore, constitutes a '*condition sine qua non*' for the fulfilment of state obligations under international law, ensuring the criminalization and prosecution of egregious conducts that threaten the very foundation of international order.

While the principles of territoriality and nationality grant states a degree of discretion in legislating and enforcing laws against crimes committed within their borders or by their nationals, universal jurisdiction imposes a duty on all states to prosecute or extradite individuals accused of international crimes, regardless of where these crimes were committed or the nationality of the perpetrators or victims. This obligation emphasizes the collective responsibility of states to uphold international norms and ensure justice for crimes that transcend national interests.

The implementation of universal jurisdiction, however, is not without its challenges. States may be reluctant to exercise it due to political, diplomatic, or practical considerations, including the risks of tension with other states and the complexities of extraterritorial prosecution. Moreover, this principle has faced criticism for potentially infringing on state sovereignty and its inconsistent application across different jurisdictions.

Referring back to the case of *Hissène Habré,* firstly Senegal's Constitution provides the fundamental legal basis for the rule of law and respect for international obligations, which are integral to implementing universal jurisdiction (*Prosecutor v. Hissène Habré,* Case No. 002/2013/EAC). Secondly, the Senegalese Code of Criminal Procedure was amended to incorporate the principle of universal jurisdiction, especially in the context of prosecuting international crimes such as torture, genocide, crimes against humanity, and war crimes. Thirdly, Law No. 2007-05 of 12 February 2007 was enacted specifically to allow Senegal to prosecute and judge the crime of genocide, crimes against humanity, war crimes, and torture, even if these crimes were committed outside Senegal. It also provided the legal framework for the creation of the Extraordinary African Chambers within the Senegalese judicial system. Finally, the Agreement between Senegal and the African Union, while not a piece of legislation *per se*, establishes the Extraordinary African Chambers in the courts of Senegal to prosecute international crimes committed in Chad during Hissène Habré's rule. This Agreement was pivotal in the practical application of universal jurisdiction in this case, as it defined the procedural framework and the scope of authority for the Chambers.

This legal framework enabled Senegal to host the trial of Hissène Habré, adhering to the principles of universal jurisdiction. The trial was a landmark in international law, demonstrating the capability of a national court to handle international crimes under the universal jurisdiction doctrine, supported by both domestic law and international agreements.

This case demonstrates how universal jurisdiction can be an effective tool for ensuring accountability, even decades after the commission of crimes, highlighting the international community's commitment to justice over political expediency.

Another example is this principle's application in the context of piracy off the coast of Somalia, where universal jurisdiction has facilitated international cooperation and prosecution efforts, emphasizing its effectiveness in addressing crimes with global impact, as seen in *Democratic Republic of Congo* v. *Belgium*; *Pinochet* Case; *Polyukhovich* v. *The Commonwealth of Australia,* among others, where national courts exercised jurisdiction over international crimes under the doctrine of universal jurisdiction (see: Guilfoyle, 2008, pp. 690-699).

These cases, currently under review, strongly demonstrate the need for domestic legislation, emphasizing the role of prescriptive jurisdiction in enabling effective

adjudicative jurisdiction by national courts. This interrelation demonstrates how a state's engagement in international agreements and its adherence to international criminal norms require robust legislative frameworks enacted. Such measures are crucial for ensuring the rule of law within international legal proceedings.

Further analysis positions universal jurisdiction within the general theory of law, emphasizing its crucial role in the enforcement mechanisms against international crimes. This conceptualization aligns with Professor James Crawford's insights in his commentary on the International Law Commission's Articles on State Responsibility. Crawford (2002) notes that a state's failure to fulfil its obligations to prosecute or extradite offenders not only undermines international justice but also violates international obligations. This reinforces the fundamental role of universal jurisdiction in the international legal order.

The subsequent sections of this paper will delve deeper into these themes, examining how domestic legislative actions and the principles of universal jurisdiction together serve as a cornerstone for maintaining global legal order and upholding the rule of law in international forums.

4. Universal Jurisdiction Ensuring the Rule of Law in International Criminal Proceedings

4.1. Universal Jurisdiction and the Rule of Law: a Two-Folded Perspective

The paper proposes a two-folded analysis of the relationship between universal jurisdiction and the rule of law, structured around two main pillars: the concept of legality and due process, which together ensure fairness and accountability in legal proceedings. According to Waldron (2008, pp. 1-61), the adherence to the rule of law implies more than just the procedural aspect (due process), and requires also consistency with the established laws (legality), ensuring that laws are applied equally and impartially.

The principle of legality in international law is enshrined in Article 38 of the Statute of the International Court of Justice, as recognized at the ICJ's Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons (1996), which assessed the legality under international law of the use or threat of nuclear weapons (International Court of Justice, 1996). The International Covenant on Civil and Political Rights (ICCPR), adopted in 1966, reinforces these principles at the procedural level. Articles 9, 14, and 15 of the ICCPR collectively ensure fairness in legal processes, uphold the principle of legality (prohibiting punishment under *ex post facto laws*), and establish due process rights in criminal proceedings.

It is essential to acknowledge the integral role of domestic courts in international criminal proceedings, focusing not only on their judicial capacity, but also on the legal framework that grants them authority. This authority is rooted in the prescriptive jurisdiction established by national legislation, which defines the scope within which courts can exert their adjudicative jurisdiction. Additionally, various forms of legal cooperation are crucial for aligning international actions with domestic legal standards. For such cooperation to be effective, the crime in question must be recognized as such within the domestic legal system of each cooperating state. This recognition ensures that international cooperation is based on the principle of legality, with due process, ensuring that actions taken on the international stage are rooted in the rule of law.

4.2. International Criminal Proceedings in Domestic Legal Systems

The complementarity principle outlined in the Rome Statute of the International Criminal Court is a cornerstone of international criminal justice, as established in Article 17. After this theoretical discussion, it is important to show how this principle influences substantial criminal proceedings, particularly in assuring the rule of law in providing compliance with legality and due process within key cooperation mechanisms. According to this principle, the International Criminal Court (ICC) can only intervene in cases where national jurisdictions are either unwilling or unable to prosecute. This ensures that the ICC serves as a court of last resort, stepping in only when national systems fail to effectively address serious international crimes.

The issue of extraditing nationals is a significant point of discussion, and varies widely among countries that are members of the ICC. Many national constitutions include provisions that protect their citizens against extradition, fostering a protective stance toward nationals. This has led to academic debates and legal interpretations that distinguish between ‘surrender’ – as outlined in the Rome Statute – and traditional ‘extradition’ practices.

The distinction between ‘surrender’ and ‘extradition’ in the context of the ICC and national laws has been discussed in various legal texts and academic discussions. A notable author who has addressed this distinction is Professor Dapo Akande (2011, pp. 485-507), a respected expert in international law. He has written extensively on issues related to international criminal law and the legal obligations of states under the Rome Statute. Again, issues of legality and due process are central to this discussion.

In his works, Akande (2011, pp. 485-507) often discusses how the ICC’s request for ‘surrender’ differs from traditional extradition, particularly in terms

of the obligations and processes involved. The Rome Statute's use of the term 'surrender', rather than 'extradition', is intended to emphasize the cooperative nature of the relationship between the ICC and its member states, avoiding some of the sovereignty concerns that typically accompany extradition procedures.

Some countries have navigated these constitutional barriers by differentiating between these terms, aligning national laws with international obligations without directly contravening constitutional protections. For instance, the French Constitution prohibits the extradition of French nationals. However, France permits the surrender of nationals under the framework of European Arrest Warrants, enabling cooperation within the EU. Germany's Basic Law similarly restricts the extradition of German nationals to non-EU countries, with exceptions permitted under specific international or European legal frameworks (Basic Law for the Federal Republic of Germany, Art. 16). Italy and Austria also have protective measures in their constitutions, but allow for extradition under certain conditions, primarily within the EU or through specific international agreements (Italian Constitution, Art. 26; Austrian Federal Constitutional Law, Art. 10).

These national restrictions are typically counterbalanced by obligations under the principle of *aut dedere aut judicare*, which requires states to either prosecute or extradite individuals accused of committing serious crimes. This principle is fundamental to ensuring that such individuals do not escape justice, promoting accountability and adherence to international legal standards.

By examining these variations, it becomes evident that while constitutional protections for nationals pose challenges for extradition, countries have developed legal frameworks that allow them to comply with international obligations, ensuring that justice is served in the international sphere. However, for the purpose of this paper, an opposing position can be seen in the case of Brazil. Brazil's constitutional protection for its nationals, as outlined in the Brazilian Constitution, implies that Brazilian nationals cannot be extradited, except in specific circumstances. These include cases where naturalized Brazilians have committed common crimes before naturalization or offences related to drug trafficking, as stated in Article 5, LI and LII (Constitution of the Federative Republic of Brazil, Art. 5).

Considering Brazil's constitutional protection for its nationals, a potential issue could arise regarding compliance with the ICC statute if a Brazilian national commits a crime that does not have jurisdictional links to Brazil. In such cases, without other jurisdictional grounds, Brazil might face challenges in complying with the ICC's expectations to extradite or prosecute. Article 17 of the Rome Statute could potentially be in question regarding Brazil's compliance when there are no jurisdictional grounds for prosecuting a national accused of crimes falling under ICC jurisdiction.

In situations where extradition is not possible, and national prosecution is required under international obligations, Brazil could opt for universal jurisdiction, similar to Senegal's approach. The case of *Belgium v. Senega*l before the International Court of Justice, where Senegal was obligated to prosecute or extradite the former Chadian dictator Hissène Habré under the United Nations Convention against Torture is a precedent (see International Court of Justice, 2012). By adopting universal jurisdiction, countries like Brazil can fulfil their international obligations and prosecute international crimes domestically even if these crimes are committed by nationals abroad with no direct link to the country.

4.3. Universal Jurisdiction 'In Absentia': an Accurate Term?

At this stage of the discussion, it is important to highlight a kay concern associated with universal jurisdiction, particularly from the standpoint of trials '*in absentia*'. Such trials have been criticized as potential violations of due process, specifically in relation to the accused's rights of fair trial and legal safeguards outlined in international legal instruments such as the International Covenant on Civil and Political Rights. Moreover, the issue of universal jurisdiction and its relationship to trials *in absentia* raises significant legal debates, particularly concerning the intersections of prescriptive and adjudicative jurisdictions.

Following the logic developed in this paper, universal jurisdiction is defined as a jurisdictional ground selected by state legislatures for exercising prescriptive jurisdiction. This choice is predicated on the state's duty to criminalize, reflecting an *erga omnes* obligation to either extradite or prosecute (*aut dedere aut judicare*) certain conducts defined as international crimes under *jus cogens* norms.

However, the application of trials *in absentia* is governed by the procedural legislation that regulates adjudicative jurisdiction. Once a state is deemed 'competent' – as determined by its own legislation that criminalizes certain conduct – its judicial bodies must initiate proceedings in accordance with domestic procedural laws. Crucially, these proceedings must align with the international framework for the protection of the rights of the accused, ensuring fundamental rights to a fair trial and due process. These rights are enshrined in key international legal documents, including the International Covenant on Civil and Political Rights (ICCPR) - Articles 14 and 15; the Universal Declaration of Human Rights (UDHR) - Article 10; the European Convention on Human Rights (ECHR) - Article 6; and the American Convention on Human Rights (ACHR) - Article 8. Collectively, these articles establish the fundamental rights to a fair trial and due process, which are central to the application and interpretation of universal jurisdiction in the international legal system.

Therefore, for the purposes of this research, the term 'universal jurisdiction *in absentia*' is inaccurate. The assumption that universal jurisdiction inherently involves the violation of the accused's rights through trials in absentia is flawed. Universal jurisdiction solely refers to a state's authority under international law to prescribe laws for certain international crimes, irrespective of where they occur. Conversely, trials *in absentia* are governed by procedural legislation within adjudicative jurisdiction, focusing on the manner in which trials are conducted rather than the scope of the law itself. Therefore, conflating these two distinct legal concepts results in misunderstandings about their respective applications and implications

This research, having refuted the allegation that universal jurisdiction inherently involves trials *in absentia*, supports the view that universal jurisdiction plays a critical role in upholding the rule of law in international legal procedures. By clarifying the distinct nature of universal jurisdiction as primarily prescriptive, this analysis shows how universal jurisdiction contributes to the enforcement of international legal norms without necessarily infringing on the procedural rights of the accused.

5. Conclusion

This paper has thoroughly examined the pivotal role of universal jurisdiction in ensuring that international legal standards are consistently upheld within national frameworks. By exploring both the theoretical underpinnings and the practical applications of this principle, it has been demonstrated that universal jurisdiction is crucial for the consistent and effective prosecution of serious international crimes across different jurisdictions. This approach not only reinforces the rule of law on a global scale but also enhances the reliability and predictability of legal processes in international criminal proceedings. In conclusion, this paper establishes several key findings:

In establishing the fundamental relationship between state sovereignty and jurisdiction within the framework of international law, it underscores the comprehensive nature of state jurisdiction – encompassing judicial, legislative, and administrative powers – as a manifestation of sovereignty. Through the theoretical perspectives of scholars like Lord MacMillan, Professor Ian Brownlie, and Professor Antonio Cassese, this paper effectively illustrates how jurisdiction serves as the foundation of state authority within its territorial confines, emphasizing the intrinsic connection between sovereignty and the competencies it confers.

By exploring the multifaceted expression of state jurisdiction in international law, this paper distinguishes between prescriptive, adjudicative, and enforcement jurisdictions. It outlines how these forms of jurisdiction interconnect to facilitate

a state's governance over international crimes and the enforcement of its laws, particularly emphasizing the primacy of domestic legal frameworks in exercising jurisdictional authority. This examination reaffirms the role of state jurisdiction in maintaining international legal order and upholding justice at both national and international levels.

The nuanced discussion on the evolution of jurisdictional grounds in international law shifts from traditional bases to the principle of universality. This principle, which allows states to legislate and adjudicate international crimes irrespective of a direct connection to the state, reflects a significant evolution in the legal landscape. It advocates for a clear differentiation between the traditional jurisdictional grounds and the modern approach of international criminalization, showcasing how universal jurisdiction operates as a vital tool for prosecuting international crimes and strengthening the global legal framework.

In synthesizing the concept of universal jurisdiction, this paper clarifies its role as primarily a prescriptive jurisdiction, enabling a state to assert legal authority over international crimes without a direct jurisdictional link at the crime's occurrence. It highlights the legislative adaptations necessary to balance this expansive jurisdictional reach with the fundamental requirements of due process, examining the conditions under which such jurisdiction can be justly exercised. It reinforces the principle of universality in international law, positioning it as essential for ensuring justice and accountability across borders.

The profound interconnection between '*jus cogens*' norms and the state duty to criminalize, establishes these peremptory norms as fundamental to international law and indispensable for maintaining global legal order. It articulates how these norms, being universally binding, require states not only to refrain from certain actions, but also to proactively criminalize and prosecute violations such as genocide, slavery, and torture. The exploration of '*jus cogens*' as '*erga omnes*' obligations accentuates the shared responsibility of states to protect human rights and enforce international law, emphasizing the collective interest over individual state preferences.

The discussion on the enforcement mechanism of '*aut dedere aut judicar*' showcases its pivotal role in operationalizing the state duty to criminalize. This principle is critical in ensuring that states either prosecute or extradite offenders of serious international crimes, thereby preventing impunity and upholding international accountability. It emphasizes the necessity for states to have robust legal frameworks that criminalize international crimes, highlighting the link between national legal readiness and international law enforcement. The paper also addresses the practical challenges in implementing this principle, stressing the importance of universal jurisdiction in overcoming legal and political barriers.

Exploring the transformative effect of universal jurisdiction on traditional notions of state sovereignty, this paper argues that universal jurisdiction is not merely an optional jurisdictional base, but a fundamental obligation derived from the core principles of international criminal law. This obligation requires states to act against the most heinous crimes affecting the international community, transcending conventional jurisdictional links such as nationality or territory. It critically examines the tensions between state sovereignty and the demands of universal justice, advocating for legislative changes within states to effectively fulfil their international obligations. This analysis demonstrates the need to balance state interests with global legal imperatives in order to uphold justice and maintain international order.

The proposed two-folded analysis navigates the dual aspects of the rule of law – legality and due process – as they pertain to universal jurisdiction. The examination underlines the principle of legality as fundamental, ensuring that actions are conducted within the bounds of law, particularly in the context of international legal frameworks such as the ICCPR and the ICJ's advisory opinions. It also highlights the critical role of due process in maintaining fairness and accountability in judicial proceedings, stressing the integral role of domestic courts in international criminal proceedings. Through the lens of prominent legal scholars and international statutes, this section delineates how universal jurisdiction strengthens the rule of law by ensuring that international norms are applied consistently and impartially across different jurisdictions.

Shifting to the practical implementation of the rule of law within domestic jurisdictions under the complementarity principle of the Rome Statute, this principle serves as a mechanism to ensure that international crimes are prosecuted primarily within national legal systems, only defaulting to the ICC as a last resort. The discussion on extradition versus surrender further explores the nuances of international cooperation in prosecuting international crimes, highlighting how different nations navigate constitutional barriers to align with ICC mandates. It effectively showcases how national legal adaptations, such as those in France and Germany, facilitate adherence to international obligations, reinforcing the importance of domestic legal systems in upholding international criminal justice standards.

Finally, in addressing a critical debate surrounding the concept of universal jurisdiction, particularly the misinterpretations associated with trials *in absentia* the paper clarifies that universal jurisdiction relates to the prescriptive authority of states to legislate against international crimes without direct jurisdictional links, distinguishing it from the procedural aspects governed by trials *in absentia*. By dissecting the conflation of these two distinct legal concepts, the paper argues that universal jurisdiction does not inherently conflict with the rights of the accused as

long as procedural justice aligns with international human rights standards. The analysis concludes that, when properly understood and implemented, universal jurisdiction plays a vital role in strengthening the rule of law internationally, without compromising fundamental judicial principles.

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