

## The Application of Universal Jurisdiction in Iranian Criminal Law

Mansour Farrokhi, PhD  
Assistant Professor  
Hormozgan University

### Abstract

*States have two kinds of sovereignty: Territorial and extraterritorial. In the area of criminal jurisdiction, territorial principle is the only principle which is exercised within the territory of States. Other principles including personality, protective and universal jurisdiction are applicable to actions and persons who commit a crime outside the territory of the State which exercises its jurisdiction. The principle of universal jurisdiction is of a great importance, because it has several international aspects and seeks to prevent impunity in respect of the offences which affect the public order and interests of the international community as a whole. In this article, the sources and challenges of universal jurisdiction will be discussed.*

**Keywords:** Jurisdiction, Universal, Sovereignty, Extraterritorial, International Crimes

### 1-Introduction

International law regards criminal jurisdiction as a prerogative of sovereign states. As a result, the traditional limits on national criminal jurisdiction are largely coextensive with the limits of national sovereignty. States obviously have territorial jurisdiction over offenses committed within their confines for control over territory is the hallmark of sovereignty. Furthermore, states sometimes have jurisdiction over offenses committed elsewhere, called extraterritorial jurisdiction. (Kontorovich, 2004, p.188). Universal jurisdiction is an illustration of extraterritorial jurisdiction.

The principle of universal jurisdiction is one of the jurisdictional principles which have been developed in the area of criminal law during recent decades. Upon this principle, States are entitled to prosecute some offences within their territories, regardless of where the offence has been committed or the nationality of the offender or victim. (Mirmohammadsadeghi, 2007, p.30).

The rationality of the principle is that there are some offences which are not committed against a specific State. Thus, regardless of *locus delicti* (the place of the commission of the offence), the accused will be tried in any country in which he/she is arrested. By exercising universal jurisdiction, the impunity of offenders will be avoided. (Goldouzian, 2013, p.49). In other words, with respect to legislative jurisdiction which differs from judicial jurisdiction, there are some offences which affect not a given society or nation, but the human community as a whole. (Dadashzadeh&Habibi, 2008, p.214).

There are two premises underlying universal jurisdiction. The first involves the gravity of the crime. Many of the crimes subject to the universality principle are so heinous in scope and degree that they offend the interest of all humanity, and any state may, as humanity's agent, punish the offender. The second involves the *locus delicti* (place of the act). Many of the crimes subject to the universality principle occur in territory over which no country has jurisdiction or in situations in which the territorial state is unlikely to exercise jurisdiction, because, for example, the perpetrators are state authorities or agents of the state. (Scharf, 2012, p.366).

In fact, the concept of universal jurisdiction is the extension of the domestic jurisdiction of a country in order to consider the offences which have not been committed within the territory or against the interests of that country and neither the accused nor the victim have its nationality. In other words, those offences are important crimes which cause international community's concern. (Foroughi, 2010, p.22).

The principle of universal jurisdiction of domestic courts is an effective factor of globalization of criminal justice and may be considered as a mechanism having an important position in the fight against impunity. (Khabiry&Jadali, 2010, p.100).

Offences such as piracy, hijacking, war crimes, genocide and crimes against humanity are the most important offences which the principle of universal jurisdiction applies. International custom and treaties are two main sources of those offences.

In considering those cases, the court exercising its jurisdiction, does not take account of *locus delicti* and the nationality of the offender and the victim. The only condition is the presence of the accused within the territory of the country, even if temporarily. However, upon the universal jurisdiction in absentia, this temporary presence is not necessary at all. (Jadali, 2007, p.796).

Universal jurisdiction thus departs from all other types of criminal jurisdiction recognized under international law, which are grounded in some concrete nexus between the forum state and the crime. Universal jurisdiction finds basis in the especially heinous characteristics of some crimes, which are so harmful that they offend the international community as a whole. (Zemach, 2011, pp. 145-146).

Recent developments with regard to universal jurisdiction have been very positive, but universal jurisdiction alone can go only so far in imposing obligations upon states. The role of universal jurisdiction is to compensate for the lack of a centralized international legal order, not to create one. Despite its limitations, the effective application of universal jurisdiction has grown dramatically. This dynamic and changing doctrine has already proved to be a powerful tool in the hands of national prosecuting authorities. Further progress seems inevitable as the fundamental humanitarian values driving the evolution of universal jurisdiction gain even broader acceptance by the international community as a whole. Through this process the duty to prosecute universal jurisdiction crimes, and perhaps even the duty to prevent them, could eventually gain recognition as compelling *jus cogens* norms from which no derogation is permitted. (Brown, 2001, p.397).

In this article, the sources and challenges of the application of the principle of universal jurisdiction in Iranian criminal law will be discussed accordingly.

## ***2-The Sources of the Principle***

Article [9] of the Islamic Penal Code provides that: “Regarding the offences perpetrators of which under a specific law or international treaties and regulations, should be tried in any country in which they are found, the offender found in Iran shall be tried and punished in accordance with the Iranian criminal statutes.”

Upon this Article, it is necessary that the offence has been recognized as an international crime by a special law, an international treaty or international regulations.

### **2-1-Special Laws**

A special law in Article [9] refers to a domestic statute which applies to one or more crimes and authorizes the judiciary to prosecute the perpetrators of those crimes, regardless of the offender’s or victim’s nationality and the place of the commission of the crime.

In Iranian penal law various crimes with international aspects have been regulated. But no authorization for prosecuting those crimes upon universal jurisdiction has been provided. For example, Suppression of Human Trafficking Act (2004) does not have any provision on universal jurisdiction. Similarly, Protection of Children and Teenagers Act (2002) have not stipulated the prosecution of the offences committed abroad by foreign offenders.

### **2-2-International Treaties**

International Treaties in Iranian legal system are equivalent to ordinary laws. According to Article [9] of the Civil Code, “The treaties concluded between Iranian government and other governments in accordance with Iranian Constitution, are considered as statutes”.

It should be noted that in Iranian criminal law, treaties are the main sources of universal jurisdiction. For example, Article [5] of the International Convention on the Suppression and Punishment of the Crime of Apartheid to which Iran has accessed in the fall of 1973 states that, “Persons charged with the acts enumerated in article II of the present Convention may be tried by a competent tribunal of any State Party to the Convention which may acquire jurisdiction over the person of the accused or by an international penal tribunal having jurisdiction with respect to those States Parties which shall have accepted its jurisdiction.”

### **2-3-International Regulations**

In Article [9] of the Penal Code “international regulations” is being added to “treaties”. In international law, because of the non-existence of an international legislature superior to State’s sovereignty, international customs and treaties are two main sources of legal rules. Article [9] of the Civil Code refers to “treaties” as international conventions and agreements which are considered as ordinary laws under Article [9]. While, referring to “international regulations” means international custom as another source of international law. (Khaleghi, 2014, p.175).

In Iranian criminal law, piracy is an offence which is inside the scope of the principle of universal jurisdiction under international customary law.

### **3-Challenges**

There are some challenges in the application of the principle of universal jurisdiction in Iranian penal law. They can be presented as follows:

#### **3-1-The Deficiency of Statutory Laws**

Sometimes statutes fail to stipulate universal jurisdiction, while it seems necessary. For example, the Act of the Suppression of Human Trafficking (2004) has not put this offence inside the scope of universal jurisdiction, whereas human trafficking because of its serious consequences is considered as an international crime. The only provision in the above-mentioned Act with regard to offences committed abroad is laid down in Article [7] which applies to Iranian nationals. In fact, this provision refers to active personality principle and not universal jurisdiction.

#### **3-2-Non-penalization**

One of the basic challenges of universal jurisdiction in Iranian criminal law is non-penalization of most international illegal acts in penal statutes. For example, apartheid and piracy which are illegalized by an international treaty and custom accordingly, lack any punishment in Iranian penal law. It follows that judges hesitate to exercise universal jurisdiction with respect to those actions.

A legal solution found to this problem is that the penalty of similar offences described in statutes, is determined with regard to the actions which has not been penalized. For example, the punishment of *Muhareba* (infringement of public security) which has been criminalized in Islamic Penal Code may be determined for piracy. But this solution is not always useful. In some cases the constituent elements of two crimes, despite some similarities are different. In addition, some actions do not resemble any offences. For instance, there is no crime in Iranian criminal statutes that is identical to apartheid.

#### **3-3-Contingent Contradictions between Islamic Jurisprudence and International Law**

As the Iranian law is mostly derived from Islamic jurisprudence, some of the international requirements may be in conflict with Islamic rules. This situation may cause problems in the application of universal jurisdiction.

Although, the Islamic Republic of Iran has accessed to some international treaties, Iranian Parliament has enacted them on the condition that any rules of those treaties which are in conflict with Islamic rules should not be observed by Iranian government. It is considered as a vague reservation which is lacking any effect under international law. However such a condition obstructs the application of the principle of universal jurisdiction in Iranian domestic law.

A typical case in this regard is Convention on the Rights of the Child. According to Iranian Guardian Council the content of this convention is partly in conflict with Islamic rules. That is why the Assembly added the following expression in the beginning of the enactment:[Single-clause Bill: “Convention on the Rights of the Child covering one introduction and 54 articles is ratified as follows and the government of Islamic Republic of Iran will be allowed to access to it, provided that any part of the convention is known to be in conflict with Islamic rules, will not be obligatory for the government.”]

### **4-Conclusion**

In spite of the acceptance of the principle of universal jurisdiction in Iranian criminal law which has been illustrated in Article [9] of the Islamic Penal Code (2013), there are some serious and basic challenges in the application of the principle.

Firstly, the statutes in which some offences with international aspects have been laid down do not refer to universal jurisdiction with regard to those offences. This deficiency is undoubtedly obstructive in the exercise of universal jurisdiction.

Secondly, some international crimes have been included in Iranian statutes, but no penalty has been fixed for those crimes. Apartheid and piracy are two main examples of such crimes. Non-penalization in this respect makes the principle of universal jurisdiction a meaningless concept.

Thirdly, the existence of unavoidable contradiction between Islamic jurisprudence as the basic foundation of the religious legal order in Iran and some rules of international treaties has resulted in conditional accession to treaties. This situation impedes the accurate application of universal jurisdiction.

The best solution in this regard is that the Iranian legislator makes some amendments to Article [9] of the Islamic Penal Code by adding a clear list of the offences which can be considered under universal jurisdiction. Additionally, fixing penalties for international crimes in the penal code will pave the way for the application of universal jurisdiction.

Adding notes by the Assembly to some present statutes like Suppression of Human Trafficking Act (2004) specifying universal jurisdiction may lead to appropriate application of universal jurisdiction.

Finally, exercising a constructive role by the Exigency Council in the framework of the Constitution seems necessary and useful in this regard. According to Article [112] of the Constitution of Islamic Republic of Iran:

“Upon the order of the Leader, the Nation's Exigency Council shall meet at any time the Guardian Council judges a proposed bill of the Islamic Consultative Assembly to be against the principles of Islam or the Constitution, and the Assembly is 'unable to meet the expectations of the Guardian Council. Also, the Council shall meet for consideration on any issue forwarded to it by the Leader and shall carry out any other responsibility as mentioned in this Constitution. The permanent and changeable members of the Council shall be appointed by the Leader. The rules for the Council shall be formulated and approved by the Council members subject to the confirmation by the Leader.”

Thus the Exigency Council can facilitate the application of universal jurisdiction where the contradiction between Islamic principles and the content of a treaty impedes the exercise of the principle of universal jurisdiction.

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