ANALYSIS OF UNIVERSAL JURISDICTION AND DEFINITIONS OF CRIMES IN NATIONAL LAW

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Abstract

Universal jurisdiction is an essential tool that a national court may prosecute individuals for serious crimes against international law namely, crimes against humanity, war crimes, genocide, and torture that harm the international community as a whole. National courts can exercise universal jurisdiction if the state has adopted legislation for the relevant crimes and prosecution for such crimes. Some international agreements allow the states to adopt the necessary law to prosecute or extradite any accused who is within the state party's territorial jurisdiction. Thus the definition and exercise of universal jurisdiction may vary depending on the domestic legal framework and particular cases concerned to prosecute individuals for international crimes. There are a growing number of other offenses that an international treaty may be subject to the jurisdiction of contracting parties which form far from the concept of universal jurisdiction.

Keywords: universal jurisdiction, crimes against humanity, war crimes, genocide, torture

1. Introduction

Every state, under universal jurisdiction, has jurisdiction to try particular offences even if the crime were committed outside the country concerned, by one of its nationality, or against one of its nationality. But international crimes are now considered that are particularly offensive to the international community as a whole. States have recognized the meaning of crimes under international law in national law. They include war crimes, crimes against humanity, genocide, and aggression. The states have provided universal jurisdiction not only over these crimes but ordinary crimes. The paper examines concept and scope of universal jurisdiction, treaties providing for jurisdiction, universal jurisdiction, international crimes and definitions of crimes in national law. The paper does not address all matters regarding universal legislation. It focuses on international crimes: war crimes, crimes against humanity, genocide, and aggression including torture.

2. Concept and Scope of Universal Jurisdiction

Under the universality principle[1], states have jurisdiction to prosecute the crimes involved which are regarded as particularly offensive to the international community as a whole. The court of any state has university jurisdiction over the person for the crime committed outside its territory irrespective of the suspect's nationality or of the impact on the national interest of the state. This rule is sometimes named permissive universal jurisdiction.

Treaties and national legislation recognize this rule not only for crimes under international law but also crimes under the national law of international involvement and domestic crimes. The national court, on behalf of the international community, is exercising jurisdiction over international crimes and crimes under the national law of international involvement.

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[1] K. C. Randall, 'Universal Jurisdiction under International Law', 66 Texas Law Review, 1988, p. 785; L. Reydams, 'Universal Jurisdiction; European Centre for Constitutional and Human Rights', Universal Jurisdiction Annual Review, 2015; A. R. Reeves, 'Liability to International Prosecution: The Nature of Universal Jurisdiction', 28 EJIL, 2017, p. 1047; D. Hovell, 'The Authority of Universal Jurisdiction', 29 EJIL, 2018, p. 427; M. Langer and M. Eason, 'The Quiet Expansion of Universal Jurisdiction', 30 EJIL, 2019, p. 779.

In the 'Eichmann' case, the appellant committed crimes having an international character that harmed the entire international community. The State of Israel was therefore entitled to universal jurisdiction to prosecute the offender.[2]

As a practical matter, when the *aut dedere aut judicare* ("either extradite or prosecute") rule applies, the state where the suspect is found must ensure that its courts can exercise all possible forms of geographic jurisdiction, including universal jurisdiction, in those cases where it will not be in a position to extradite the suspect to another state or to surrender that person to an international criminal court.

3. Treaties Providing for Jurisdiction

In addition to pirates and war criminals as universal jurisdiction, several treaties provide the destruction of submarine cables, drug trafficking, slavery, etc. for the suppression by the international community.[3] These treaties provide for the exercise of state jurisdiction but not universal jurisdiction. Some conventions institute a quasi-universal jurisdiction in providing for the jurisdiction upon different bases by an obligation of states parties to establish such jurisdiction in domestic law.

In many instances, the offence involved will constitute *jus cogens* (peremptory norm). The view is sometimes put forward that where a norm of *jus cogens* exists, particularly where the offence is regarded as especially serious, universal jurisdiction as such may be created.[4] International law recognizes that domestic legal orders may validly provide and exercise jurisdiction over the alleged offenders. In this effect, it might be different from universal jurisdiction when a pirate may be apprehended on the high seas and prosecuted in that state.

The type of jurisdiction at issue in such circumstances cannot, therefore, be described as universal, but rather as quasi-universal.[5] Judges Higgins, Kooijmans and Buergenthal in their Joint Separate Opinion in *Congo v. Belgium* referred to this situation "rather as an "obligatory territorial jurisdiction over persons" or "the jurisdiction to establish a territorial jurisdiction over persons for extraterritorial events" rather than as true universal jurisdiction".

Several treaties that follow the quasi-universal model generally provide for mutual assistance and the offenses in question as extraditable offenses under any extradition treaty. These agreements include, for example, the UN Torture Convention 1984 and treaties relating to hostage-taking, currency counterfeiting, hijacking, and drug trafficking. Such treaties are normally affected nationally.

Further, the extradition agreements were concluded between state parties to extradite and prosecute the suspect defining the extraditable offenses.[6] In Ex parte Pinochet (No. 3), where the majority of the House of Lords held that torture committed outside the United Kingdom was not a crime punishable under UK law until the provisions of the Convention against Torture were implemented by section 134 of the Criminal Justice Act 1988.[7]

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[2] (2000) 1 WLR 1573.

[3] *Alcom Ltd v. Colombia* (1984) 2 ll ER 6, 9; 74 ILR, pp. 180,181; Akehurst, 'Jurisdiction in International Law', 46 BYIL, 1972–73, pp. 160–1; Ryngaert, 'Jurisdiction in International Law', 2nd ed. Oxford, 2015, p. 100; C. McLachlan, 'Foreign Relations Law', Cambridge, 2014, pp. 207.

[4] *Planmount Ltd v. Zaire* (1981) 1 All ER 1110; 64 ILR, p.268.

[5] *Alcom Ltd v. Colombia* (1984) 2 All ER 6, 10; 74 ILR, p. 183.

[6] *Jones v Saudi Arabia* (2006) UKHL 26, para. 8; K. Kittichaisaree, 'The Obligations to Extradite or Prosecute', Oxford, 2018; Shaw, M.N, 'International Law', 9th edn, Cambridge University Press, 2021, p.1694.

[7] 2006 EWCA Civ 1529, paras.132-3; K. Grady, 'International Crimes in the Courts of England and Wale', Criminal Law Review, 2014, p. 693.

The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1973 provides that contracting states adopt domestic law to take an action upon any activities such as assaults upon the person, premises, and transport of such persons a crime under their domestic law. Each state is to establish its jurisdiction over these crimes when committed in its territory or on board ships or aircraft registered in its territory, or when the alleged offender is a national, or when the crimes have been committed against an internationally protected person functioning on behalf of that state. A person is regarded as internationally protected when he is a head of state or government, or foreign minister abroad, or state representative, or an official of an international organization.[8]

The crimes and jurisdiction for such crimes should be defined by each state party[9] under their National law provided by the Convention on the Safety of United Nations and Associated Personnel, 1994 in order to suppress if the crimes are committed in the defined territory.[10]

The Montreal Convention contains similar rules as to jurisdiction and extradition as the Hague Convention but is aimed at controlling and punishing attacks and sabotage against civil aircraft in flight and on the ground rather than dealing with hijacking directly.

The Beijing Convention of 2010 criminalises the acts of using civil aircraft causing death, serious bodily injury, or severe damage; using civil aircraft to release or discharge any biological, chemical, or nuclear weapon, and cyber-attacks.

The wide range of jurisdictional bases is accepted, although universality is not included. Nevertheless, condemnation of this form of activity is widespread and hijacking has likely become an international crime of virtually universal jurisdiction in practice. International terrorism may in time be regarded as a crime of universal jurisdiction.[11]

Of course, questions as to enforcement will arise where states fail either to respect their obligations under the above Conventions or, if they are not parties to them, to respect customary law on the reasonable assumption that state practice now recognises hijacking as an unlawful act.

Bilateral arrangements may also be made, which provide for the return of, or prosecution of, hijackers.[12] States may also, of course, adopt legislation that enables them to prosecute alleged hijackers found in their territory,[13] or more generally seeks to combat terrorism. For example, the 1984 US Act to Combat International Terrorism provides rewards for information concerning a wide range of terrorist acts primarily (although not exclusively) within the territorial jurisdiction of the United States.

4. Universal Jurisdiction

In addition to piracy, war crimes are now accepted by most authorities as subject to universal jurisdiction, though of course the issues involved are extremely sensitive and highly political.[14] While there is little doubt about the legality and principles of the war crimes

[8] *Australia and Newzealand Banking Group v. Common Wealth of Australia*, 1989, p.59.
[9] *NAC v. Nieria* 63 ILR, p. 137.
[10] *Argentine Airlines v. Ross* 63 ILR, p. 195.
[11] *Saudi Arabia v. Nelson* 123 L L.Ed.2d 47, 61 (1993); 100 ILR, pp.545, 553.
[12] *Transamerican Steamship Corp.v. Somalia* 590 F.Supp. 968 (1984) and 767 F.2d 998.
[13] *Yessenin-Volpin v. Novosti Press Agency* 443 F. Supp. 849 (1978); 63 ILR, p. 127.
[14] 999 F.Supp.1 (1998); 121 ILR 618; M. Akehurst, 'Jurisdiction', p. 160; A. Cowles, 'Universality of Jurisdiction over War Crimes', 33 California Law Review, 1945, p. 177; Brownlie. I, 'Principles of Public International Law' (ed. J. Crawford), 9th ed., Oxford, 2019, pp. 451 ff; D.W. Bowett, 'Jurisdiction', p. 12; Higgins, 'Problems and Process', p. 56; Mann, 'Doctrine of Jurisdiction', p. 93; Bassiouni, M.C, 'Crimes Against Humanity', p. 510.

decisions emerging after the Second World War, a great deal of controversy arose over suggestions of war crimes with regard to American personnel connected with the Vietnam War,[15] Pakistani soldiers involved in the Bangladesh War of 1971[16] and persons concerned with subsequent conflicts.

Crimes against peace and crimes against humanity are defined within the ambit of the jurisdiction of the tribunal.[17] Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, 1968 highlights that war crimes form a distinct category under international law, susceptible to universal jurisdiction. Universal jurisdiction over grave breaches: willful killing, torture or inhuman treatment, unlawful deportation of protected persons, and the taking of hostages includes in the four Geneva Red Cross Conventions of 1949. The list was extended in Additional Protocol I of 1977 to the 1949 Conventions to include, for example, attacking civilian populations.[18]

Nuremberg practice demonstrates that crimes against peace consist of the commission by the authorities of a state of acts of aggression. In practice, serious problems are likely to arise within the framework of universal jurisdiction. However, whether this category can be expanded to include international terrorism is open to question. Crimes against humanity cover genocide and related activities. They differ from war crimes in applying beyond the context of an international armed conflict.[19]

The UN Secretary-General's Report on the Establishment of an International Tribunal for the Former Yugoslavia noted in the commentary to article 5 of what became the Statute of the Tribunal that serious crimes regarding inhuman acts, willful, torture, or rape fall into kind of crimes against humanity irrespective occurs in international or inter in nature. And also attack against any civilian population on any grounds remains under this head.[20]

According to Statute for the International Criminal Court, 1998, genocide, crimes against humanity, war crimes, and aggression, are the most serious crimes concerned with the entire international community committed by a person who is individually responsible and will be punished under the jurisdiction of the court.

5. International Crimes

One or more International crimes have been defined by the States. At this point, states have failed to define not only all of these crimes in the national law of international concern but the definitions are inconsistent under international law. It would tend to create a serious impunity gap.

War Crime

In addition to piracy, war crimes are now accepted by most authorities as subject to universal jurisdiction, though of course, the issues involved are extremely sensitive and highly political.[21] While there is little doubt about the legality and principles of the war crimes decisions emerging after the Second World War, a great deal of controversy arose over suggestions of war crimes with regard to American personnel connected with the Vietnam

[15] (2014) 3 SCR 176, 208, para. 44.
[16] 124 ILR, pp.427, 435.
17Article 6 of the Charter of the International Military Tribunal, 1945.
[18] (2000) 1 WLR 1573, 1588 (per Lord Millett).
[19] *Ibid*, para.61, 66; L. C. Green, 'The Contemporary Law of Armed Conflict', 3rd ed., Manchester, 2008, chapter 18; E. Schwelb, 'Crimes Against Humanity', 23 BYIL, 1946, p. 178.
[20] (2006) UKHL26, para9, 24-8; 129 ILR, p.717, 726-8.
[21] A. Cowles, 'Universality of Jurisdiction over War Crimes', 33 California Law Review, 1945, p. 177.

War,[22] Pakistani soldiers involved in the Bangladesh War of 1971[23] and persons concerned with subsequent conflicts.

Article 2 of the International Criminal Tribunal for the Former Yugoslavia (ICTY) Statute provides for the jurisdiction regarding grave breaches of the Geneva conventions, 1949, such as "willful killing", "torture" inhuman treatment", …and taking civilians as hostages". Similarly, article 6(b) of the Nuremberg Charter mentions war crimes as serious crimes. The International Criminal Tribunal for Rwanda (ICTR) Statute also provided for individual responsibility for which the principles of internal armed conflicts were violated. Accordingly, starting from *Tadic's* judgment[24], a number of provisions relating to international armed conflict were recognized in internal conflicts. In addition, in the *Bosco Ntaganda* case, International Criminal Court held that sexual slavery established a crime against humanity and a war crime.[25]

In the Eichmann case[26] decided by the District Court of Jerusalem and the Supreme Court of Israel in 1961, "Eichmann was prosecuted and convicted under an Israeli law of 1951 for war crimes, crimes against the Jewish people and crimes against humanity. The fact that the crimes were committed prior to the establishment of the state of Israel did not prevent the correct application of its powers pursuant to universal jurisdiction under international law. Israel's municipal law merely reflected the offences existing under international law".

Crimes against Humanity

Article 6 of the Nuremburg Charter describes crimes against humanity as "murder, "extermination, enslavement, deportation and other inhumane acts committed against any civilian population"…. Also article 5 of the ICTY Statute stipulated jurisdiction of the crimes in both international and non-international armed conflicts. Crimes must be a widespread and systematic attack against any civilian.[27]

For instance, the Belgium Court of Cassation took the view in its Decision of 12 February 2003 in *HSA and Others v. SA and Others* [28] that the presence of the accused was not necessary. But the Belgium Statute of 1993, as amended in 1999 provided for a wide jurisdiction in the case of genocide, crimes against humanity and war crimes. This Statute amended 2003 provides that the alleged serious violation of international law in question shall be one committed against a person, a Belgian national or legally resident in Belgium for at least three years and that any prosecution, including a preliminary investigation phase, may only be conducted.

Under article 3 of the ICTR Statute, the court has the power to prosecute the crimes committed as a 'widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds'. Article 7 of the ICC Statute noted as well.29

Similarly, in the *Tadić* trial Decision of 7 May 1997, this interpreted the phrase 'directed against any civilian population' as meaning 'that the acts must occur on a widespread

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[22] *Calley v. Calloway* 382 F.Supp. 650 (1974), rev'd 519 F.2d 184 (1975), cert. denied 425 US 911 (1976).
[23]House of Commons Library, 'Bangladesh: The International Crimes Tribunal', 2012, https://commonslibrary.parliament.uk/research-briefings/sn06318/.
[24] Case No. IT-94-1-T, Decision of 2 October 1995.
[25] Case No. ICC-01/04/-02/06, ICC, Judgment of 8 July 2019, paras. 949.
26 (2000) 1 WLR 1573, para.31.
[27] Article 3 of ICTR Statute; article 7 of ICC Statute; article 5 of ICTY; *Tadic* Case No. IT-94-1-T, para. 644; 112 ILR, pp. 1, 214; *Akayesu* Case No. ICTR-96-4-T, 2 September 1998, para. 580.
[28] *Benkharbouche v. Secretary of State for Foreign and Commonwealth Affairs* (2017) UKSC 62, para.75.
[29] See also *Akayesu*, Case No. ICTR-96-4-T, 1998, paras. 597 ff.; *Kunarac*, Case Nos. IT-96-23-T and IT-96-23/1-T, ICTY, Judgment of 22 February 2001, paras. 437 ff.

or systematic basis, that there must be some form of a governmental, organizational or group policy to commit these acts and that the perpetrator must know of the context within which his actions are taken'.30

Genocide

In the Convention on the Prevention and Punishment of the Crime of Genocide signed in 1948, genocide was defined as any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group.

In the 1990s, the issue of genocide unfortunately ceased to be an item of primarily historical concern. The Statutes of both the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda provide for the prosecution of individuals for the crime of genocide and a significant case-law has now developed through these tribunals. Furthermore, the International Court of Justice in application of the Genocide Convention reaffirmed in its Order of 8 April 1993 on provisional measures.31 The view expressed in the Advisory Opinion on Reservations to the Genocide Convention is that the crime of genocide results in great losses to humanity and is contrary to moral law and aims of the United Nations'.[32] In the *Akayesu* case,[33] the ICTR reaffirmed the specific intent necessary as 'the specific intention, required as a constitutive element of the crime'.

The *Krstić* case, the ICTY noted that the intent to eradicate a group within a limited geographical area, such as a region of a country or even a municipality, could be characterised as genocide,[34] while 'the intent to destroy a group.

As far as the International Criminal Court is concerned, the first person charged with the crime of genocide was President Al Bashir of Sudan in the context of the Darfur situation and following a referral by the Security Council in resolution 1593 (2005). Arrest warrants were issued on 4 March 2009 and on 12 July 2010.[35]

Aggression

Aggression is recognised as a crime in customary international law. Article 6 of the Nuremberg Charter defined its jurisdiction as including 'crimes against peace'. 'Planning, preparation, initiation, or waging of a war of aggression or a war, or participation in a common plan or conspiracy' for that kind inconsistent with international treaties, agreements fall into this concern.[36]

General Assembly resolution 95(1) affirmed the principles recognised by the Nuremberg Charter and its judgment. Aggression was termed the 'supreme international crime' in one of the judgments.[37] The Tokyo Charter included the same principle, as did Allied Control Council Law No. 10. General Assembly resolution 3314 (XXIX) of 14 December 1974 contained a definition of aggression in contravention of the Charter. At the ICC Review

30 Case No. IT-94-1-T, para. 644; 112 ILR, pp. 1, 214.
31 ICJ Reports, 1993, pp. 3, 16, 23; 95 ILR, pp. 1, 31.
32 ICJ Reports, 1951, pp. 15, 23; 18 ILR, pp. 364, 370.
33 Case No. ICTR-96-4-T, 1998, para. 498.
34 Case No. IT-98-33-T, 2001, para. 589. See also *Croatia v. Serbia*, ICJ Reports, 2015, p3, 65.
35 *Popović*, Case No. IT-05-88-A, Appeals Chamber, Judgment of 30 January 2015, particularly para. 1065ff.
36 General Assembly resolution 95(1); General Assembly resolution 3314 (XXIX) of 14 December 1974; article 5 of the ICC Statute, 1998.
37 Judgment 186, 41 AJIL, 1947, p. 172.

Conference held in Kampala in 1910, amendments to the Statute were adopted,[38] which defined the crime of aggression in a new article 8 *bis*, and laid down jurisdictional conditions.

Universal jurisdiction is also an essential tool to explore justice within the jurisdiction of international courts when states cannot be capable to examine crimes under international law in their own countries. Hence, every state should provide its courts with effective universal jurisdiction to suppress serious crimes that harm the entire international community.

6. Definitions of Crimes in National Law

States have determined war crimes in their domestic law.[39] In some instances, states have exercised universal jurisdiction over such crimes. Another, without being expressly adopted in their domestic law, universal jurisdiction over ordinary crimes under national law has been determined by their courts. The definition of states of war crime conflicts with one another. For example, some states recognized such crimes in national law, but some states provide these crimes in international armed conflicts.

States have involved crime against humanity in their national law. Some have universal jurisdiction over such crimes.[40] The courts exercise universal jurisdiction over ordinary crimes: murder assault, rape, abduction, and attack against civilians not included in domestic law. Defining crimes against humanity is highly different within the state practices. In some practice, "only one crime against humanity, such as apartheid[41], slavery or the slave trade[42]" amount to that kind in national law".

Universal jurisdiction over Genocide has been prescribed in some states.[43] Some take universal jurisdiction over ordinary crimes: murder, assault, rape, and abduction even though their national laws did not define them. If these crimes are committed with the intent to destroy, in whole or part community or certain group, it could count as "genocide". The courts have exercised jurisdiction over such crimes in treaties ratified.[44] The state has jurisdiction over the relevant crime.

National interpretations of genocide are wider than those of the Genocide Convention. For example, the Supreme Court of Spain decided in 2003 in the Guatemalan Genocide case[45] that jurisdiction would cover only acts of genocide in which Spanish nationals were victims. However, this decision was overturned on 26 September 2005 by the Constitutional Court, which decided that the domestic jurisdiction provision with regard to crimes against humanity was not limited to cases involving Spanish nationals who were victims of genocide.

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38 A. Zimmermann, 'Amending the Amendment Provisions of the Rome Statute: The Kampala Compromise on the Crime of Aggression and the Law of Treaties', 10 Journal of International Criminal Justice, 2012, p. 209.

39 Australia Criminal Code Act (2011); Denmark Criminal Code (2005); Finland Criminal Code Ch-1, s.7(1); Germany Code of Crime Against International Law (2001); Hungary Criminal Code (2005); Spain Judiciary Law (2009).

40 Cambodia Penal Code (2010); France Code of Criminal Procedure (2011); Germany Code of Crime against International Law (2001); Luxembourg ICC Act (2012); Nicaragua Penal Code (2008); Spain Judiciary law (2009).

41 Latvia Criminal Law (2009), s. 4(1)(2) and(4); Kyrgyzstan Constitution, art.6(1).

42 United Arab Emirates, Federal Law (2005), art.21; United Kingdom, Slave Trade Act (1873), s.5,26.

43 Belgium Code of Criminal Procedure (2006); Denmark Criminal Code (2009); Germany Code of Crime against International Law (2001); Spain Judiciary Law (2009); Cuba, Penal Code, 1987; Congo, Code of Criminal Procedure, 1963.

44 The Convention for the Prevention and Punishment of the Crime of Genocide, 1948; The Rome Statute of the International Criminal Court, 1998.

45 Judgment No. 237/2005. See e.g. N. Roht-Arriaza, 'Guatemala Genocide Case. Judgment No. STC 237/2005', 100 AJIL, 2006, p. 207.

Many states adopt national laws against the crime of aggression with various prohibitions.[46] Aggression can be tried under universal jurisdiction.[47] Moreover, the state has clarified torture as a crime in the national law of international concern and exercised jurisdiction over crimes as treaties ratified. Such treaties require state parties to provide the accused to be prosecuted, or extradited. Thus, the state has universal jurisdiction over the relevant crime.[48]

And, even though some states will not have defined the crime in national law, its court's jurisdiction has recognized as treaties ratified to prosecute. On the other hand, though an *aut dedere aut judicare* treaty has been ratified, a suspect would not be prosecuted under international law because of a lack of national crime definition. However, the States could realize treaty obligation as the principle of legality by the offender to be prosecuted for the crime prescribed in national law if the state had not provided universal jurisdiction by their court over ordinary crimes. The state has jurisdiction over an ordinary crime.[49]

Furthermore, some states have provided their courts with universal jurisdiction over ordinary crimes, for example, rape, murder, assault, abduction and some conduct which could amount to crimes under international law.[50]

Influential decision relating interpretation of judicial provisions does not exist in most states. Therefore, national courts construe such provisions in different ways as they practice.

7. Conclusion

Some crimes that harm humanity as a whole should be considered international crimes. Looking back on universal jurisdiction by national legislation and their courts, it shows inconsistencies with one another. It is essential to reach an agreement regarding criminal offenses to exercise universal jurisdiction.

It would be appropriate if the criteria would be taken into account, such as term, scope, extent, and requirements of the exercise of universal jurisdiction, coordination in criminal matters, and making model standards for national courts and authorities concerned with the movement of universal jurisdiction, and limits on universal jurisdiction in order to suppress and adjudicate the crimes that seriously harm the entire international community. It would be useful to make a decision on the effects of universal jurisdiction.

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