CZU: 341.49
https://doi.org/10.52277/1857-2405.2021.3(58).04

APPLICATION OF UNIVERSAL JURISDICTION FOR WAR CRIMES IN NATIONAL LEGISLATIONS OF STATES: COMPARATIVE ANALYSIS

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SUMMARY

The present article is dedicated to the meaning, nature and scope of the universal jurisdiction over war crimes as well as the use of universal jurisdiction in the practice of various states. The universal jurisdiction on war crimes can be considered as one of the cornerstones of the current international law areas, particularly international criminal law and international humanitarian law. In this regard, not only international courts, but also national judiciary applies the concept of universal jurisdiction while overviewing the criminal cases of world-wide importance.

The article deals with war crimes and the application of universal jurisdiction, which pose a serious threat to international peace and security. First of all, the essence of universal jurisdiction, the disagreement over its application and, consequently, its importance are touched upon. It has become the responsibility of states to prosecute or to extradite those convicted of war crimes, crimes against humanity, aggression and genocide, regardless of their nationality or home country. Of course, the goal here is to ensure that those convicted of international crimes that are dangerous to humanity go unpunished with no exception. There are many case examples from the national jurisdiction of different states and the article refers to specific court judgements in this regard. Finally, the author considers recommendations regarding the establishment of national legislation

APLICAREA JURISDICȚIEI UNIVERSALE PENTRU INFRACȚIUNILE DE RĂZBOI ÎN LEGISLAȚIILE NAȚIONALE ALE STATELOR: ANALIZĂ COMPARATIVĂ

SUMAR

Prezentul articol este dedicat semnificației, naturii și sferei jurisdicției universale asupra crimelor de război, precum și utilizării jurisdicției universale în practica diferitor state. Jurisdicția universală cu privire la crimele de război poate fi considerată drept una dintre pietrele de temelie ale dreptului internațional actual, în special – drept penal internațional și drept internațional umanitar. În acest sens, nu numai instanțele internaționale, ci și sistemul judiciar național aplică conceptul de jurisdicție universală în timp ce face o privire generală asupra cazurilor de importanță mondială.

Articolul tratează crimele de război și aplicarea jurisdicției universale, care reprezintă o amenințare serioasă pentru pacea și securitatea internațională. În primul rând, sunt abordate esența jurisdicției universale, dezacordul asupra aplicării sale și, în consecință, importanța acesteia. A devenit responsabilitatea statelor să judece sau să extrădeze pe cei condamnați pentru crime de război, crime împotriva umanității, agresiuni și genocid, indiferent de naționalitatea sau țara de origine. Desigur, scopul aici este să ne asigurăm că cei condamnați pentru crimele internaționale periculoase pentru umanitate rămân nepedepsiți fără nicio excepție. Există multe exemple de cazuri din jurisdicția națională a diferitelor state, iar articolul se referă la hotărâri specifice în acest sens. În cele din urmă, autorul ia în considerare recomandările privind stabilirea legislației naționale, ceea ce permite o aplicare mai eficientă a jurisdicției universale în legătură cu crimele de război.

Cuvinte-cheie: *criminalitate internațională, responsabilitate penală, încălcări ale dreptului internațional, ius cogens, legislație națională, crime internaționale, crime de război, instanță penală internațională, jurisdicție universală, drept penal internațional.*

what allows more efficient application of universal jurisdiction in connection with war crimes.

Key-words: *international criminality, criminal responsibility, international law violations, ius cogens, national legislation, international crimes, war crimes, international criminal court, universal jurisdiction, international criminal law.*

...There are some other advantages of the International Criminal Court over universal jurisdiction as well. The International Criminal Court has uniform and developed, unique, standards for exercising its jurisdiction. In universal jurisdiction, on the contrary, there is no unity and uniformity between the laws of universal jurisdiction of individual states in the definition of crimes and in what cases jurisdiction can be applied. Moreover, the International Criminal Court, as an independent international body, is comparatively far away of obstacles and influences that may be created by foreign and domestic political interests that irritate states. The International Criminal Court, as a specialized body, is well-established for investigative examinations and prosecution, with sufficient resources, professionalism and international support. Proponents of universal jurisdiction believe that the existence of a dual system will give countries more choice, and international justice will be established. In this case, we can conclude that the International Criminal Court and the universal jurisdiction, which make one impossible for the other, are two separate parts of a comprehensive approach to ending the impunity of perpetrators of serious international crimes.

The jurisdiction of the International Criminal Court will not replace the national jurisdiction, but will complement it. Naturally, national courts have a key role to play in the investigation and prosecution of crimes within their jurisdiction. According to the principle of complementarity, as noted above, the International Criminal Court will act only in cases where national courts are unwilling or unable to exercise jurisdiction. If a national court is able to exercise jurisdiction, the International Criminal Court, acting under Chapter VII of the UN Charter, may not intervene or be represented by the citizens of that State, except on the recommendation of the UN Security Council. The grounds for allowing a case to be heard by a court are clearly defined in the Statute. In addition, defendants and interested States may challenge the jurisdiction or admission of a case, whether or not they are parties to the Statute. In addition, they have the right to appeal any decision.

Universal jurisdiction is exercised regardless of the location of the crime and the nationality of the perpetrator. Thus, it is not primary the main territory or citizenship for this jurisdiction, but the nature of the act committed [2; p.79-80]. In 1996, a trial began in a Spanish court against a number of Argentine officers. The officers were accused of abducting and killing Spanish citizens during the military junta's rule in Argentina from 1976-1983. Argentina flatly refused to cooperate; at the same time, it argued that the Spanish court had no jurisdiction over the acts committed in Argentina, and that the officers had already been convicted by an Argentinian court and later pardoned by the Argentine president. However, the Spanish court stated that it had jurisdiction over these acts, noting that crimes against humanity could be prosecuted anywhere. Investigating the circumstances of the case, the Spanish authorities appealed to the relevant Swiss authorities to find the secret bank accounts belonging to any of the defendants. The purpose was to use the money to compensate victims of crimes committed. The Swiss government complied with the request and ordered the freezing of the found bank accounts.

Under universal jurisdiction, crimes prosecuted are considered crimes against humanity because they are extremely serious crimes for jurisdictional arbitration. Therefore, the concept of universal jurisdiction is very close to the idea that some international norms are permanent or given to the whole world community, and the concept of «common international law» is very close to the idea that certain international legal obligations unite the whole world. Lots of prominent international NGOs (e.g. Amnesty International), proponents of universal jurisdiction, also considers that it should be the direct responsibility of States to prosecute perpetrators of crimes that pose a serious threat to international peace and security. There should be no refuge anywhere in the world for the perpetrators of genocide, crimes against humanity, war crimes, torture.

Former Secretary of State Henry Kissinger, in his book "The Pitfalls of Universal Jurisdiction", claims that universal jurisdiction violates the sovereignty of every state. [12] The widespread agreement that crimes against humanity should be prosecuted has prevented the proper role of international courts from being fully taken into account. Universal jurisdiction means promoting universal tyranny, as well as ruling tyranny. According to Henry Kissinger, if virtually any number of states can create such universal jurisdiction tribunals, the process can quickly turn into a political show with a political motive, serving as a tool to put a quasi-judicial seal on the enemies and opponents of the state. Apparently, a well-known figure like Kissinger opposed universal jurisdiction. Kissinger's claim was not unequivocally rejected. Kissinger's critique of universal jurisdiction was explained in two main ways:

1) The soon-to-be-established International Criminal Court.
2) The exercise of universal jurisdiction by national courts (in particular, the International Criminal Court will not use universal jurisdiction, but rather the traditional power of states to try crimes committed on their territory).

Kissinger claimed that the crimes listed in the Rome Statute of the International Criminal Court were vague and very sensitive to politicization. He noted that the statutory definition of war crimes stems from the Pentagon's widely accepted Geneva Conventions and Additional Protocols, which were in its military directives and adopted in 1977. Similarly, the Statute's definition of genocide is taken from the 1948 Genocide Convention, which was ratified by 131 countries, including the United States. The definition of crimes against humanity is taken from the Statute of the Nuremberg Tribunal. He said he did not believe the Statute would be innovative.

Benjamin Ferencz, an American lawyer who was one of 11 judges at the Nuremberg Trials, called Kissinger's approach «harmful» and said that the courts, set up by the UN Security Council in the 1990s with strong US support to punish war crimes in the former Yugoslavia and Rwanda, already convicted a number of criminals. Moreover, Ferencz reminded the decision by the British House of Lords, which upheld the legal validity of the arrest of former Chilean President Augusto Pinochet in Britain, accused of killing Spanish nationals in Chile, as well as the trial of Adolf Eichmann for genocide against Jews. Kissinger believed that a separate trial should be organized for each accused, but said that the trial would not be fair. Conversely, Benjamin Ferencz said this was completely unfounded, adding that the best way to make sure that the law is not abused as a weapon to resolve political disputes, is to use highly qualified judges from many countries to ensure a fair trial in accordance with internationally accepted standards [5]. Such a Court has already been established which is the International Criminal Court. Ferencz went on to say that innocent people should not be afraid of the rule of law, but should help punish the perpetrator. This suggests that Kissinger's views on existing international law were wrong and could be seen as an evasion of responsibility. At the same time, it is possible that this idea will set negative precedents in the future. The demand of the modern world is to punish those who have committed war crimes without any justification.

For the above-mentioned reasons, there are some states that have consistently advocated the application of universal jurisdiction. For example, in **Germany** German criminal law provides for the implementation of the principles of universal jurisdiction through genocide, crimes against humanity and war crimes through the norms of international law. The German Code incorporates the provisions of the Statute of the International Criminal Court into national law. Relevant provisions of German criminal law was enacted in 2002 and was applied only once until 2014, against Rwandan rebel leader Ignace Murwanashyaka, who was convicted in 2015 and was sentenced to 13 years in prison. In a similar way, in **France**, Article 689 of the French Criminal Code includes offenses that can be prosecuted if committed by French citizens or foreigners outside the territory of France. Such violations include torture, terrorism, nuclear smuggling, piracy, hijacking.

Spain. Spanish law recognizes the principle of universal jurisdiction too. Paragraph 23.4 of the Judicial Organization Act, which entered into force on 1 July 1985, states that Spanish courts, Spanish citizens or foreigners may be deemed to have committed crimes of genocide or terrorism abroad under Spanish criminal law, as well as international treaties and conventions. It has jurisdiction over other crimes to be tried in Spain. Consequently, Rigoberta Menchú, who was awarded the Nobel Peace Prize in 1999, has filed a lawsuit against the Guatemalan military command in a Spanish court. Menchu's lawsuit against Guatemala's civil war violence was filed against high-ranking officials, and in September 2005 the Spanish Constitutional Court ruled that „the principle of universal jurisdiction takes precedence over national interests". On July 7, 2006, six high-ranking officials were formally charged and summoned to the Spanish National Court. Moreover, in June 2003, Spanish Judge Balthazar Gartson sentenced Ricardo Miguel Cavallo, a former naval officer extradited from Mexico to Spain, to prison on charges of genocide and terrorism during Argentina's military dictatorship.

Australia. Under the Australian Constitution, the Australian Supreme Court affirmed in 1991 the Australian Parliament's authority to exercise universal jurisdiction over war crimes in the case of Polyukhovich v. The United Nations [6]. Similarly, in **Belgium** in 1993, the Belgian parliament adopted a „right of universal jurisdiction", often referred to as „Belgium's right to genocide", which allows people convicted of war crimes, crimes against humanity and genocide to be tried. Along with the amendments to the Code of Criminal Procedure, Belgian courts now have an expanded form of active and passive identity jurisdiction over war crimes, crimes against humanity and genocide. Article 12 bis of the Preamble to the Code of Criminal Procedure empowers Belgian courts that Belgium has a contractual obligation to prosecute any crime committed outside Belgium.

Conclusion and recommendations. In conclusion, we may summarize that the application of universal jurisdiction in relation to international crimes that pose a serious threat to international peace and security must be protected and expanded. Yet, the development of national practices on the use of universal jurisdiction is not commonly accepted. In this regard, the establishment by international organizations (or maybe by the International Criminal Court or the International Court of Justice) of guidelines for the national application of universal jurisdiction could be of vital importance. It is recognized that international law is poweful when it is implemented and applied effectively in national legal systems.

Thus, the concept of universal jurisdiction, although having some new aspects for the traditional criminal legislation in national level, gets the real power only when it is considered by national governmental authorities. As it is examined before, some states voluntarily do so when the others do not express much willing to apply universal jurisdiction for war crimes, whic is understandable. In the absence of international controlling mechanisms and binding implementation conditions it is far away from reality to demand world-wide punishment for the perpetrators of international war crimes. So, the first step here is to establish individual control-supervisory mechanisms what will later raise the entire meaning, role and stand of international criminal law as well as international humanitarian law. So far, international judiciary of other nature (e.g. the Europen Court of Human Rights, human rights committees, etc.) strives to examine the universal jurisdiction over war crimes in the context of the violations of absolute human rights such as prohibition of torture and slavery.

The essence of the principle of universal jurisdiction is to allow a state to exercise its authority over actions that have negative consequences for it, regardless of where these actions occur and by whom. National laws based on this principle are extraterritorial, i.e. they apply to actions outside the state, which in turn does not allow the accused to evade responsibility. As a result, despite opposition to the principle of universal jurisdiction, a number of countries today have adopted laws that support universal jurisdiction. Amnesty International noted in its report that a total of 163 of the 193 UN member states may exercise universal jurisdiction over common crimes within the framework of national law in connection with one or more crimes as required by international law. As of September 1, 2012, Amnesty stated that a total of 147 states had universal jurisdiction over one or more crimes under international law. Less than 166 states have defined at least one of the four crimes to which universal jurisdiction can be applied - war crimes, crimes against humanity, genocide, torture - as crimes in their national laws. In addition, 91 states have secured universal jurisdiction over ordinary crimes within the framework of national law, which may or may not constitute violations of international law [8].

The European Parliament's (EP) Subcommittee on Human Rights has launched an investigation into the application of the principle of universal jurisdiction. The aim of the study was to help the European Parliament to form an opinion and make a decision, as well as to provide practical recommendations on how to improve the application of the principle in EU member states and third countries, and it has been almost effective. These attempts again prove the original idea that the international justice is not just a conceptual theory and has significant practical meaning. And we should not forther that universal jurisdiction is the most effective method of ensuring and protecting justice at the international and national law levels.

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