

CZU: 341.49

[https://doi.org/10.52277/1857-2405.2021.2\(57\).07](https://doi.org/10.52277/1857-2405.2021.2(57).07)

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

APLICAREA JURISDICȚIEI UNIVERSALE PENTRU INFRAȚIUNILE 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 diferitelor 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.

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.



Target setting

States generally have the authority to investigate or prosecute crimes committed by or against their citizens. However, the essence of international crimes is so serious that it has caused serious concern to states because it is directed against all mankind, all humanity and the idea that the fight against universal impunity has no borders – the principle of universal jurisdiction – has emerged.

The concept of universal jurisdiction was controversial from the very beginning, and there were some difficulties in specifying its purpose.

The attitude of states to the principle of universal jurisdiction has been ambiguous. Most international lawyers and liberal internationalists accepted the existence of universal jurisdiction, but currently each scholar or expert considers its meaning differently. Much time has been spent in the last twenty years on studying and clarifying the principle of universal jurisdiction in its very essence. At least, it was commonly accepted that the universal jurisdiction plays an important role in ensuring justice at the international level and punishing criminals.

Nevertheless, in order to apply this principle, states has to first adopt relevant legislation which is not the case for each country. It is without doubts, universal jurisdiction allows all states to fulfill their responsibilities to protect from, prosecute and punish those who commit war crimes. In this regard, best national practices should be studied in order to introduce all benefits of universal jurisdiction before states who still demonstrate conservativeness to adopt relevant legislation.

Relevance of the research topic

The application of universal jurisdiction in relation to war crimes is of utmost importance today, particularly for the Post-Soviet region and the Middle East. Currently, Ukraine lodged an application against Russia to the European Court of Human Rights since it could not find any other way to bring Russia to justice for the war crimes and the violations of the fundamental principles of international law. Moreover, present situation in the Middle East also leaves behind the hope for the bright future of the concept of universal jurisdiction for war crimes, particularly for the repeated cases of torture, slavery, illegal use of prohibited weapons, etc. Impunity for crimes committed both in the territory of a particular state and at the international level leads to an increase in criminality.

Sometimes the provision of asylum to persecuted states by certain states allows crimes to go unpunished. Impunity for crimes that pose a serious threat to international peace and security is, of course, undesirable for the international community. In particular, it is a fact that war crimes, crimes

against humanity, aggression and genocide pose a serious threat to humanity, and it has become the responsibility of states to investigate, prosecute or punish the perpetrators.

This is the most effective method used to prevent impunity for crimes that have already occurred, and is implemented within this universal jurisdiction [2, p. 82].

The concept of universal jurisdiction applied to war crimes, crimes against humanity, aggression and genocide, which contradict the norms of international law, is not new for modern public international law. The 1949 Geneva Conventions provided for the first time that States Parties should ensure that persons convicted of war crimes are persecuted or extradited. Universal jurisdiction allowed the state of Israel to prosecute Adolf Eichmann, a high-ranking Nazi official, for his role in the Holocaust in 1961 during World War II. Moreover, it can be noted that wars have not decreased since then and local wars have appeared in a broader form.

Of course, this trend also actualizes the concept of the universal jurisdiction over the crimes committed. This, in turn, increases the obligation of states to universal jurisdiction over war crimes, known as «grave violations» of the Geneva Conventions and Additional Protocol No. 1.

In addition to the Geneva Conventions and Additional Protocol No. 1, a number of other agreements require states to have universal jurisdiction over certain crimes, including those committed during armed conflict. Such agreements include, in particular, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Inter-American Convention on Forced Disappearances, the Convention on the Safety of the United Nations and Related Personnel and the Convention on the Protection of Cultural Heritage.

In addition, the unwritten norms of customary nature – the customary international law also contain relevant provisions.

Conducted research level

The essence and application of universal jurisdiction have been the subject of research at almost different times. In particular, the application of universal jurisdiction in relation to war crimes is reflected in the scientific works of legal scholars. It is known that this topic has been studied more by foreign experts.

Among them, in particular, the names of A. Cassese, S. Smis and K. Van der Borcht, M. Cherif Bassiouni, S. Macedo, A. O. Sullivan are among the well-knowns. Among the national specialists are L.H. Huseynov, A.I. Aliyev, R.K. Mammadov, A.T. Safarov, A.V. Allahverdiyev, S.T. Majidov who examined various aspects of the universal jurisdiction. Yet, the current research work strives to overview national

legislations of different countries in order to produce guidelines on best practices which is an innovative solution never studied before.

One may highly appreciate that some of former Soviet countries established terms of universal jurisdiction in their domestic laws. In particular, the Republic of Azerbaijan may be an example of a country what reflected the notion of universal jurisdiction in the national criminal law. We would like to note that the Criminal Code of the Republic of Azerbaijan explains in detail the crimes of war, crimes against humanity, aggression and genocide, to which universal jurisdiction is applied, and almost does not contradict the norms of international law. It is noteworthy that the principle of universal jurisdiction is also reflected in the Criminal Code of the Republic of Azerbaijan [7, p. 80]. Article 12.3 of the Code states that crimes against peace and humanity, war crimes, terrorism, aircraft hijacking, hostage-taking, torture, piracy, etc. are among the persecuted crimes in Azerbaijan. Foreigners or stateless persons who have committed attacks on persons or organizations enjoying international protection, crimes related to radioactive materials, as well as other crimes punishable under international agreements to which the Republic of Azerbaijan is a party, are prosecuted under this Code too.

Research objectives

One of the main purposes of developing this topic what is dedicated to the study of the application of universal jurisdiction in relation to war crimes, is to explain the essence and importance of universal jurisdiction, to draw attention to the results obtained by conducting a comparative analysis of perpetrators of war crimes, and to evaluate the results to produce further a guideline on best practices.

It is well known that historically there have been disagreements over universal jurisdiction, which has long been the subject of controversy. One of our goals is to reveal the truth about universal jurisdiction and to inform the public about its importance in punishing criminals.

Main content

Universal jurisdiction is a legal doctrine that allows national courts to prosecute and punish perpetrators of crimes against humanity, war crimes, aggression and genocide, regardless of where they are committed or the nationality of the accused or victim. There is no formal legal basis for universal jurisdiction, it is based on traditional international norms. Article 1 of the Princeton Principles on Universal Jurisdiction, submitted by the University of Princeton in the United States, sets out the grounds for universal jurisdiction in a more precise manner.

[11, p. 28]. These Principles defines that universal jurisdiction is a criminal jurisdiction based solely on the substance of the offense, without regard to the nationality of the person who committed the crime, the alleged or convicted person, the victim's nationality or other relations.

Therefore, universal jurisdiction shall be exercised by a competent and ordinary judicial authority of any State against serious international crimes and a state may, on the basis of universal jurisdiction, require the extradition of a person found guilty or convicted of a serious crime in accordance with international law, in which case the person's trial must be provided in accordance with international human rights norms and standards.

When exercising its universal jurisdiction with a request for extradition, a State and its judicial authorities shall be able to observe the independence and impartiality of the judicial system and shall exercise its general jurisdiction in good faith in accordance with the norms and obligations of international law.

Nevertheless, not all states who are the active members of international community accepts the possibility of universal jurisdiction. States typically have a legal framework that allows local courts to assess universal jurisdiction over specific crimes.

The scope and composition of the law of universal jurisdiction usually vary from state to state. However, existing national legislation may not always be necessary for local courts to exercise universal jurisdiction.

International conventions and traditional international norms may also provide for the exercise of universal jurisdiction by partner States. Proponents of universal jurisdiction argue that it is not always possible to prosecute in a country where a crime has been committed. For example, a transitional state may not have sufficient legal framework and resources to conduct investigations and prosecute after a devastating conflict or war. Alternatively, the state may intentionally refuse to prosecute or refuse to pay sufficient attention to a crime committed on its territory.

For example, a criminal act and an act that must be prosecuted by law may be approved or supported by the state, or the perpetrators may hold official positions in government or have strong supporters in the ruling regime. These were famous facts for the war crimes committed in Africa, in Bosnia, etc.

Thus, it is possible that the state does not have the will to investigate, which means that the alleged crimes will not be prosecuted. In the absence of binding international responsibility, other states may intend to initiate prosecution under universal jurisdiction to prevent impunity and establish justice for victims.



Although many states do not have a common obligation to punish perpetrators of serious crimes under universal jurisdiction, they must punish criminals in the common interest and for universal security. Sometimes it happens that the offender himself/herself holds a position in the state governmental structure and moves freely in the territory of a certain state, manages to evade punishment, of course, in this case the international community is required to prosecute and put pressure on the state in this area. In this respect, numerous lawsuits under universal jurisdiction can be cited as examples [14, p.918-919]:

- Extradition request of a Spanish court seeking the trial of former Chilean President Augusto Pinochet in 1998 for torture, murder, illegal detention and kidnapping;
- The prosecution and sentencing of two Rwandan nurses, Sister Gertrude and Sister Maria Kisito, by a Belgian court in 2001 for war crimes committed during the 1994 Rwandan genocide;
- Prosecution and sentencing of the leader of the militarized Serbian group Nikola Jorgic and Serbian soldier Novislav Djacic by the German courts in 1997 for genocide in Bosnia and Herzegovina, and war crimes and torture against former Chadian President Hissene Habre. He was investigated and indicted by a Belgian court in 2005 for crimes and other human rights abuses.

Unlike many countries, the United States approaches the issue of universal jurisdiction from a different perspective. The U.S. is concerned that U.S. citizens may face politically motivated prosecution by foreign courts if other countries exercise universal jurisdiction. Opponents of universal jurisdiction have expressed support for this concern, expressing concern at the prosecution of the U.S. government officials who have been referred to universal jurisdiction to judge the conflicting policies and actions of the United States in a number of countries. In Germany, for example, complaints have been filed against former US Secretary of Defense Donald Rumsfeld, former CIA Director George Tenet and others over alleged war crimes in Iraq's Abu Ghraib prison and Guantanamo Bay.

Unfortunately, as a result of pressure, the German prosecutor at the last moment opposed the investigation in this regard. As a result, those individuals were not prosecuted.

It is known that the permanent International Criminal Court does not have universal jurisdiction [12, p. 3-5]. The court has limited its jurisdiction, as stated in the Rome Statute. It is almost certain that the Court does not intersect with universal

jurisdiction, but, as stated in the Statute, exercises jurisdiction over limited types of crimes and offenders committed under certain conditions. In addition, if the jurisdiction requirements of States and the International Criminal Court are met, the International Criminal Court and local courts may have jurisdiction over the same cases.

It should not be forgotten that the International Criminal Court is neither a substitute for the prosecution of international crimes at the local level, nor does it preclude the ability of states to prosecute under universal jurisdiction. States may continue to exercise universal jurisdiction, in particular the prosecution of criminal cases outside the jurisdiction of the International Criminal Court. The International Criminal Court cannot deal with crimes committed before July 1, 2002, and only judges the limited category of individuals with the highest level of responsibility for the most serious crimes [15, s. 245]. According to the Rome Statute, the International Criminal Court is a complement to local criminal jurisdictions.

Under the principle of complementarity, local courts have priority over the jurisdiction of the International Criminal Court. The International Criminal Court can only act if local legal systems are incapable or deliberately fail to exercise their jurisdiction.

Universal jurisdiction is one of the ways in which local courts can take on litigation that may satisfy the principle of complementarity. In some cases, the existence of the International Criminal Court may minimize the application of universal jurisdiction. States that do not have the necessary precautionary measures and do not have an improved legal system, will prefer to be tried by the International Criminal Court, not their local courts.

However, the International Criminal Court seeks to support the wider application of universal jurisdiction by raising awareness of violence. States with an advanced justice and legal system that has universal jurisdiction may be encouraged to use their judicial jurisdiction more frequently by preferring to oversee the prosecution process rather than referring the case to the International Criminal Court. Other states have the opportunity to hear criminal cases under the jurisdiction of the International Criminal Court, thus encouraging them to enact legislation that incorporates aspects of the Rome Statute.

In general, the International Criminal Court may serve as an example and incentive for states to exercise jurisdiction to prosecute serious international crimes, while states are likely to continue to exercise jurisdiction to prosecute cases not considered by the International Criminal Court.

(Continued – in the next version)