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ON THE UNDERSTANDING OF UNIVERSAL JURISDICTION

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ЩОДО РОЗУМІННЯ УНІВЕРСАЛЬНОЇ ЮРИСДИКЦІЇ

АНОТАЦІЇ (ABSTRACTS), КЛЮЧОВІ СЛОВА (KEY WORDS)

Problem statement. Today there is an armed conflict in Ukraine. Despite the fact that it is not officially recognized, the aggressor is attacking us "on all the fronts". Usually, we notice only those aspects of this conflict that threaten the security of our entire state, but in the meantime, the enemy uses all legal and illegal opportunities to strike Ukraine. One example of his alleged legal actions is the condemnation of Ukrainian citizens using the concept of universal jurisdiction. Of course, these citizens are not ordinary people. They are representatives of the elites of our society, because they are public figures, politicians and militaries. The problem of jurisdiction in general and universal jurisdiction in particular relates to the concept of the scope of international and domestic law and is important for both theory and practice of international relations. In light of this issue, the following questions are particularly relevant and the **purpose** of the article: the legitimacy of establishing universal jurisdiction and legal restrictions imposed on the exercise of universal jurisdiction. **Methods.** The methodological basis of the study is general and special legal research methods used in the theory of international law. Among them, there are general scientific research methods, such as philosophical, dialectical, synergetic, methods of induction and deduction. **Results.** We can assume that the concept of universal jurisdictions is now on the path of its formation as a separate institute of international criminal law. It is clear that until universal jurisdiction has become universally recognized institute of international law, although several agreements have already been concluded, and States legislative acts have been adopted, for the unambiguous approval of their place in the system of international law, this concept requires regulatory legal international regulation, for example, in the form of a single treaty. **Conclusions.** There are several essential features of the above definition. First, universal jurisdiction is governed by the law of a State that has an extraterritorial scope. Second, the reason for its application is the crime itself, irrespective of the legal or factual connection of the State with the persons or territory in which the crime was committed. However, the modern understanding of universal jurisdiction does not exclude other types of jurisdiction that arose in earlier historical stages.

Key words: *international criminal law; universal jurisdiction; armed conflict; the Geneva Conventions*

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Постановка проблеми. У статті розглянуто поняття та особливості універсальної юрисдикції, актуальної для України зараз у світлі подій на Сході. Зокрема, увагу було приділено ознакам і видам концепції універсальної юрисдикції; виявлено деякі теоретичні розбіжності в її розумінні. Невіддільним елементом дослідження стали етапи становлення та розвитку цієї концепції. **Завданнями статті** є: дослідження змісту концепції універсальної юрисдикції, виходячи з історичних передумов її появи, а також сучасного розуміння у світлі інших видів юрисдикції; розгляд комплексу нормативних правових актів, міжнародних договорів та доктринальних робіт, які стосуються універсальної юрисдикції; виявлення сучасного місця універсальної юрисдикції у системі міжнародного права. **Методи дослідження.** Методологічною основою дослідження виступають загальнонаукові та спеціально-правові методи дослідження, що використовуються в науці міжнародного права. З числа загальнонаукових методів дослідження застосовувались філософський, діалектичний, синергетичний, методи індукції та дедукції. **Результати дослідження.** Концепція універсальної юрисдикцій зараз перебуває на шляху формування як окремого інституту міжнародного кримінального права. Однак зрозуміло, що поки вона не є визнаним інститутом міжнародного права. **Висновки.**

Універсальна юрисдикція встановлюється законодавством держави, яке має екстериторіальну сферу дії. Підставою для її застосування є вчинений злочин безвідносно до наявності правового або фактичного зв'язку держави з винною особою або територією, на якій було скоєно злочин. Сучасне розуміння універсальної юрисдикції не виключає й інші її види, що виникли на більш ранніх історичних етапах. Також, на наш погляд, для однозначного затвердження її місця в системі міжнародного права, потрібно закріпити цю концепцію на рівні міжнародного права, наприклад, у вигляді міжнародного договору.

Ключові слова: *міжнародне кримінальне право; універсальна юрисдикція; збройний конфлікт; Женевські конвенції*

Problem statement

Today there is an armed conflict in Ukraine. Despite the fact that it is not officially recognized at the international and national level, the aggressor is attacking us "on all fronts". Usually, we notice only those aspects of this conflict that threaten the security of our entire state, but in the meantime, the enemy uses all legal and illegal opportunities to strike us. One example of his alleged legal actions is is the condemnation of Ukrainian citizens using the concept of universal jurisdiction. Of course, these citizens are not ordinary people. They are representatives of the elites of our society because they are public figures, politicians, and militaries.

The problem of the jurisdiction in general and universal jurisdiction, in particular, relates to the concept of the scope of international and domestic law and is important for both theory and practice of international relations.

In light of this issue, the following questions are particularly relevant. First, the legitimacy of establishing universal jurisdiction: under what rules of common international law should it be established? Secondly, what are the legal restrictions imposed on the exercise of universal jurisdiction?

Definitions of the concept of "universal jurisdiction"

In the primary and fundamental sense, the term "jurisdiction" means the right of the state to compel enforcement of judicial activity in respect of persons and activities that have taken place in a particular spatial sphere. Based on this definition, the concept of "jurisdiction" should reflect the relationship of three aspects:

– The functional aspect defines the range of powers, beyond which the state has no right to go when exercising its jurisdiction;

– Territorial aspect links the possibility of exercising jurisdiction to the legal regime of the space within which jurisdiction is envisaged;

– Personal aspect limits the jurisdiction of the State, depending on the nationality of the person in respect of whom the jurisdiction is to be exercised.

The most valuable (in practical terms) is the classification, based on the territorial criterion. For this reason, territorial, extraterritorial, and universal jurisdiction are distinguished [1, p.52].

The concept of universal jurisdiction allows states or international organizations to prosecute a person regardless of where the crime was committed, regardless of the nationality of the accused person, his or her place of residence, or any other relationship with the prosecution body [2, p.252]. A. Cassese adds that "the so-called *principle of universality* allows the state to bring a person charged with the commission of an international crime, regardless of the person's relationship with the state-prosecutor" [3, p.261].

R. O'Keefe defines the essence of universal jurisdiction as follows: "Universal jurisdiction is the prescriptive jurisdiction over crimes committed abroad by persons who, at the time of the committing of an unlawful act, were neither residents nor citizens of the requesting State and whose acts are not a threat to the state exercising this kind of jurisdiction" [4, p.745].

Its special form is universal jurisdiction *in absentia,* which, as it was determined by L. Reydams', means that any state can individually initiate an investigation against the aforementioned person in the absence of the latter [5, p.38].

"It is considered that universal jurisdiction should be applied to crimes, whose termination by all states without justification is justified or envisaged by the policy of the international community, so-called *erga omnes*" – stated prominent lawyers V. Kalugin and D. Akulov [6, p.184]. According to the well-known specialist in international law I. Fisenko, universal jurisdiction follows from the general conviction of a certain crime [7, p.176].

Principles and types of "universal jurisdiction"

The principles to which universal jurisdiction apply, determined by the development of international law at various historical stages, are the following:

– General universal principle based on cooperation between states;

– Principle of limited cooperation based on universality;

– One-sided universal principle [8, p.3].

The first type of universal jurisdiction applies to

all serious crimes that are punishable under most legal systems. However, there are no differences between ordinary domestic crimes and serious violations of international law. Cooperation consists of the interaction of States on criminal matters. Historically, this understanding of universal jurisdiction was the first, since the question of universal jurisdiction was reflected in the writings of scholars of 15th – 16th centuries when there was no clear difference between international and domestic law. The main feature of the principle of limited cooperation based on universality, in contrast to the principle stated above, is that the latter applies only to serious violations of international law. A similar transformation of the meaning of universal jurisdiction was reflected in the writings of G. Grotius and E. de Vattel, and lately in 1931 in a resolution of the Institute of International Law [9, p.348; 10, p.124]. The research of these scholars, in my opinion, can be considered as a doctrine of international law in the sense of article 38 of the Charter of the International Court of Justice [11].

It should be added that the concept of universal jurisdiction is directly related to the *aut dedere aut judicare* clause, which means that the state, in the authority of which the person suspected of committing a crime has resided, is bounded, without any exceptions and regardless of whether the crime was committed in its territory, to refer this case to its competent authorities for the purpose of criminal prosecution [10, p.145]. The first two types of universal jurisdiction are expressions of this clause. The difference between them lies mainly in the nature of the crimes that fall under this clause. If the general universal principle based on cooperation between states is established in relation to ordinary domestic crimes, then the principle of limited cooperation based on universality is established in respect of crimes that violate the rights and interests of the State or the international community as a whole (*erga omnes*).

In accordance with the same one-sided universal principle, the State establishing jurisdiction is not limited by a factual or legal link to a criminal act – a serious violation of international law. Therefore, universal jurisdiction, in this case, is established on the nature of the violation committed, which affects the interests of the entire community, and violates the rules of *jus cogens* [8, p.4].

Currently, various jurisdictions co-exist in the laws of some states (Austria, Denmark, Germany, Sweden, etc.) [2, p.279]. On the one hand, persons who have committed crimes against a particular state (who are abroad or who have committed crimes outside the territory of that country, but the consequences of the crime related to that country) are punished, and on the other hand, persons who have committed international crimes, a serious violation of international law; and punishment is carried out in accordance with the provisions of conventions containing the *aut dedere aut judicare* clause (for example, Convention on the Illicit Seizure of Aircraft of 1970) [12].

In addition, a number of states have enacted laws establishing universal jurisdiction over any factual or legal connection with a crime, based on the nature of a serious violation of international law (most EU countries, Australia, Israel, Russia, Senegal) [2, p.280].

The one-sided principle of universality is a new type of universal jurisdiction. It is expressed through the following definition: a jurisdiction attributed to crimes committed abroad by persons who, at the time of the commission of the illegal act, were neither residents nor citizens of the attributing state and whose acts constitute no threat to the fundamental interests of the state, exercising this kind of jurisdiction. This principle should apply to several international crimes, including 1) piracy; 2) slavery; 3) aggression; 4) war crimes; 5) crimes against humanity; 6) genocide; 7) apartheid; 8) torture; 9) unlawful seizure of aircraft [8, p.4]. We are interested in the crimes, forbidden by international criminal law: the crime of aggression, crimes against humanity, genocide, and war crimes.

Sources of universal jurisdiction

The grounds for exercising universal jurisdiction over war crimes are presented in both international treaties and customary law.

In all the four Geneva Conventions for the protection of war victims of 12 August 1949, universal jurisdiction is provided for violations, which are qualified as serious. Each of the Conventions has provisions (articles 49, 50, 129 and 146 respectively) which oblige States to search for persons who are alleged of committing such violations and, regardless of their nationality, to refer them the court of this state or extradite them (to refer a court to another State – a party to the Conventions, that has reasonable grounds for their accusation, it is the principle "*aut dedere aut judicare*"). Although the Conventions do not explicitly state that jurisdiction does not depend on the place of the committing of the crime, their interpretation, as a rule, affirmed the presence of universal jurisdiction [13, p.398]. As such, the Conventions are one of the first examples of embodying universal jurisdiction the law of treaties.

The Geneva Conventions provide for binding universal jurisdiction, meaning that they oblige

states to prosecute persons suspected of committing serious crimes or to take appropriate action to extradite the letters. States may initiate investigations or prosecute persons outside their territory. Since extradition is not always possible, states must in any case adopt appropriate criminal laws that allow such person to be judged, regardless of his nationality and the place of committing a crime [14, p.91].

Other treaties in the sphere of international humanitarian law (IHL), such as the Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict of 1954 and the Second Protocol thereof, provide for a similar obligation for the States-parties to cease serious violations on the basis of the principle of universal jurisdiction [15].

While the relevant provisions of the IHL treaties cover only serious violations, the universal jurisdiction in customary IHL is extended to all violations of the laws and customs of war. These include some serious violations of the laws applicable in the context of non-international armed conflicts, including Article 3, common to all four Geneva Conventions, and Additional Protocol II of 1977 thereof [14, p.302].

Here are other legal documents that can or could be considered (if they ever came into force) as sources of consolidation of the concept of universal jurisdiction at the international and national levels. In 1931, the Institute of International Law attested to the understanding of universal jurisdiction in its resolution (Article 5) [16]. However, the modern understanding of universal jurisdiction has changed in view of the emergence of erga omnes and jus cogens concepts, which have become part of positive international law. Henceforth, it has been applied on the sole basis of the nature of the international crime committed. A new stage in the international cooperation of the states in this area was the development, in 1937, under the auspices of the League of Nations, of the Convention on the Prevention and Punishment of Terrorism, as well as the Convention on the Establishment of an International Criminal Court. Although both conventions did not enter into force, many of their provisions formed the basis for the establishment of principles and norms of international cooperation concerning the fight against terrorism, such as the inevitability of punishing criminals, universal jurisdiction, the obligation to either extradite the alleged offender or prosecute him or her in criminal proceedings, provisions for the mutual exchange of relevant information, etc [17, p.267]. The question of the possibility of applying universal jurisdiction to war crimes was on the agenda during the Second World War [18, p.177]. The UN Commission on War Crimes stated that "the right to condemn war crimes… belongs to every independent state" [19].

Some tendencies towards the consolidation of the concept of universal jurisdiction at the international level can be found in a number of universal international treaties, namely, in the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, in the International Convention on the Suppression of the Crime of Apartheid of 30 November 1973, in the United Nations Convention on the Law of the Sea of 10 December 1982 [20, p.315].

At the regional level, in 1990 the Council of Europe reached consensus on extraterritorial jurisdictions. Among them was the universal jurisdiction. In particular, it was stated, that "these types of jurisdiction can be regarded as principles of jurisdiction firmly established by the practice of states" [21, p.12]. Then, in the case of the Arrest Warrant of 11 April 2000, the special opinion of the judges of the International Court of Justice indicated that universal jurisdiction had the character of a customary rule of international law and was at the same time enshrined in several conventions [22, p.6].

The UN Security Council Resolution No 978 of 27 February 1995 called on states to "arrest and detain, in accordance with their domestic law and relevant standards of international law, pending judicial review by the Rwanda International Tribunal or the competent national authorities identified in their territories, the persons for whom there is sufficient evidence that they were responsible for acts falling within the jurisdiction of the International Criminal Tribunal for Rwanda" [23]. Also, the UN drew attention to the problem of universal jurisdiction over the events of 2006, when a French court issued an arrest warrant for nine high-ranking Rwandan officials accused of acts of terrorism against their own government belonging to another nation. After detention, the diplomatic scandal erupted, and genocide began in Rwanda. Subsequently, in 2008, a Spanish court accused Rwandan military officials of committing genocide. The African Union has already intervened in this matter, so a representative of Tanzania at the UN, in 2009, initiated an analysis of the issue of universal jurisdiction at the UN General Assembly [24, p.8].

There are also current doctrinal attempts to consolidate the mechanism of use of the principle of universal jurisdiction. These are, for example, the Princeton Principles of Universal Jurisdiction. There are only fourteen of them, but their content clearly defines the scope of this principle. Important issues such as competitive jurisdiction, amnesty,

reasons for refusing to extradite offenders are raised [25, p.15]. Ignoring these fundamentals leads, in practice, to the conflicts of jurisdiction or denial of justice.

In contrast to the law of treaties, there is no reason to think that customary international law requires the exercise of jurisdiction by States. Rather, it enables States to exercise their discretion in exercising or not exercising universal jurisdiction over war crimes that are not serious violations [8, p.5].

The concept of universal jurisdiction and the system of international law

The place of the concept of universal jurisdiction in the system of international law is determined, first of all, by its branch affiliation to the international criminal law. The system of international law, as a whole, is a set of principles and rules of international law that make up a whole and, simultaneously, are organized into relatively separate components - institutions and branches of international law [26, p.153]. It is the result of a number of factors of objective and subjective order that determine the development of international relations and law, governing them [27, p.42].

I. Lukashuk writes what the system of international law is a set of legal norms characterized by fundamental unity and at the same time an orderly division into relatively separate parts (branches, branches, institutions). The material system-forming factor for international law is a system of international relations that is international law designed to serve. Basic legal and moral-political systemic factors are the goals and principles of international law [28, p.107].

The main elements of the so-called horizontal structure of the system of international law are institutions and branches. However, if the definition of "institute" does not cause controversy ("it is a system of interrelated and complementary (by purpose) norms that regulate a relatively separate set of interconnected public relations") [27, p.42], then there are practically no parameters to determine the branches of law in the domestic and international aspect.

The institute should be understood as a system of interconnected, mutually complementary norms governing a separate set of interconnected social relations [27, p.43]. Based on the theories of S. Alekseev, there are several unique features for the structure of the legal institute:

a) the presence of a set of "equal" regulatory requirements. The institute includes several one-line provisions;

b) as a rule, legal diversity of prescriptions. They are therefore linked in the one complex providing a versatile impact on this site of social relations. For example, regulatory institutions in many cases combine mandatory and authoritative rules. (However, a number of institutes, including many protective and general ones, consist of norms of one type - such, in particular, the institutes of the special part of the international criminal law);

c) the unity of all the rules by stable regular relationships, which are expressed in general prescriptions, and most importantly - in the legal structure [29, p.54].

The institute of international law is a relatively isolated complex of international legal norms, which have a special regulatory orientation, and which are found within the scope of one branch, or have interbranch character. It acts as the primary legal "community" [20, p.219].

The fundamental differences between the institute and the branch are peculiarities of the object scope of their norms and, accordingly, the features of regulatory complexes that form them. The object of the norms that make up an institute of international law is a homogeneous relationship, which, regardless of it object, is determined by one class of goals.

As for the universal jurisdiction, its object is regulation of interstate relations, connected with convictions of persons guilty of commission of the most serious crimes under international law.

Also, the normative complex can form an institute only if it is a system entity. The main criteria of the institute international law is:

1. specificity of the object-scope of the rules that make up this regulatory complex;
2. indivisibility of the regulatory complex into another institutes or sub-branches;
3. presence of the rules *erga omnes* in the regulatory set;
4. presence of special institutional norms among the erga omnes norms [30, p.220].

Let us focus on each individual criterion. The objective target area of universal jurisdiction is manifested in the fact that this legal complex regulates the range of relations related to the provision to states, international organizations, and international courts of the opportunity to prosecute persons guilty of encroaching on the common interests of mankind, which require special protection mechanisms. Hence, another criterion for the selection of the institute of international law is the availability of erga omnes standards. Special institutional norms for it are the principle of *aut dedere aut judiare*.

An additional criterion may be the existence of a codification act. In our case, it is absent, but it is

not crucial. On the other hand, there is another additional criterion – a significant array of regulatory material.

It should be added that opponents of such views, such as Henry Kissinger, claim that universal jurisdiction is a violation of the sovereignty of each state: all countries are equal, as enshrined in the Charter of the United Nations [11]. According to him, from the practical point of view, since any state can implement the concept of universal jurisdiction in its own internal legislation, such a situation carries the risk of politically motivated, demonstrable lawsuits initiated with the aim of realization of quasi-judicial hunting for political enemies [31, p.102]. However, this opinion has not found much support among scholars.

In general, the main theoretical problem that arises in the exercise of universal jurisdiction is the conflict of two fundamental principles of law, one of which is that the crime must be punished and the other is the inviolability of the principle of sovereign equality of states.

Conclusions

Thus, there are several essential features of universal jurisdiction. First, it is governed by separate national law that has an extraterritorial scope. Second, the reason for its application is an existence of the crime itself, irrespective of the legal or factual connection of the prosecuting state with the persons or territory in which the crime was committed. The transition to this understanding of universal jurisdiction was made after World War II when the international community set new legal standards in international relations. New values, embodied in *jus cogens* standards and *erga omnes* commitments, have emerged. However, the modern understanding of universal jurisdiction does not exclude other types of jurisdiction that had arisen in earlier historical stages.

Also, we can assume that the concept of universal jurisdictions, in our opinion, is now on the path of its formation as a separate institute of international criminal law. It is clear that universal jurisdiction has not yet become universally recognized institute of international law, although several treaties have already been concluded, and national legislative acts have been widely adopted. For the sake of unambiguous approval of its place in the system of international law, this concept requires the approvement of international legal regulation, for example, in the form of a single, all-encompassing treaty. Such a document should consolidate clear definition of universal jurisdiction, types of it, and, what are the most important, legitimate grounds thereof. Construction of the above treaty should provide for elimination of contradictions, arising from the exercise of universal jurisdiction, first of all, of the conflict between the punishment of criminals and the principle of non-interference in the internal affairs of another state.

Conflict of interest

The author declares the absence of any conflict of interest.

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