

SOME LEGAL ASPECTS OF APPLICATION OF UNIVERSAL JURISDICTION OVER WAR CRIMES

*Evrensel Yargının Savaş Suçlarına
Uygulanmasının Bazı Hukuki Yönleri*

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Abstract


The application of universal jurisdiction over war crimes requires responses to a number of questions: Which crimes under international law are considered war crimes? Is there consensus regarding the application of universal jurisdiction over war crimes? Is the prosecution of war crimes under universal jurisdiction the right or the duty of a state? Does the application of universal jurisdiction over war crimes require any connection to the forum state? Do the state officials enjoy immunities from being prosecuted by foreign states under universal jurisdiction for war crimes? Which value should outweigh in deciding of reasonableness of application of

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universal jurisdiction – to prevent the impunity of the perpetrators of war crimes or to ensure stable and secure international relations with the foreign states? What measures should be taken to ensure further efficiency of universality principle in combatting international crimes?

These questions are the major ones, but not exhaustive and the answers to them have both theoretical and practical importance. In this article we will try to find answers to those questions analyzing the relevant norms of international law, the decisions of the international courts, the legislation and case-law of the states, as well as the legal doctrine. Significant place in the article is allocated to the questions related to the limitations on application of universal jurisdiction and how these limitations could affect the future perspective of this principle.

Findings reached in the article are that further limitations on application of universality principle can lead to loss of its meaning as a legal concept and adoption of a single convention in this field is the possible way out to preserve the important role of this principle in fighting international crimes.

Keywords: Universal jurisdiction, War crimes, International crimes, Immunities, Forum State.

Öz

Savaş suçları üzerinde evrensel yargı yetkisinin uygulanması bir dizi soruya yanıt gerektirir: Uluslararası hukuka göre hangi suçlar savaş suçu olarak kabul edilir? Savaş suçları üzerinde evrensel yargı yetkisinin uygulanması konusunda fikir birliği var mı? Savaş suçlarının evrensel yargı yetkisi altında kovuşturulması bir devletin hakkı mı yoksa görevi midir? Savaş suçları üzerindeki evrensel yargı yetkisinin uygulanması forum devletiyle herhangi bir bağlantı gerektiriyor mu? Devlet yetkilileri savaş suçları nedeniyle yabancı devletler tarafından evrensel yargı yetkisi altında yargılanmaktan muaf

tutuluyor mu? Evrensel yargı yetkisinin uygulanmasının makul olup olmadığına karar verirken hangi değer daha ağır basmalıdır - savaş suçu faillerinin cezasızlığını önlemek veya yabancı devletlerle istikrarlı ve güvenli uluslararası ilişkiler sağlamak? Uluslararası suçlarla mücadelede evrensellik ilkesinin daha fazla etkinliğini sağlamak için ne tür önlemler alınmalıdır?

Bu sorular başlıca sorulardır, ancak kapsamlı değildir ve cevaplar hem teorik hem de pratik öneme sahiptir. Bu makalede uluslararası hukukun ilgili normlarını, uluslararası mahkemelerin kararlarını, devletlerin mevzuatı ve içtihatlarını ve ayrıca yasal doktrini analiz ederek bu sorulara cevap bulmaya çalışacağız. Makalede önemli bir yer evrensel yargı yetkisinin uygulanmasına ilişkin sınırlamalara ve bu sınırlamaların mevcut ilkenin gelecekteki perspektifini nasıl etkileyebileceği ile ilişkin sorulara ayrılmıştır.

Makalede evrensellik ilkesinin uygulanmasındaki daha fazla sınırlamanın onun hukuki bir kavram olarak anlamını yitirmesine yol açabileceği ve bu alanda tek bir sözleşmenin kabul edilmesinin bu ilkenin uluslararası suçlarla mücadeledeki önemli rolünü korumanın olası bir yolu olduğu sonucuna varılmıştır.

Anahtar kelimeler: Evrensel Yargı, Savaş Suçları, Uluslararası suçlar, Dokunulmazlıklar, Forum Devleti.

INTRODUCTION

Universal jurisdiction, which is one of the forms of criminal jurisdiction, allows the courts of any state to prosecute those, who alleged to have committed certain serious crimes, regardless of where the alleged crime was committed, as well as of the nationality of the perpetrator or the victim of the crime. In this case the jurisdiction is based on the crime itself, not on the

place, where the crime was committed or the persons, who have committed the crime.¹

As a rule, universal jurisdiction is exercised over the crimes regarded by the international community as especially serious. There is no consensus either in doctrine or state practice with respect to the circle of crimes, which can be prosecuted based on universal jurisdiction. Nevertheless, it is mainly accepted that these crimes include, *inter alia*, the crimes against peace, humanity and security of mankind, genocide, torture, as well as war crimes.

Although the issue of application of universal jurisdiction over war crimes is less disputable in the doctrine, it is still premature to state that the debates around this matter are closed.² In the meantime, war crimes are better positioned in comparison to other crimes, subject to universal jurisdiction, mainly because there are more international conventions regulating the matters related to war crimes than any other international crime.³

Universal jurisdiction is not the only legal means in international law to prevent the impunity for war crimes. Those,

¹ *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law*, Edited by Stephen Meledo, (Philadelphia: University of Pennsylvania Press, 2004), p. 18; Christopher L. Blakesley, "United States Jurisdiction over Extraterritorial Crime," *Journal of Criminal Law and Criminology* 73, no. 30 (1982), p. 1111.

² There have been efforts in legal doctrine to challenge the very nature of jurisdiction applied over war crimes. See, Matthew Garrod, "The Protective Principle of Jurisdiction over War Crimes and the Hollow Concept of Universality," *International Criminal Law Review* 12, (2012): 763-826; See also, Bartram Brown, "The Evolving Concept of Universal Jurisdiction (Symposium)," *35 New England Law Review* 383, (2001), p. 384.

³ Anthony J. Colangelo, "The Legal Limits of Universal Jurisdiction," *Virginia Journal of International Law* 47, (2006), p. 191.

who are suspected of committing such crimes can be brought either before the local courts based on territorial or personal jurisdiction, *ad hoc* International Penal Tribunals, or the International Criminal Court. However, all these means have significant deficiencies in fighting war crimes. As it was rightly emphasized by Christopher C. Joyner, “since war criminals often operate with the knowledge and assistance of local political and legal authorities, domestic law does little to deter these actors.”⁴ The *ad hoc* International Penal Tribunals are mainly established to try crimes committed by the citizens of particular countries. As far as the International Criminal Court is concerned, not all the states are members of the Court. Furthermore, it is physically impossible for the Court to try all the cases of war crimes. In this respect, universal jurisdiction is the most efficient, under some circumstances even the only, legal tool in preventing impunity for war crimes.

I. PROSECUTION OF WAR CRIMES UNDER UNIVERSAL JURISDICTION: THE RIGHT OR THE DUTY FOR A STATE?

The notion of war crimes encompasses the cases of grave breaches of international humanitarian law both in international and non-international armed conflicts. It primarily includes grave breaches of the Geneva Conventions of 12 August 1949 for the protection of war victims and Additional Protocol I to the Convention. According to Article 85 (5) of the Protocol I, “without prejudice to the application of the Conventions and of this Protocol, grave breaches of these instruments shall be regarded as war crimes.”⁵

⁴ Christopher C. Joyner, “Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability,” *Law and Contemporary Problems* 59, (1996), p. 153.

⁵ Additional Protocol I to the Geneva Conventions further extended the circle of grave breaches set out in Articles 50, 51, 130 and 147 of the respective Conventions.

War crimes perpetrated in non-international armed conflicts include the violations of Article 3, which is general for all Geneva Conventions, as well as grave breaches envisaged in Protocol II.

War crimes are also set out in Article 8 of the Rome Statute of the International Criminal Court. Furthermore, in accordance with the Second Protocol (1999) to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict "*making cultural property, protected under the Convention and the Second Protocol, the object of attack*" is considered war crime and prosecuted based on universal jurisdiction.

Finally, the Convention on the safety of the United Nations and associated personnel dated 9 December 1994 sets forth that certain attacks against the UN personnel within peacemaking or peace-keeping operations are amounted to war crimes.

One of the pioneers of research of the subject matter of this article Willard B. Cowles expressed his formula of universality principle over war crimes as follows: "*The States of the world have jurisdiction to try and punish any war criminal unless prohibited from so doing by international law. Whether or not any such prohibition exists is to be found in the practice of States in relation to the trial and punishment of such offenses.*"⁶

Back in the late 1940s the United Nations War Crimes Commission (UNWCC) stated that alongside with the pirates, war criminals are also punished based on universal jurisdiction. In particular, referring to the *Almelo Trial*, the UNWCC emphasized that "*under the general doctrine called Universality of Jurisdiction over War Crimes, every independent state has in International Law jurisdiction to punish pirates and war criminals in*

⁶ Willard B. Cowles, "Universality of Jurisdiction Over War Crimes," *California Law Review* 33, (1945), p. 216.

its custody regardless of the nationality of the victim or the place where the offence was committed.”⁷

Two years later the Geneva Conventions, the major international instrument to protect the fundamental rights in war time, endorsed the UNWCC position that war crimes are subject to universal jurisdiction. In particular, the relevant articles of the Geneva Conventions (Articles 49, 50, 129 and 146 respectively) read that, *“Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a ‘prima facie’ case.”*

Some authors allege that the Geneva Conventions do not directly envisage the application of universal jurisdiction over war crimes. In particular, M. Cherif Bassiouni noted that *“there is no provision in the conventions related to the armed conflicts containing universal jurisdiction and that the assertion that universal jurisdiction is applied over war crimes is essentially driven by academics’ and experts’ writings.”⁸* The similar view was expressed by Anthony J. Colangelo, who stated that *“no positive instrument concerning the law of armed conflict provides affirmatively in its*

⁷ “Law Reports of Trials of War Criminals”, Selected and Prepared by the United Nations War Crimes Commission, English Edition, Volume I, 1947, Last modified April 26, 2021, <http://www.unwcc.org/wp-content/uploads/2017/04/Law-Reports-Volume-1.pdf>.

⁸ M. Cherif Bassiouni, “Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice,” *Virginia Journal of International Law* 42, (2001), p. 117.

jurisdictional provisions for the conventional equivalent of universal jurisdiction.”⁹

This writer does not share those views. First of all, 2016 Commentary to Article 49 of the I Geneva Convention clearly states that *“the effective implementation of these obligations requires that each State Party has previously extended the universality principle to the list of grave breaches in its national legislation.”*¹⁰ Furthermore, para. 1851 of the Report of the United Nations Fact Finding Mission on the Gaza Conflict dated September 15, 2009 reads that Article 146 of the IV Geneva Convention establishes universal jurisdiction.¹¹

Alongside with the Geneva Conventions, the Draft Code of Crimes Against the Peace and Security of Mankind, elaborated by the International Law Commission in 1996 provides for universal jurisdiction over war crimes. In particular, Article 8 of the Draft Code reads that *“without prejudice to the jurisdiction of an international criminal court, each State Party shall take such measures as may be necessary to establish its jurisdiction over war crimes, irrespective of where or by whom those crimes were committed.”*¹²

⁹ J. Anthony J. Colangelo, “The Legal Limits of Universal Jurisdiction,” *Virginia Journal of International Law* 47, (2006), pp. 192-193.

¹⁰ “Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field”, Geneva, 12 August 1949, Commentary of 2016, Article 49, Penal Sanctions, Last modified April 30, 2021, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=3ED0B7D33BF425F3C1257F7D00589C84>.

¹¹ “Human Rights in Palestine and Other Occupied Arab Territories”, Report of the United Nations Fact Finding Mission on the Gaza Conflict, 15 September 2009, Last modified January 17, 2021, <https://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf>.

¹² Simple: “Draft Code of Crimes Against the Peace And Security of Mankind”, Last modified January 21, 2020,

It is widely accepted that the prohibition of war crimes is a *jus cogens* norm, i.e. peremptory norm from which there can be no derogation and *erga omnes* obligation, i.e. obligation for all states¹³. That means, the prosecution of war crimes is not an optional right, but a duty for all states. In other words, each state is not only entitled to prosecute war crimes, based on universal jurisdiction, but they are even obliged to exercise such jurisdiction, or extradite such persons for a trial to another state, “willing and able” to exercise prosecution, or hand them over to the international tribunal with the relevant jurisdiction. This fundamental obligation, which is expressed in each state’s duty to prosecute on the national level those, who alleged to have committed war crimes, is set out in the afore-mentioned articles of the Geneva Conventions.

As it was emphasized by M. Cherif Bassiouni, *erga omnes* character of obligation to prosecute war crimes imply certain duties, such as to “prosecute or extradite, the non-applicability of status of limitations and immunities, as well as universal jurisdiction over those, who have committed such crimes”.¹⁴

According to Amnesty International as of 2012 at least 136 UN member states have envisaged universal jurisdiction over war crimes in their legislation¹⁵, which clearly demonstrates the

https://legal.un.org/ilc/texts/instruments/english/draft_articles/7_4_1996.pdf

¹³ Christopher C. Joyner, “Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability,” *Law and Contemporary Problems* 59, (1996), pp. 168-169.

¹⁴ *International Criminal Law 3: International Enforcement*, Third Edition, Edited by M. Cherif Bassiouni, (Leiden: Martinus Nijhoff, 2008), p. 11.

¹⁵ “Universal Jurisdiction: A Preliminary Survey of Legislation Around the World - 2012 Update”, London: Amnesty International Publications, October 2012, Last modified January 17, 2021,

existence of *opinio juris* on the matter. In the meantime, indictments for war crimes constituted the major part of indictments (alongside with torture) in universal jurisdiction trials worldwide for the past half of a century.¹⁶

It should be noted that although the Geneva Conventions did not envisage directly the possibility of implementation of the state's duty to prosecute the persons, alleged to have committed war crimes by handing them over to the international criminal tribunal, the International Red Cross Committee, which provided official interpretation to the Geneva Convention stated clearly that, the elaborators of the Conventions have not excluded that the states can exercise their duty to punish the persons, alleged to have committed war crimes, by handing over those persons to the international criminal tribunal.¹⁷

International law strictly prohibits granting asylum to the persons, alleged to have committed war crimes. Article 14 of the Universal Declaration of Human Rights sets out that "*the right to seek and to enjoy asylum from persecution may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.*" In

<https://www.amnesty.org/download/Documents/24000/ior530192012en.pdf>.

¹⁶ Devika Hovel, "The Authority of Universal Jurisdiction," *The European Journal of International Law* 29, no: 2 (2018), p. 434.

¹⁷ The ICRC's Commentary to the I Geneva Convention published in 1952 reads as follows: "*At the same time there is nothing in the paragraph to exclude the handing over of the accused to an international penal tribunal, the competence of which is recognized by the Contracting Parties. On this point the Diplomatic Conference declined expressly to take any decision which might hamper future developments of international law.*" Simple: "Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field", Geneva, August 19, 1949, Commentary of 1952, Last modified January 11, 2020, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=F2D40BED87D146D1C12563CD0042232B>.

the meanwhile, in accordance with Article 1 of the Declaration on Territorial Asylum adopted by the UN General Assembly in 1967 “the right to seek and to enjoy asylum may not be invoked by any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes.”

The states’ duty not to grant asylum to the persons, alleged to have committed war crimes, also mean that states shall refrain from handing those persons to the states, which can grant asylum to them.

II. LIMITATIONS ON APPLICATION OF UNIVERSAL JURISDICTION OVER WAR CRIMES

A. Connection with the Forum State

The major difference between universal jurisdiction and the other forms of criminal jurisdiction is that no connection is required of the committed crime or the person, alleged to have committed the crime, with the state, which court sues that person (forum state). In other words, each state can bring before its courts the person, alleged to have committed war crimes, regardless of the state territory, where the alleged crime was committed, the nationality of the person, alleged to have committed the crime or of the victims of the alleged crime.

In its judgement on the case of *Naït-Liman v. Switzerland*, the European Court of Human Rights concluded, *inter alia*, that “in the concept’s absolute form” the application of universal jurisdiction does not depend on *ratione personae* or *ratione loci* connections with the “jurisdiction applied to in a specific case.”¹⁸

¹⁸ “Case of Naït-Liman v. Switzerland”, European Court of Human Rights, Grand Chamber, Application no. 51357/07, Judgement, 15 March 2018, Last

Although the doctrine mainly also supports the “concept of absolute form of universal jurisdiction”¹⁹, the legislation, as well as the judicial practice of the states are inclined to demonstrate a different approach, requiring a connection (sometimes substantial connection) of the alleged crime with the forum state to launch prosecution.

Germany is a clear example of this practice. In general, Articles 6 (9) and 7 (2) of the German Criminal Code envisaging the application of universal jurisdiction, do not require a connection of the committed crime or the person, alleged to have committed crime, with Germany.²⁰ Section 1 of Article 1 of the Code of Crimes Against International Law adopted by the German Federal Parliament on 26 June 2002 reads that “*this act shall apply to all criminal offences against international law designated*

modified April 14, 2021,
[https://hudoc.echr.coe.int/eng#{%22fulltext%22:\[%22\%22CASE%20OF%20JORGIC%20v.%20GERMANY\%22%22\],%22sort%22:\[%22kdate%20Descending%22\],%22languageisocode%22:\[%22ENG%22\],%22documentcollectionid%22:\[%22JUDGMENTS%22\],%22itemid%22:\[%22001-81608%22\]}](https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22\%22CASE%20OF%20JORGIC%20v.%20GERMANY\%22%22],%22sort%22:[%22kdate%20Descending%22],%22languageisocode%22:[%22ENG%22],%22documentcollectionid%22:[%22JUDGMENTS%22],%22itemid%22:[%22001-81608%22]}).

¹⁹ Anthony J. Colangelo, “The Legal Limits of Universal Jurisdiction,” *Virginia Journal of International Law* 47, (2006), pp. 150-151, See also, Bartram Brown, “The Evolving Concept of Universal Jurisdiction (Symposium),” 35 *New England Law Review* 383, (2001), p. 383, Christopher C. Joyner, “Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability,” *Law and Contemporary Problems* 59, (1996), p. 171.

²⁰ Article 6 (9) of the German Criminal Code reads that “*German criminal law shall apply, regardless of the law of the place of their commission, to the acts which, on the basis of an international agreement binding on the Federal Republic of Germany, shall also be prosecuted if they are committed abroad.*” Simple: “Criminal Code of Germany”, Last modified January 11, 2020, https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html; Luc Reydam, *Universal Jurisdiction: International and Municipal Legal Perspectives* (New York: Oxford University Press, 2003), p. 145.

*under this Act, even when the offence was committed abroad and bears no relation to Germany.*²¹"

However, the local courts exercising universal jurisdiction over war crimes, genocide and the other deeds, considered a crime under international law, have reached a conclusion that a connection with Germany (for example, the fact of residence in Germany) is required to prosecute the persons, alleged to have committed the said crimes.

The first case, where a connection with Germany was required has been *Tadic* case. On 13 February 1994 the Federal Court of Justice of Germany hearing the case submitted that a connection of the crime of genocide, alleged to have committed, with Germany is required "*in order not to violate the principle of non-interference with internal affairs of the other states.*" The court concluded that such a connection existed in *Tadic* case. Thus, the person, suspected to have committed a crime in Bosnia and Herzegovina resided in Germany for several months and arrested there. The Court submitted, *inter alia*: "*The German criminal law is applied to the crime of genocide committed abroad regardless of the law of the place of commission (universality principle). The primary condition for that is existence of legal connection in each case; only under such circumstances the application of the German criminal law to the deeds committed beyond the German territory will be possible. Absence of such a connection will lead to the violation by the forum state of the principle of non-interference with the internal affairs demanding respect to the state sovereignty. The fact that the accused has been residing in Germany for several months, that he has*

²¹ "Act to introduce the Code of Crimes Against International Law of June 26, 2002", 2021, Last modified January 11, <https://www.refworld.org/docid/4374af404.html>.

created the center of his interests and arrested here, proves the existence of connection of this person with Germany.²²

The conclusion on *Tadic* case was later confirmed on *Djajic* case in May 1997. The Bavarian State Supreme Court hearing the case submitted that Germany is entitled to exercise universal jurisdiction on condition that “*she does not violate the principle of non-interference with internal affairs of the other states*” and for that purpose substantial connection with Germany is needed. The Court concluded that the fact that the suspected person had been living in Germany voluntarily and Germany had participated in the UN peacekeeping operation on the territory of Yugoslavia together with the other states is a substantial connection to hear the case.²³

Neither German legislation, nor German precedent-law shed light to the factors which can be regarded as substantial connection for bringing the case before the German courts. The existence of this connection is determined each time by the court itself hearing the case.

Alongside with the German precedent-law the requirement of connection with the forum state is set out in the legislation and

²² “*Tadic* case, Federal Court of Justice, 13 February 1994”, Last modified January 28, 2021, https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/caseLaw.xsp?documentId=5171ADA8D4AD66AE412566080038787C&action=openDocument&xp_countrySelected=DE&xp_topicSelected=GVAL-992BU6&from=state_

²³ “*Novislav Djajic* case, Bavarian Higher Regional Court, 23 May 1997”, Last modified January 21, 2020, https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/xsp/.ibmmodres/domino/OpenAttachment/applic/ihl/ihl-nat.nsf/3EA892A1FB670B46412565FC00394EA5/CASE_TEXT/Novislav%20Djajic%20case%20-%20Decision%20of%2023%20May%201997%20%5Bin%20English%5D.PDF.

recedent law of France,²⁴ Austria,²⁵ Belgium,²⁶ Spain²⁷ and the other countries as well. According to 1985 Spanish Judicial Power Organization Act universal jurisdiction could only be exercised in Spain if one of the following three conditions is fulfilled: the accused is present in Spain, the victim is Spanish, or there is another clear connection with Spain.

The Princeton principles on universal jurisdiction elaborated in 2001 also set forth that universal jurisdiction may be exercised by a court of any state on a condition that the person is present before that court.²⁸

It may be concluded that currently there is no single approach to the issue of necessity of connection with the forum

²⁴ “Cour de Cassation, Chambre criminelle, Arrêt 26 Mars 1996 (Javor), Bulletin criminel, 1996, N° 132”, Last modified January 17, 2021, <https://www.legifrance.gouv.fr/juri/id/JURITEXT000007068336>; “Loi n° 95-1 du 2 janvier 1995 portant adaptation de la législation française aux dispositions de la résolution 827 du Conseil de sécurité des Nations Unies instituant un tribunal international en vue de juger les personnes présumées responsables de violations graves du droit international humanitaire commises sur le territoire de l'ex-Yougoslavie depuis 1991”, Last modified January 21, 2021, <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000532676/>.

²⁵ “Penal Code of Austria”, Last modified December 28, 2020, https://policehumanrightsresources.org/content/uploads/2016/08/Criminal-Code-Austria-1998.pdf?x96812_.

²⁶ “Cour d’appel de Bruxelles, Chambre des mises en accusation”, Sharon & Yaron, 26 Juin 2002, Last modified January 17, 2021, <https://competenceuniverselle.files.wordpress.com/2011/07/arret-26-juin-2002-apercu.pdf>.

²⁷ “Permanent Mission of Spain to the United Nations.” dated 29 April 2003, Last modified January 14, 2020, https://www.un.org/en/ga/sixth/68/UnivJur/Spain_E.pdf.

²⁸ Princeton University Program in Law and Public Affairs. “The Princeton Principles on Universal Jurisdiction 28 (2001)”, Last modified January 28, 2021, <http://hrlibrary.umn.edu/instree/princeton.html>.

state of the committed crime or the person, who allegedly have committed the crime, to institute criminal proceedings over war crimes. Although the Geneva Conventions do not explicitly require such a connection, this is more an exception rather than a general rule²⁹. As it follows from the analysis of the states' case-law the majority of them are reluctant to apply universal jurisdiction once there is no connection with the forum state.

B. Immunities

It is commonly accepted in international law that the personal immunity cannot serve as a ground to avoid responsibility for war crimes. Yet the Treaty of Versailles signed on 28 June 1919 noted that heads of states' immunities have certain limitations as far as the deeds regarded as international crime under international law are concerned. In accordance with Article 227 of the Treaty it was decided to establish a special tribunal to try former German Emperor William II of Hohenzollern for the "*offences against international morality and the sanctity of treaties.*"³⁰ It was a period when the concept of responsibility of natural persons for violating of laws and rules of war had recently started to develop. During and after World War II this concept has fully established.³¹ It was mainly reflected in the charters and judgements of the Nuremberg and Tokyo Military Tribunals.

²⁹ Ryan Rabinovitch, "Universal Jurisdiction in Absentia," *Fordham International Law Journal* 28, no: 2 (2004), p. 506.

³⁰ "Universal Jurisdiction and Absence of Immunity for Crimes against Humanity", Amnesty International, 1 January 1999, Last modified January 22, 2020, <https://www.amnesty.org/download/Documents/148000/eur450011999en.pdf>.

³¹ Igor P. Blishchenko, *International Humanitarian Law* (Moscow: Progress Publishers, 1989), p.186.

In the meantime, the immunity from other states' jurisdiction enjoyed by diplomatic agents, as well as a number of state's high ranking officials, especially heads of states, heads of Governments (it should be noted that some authors state that unlike heads of states heads of Governments do not enjoy the immunities in the territories of foreign states) and Ministers for Foreign Affairs, is also commonly accepted principle in international law.³² Respect to this principle is very important in order not to prevent those persons from fulfilling their duties. The problem arises, in particular, when the person, suspected of having committed international crime, is still in office. In these circumstances a contradiction emerges between the principles of necessity to punish the persons, alleged to have committed a crime affecting the interests of the international community as a whole and absolute inviolability of state officials holding high rankings from the other states' jurisdiction. The solution of this contradiction has importance both for international law theory and judicial practice.

In this respect, Judgement adopted by the International Court of Justice on 14 February 2002 on the case of Democratic Republic of the Congo against the Kingdom of Belgium is highly interesting.³³ The reason for the dispute between the two

³² Ilias Bantekas and Susan Nash, *International Criminal Law*, Second Edition (London: Cavendish Publishing Limited, 2003), pp.168.

³³ With respect to the issue of immunities for war crimes, see also *Pinochet*, *Gaddafi* and *Fidel Castro* cases. J. Craig Barker, "The Future of Former Head of State Immunity after ex parte Pinochet," *International and Comparative Law Quarterly* 48, (1999): 937-948, Andrea Bianchi, "Immunity versus Human Rights: The Pinochet Case," *European Journal of International Law* 10, (1999): 237-277, Reed Brody and Michael Ratner, *The Pinochet Papers: The Case of Augusto Pinochet in Spain and Britain* (The Hague, London, Boston: Kluwer Law International, 2000), "Gaddafi case", General Prosecutor at the Court of Appeal of Paris, Appeal judgment, Appeal No.00-87215, Decision No.64, (2001) 125 ILR 490, (2001) RGDIP 474, ILDC 774 (FR 2001), 13th March 2001,

countries was the international arrest warrant issued on 11 April 2000 by Belgian investigating judge against the incumbent Minister for Foreign Affairs of the Democratic Republic of the Congo Abdulaye Yerodia Ndombasi accusing him of having committed of war crimes and crimes against humanity and circulation of that warrant to the foreign authorities to ensure his extradition to Belgium.³⁴ On 17 October 2000 the Congo lodged an application with the Court against Belgium and requested the Court to deliver a decision on annulment of the international arrest warrant of 11 April 2000. The Congo claimed that issuing such a warrant Belgium had violated the diplomatic immunity enjoyed by its Minister for Foreign Affairs.

In its Judgement the International Court of Justice found substantiated the claim of the Congo on violation of Yerodia's immunity by Belgium. Thus, the Court submitted that "*although the international treaties, and in particular, the Vienna Convention on Diplomatic Relations of 18 April 1961 do not contain any provision specifically defining the immunities enjoyed by incumbent Ministers for Foreign Affairs, under customary international law they enjoy absolute immunity from criminal jurisdiction while in Office.*" The Court concluded that "*the functions of Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she*

France; Court of Cassation [Cass]; Criminal Division, Last modified January 22, 2021, https://www.lumsa.it/sites/default/files/UTENTI/u831/OPL_%20Gaddafi%20case%2C%20General%20Prosecutor%20at%20the%20Court%20of%20Appeal%20of%20Paris%2C%20Appeal%20judgment%2C%20Appeal%20No%2000.pdf; Antonio Cassese, *International Criminal Law* (New York: Oxford University Press, 2003), Simple: "Case Concerning the arrest warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), International Court of Justice", Last modified January 14, 2020, <https://www.icj-cij.org/public/files/case-related/121/121-20020214-JUD-01-00-EN.pdf>

³⁴ It was claimed that in his public address made in 1998 Abdulaye Yerodia called to persecute and perish all tutsi population, including civilians and combatants. After the warrant was issued Yerodia made trips to a number of countries, but none of them tried to arrest him.

fulfils regular trips abroad and his or her deprivation from immunity would hinder him or her in the performance of his or her duties.” The International Court of Justice found that “the issue against Mr. Abdulaye Yerodia Ndombasi of the arrest warrant of 11 April 2000, and its international circulation, constituted violations of a legal obligation of the Kingdom of Belgium towards the Democratic Republic of the Congo, in that they failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs of the Democratic Republic of the Congo enjoyed under international law. Therefore, the Court decided that the Kingdom of Belgium must cancel the arrest warrant of 11 April 2002 and so inform the authorities to whom that warrant was circulated.”

In the meanwhile, this decision must not be regarded as a ground to exempt the high ranking state officials, alleged to have committed war crimes, from entire responsibility. It was emphasized by the Court itself as well. Thus, the Court submitted that in some circumstances an incumbent or former Minister for Foreign Affairs can be brought before courts despite the immunities attributed to him or her by international law. Firstly, since the said persons do not enjoy criminal immunity in their own countries, they can be tried by the courts of the latter. Secondly, these persons can be prosecuted by the courts of foreign states in two cases - if their own state waives their immunity, and once they leave the office of Minister for Foreign Affairs and thus, no longer enjoy the diplomatic immunities. Finally, such persons can be tried by international criminal tribunals once they have jurisdiction.³⁵

This Judgement of the International Court of Justice resulted in making amendments to the Kingdom of Belgium Law of 7 May 2003 on Punishment of Serious Violations of International Humanitarian Law and Article 144 of Judicial Code. In

³⁵ C. Sonja Grover, *The European Court of Human Rights as a Pathway to Impunity for International Crimes* (Heidelberg: Springer-Verlag, 2010), p. 38.

accordance with the amendments “*the international immunity of the person deriving from the office he or she holds does not prevent the application of this law, except in the circumstances provided by international law.*”³⁶”

CONCLUSION

There is no doubt that universal jurisdiction is an efficient tool in fighting the crimes, regarded by the international community as especially serious, including war crimes, and one of the important means to prevent impunity for such crimes. The importance of universal jurisdiction is that any state, which has no connection with the committed crime, can bring the person, alleged to have committed the crime, before its courts for the sake of common interests. However, almost there is no state exercising universal jurisdiction without any condition. There are some restrictions in the national legislation and judicial practice.

First of all, it is the requirement of connection with the forum state, which exists in the legislation of majority of the states and only in rare cases a state institutes criminal proceedings based on universal jurisdiction with regard to a suspected person, who is not present on its territory. This requirement contradicts to the absolute form of universal jurisdiction and to this writer’s stance serves as a major obstacle in fighting war crimes on the national level. It is obvious that the application of universal jurisdiction, in particular with respect to high ranking officials of the foreign countries, who are not even present on the territory of the forum state can trigger tensions in international relations. However, it is also clear that so far there is no other international legal tool, as effective as universal jurisdiction, in fighting international

³⁶ “Human Rights Watch, Belgium: Questions and Answers on the “Anti-Atrocity” Law”, Last modified January 21, 2021, <https://www.hrw.org/legacy/campaigns/icc/belgium-qna>.

crimes, in particular committed by high profile officials. Anyway, unfortunately, the experience of Belgium and Spain, once with the most progressive legislation in the field of universal jurisdiction, demonstrates that the states are getting farther from the practice of application of absolute form of universal jurisdiction.

One of the other issues to be paid attention in exercising universal jurisdiction is the issue of immunities. It should be taken into account that customary international law does not allow to prosecute diplomatic agents, as well as the incumbent head of state, head of Government and Minister for Foreign Affairs by a foreign state even for international crimes. It is important that the circle of persons enjoying immunity in the foreign states is not enlarged further.

Connection with the forum state and immunities are not the only limitations on application of universal jurisdiction. The absence of the relevant legislation, political interference into the judicial decision-making process, unlawful application of acts of amnesty, pardon or other such kind of impunity acts, unlawful application of statutory limitations are additional impediments for application of universal jurisdiction. Further restriction of universality principle can result in loss of its meaning and its disappearance as a legal concept.

To this writer's opinion there is a huge demand in international law to elaborate a single convention on universal jurisdiction, which will cover all the issues related to its application. The convention should both codify the already existing norms of international law, and elaborate new norms, taking as a basis the best practices in the states' legislation and case-law. The adoption of such a convention would allow to preserve the role of universal jurisdiction as the most effective legal tool in fighting heinous crimes.

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