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BASICS FOR UNIVERSAL JURISDICTION FOR COMMISSION OF GRAVE CRIMES

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SUMMARY

The article discloses the peculiarities of application of universal jurisdiction both in international and national law, relevant for Ukraine now in the light of events in the East. In particular, attention was paid to the issue of the immunities of senior officials. An inalienable element of this study was the description of the powers of state bodies and international judicial bodies in the application of this concept, particularly, within the framework of the International Criminal Court.

Key words: universal jurisdiction, immunities of high official, international criminal law, grave crimes.

ОСНОВИ УНІВЕРСАЛЬНОЇ ЮРИСДИКЦІЇ ЗА ЗДІЙСНЕННЯ НАЙТЯЖЧИХ МІЖНАРОДНИХ ЗЛОЧИНІВ

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АНОТАЦІЯ

У статті розкриваються особливості застосування універсальної юрисдикції як у міжнародному, так і в національному праві, що є актуальним для України нині у світлі подій на Сході. Зокрема, увагу було приділено питанням імунітету високопосадовців. Невід'ємним елементом цього дослідження є аналіз повноважень державних судових органів та міжнародних судових органів у застосуванні цієї концепції, зокрема в рамках Міжнародного кримінального суду.

Ключові слова: універсальна юрисдикція, імунітети високопосадовців, міжнародне кримінальне право, найтяжчі міжнародні злочини.

Statement of the problem. Currently international community is faced with bloody armed conflicts. During the operation in Syria thousands of civilians are becoming victims. Many other countries are suffering, because they are forced to divide their homes with the waves of migrants. Every day we see violation of human rights, which are the most important values enshrined in international law and these violations constitute crimes against international law.

The relevance of the research topic. Ukraine is also experiencing a similar situation. Our task is to figure out whether there is an effective mechanism to convict the perpetrators of the most serious crimes. There are mechanisms to punish the subject, whose actions affect the interests of all mankind. It is widely known and used both in international and national law, and called universal jurisdiction.

The problem is that still there are no any unified principles for its application. In particular, the question arises, who can apply it and against whom.

Status of research. To the authors, that affected this issue can be attributed a number of researchers. The category of subjects of jurisdiction, including international criminal jurisdiction, was investigated by S. Chernichenko, O. Glikman, M. Cherif Bassiouni, Dalila V. Hoover and Cedric Ryngaert. The issue of prosecution under international criminal law in connection with universal jurisdiction was the subject of studies by A. Abashidze and K. Ageychenko.

The Object and Purpose of the Article are:

– the study of universal jurisdiction, based on classical cases of its application in national and international law;

– the consideration of the issue of the immunities of senior officials.

Presentation of the main material. There is no generally accepted definition of universal jurisdiction in conventional or customary international law [1]. However, it generally amounts to the assertion of jurisdiction by any State over crimes that are so heinous [2] regardless of "any nexus the State may have with the offence, the offender, or the victim [3] even if its nationals have not been injured by the acts. Universal jurisdiction offenses are injuries to "the international community as a whole" [4]. Paragraph 1(1) of the Princeton Principle defines universal jurisdiction as: "Criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction" [2, 28].

In his work on the theory of international law Professor S. Chernychenko notes, that any subject of international law has a jurisdiction. One agrees in general with this conclusion, but we would like to make a reservation. As we understand, based on the peculiarity and multilevelness of international legal personality jurisdiction is inherent only to those subjects of international law, who have the opportunity not only to determine the rules of conduct and to create rules of law, but also to ensure their observance since practical realization of jurisdiction is often connected with the involvement of coercive mechanism. In other words, as the professor observes: "it is typical for those (subjects) who have the power" [5, 111]. These subjects of international law today include states, state-like entities and international intergovernmental organizations.

Classically the exercise of universal jurisdiction is attributed exclusively to the states. It is only state, that establishes legislative rules, which allow the application of universal

jurisdiction. In general, it applies to the most serious crimes under international law. Also only states are parties to international treaties, which consolidate the principle of universal jurisdiction that allows national courts to consider cases using this concept. This situation has rather deep historical roots [6, 3] and currently it looks like this.

Many international conventions provide for a duty to prosecute certain crimes, but do not always entail universal jurisdiction [7, 103]. The four 1949 Geneva Conventions recognized the principle of universal jurisdiction in the form of the obligation to extradite and prosecute "grave breaches" [8]. In addition, states that have ratified the Convention against Torture and Other Cruel Inhuman and Degrading Treatment or Punishment [9] are legally bound to exercise universal jurisdiction over perpetrators in breach of the Convention. Today most States have recognized, that they have a moral duty to exercise universal jurisdiction over these crimes.

One of the first classical case for this concept is "The Butare Four Case". In June 2001, four Rwandan Hutus [10] were convicted in a Belgium court of committing genocide in Rwanda in violation of a Belgian universal jurisdiction statute [11]. The success of the case, which marked Belgium's first application of its universal jurisdiction laws, resulted in a profusion of complaints.

In accordance with Article 12 of the Rome Statute, there is a possibility for a State, which is not a Party to this Statute, to accept by declaration lodged with the Registrar, the exercise of jurisdiction by the Court with respect to the crime in question [12].

Universal jurisdiction is also theoretically inherent in international organizations, bearing in mind those with both judicial and quasi-judicial powers.

In addition, Article 13 of the Rome Statute grants the ICC authority to prosecute international crimes committed by nationals of non-party States that are referred by a State party or the Security Council to the Prosecutor. Indeed, the international community may request the Security Council to adopt a resolution under Chapter VII of the United Nation Charter to mandate non-party States to cooperate with the ICC in cases of threats or breaches to the peace [12].

Thus, if national of a state commits an international crime in a State party to the Rome Statute, the ICC has authority to prosecute a national without the consent of the state. Similarly, if national of a state commits a crime in a non-party State that poses a threat or breach of peace, the Security Council can refer the case to the Court, where the Court would not otherwise has authority to hear it. While states sees these instances as a violation of international law, its recent approval of the U.N. Security Council Resolution 1973 ("Resolution 1973") to respond to the massive shootings of Libyan civilians perpetrated by security forces under the control of Muammar Gaddafi provides otherwise. Indeed, when some states approved Resolution 1973, they consented to some extent to the authority of the ICC to investigate and prosecute international crimes committed by a non-party State's national. In other words, the United States' continuous assertion that the ICC jurisdiction over nationals of non-party States that did not consent to it violates international law no longer stands [13, 105].

The questions also raised about the subjects, that may be prosecuted under universal jurisdiction.

In the classical case, the subject of international criminal responsibility is a special entity: an individual, who is in direct contact with the state, e.g. it's official. What concerns criminal jurisdiction, individuals are brought to liability under universal jurisdiction, as it is inherent part of international criminal law [14].

When bringing individuals to justice, there may exist some questions about the immunities and privileges, which officials have in accordance with international and national law. This is one of the most interesting and topical issues in the field of the study of international legal problems in the fight against crime [15, 2]. Senior officials of the state enjoy absolute immunity from the criminal jurisdiction of another state for any action.

In accordance with the Convention on Special Missions, 1969 [16], Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1973 [17], Convention on the Representation of States in their Relations with International Organizations of universal character, 1975 [18], etc., the immunity of senior officials from the criminal jurisdiction of the receiving state is established.

Due to the national legislation of many countries the head of state has immunity from criminal jurisdiction for acts committed during his term of office. Criminal responsibility of the head of state can come only after a special procedure for his removal from office – impeachment.

Under general rules, the former head of state may be prosecuted only for the commission of a particularly grave crime during his term of office. Recent examples of the prosecution of former leaders in national courts of Georgia, Italy, France (2014), Israel (2010, 2014), Mongolia (2012), Maldives (2008), etc., confirm the practice of lifting immunity in special cases [19, 12]. Senior officials of the state (not only the former, but also the current ones) do not have immunity from the jurisdiction of the bodies of international criminal justice. Acts committed by them in the event of a manifest violation of international law (crimes against peace and security) do not fall within the definition of [20, 738] functional (in respect of acts performed on behalf of the state, when performing their official duties) or personal immunities. International tribunals for former Yugoslavia, Rwanda, Sierra Leone and East Timor have tried the former political and military leaders of these countries for their crimes against humanity and war crimes during their term of office.

The Rome Statute of the International Criminal Court provides, that the position of the head of state or government, a member of the government or parliament does not release a person from criminal responsibility in accordance with the Statute and is not itself a ground for mitigating the sentence. The inadmissibility of the accused's reference to his position as the basis for the release from liability is an important part of the current international law [20, 669].

On February 14, 2002, the ICJ concluded, that high-ranking officials may have immunity in accordance with international law during their civil service. The Court noted, that immunity was granted to civil servants not for abuse, but for the effective exercise of their functions on behalf of the States concerned. The court also stated tha, overseas civil servants may enjoy immunity from arrest in another state for criminal prosecution, including allegations of war crimes or crimes against humanity. [21]. But the ICJ also argued that civil servants "may be parties to criminal proceedings in some international criminal courts that have jurisdiction, such as the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda <...>, as well as the International Criminal Court" [22]. In 2003, the Special Court for Sierra Leone (SCSL), which was created under an agreement between the United Nations and the Government of Sierra Leone, issued an arrest warrant for the ex-Liberian president Charles Taylor [22]. Taylor challenged the jurisdiction of the Special Court, referring to his immunity, but the Special Court of Sierra Leone has ruled that "sovereign equality of States is not an impediment to condemnation by an international criminal tribunal or a court of the head of any state" [23]. In 2012, the Special Court sentenced Taylor to fifty years in prison, making him the first head of state, after the Nuremberg trial, convicted by an

international court [24]. Thus, the question of whether the former head of state can have immunity depends on the international court or tribunal, which will try to condemn him, on the organization of that court and on interpretation of its own mandate.

On March 4, 2009, the International Criminal Court for the first time in history issued an arrest warrant for the incumbent President of Sudan, Omar al-Bashir, accusing him of crimes against humanity (murder, extermination, forced displacement, torture, rape) and war crimes (intentional use of force against civilian population and marauding) [25].

On July 12, 2010, the International Criminal Court issued a new warrant for the arrest of Omar al-Bashir accusing him of organizing and carrying out genocide, massacre and terror, three ethnic groups in the population of Darfur (Sudan) [26]. Despite the orders issued by the International Criminal Court, al-Bashir continued to travel to foreign countries. On November 28, 2011, the Supreme Court of Kenya issued a warrant for his arrest, declaring, that the Sudanese President would be arrested in the event of his arrival on the Kenyan territory [27].

On June 14, 2015, Omar al-Bashir arrived in Johannesburg for the African Union leaders' summit. In this regard, the International Criminal Court has demanded the arrest and extradition of al-Bashir from the Government of South Africa. Judge of the High Court of Pretoria, Hans Fabricius, ruled that the Sudanese leader must not leave the territory of South Africa before making a final decision on this issue. However, Omar al-Bashir left South Africa after the first working day of the summit and returned to the Sudan [28]. South African ruling party "African National Congress" accused the International Criminal Court of being biased.

In May 2016 Omar al-Bashir visited the inauguration of the Uganda President Yoveri Museveni. Although Uganda is a member of the International Criminal Court, al-Bashir was not arrested [29].

International judicial bodies play a key role in the process of fragmentation of international law, namely, because the interpretation of the content of legal norms by these courts leads to actual change of these norms for the needs of certain states and international organizations and, as the consequence, total different decisions are made.

In our case, we are dealing with sectoral fragmentation, which arises due to a conflict of law between the regimes of individual branches.

International courts often have a unique position characterized, on the one hand, by formal independence, and, on the other hand, by the actual dependence of the decisions of international courts on the will of international actors. It transforms international courts into instruments for international actors to achieve their goals and protect their interests through international judicial procedures. Decisions of international courts become situational, what inevitably leads to the fragmentation of international judicial practice and international law in general [30,110].

The principle of universal jurisdiction has not yet been applied in Ukraine, since the only provision, relating to it, that enshrines our legislation is, according to Article 8 of the Criminal Code of Ukraine, that the criminal jurisdiction applies to any offense against which Ukraine has the right or duty of judicial prosecution under an international agreement. In particular, foreigners or stateless persons, who permanently reside in Ukraine and have committed offenses abroad are liable in Ukraine in cases stipulated by international treaties or if they have committed serious or particularly grave crimes provided by this Code against the rights and freedoms of Ukrainian citizens or interests of Ukraine.

Conclusions. Unambiguous entities that may apply universal jurisdiction are states and international judicial bodies. In turn, we can't overlook the fact that international organizations can also have a direct relationship to the application of universal jurisdiction.

Summarizing, we note, that given the differences in application of universal jurisdiction in international and national law, it is necessary to unify the understanding of subjects of responsibility under it. Although it is clear, that now only individuals are attributed to them, there is still a problem regarding the attitude to the immunities of high officials by different international judicial bodies. Many states enjoy the opportunity to avoid the ruling of international judicial bodies, using the differences in their decision, which result in conflict of regimes. The immunities of high officials are not recognized by Rome Statute of the International Criminal Court, but general international law still accepts them. Unfortunately, universal jurisdiction has not yet been legislated in Ukraine.

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