8. Сухорильський П. Право бути забутим у правовій системі Європейського Союзу: реалії, проблеми та перспективи. *Наука міжнародного права на рубежі століть. Тенденції розвитку та трансформації :* спеціальне видання наукових статей / за наук. ред. В. Репецького. Львів : ЛНУ імені Івана Франка, 2016. С. 90–101.
9. Бойко А. Право на забуття: деякі аспекти теорії і практики. *Журнал східноєвропейського права.* 2018. № 48. С. 124–131.

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LEGAL ASPECTS OF APPLICATION OF THE UNIVERSAL JURISDICTION BY THE RUSSIAN FEDERATION AGAINST UKRAINIAN HIGH OFFICIALS

ПРАВОВІ АСПЕКТИ ЗАСТОСУВАННЯ УНІВЕРСАЛЬНОЇ ЮРИСДИКЦІЇ РОСІЙСЬКОЮ ФЕДЕРАЦІЄЮ ПРОТИ УКРАЇНСЬКИХ ВИСОКОПОСАДОВЦІВ

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Currently, an international community is faced with bloody armed conflicts. Every day we see a violation of human rights, which are the most important values enshrined in international law.

Ukraine is also experiencing a similar situation. During the aggravation of Ukrainian-Russian relations, the issue of responsibility of the parties to the conflict for their crimes is very relevant. In this context, accusations and convictions often occur at the level of national courts. From Russia's side, they become the instrument of condemning citizens of the other party for war crimes.

Our task is to figure out whether this mechanism is effective to convict the perpetrators of the most serious crimes. The problem is that still, at the international level there aren't any unified principles for its application. In particular, the question arises, who can apply it and against whom, in particular, within the framework of the criminal law of the Russian Federation.

An inalienable element of this study is the analysis of the powers and practice of the judicial authorities in this matter, in particular, the mechanisms of application of universal jurisdiction against Ukrainian high officials and military command in this context. Due to this, we provide the consideration of issues of practical application thereof in cases of war crimes. The conclusion is that Ukraine can and must implement and apply this concept in its legislation, in particular against Russian high officials and military command in connection with the armed conflict in the East of Ukraine.

Key words: universal jurisdiction, criminal law, grave crimes, high officials.

У статті розкриваються особливості закріплення концепції універсальної юрисдикції у кримінальному праві Російської Федерації. Зокрема, увагу було приділено механізмам її застосування проти українських посадових осіб і вищого військового командування в контексті збройного конфлікту на Сході України.

Ключові слова: універсальна юрисдикція, кримінальне право, найтяжчі міжнародні злочини, високопосадовці.

В статье раскрываются особенности закрепления концепции универсальной юрисдикции в уголовном праве Российской Федерации. В частности, внимание было уделено механизмам её применения против украинских должностных лиц и высшего военного командования в контексте вооруженного конфликта на Востоке Украины.

Ключевые слова: универсальная юрисдикция, уголовное право, тяжелые международные преступления, высокопоставленные чиновники.

Dedicated to the 75th Anniversary of the Institute of International Relations of Taras Shevchenko National University of Kyiv

William Schabas defines universal jurisdiction as "the competence of a national court to judge a person suspected of a serious international crime – genocide, war crimes, crimes against humanity or torture – even if neither the suspect nor the victim is a national of the country where the court is located, and the crime took place outside of this country" [1, p. 138].

For quite some time Ukrainian legislators did not pay attention to this concept, because we do not have enough resources to condemn war criminals, whose crimes are not directly related to our territory. The first armed conflict in the modern history of Ukraine began in 2014, and the opposite side has outstripped us, applying the principle of universality against Ukrainian high officials. The flexibility of this principle has become useful to them because they do not recognize themselves involved in the conflict in the East. On the other hand, the Russian Federation has opened this path, showing us the advantages and disadvantages of the practical implementation of universal jurisdiction. Now there is the time to draw attention to the world practice of applying the principle of universality, and to analyze doctrinal approaches, to evaluate the results of cases, already considered, in the long run. Thus, Ukraine will be able to respond adequately to the Russian Federation with condemnation of Russian top officials, simultaneously adhering to the rules established from the outset – allegedly Russia is not directly a party to the conflict. First of all, we turn directly to the roots on which the application of the principle of universality is based accordingly to Russian femida itself.

As V. Grabar noted, in Russian theory of international law there is a particularly strong influence of the universalist theory of spatial action of criminal law, according to which "a criminal act, wherever it was committed, infringes on the common good of all states and must be punished by all states" [2, p. 456].

Currently, the Russian criminal and criminal procedure legislation (along with other types of jurisdiction) does not contain the principle of universality. In particular, according to part 3 of art. 12 of the Criminal Code of the Russian Federation, "foreign citizens and stateless persons who do not permanently reside in the Russian Federation and who committed an offense outside the Russian Federation may be found criminally liable under this Code in cases where the crime is directed against the interests of the Russian Federation or a citizen of the Russian Federation or a person permanently residing in the Russian Federation, stateless persons, as well

as in cases stipulated by an international treaty of the Russian Federation, if foreign citizens and stateless persons, who do not permanently reside in the Russian Federation, were not convicted in a foreign state and were prosecuted on the territory of the Russian Federation". In accordance with this article, the Russian Federation applies extra-territorial jurisdiction on the basis of the principle of protection and passive personal principle. In the part of the wording "in cases stipulated by the international treaty of the Russian Federation" one cannot see the legislative establishment of the principle of universality, since the relevant provisions of international treaties must be transformed into the legal system of the Russian Federation, and the principle of universality itself should be clearly expressed along with the procedural conditions of proceedings. Currently, the Russian Federation, as a permanent member of the UN Security Council, is pursuing an active foreign policy, including in the field of the protection of human rights and freedoms [3, p. 14].

According to some representatives of Russian legal doctrine, universal jurisdiction is an effective legal remedy that helps to eliminate impunity, thus protecting the people from serious crimes, including genocide, crimes against humanity, war crimes and aggression. In addition, the universal jurisdiction in absentia gives the state, which is going to judge the perpetrators of international crimes, a solid basis for the administration of justice, when the suspects hide from law enforcement bodies or do not want to appear before the courts of the respective states [4, p. 107].

In practice, however, it looks quite different. In 2014, the Basmanny District Court of Moscow arrested in absentia the leader of the Ukrainian "Right Sector" organization, Dmitry Yarosh, on charges of appeals for terrorism. According to the investigation, Yarosh is accused of crimes provided for in part 2, article 205.2 and part 2, article 280 of the Criminal Code of the Russian Federation (public appeals for the implementation of terrorist and extremist activities carried out using the media). The leader of the "Right Sector" was declared an international wanted, he was charged in absentia [5].

On June 18, 2014, the Investigative Committee of the Russian Federation opened a criminal case against the Minister of Internal Affairs of Ukraine Arsen Avakov and the head of the Dnipropetrovsk Regional Administration Igor Kolomoisky, accusing them of organizing assassinations, using prohibited means and methods of warfare, obstructing the professional activities of journalists and kidnapping people during armed confrontation in eastern Ukraine [6]. And on July 9, Basmanny District Court of Moscow upheld the petition of the investigators regarding the application to Arsen Avakov, for an extracurricular preventive measure in the form of taking into custody on charges of committing crimes provided for in part 3. art. 33, part 2 of Art. 105, part 3, art. 33, part 1 art. 356, part 3 of art. 33, part 3, art. 144, part 3, art. 33, and part 3, art. 126 of the Criminal Code (murder, the use of prohibited means and methods of warfare, obstruction of journalists' professional activities, theft of people) [7].

The Ukrainian minister is accused on the basis of the so-called passive national principle, in committing a crime, although outside of Russia, but against Russian citizens. This charge is based on part 3, art. 12 of the Criminal Code of the Russian Federation, which states that foreign citizens who do not permanently reside in the Russian Federation and who have committed an offense outside the Russian Federation are liable to criminal liability under this Code in cases where the crime is directed against the interests of the Russian Federation or a citizen of the Russian Federation or a person, who permanently resides in the Russian Federation and stateless persons [3, p. 14].

Formally, Russia violated the rules of its own legislation, because the conviction itself, which is based on the principle of universality, require the existence of an international armed conflict.

In spite of this, a criminal case has been filed against Defense Minister Valery Geletey, Chief of the General Staff of the Armed Forces of Ukraine Viktor Muzhenko, as well as other persons from the commanders of the 93nd Brigade of the Armed Forces of Ukraine and a number of senior officials from the Ukrainian military commanders for "the organization of murders, the use of prohibited means and methods of warfare and genocide" [8].

In 2015, the Investigative Committee of the Russian Federation opened a criminal case against Oleg Lyashko, head of the Radical Party in the Verkhovna Rada, and the soldiers of the Azov National Guard regiment on suspicion of kidnapping a resident of the city of Mariupol, Dmitry Tchaikovsky (Donetsk Oblast). The criminal case was initiated on the grounds of crimes stipulated in part 2 art. 126, part 2 art. 117 and part 1 art. 356 of the Criminal Code (abduction, torture, the use of prohibited means and methods of warfare) [9].

In 2016, the Investigative Committee of the Russian Federation charged in absentia with a crime envisaged by part 3, art. 33, part 1, art. 356 of the Criminal Code (organization of the use of prohibited means and methods of warfare) the commanders of 92nd and 72nd individual mechanized brigades, colonels Viktor Nikoluk and Andriy Sokolov [10], and another seven officers of the Armed Forces of Ukraine [11]. In 2017, an investigation in absentia was carried out on charges of committing similar crimes by Colonel Oleg Lisovoy [12] and six other officers of the Armed Forces of Ukraine [13; 14].

Russia argues its actions with such provisions. The passive principle is not uncommon either in international or national criminal law. For example, in the case of the "Lotus Steam", the International Court of Justice has indicated that territoriality is not an absolute principle of international law and in no case coincides with the principle of territorial sovereignty. Thus, it concluded, that the prosecution on an extraterritorial or passive national principle is not contrary to international law [15]. Russian courts argue their position rather vaguely, emphasizing in many cases on the national judicial practice of different states regarding the prosecution of a person who committed a crime against the citizens of this state [16], that is, Russia justifies their actions by the presence of a direct link between the state of the court and victims of the crime of "usage of prohibited means and methods of warfare". Although the victims of these crimes, which allegedly committed by Ukrainian citizens – military, are citizens of Ukraine, and not of the Russian Federation. In this case, the application of the passive principle is not permissible.

However, as already mentioned, there is another completely bizarre contradiction in the actions of the Russian side. It is well-known fact, that the Russian Federation denies the existence of an armed conflict of an international nature between Ukraine and Russia, as well as the government-sanctioned sending to the territory of Ukraine of Russian military personnel, militants and mercenaries in order to participate in terrorist acts. Therefore, the main version is the qualification of the events in the Donetsk and Lugansk regions by the Russian's Main Investigation Department of the Investigative Committee as an armed conflict of a non-international nature. This approach corresponds to the comments of Russian experts in the field of jurisprudence and international law.

Mostly, Russian lawyers consider the conflict in Ukraine's eastern region as an armed conflict of a non-international nature, although it should be noted that this question has not received much attention in the Russian doctrine generally. Thus, Russian scientists, in particular, I. Kotlyarov, concentrate on war crimes committed during the conflict rather than on its qualifications. Of course, responsibility for the absolute majority of war criminals lies on Ukrainian military [17; 16].

But it should be noted that only article 3 of the Geneva Conventions of 1949 and Additional Protocol I thereto apply

to armed conflicts of non-international character [18; 1]. The obligation of the same state to seek and prosecute those responsible for serious violations and war crimes arises only in the event of an armed conflict of an international nature. The handling of criminal cases against Ukrainian military personnel in the territory of the Joint Forces Operation by representatives of the Investigative Committee of Russia is an unlawful act, and such cases may be qualified as interference in the internal affairs of Ukraine. Through reference to art. 356 of the Criminal Code, representatives of the Investigative Committee of Russia go beyond their powers to initiate criminal proceedings against Ukrainian military on the grounds of a crime that allegedly took place during the period of the anti-terrorist operation on the territory of Ukraine. It violates the basic principles of international law, as well as contradicts the rules of universal criminal jurisdiction and the provisions of the Geneva Conventions and the Additional Protocols thereto [18; 1].

It should be added that the Chief Investigatory Department of the Investigative Committee of Russia launched a criminal case concerning "genocide of the Russian-speaking population", which lives on the territory of Luhansk and Donetsk regions [19]. But, the "Elements of Crimes" of the ICC, in accordance with article 6 of the Rome Statute, distinguish the elements for each of the punishable crimes, listed in Article II of the Genocide Convention. For the jurisprudence of the ICC, such elements of the crime of genocide are:

– an objective element – criminal behavior (actions intended to destroy, in whole or in part, any national, ethnic, racial or religious group through: the killing of members of such a group, causing serious bodily or mental harm for the members of such a group, etc.);
– the object of the crime – the protected group itself;
– and the subjective element (intent) [20, p. 124].

If we consider this situation in terms of these elements, then we will see that no action, which can be considered as genocide, has taken place, and there is no reason to segregate a separate protected group "Russian-speaking population", and, respectively, there is no intention of such crime. As stated in article 30, unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge [20, p. 124].

Applying the foregoing to the fact of persecution of Ukrainian high-ranking officials, we understand that although Russia has a legal basis in the form of art. 12 of the Criminal Code of the Russian Federation for the persecution of non-citizens of the Russian Federation, but the use of this article is dependent on the commission of a grave crime (genocide, war crime, torture). Nevertheless, we see that, for example, A. Avakov is blamed for the organization of the murder of two or more people; a person or his or her relatives in connection with the performance by a given person of service or performance of a public duty; committed in a dangerous way; committed by a group of persons, a group of persons by prior conspiracy or an organized group; on motives of political, ideological, racial, national or religious hatred or hostility or of motives of hatred or hostility towards any social group. This crime does not relate to crimes against peace and humanity. Thus, Russia has no jurisdiction to prosecute the minister on this basis. But Russia has also charged him with the crimes against peace and humanity since he allegedly used prohibited methods and means of warfare [21]. However, Russia has not formally entered into the war with Ukraine, and always notes that there is only internal conflict in Luhansk and Donetsk regions. Whence then appeared prohibited methods and means of warfare, if there is no war? Apparently, the issue is rhetorical and should be solved only by logical method inherent to Russia.

Summing up, we emphasize that currently the Russian criminal and criminal procedure legislation (along with other types of jurisdiction) does not establish the principle of universality. However, this does not prevent the Russian femida from using it in practice in order to achieve its own goals, even if such application contradicts the rules of international law. In particular, it was checked by Ukrainian officials and military personnel themselves.

Of all the crimes, in relation to which the Russian Federation is trying to apply the principle of universality, war crimes are most often distinguished, namely the use of prohibited methods and means of warfare. It does not require the implementation of universal jurisdiction in national law, as it has been already stipulated in the Geneva Conventions. However, a war between the Russian Federation and Ukraine should be declared to make it possible. Russia does not recognize its presence on the territory of the East of Ukraine, labeling this armed conflict as internal. In this case, it seems that Russia interferes to the internal affairs of another state.

What should Ukraine do in this case? The question is not rhetorical at all and we have a well-grounded answer on it. It is necessary not only to prove that Russia interferes in Ukraine's internal affairs at all levels, not only to provide evidence of its aggressive actions but also to give a deflection on its own. First of all, it concerns, of course, diplomatic ways of resolving the conflict but one should not forget about the existence of international jurisdictional ways. Ukraine does everything possible to condemn Russian crimes through international judicial bodies. This is a promising way, which will help us to punish effectively both the Russian Federation as a state and its high-ranking officials for the most serious crimes against international law in the future.

What will this give to Ukraine? The Russian side will finally understand clearly that Ukraine is capable of effectively confronting the hybrid war not only via the international community, but also on its own. We will demonstrate that the methods of our struggle are sufficiently diversified and that the response to external threats is lightweight and effective. Once again, we will remind that the crimes of the Russian Federation have wide geography, and the fact, that the world has closed its eyes to this for decades, only allowed the aggressor to consider himself unpunished. Now the necessity of condemning the actions of the Russian Federation is already inevitable.

We are asking for assistance thereof in the international judicial bodies, but it will be superfluous to show that our courts can also act in a timely and effective manner. It remains only to give our courts the legislative basis for such activities.

REFERENCES

1. Schabas W.A. The UN international criminal tribunals: the former Yugoslavia, Rwanda and Sierra Leone. Cambridge University Press, 2006. 250 p.
2. Грабарь В.Э. Материалы к истории литературы международного права в России. (1647–1917). Москва : Изд-во Акад. наук СССР, 1958.
3. Уголовный кодекс Российской Федерации : текст с изменениями и дополнениями на 15 февраля 2018 г. Москва : ЭКСМО, 2019. 190 с.
4. Королев Г.А. Проблемы применения универсальной юрисдикции in absentia. *Журнал российского права.* 2009. № 10. С. 104–111.
5. Лидер «Правого сектора» объявлен в международный розыск, ему было заочно предъявлено обвинение. URL: http://podrobnosti.ua/ 964004-basmannyj-sud-moskvy-zaochno-arestoval-lidera-pravogo-sektora-jarosha.html (дата звернення: 02.03.2019).
6. Возбуждено уголовное дело в отношении Игоря Коломойского и Арсена Авакова. URL: http://sledcom.ru/actual/405159/ (дата звернення: 05.03.2019).
7. По ходатайству следствия суд заочно арестовал Арсена Авакова. URL: http://www.sledcom.ru/actual/407107/ (дата звернення: 05.03.2019).

8. Возбуждено уголовное дело в отношении ряда высокопоставленных должностных лиц вооруженных сил Украины. URL: http://www.sledcom.ru/ actual/417811/ (дата звернення: 05.03.2019).

9. Росія звинувачує Ляшка у викраденні людини. URL: https://ukranews.com/ua/news/352765-rosiya-zvynuvachuye-lyashka-u-vykradenni-lyudyny# (дата звернення: 05.03.2019).

10. В СК России продолжается расследование преступлений украинских военнослужащих в Донбассе. URL: https://sledcom.ru/news/item/1080237/ (дата звернення: 05.03.2019).

11. Возбуждено уголовное дело о преступлениях, совершенных силовыми структурами Украины. URL: https://sledcom.ru/news/item/1083516/ (дата звернення: 05.03.2019).

12. Заочно предъявлены обвинения командирам подразделений Вооруженных сил Украины, причастным к обстрелам гражданского населения. URL: https://sledcom.ru/news/item/1095141/ (дата звернення: 07.03.2019).

13. Следственным комитетом установлены новые факты артобстрелов Донецкой области и имена украинских военнослужащих, причастных к ним. URL: https://sledcom.ru/news/item/1102200/ (дата звернення: 09.03.2019).

14. Заочно предъявлено обвинение еще двум украинским военнослужащим, которые проводили артиллерийские обстрелы мирного населения. URL: https://sledcom.ru/news/item/1117214/ (дата звернення: 09.03.2019).

15. Case of the s.s. “Lotus”. URL: www.icj-cij.org/pcij/serie_A/A.../ 30_Lotus_Arret.pdf/ (дата звернення: 09.03.2019).

16. United States of America v. Fawaz Yunis. URL: http://law.justia.com/cases/federal/appellate-courts/F2/924/1086/224419// (дата звернення: 09.03.2019).

17. Котляров И.И., Пузырева Ю.В. Гражданская война в Украине: международное право и уголовная ответственность индивидов за совершение международных преступлений. *Московский журнал международного права.* 2014. № 4.

18. Женевские конвенции от 12 августа 1949 года и дополнительные протоколы к ним. Москва : Междунар. ком. Красного Креста, 1994. 319 с.

19. Слідчим комітетом РФ порушено кримінальні справи проти українських військових. *Сайт espreso.tv.* URL: http://espreso.tv/article/2014/07/ 19/slidchym_komitetom_rf_porusheno_kryminalni_spravy_proty_ukrayinskykh_viyskovykh (дата звернення: 09.03.2019).

20. Доклад Подготовительной комиссии для Международного уголовного суда. Нью-Йорк : ООН, 2000. Ч. 2: Окончательный проект текста Элементов преступлений. 56 с.

21. Обвинения России украинского министра Авакова: пассивная национальная юрисдикция и функциональный иммунитет. URL: http://zakon.ru/Blogs/obvineniya_rossii_ukrainskogo_ministra_avakova_passivnaya_nacionalnaya_yurisdikciya_i_funkcionalnyj_/12769 (дата звернення: 11.03.2019).