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EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES AND THE UNIVERSAL REPRESSION IN INTERNATIONAL CRIMINAL LAW

INTRODUCTION

The purpose of this article is to determine the relation between the extraterritorial application of human rights treaties and the universal repression in international criminal law. Describing its details requires that we focus on these aspects of both regimes, which can potentially involve the application of each of them. The most certain way to identify this relation is to analyse their possible similarities and differences. From such perspective, we will be able to assess whether these two sets of norms are completely independent, complementary or inextricably linked.

1. THE COMPARISON OF EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES AND THE UNIVERSAL REPRESSION IN INTERNATIONAL CRIMINAL LAW

Both the human rights treaties and the international criminal law pertain not only to the states, but also to every individual as a subject of international law[1]. Human rights treaties do this from the perspective of his rights. International criminal law — from the perspective of individual's duties. The states, in turn, are obliged to implement these norms in practice. In case of human rights, every obligation of the state can be assigned to one of the three basic categories: to respect, to protect, and to fulfil[2]. In the case of international criminal law, the state may

[1] *International Law*, ed. M. Evans, 2nd ed., New York 2006, p. 719.
[2] See H. Shue, *Subsistence, Affluence and U.S. Foreign Policy*, 2nd ed., Princeton 1996.

or must prosecute or bring to trial persons accused of war crimes, crimes against humanity, genocide, aggression, torture and trans-national terrorism[3].

The main point of discussion on the extraterritorial application of human rights treaties is the question on the scope of legal obligations of states in this respect. This article bases on an assumption that such extraterritorial obligations do exist and are mainly, but not exclusively, determined in reference to the concept of state jurisdiction[4]. This theory implies that even if a state does not exercise an effective jurisdiction over third parties outside its territory, it still exercises jurisdiction over its own acts (for instance, the Minister of Foreign Affairs over ambassadors), and thus, is still obliged to respect human rights, even if it does not have enough power or authority to protect and fulfil these norms. Consequently, if the state is able to protect, but not to fulfil human rights outside its territory, it has a duty to do so, as long as the matter falls, within its jurisdiction.

The limit of the state obligations in this respect is determined by its jurisdiction. While the effective jurisdiction constitutes a precondition for triggering human rights obligations, any obligations under human rights treaties cannot be interpreted as entailing a duty to acquire an extraterritorial jurisdiction in order to implement legal norms on human rights.

When it comes to the international criminal law, according to principle 1 para 1 of the Princeton Principles on Universal Jurisdiction (thereinafter: Princeton Principles), the universal jurisdiction is 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[5]. However, this definition does not answer the question on what the scope of legal obligations of states under the concept of universal repression in international criminal law is. According to Eugene Kontorovich, the principle of universal jurisdiction 'gives all states prosecutorial entitlement'[6]. In his research, the author points cases of Macedonia and Uganda where prosecutions threatened to restart civil wars. He finds that some countries may, under certain circumstances, be willing to give an amnesty instead to prosecuting international law criminals[7].

The legal concept of universal repression is therefore based on the entitlement of every state to exercise criminal jurisdiction over anyone in the world who has committed a crime to which this principle is applicable. This entitlement is cor-

[3] *International Law*..., p. 719.

[4] R. Wilde, "The Extraterritorial Application of International Human Rights Law on Civil and Political Rights", [in:] *Routledge Handbook of International Human Rights Law*, eds. S. Sheeran, N. Rodley, London 2013, p. 637.

[5] *The Princeton Principles on Universal Jurisdiction*, ed. S. Macedo, Princeton 2001.

[6] E. Kontorovich, "The Inefficiency of Universal Jurisdiction", *University of Illinois Law Review* 2008, vol. 1, pp. 9–10.

[7] *Ibidem*.

related with the obligation of the individual to undergo the criminal proceedings initiated against him by the state exercising its universal jurisdiction. There is a huge discussion on the obligations of third states towards the state which acts outside its own territory. For instance, there are questions of intrusion upon territorial sovereignty of other states. Similarly, according to the principle 1 para 3 of the Princeton Principles, a state may rely on universal jurisdiction as a basis for seeking the extradition of a person accused or convicted of committing a serious crime under international law[8]. However, this aspect of universal jurisdiction is located beyond the scope of this article, which collates this concept with the state obligations under human rights treaties.

Before proceeding to the discussion on the substantive content, we can compare the underlying values and purposes of the two regimes analysed in this article. As Henry Kissinger writes, the doctrine of universal jurisdiction refers to the universal standards. He asserts that 'some crimes are so heinous that their perpetrators should not escape justice by invoking doctrines of sovereign immunity or the sacrosanct nature of national frontiers'[9]. This observation implies that the need for justice delivered through the means of universal jurisdiction must outweigh any other conflicting principles of public international law (e.g. territorial sovereignty). Next, the literature describes the substantive criminal law as seeking to 'protect society from the most serious breaches of legal standards of behaviour by punishing those individuals responsible, irrespective of whether they are agents of the state or acting in private capacity'[10]. Finally, recognising the universal jurisdiction aims at the larger goal of supporting 'international collaboration in enhancing the work of domestic mechanisms, as well as in strengthening a global response to transnational threat', such as terrorism[11]. As usual, we must bear in mind that public international law constitutes a resultant of different factors. For instance, it is noted that the absence of universal jurisdiction of the International Criminal Court may have been good for it, because it is the limited jurisdiction of this Court which creates an incentive for states to ratify the Rome Statute[12].

The purpose of universal jurisdiction distinguishes it from other jurisdictional principles of public international law. For instance, the protective principle permits a state to 'grant extraterritorial effect to legislation criminalizing conduct damag-

[8] This is related to the expression *aut dedere aut judicare*, used to describe the alternative obligation of state either to extradite or prosecute international law crimes.

[9] H. Kissinger, "The Pitfalls of Universal Jurisdiction", [in:] *The International Criminal Court, Global Politics and the Quest for Justice*, eds. W. Driscoll, J. Zompetti, S. Zompetti, New York 2004, p. 93.

[10] *International Law*..., p. 722.

[11] *International Criminal Justice, Critical Perspectives and New Challenges*, eds. G. Andreopoulos, R. Barberet, J. Levine, New York 2011, p. ix.

[12] J. Klabbers, *International Law*, New York 2013, p. 222.

ing to national security or other central State interests'[13]. The universal jurisdiction, in turn, is predestined to 'protect the interests of the international community or of individuals in the States who make up that community'[14]. Although in practice there are cases of mingling these different types of interest[15], circumventing or overlooking that purpose can arm the critics with an argument that the universal jurisdiction allows to, as Eugene Kontorovich says, 'simply dress geopolitical vendettas in legal robes'[16].

The Universal Declaration of Human Rights 1948[17], although not a human right treaty itself, contains the best depiction of the purposes of enshrining human rights norms in treaties binding to states under public international law. It enunciates that recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. Some scholars perceive the universal repression in international law as a stub of a global system of justice, which can "'end impunity' for mass atrocities, deter such crimes, and foster a more robust international legal regime"[18].

When it comes to the substantive content, in case of intra- and extraterritorial application of human rights treaties, there are no differences or exceptions. All human rights have to be equally abided by. Admittedly there are definitely human rights particularly significant when it comes to the acts of the state outside its territory (e.g. right to life and the prohibition of torture). The same can be said about the rights which mainly entail the obligations to respect and protect, as the extraterritorial jurisdiction of the states is usually limited and does not allow to implement the policy aimed at realising the obligation to fulfil human rights. But from the perspective of the legal obligations under human rights treaties, their extraterritorial application does not affect the scope or substantive content of human rights being in force.

According to Ilias Bantekas, the principle of universal jurisdiction in international criminal law applies to two main categories: 'certain crimes that are universally considered heinous and repugnant' as well as to 'crimes committed in locations that are beyond the exclusive authority of any State'[19]. This division indicates the existence of two different categories of crimes. First, these are crimes of relatively higher severity, commission of which can occur virtually anywhere in the world and second, these are all other crimes committed outside the territory

[13] I. Cameron, "International Criminal Jurisdiction, Protective Principle", [in:] *Max Planck Encyclopedia of Public International Law*, 2007, para 1.

[14] Ibid., para 13.

[15] Ibid., para 19.

[16] E. Kontorovich, S. Art, "An Empirical Examination of Universal Jurisdiction for Piracy", *American Journal of International Law* 2010, vol. 104.

[17] *Universal Declaration of Human Rights* (1948), U.N. Doc. A/RES/3/217A (1948).

[18] E. Kontorovich, S. Art, *An Empirical*...

[19] I. Bantekas, *Criminal Jurisdiction of States under International Law*, [in:] *Max Planck Encyclopedia of Public International Law*, 2011, para 22.

of one state, but not within the area of exclusive jurisdiction of another. The above theory seems to be incoherent with the very definition of universal jurisdiction, which is triggered only if the crime committed was of a certain nature, irrespectively of the place of commission, nationality of the actor or link to the particular state.

According to Princeton Principles, principle 2, the universal repression applies mainly, but not exclusively to the following crimes: piracy[20], slavery, war crimes, crimes against peace, crimes against humanity and torture. There is a general agreement that as the decisive role in the universal jurisdiction regime is played by the customary international law, the little state practice with respect to other crimes entails difficulties[21]. Tomasz Ostropolski in his analysis points that these doubts lead to the attempts to add more flexibility and infer the norms pertaining to the universal jurisdiction from the treaties containing mechanism *aut dedere aut iudicare* or to the organisation of International Criminal Court and international criminal courts ad hoc[22]. Although the author mentions the possibility of emergence of at least some terrorist crimes as the crimes encompassed by the universal jurisdiction, he concludes that currently 'it is impossible to precisely determine the substantial scope' of its applicability[23].

2. THE RELATIONSHIP BETWEEN EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES AND THE UNIVERSAL REPRESSION IN INTERNATIONAL CRIMINAL LAW

The remarks made in the previous section allow us to analyse the relationship between the two discussed regimes. It has been established that the universal jurisdiction constitutes a right and not a duty of the state to prosecute crimes of certain nature, irrespective of any other circumstances of their commission. On the other hand, the human rights treaties award rights only to individuals, leaving the states with the obligations correlative to these rights. This applies to the extraterritorial acts of the state and thus, encompasses all the possible way in which the universal jurisdiction can be exercised.

What is more, the human rights obligations remain in force even if the state acts in violation of territorial sovereignty of another. Accordingly, even if the state oversteps its capacity under the universal jurisdiction regime, it is still bound

[20] On the issue of piracy, see T. Paige, "Piracy and Universal Jurisdiction", *Macquarie Law Journal* 12, 2013.

[21] T. Ostropolski, *Zasada Jurysdykcji Uniwersalnej w Prawie Międzynarodowym*, Warszawa 2008, pp. 67–69.

[22] Ibid.

[23] Ibid., p. 83.

with the human rights obligations. The only exception can take place when the human rights treaty allows states to take measures derogating from their human rights obligations to the extent strictly required by the exigencies of the situation. This, however, is relevant to the universal jurisdiction regime only to a limited extent, since the human rights treaties usually list the right to life (except in respect of deaths resulting from lawful acts of war) and prohibition of torture as non-derogable rights.

According to the above, the first relationship between the extraterritorial application of human rights treaties and the universal repression in international law is that in the exercise of the latter, the states are bound to the human rights treaties to the extent to which they exercise the effective jurisdiction.

The above entails subsequent questions. For instance, it reveals that there is a double usage of the term 'jurisdiction'. With respect to the extraterritorial application of human rights treaties, the requirement of effective jurisdiction entails a test whether the state exercises 'sufficient authority and control to be held liable' under these treaties[24]. The international criminal law, in turn, refers to the universal jurisdiction as to the sort of criminal jurisdiction based solely on the nature of the crime. This definition per se makes it impossible to require the meeting the requirement of effective jurisdiction outside the territory of the state which carries out investigation under the universal jurisdiction regime. Such interpretation would lead to a conclusion that a state is entitled to exercise effective jurisdiction over the whole world.

Principle 1 para 2 of the Princeton Principles provides that the universal jurisdiction may be exercised by a competent and ordinary judicial body of any state in order to duly try a person accused of committing serious crimes under international law, provided the person is present before such judicial body. Neither the human rights treaties nor the universal repression principle require the states to acquire any effective jurisdiction outside their territory. However, their relationship might be observed when the state actually acquires such jurisdiction. In this case, a fundamental question arises: if the state exercises effective jurisdiction outside its territory and thus is obliged to apply the human rights treaties in its extraterritorial acts, is the state required to exercise the universal repression under the international criminal law over the individuals located within the area of its effective jurisdiction?

Although the human rights treaties sometimes award some rights exclusively to the citizens (e.g. art. 25 of the International Covenant on Civil and Political Rights[25]), the human rights treaties in an overwhelming majority of their norms refer to all people irrespective of their nationality, links to a particular state etc.

[24] N. Wenzel, "Human Rights, Treaties, Extraterritorial Application and Effects", [in:] *Max Planck Encyclopedia of Public International Law*, 2008, para 19.

[25] Polish O.J. 1977 No 38, Item 167.

As Antonio Cassese points, the international human rights law 'has contributed to the development of criminal law by expanding, strengthening, or creating greater sensitivity to the values it protects, such as human dignity and the need to safeguard as far as possible life and limb'[26].

But next to the relationship in terms of values and goals, the analysis of substantive content of the international criminal law leads to a conclusion that every international law crime constitutes a violation of human rights. At the same time, looking from the different perspective, Antonio Cassese noted that the human rights law 'lays down the fundamental rights belonging to suspects and accused persons, to the victims and witnesses, and also sets out the basic safeguards for a fair trial'[27]. He points that the international human rights law, as the 'increasingly important segment of public international law', has 'significantly impregnated the whole area of international criminal law'[28]. In this respect, the author finds the 'pervasive influence of human rights doctrines' relevant to developing the international legal safeguards against the arbitrary prosecution and punishment[29].

The above considerations are reflected in the principle 9 para 1 of the Princeton Principles, which safeguards the *ne bis in idem* principle provided that the prior criminal proceedings or other accountability proceedings have been conducted in good faith and in accordance with international norms and standards.

But the relationship of human rights law with the concept of universal repression is more technical. While under the human rights treaties the states are generally free to choose means through which the human rights are respected, protected and fulfilled, it is undisputed that the effective implementation of most fundamental rights requires them to criminalise and prosecute certain activities. This refers to the most serious areas covered by the human rights law such as the protection of minor's sexual integrity (see X and Y v. Netherlands, Application no. 8978/80, ECHR Judgment of 26.03.1985, p. 15–17) and the domestic servitude, which must be criminalised in order to effectively investigate alleged violations of prohibition of slavery and forced labour (C.N. v. United Kingdom, Application no. 4239/08, ECHR Judgment of 13.11.2012, para 84). Accordingly, the human rights treaties entail the same duty of criminalisation and effective investigation of the crimes which fall within the universal jurisdiction regime.

In order to effectively fight these crimes, states may decide to enact the international legal instruments, such as the Convention on the Prevention and Punishment of the Crime of Genocide 1948. However, creating additional internationally binding norms is not required by the human rights treaties. What the human rights treaties do require is to effectively investigate and prosecute piracy, slavery, war

[26] *International Law...*, p. 721.
[27] Ibid.
[28] Ibid.
[29] Ibid., p. 722.

crimes, crimes against peace, crimes against humanity and torture as long as such criminal proceedings can take place within the effective jurisdiction of the state.

In terms of relation between the extraterritorial application of human rights treaties and the universal repression in international criminal law, the above considerations allow us to find that while these two regimes are in principle complementary to each other, in some part they are also inextricably linked.

The human rights law sets out standards which clearly indicate that the most grave crimes should be prosecuted irrespective of factors other than their very nature. However, the legal significance of the human rights treaties is limited to their binding dimension and does not extend to what the state is entitled to do. In other words, to the extent of the effective jurisdiction of the state, the human rights treaties go further than the principle of universal repression and not only allow, but also strictly require the states to investigate and prosecute piracy, slavery, war crimes, crimes against peace, crimes against humanity and torture based solely on the nature of the crime. At the same time, the principle of universal jurisdiction entitles the states to investigate and prosecute the same crimes also outside the area of their effective jurisdiction. In this sense, the two regimes add something to each other and therefore, are complementary.

But if the state decides to pursue the universal repression over persons who are outside its effective jurisdiction, all of the acts of the state aimed at achieving this aim are followed by the obligation to comply with the human rights norms. For instance, seeking the extradition of a person accused or convicted of committing a serious crime under international law is allowed only if the state has established a prima facie case of the person's guilt and that the person sought to be extradited will be tried or the punishment will be carried out in accordance with international norms and standards on the protection of human rights in the context of criminal proceedings (Princeton Principles, principle 1, para 3). In this aspect, the universal repression is inextricably linked with the obligations under the human rights treaties, even if it refers to the person located outside the area of effective jurisdiction of the state.

POZATERYTORIALNE STOSOWANIE TRAKTATÓW PRAW CZŁOWIEKA A REPRESJA UNIWERSALNA W MIĘDZYNARODOWYM PRAWIE KARNYM

Streszczenie

Jaka jest relacja między pozaterytorialnym stosowaniem traktatów praw człowieka a represją uniwersalną w międzynarodowym prawie karnym? Z jednej strony efektywne wdrożenie niektórych norm traktatowych ustanawiających poszczególne prawa człowieka wymaga wydania i egzekucji konkretnych przepisów prawa karnego na poziomie krajowym. Z drugiej strony międzynarodowe prawo karne stanowi oddzielny reżim, rządzący się innymi zasadami. Jednym z aspektów, który łąc-

zy te dwie płaszczyzny jest ich pozaterytorialne stosowanie. Jaka jest zatem relacja między represją uniwersalną i pozaterytorialnym stosowaniem traktatów praw człowieka? Czy reżimy te są komplementarne? Czy prawo praw człowieka zawsze podąża za działaniami państwa mającymi na celu realizację represji uniwersalnej? Niniejszy artykuł składa się z dwóch zasadniczych części. Zaczyna się od analizy podobieństw i różnic między tymi dwoma reżimami, a następnie przechodzi do dyskusji na temat ich bezpośredniej relacji. Podjęto próbę odpowiedzi na pytanie, czy każdy z nich może tak naprawdę istnieć bez zastosowania drugiego.