THE ORGANIZATION OF JURISDICTION FROM A EUROPEAN UNION PERSPECTIVE

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Abstract
Nowadays, universal jurisdiction is the favorite technique used to prevent impunity for international crimes and it is one of the most effective methods to deter and prevent international crimes by increasing the like hood of prosecution and punishment of its preparators. In regard to the defendant's rights, the European Union states consider applicable all the rights that are necessary to assure that the trial is equitable and expeditious. There is no exception to the right to a fair trial. So, a defendant who is being prosecuted on the basis of the universality principle can rely on all the procedural rights provided for the Convention on Human Rights and the domestic code of criminal procedure without any restrictions. In Germany, the Federal Constitutional Court, in a case concerning genocide committed abroad, declared expressly that no special criminal proceedings must be provided for specific crimes.

Keywords: *"universal jurisdiction", "human rights", "European Union", "criminal procedure"*

Introduction

According to the principle of mandatory prosecution who prevails in many countries such Belgium, Croatia, Hungary, Spain, Sweden and Turkey, the criminal prosecution authorities are obliged to initiate the measures necessary for prosecution when they gain knowledge or form a suspicion of the commission of a criminal offence.

This means that they have no discretion as to whether to initiate criminal proceedings; they are deluged to take the necessary investigative measures. No particular national rules are set up with regard to the exercise of prosecutorial discretion as far as crimes are concerned that are subject to universal jurisdiction. In Belgium the Public Prosecutor (procureur federal) has a duty to ask preliminary judge to investigate, if a complaint is submitted, with exception.

In contrast, the principle of discretionary prosecution allows prosecuting authorities to refrain from prosecution in certain cases. Regarding the prosecution of extraterritorial crimes, some countries recognize specifically the principle of discretionary prosecution.

The application of a pure universal jurisdiction can cause a lot of problems. For example, due to the lack of restrictions, the prosecution of crimes subject to universal jurisdiction can create political problems. Also, the risk of overstretching national investigative resources exists in those cases in witch it appears to be very unlikely that a criminal trial over be completed.[1]

The principle of discretionary prosecution can solve some of these problems, because the prosecutor can refrain from prosecutor, taking into account the political ramifications of the case or the case or the existence of "prima facie" evidence.

Concerning the principle of universal jurisdiction, a distinction can be made between two systems.

First, the prosecution of crimes committed abroad in general depends on the approved of the Prosecutor General, exercising his discretion, such in Croatia and Finland. In Hungary, the Attorney

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[1] Florian Jessberger, *National Reports (CD Rom annexe),* at XVIII-th *International Congress of Penal Law (Chine.-2007).*

General has the right to exercise discretionary power in deciding whether or not to initiate proceedings based on universal jurisdiction.

In some countries there are guidelines for the prosecutor on how to make use of his discretion. For example, in Finland, the prosecution order procedure is needed, because it enables a case-by-case consideration of whether prosecution in Finland is appropriate. The consideration must take into account factors such as the sovereignty of other states and possible conflicts of multiple jurisdictions. In practice, the lack of necessary evidence might prevent prosecution.[2] In Croatia, concerning crimes against international war and humanitarian law, the Chief state Prosecutor may deport from the "ne bis in idem" principle if he believes that proceedings in another state were concluded contrary to internationally recognized standards of a fair trial.

In the Netherland, the general rule is that the Public Prosecutor may decide not to prosecute of this in the general interest. No particular national rules are set with regard to the exercise of prosecutorial discretion as far as crimes are concerned that are subject of universal jurisdiction. Notwithstanding there is a Regulation on the Consideration of Accusations With Regard to Crimes Included in the International Crimes Act 2003 wich deals with a significative question. The Public Prosecutor must consider whether there is a reasonable case in order to initiate further investigations. So, reference is made to the existence of "prima facie" evidence. Moreover, the accusation must be sufficiently specified as for as time and place are concerned. Subsequently, the Public Prosecutor has to weigh all the facts and circumstances in order to establish whether there is a reasonable prospect of successful investigations and subsequent criminal proceedings within a reasonable time. The Public Prosecutor has to take into account: 1)when were the alleged acts commited; 2) what are the chances that witnesses will be willing to be present in court in the Netherlands; 3)will it be possible to gather sufficient evidence to warrant a conviction; 4) will other states be able and willing to render assistance if requested.

The second, in Germany, the scope of prosecutorial discretion varies depending on whether universal jurisdiction is exercised under international crimes or under treaty-based crimes.

Regarding treaty-based crime, the public prosecutor can exercise his or her wide discretion and refrain from prosecution.

With regard to the scope of universal jurisdiction over international crimes such genocide, crimes against humanity and war crimes committed abroad, investigation and prosecution are mandatory. But the law provides for discretion whether to prosecute genocide, crimes against humanity and war crimes committed abroad only if a foreigner who is accused of the crime is not present on German territory and he is not expected to enter German territory or a German who is accused of the crime is not present on German territory, his entry into Germany is not expected and if the offence is being prosecuted before on international court of the state on whose territory the offence was committed or whose national was harmed by the offence.

The law contains some guidelines for the prosecutor. According to these, the prosecutor is encouraged to refrain from using his power to prosecute if the following conditions are fulfilled: a) a German is not involved in the crime, either as preparator or as victim; b) the offence is being prosecuted by a primarily responsible international or foreign jurisdiction ; c)the accused is not present on German territory and he is not expected to enter the country or his transfer or extradition to a primarily responsible international is permissible and intended.

It is interesting that even if the conditions are met, and prosecution is discretionary, prosecution and trial remain permissible.

The decision to refrain from or to terminate investigations or proceedings is the exclusive responsabillity of the Federal Attorney General. The prosecutor can withdraw the charges at any

[2] Isidoro Blanco Cordero, *Universal Jurisdiction-General report*-International Rewiew of Penal Law (vol. 79), p. 68-69.

stage of the proceedings, even if charges have already been preferred. The Federal Attorney General has full discretionary power.

In some countries, such Germany and Belgium, concerning the prosecutor's discretionary decision, it is final and it is not subject to appeal. In Belgium, the arbitral Court has repealed the law, because the decision not to prosecute in some cases is not taken by a judge. Neverthless , in the Netherlands, if the Public Prosecutor decides not to initiate criminal proceedings, an interested party can file a complaint against this decision.

Regarding the competence, there is no concentration of prosecutorial or adjudicative competencies concerning the exercise of universal jurisdiction. In Croatia, crimes against values protected by international law must be judged by panels of the competent court, composed of three judges distinguished by their experience in the most complex cases. Therefore, all courts of the states are able to exercise universal jurisdiction, such in Japan.

However, regarding the competence of courts *rationae materiae* concerning crimes subject to universal jurisdiction, in some countries there is a specific judicial organ. For example, in Japan the judicial organ competent to exercise universal jurisdiction is the *Audiencia National*, in Belgium, the *Cour d'assises* with a popular jury is competent to prosecute the graves crimes. In the Netherlands, with regards to international crimes, the District Court at The Hague has been declared exclusively competent. In Germany, as regards international crimes, special rules applies: the competence to prosecute international crimes is concentrated; exclusive competence lies with the Federal Attorney General and the Higher Regional Court (Oberlandesgericht) in whose district the provincial government is situated .

Regarding all other crimes over which universal jurisdiction has been established exclusively that no court has been appointed exclussively. The competent court therefore has to be determined according to the general principles of competence as are set out in the Code of Criminal Procedure, such in the Netherlands, Germany, Finland, Hungary and Turkey. In Netherlands, the Code of Criminal Procedure states some rules: the Court in which district the alleged offender is present is competent; the Amsterdam District Court is also competent if the crime has been committed at sea and again, the Amsterdam District Court if no other Court has been declared competent.

In Germany, if a local venue cannot be established in any domestic court, the Federal High Court decides which court shall be competent. In Finland, according to the Criminal Procedure Act, the competent court for an offence committed outside Finland is the court of the place where the person to be charged lines, is resident or is found.

In Sweden, due to the fact that are specialist prosecutors chambers for international crimes, in practice the prosecution will be usually concentrated in only certain district courts, in particular the Stockholm district court.

Concerning international arrest warrants or detention requests for crimes subject to universal jurisdiction, can be distinguished three systems.

First, in some countries (Finland, Croatia, Germany, Hungary, Romania, Sweden) no particularities need to be taken into consideration concerning crimes over which universal jurisdiction has been established. So, in Croatia only the court before which criminal proceedings are pending can issue on international arrest warrant.

Second, in other countries the institution competent to issue on international arrest warrant depends on the crime concerned. In the Netherlands, the National Prosecutor 's Office, located in Rotterdam, has been declared exclusively competent concerning international crimes.

So, only the Public Prosecutor located at this office may issue on international arrest warrant with regard to war crimes, genocide, crimes against humanity and torture. Regarding the other crimes subject to universal jurisdiction, any Public Prosecutor can issue on international arrest warrant as far as those crimes are concerned.

Third, if the presence in the territory of the European Union state is necessary to initiate criminal proceedings, the competent court cannot issue on international arrest warrant against

perpetrators of the crimes residing abroad (for example, in Croatia, in cases of international crimes subjects to universal jurisdiction).

In the context of the European Union, extradition between European Union members states has been replaced by another instrument: the surrender of a requested person which can be arderd by an European Arrest Warrant and is prescribed by the Framework Decision on the European arrest warrant and the surrender procedures between member states.[3]

Because of the existence of the European Arrest Warrant, the transmission of arrest warrants and inprisonement requests between the European Union States became easier and faster.

References:

- Bassouini, M. C., 2001, *Universal Jurisdiction for International Crimes: Historical* Perspectives and Contemporary Practice, *Virginia Journal of International Law*, vol. 421, p. 81-182;
- *Council Framework Decision of 13June 2002 on the European arrest warrant and the surrender procedures between member states* (2002/584/IHA,OJ ECL 190 of 13 June 2002, 1
- De La Cuesta, J. L., 2006, *Résolutions de Congrès de l'Association International de Droit Pénal* (1926-2004), *Revue Internationale De Droit Pénal*;
- Florian Jessberger, *National Reports* (CD Rom annexe), at XVIII-th International Congress of Penal Law (Chine-2007)
- George P. Fletcher, *Against Universal Jurisdiction*, "Journal of International Criminal Justice 2003, p. 580-584, 58;
- Isidoro Blanco Cordero, *Universal Jurisdiction-General report*-"International Review of Penal Law" (vol. 79), p. 68-69.
- Jessberger F., 2008, *Revue Internationale De Droit Pénal*, vol. 79, p. 63;
- Muciorama Maja,2008,*Report*," Revue Internationale De Droit Pénal", rd. 79, p. 61-62 (Spain);
- *Neue Juristische Wochenschrift*, 2001, p. 1848;
- *Revue Internationale De Droit Pénal*, 1933, rd. 10, p. 156-161 (French).
- *Revue Internationale De Droit Pénal*, 1948, rd. 19, p. 418-421 (English)
- *Revue Internationale De Droit Pénal*, 2008, Vol. 79, p. 60-61.
- *The United States Constitution*, article 1, section 8, clause 10
- Van Elst, R., Van der Wilt, H., 2008, Netherlands, *International Review of Penal Law*, vol. 79, p. 62.

[3] *Council Framework Decision of 13 June 2002* on the European arrest warrant and the surrender procedures between member states (2002/584/IHA, OJ ECL 190 of 13 June 2002, 1).