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UNIVERSAL JURISDICTION IN THE CRIMINAL LAW OF BOSNIA AND HERZEGOVINA

Abstract: Universal criminal law jurisdiction is one of the principles of territorial validity of criminal legislation. It is about the application of the criminal legislation of a country to persons who are not their nationals, nor have they committed a criminal offense against their nationals or that country, nor has this offense been committed on the territory of that country. Therefore, it is a departure from the classic settings of criminal law with regard to territorial validity. In the foreground is not the connection between a specific state and the committed criminal offense, but the interests of the entire international community. It is about national prosecution, primarily of international crimes.

In the criminal legislation of BiH, universal jurisdiction is regulated according to the model of the Criminal Code of the former SFRY. It is about too broad definition of universal jurisdiction, and in the context to which criminal offenses it is to be applied, thus using general and vague clauses. In addition to high-quality regulation at the national level, interstate agreements are also crucial for the efficient application of universal jurisdiction, which further improve international criminal justice cooperation, in terms of transfer of evidence, cases, etc.

The paper presents the corresponding provisions from the Criminal Code of BiH, with special reference to the key elements of the conditions of universal jurisdiction. Trying to answers the question, the authors also analyze universal jurisdiction as a subject matter of dispute between the states. In conclusion, the authors also give certain de lege ferenda suggestions.

Keywords: universal jurisdiction, territorial validity, criminal offense, criminal law, Bosnia and Herzegovina.

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1. INTRODUCTORY REMARKS

In order to suppress the most serious forms of criminal offenses as effectively as possible, the international community has established the institute of national prosecution for international crimes, which is known as universal criminal law jurisdiction. It is about the position of individual countries which in this way expand the application of their own criminal law on the basis of certain criminal law institutes, with the aim of protecting universal values.[1] In this way, they apply their criminal legislation to persons who are not their citizens, have neither committed a criminal offense against their citizens or that state, nor is that person located within the territory of the state that is trying him. Therefore, it is a departure from the classic settings of criminal law with regard to its territorial validity, which causes polemics among theoreticians and practitioners of (international) criminal law.[2]

In the modern world, migration and population mobility are largely eroding the concept of citizenship, and technological progress and transnational organized crime are eroding the concept of territoriality.[3] With the development of international law, especially with the adoption of international conventions, this common interest grows into universal values of humanity, which every state is obliged to protect.[4] In the foreground is not the connection between a specific state and the committed criminal offense, but the interests of the entire international community.[5] The basis of the interpretation of universal jurisdiction, which represents the obligation of every state, lies in such interpretation. Accordingly, it is noticeable that the right to punishment (*ius puniendi*) belongs to the state, that is, to the sovereignty of states. The states ensure this right to punishment by determining the boundaries of the spatial validity of the criminal law.[6]

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1 See A. Eser, O. Lagodny, (eds.), *Principles and Procedures for a New Transnational Criminal Law,* Freiburg, 1992.

2 I. Bantekas, „The principle of mutual recognition in EU criminal law", *European Law Review*, 2007, 365.

3 M. Munivrana, „Univerzalna jurisdikcija", *Hrvatski ljetopis za kazneno pravo i praksu*, Zagreb, vol. 13, 1/2006, 231.

4 See N. Arajärvi, „Looking Back from Nowhere: Is There a Future for Universal Jurisdiction over International Crimes?", *Tilburg Law Review*, vol. 16, 2011, 5–29.

5 See M.C. Bassiouni, „Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice", *Virginia Journal of International Law Association*, 2001, 945–1001.

6 See H.A. Kissinger, "The Pitfalls of Universal Jurisdiction", *Foreign Affairs,* 80, 4/2001, 86–96; M. Chadwik, „Piracy and the Origins of the Universal Jurisdicton: On Stranger Tides", *The American Journal of International Law*, Vol. 114, 3/2020, 555-560; G. P. Fletcher,"Against Universal Jurisdiction", *Journal of International Criminal Justice,* Volume 1, Issue 3, 580–584; W.B. Cowles, „Universality of Jurisdiction over War Crimes", *California Law Review*, Volume XXXIII, 2/1945, 177–218; Z. Konstantopoulou, „Universal jurisdiction", *Revue internationale de droit pénal*, Vol. 80, 3-4/2009, 487–512; F. Lafontaine, „Universal Jurisdiction - the Realistic Utopia", *Journal of International Criminal Justice,* Volume 10, 5/2012, 1277–1302; M. Langer, „The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes", *The*

One of the most important things is how to apply universal jurisdiction within clearly defined legal frameworks, and to avoid any possibility of abuse that leads to the violation of the principle of state sovereignty and good relations between the states. In this context, the issue of jurisdiction is most often considered as a preliminary issue, which should be resolved before the merits of the criminal case. Accepting or terminating the cases discussing the jurisdiction may mask their political context.[7] This can certainly lead to abuse of this very important institute of international criminal law. It should be said that the states, the scientific and professional public basically accept the idea of universal jurisdiction, but since it is a complex institute, there are different understandings of it. Therefore, it is necessary to analyze this institute, its legal nature and characteristics that vary from state to state. States. It is this diversity in the acceptance and implementation of universal jurisdiction in national criminal justice systems that leads to different interpretations, so we can say it also leads to abuse of this very important institute of (international) criminal law.

Certain authors believe that the historical development of universal jurisdiction can best be observed through four phases.[8] The first phase refers to the period of international traditional law. The second phase covers the period after the Second World War until the end of the sixties of the last century. The third phase covers the period from the seventies of the last century, until the establishment of international *ad hoc* tribunals, and the fourth phase covers the period from the nineties to the present day.[9]

We find the first forms of universal jurisdiction in the works of *Huge Grotius*, in the 17th century, in relation to criminal offenses of piracy. *H. Grotius* called pirates *bastis humani generis* or „enemies of humanity", and he believed that all

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American Journal of International Law, vol. 105, 1/2011, 1–49; H. M., Madeline, „Universal Jurisdiction in a Divided World: Conference Remarks", 35 *New Eng. Law Review*, 2001, 337–361; X. Philippe, „The principles of universal jurisdiction and complementarity: how do the two principles intermesh?", *International Review of the Red Cross*, volume 88, number 862, June 2006, 375–398; R. Rabinovitch, „Universal Jurisdiction in Absentia", *Fordham International Law Journal*, vol 28, 2005, 500–530; A.H. Butler, „The Doctrine of Universal Jurisdiction: A Review of the Literature", *11 Crim. L. F.*, 2000, 353–357; M.P. Scharf, „Universal Jurisdiction and the Crime of Aggression", *Harvard International Law Journal,* vol. 53, no. 2, 2012, 358–388.

7 See D. Hovell, „The Authority of Universal Jurisdiction", *The European Journal of International Law* Vol. 29 2/2018, 427–456. Available on: *https://academic. oup. com/ejil/article/29/2/427/ 5057077* (19.11.2023).

8 M. Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crime under International Law*, Institute for Legal Studies, Utrecht, 2005, 49.

9 See L. Arbour, „Will the ICC have an Impact on Universal Jurisdiction?", *Journal of International Criminal Justice*, Oxford University Press, 3/2003, 585–588; O. Bekou, R.Cryer, „The International Criminal Court and Universal Jurisdiction: A close encounter?", *International and Comparative Law Quarterly*, Nottingham, vol 56, Issue 1, 2007, 49–68; C. Ryngaert, „Universal Jurisdiction in an ICC Era", *European Journal of Crime, Criminal Law and Criminal Justice*, 46/2006, 46–80.

the states should punish piracy, because it is their common interest, regardless of the place where the crime was committed and who the perpetrator is. In his work „De iure belli ac pacis" *H. Grotius* stated: "As the laws of each state have in mind its own interests, the consent of all the states, or at least majority of them, could produce certain common laws between them. It is obvious that this is how the laws were established, the purpose of which is the interest, not of each state individually, but of a large community of states.[10] On the other hand, a group of authors led by *Montesquieu, Voltaire and Jean-Jacques Rousseau* opposed this approach. Their views were based on the views of *C. Beccariae*, who believed that „judges are not the avengers of humanity, and that the crimes are punishable in the country in which they were committed". Thus, the aforementioned group of authors took firm positions on what will be defined in modern criminal law as *the territorial principle of the validity of criminal legislation*.[11]

Some authors believe that the first form of universal jurisdiction *actio popularis*, existed in Ancient Rome, where every citizen could initiate criminal proceedings, regardless of whether he was injured by the criminal offense. Universal jurisdiction developed as a need to protect the exchange of goods that took place by sea, as well as the sailing itself, which was disrupted by pirates with theft, murders and torture.[12] Based on the above stated, the states very early realized the need for efficient prosecution of pirates, regardless of whose citizens they were and where the piracy was committed.

Historically, the oldest and most accepted application of universal jurisdiction was for piracy on the high seas.[13] Every country has a right to use the high seas. Even more, it has a right to patrol the high seas in search of pirates without violating the sovereignty of any state[14]. Piracy is a crime that has been recognized for the longest time in history as an object of universal jurisdiction.[15] The place where the piracy was committed (the high seas) is the key premise of universal jurisdiction, because international waters excluded the jurisdiction of specific states.[16]

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10 See H. Grotius, *De Jure Belli ac Pacis*, Book II, chapter XXI, section IV (English translation by Francis W. Kelsey (Oxford/London: Clarendon Press/Humphrey Milford, 1925), 527–529.

11 See L. Benavides, „The Universal Jurisdiction Principle: Nature and Scope", *Anuario Mexicano de Derecho Internacional*, vol. I, 2001, 19–96; Škulić M., "Značaj Suda pravde Evropske unije kao segmenta zajedničkih krivičnopravnih/krivičnoprocesnih mehanizama EU u kontekstu dejstva načela *ne bis in idem*", *Pravni život*, 9/2019, 521–547.

12 E. Kontorovich, „A Positive Theory of Universal Jurisdiction", *80 Notre Dame Law Review*, 2004, 32.

13 R. Kenneth, „Universal jurisdiction under International Law", *Texas Law Review,* 66, 1988, 791.

14 W. R. Slomanson, *Fundamental Perspectives on International Law*, Thomson West Publishers, USA, 2003, 225.

15 W. B. Cowles, „Universality of Jurisdiction over War Crimes", *California Law Review*, 1945, 181.

16 Palestinian Center for Human Rights, *The Principle and Practice of Universal Jurisdiction*, 2010, p. 16. Available on: *https://reliefweb.int/report/occupied-palestinian-territory/principle-and-practice-universal-jurisd iction -pchr s-work* (9.12. 2023.)

In the interest of justice, the jurisdiction was given to any state that deprived a pirate of his liberty.

While piracy and the need to protect international interests were elements of the initiation of universal jurisdiction, the fact that it was committed outside the territorial jurisdiction of any state was *ratio legis* of its application. This is different from the idea of universality in relation to genocide, crimes against humanity and war crimes, where the seriousness of these crimes is *ratio legis* for its application.[17] The heinousness of piracy cannot be compared to the heinousness of genocide or crimes against humanity, and piracy is rather comparable to ordinary robbery.[18] In other words, the grounds for the application of universal jurisdiction for piracy in the 19th century was based on the fact that pirates are not under the authority or protection of any state, rather on the basis of the nature of the crime itself.[19] This position was accepted later and when adopting the Convention on the High Seas from 1958 and the Convention on the Law of the Sea from 1982.

Universal jurisdiction over piracy was reaffirmed by the 1982 UN Convention on the Law of the Sea. Pirates can be seen as the precursors of today's perpetrators of international crimes, perpetrators of genocide, crimes against humanity, war crimes and crimes of aggression.[20]

Back in 1933, at the International Congress of Criminal Law, held in Palermo, the universal suppression of serious crimes was considered.[21] Already at this stage of the development of universal jurisdiction, questions began to arise as to whether universal jurisdiction can be applied only to piracy or to other crimes as well. This dilemma will remain until today.

Universal jurisdiction came to the fore especially after the Second World War, during the trial to war criminals. After the Nuremberg and Tokyo trials, the case of Adolf Eichmann,[22] who was kidnapped by Israeli secret service agents in Argentina on 11 May 1960, was transferred to Israel to be tried for crimes against the Jewish people, crimes against humanity and war crimes committed on the territory of Central and Eastern Europe, stands out in particular.[23]

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17 L. S. Sunga, *Individual Responsibility in International Law for Serious Human Rights Violations*, Martinus Nijhoff Publishers, 1992, 102–103.

18 See C. Kres, „Universal Jurisdiction over International Crimes and the Institut de Droit international", *Journal of International Criminal Justice*, Vol. 4(3), 2006, 561–585.

19 M. Takeuchi, „Beyond Dichotomy between Deduction and Induction-Critical Appraisal on the Approaches to Universal Jurisdiction", *Okayama Law Journal*, 2/2014. Vol. 64, 8.

20 See M Chadwik, „Piracy and the Origins of the Universal Jurisdicton: On Stranger Tides", *The American Journal of International Law*, Vol. 114, 3/2020, 555–560.

21 See. Universal jurisdiction*, International Review of Penal Law,* vol. 80, 2009, pp. 395-396. Available on: *https://www.cairn. info/revue-internationale-de-droit-penal-2009* (22.12.23).

22 Adolf Eichmann was an SS official in Nazi Germany. The creator of the „final solution" policy, the so-called Jewish question. He is considered the father of the committed Holocaust.

23 Argentina considered that Israel, with this operation, violated its sovereignty and violated international law, and filed a complaint to the UN Security Council. The Security Council adopted the Resolution 138 of 24 June 1960, which stated that such actions could threaten international peace and security.

As it can be noted, Eichmann was tried in Israel, for crimes committed out of the territory of Israel, and he was an Austrian-German citizen. At the beginning of the 1960s, Israel was one of the first countries to invoke the principle of universal jurisdiction in its revolutionary trial against Eichmann, called the „architects of the Holocaust".[24]

In its decision from 1961, the Supreme Court of Israel pointed out that „the essential basis on which the application of universal jurisdiction with respect to the crime of piracy is based - also justifies its application with respect to the crimes we are dealing with in this case".[25] At the trial, Eichmann did not dispute the basic facts of the indictment, but the jurisdiction and competence of the Israeli court. He believed that the crimes he was charged with were committed before the creation of the state of Israel, and the application of Israeli law could be considered *ex post facto*. The trial was justified by the fact that Israeli law basically follows international customary law that existed even before Eichmann committed the crime.

In addition, Eichmann disputed the jurisdiction of the Israeli court based on illegal arrest and kidnapping by the Israeli secret services, and he pointed out as disputable the retroactive application of the Israeli law.[26] Both the District Court in Jerusalem and the Supreme Court of Israel rejected the aforementioned objections and confirmed their jurisdiction.[27]

The positions taken by the aforementioned courts regarding universal jurisdiction are also interesting. The District Court of Jerusalem emphasized that the crimes listed in the 1950 Nazis and Nazi Collaborators Law were not only crimes under domestic law but also violations of international law. The court confirmed that universal jurisdiction was not based on Israeli law, nor on Article 6 of the Genocide Convention, but on the very nature of genocide, as the most serious crime under international law.[28] The Supreme Court of Israel took a position on the justification of the application of universal jurisdiction, because the characteristics of committed crimes were indisputably such that it was a crime against humanity.[29]

The main reason why international law allows the states to apply universal jurisdiction for piracy is the existence of common interests of the international community. Consequently, the states act as an authority of the international community. Accordingly, the same reasons that justify the application of universal jurisdiction for piracy, justify Israeli (universal) jurisdiction for the Eichman case.[30]

The Supreme Court of Israel, when applying universal jurisdiction, relied on precedents created in trials after the Second World War and on an analogy in the

24 See D. Morrison, J.R. Weiner, „Curbing the Manipulation of Univrsal Jurisdiction", *Jerusalem Center for Public Affeirs, Jerusalem*, 2010, 3; S. Zuccotti, *The Holocaust, the French, and the Jews*. Lincoln, NE: University of Nebraska Press, 1999 and Bauer, Y., *A History of the Holocaust*, Franklin Watts, New York, 1982.

25 F. Karčić, *Kako je nastala i razvijala se univerzalna jurisdikcija*, Oslobođenje, Sarajevo, 14.12.2019. Available on: *https://www.oslobodjenje.ba/dosjei/teme/kako-je...* (15.02.2024).

26 Eichmann was accsed on the basis of Islaeli Nazis and Nazi Collaborators Law from 1950.

27 M. Inazumi, *op. cit*., 63.

28 *Ibid.*, 64.

29 *Ibid*.

30 *Ibid*.

context of piracy.[31] The District Court in Jerusalem sentenced Eichmann to death, and the Supreme Court of Israel upheld this sentence.

2. CRIMINAL CODE OF BOSNIA AND HERZEGOVINA

In the current legislation of BiH, universal jurisdiction is also determined by the Criminal Code of BiH (CC BiH[32]). Article 9, paragraph 4 of this law stipulates that the criminal legislation shall also be applied to an alien who, outside the territory of BiH, perpetrates a criminal offense against a foreign state or a foreign national, which carries a punishment of imprisonment of five years or a more severe punishment. In paragraph 5 of the same article, it is prescribed that the criminal legislation of Bosnia and Herzegovina shall apply only if the perpetrator of the criminal offense is found in or extradited to Bosnia and Herzegovina, and in the case from paragraph (4) of this Article - only if the perpetrator is found in the territory of Bosnia and Herzegovina and is not extradited to another country.[33]

In addition, it is important to mention paragraph 1, item c) of Article 9 of this law, which stipulates that the criminal legislation of Bosnia and Herzegovina shall apply to anyone who, outside of its territory, perpetrates a criminal offense that Bosnia and Herzegovina is bound to punish according to the provisions of international law, international or interstate agreements. According to some authors, this is about the application of a realistic or protective principle, so the effects of the protective principle extend to those criminal offenses committed abroad, to which certain objections can certainly be pointed out.[34] Some authors believe that this is a special universal jurisdiction incorporated into the application of the realistic or protective principle.[35]

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31 M. Zulfu Oner, *The principle of Universal jurisdiction in Interantional Criminal Law*, Justice Academy of Turkiye, Issue 12, 2016, 189.

32 *Official Gazette of BiH*, nos. 3/2003, 32/2003, 37/2003, 54/2004, 61/2004, 30/2005, 53/2006, 55/2006, 32/2007, 8/2010, 25/2015, 40/2015, 35/2018, 46/2021, 31/2023 and 47/2023.

33 See M.N. Simović, V.M. Simović, M. Govedarica, *Krivično procesno pravo II*, peto izdanje (izmijenjeno i dopunjeno), Pravni fakultet Univerziteta u Istočnom Sarajevu, Istočno Sarajevo, 2021, 304–318; M.N. Simović, M., Blagojević, V. M. Simović, *Međunarodno krivično pravo*, treće izmijenjeno i dopunjeno izdanje, Pravni fakultet Univerziteta u Istočnom Sarajevu, 2023, 528–542; M.P.Munivrana, P. Novoselec, „Univerzalno načelo u hrvatskom kaznenom pravu, posebno s osvrtom na odnos Zakona o primjeni Statuta Međunarodnog kaznenog suda i Kaznenog zakona", *Hrvatski ljetopis za kaznene znanosti i praksu*, vol. 24, 2/2017, 695–714; A. Mujkanović, *Univerzalna krivičnopravna jurisdikcija u nacionalnom i međunarodnom krivičnom pravu*, doktorska disertacija, Pravni fakultet, Univerzitet u Zenici, 2022, 15–22; Vešović, M. „Jedan aspekt univerzalne jurisdikcije u savremenom krivičnom pravu", *Strani pravni život*, god. 63, 1/2019, 55–65; S. Softić S., „Međunarodna jurisdikcija u krivičnim stvarima", *Kriminalističke teme,* Fakultet za kriminalistiku, kriminologiju i sigurnosne studije, Sarajevo, 1-2/2013, 131–151.

34 M. Munivrana, *op. cit*., 224.

35 I. Josipović, „Pravni i politički aspekti spora Hrvatske i Srbije o nadležnosti za ratne zločine", *Hrvatski ljetopis za kaznene znanosti i praksu*, vol. 24, 1/2017, 42.

Thus, the provisions of Article 9 of the CC BiH prescribe universal jurisdiction (paragraph 4), and paragraph 5 prescribes additional conditions for universal jurisdiction. Paragraph 1, item c) also talks about the criminal prosecution of all persons (including foreign citizens and stateless persons), regardless of the place of commission, in accordance with the provisions of international law.

In this context, it should be mentioned that the provisions on universal jurisdiction are included in the legal order of BiH in an indirect way. Thus, the Constitution of BiH stipulates that certain international conventions shall be directly applied in BiH, and are above the law in terms of legal force.[36]

Universal jurisdiction is also determined by the criminal laws of the entities the Federation of BiH (FBiH),[37] the Republika Srpska (RS)[38] and Brčko District (BD).[39] This jurisdiction is prescribed almost identically to that in the CC BiH. In these provisions too, the terminology and nomotechnics of the Criminal Code of the former SFRY (CC SFRY)[40] are inherited. Similar to the CC BiH, it is about the amount of the threatened sentence (five years and more); the presence of the perpetrator on the territory (FBiH, RS and BD BiH); the court cannot impose a more severe sentence than that one prescribed by the law of the country where the offense was committed; the requirement of double punishment and the principle *aut dedere aut judicare.*[41]

The provision „according to that legislation" is prescribed identically in the CC FBiH[42] and CC RS,[43] while the CC BDBiH[44] has a somewhat clearer and more specific

36 Here we can mention the Convention on the Prevention and Punishment of the Crime of Genocide from 1948, the Geneva Convention from 1949, etc.

37 Criminal Code of the Federation of Bosnia and Herzegovina, *Official Gazette of the Federation of BiH*, nos. 36/2003, 21/2004, 69/2004, 18/2005, 42/2010, 42/2011, 59/2014, 76/2014, 46/2016, 75/2017 and 31/2023.

38 Criminal Code of the Republika Srpska, *Official Gazette of the Republika Srpska*, nos. 64/2017, 104/2018, 15/2021, 89/2021 and 73/2023.

39 Criminal Code of Brčko District of Bosnia and Herzegovina, *Official Gazette of Brčko District of BiH*, no. 19/2020 – consolidated version.

40 „Official Gazette of SFRY", nos. 44/1976, 36/1977, 56/1977, 34/1984, 37/1984, 74/1987, 57/89 and 3/90.

41 See. M.J. Kelly, „Cheating Justice by Cheating Death: The Doctrinal Collision for Prosecuting Foreign Terrorists - Passage of *Aut Dedere Aut Judicare* into Customary Law & Refusal to Extradite Based on the Death Penalty", *20 Ariz. J. Int'l & Comp. L.*, 2003, p. 491: 496–497.

42 Article 13, paragraph 4 of the CC FBiH establishes that the criminal legislation in the Federation shall be applied to an alien who, outside the territory of the Federation, perpetrates against a foreign state or an alien a criminal offense, for which a punishment of imprisonment for a term of five years or a more severe punishment may be imposed under the legislation in force.

43 Article 13, paragraph 2 of the CC RS: „The criminal legislation of the Republika Srpska shall also apply to any alien who, outside the territory of the Republika Srpska, commits any criminal offence against a foreign country or an alien, which is punishable by five years of imprisonment or a more severe punishment pursuant to that legislation, if he happens to be found in the territory of the Republika Srpska and he is not extradited to the foreign country. Unless otherwise provided by this Code, in this case the court shall not pronounce a sentence that is more severe than the one provided for in the legislation of the country where the criminal offence was committed."

44 Article 13, paragraph 3 of BDBiH: Criminal legislation of Brčko District shall be applied to a foreign citizen who, while being abroad, perpetrates a criminal offence against a

provision – „according to the law of that state". The provisions of the CC BD somewhat more specifically meet the requirement of definiteness of the law (*nullum crimen sine lege certa*).

The requirement of double punishment is more clearly expressed in the CC RS[45] with one exception.[46] The CC BDBiH prescribes the requirement of double punishment,[47] also with one exception.[48]

It is also necessary to point out to the entities and CC BD that speak about the application/validity of the general part of the law (Art. 14 CC FBiH, 16 CC RS and 14 CC BDBiH). The aforementioned provisions prescribe that the provisions of the general part of these laws shall apply to all perpetrators of all criminal offenses prescribed by the laws of FBiH and BD BiH, while the CC RS regulates that the provisions of the general part of this code shall apply to all criminal law provisions contained in the laws of the Republika Srpska.

With regard to the above, the question that is rightly raised is how and in what way universal jurisdiction can be applied to criminal offenses that are not prescribed by entity laws and the law of the Brčko District, whose courts do not have jurisdiction to prosecute them, thinking, primarily, of international criminal offenses *stricto sensu* (genocide, crime against humanity, war crimes).[49] In accordance with positive legal provisions, the Court of BiH has exclusive jurisdiction over them according to the Criminal Code of BiH, according to the provisions of this law that prescribe universal jurisdiction, and in the context of criminal offenses against international law. This is also indicated by the provisions of entity criminal laws and the CC BDBiH, which refer to the application of the general part of these laws.

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foreign state or a foreign citizen for which, under the law in force in the state of perpetration of the criminal offence, a sentence of imprisonment for a term of five years or a more severe penalty may be imposed, if he is found in Brčko District territory. In such cases, unless otherwise stipulated by this Code, the court may not pronounce a sentence more severe than the sentence prescribed by the law of the state in which the criminal offence was perpetrated.

45 Article 13, paragraph 5: „...prosecution shall be carried out only if the criminal offence is punishable also under the legislation of the country where the criminal offence was committed."

46 Article 13, paragraph 6: „In cases referred to in Article 13, paragraph 3 of this Code, the prosecutor shall carry out prosecution, regardless of the legislation of the country where the criminal offence was committed if, at the time of commission, the act was considered criminal offence under the principles recognized by the international law".

47 Article 13, paragraph 5: „...prosecution shall be instituted only if the perpetrated criminal offence is also punishable under the laws of the state in which the criminal offence was perpetrated".

48 Article 13, paragraph 6: „The prosecutor may institute prosecution referred to in Article 13, paragraph 3 of this Code, irrespective of the law of the state in which the criminal offence was perpetrated, if the criminal offence in question was, at the time of perpetration, defined as a criminal offence under the principles of the international law".

49 Here, we mean the proceedings conducted for war crimes committed during the war in BiH, when entity courts applied CC SFRY, as milder law at a time the criminal offenses were perpetrated.

2.1. Conditions of universal jurisdiction according to the Criminal Code of BiH

When talking about the conditions of universal jurisdiction, it is important to point out that these conditions in a certain way determine the subsidiary character of this jurisdiction. This means that universal jurisdiction is conditioned by certain assumptions such as the presence of the suspect, extradition[50] (*aut dedere, aut judicare*), double criminality, and the amount of the threatened sentence. The conditions of universal jurisdiction are in the function of preventing the deterioration of relations between states.[51]

2.1.1. Presence of the suspect

Article 9, paragraph 5 of the CC BiH stipulates that criminal legislation (universal jurisdiction) shall apply in the case referred to in paragraph (4) of this Article only if the perpetrator is found in the territory of Bosnia and Herzegovina. With this, the BiH legislator practically rejected the broader form of universal jurisdiction, i.e. universal jurisdiction *in absentia*.[52] The stated position is justified because it is in accordance with the majority of international documents that deal with this domain, as well as with the positions of leading theoreticians and practitioners of criminal law.

Of course, the suspect's presence is not required to start an investigation or to take certain actions with the aim of elucidating a certain criminal offense. Some countries do not prescribe this condition when dealing with the most serious crimes against international law (genocide, war crimes, etc.).[53]

2.1.2. Aut dedere aut judicare

One of the assumptions of the application of universal jurisdiction is the principle *aut dedere aut judicare* (extradite or judge).[54] It is a principle of international law that requires the states to extradite the perpetrator of a criminal offense

50 See J. O. Hafen, „International Extradition: Issues arising under the Dual Criminality Requirement", *Brigham Young University Law Review*, 1/1999, 191–230; P. Finkelman, „International Extradition and Fugitive Slaves: The John Anderson Case", *Brooklyn Journal of International Law*, 18(3), 1992, 765–810.

51 P. Baumruk, „Universal Jurisdiction: A Tool against Impunity", *Czech Yearbook of Public and Private International Law*, vol. 4, 2013, 63.

52 See J.G. Starkey, „Trial in Absentia", *St. John's Law Review*, 1978, 53 (4), 721.

53 This is visible from determination of universal jurisdiction according to the Criminal Code of the Republic of Croatia from 2011. In addition, neither FR Germany stipulates the presence of the suspect for international crimes *stricto sensu*.

54 See *The obligation to extradite or prosecute* (*aut dedere aut judicare*), Final Report of the International Law Commission, 2014. The report will appear in Yearbook of the International Law Commission, vol. II (Part Two), 2014, 2–14.

to another state for prosecution or, if there are obstacles to that - to try the perpetrators itself.[55] The core of this principle is that no perpetrator goes unpunished.[56]Article 9, paragraph 5 of the CC BiH prescribes that the criminal legislation of Bosnia and Herzegovina shall apply only if the perpetrator of the criminal offense is found in the territory of Bosnia and Herzegovina or extradited to it, while in the case referred to in paragraph 4 of this Article - only if the perpetrator is found in the territory of Bosnia and Herzegovina and is not extradited to another country. Therefore, BiH's obligation is to extradite the perpetrator of the criminal offense (an alien) to another country, and if there are obstacles to extradition - to try him. Thus, this international principle is fully respected in positive legal provisions relating to universal jurisdiction.

The universal principle formed in this way is in accordance with the principle *aut dedere aut judicare*, which greatly influences the determination of universal jurisdiction in international criminal law.[57] C. Bassiouni also calls the principle *aut dedere aut judicare* an *ius cogens* obligation.[58] Today, there is universal agreement that this principle represents a universal obligation.[59]

In literature, the question arises whether in this way the principle *aut dedere aut judicare* overlaps with the principle of universal jurisdiction. If extradition cannot happen, the state is obliged to transfer the case to the authorities competent for prosecution. Of course, the principle *aut dedere aut judicare* does not specify which form of jurisdiction will be used. As long as the suspect is being prosecuted in the country where he is located, in case of impossibility of extradition, the principle *aut dedere aut judicare* is respected.[60] Thus, in the Draft Code against the Peace and Security of Mankind, adopted by the International Law Commission (ILC) in 1996, it is stated that the obligation to extradite or prosecute rests with the state on whose territory the perpetrator is located. The state on whose territory the perpetrator is - has a unique position to ensure the implementation of the Code.[61]

The states must transfer the case to the appropriate authorities for prosecution, unless they extradite the perpetrator to another state or to the appropriate international criminal tribunal.[62] Universal jurisdiction can be applied through

55 See C. Soler, *Aut dedere aut judicare, The global Prosecution of Care Crimes under International law,* Springer, pp. 319–401.

56 See. M.P. Scharf, *Aut dedere aut judicare*, Max Planck Encyclopedias of International Law [MPIL], 2008.

57 M. Munivrana, *op. cit*., p. 223.

58 P. Baumruk, *op. cit*., 254.

59 F. C. Blaas, Double Criminality in International Extradition Law, The University of Stellenbosch, 2003, 21. Available on: *https://core.ac.uk/download/pdf/37376692.pdf.* (7.1.2024).

60 P. Baumruk, *op. cit*., 75.

61 1996 Draft Code of Crimes, Commentary to Article 8, para. 3. International Law Commission: Report of the International Law Commission on the Work of its Forty-eight session, 51 UNGAORSupp. N.10, at 9, UN Doc. A/51/10 (1996). Available on: *https://legal.un.org/ilc/sessions/48/docs.shtml* (20.1.2024.).

62 C. C. Jalloh, „The International Law Commission's First Draft Convention on Crimes Against Humanity: Codification, Progressive Development, or Both?", *Case Western Reserve Journal of International Law,* 52, 2020, 372.

the obligation to apply the principle *aut dedere aut judicare* if the perpetrator of an offense, which is so serious that it requires prosecution even outside the country where it was committed, is arrested on the territory of another state. In this case, the state has an obligation to extradite the suspect to the state that declares its jurisdiction - in order to prosecute the suspect.

Although this is not an application of narrower universal jurisdiction, because states can decide not to prosecute but to extradite a suspect, it is an indisputable mechanism through which the states can cooperate in order to fight impunity for crimes and fulfill the goal of universal jurisdiction. Jurisdiction based on international agreements is based exclusively on mutual relations/interests of the contracting parties (states act in their own interest), and the jurisdictional basis is the principle *aut dedere aut judicare*. Jurisdiction based on this principle is often treated as a specific variant of universal jurisdiction.[63]

Universal jurisdiction is the most common and safest form of prosecution based on the principle *aut dedere aut judicare*. These two principles should not be equated, since prosecution can be based on other grounds, for example, active or passive personality.[64] The importance of *aut dedere aut judicare* in strengthening the universal principle becomes more impulsive when the crime committed outside the territory of the country has no connection with the country of the forum, and requires extradition or prosecution, which necessarily reflects on universal jurisdiction.[65] The obligation to extradite or try for international crimes in international law may be contrary to the principle of double criminality and legality, if the criminal offense as such is not provided for in the requested state. This scenario is not impossible if the state has not implemented certain criminal offenses in its national legal system. The requested state cannot extradite due to the absence of the principle of double criminality, nor can it prosecute due to the principle of legality of criminal prosecution.[66]

Explicit inclusion of universal jurisdiction in international conventions is limited, and a certain number of treaties implicitly allow the states to apply universal jurisdiction in their national legislations. On the other hand, the principle *aut dedere aut judicare* can be found in most multilateral treaties dealing with transnational crimes[67].

2.1.3. Double criminality

Although it is not unambiguously legally defined,[68] the concept of double criminality is also known in the literature as the identity of the norm, double

63 M. Vešović, „Osnovne karakteristike univerzalne jurisdikcije u savremenom krivičnom pravu", *Strani pravni život*, god. LXIV, 3/2020, 9.

64 *Ibid.*

65 P. Baumruk, *op. cit*., 81.

66 F.C. Blaas, *op. cit*., 26.

67 *Ibid.*

68 See P.O. Träskman, „Should We Take the Condition of Double Criminality Seriously?", *Nordisk Tidsskrift for Kriminalvidenskab,*76, 1989, 135–155*, https://doi.org/10.7146/ntfk.*

criminality, dual incrimination, or double culpability.[69] The Institute of double criminality is relevant when defining the extraterritorial principles of the application of criminal legislation in the area, that is, when determining negative assumptions for extradition.[70] The condition of double criminality must be met in order for the criminal legislation of a country to be applied to criminal offenses committed outside its territory.[71] It must be a criminal offense according to the provisions of domestic criminal legislation, as well as according to the legislation of the state on whose territory it was committed.[72]

Double criminality is a substantive legal assumption (condition) for the exercise of the state's penal power, that is, of the state's right to punish (*ius puniendi*).[73] It must be a criminal offense according to the provisions of the domestic criminal legislation, as well as according to the legislation of the state on whose territory it was committed.[74] In this sense, determining the content of the criminal law norm of foreign law is the assumption for the application of domestic law, and the meaning of the institute of double criminality is the acceptance of a foreign legal order.[75]

According to the identity of norms, in order for a certain criminal offense to be prosecuted on the basis of universal jurisdiction, the offense must be punishable under the law of BiH, as well as under the law of the country where the offense was committed. In the context of double criminality, the criminal offenses do not have to be the same, but must be about the similarity of the important features of the criminal offense.[76]

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v76i.71234 and S.Z. Feller, "The Significance of the Requirement of Double Criminality in the Law of Extradition", 10 *Is. L. R.*, 1975, 70.

69 In literature in English language, the following term are used: *double criminality, double criminality, double penalization, dual (criminal) liability, dual incrimination, double prosecutability, double culpability, equivalency of offences and even reciprocity of offences.*

70 See M. Plachta, "The Role of Double Criminality in International Cooperation in Penal Matters" in Jareborg, N., ed., *Double Criminality. Studies in International Criminal Law*, Uppsala 1989, 84–134.

71 See L. Gardocki, "Double Criminality in Extradition Law", *Israel Law Rewiew*, Volume 27, 1-2/1993, 286–296.

72 See D. Derenčinović, „Doseg isključenja provjere dvostruke kažnjivosti iz Zakona o pravosudnoj suradnji u kaznenim stvarima s državama članicama Europske unije", *Hrvatski ljetopis za kazneno pravo i praksu*, vol. 21, 2/2014, 249–270.

73 See *Criminal Law*, ed. Nils Jareborg, Iustus, Uppsala 1989, pp. 43–56.

74 See J. Nils (ed.), *Double Criminality – Studies in International Criminal Law*, Uppsala, 1989. and J. Vervaele, „The transnational *ne bis in idem* principle in the EU: mutual recognition and equivalent protection of human rights", *Utrecht Law Review*, 2005, 100–118.

75 D. Derenčinović, *op. cit.*, 264.

76 This is a term called in literature „an analogous transposition of facts". Hereby, factual description of offense is summed up under domestic legal norm. See D. Krapac, Novi Informator, „Ulazi li zastara u pojam dvostruke kažnjivosti pri primjeni europskog uhidbenog naloga?", available on*: https://informator.hr/strucni-clanci/ulazi-li-zastara-u-pojam-dvostruke-kaznjivosti-pri-primjeni-europskog-uhidbenog-naloga* (25.02.2024).

In the literature, it is rightly pointed out that the concept of double criminality, i.e. mutual punishability, is more appropriate than the concept of *norm identity*. Namely, the norm identity implies a complete equivalence, that is, the overlapping of all the characteristics of the nature of the criminal offense and of all the elements of the legal description in both countries. Given the tendencies of extensive definition of that institute, a more adequate term is certainly double, that is, mutual punishment.[77]

The provision of Article 9, paragraph 4 of the CC BiH prescribes that the criminal legislation of BiH shall also apply to an alien who, outside the territory of BiH, perpetrates a criminal offense against a foreign state or a foreign national for which „under this legislation" a sentence of imprisonment for a term of five years or more severe punishment can be imposed. Here, double criminality is defined not only as condition that the behavior constitutes a criminal offense in both countries, but is also conditioned by the amount of the prescribed penalty or other conditions, which is why such double criminality is also called *qualified double criminality.*[78]

The provision „according to that legislation" refers to the existence of the requirement of double criminality or the identity of norms. Such a provision is confusing in terms of the fact to which legislation it refers, and in terms of the term used. The provision „according to that legislation" has the significance of a general clause and is contrary to the principle *nullum crimen sine lege certa.*[79] Some authors believe that it is only about the legislation of the country whose regulation is (in this case the legislation of Bosnia and Herzegovina), and others that it is about foreign legislation.[80] This inconsistency in the CC BiH is transferred from the CC SFRY (Article 107, paragraph 2).

The same provision existed in the previously valid Criminal Code of the Republic of Croatia from 1997[81] (Article 14, paragraph 4). However, in Article 16 of the current law[82] (Application of criminal legislation for criminal offenses against values protected by international law committed outside the territory of the Republic of Croatia) the said domain is regulated in a significantly different way: it is prescribed that the criminal legislation of the Republic of Croatia shall apply to anyone who, outside its territory, commits a criminal offense from Article 88, Article 90, Article 91, Article 97, Article 104, Article 105 and Article 106 of this

77 See *ibid*.

78 I. Turudić, T. Pavelin Borzić, I. Bujas, „Odnos načela uzajamnog priznavanja/ povjerenja i provjere dvostruke kažnjivosti", *Zbornik Pravnog fakulteta Sveučilišta u Rijeci,* Rijeka, 1991, 1086.

79 Nevertheless, in modern law, which refers to universal jurisdiction, there is a tendency to expand the universal principle by means of a general clause. See P. Novoselec, I. Martinović, *Komentar Kaznenog zakona, I. Knjiga*, Narodne novine, Zagreb, 2019.

80 Stated according to: B. Pavišić, V. Grozdanić, P. Veić, *Komentar Kaznenog zakona*, Narodne novine, Zagreb 2007, 71.

81 Criminal Code of the Republic of Croatia, *National Newspaper* no. 110/97.

82 Edited text, *National newspaper*, nos. 125/2011, 144/2012, 56/2015, 61/2015, 101/2017, 118/2018, 126/2019, 84/2021, 114/2022 and 114/2023.

law, as well as a criminal offense for which the Republic of Croatia is obliged to punish, according to an international agreement, even when it was committed outside the territory of the Republic of Croatia.[83]

In literature, there are many critics addressed to the institute of double criminality based on the assumption that the court must investigate the regulations of a foreign state using the comparative method. Interpreting foreign law is a risky endeavor that can go in the wrong direction.[84] The danger of this scenario is significant.[85] Domestic legislation is best interpreted by domestic courts.[86] This leads to a more difficult approach in meeting the requirements of double criminality, and certain countries try to reduce these requirements when extraditing for the most serious crimes.[87]

The mentioned problems can also affect the effective application of universal jurisdiction, in the context of fulfilling the requirement of double criminality. On the other hand, the question of applying double criminality when using universal jurisdiction for the most serious international crimes, i.e. when applying *ius cogens* norms, is justifiably raised.[88]

2.1.4. The amount of threatened punishment

Universal jurisdiction in the criminal legislation of Bosnia and Herzegovina is conditioned by the amount of the threatened punishment. Thus, in Article 9, paragraph 4 of the CC BiH, it is stipulated that the criminal legislation shall also apply to an alien who, outside the territory of BiH, perpetrates a criminal offense against a foreign state or a foreign national which, under this legislation, carries a *punishment of imprisonment for a term of five years or a more severe punishment*.

83 See A. Garačić, *Zakon o pravosudnoj suradnji u kaznenim stvarima s državama članicama Europske unije u sudskoj praksi*, Libertin naklada, Rijeka, 2015. and D. Krapac, „Okvirna Odluka vijeća (Europske unije) od 13. VI. 2002. godine o europskom uhidbenom nalogu (EUN) i postupcima predaje između država članica (2002/584/PUP)", *Zbornik Pravnog fakulteta u Zagrebu*, Vol. 64, 5-6/2014.

84 See B. Swart, B., "Human Rights and the Abolition of Traditional Principles" in A.Eser, Lagodny, O., eds., *Principles and Procedures for a New Transnational Criminal La*w, Freiburg 1992, 16.

85 See M. Deflem, I. Kyle, 2017. „Extradition, International", *Encyclopedia of American Civil Rights and Liberties: Revised and Expanded* (eds. K. E. Stooksbury, J. M. Scheb II, O. H. Stephens), Santa Barbara, CA: ABC-CLIO, 340–342.

86 F. C. Blaas, *op. cit.*, 31.

87 See I. A. Shearer, *Extradition in International Law,* Manchester University Press, 1971; G. Gilbert, *Aspects of Extradition Law,* Dordrecht: Martinus Nijhoff, 1991; M.C. Bassiouni, *International Extradition: United States Law and Practice*, 3rd edn, Oxford Scholarly Authorities on International Law, 1995; A. Eser, "Common Goals and Different Ways in International Criminal Law, Reflections from a European Perspective", *31 Harv.Int.LJ.,*1990, 125.

88 See E.Fitzgerald, „Recent Human Rights Developments in Extradition Law & Related Immigration Law", *The Denning Law Journal,* 25, 2013, 89–90.

Therefore, in order to apply universal jurisdiction in BiH, it must be a criminal offense punishable with five years or more. As we have previously stated, the condition of double criminality is additionally qualified by the amount of the threatened punishment.[89]

Such a broad provision leads to a situation where, according to positive criminal law legislation, it is possible to apply universal jurisdiction for those criminal offenses that do not fall in the group of international criminal offenses, in the narrower and broader sense. This determination is not in accordance with international documents and the views of leading authors who treated the institute of universal jurisdiction in their work. This leads to the possibility of abuse of universal jurisdiction and the deterioration of international relations. In this way, this very important institute of international and national criminal law would be in contradiction with the very *ratio legis* of universal jurisdiction, which is prosecution and punishment for the most serious forms of international criminal offenses, which have been declared as such by the international community and for which there is a consensus at the global level.[90]

The identical provision to the one from the CC BiH is also found in the entity criminal laws, as well as in the CC BDBiH, which further complicates the mentioned problem, because the amount of the threatened punishment also corresponds to some „ordinary" criminal offenses. At the same time, the essence of universal jurisdiction is not in the threatened punishment, but in the gravity and seriousness, that is, in the nature of the crimes committed.[91] On the other hand, there is an approach that is much more practical and clear, which is called the *enumerative method or the method of the list of crimes*, that is, the catalog of criminal offenses that are listed in the context of universal jurisdiction.[92] In addition, there is also the „no list" method, which limits certain crimes with a general clause of conditions, usually the amount of the threatened punishment.[93]

The question also arises whether all perpetrators of criminal offenses, punishable by a sentence of imprisonment for a term of five or more years, should be prosecuted. From a humanistic point of view, the answer is positive, motivated by the aspiration that all serious crimes be punished. However, on the other hand, the question of the interests of the international community and the process economy also arises.[94]

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89 I. Josipović also speaks about the amount of threatened punishment as a condition for the application of universal declaration. See I. Josipović, „Pravni i politički aspekti spora Hrvatske i Srbije o nadležnosti za ratne zločine", *Hrvatski ljetopis za kaznene znanosti i praksu*, vol. 24, 1/2017, 39.

90 These are the most severe crimes such as genocide, crime against humanity, war crimes etc.

91 It can be said that all serious crimes are threatened with high penalties, but the amount of punishment for the application of universal principle in BiH (five years and more) is too low for an institute that carries *ius cogens* norms at its core.

92 For example, in the Criminal Code of the Republic of Croatia from 2011.

93 For example, CC BiH and the Criminal Code of the Republic of Serbia. See P. Aughterson, „Extradition: Australian Law and procedure, North Ride", Law Book CO., 1995. Available on: *http//www.catalouge.nia.gov.au.* (15.12.2022.)

94 M. Munivrana, *op. cit*., 224.

The CC BiH has maintained a limit of five years and longer for the application of criminal legislation against an alien who perpetrates a criminal offense against a foreign country or a foreigner outside the territory of BiH. This solution, as stated, was taken from the former CC SFRY, which was not changed even by the adoption of the CC BiH from 2003. Given the change in the social and legal system, and the change in penal policy since the independence of BiH, the mentioned limit should have been adequately changed, if the position for this establishment of universal jurisdiction was to be maintained. Now, the catalog of criminal offenses provided for by the universal jurisdiction is determined by the general clause and meets the requirements of legal certainty, which leads to legal uncertainty. A better solution would be if the law prescribed a catalog of criminal offenses to which universal jurisdiction applies.

2.1.5. Procedural determination of double criminality

In theory, the concepts of double criminality *in abstracto* and *in concreto* are distinguished. Double criminality *in abstracto* is a substantive legal concept according to which the executing state subsumes (summarizes) the facts and legal qualification of criminal offense from the received request under the corresponding norm of domestic criminal law.

In the case of double criminality *in abstracto*, it is always a matter of substantive legal assumptions that establish or exclude the punishability of the crime (e.g. characteristics of the nature of the criminal offense, delusion, necessary defense, etc.). Contrary to that, in case of double criminality *in concreto*, we are talking about procedural legal assumptions that do not affect the punishability of the crime, but rather the punishment of the perpetrator (e.g. amnesty, statute of limitation, age of the perpetrator, etc.).[95]

In addition to checking the matching of the characteristics of criminal offenses, it is also possible to check the existence of legal presumptions that such a criminal offense can be prosecuted in both countries. It is a procedural determination of double criminality.[96]

Article 210 (Special conditions for criminal prosecution), paragraph 1 of the CPC BiH stipulates that in the event that a criminal offense was committed outside the territory of Bosnia and Herzegovina, the prosecution may be initiated by the prosecutor, provided that this criminal offense is envisaged under the law of Bosnia and Herzegovina. Paragraph 2 of the same Article stipulates that the Prosecutor shall undertake the criminal prosecution only if the offense committed is prescribed as the criminal offense under the law of the country in whose territory the criminal offense was committed. Neither in that case shall the prosecution be undertaken,

95 D. Derenčinović, *op. cit.*, 266.

96 Article 210 of Criminal Procedure Code of BiH (*Official Gazette of Bosnia and Herzegovina*, nos. 3/2003, 32/2003, 36/2003, 26/2004, 63/2004, 13/2005, 48/2005, 46/2006, 76/2006, 29/2007, 32/2007, 53/2007, 76/2007, 15/2008, 58/2008, 12/2009, 16/2009, 93/2009, 72/2013 and 65/2018).

if under the law of that country the prosecution is to be undertaken only upon the request of the injured party. Nevertheless, the injured party filed no such request. In paragraph 3, it is established that notwithstanding the law of the country where the criminal offense was committed, the Prosecutor may undertake the prosecution if such an act is a criminal offense against the integrity of Bosnia and Herzegovina or if that act is considered a criminal offense under the rules of international law. It can be concluded that double criminality is treated in paragraphs 2 and 3, while paragraph 3 contains the substantive legal basis of the application of the real or protective principle (in the case of criminal offense against the integrity of Bosnia and Herzegovina) and the universal principle (although this act is considered a criminal offense according to the rules of international law). It is a kind of deviation from double punishment for the most serious forms of international crimes, which has its theoretical and practical basis.

3. UNIVERSAL JURISDICTION AS SUBJECT MATTER OF DISPUTE BETWEEN THE STATES

As we already stated, the application of universal jurisdiction can lead to misunderstandings and violation of interstate relations. As an example, we can cite the Report of the Council of Europe in which it is stated that according to African countries, they are individually targeted in the context of the arrest of their officials by European countries, and that the use of universal jurisdiction is politically motivated[97]. All this leads to the violation of interstate relations, violation of the state sovereignty, interference with the internal affairs of other states, etc., which calls into question the very application of universal jurisdiction.

One of the basic objections to universal jurisdiction is that it undermines the sovereignty of states. It affects the sovereign equality and independence of the states.[98] It is important to emphasize that the sovereign equality of the states is also proclaimed by the UN Charter. In addition, the right to punishment is an important attribute of sovereignty.

Most of discussions regarding universal jurisdiction revolve around the conflict between two legal principles. On the one hand, it is about the principle of sovereignty, and, on the other hand, the principle of individual responsibility for international crimes, that is, that the perpetrators of serious crimes do not go unpunished.

The central requirement is the need to determine the balance between the interests of the international community in punishing the perpetrators of the most serious crimes and the will of the states to preserve their sovereign prerogatives and, consequently, protect their citizens from foreign interference with their

97 Council of The European Union, The AU-EU Expert Report on the Principle of Universal Jurisdiction, Brussels, 16 April 2009. Available on: *https://data.consilium.europa.eu/doc/document/ST-8672-2009-REV-1/en/pdf.* (20.12.2023.).

98 *Ibid*.

internal affairs.[99] The application of universal principle, at first glance, may appear as if the state exceeds its competences and „abuses" its sovereign right to punishment, because it judges a criminal offense that has no connection with the values, goods and interests protected by its criminal legislation.[100]

In recent times, the best indicator of violated relations is the relationship between the Republic of Croatia and the Republic of Serbia, regarding the prosecution of Croatian officers and soldiers (the case of Velimir Marić and Tihomir Purda, for crimes committed during the war on the territory of the Republic of Croatia from 1991 to 1995). The most recent example of the repeated violation of these relations on the same basis is the confirmation of indictments in the Republic of Serbia, in July 2022, against four Croatian army pilots who were accused of committing war crimes against the civilian population during the „Storm". The tightening of interstate relations also occurred between Bosnia and Herzegovina and the Republic of Serbia, due to the same reasons (the cases of Ejup Ganić, Jovan Divjak, Ilija Jurišić and Husein Mujanović). The Serbian Law on the Organization and Jurisdiction of State Authorities in War Crimes Proceedings,[101] from 2003, is also a subject of dispute.[102]

4. CONCLUSION

Although universal jurisdiction is globally accepted today (in different ways and in different forms), there is no widely accepted definition of it. The reasons for this lie in the fact that there is no universally accepted document on this jurisdiction, and that it is left up to the states how to prescribe it, determine its characteristics, elements, scope and method of its application, etc. This fact leads to most of the problems related to this jurisdiction.

The term universal jurisdiction does not cause ambiguities in theory and practice. However, in order to understand this term and determine its definition, one must understand the social conditions and circumstances that led to the application of universal jurisdiction. By defining this jurisdiction, the requirement of definiteness of the legal norm would be fulfilled, and general clauses would be avoided, which is not the case now.

There is no scientific and professional agreement regarding the definition of universal jurisdiction. In addition, the legal texts of most countries did not comply with the principle *nullum crimen sine lege certa*. Likewise, by comparing

99 P. Baumruk, *op. cit*., 157.

100 S. Ganić, E. Ćorović, „Principi univerzalnog važenja krivičnog zakonodavstva i pitanje državnog suvereniteta", *Zbornik radova Pravnog fakulteta u Novom Sadu*, Novi Sad, 2013, 246.

101 *Official Gazette of the Republic of Serbia*, nos. 67/2003, 135/2004, 61/2005, 101/2007, 104/09, 101/2011, 6/2015 and 10/2023.

102 See М. Пајванчић, „О судској власти у уставном систему Србије у контексту међународних стандарда", *Зборник радова Правног факултета у Новом Саду*, Нови Сад, 3/2011, 7–21.

the normative definition of universal jurisdiction, its too broad definition can be observed.

Universal jurisdiction is determined in the criminal law of Bosnia and Herzegovina in such a way that the nomotechnique followed was taken from the Criminal Code of the former SFRY. The positive aspects of this determination are that it is a conditional universal jurisdiction, and the suspect's presence on the territory of Bosnia and Herzegovina is required. In addition to this condition, double criminality, the amount of the threatened penalty and the principle *aut dedere aut judicare* are required. On the other hand, the critics that can be directed at such determination of universal jurisdiction is that general clauses were used in a certain segment. First of all, it refers to the segment which prescribes double criminality („according to that legislation"). The following question in rightly asked - what was the intention of the legislator with such determination of this punishment? Does this provision refer to the legislation of BiH when domestic authorities apply universal jurisdiction or to the country in which the crime was committed? The same critics can be directed at the entity laws, with the fact that the CC BDBiH additionally clarifies that criminal prosecution shall be undertaken if it is a criminal offense and according to the law of the country in which the offense was perpetrated.

The amount of the threatened penalty is also not adequately applied. By limiting, or rather by prescribing the minimum of threatened sentence (over five years), *ratio legis* of universal jurisdiction itself is lost. Its *ratio legis* is not in the amount of the threatened punishment, but in the seriousness of the international crimes and acts for which it is prescribed. In this way, universal jurisdiction is also used for „ordinary" criminal offenses, thereby losing its universality.

Finally, we believe that universal jurisdiction should be made internationally binding through its internationalization. The best way to do this is to adopt an international convention on universal jurisdiction within the framework of the UN. Universal jurisdiction without an international convention is more permissive than mandatory in nature.

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UNIVERZALNA JURISDIKCIJA U KRIVIČNOM PRAVU BOSNE I HERCEGOVINE

Rezime

Univerzalna krivičnopravna jurisdikcija predstavlja jedno od načela teritorijalnog važenja krivičnog zakonodavstva. Radi se o primjeni krivičnog zakonodavstva neke države na osobe koje nisu njihovi državljani niti su počinili krivično djelo protiv njihovih državljana ili te države, niti je to djelo počinjeno na teritoriji te države. Dakle, radi se o odstupanju od klasičnih postavki krivičnog prava u pogledu teritorijalnog važenja. U prvom planu nije veza između konkretne države i izvršenog krivičnog djela, već interesi cjelokupne međunarodne zajednice. Riječ je o nacionalnom procesuiranju, u prvom redu međunarodnih krivičnih djela.

U krivičnom zakonodavstvu BiH univerzalna jurisdikcija uređena je po uzoru na Krivični zakon bivše SFRJ. Radi se o preširokom određenju univerzalne jurisdikcije, i to i u kontekstu na koja krivična djela je primijeniti, tako korištenja generalnih i nejasnih klauzula. Pored kvalitetnog uređenja na nacionalnom nivou, za efikasnu primjenu univerzalne jurisdikcije ključni su i međudržavni sporazumi, kojima se dodatno unapređuje međunarodna krivičnopravna saradnja, u smislu ustupanja dokaza, predmeta itd.

U radu je dat prikaz odgovarajućih odredbi iz Krivičnog zakona BiH, sa posebnim osvrtom na ključne elemente uslova univerzalne jurisdikcije. Nastojeći dati odgovore na postavljena pitanje, autori analiziraju i univerzalnu jurisdikciju kao predmet spora među državama. Zaključno, autori daju i određene de lege ferenda prijedloge.

Ključne riječi: univerzalna jurisdikcija, teritorijalno važenje, krivično djelo, krivični zakon, Bosna i Hercegovina.

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