IMMUNITY VERSUS IMPUNITY IN THE CONTEMPORARY INTERNATIONAL CRIMINAL JURISDICTIONAL FRAMEWORK

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Аннотация

В статье рассматриваются особенности международной уголовной юрисдикции в случаях привлечения к ответственности подозреваемых в совершении международных преступлений и защищенных иммунитетами высших государственных должностных лиц. Анализируется соотношение правовых традиций государств-участников Римского статута относительно иммунитетов и их принятых международных обязательств пересмотреть национальный подход к иммунитетам должностных лиц в соответствии с нормой, устанавливающей недопустимость ссылки на должностное положение в случае совершения международного преступления, входящего в предметную юрисдикцию Международного уголовного суда. Подчеркивается, что новый юрисдикционный режим, установленный МУС, повлиял на место и роль иммунитетов в системе современного международного уголовного права, а следовательно – на их правовое значение на межнациональном и внутригосударственном уровнях. Автором сделан вывод о том, что существующие нормы международного права оставляют нерешенной проблему баланса, с одной стороны, правового обеспечения борьбы с безнаказанностью должностных лиц, и с другой стороны – исключения возможности злоупотребления уголовно-правовыми средствами в политических целях.

Ключевые слова: международная уголовная юрисдикция, иммунитет, международные преступления, Международный уголовный суд.

Summary

The article focuses on the specifics of the international criminal jurisdiction when the highest state officials privileged with immunities are suspected in committing international crimes. The author considers the correlation of the ICC Rome Statute member states' legal traditions concerning immunities and their obligations to revise the domestic approach to the immunities issue according to the norm establishing the irrelevance of the state capacity when international crimes within the ICC jurisdiction are in question. It is emphasized that the new jurisdictional regime established by the ICC has influenced the legal substance of immunities institute in the contemporary international criminal law and therefore at the international and national levels. The conclusion is drawn that the existing provisions of international law resolve the problem of the balance of avoiding impunity for international crimes from one side, and avoiding the abuse of criminal component in political games from the other.

Key words: international criminal jurisdiction, immunity, international crimes, International Criminal Court.

The international criminal jurisdiction in the sense of the right of the international judicial bodies in accordance with their competence to consider and decide on criminal cases is a relatively new legal phenomenon [1]. High expectations are laid on it in fighting against international crime. One has to admit that at the beginning of the new millennium, the prevailing culture of impunity continues to encourage further expansion of human rights violation. The international justice can help to ensure that international crimes do not go unpunished.

Studying the jurisdiction of international criminal courts and tribunals is gaining significant scientific and practical importance. A large contribution to the development of the idea of the international criminal justice was made by many scholars, having dedicated a number of their publications and practical work, among which one could mention K. Ambos, L. Arbour, M.H. Arsanjani, K.D. Askin, M.Ch. Bassiouni, C.L. Blakesley, A. Bos, L. Caflisch, A. Cassesse, R.S. Clark, J. Crawford, H.A.M. von Hebel, P. Cesare, Ph. Kirsch, R. May, T. Meron, J. Murphey, G.O.W. Mueller, V.P. Nanda, R.B. Philips, G. Gaja, A. Pellet, L.N. Sadat, M. Scharf, D.J. Scheffer, A. Triffterer, V. Tochilovsky, A. Zimmermann, J. Stone, R.K. Woetzel, E. Wilmshurst. In the Soviet legal science the concept of international criminal responsibility was developed in the works of A. Trainin, N. Polansky, A. Poltorak, D. Levin, N. Lebedev, I. Ledyakh, P. Romashkin, S. Chernichenko and other scientists. Within the last decades there has been a tendency to increase the attention to the topic. In the post-Soviet period significant contribution to the development of the concept of international criminal jurisdiction was made particularly by I. Blishchenko, Y. Vasiliev, R. Kalamkaryan, I. Kostenko, R. Mullerson, A. Naumov, Y. Reshetov, V. Rusinova, I. Fisenko and many other reputable lawyers. In the Ukrainian legal science the issues of the international criminal justice and international legal regulation against large-scale violations of human rights have been approached by V. Antipenko, M. Buromensky, V. Butkevich, S. Vihrist, N. Gnatovsky, V. Gutnick, D. Kasinyuk , D. Kuleba, N. Zelinskaya, I. Lukashuk, A. Matsko, N. Paszkowski, T. Syroed.

The adoption of the Statute of the International Criminal Court (ICC) was a major step in a longstanding effort to establish a permanent forum of international criminal justice [2]. The attempts to create a universal judicial mechanism for prosecuting criminals responsible for committing the most serious crimes, were undertaken since the beginning of twentieth century, starting from the World War I and continuing after Nuremberg Tribunal establishment [3]. Nuremberg precedent played a crucial role in developing the basic principles of the international criminal justice as well as in defining crimes subject to it [4]. It was the first successful precedent of prosecuting individuals in the international judicial body by states on behalf of international community [5]. In 1947, the UN General Assembly requested that the International Law Commission, then referred to as the Codification of International Law, begin to codify the principles of international law that emerged from the Nuremberg Tribunal; the first draft statute for establishing an ICC was completed in 1950 [6]. Nonetheless serious attempts were made by the international community after

the World War II to establish a permanent court that would prosecute individuals on the basis of international criminal jurisdiction, constant disagreement with regard to the scope and definitions of criminal offences which would constitute the subject matter jurisdiction of the future international criminal court, as well as political situation in light of the Cold War, made all efforts unsuccessful [7]. The end of the East-West confrontation was accompanied by horrible events happening in the former Yugoslavia and later in Rwanda [8].

Atrocities that occurred and failure of the domestic judicial systems to prosecute responsible for them individuals made international community come back to the idea of common efforts in exercising justice [9]. Eventually two ad hoc Tribunals (one for the crimes committed in the Former Yugoslavia and one for those in Rwanda) were established by virtue of Security Council resolutions in application of Chapter VII of the UN Charter [10]. The basis for the jurisdiction of both Tribunals was found in the Security Council's competence according to the UN Charter and later was challenged by the Defence in one of the first ICTY cases, Tadic [11]. The imperative character of jurisdiction, right of the Tribunals to withdraw cases from domestic courts, and their establishment in general were viewed illegitimate; Defence argued that there was no sufficient basis set in the UN Charter which would authorize the SC to establish judicial bodies [12]. Together with nevertheless effective functioning of ICTY and ICTR, which prosecuted individuals for genocide, war crimes and crimes against humanity, the idea of permanent international criminal court based on the international treaty and thus having 'agreement' jurisdiction was gaining a certain practical shape [13].

The Preparatory Committee of the International Law Commission was working on the draft of the future ICC statute, and finally in 1994 the ILC produced a comprehensive draft statute for an international court which was submitted to the UN General Assembly. Four years later, on July 19, 1998, the ICC Statute was adopted in Rome [14]. While the Statute was drafted, the ideal concept of the universal international court exercising criminal jurisdiction over individuals who committed international crimes was darkened by expectable lack of consensus among states with regard to many disputable issues [15]. These issues related as to general questions as finding a balance between remaining states' sovereignty untouchable and giving ICC criminal jurisdiction over their citizens; level of the SC control over the ICC activities as well as procedural matters and subject matter jurisdiction [16].

Despite these difficulties, the Preparatory Committee was able to resolve or narrow many of the issues, such as parameters of the principle of «complementarity», governing the relationship between the ICC and national judicial systems and other controversial issues [17]. The ICC Statute is a complex document presenting a consensus of international community and therefore is quite different from the ICTY an ICTR Statutes as well as national criminal legal laws, which do not have to satisfy interests of various states with various political concerns [18]. The basis of its jurisdiction is a treaty and therefore it does not establish universal jurisdiction: it exercises territorial and active personal principles of jurisdiction [19]. The unique nature of the Rome Statute explains complex system of provisions set in it [20].

While implementing the ICC Statute into domestic systems, the states faced the necessity of changing not only constitutional provisions, but also criminal and criminal procedure law, criminalizing the offenses under the Rome Statue and providing procedural guarantees for cooperation with the Court. All these changes were made in order to bring national legislation in accordance with the Statute's provisions. They also served an idea of development of the legal foundation for domestic prosecutions of the international crimes [21]. This idea is consistent with the complementarity principle of the ICC: establishment of the Court and its jurisdiction as provided by the Statute had as an objective not to limit national courts but rather urge them to conduct prosecutions of international crimes [22].

The ratification process included a thorough analysis of the Statute in light of the domestic legal order, which, in many countries, has led to intense debate of the compatibility of the Rome Statute with national Constitutions [23]. Main constitutional issues included extradition of the state's nationals to the ICC [24], possibility for the court to impose a term of life imprisonment [25], and the constitutional immunities, such as those conferred on heads of states or parliamentarians, with the duty to arrest and surrender suspects, irrespective to their official status. Other controversial issues, effected criminal and criminal procedure law were exercise of the prerogative of pardon; execution of requests made by the court's Prosecutor [26]; amnesties decreed under national law or the existence of a national statute of limitations [27]; and the fact that persons brought before the court will be tried by a panel of three judges rather than a jury [28].

Several factors are important for analyzing the constitutional incompatibility: prohibition of the reservations (art. 120 of the Statute); complex process of amending constitutions; and the nature of the legal system of the Member State. The last one is especially important for the purpose of the present analysis. Dualist countries, when they deemed provisions of the Statute being inconsistent with their domestic law to the extent that it became an obstacle for the Statute's ratification, had to find a way to harmonize their national law, and constitutions in particular, with the Rome Statute. For monist states, ratification of the Statute formally did not create a necessary burden of adjusting national legislation [29]. The rank of international rules and its position within the national legal order is established by constitutions both in monist and dualist states [30]. The trend nevertheless exists that if the conflict between national and international law arises, monist states do automatically recognize precedence of the international law, and human rights norms in particular. With regard to constitutional provisions and their relation to international law rules, they may be either overridden by international law or have an equal rank [31].

Some states do not represent a clear monist or dualist system. Germany, for example, is a hybrid monist/dualist system [32]. It is required that «act of consent» introduces a treaty into domestic system although general principles o international law and customary law constitutes part of federal law automatically [33]. According

to the Constitution of Germany, Article 25 «Public international law and federal law», «[t]he general rules of public international law form part of the Federal law. They take precedence over the laws and directly create rights and duties for the inhabitants of the Federal territory» [34]. Since the Rome Statute is a treaty it has a rank of legislative act which incorporated it into national law, ICC Statute Act, its provisions theoretically could be overridden by other legislation. The *lex posterior rule* applies here; but in regard to treaties in the field of human rights, which is Rome Statute in its nature, the more recent opinion argues in favor of the concept of *lex specialis* [35].

It would seem that dualist states had to perform more extensive legislative activity on adjusting national constitutions while implementing the Rome Statute into domestic law. However, most of countries, representing both dualist and monist legal systems, conducted a harmonization process in a way requiring only minor changes [36]. Two main methods of harmonization of national constitutions with the Statute were amendment and interpretation. Amendment of the constitutions was done in a different way in different countries: in some constitutions concrete controversial provisions were amended [37]. In German Constitution, for instance, Article 16 was changed: the provision stated that «[n]o German may be extradited to a foreign country» was amended in a way to allow extradition to «to a member state of the European Union or to an international court of justice as long as the rule of law is upheld» [38]. Another amending approach, exercised by many monist and dualist countries was general in nature and did not specify the constitutional provisions to which it was intended to relate. For example France, Brazil, Belgium, and Luxemburg, amended their constitutions with the new provision stating that the states «recognize the jurisdiction of the ICC» (France); «nothing in the constitutions can be an obstacle to ratify the Rome Statute and fulfil obligations according to it» (Luxemburg) [39]. Even though it is called amendment method, the consequence of adding such provisions was flexible interpretation of the constitutional provisions which nevertheless had controversial character. It is suggested that such general amendment provides or clarifies that the treaty would take precedence over constitutional provisions in the event of any conflict, as, for instance, was presented in Belgium legal position [40]. In Netherlands, Ratification Act was adopted which established that the Rome Statute overrides the Dutch Constitution to the extent of any inconsistency; the same approach was exercised in Finland through Cooperation Act [41]. Interpretative approach was used in most of the Member States: their constitutions were read as consistent with the Rome Statute [42]. As a result, no amendments were made to the constitutions; closer analysis of the Statute together with the relevant constitutional provisions has led to an abeyance of initial concerns about compatibility, in favour of the view that the Statute and the constitution can be read harmoniously. Number of states signed but did not ratify the Rome Statute referring to constitutional incompatibility. However, one may find rather political than legal reasons: the constitutional problems raised derive first of all from the effect of transfer of sovereignty resulting from the ratification [43]. Legal analysis done by the Member States' Constitutional Courts, interpretation and relevant legislative efforts of states clearly showed that from the legal point of view, the spirit of the Statute and its concrete provisions are coherent with the contemporary legal order of the civilized nations. In many countries harmonization of national law went far beyond constitutional review. Germany, for example, adopted a largely independent body of rules on a form of a Code of Crimes against International Law (CCAIL) in June 2002 [44]. It was drafted in order to align German criminal law with the Rome Statute, and to facilitate the domestic prosecution process which has priority. The main objective of the Code was to implement penal regulations of the ICC Statute. Other objectives included to promote legal clarity and practical application with standards in a single body of rules; to guarantee indubitably for the **complementarity** of the prosecution responsibility of the ICC that Germany is always in the position to prosecute crimes for which the ICC is competent [45]. All crimes within the subject matter jurisdiction of the ICC were incorporated into German domestic law pursuant to the CCAIL. Moreover, the Code went beyond the requirements of the Rome Statute and criminalized offences according to customary international criminal law which are wider in scope than the subject matter jurisdiction of the ICC, such as Protocols to Geneva Conventions.

I would like to focus on one provision of the Rome Statute and its impact on national law of the Member States: irrelevance of the official capacity and immunities with regard to the exercise of the ICC jurisdiction. The problem of immunities granted by most of the Member States' constitutions to heads of state or government, members of government or parliament, elected representatives or government officials and establishing of the ICC jurisdiction over them was one of the first to resolve while implementing the Rome Statute into domestic legislation [46].

The strong tradition to entitle certain categories of state officials with immunity from criminal jurisdiction pursuant both to national and international law was explicitly overridden by Article 27 (1, 2) of the Rome Statute, which establishes that «[t]his Statute shall apply equally to all persons without any distinction based on official capacity…» (27 (1)); «[i] mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such person» (27 (2)). In order to comply with the Rome Statute, the Member States must clarify (by amendment or by authoritative interpretation) that their constitutional provisions guaranteeing immunity for state officials do not preclude surrender to the ICC. Almost no countries changed their constitutional provisions covering immunity issue. As it was mentioned above, amendment of constitutions mostly had general harmonizing nature. Norway for example, added a provision into the Constitution stating that «[t]he Statute … does not conflict with the Constitution.» Spain took similar approach; however both Spanish and Norwegian Constitutions grant absolute immunity for the Kings while the Statute establishes that the state shall disregard immunity if it has to surrender a suspect to the ICC. The main point in reasoning was that possibility of the conflict between these provisions seems to be very hypothetical and must not create an obstacle for prompt ratification of the Rome Statute [47].

There were several ways chosen by interpretative authorities in order to establish consistency of the Statute and constitutional provisions with regard to immunities [48]. First emerged from wording of the Statute which requires recognition only of the ICC jurisdiction over immune individuals, and not explicitly of domestic and foreign courts' jurisdiction; therefore irrelevance of immunities outside national judicial system in compatible with constitutions. Second, particularly interesting, was recognition of the customary international rule that immunity is irrelevant when international crimes are in stack and therefore surrender of such an individual would be consistent with the international obligations of the state. Third approach was rupturing of the constitutional order by commission of heinous crimes. In situations, where international crimes are committed by a senior state official, the very constitutional framework of the state is likely to have been profoundly ruptured and therefore a perpetrator violating constitutional principles cannot rely on the constitution for protection [49]. For instance, the Finnish Constitution confers some immunity on the President and Ministers and there are particular procedures regarding the institution of proceedings against the President, Ministers and Members of Parliament in other laws. The Finnish Parliament decided that because of the nature of the seriousness of the crimes within jurisdiction of the ICC, these provisions would not apply in a relevant situation so there was no need to expressly override them [50].

A clear distinction should be drawn between constitutional provisions granting immunity and those requiring additional procedure for arrest and prosecution of a state official. For example, pursuant to article 46 (1) of the Constitution, («Indemnity and immunity of deputies»), «[a] deputy may not at any time be prosecuted in the courts … for a vote cast or a statement made by him in the House of Representatives [Bundestag] or in any of its committees» [51]. This is a provision establishing immunity. Parts (2), (3), and (4) require permission of the Bundestag in order to arrest or prosecute a deputy. It means that there is immunity from prosecutions for statements made in Bundestag, however that does not mean that the Constitution provides exclusions from criminal liability; it just requires permission of the Parliament to start proceedings. Moreover, article 24 of the Constitution authorizes the German Parliament to transfer part of German sovereign rights to an international body like the ICC. It is considered that Article 24, which states that «[t]he Federation may by legislation transfer sovereign powers to intergovernmental institutions», overrides Articles 46 so that the potential immunity conferred in the Constitution is not applicable to the ICC. As for domestic prosecutions, the courts can try deputies upon permission of Bundestag; there is no general immunity from criminal jurisdiction. Furthermore, in case of international crimes Bundestag would be obliged to give such permission because it would be within international obligations of Germany. Thus the related provisions of the German Constitution were not changed because they do not conflict the Statute [52].

Both dualist and monist states mostly chose the broad interpretative approach in harmonizing their domestic law with the Rome Statute with respect to immunity issues. It was fully justified by absence of any provisions of the Rome Statute explicitly obliging states to change their national law and in particular there are no provisions requiring abolishing immunities with respect to other than ICC's jurisdiction [53]. The states that ratified the ICC statute agreed with the ICC's jurisdiction over their immune state officials for sake of justice guaranteed by the complementarity principle of ICC. However, states did not agree to eliminate the principle of immunity at all, even with respect to international crimes; none of the Rome Statute provisions explicitly oblige states to conduct domestic prosecutions over international criminals on the same principles that are applied by the ICC. However, the principle of the complementarity as well as wording of the **Preamble** and **cooperation provisions** of the Rome Statute constitute: a) duty of the Member States to prosecute crimes within the subject matter jurisdiction of the ICC; and b) duty to ensure that national legislation gives a procedural possibility for states to arrest and surrender individuals to the ICC regardless of their official capacity. Both obligations deal with different means of exercising criminal jurisdiction by Member States. Does it mean that legislation respecting immunity from criminal jurisdiction is an obstacle for full compliance with the states' international obligations under the Rome Statute? In other words, would national courts' acceptance of immunity defense in case of international crimes comply with the state's international obligations despite that fact that they are obliged to disregard it when issuing an arrest warrant? [54]. The analysis presented here is based on the assumption that the state recognizes the precedence of the international obligations over the constitution and laws either being monist state, or enacting law providing so.

First of all, before analyzing whether such existing legislation is coherent with the Statute, one should answer the question if a duty to prosecute domestically under the Rome Statute exists in general. If there is no such an obligation, then conflicting provisions of national law are irrelevant. Both explicit language of the Preamble of the Rome Statute and implicit meaning of the admissibility provisions, construing principle of complementarity, make possible to suggest that there is such a duty [55]. According to the Preamble, states agreed on the Statute «affirming that the most serious crimes of concern to the international community as a whole *must not go unpunished* and that their *effective prosecution must be ensured by taking measures at the national level* and by enhancing international cooperation», «determined to *put an end to impunity for the perpetrators* of these crimes and thus to contribute to the prevention of such crimes»; «recalling that it is the *duty of every State to exercise its criminal jurisdiction over those responsible for international crimes»* [56]. Principle of complementarity does not constitute *any* explicit obligation. It is a strong presumption upon which the concept of complementing nature of the ICC was developed, that states would take all possible measures in order not to be determined as «unwilling» or «unable» to conduct domestic prosecutions [57]. However, principle of complementarity has not only declarative character, it has very practical impact on the implementation process. This principle means that a state with jurisdictional competence has the first right to institute proceedings unless the ICC itself decides that the state «is unwilling or unable genuinely to carry out the investigation or prosecution» [58]. The assumption

in Rome was that such a determination would be straightforward for the ICC in either of two situations: when the state chooses not to exercise its jurisdiction («unwilling»); or when the states' legal and administrative structures have broken down («unable») [59].

There is the third possibility for the ICC to determine the state as «unable»: when the national legislation, including both criminal and criminal procedure law, does not ensure prosecutions of the crimes within the subject matter jurisdiction [60]. This brings us to the conclusion that in order not to be determined as «unable» state, its legislation should comply with the Rome Statute, including provisions of irrelevance of immunity. This conclusion does not mean the state is obliged to do so; if the state's legislation affirms immunity from domestic prosecutions it would then mean that the only recourse would be to arrest and surrender such a person to the ICC upon its request [61]. But isn't arrest and surrender the individual to the international criminal tribunal a clear exercise of the state's *criminal jurisdiction* exactly from which such an individual is immune?

Secondly, the Member State is obliged to «comply with requests for arrest and surrender» suspects to the ICC, according to the Article 89 of the Rome Statute «Surrender of persons to the Court.» Since the ICC does not recognize immunity and has jurisdiction over individuals regardless of their official capacity, it might be a case when the Court requests to arrest and surrender a person who is entitled immunity according to the constitution, for example a senior state official of this state. There would be a conflict between national constitution which has been nevertheless interpreted as harmonic with the Statute, and obligations pursuant to the Statute. Since obligations under the Statute presumably precede over national law, provisions of the Statute establishing them would override national norms granting immunity. Thus there is an international obligation of Member States to exercise their criminal jurisdiction over immune individuals arresting and surrendering them to the ICC upon request of the Court; and national legislation, including constitutions, may not restrict it [62].

Moreover, under the Rome Statute, (Article 88 «Availability of procedures under national law»), the Member States shall «ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part» (Part 9, «International Cooperation and Judicial Assistance») [63]. That means that there is an obligation of the Member States to ensure that their domestic law makes possible enforcement of the Article 89, obliging arrest and surrender a suspect, regardless of his official capacity, to the ICC upon its request.

Therefore, the following conclusions can be made:

1. There is an international obligation of the Member States to prosecute for international crimes within their criminal jurisdiction under the Rome Statute [64]. Therefore national provisions restricting fulfillment of these obligations are overridden by the Statute and thus unenforceable.

2. Another international obligation (according to the Statute) includes duty of states to exercise their criminal jurisdiction when arresting and surrendering individuals to the ICC, including those granted immunity according to the constitutions; and ensure that national legislation gives grounds to act so.

3. States that that implement this obligation, without providing for removal of immunities for domestic prosecutions, would be in a situation where they can only surrender a person but cannot prosecute [65].

4. Legislation granting immunity from criminal jurisdiction is incompatible with the Statute. Therefore the immunity defense based on this legislation could be unlikely accepted by the court in case of international crimes, even if the person granted absolute immunity by the constitution of the state.

Therefore, irrelevance of immunity in domestic prosecutions is «implicitly presupposed and required by the Statute for the proper functioning of complementarity principle» [66]. Changes in national legislation if it is inconsistent with the Statute with regard to the issue here «are legally imposed» by Article 27 (2) read in conjunction with Article 88» [67]. All these conclusions allow us to suggest that the national courts of the Member States have strong legal basis under the Rome Statute for denial of immunity defense when international crimes are at stack even if changes in relevant legislation were not done. Another question is whether they would ever do so.

Practically, there is almost no chance that national courts would try, for example, a head of their state. First, because the crimes within the ICC's jurisdiction usually have massive and systematic nature, and involve active participation of state authorities. If it is a weakened country suffering from genocide and other international crimes, there is a small chance that judiciary would be able to function properly. If it is a strong power-centralized state and senior state official would be suspected in commission of such crimes, there is again almost no possibility that judiciary would be willing to go against executive. And if a state functions according to the rule of law, and judiciary would be willing and able to apply provisions of the Rome Statute and follow the state's international obligations, it is hard to imagine that such a state would ever suffer from any of the crimes within the jurisdiction of the ICC. As it was proven above, there is an international obligation of Member States to prosecute individuals within their jurisdiction for international crimes under the Statute. Preamble says that states have to «exercise criminal jurisdiction»; [68] Article 17 establishes that «the case is inadmissible if the case is being ... prosecuted by a State *which has jurisdiction over it*….» Consequently it seems that if the state recognizes universal jurisdiction, it has an obligation to prosecute all individuals regardless of their nationality [69]. Fulfilment of the duty to prosecute may also mean extradition of a suspect to the state of his citizenship, pursuant to international agreements on criminal and judicial assistance (if such a state seems to be «willing» and «able» to prosecute; otherwise the person might be surrendered to the ICC).

The Statute of the ICC does not require states to invoke universal jurisdiction. However, with regard to some of the offences within the subject matter jurisdiction of the ICC, there are other conventional international obligations of states to exercise it. This duty to either prosecute or extradite is contained in Convention (IV) relative to the Protection of Civilian Persons in Time of War, Article 146 [70]. States parties to the

Geneva Conventions are obliged to seek out and either prosecute or extradite those suspected of having committed «grave breaches» of those Conventions: «Each High Contracting Party shall be under the obligation to search for persons alleged to have committed or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case» [71].

With respect to other crimes under the Rome Statute, there are no treaty international rules which explicitly require exercising of universal jurisdiction. However, it may be argued that extraterritorial punishment of genocide, for instance, has become a customary international rule. Moreover, prohibition of genocide reached *jus cogens* rank and there is *erga omnes* obligation to prevent and punish genocide. Both concepts *(jus cogens and erga omnes)* have universal character. There is uncertainty as to whether obligations *erga omnes* involves the imposition of obligations and duties on states or merely the granting of certain rights. Bassioni considers that one of the consequences of such a characterization is that states must recognize the universality of jurisdiction over such crimes and must not grant immunity to the violator of such crimes [72]. However, full analysis of correlation of *erga omnes* and universal jurisdiction would exceed the scope of the paper [73]. The only strong suggestion may be made that when *erga omnes* obligation is related to international crimes it gives right to states to prosecute responsible for them individuals applying principle of universality [74]. In *Nulyarimma v. Thompson,* the Federal Court of Australia found that «the prohibition of genocide is a peremptory norm of customary international law *(jus cogens)* giving rise to non-derogable obligations *erga omnes* that is, enforcement obligations owed by each nation State to the international community as a whole….» [75].

Ad hoc Judge Kreca in his dissenting opinion in *Bosnia v. Yugoslavia* stated that «the norm prohibiting genocide, as a norm of *jus cogens*, establishes obligations of a State toward the international community as a whole, hence by its very nature it is the concern of all States. As a norm of *jus cogens* it does not have, nor could it possibly have, a limited territorial application with the effect of excluding its application in any part of the international community. In other words, the norm prohibiting genocide as a universal norm binds States in all parts of the world» [76].

With regard to crimes against humanity, there are no treaties establishing universal jurisdiction. There is also no universal opinion whether it is *jus cogens* norm or prosecution of them is an *erga omnes* obligation even though such opinions prevail in international and domestic jurisprudence [77]. Therefore, there is no formal duty of states to recognize universal jurisdiction with respect to all crimes within the ICC jurisdiction neither under Rome Statute and other treaties nor according to the customary law. However, recognition of necessity to jointly fight crimes against international law made states go beyond the scope of their international obligations. Now most of European states implemented the principle of universal jurisdiction into their criminal and criminal procedure law: Estonia, Netherlands, Belgium, Norway, Finland, Germany and others; some of them only with regard to ICC crimes, some on a general basis. For example, Germany established universal jurisdiction when international crimes are in stack. According to the Code of Crimes against International Law (CCAIL), Section 1, German public prosecutors are *allowed* to investigate the crimes under the Rome Statute regardless of where, when, by whom or against whom the crimes are committed: «even when the offence was committed abroad and bears no relation to Germany «[78]. The question remains whether the domestic courts of Germany are *obliged* to prosecute any individual for international crimes. According to the Criminal Procedure Code of Germany, Article 153 (f) [79] which was added to the Code according to CCAIL, «a prosecutor need not prosecute if the accused is not present in Germany and such presence is not to be anticipated».

Belgium exercised the same approach deciding on the extent of applicability of the universal jurisdiction. In *Sharon*, the complaint was brought before the Belgian court concerned the killings of 900 Palestinian men, women and children in the Sabra and Shatila refugee camps in the suburbs of Beirut, Lebanon in September 1982 [80]. The Court's decision was based on its analysis of Belgian law which concluded that no investigation can be opened in Belgium for war crimes, crimes against humanity or genocide unless the suspect is found in the country. Court of Cassation upheld the first instance decision [81]. Therefore, even though domestic acceptance of the universal jurisdiction and duty to prosecute for international crimes together may create an obligation to exercise criminal jurisdiction by Member States over all persons regardless of their nationality, the procedure and limits of such universal jurisdiction are governed by national law. It might be clearly suggested only that national courts are authorized to prosecute such individuals; or extradite them either to the state or to ICC [82].

As one can see, the Rome Statute does not explicitly *oblige* states to disregard immunity, it declares that the ICC's jurisdiction shall not be barred by immunity under both national and international law (27 (2)). Principle of immunity of foreign state officials from domestic prosecution has not been declined and will more than unlikely be eliminated because of the risk of politically motivated prosecutions over foreign state officials. There are reasonable grounds to believe that states might use accusation in commission of crimes in political games. This is one of the reasons why we can only find precise rules in international law which give jurisdiction over immunity privileged individuals to international criminal tribunals. But since the crimes at issue are those which threat international community as a whole, one may argue that there are conflicting interests: to avoid political and ambiguous prosecutions but to guarantee prosecution of any individual responsible for international crime. If such a person falls under the jurisdiction of the ICC than even if the state does not prosecute him there are legal grounds to try him in the ICC. But if the person is not national of the Member State and did not commit a crime on the territory of the Party, then only by exercising universal jurisdiction the international community may ensure his punishment. Therefore, if a state declines to prosecute an individual on the basis of his immunity and this individual does not fall under the

jurisdiction of the ICC, there are almost no possibilities to hold him responsible because usually high level state officials are not tried in their own states. However, states do not act according to moral obligations but according to their national law and international obligations. Variety of decisions made both by international and domestic court shows inconsistency of applicable international law and approaches of its interpretation. This is a result of a conflict between treaty and customary international rules respecting immunity from foreign prosecutions (which have never been declined by international law) and principle of irrelevance of immunities when international crimes are in stack together with the general obligation to prosecute international crimes. With regard to international criminal prosecutions carried out by ICTY, ICTR, and ICC, the principle of irrelevance of official capacity has formed a customary rule establishing exception from immunity [83]. Adoption and implementation by states of the Rome Statute reasoned not only review and changes in national law made in order to comply with the Statue's provisions; it affected existing international rules which may influence application of the Statute.

Changes on a national level included explicit or implicit elimination of all types of immunities, traditionally granted to individuals by a state, in cases of international crimes covered by the ICC jurisdiction. Interpreting the principle of complementarity, irrelevance of immunities was accepted by countries not only with regard to compliance with the Court's jurisdiction over immune persons, but also on a domestic level, which would allow national courts to prosecute this state's officials for international crimes regardless of their official capacity. Moreover, the Rome Statute had a considerable impact on international law on immunities [84]. Drafters of the ICC Statute did not intend to influence existing rules of international law. However, the Rome Statute's interpretation created uncertainty once more rising a question of a balance between values of a state's sovereignty and human rights protection by punishment of international crimes. The conflict between these values is reasoned by a specific nature of human rights law and other norms of international criminal law. As the ICTY held in Kupreskic, «norms of international humanitarian law were not intended to protect State interests; they were primarily designed to benefit individuals *qua* human beings» [85]. International rules regulating immunities has been reconsidered in light of existence of controversial provisions between customary and treaty norms respecting personal and functional immunity of foreign state agents and developing principle of irrelevance of immunity in cases including international crimes. To become an equal respected member of an international society, it is important to implement the Rome Statute. Ukraine, seeking recognition as a democratic state, must ratify the Statute and therefore change domestic legislation according to its principles, in particular, with regard to the immunities from criminal prosecution of state officials.

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1. The prosecutor can refrain from the prosecution of an act punishable according to §§ 6 to 14 of the CCAIL in the cases of § 153c (1) Nr. 1, 2, if the accused is not present in the country and such a presence is not to be expected.

Is in such a case of § 152c (1) Nr. 1 the accused a German, then this is only

valid if the act is being prosecuted by an international court or by a state on whose territory the act has been committed or whose citizen was injured by the act.

2. The prosecution can especially refrain from the prosecution of an act punishable according to §§ 6 to 14 of the CCAIL in the cases of § 153c (1) Nr.1, 2, if :

1) no suspicion is present against a German;

2) the act was not committed against a German;

3) no suspect is present in the country and such a presence is not to be expected and;

4) the act is being prosecuted by an international court or by a state on whose territory the act has been committed or whose citizen was injured by the act.

The same is true if a foreigner accused of an act committed in a foreign country is present in the country, but the requirements according to sentence 1 Nr. 2 and 4 are fulfilled and the extradition to an international court or the extradition to the prosecuting state is admissible and intended.

3. Is, in the cases of (1) or (2), the public claim already brought forth, then the prosecution can withdraw the charges at any stage of the trial and stop the trial.

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ДОГОВОР ПОРУЧЕНИЯ В РИМСКОМ ЧАСТНОМ ПРАВЕ И ЕГО РЕЦЕПЦИЯ В ГРАЖДАНСКОМ ПРАВЕ УКРАИНЫ

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Summary

The article is devoted researching of contract of commission in Roman private law and its subsequent reception by the legislation of the separate European states.

Author analyses evolution of contract of commission in Roman private law and its subsequent transformation in the process of development of civil legislation in separate countries. Author paid attention to process differentiation in the theory of civil law of relations of commission with the relations of representative office. In article analyses changes in scientific approaches taken in the dynamics of the development to the relations of representative office and their influence on correlations of representative relationships with the contract of commission, which is envisaged at legislative level.

Correlation of contract of agency and delivery of warrant is investigational in a pre-revolution, soviet and Ukrainian legislation. Author drawn conclusion about basic progress of contract of commission trends in modern legal practice.

Key words: representative, contract of commission, warrant, reception, Roman private law, reception of Roman private law.

Аннотация

Статья посвящена исследованию договора поручения в римском частном праве и его последующей рецепции законодательством отдельных европейских государств.

Проанализирована эволюция договора поручения в римском частном праве и его последующая трансформация в процессе развития гражданского законодательства отдельных стран. Обращено внимание на процесс разграничения в теории гражданского права отношений поручения с отношениями представительства. Проанализированы изменения в научных подходах, взятые в динамике своего развития к отношениям представительства, и их влияние на соотношения представительских отношений с договором поручения, закрепленные на законодательном уровне.

Исследовано соотношение договора поручения и выдачи доверенности в дореволюционном, советском и украинском законодательстве. Сделаны выводы об основных тенденциях развития договора поручения в современной юридической практике.

Ключевые слова: представительство, договор поручения, доверенность, рецепция, римское частное право, рецепция римского частного права.

Постановка проблемы. Для осуществления гражданских прав и обязанностей граждане и юридические лица нередко вынуждены обращаться к услугам других лиц, осуществляющих для них разнообразные действия, обуславливающие возникновение, изменение и прекращение гражданских правоотношений. Отношения такого рода принято называть «представительством». Наиболее распространенным договором, порождающим представительство, является договор поручения, без его существования невозможно представить современную общественную жизнь. Договор поручения заключается при необходимости профессионального представительства интересов одного из участников гражданских отношений перед другими в области предпринимательской деятельности, при предоставлении юридической помощи физическим и юридическим лицам, а также при представительстве в судах и в других органах государственной власти. В связи с развитием рыночных отношений, коммерческой деятельности с использованием коммерческого представительства появляются новые области применения договора поручения.

Актуальность темы исследования. Активное использование договора поручения и спектр его применения в гражданском обороте подтверждают популярность и важность этого вида договора для юридической практики. Между тем, до настоящего момента остаются дискуссионными и нуждаются в разрешении вопросы о понятии до-