

Slovenia's View on the Scope and Application of the Principle of Universal Jurisdiction

Slovenia recognizes universal jurisdiction as an important and well-established principle of international law aimed at combating impunity and ensuring accountability for the most serious international crimes. We would therefore like to take this opportunity to reaffirm our views on the scope and application of the principle.

Furthermore, we would like to express our support and appreciation for the yearly reports of the Secretary-General and continued discussions within the Sixth Committee and the Working Group.

The scope of the principle of universal jurisdiction

Slovenia regards the principle of universal jurisdiction as a critical component of the international criminal justice system, necessary to uphold the rule of law at both national and international level, ensure that perpetrators are brought to justice, protect the rights of victims and meaningfully contribute to sustaining peace in post-conflict situations.

Atrocities threaten the international peace and security and represent a shock for the collective consciousness. Proper prosecution and trial for such atrocities are essential for the preservation of humanity; impunity is therefore unacceptable. The horrific nature and exceptional gravity of the most serious international crimes renders their suppression a joint concern of all members of the international community. All states have therefore the right and the interest to prosecute the perpetrators of such atrocities.

We firmly believe that universal jurisdiction offers an important tool for combating impunity, if properly applied. The first step towards the goal of ending impunity is a conceptual and legal clarification of the principle of universal jurisdiction that would contribute to its effective use and avoid potential abuse or misuse. We must acknowledge the fact of the diverse spectrum of existing understandings of universal jurisdiction. In case of the inability of reaching political consensus, it is necessary to compromise and narrow the gap between diverse conceptual ideas of the term.

Slovenia firmly believes that it is necessary to reach political consensus regarding the scope of universal jurisdiction.

We define the principle of universal jurisdiction as the entitlement of any state to prosecute and try the most serious crimes based solely on the nature of the crime, irrespective of where the crimes were committed and of the nationality of the perpetrator or victim. Universal jurisdiction is complementary to other principles of extraterritorial jurisdiction, namely the territorial, protective and personality principle.

We would like to stress that universal jurisdiction does not apply to all crimes. It is reserved for certain crimes whose abhorrent nature merits its application. We accept that international treaty law, international customary law and general principles of international law recognized by the international community are the main guiding sources in defining crimes that by their nature can be tried under universal jurisdiction.

Slovenia recognizes the divergent views among states concerning the application of universal jurisdiction to the crime of aggression, which is also one of the most serious international crimes. The crime of aggression can be committed only if the aggression is committed by the state represented by the accused. Thus, individual criminal liability is inextricably linked to the responsibility of the state itself, which obviously raises a number of legal problems. We however maintain that recourse to universal jurisdiction with respect to the crime of aggression is not incompatible with international law. Furthermore, we consider that it is indispensable to pursue a formal debate on the contours of the crime and the conditions for the exercise of jurisdiction over it until a broader consensus is reached.

In addition, numerous treaties oblige states parties to empower and enable their criminal justice system to exercise universal jurisdiction over crimes defined in those treaties, such as terrorism, organised crime, money laundering, corruption, trafficking in human beings, smuggling of weapons and drugs, etc., although the exercise of universal jurisdiction in such cases is tied to the condition of the presence of the perpetrator in the territory of the forum state.

Finally, we believe that the list of offences should not be exhaustive.

The application of the principle of universal jurisdiction

Slovenia believes that further international consensus is needed regarding the application of the principle of universal jurisdiction. In our view, it is necessary to enhance international cooperation in criminal matters for a more efficient prosecution of the most serious international crimes. The international community should aim to develop and establish new ways for state cooperation and a gradual emergence of obligations for such cooperation.

We believe that the biggest challenge for states regarding the application of universal jurisdiction is finding the right balance between protecting fundamental human rights and preserving appropriate levels of state sovereignty.

In order to avoid its unrestricted use and conflicts of jurisdiction between states the principle of universal jurisdiction should be applied according to the principle of subsidiarity. Slovenia considers universal jurisdiction to be an exceptional legal tool, a principle of »last resort«, intended to complement and not supplant other bases of jurisdiction under international law. It is intended to allow states to exercise its jurisdiction against the most serious crimes in exceptional circumstances and should always be exercised in consistency with international law.

While recognizing that there is no existing hierarchy in international law between principles of extraterritorial jurisdiction, Slovenia is of the view that the primary responsibility to prosecute perpetrators of the most serious international crimes should rest with those states, on whose territory the crimes were committed. Other jurisdictional links, such as the nationality of the perpetrators as well as the victims are also widely accepted. Only if those states are unwilling or unable to bring perpetrators to account, other states that have no direct connection should fill the gap based on universal jurisdiction.

We firmly believe that each state should prohibit serious crimes under their domestic law, and exercise effective jurisdiction over those crimes which are committed on their territory or by their nationals. The territorial state is often best placed to obtain evidence, secure witnesses, enforce sentences, and to deliver the “justice message” to perpetrators, victims and affected communities. Nonetheless, it is a fact that many serious crimes of international concern go unpunished in the territorial and national jurisdiction.

In this regard, the international criminal justice system afforded independent mechanisms for the prosecution of the most serious crimes as the former ad hoc International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). The current independent complementary mechanism is the International Criminal

Court (ICC). However, none of these mechanisms operate on the basis of universal jurisdiction. The ICC is also a court of last resort with jurisdiction to prosecute perpetrators only if a state which has jurisdiction is either unable or unwilling to act.

Slovenia has been a strong supporter of these bodies as important mechanisms to end impunity. However, due to jurisdictional and practical limitations these bodies cannot investigate and prosecute all perpetrators of serious international crimes. It is the duty of states to protect human rights and prosecute perpetrators of the most serious international crimes.

We believe that universal jurisdiction is therefore one of the essential components of our collective international criminal justice system. It allows the states to fill the impunity gap by invoking universal jurisdiction in cases when states which have jurisdiction are unable or unwilling to act, and international courts and tribunals lack the jurisdiction or practical means of prosecuting the perpetrators.

However, as a principle of customary international law it should not be confused with the exercise of jurisdiction provided for in international treaties or the exercise of jurisdiction by international tribunals.

We consider the principle of *aut dedere aut judicare* (either extradite or prosecute) under relevant international treaties and the application of universal jurisdiction under customary international law to be closely connected in deterring the most serious crimes. While recognizing that the principles of universal jurisdiction and *aut dedere aut judicare* may overlap, they are distinct.

In our view, the legitimacy and credibility of the use of universal jurisdiction are best ensured by its responsible application in good faith, in a non-abusive and non-selective manner. The principle must be applied in accordance with the Charter of the United Nations and rules and principles of international law, including non-violation of state sovereignty, non-interference in the internal affairs of states and the sovereign equality of states.

We believe it is possible to avoid potential abuse of universal jurisdiction by establishing additional conditions for its application. Slovenia considers that the presence of the accused or victim on the territory of the forum state or a reasonable prospect for it should be a prevalent approach in the application of universal jurisdiction. First and foremost, a distinction should be made between investigation and main proceedings. Certain investigative procedures in the pre-trial phase are admissible also on the basis of universal jurisdiction even though the defendant is located outside the national territory. However, the presence of the defendant or victim on the territory of the forum state or a reasonable

prospect for it should be required for the main proceedings. It is for this reason that we find trials *in absentia* potentially problematic. Another condition can be that the prosecution under the principle of universal jurisdiction must be approved by the competent authority (either by the Attorney General or Minister of Justice or Foreign Affairs).

This is essential to ensure that the goal of ending impunity does not in itself generate abuses of human rights of the accused or conflict with other existing rules of international law.

We would further like to emphasise that the application of the principle of universal jurisdiction is not unlimited and it should be applied in accordance with existing international law rules on immunities of heads of states and governments.

We would like to stress that maintaining judicial independence and impartiality is necessary to ensure that the principle of universal jurisdiction is not manipulated for political ends. The criminal procedures and trials must be conducted in compliance with due process standards and when possible in cooperation with other states. It is also essential that prosecutors, judges, lawyers and other judicial authorities are properly trained for prosecuting, pleading and adjudicating trials of this nature. In this way the procedures will be carried out without causing unnecessary disputes among states.

Moreover, states must ensure that their domestic courts uphold fair trial obligations. This includes the minimum fair trial guarantees, such as the right of the accused persons to be present at their own trial, to defend themselves in person or through counsel of their own choosing, to examine witnesses and have witnesses examined on their behalf and to be tried without due delay.

We would also like to point out that the prosecution and trial of criminal offences occurring abroad causes particular problems in relation to the gathering of evidence, respect for the defendant's rights, and identification and protection of witnesses and victims. Indeed, the access of victims to justice must be ensured to the greatest extent possible. Appropriate procedures for prosecutions and trials under universal jurisdiction must address these issues by means of suitable provisions to facilitate investigations as well as the gathering, evaluation and preservation of evidence.

In order to improve the application of universal jurisdiction, we believe it is necessary to adopt comparable national legislation regarding the most serious international crimes. In this respect it would be important that states that have not yet done so adopt legislation based on the Rome Statute of the International Criminal Court. This is a precondition for the establishment of an effective cooperation and mutual assistance mechanism to prosecute the most serious international crimes.

We strongly believe that the application of universal jurisdiction could only be successful if complemented by effective mechanisms for mutual legal assistance and cooperation in criminal matters. The current international procedural legal framework for mutual legal assistance and extradition for the most serious international crimes is incomplete and outdated, which seriously hampers the ability of states to cooperate effectively in the fight against impunity.

We would therefore like to use this opportunity to reiterate the importance of the MLA initiative led by Argentina, Belgium, the Netherlands, Mongolia, Senegal and Slovenia for a procedural multilateral treaty on mutual legal assistance and extradition for domestic prosecution of the crime of genocide, crimes against humanity and war crimes. The diplomatic conference for the adoption of the convention was supposed to take place in June 2020 in Ljubljana but unfortunately had to be postponed due to the COVID-19 outbreak. A new date will be announced in due course.

The principle of universal jurisdiction in the national legislation

The last substantial amendment of the Penal Code¹ in 2011 introduced some major changes to the rules governing the principle of universal jurisdiction.

The relevant provisions on universal jurisdiction of the Penal Code² are found in the second and third paragraphs of Article 13 with conditions for prosecution stipulated in Article 14. The law does not contain a list of crimes for which the principle of universal jurisdiction can be applied.

The principle of universal jurisdiction according to the second paragraph of Article 13 applies to cases when a foreign national commits a criminal offence abroad, is apprehended on the territory of Slovenia and is not extradited to a foreign country.

The third paragraph of Article 13 is a clear and unambiguous legal basis for the exercise of universal jurisdiction. It applies in cases when a foreigner commits a crime abroad which can be prosecuted in all countries, irrespective of where it is committed, by virtue of international treaty law, international customary law or general principles of international law recognized by the international community. The provision is relatively advanced, defining

¹ Act Amending the Penal Code - KZ-1B (Official Gazette of the Republic of Slovenia [*Uradni list RS*], No. 91/11 of 14 November 2011)

² Penal Code (Official Gazette of the Republic of Slovenia [*Uradni list RS*], Nos 50/12 – Official Consolidated Text, 6/16 – corr., 54/15, 38/16, 27/17 and 23/20)

universal jurisdiction so as to extend the power to exercise universal jurisdiction if such an obligation stems from an international treaty, international customary law or general principles of international law. This gives the judiciary a legal possibility for a relatively wide-range application of universal jurisdiction with the aim to ensure justice outside the national territory.

For the exercise of universal jurisdiction to be possible, certain conditions must be met. Prosecution under the third paragraph of Article 13 must always be approved by the Minister of Justice.

Universal jurisdiction under the second paragraph of Article 13 applies according to the principle of subsidiarity and is bound to the identity of the norm or the principle of double criminality. This means that the act has to be punishable also in the jurisdiction where it was committed. If the act is committed in a foreign country and is not punishable there, the perpetrator may be prosecuted only with the permission of the Minister of Justice, provided that the act, when committed, was considered a criminal offence according to the customary rules and principles recognized by the international community.

The inclusion of the safeguard in the form of the authorization of criminal procedure under the principle of universal jurisdiction is necessary to avoid the over-extended application of universal jurisdiction.

The application of the principle of universal jurisdiction under paragraph 2 of Article 13 is further limited in the following situations:

- If the perpetrator has already fully served the sentence imposed on him abroad or if it was decided in accordance with an international treaty to serve the sentence imposed abroad in Slovenia;
- If the perpetrator has been acquitted abroad by a final judgement, if his sentence has been remitted or the execution of the sentence has fallen under the statute of limitations. However, the statute of limitations is excluded under Article 95 of the Penal Code in case of criminal prosecution or enforcement of sentences for offences for which life imprisonment may be imposed under this Code, for offences from Article 100 to 105 of the Penal Code, which includes genocide, crimes against humanity and war crimes, or for those offences for which the statute of limitations under international law is not possible;
- If under a foreign law the criminal offence may only be prosecuted upon request of the injured party, and such request has not been filed or has been withdrawn.

Criminal offences that can be tried under universal jurisdiction are regulated in accordance with the Kampala Amendments adopted at the Review Conference of the Rome Statute of the International Criminal Court. In Article 102 on war crimes the lists of violations of the laws or customs of law applicable in international and non-international armed conflicts are uniform.

The definition of the crime of aggression in Article 103 is in accordance with the Kampala definition of the crime of aggression from Article 8bis of the Rome Statute.

The definition of the crime of piracy in Article 374 has been made compatible with its definition in the UN Convention on the Law of the Sea by specifying the territory on which such a crime can be committed, namely on the territory that is not under any state jurisdiction (the high seas).

Article 374a defines the crime of the breach of restrictive measures adopted by international organisations (sanctions).

The Slovenian criminal procedural rules are equally applicable in the context of the principle of universal jurisdiction, ensuring recognized standards of due process, including the rights of the accused.

The Criminal Procedure Act³ in effect prohibits trials in complete absence of the defendant. The relevant rule is found in Article 307, which allows a trial to be held when a duly summoned defendant fails to appear at the main hearing but only if his presence is not indispensable, if his defense counsel is present at the trial and if the defendant has already been heard.

According to Article 6 of the Penal Code criminal liability can be excluded due to immunity under the provisions of the constitution or rules of international law.

We would like to conclude with the observation that our criminal legislation is aligned with the international legal order and grants the judiciary broad prospects of prosecuting the most serious international crimes, irrespective of the territory on which they have been committed.

Although no criminal cases on the basis of universal jurisdiction have taken place in Slovenia, our national legal order accepts that international treaty law, international customary law and general principles of international law recognized by the international

³ Criminal Procedure Act (Official Gazette of the Republic of Slovenia [*Uradni list RS*], Nos 32/12 – Official Consolidated Text, 47/13, 87/14, 8/16 – dec. US, 64/16 – decree US, 65/16 – decree US, 66/17 – ORZKP153,154, 22/19 and 55/20 – dec. US)

community are the main guiding sources in defining crimes that by their nature can be tried under universal jurisdiction.