AMANDINE CAYOL, ZHULDYZ SAIRAMBAEVA, PIERRE CHABAL (eds.)

THE CHALLENGE OF CHANGE FOR THE LEGAL AND POLITICAL SYSTEMS OF EURASIA

THE IMPACT OF THE NEW SILK ROAD

PETER LANG

Cultures juridiques et politiques Vol. 15

After reflecting *On the European and Asian origins of legal and political systems: views from Korea, Kazakhstan and France* (2018), the authors address in this book three intertwined issues. First, how systems that were established long ago are challenged by the necessity to adapt to change both in time, rapidly after the end of the cold war, and in space, across the continent of Eurasia and no longer 'simply' in their sub-region. Second, how these systems evolve both in a *sui generis* manner and adopt, each for itself, reforms at the national and sub-regional levels; and also in a reciprocal manner, learn and borrow from each other towards a 'regional legal order' in the making. Third, how extra-judicial evolutions, such as the logistical and commercial dynamics of the *Belt and Road Initiative(s)* appear more and more as the source or the cause of that very change affecting all Eurasian actors and interests. Examined elsewhere from a broad social sciences perspective, in the publication *Cross-border exchanges: Eurasian perspectives on logistics and diplomacy* (2019), these issues are here systematically analysed by a mix of conceptual and doctrinal perspectives and of textual, jurisprudential and positivist perspectives. Naturally, the challenge within the challenge is to ascertain whether a pan-regional or global legal 'model' would be capable of impacting change in general and legal change in particular as part of the 'post-cold-war 2:', where the political-military legacy is overcome by and yields to business concerns reaching beyond cautious legal constructions.

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Les conceptions du pouvoir, du droit et de l'ordre se réfèrent inévitablement à l'ensemble du système de représentations qu'est la culture de chaque société. Toute forme de culture ayant donc nécessairement une dimension politique et juridique, la collection « Cultures juridiques et politiques » publie des travaux, tels que des thèses, synthèses de recherches, ouvrages collectifs et actes de colloques, se proposant de faire connaître les systèmes politiques et juridiques des pays européens, d'évaluer les grandes tendances des processus d'intégration politique et d'harmonisation juridique en cours dans l'Union européenne et d'éclairer les interférences entre le politique, le juridique et les autres aspects « culturels » dans le contexte de ces processus.

Collection dirigée par Stephanie Rohlfing-Dijoux et Otmar Seul.

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Part IV
The Challenges of Change in Civil Law and Human Aspects

The jurisdiction of national courts in the implementation of prosecution of violations of international humanitarian law

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In accordance with the basic principles of international humanitarian law applicable in armed conflict, the Geneva Conventions[1] and Additional Protocol[2] contains a list of specific actions defined as 'grave breaches', which entail international criminal responsibility in the case of non-compliance with standards and international humanitarian law requirements. This list of 'serious violations' of international humanitarian law is rather extensive and exhaustive, but taking into account the development of the military industry, new technologies used in warfare should not be limited by the existing list and rely solely on international jurisdiction to prosecute the perpetrators of such violations. Now it becomes necessary to grant the extended jurisdiction of national courts to prosecute those responsible for violations of international humanitarian law.

In this regard, it should be noted that the rules of international humanitarian law set for such crimes individual responsibility of individuals who have committed or have ordered the commission of these crimes. Speaking about violations of international humanitarian law, it is necessary to focus on the fact that until now it was thought that such rules apply only in respect of international armed conflict and shall not apply to the internal (non-international) armed conflicts. This is due to

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1 Geneva Conventions of 12 August 1949 and Additional Protocol to them. – M.: MKKK, 2005.

2 Additional Protocol I to Geneva Conventions of 12 August 1949 concerning to the protecting of victims of international armed conflicts // Geneva Conventions of 12 August 1949 and Additional Protocol to them. – M.: MKKK, 2005.

the fact that at the time of the adoption of 'Additional Protocol I' a view occurred that the application of the system to prevent 'serious breaches' to internal conflicts is unacceptable interference in the internal affairs of the State.

But the reality of recent years shows that the majority of armed conflicts have non-international character, in the course of the commission of numerous violations of international humanitarian law. Acts committed during such conflicts, in its cruelty and mass violation of human rights, are not inferior to acts characterised as 'serious violations' of international humanitarian law that are considered, in turn, as war crimes. That is why the international legal doctrine and international jurisdiction formed an opinion on the recognition of the need to extend the mechanism of suppression of 'serious violations' of international humanitarian law in internal armed conflicts and the importance of extending the repression of such crimes to the national courts.

In this regard, efforts that States should take to implement the criminal prosecution of those responsible for 'serious violations' of international humanitarian law forms an emerging theory. In the absence of a recognised permanent international criminal court, the preventive function of war crimes falls on a fraction of States. Although the Rome Statute of the International Criminal Court[3] (hereinafter – the Statute of the ICC) entered into force in 2002, many States such as China, the US and Russia have not ratified it. As a result, it cannot be considered that the Rome Statute of the ICC is universal. What is more, it can be assumed that the main burden to stop the violations of international humanitarian law lies upon the States.

Thus, in the case of many other international offences, the obligation to prevent war crimes is an alternative form of *aut dedere aut judicare* or *aut prosequi*. In accordance with this obligation, a State must search executors of war crimes or crimes against humanity and bring them to justice for these acts, regardless of the nationality of the executors or of their victims, as well as the place where the acts committed or extradite executors under the law of the State to which the request is made.[4] From this it follows that the State has the right to carry out a so-called 'universal

[3] Rome Statute of the International Criminal Court: adopted 17 July 1998, with amendments and additions from 25 September 1998 and 18 May 1999 // Preparation Commission for International Criminal Court. UN. – New York, 1999.

[4] E. DAVID, "Principy prava vooruzhennyh konfliktov", M.: MKKK, 2011, p. 647.

criminal jurisdiction' in respect of the person (persons) who have committed violations of international humanitarian law, or, if not, to give it to any interested State under the conditions provided by its national legislation.

I. The imperfection of existing positive law

This alternative obligation is formulated in general terms in various UN General Assembly`s resolutions, which are always accepted without objection and processed like normative documents. Therefore, these documents are binding for any State recognised them. Regarding to executors of military crimes, the obligation to prosecute and extradite them is formulated in the Geneva Conventions of 1949: I, 49; II, 50; III of, 129, and IV, 146 (as well as in paragraph 1 of article 85 of Additional Protocol I of 1977, because it contains a reference to these provisions). Such a rule is set in the Conventions on genocide (articles III and IV) and apartheid (articles 4 and 11) with regard to executors of the relevant actions.

The obligation *aut dedere aut judicare* is not explicitly present in the conventions that do not establish a universal criminal jurisdiction. They are spoken in general terms only about the obligation of signatory States to cooperate with each other in solving problems that may arise in relation to the aim or in connection with the implementation of the provisions of such Convention:

1. The UN Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction 1972 (Art. 5);[5]
2. Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques 1976 (p. 1, Art. 5);[6]

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[5] The Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, 10 April 1972, Official page of International Committee of the Red Cross: http://www.icrc.org/rus/resources/documents/misc/convention-biological-weapons-100472.htm.

[6] Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques. Recommended for consideration, signing and ratification by all States by resolution 31/72 of General Assembly from 10 December 1976, Official page of UN Organisation: http://www.un.org/ru/documents/decl_conv/conventions/hostenv.shtml.

3. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, which says: "Each State Party shall cooperate with other States Parties and afford the appropriate form of legal assistance to facilitate the implementation of the obligations under paragraph 1" (including to recognise in domestic law the criminal actions considering by Convention) (p. 2, Art. VII).[7]

In these general terms it is very difficult to discern the source of the obligation to extradite military criminals. However, since, for example, the use of chemical weapons would be qualified as a crime against humanity, obligation provided by customary law to prosecute and extradite those guilty persons is able to make up the bad drafting of these conventions.

In the case of accepting direct normative-legal act in a particular State, granting the national judge with the universal jurisdiction for analysis cases of the facts, recognised by a violation of norms of the international humanitarian law, there are a number of important questions:

– is the law of a particular State applicable to acts committed abroad by foreigner in respect of other foreigners in the framework of conflict under the Additional Protocols I and II, considering that international law military do not recognise crimes committed in conflicts of this kind?
– is this law applicable to military crimes committed in an armed conflict which is not regulated by the Additional Protocols I and II under the fact that: i/ one of the parties in the conflict is not bound by these agreements, while the conflict itself is one of those, which are discussed in the documents; ii/even if the parties in the conflict are bound by the Protocol, the conflict itself is not considered in them?

For a full solution of problems of expanding the jurisdiction of national courts in the implementation of prosecution of violations of international humanitarian law, it is necessary to consider these situations separately.

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[7] Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction. Open for signing in 1993, Official page of organisation on prohibiting chemical weapon: http://www.opcw.org/ru/konvencija-o-khimicheskom-oruzhii

For the beginning, let us consider cases where the application of the law does not depend on the fact that violations of international humanitarian law committed in non-international armed conflicts are not recognised as criminal.

The ability of the State to exercise jurisdiction over the extraterritorial nature of the investigation of criminal cases has already been recognised in international law. The problem that still occurs in this connection is: could a State give itself universal jurisdiction which is not provided by international law? Is not this an abuse of sovereignty from the part of this State and will it not break the principle of legality and proportionality of penalties?

Of course, when the State reacts to an act prohibited by international law, there is no abuse of sovereignty. Even if a breach of 'Additional Protocol II' is not recognised as criminal under international law, the fact remains that these actions are beyond the scope of the exclusive jurisdiction of the State and apply to all countries, united by this provision, not only States that have signed the Protocol, but also those bound by obligations before the international community in the field of human rights if the relevant acts may amount to a violation of these rights, as is the case of prisoner`s torture or executions of non-combatant.

If these violations fall under the Article 3, which is common to the four Geneva Conventions of 1949, States can and should respond in accordance with article 1, also common to the four Geneva Conventions of 1949, which obliges States to 'ensure respect' all provisions of these documents. Thus, the fact that the government takes actions to stop violations is not either an abuse of sovereignty or interference in the internal affairs of the State in the territory which gone civil war.

II. The dialectics of national/international jurisdictions over territoriality

There is an open question about the prosecution by national courts of persons who have violated international humanitarian law during armed conflict (international or non-international) in the country, which is not bound by the obligations arising from the Geneva Conventions and their Additional Protocols I and II. This problem could only arise in respect of the Additional Protocols, since it is known that almost all States that are members of the international community are parties of the Geneva

Conventions 1949, but Additional Protocols is not binding for a third of them.

Does that mean that, because of this lack of ratification of the Additional Protocols I and II, their rules are not applicable to the unlawful acts committed during the war, and that therefore, the national provisions will also not apply to actions under the Protocol? This is not entirely true, since the prosecution for actions recognised by national law as offences will be possible, but in condition that these actions are prohibited by a customary rule similar to the norm of the corresponding Protocol. Each party in the conflict, even if not bound by the Additional Protocols I and II, remains bound by customary norms. Thus, the action discussed here is not necessarily taken place in a legal vacuum. Being under the action of customary norm, similar to the contractual norm, these actions are prohibited and the law can be applied to them, although it refers to the Protocols, not to the custom. Not to apply it to a particular action on the pretext that the identical material norm has another formal source (custom, not the Protocol), would be contrary to the spirit of the law.[8]

The Geneva Conventions and their Additional Protocols apply only in certain situations of armed conflict: the Geneva Conventions and Additional Protocol I – international armed conflicts; Additional Protocol II – non-international armed conflicts, in which i/ the government and ii/ organised armed forces are involved, controlling part of the territory.

Nevertheless, there is a question about non-international armed conflicts falling solely under article 3, common to the four Geneva Conventions of 1949, the scope of which is broader than the Additional Protocol II and whether the norms adopted under the national level will apply in respect of such cases. Most likely, the State will take the path of least resistance and such laws will only apply to serious violations taking place in the internal conflict in the territory of that State, provided by the Additional Protocol II.

But in any case, for the prosecution of executors of violations of international humanitarian law, an effective mechanism is required, as that should serve the national law of a particular State. This law should be referred to the violations, i.e., "wrongful act or omission in respect of persons and (or) property protected under international conventions".

[8] E. DAVID, "Principy prava vooruzhennyh konfliktov", M., 2000, p. 189-190.

Moreover, persons affected by common article 3 of the Geneva Conventions of 1949, belong to the category of persons enjoying the patronage of these conventions. Thus, a national law aimed to prosecute those persons, who are responsible for violations of international humanitarian law, should not make much difference between the victims considered as violations. Victims of violation, committed in the conflict under common article 3, are 'protected person' within the meaning of the Geneva Conventions and, therefore, are victims of violations recognised as criminal in this law. Moreover, the law by means of which the jurisdiction of national courts will expand for prosecuting persons responsible for violations of international humanitarian law, must refer to the Additional Protocols I and II, because it relates to common article 3. It follows from this that these violations of norms of international law will correspond to the offences contained in the enactment of national laws and under the jurisdiction of national courts.

At the same time, if a national legislator has not possibility to make reference to the common article 3 of the Geneva Conventions of 1949 and their Additional Protocols I and II, this does not entail the impossibility of adopting and applying such national law to the violations of international humanitarian law. The legislator in view of the sovereignty of the State is able to give a normative-legal act to determine the acts constituting the offence.

Consequently, the scope of the crime stipulated in such law is not related to the scope of the definition of crimes contained in the Geneva Conventions and their Additional Protocols I and II, i.e. the scope of the law will be limited only by the notion of 'persons and property… under the auspices of the Conventions and Protocols I and II…', and persons, using the patronage of common article 3, necessarily fall into the category of persons using the patronage of the Conventions that contain this article.

Implementation of jurisdiction by national courts over criminal offences are based on such basic principles as the principle of territoriality and nationality. It should be noted that the principle of territoriality according with jurisdiction is vested to the courts of the State in the territory of which the crime was committed. It is an expression of a territorial nature in its essence of State sovereignty and the presumption that the crime affects the interests of the State where it was committed.[9] International practice and legal doctrine have long been considered the

[9] J. M. VAN BEMMELEN, "Reflections and Observations on International Criminal Law", *A Treaties on International Criminal Law*, vol. 1, p. 80.

principle of a place of fulfilment and citizenship as generally accepted principles. However, the latter is considered to some extent subordinate to the first.[10] At the same time, it does not prevent States to take the initiative and acknowledge the criminal act in their domestic legislation as violations of international law, which are not recognised as such from the point of view of international law.

In addition, for extending the jurisdiction of national courts in the prosecution of those who violate international humanitarian law, States may adopt internal legal act, from which it follows that any violation of the Geneva Conventions and their Additional Protocols I and II, not being included in the category of 'serious violation', will still be considered as the basis for prosecution under the national criminal law of a State. In this case, we disagree with the view that:

> "Possessing a distinctive feature of the principle of universality, allowing jurisdiction over non-citizens will be extended to the national courts of States. Because now this principle is regarded as the basis of international criminal jurisdiction over individuals who commit international crimes".[11]

III. Preventing violations of international humanitarian law by national courts: right or duty?

Preventing war crimes and crimes against humanity is an important task of all mankind, which one way or another, turns into an obligation. This is due to the fact that some of the classic obstacles to the extradition and prosecution in the legislation of a number of States were eliminated in respect of crimes against the peace and security of mankind. In this case, we are talking about the principle of the 'universality', the 'inevitability' of punishment, the political nature of the crimes, the period of limitations, amnesty, even non-retroactivity – as 'obstacles' to criminal prosecution.

Acting for preventing of violations of international humanitarian law by national courts is more an obligation than a right. A 1935 study on the issues of criminal jurisdiction of States conducted by the Harvard Law Institute suggested the universality principle to be applied in addition to

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[10] Y. BROUNLI, "Mezhdunarodnoe pravo:Kniga pervaya", M., 1977, p. 428–433.

[11] U. A. RESHETOV, "Bor`ba s mezhdunarodnimi prestuplenyami protiv mira i bezopasnosti", M., 1983, p. 173.

principles such as: place of the act, citizenship, principle of passive personal conduct of the State having arrested the criminal, in the case that the committed crime is punishable according to the law of the State to which the offender is legally relevant but that State refuses to carry out the procedure. In this case, it refers to the already mentioned principle of *aut dedere aut punier*.

The principle of universality has received the greatest development in relation to international crimes against the peace and security of mankind, when suspected persons may be punished by any State. In this regard,

> "the existence of 'international crimes' as concept, i.e. delicts encroaching on the fundamental values of the international community, led to the emergence of the principle of universality, according to which any State as a member of this community has the right to oppose these offenses, no matter where they were committed".[12]

In this regard, J. Dotrikura suggests that international criminal jurisdiction is the answer to the main problem of our time – the fight for universal peace.[13] Consequently, executors of international crimes should be punished regardless of where the crime was committed and at the same time all States shall take the necessary measures for the arrest and deportation of those persons, responsible for international crimes to those countries where they have committed them for trial and punishment according to the laws of those countries. Consequently, every State is obliged to take all measures for such combating and punishing, possibly through the adoption of a special normative-legal act, extending the jurisdiction of the national courts on this issue.

In particular, this is confirmed in the Principles of international cooperation in the detection, arrest, extradition and punishment of persons, responsible in military crimes and crimes against humanity adopted by the UN General Assembly on 3 December 1973. For example, principle 5 states: "Persons against whom there is evidence that they have committed war crimes and crimes against humanity shall be subject to trial and, if found guilty, to punishment, as a general rule, in the countries where

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[12] S. Z. FELLER, "Jurisdiction over Offenses with a Foreign Element", in M. C. BASSIOUNI and V. P. NANDA (Eds.), *A Treatise on International Criminal Law*, vol. V, Springfield, Ill., Thomas, 1973, p. 41, 43.

[13] J. DAUTRICOURT, "The International Criminal Court", *A Treaties on International Criminal Law*, vol. 1, p. 653–654.

they committed these crimes. In line with this States shall cooperate on questions of extraditing such persons".[14]

At the same time, there are circumstances excluding responsibility. Accused to stop the persecution to which they are exposed, often refer to two classic circumstances precluding responsibility. These justifications are i/ the requirements of the law or authority, and ii/ a state of emergency. Thus, the prescription of law or government – is the classic method of protection, but it was declared irrelevant for military crimes and crimes against humanity in the Charter of the International Military Tribunals at Nuremberg (art. 8.) and Tokyo (art. 6), as well as in their indictments.

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In conclusion, the jurisdiction of national courts in the implementation of prosecution of executors of violations of international humanitarian law is determined by the national legal acts. States, being full participants in international relations, are required to bring their *national* legislation in accordance with international regulations, which naturally leads to the fact that States do not just have the right, but an obligation, to prosecute those persons responsible for violations of international humanitarian law.

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[14] Principles of international cooperation in the detection, arrest, extradition and punishment of persons, responsible in military crimes and crimes against humanity. Adopted by resolution 3074 (XXVIII UN General Assembly from 3 December 1973, UN Organisation`s official page: http://www.un.org/ru/documents/decl_conv/conventions/warcrimes_principles.shtml.