ADVISORY SERVICE ON IHL

ICRC

GENERAL PRINCIPLES OF INTERNATIONAL CRIMINAL LAW

International criminal law is the body of law that prohibits certain categories of conduct deemed to be serious crimes, regulates procedures governing investigation, prosecution and punishment of those categories of conduct, and holds perpetrators individually accountable for their commission. The repression of serious violations of international humanitarian law is essential for ensuring respect for this branch of law, particularly in view of the gravity of certain violations, qualified as war crimes. It is in the interest of the international community as a whole to investigate and repress such crimes. There are several basic principles upon which international criminal law is based. Since international crimes increasingly include extraterritorial elements, requiring enhanced interaction between States, it is becoming more pressing to coordinate respect for these principles. States must uphold them while also respecting their own national principles of criminal law and any specific principles outlined in the instruments of the regional bodies to which they are party.

BASES OF JURISDICTION

A State exercises jurisdiction within its own territory. Such jurisdiction includes the power to make law, to interpret or apply the law, and to take action to enforce the law. While enforcement jurisdiction is generally limited to national territory, international law recognizes that in certain circumstances a State may legislate for, or adjudicate on, events occurring outside its territory.

A number of principles have been invoked as the basis for extraterritorial jurisdiction. These include:

- the nationality or active personality principle (acts committed by persons having the nationality of the forum State);
- the passive personality principle (acts committed against nationals of the forum State); or
- the protective principle (acts affecting the security of the State).

While these principles enjoy varying levels of support in State practice and opinion, they all require some link between the act committed and the State asserting jurisdiction. Universal jurisdiction, a further basis for asserting extraterritorial jurisdiction, requires no such link.

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Universal jurisdiction is the assertion of jurisdiction over offences regardless of the place where they were committed and the nationalities of the alleged perpetrator or of the victims. Universal jurisdiction is held to apply to a range of offences the repression of which by all States is justified, or required as a matter of international public policy and by certain international treaties.[1]

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STATUTORY LIMITATIONS

Time-barring, or the application of a statutory limitation on prosecution in the event of a criminal offence, aims at preventing unjustified delays between the commission of the offence and the prosecution and potential punishment of the alleged perpetrator. Statutory limitations may apply to either of two aspects of legal proceedings.

- The time bar may apply to prosecution: if a certain time has elapsed since the offence was committed, no criminal proceedings could be initiated and no verdict could be reached.
- The limitation may apply only to the application of the sentence itself: the fact that a certain amount of time had elapsed would preclude the imposition of a criminal sentence.

Most legal systems have statutory limitations for minor criminal offences. However, for serious crimes, several legal systems, in particular those based on common law, do not permit statutory limitations for initiating criminal prosecution. Legislatures in countries where civil law prevails have either established statutory limitations for serious crimes that are much longer than those for minor offences, or, like common law countries, do not permit the imposition of such limitations to serious criminal offences altogether.

The time-barring of the application of criminal penalties is less prevalent. It does not exist at all in common law, and is extremely restricted in other legal systems. Where it does exist, the time bars are generally very long for the most serious offences and do not apply for certain types of offences or in cases involving dangerous or repeat offenders.

1 For a more in-depth discussion of universal jurisdiction, please refer to the Advisory Service Factsheet entitled *"Universal jurisdiction over war crimes"*.

The absence of statutory limitations for certain crimes in international law

The 1949 Geneva Conventions and their 1977 Additional Protocols are silent on the subject of time bars for war crimes.

The United Nations Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity of 1968 applies to both prosecutions and the imposition of sentences. It covers war crimes – in particular grave breaches of the Geneva Conventions – and crimes against humanity, acts resulting from a policy of apartheid and genocide, committed in times of war and of peace. It is retroactively effective (Art. I) and under its provisions, State parties undertake to abolish existing statutory limitations or to adopt any laws or other measures to ensure the non-application of statutory limitations to such crimes (Art. IV).

Further, the Rome Statute of the International Criminal Court (ICC) provides for the non-applicability of statutory limitations for war crimes, crimes against humanity, genocide and the crime of aggression (Art. 29).

Customary international law

Several factors have helped bring to the fore the customary nature of the non-applicability of statutory limitations to war crimes and crimes against humanity:

- the growing number of States having stipulated the non-applicability of statutory limitations to these crimes in their penal legislation;
- the codification of this concept in Article 29 of the ICC Statute, which its drafters considered crucial to preventing impunity for these crimes.

Nullum crimen, nulla poena sine lege

Also known as the principle of legality, this principle, which is enshrined, for example, in Article 15 of the International Covenant on Civil and Political Rights, provides that no one may be convicted or punished for an act or omission that did not constitute a criminal offence, under national or international law, at the time it was committed. It further provides that no heavier penalty may be imposed than applicable at the time the criminal offence was committed. The purpose of this principle is to ensure that legislation is specific and predictable so that individuals may reasonably foresee the legal consequences of their actions. The ICC Statute contains a similar provision on the principle of legality (Art. 22).

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The principle of legality is associated with the principle of non-retroactivity, the principle of specificity, and the prohibition of analogy. The principle of non-retroactivity provides that a law cannot be applied to events that occurred prior to its existence. The principle of specificity requires that the definition of the proscribed act be sufficiently precise, while the prohibition of analogy requires the definition to be strictly construed.

Ne bis in idem

This Latin maxim enunciates the principle that no person should be tried or punished more than once for the same offence. It ensures fairness for defendants since they can be sure that the judgment will be final and protects against arbitrary or malicious prosecution at both domestic and international level. Further, this principle endeavours to ensure that investigations and prosecutions are scrupulously initiated and carried out.

It is important to note that the specific application of *ne bis in idem* at the international level depends upon its formulation in the relevant statutes of international tribunals. For example, the Statutes of the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) provide that no national court may try a person for offences already tried before the international tribunal, while under certain specific circumstances the international tribunal may try a person that a national court

has already tried.[2] The ICC Statute provides for a slightly different application of the principle of *ne bis in idem* in that a person may be tried at national level for offences which already constituted the basis of a conviction by the ICC. The ICTY, ICTR and ICC Statutes all provide for the possibility of trying an individual for offences that was already the subject of proceedings at national level where the proceedings were designed to shield the person from criminal responsibility at the international level (Art. 10(2)(b) ICTY Statute; Art 9(2)(b) ICTR Statute; Art. 20(3)(a) ICC Statute).

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FORMS OF INTERNATIONAL CRIMINAL RESPONSIBILITY

Individual criminal responsibility

International criminal law allows for individuals to be held criminally responsible not only for committing war crimes, crimes against humanity and genocide, but also for attempting, assisting in, facilitating or aiding and abetting the commission of such crimes. Individuals may also be held criminally responsible for planning, instigating or ordering the commission of such crimes.

Command responsibility

Violations of international criminal law can also result from a failure to act. Armed forces or groups are generally placed under a command that is responsible for the conduct of its subordinates. As a result, in order to make the system effective, hierarchical superiors may be held to account when they fail to take proper measures to prevent their subordinates from committing serious violations of international humanitarian law.[3]

IMMUNITY

Immunities flow from the idea of State sovereignty. Traditionally, State representatives were granted immunity from foreign jurisdiction. The purpose of immunity is to allow State representatives to effectively exercise their official functions and represent the State in international relations. Two types of immunity have emerged.

- Personal immunity protects the acts of persons essential to a State's administration, whether in their personal or official capacity, for the duration of their term in office.
- Functional immunity protects official acts of State representatives carrying out their functions for the State and continues to protect those acts after the end of their term in office.

Immunity thus acts as a procedural bar to the initiation of proceedings against protected persons by foreign jurisdictions; the official's State of nationality may nevertheless waive the immunity.

The ICTY, ICTR and ICC Statutes explicitly exclude the availability of functional immunities in cases of international crimes (Art. 7(2) ICTY Statute; Art. 6(2) ICTR Statute; Art. 27(1) ICC Statute). Only the ICC Statute expressly excludes the availability of personal immunities in cases of international crimes (Art. 27(2)). In practice, the ICTY indicted two sitting Heads of State although the Tribunal's jurisdiction was only effectively exercised once they had left office.

The ICC Statute requires States to remove immunities regarding the perpetration of international crimes by enacting appropriate legislation in their national law (Arts 27 and 88). The waiver of immunity is qualified in Article 98(1) of the ICC Statute with respect to non-party States.

2 Such circumstances are: if the act for which he or she was tried was characterized as an ordinary crime, or if the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted. See Art.10(2) ICTY Statute.

3 For more information, please refer to the Advisory Service Factsheet entitled "*Command responsibility and failure to act*".

MISSION

The International Committee of the Red Cross (ICRC) is an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of armed conflict and other situations of violence and to provide them with assistance. The ICRC also endeavours to prevent suffering by promoting and strengthening humanitarian law and universal humanitarian principles. Established in 1863, the ICRC is at the origin of the Geneva Conventions and the International Red Cross and Red Crescent Movement. It directs and coordinates the international activities conducted by the Movement in armed conflicts and other situations of violence.

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ICRC

International Committee of the Red Cross
19, avenue de la Paix
1202 Geneva, Switzerland
T +41 22 734 60 01
shop.icrc.org

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