

UNIVERSAL JURISDICTION OVER WAR CRIMES



Based on the notion that certain crimes are so grave that they affect the international community as a whole, the principle of universal jurisdiction, which entitles a State to prosecute offenders even in the absence of any link between the crime committed and the prosecuting state, is one means of facilitating and securing the repression of such crimes. The rationale of universal jurisdiction is to avoid impunity and to prevent those who committed serious crimes from finding a safe haven in third countries. Indeed, universal jurisdiction enables all States to fulfill their duty to prosecute and punish the perpetrators of war crimes. In order to make this principle effective, States are required to establish universal jurisdiction for war crimes in their national legislation.

STATE JURISDICTION

Jurisdiction includes the power to make law (legislative jurisdiction), to interpret or apply law (adjudicative jurisdiction) and to take action to enforce law (enforcement jurisdiction). While the assertion of 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 (extraterritorial jurisdiction).

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Criminal law generally recognises a number of principles allowing for the exercise of such extraterritorial jurisdiction. These include acts:

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

While these principles require some form of link between the act committed and the State asserting jurisdiction, universal jurisdiction, a further basis for asserting extraterritorial jurisdiction, requires no such link.

UNIVERSAL JURISDICTION

Universal jurisdiction refers to the assertion of jurisdiction over offences regardless of the place where they were committed and the nationality of the perpetrator or the victim. It 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 due to the gravity of the crimes, and the importance of their repression in the eyes of the international community.

A distinction can be made between the offences that States are obliged to investigate in application of universal jurisdiction (mandatory universal jurisdiction) and those with respect to which they may choose to do so (permissive universal jurisdiction). Universal jurisdiction may be provided for by a rule of customary or treaty-based international law. In cases where it is established by treaty, it is generally mandatory for the parties to that treaty.

The exercise of universal jurisdiction may either take the form of the enactment of national law (legislative universal jurisdiction) or the investigation and trial of alleged offenders (adjudicative universal jurisdiction). The former is far more common in State practice and is generally a necessary basis for investigation and trial. It is however feasible, at least in principle, for a court to base its jurisdiction directly on international law and to exercise adjudicative universal jurisdiction without any reference to national legislation.

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The basis for the assertion of universal jurisdiction over war crimes is found in both treaty law and in customary international law.

Treaty law

The treaty basis for the assertion of universal jurisdiction was first introduced by the four Geneva Conventions of 1949 for the protection of war victims in relation to those violations of the Conventions defined as grave breaches.

Under the relevant article of each Convention (Arts 49, 50, 129 and 146, respectively), States are required to search for alleged offenders “regardless of their nationality,” and either bring them before their own courts or hand them over for trial by another State Party which has made out a prima facie case. While the Conventions do not expressly state that jurisdiction is to be asserted regardless of the place of the offence, they have generally been interpreted as providing for mandatory universal jurisdiction. Reflected through the formula *aut dedere aut judicare*, States have no choice but to prosecute or to extradite those who have allegedly committed grave breaches. This obligation imposes an active duty on the States, since they have to ensure that the person who has committed grave breaches be arrested and prosecuted. For this purpose, and given that extradition to another State may not be an option, States must in any event have in place criminal legislation enabling them to try alleged offenders, regardless of their nationality or the place of the offence.

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Additional Protocol I of 1977 to the Geneva Conventions of 1949 extends the principle of universal jurisdiction to grave breaches relating to the conduct of hostilities. It also qualifies all grave breaches as war crimes (Art. 85).

Other instruments relevant to international humanitarian law, such as the Hague Convention of 1954 for the protection of cultural property in the event of armed conflict, and its Second Protocol, provide for a similar obligation, requiring States Parties to repress serious violations of these instruments on the basis of the principle of universal jurisdiction. The Convention against Torture of 1984 has been interpreted as creating an obligation on States to exercise universal jurisdiction where necessary to repress the commission of that crime. The 2006 International Convention for the Protection of All Persons from Enforced Disappearance requires States to take measures in order to exercise universal jurisdiction over the offence of enforced disappearance, when the alleged offender is present in their territory and they do not extradite him.

Customary international law

While the relevant treaty law provisions are restricted to grave breaches, universal jurisdiction in customary international law may be regarded as extending to all violations of the laws and customs of war which constitute war crimes. This would include certain serious violations of applicable law, in particular Article 3 common to the Geneva Conventions and of Additional Protocol II of 1977, committed in non-international armed conflict.

States have adopted a range of methods to provide for universal jurisdiction under their national law.

In contrast with treaty law, there do not appear to be any grounds for concluding that customary international law requires States to exercise jurisdiction. Indeed, Rule 157 of the ICRC Customary International Humanitarian Law Study¹ enounces that States have the right to vest universal jurisdiction in their national courts over war crimes.

LEGISLATIVE METHODS

States have adopted a range of methods to provide for universal jurisdiction under their national law.

Constitutional provisions are of central importance in determining the status of international customary or treaty law in the domestic legal system. It is conceivable that courts might rely directly on such provisions or on international law to exercise universal jurisdiction where permitted or required. However, because the relevant provisions of international law are not self-executing, it is preferable

¹ See <http://www.icrc.org/customary-ihl/eng/docs/home>.

to specify in national law the jurisdiction applicable to war crimes.² States should therefore ensure that there exists a specific ground for exercising the jurisdiction, a clear definition of the crime and its constitutive elements, and proper sanctions.

A number of States with a (code-based) civil-law system provide for universal jurisdiction within their ordinary and/or military penal code. This code may define the jurisdictional and material scope of the offence in the same section. More frequently however, the provisions on universal jurisdiction are included in the general section of the code and refer to substantive offences defined elsewhere in the same instrument. Universal jurisdiction may also be laid down in criminal procedural law or in a law on the organization of the courts. Some States have granted their courts universal jurisdiction with regard to certain offences by means of a special stand-alone law.

In countries without code-based systems – generally those with a common-law system – it is the usual practice to provide for universal jurisdiction in primary legislation defining both the jurisdictional and material scope of the offence.

LEGISLATIVE ISSUES

Whatever the method adopted, a number of issues need to be addressed in providing for universal jurisdiction in national law:

- In order to prevent impunity, all war crimes, whether committed in connection with international or non-international armed conflict, should be subject to universal jurisdiction.
- It is important to make clear that jurisdiction extends to all persons directly or indirectly responsible for committing the offences concerned,³ whatever their nationality and regardless of whether the offence was committed within the State's territory or abroad.
- The conditions for opening criminal proceedings, or for justifying a refusal to do so, must be set forth in a clear and precise manner. However, such conditioning factors should be aimed at increasing the effectiveness and predictability of universal jurisdiction and should not unnecessarily restrict the possibility of prosecuting suspected offenders.
- Given that the jurisdiction of States may be concurrent, the exercise of jurisdiction by any one State may be subject to certain conditions, such as respecting the principle of *ne bis in idem* (no legal action can be instituted twice for the same cause of action) and taking into account penalties already imposed abroad, previous exercise of jurisdiction by another State or by an international tribunal, and the defendant's presence – even temporary – in the territory of the prosecuting State.

OTHER ISSUES

The prosecution and trial of 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 this respect, arrangements for international judicial cooperation and assistance are essential and may in some cases require reinforcing.⁴ It is also essential that judges and lawyers are properly trained for pleading and adjudicating trials of this nature.

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² For more information on methods of incorporating universal jurisdiction into national legislation please refer to the Advisory Service Factsheet entitled “*Methods of incorporating punishment into criminal law*”.

³ For more information on the individual criminal responsibility, please refer to the Advisory Service Factsheet entitled “*Command responsibility and failure to act*”.

⁴ For more information on international judicial cooperation, please refer to the Advisory Service Factsheet entitled “*Cooperation with extradition and judicial assistance in criminal matters*”.

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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