ICRC

ADVISORY SERVICE

ON INTERNATIONAL HUMANITARIAN LAW

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, which it is in the interest of the international community as a whole to punish. 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.

Universal jurisdiction is the assertion of jurisdiction over offences regardless of the place where they were committed and the nationalities of the perpetrator or of the victims. Universal jurisdiction is held to apply to the core international crimes, namely war crimes, crimes against humanity and genocide, whose repression by all States is justified or required as a matter of international public policy and by certain international treaties.[1]

Statutory limitations

Time-barring, or the application of a statutory limitation on legal action in the event of an offence, may relate to either of two aspects of legal proceedings.

- The time bar may apply to prosecution: if a certain time has elapsed since the breach was committed, this would mean that no public action could be taken and that no verdict could be reached.
- The limitation may apply only to the application of the sentence itself: in this case, the fact that a certain amount of time had elapsed would mean that the criminal sentence could not be applied.

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

Most legal systems have time bars for minor offences. But for serious crimes, several legal systems, in particular those based on common law, do not permit a time bar for prosecution. Legislatures in countries where civil law prevails have either established time bars for serious crimes that are much longer than those for misdemeanours, or excluded this type of crime altogether from the effect of statutory time limitations.

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 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.

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 applies to both prosecution and application of sentences, and covers war crimes – in particular grave breaches of the Geneva Conventions – and crimes against humanity, including apartheid and genocide, committed in times of war and of peace. It is retroactively effective, insofar as it abolishes time bars that had previously been established pursuant to laws or to other enactments.

Further, the Rome Statute of the International Criminal Court (ICC) stipulates 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 war crimes and crimes against humanity and the non-applicability of statutory limitations to them:

- 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;
- the growing number of States party to United Nations and Council of Europe conventions.

Nullum crimen, nulla poena sine lege

Also known as the principle of legality, this principle, which is enshrined in Article 15 of the International Covenant on Civil and Political Rights, states that no one may be convicted or punished for an act or omission that did not violate a penal law in existence at the time it was committed. Therefore, the existence of a particular crime depends on the existence of legislation stating that the particular act is an offence, and for a specific penalty to be imposed for that offence, the legislation in force at the time of its commission must include that particular penalty as one of the possible sanctions for that crime. 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 specific provision on the principle of legality (Art. 22).

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 states that the law proscribing a given act must have existed before the act in question occurred. As such, this principle prohibits the retroactive application of the law. 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 crime. 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 acts 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. 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 conduct 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 conduct that was already the subject of proceedings at national level where the proceedings were designed to shield the person from criminal responsibility at international level (Art. 10(2)(b), ICTY Statute; Art 9(2)(b), ICTR Statute; Art. 20(3)(a), ICC Statute).

Forms of 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 and even instigating 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 should be held to account when they fail to take proper measures to prevent their subordinates from committing serious violations of international humanitarian law. They may therefore be held to be criminally responsible for criminal activities to which they made no personal contribution.[2]

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)).

Indeed, the ICC Statute goes so far as to require States to remove immunities regarding the perpetration of international crimes by enacting appropriate legislation in their national law (Arts 27 and 88). In practice, the ICTY indicted two sitting Heads of State although the court's jurisdiction was only effectively exercised once they had left office. The waiver of immunity is qualified in Article 98(1) of the ICC Statute with respect to non-party States

[2] For more information, please refer to the Advisory Service Factsheet entitled "Command responsibility and failure to act".