

International Criminal Justice

International Criminal Jurisdiction – The concept of universal jurisdiction

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Criminal Jurisdiction

- Five distinct principles to establish jurisdiction
- National courts consider themselves competent to deal with an offence:
 - A) An offence committed within the borders of the territory of a state, in accordance with the principle of territoriality
 - The principle is not absolute (ICJ in the Lotus case 1927: *“each state may adopt other bases for the exercise of its jurisdiction, provided that they do not exceed the limits within which international law permits states to exercise their jurisdiction”*)
 - B) An offence committed by nationals of a state abroad, based on the principle of nationality
 - C) An offence committed by foreigners outside its borders with victims being nationals of the state, in accordance with the principle of passive nationality
 - D) Foreigners for offences committed abroad and affecting its security, based on the principle of protectionism

The principle of universal jurisdiction

- **The principle of universality**, otherwise universal jurisdiction (Willard Cowless)
- Classic definition by the member of the Nuremberg Tribunal, Donnedieu de Vabres: it constitutes the right of every state to prosecute and punish certain crimes, regardless of the place of their commission and the nationality of the perpetrators or victims, based solely and exclusively on their nature, as extremely dangerous for the entire international community
- The principle of universality is also inherent in the work of Hugo Grotius, Vattel, Max Huber, et.c.
- Original scope of universal jurisdiction: piracy, slave trade and robbery
- Justification: the suppression of the impunity enjoyed by the perpetrators of these crimes, because their activity extended beyond the territorial limits of a state (usually on the high seas)

The principle of universal jurisdiction (2)

- **Universal jurisdiction** (compétence universelle)
- Exercise of criminal jurisdiction by the courts of a state
- Push for the development of International Criminal Law
- Establishment by the UN Security Council of the International Criminal Tribunal for the former Yugoslavia (ICTY) 1993
- The International Criminal Tribunal for Rwanda (ICTR) 1994
- Establishment of the International Criminal Court (ICC) with the Rome Statute in 1998

The principle of universal jurisdiction

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- Universal jurisdiction is recognized doctrinally by many national criminal codes
- **Greek penal code:** Art. 8
- **Germany (Völkerstrafgesetzbuch - VStGB):** Germany's Crimes Against International Law Act (2002) allows German courts to prosecute genocide, crimes against humanity, and war crimes even when the crimes were committed abroad by foreigners.
- **Canada (Crimes Against Humanity and War Crimes Act, 2000):** allows for the prosecution of individuals for genocide, crimes against humanity, and war crimes, regardless of whether the crimes were committed in Canada or whether the suspect was a Canadian citizen at the time of the offense.
- **Argentina (Constitution and Penal Code):** Article 118 of the Argentine Constitution allow for trials of crimes under international public law committed outside the country.
- **Belgium (Act Concerning the Punishment of Grave Breaches of International Humanitarian Law):** Historically known for a broad, "pure" universal jurisdiction law (later amended), Belgium still allows its courts to prosecute international crimes.

The principle of universal jurisdiction

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- **The Netherlands (International Crimes Act, 2003):** This Act allows Dutch courts to exercise jurisdiction over international crimes (genocide, war crimes, etc.) if the suspect is found in the Netherlands, or if the victim is a Dutch national.
- **United Kingdom (Criminal Justice Act 1988):** Section 134 of this Act explicitly authorizes UK courts to prosecute torture, regardless of where it was committed or the nationality of the perpetrator.
- **Sweden (Act on Punishment for Genocide and Serious Violations of International Humanitarian Law):** Swedish courts are empowered to prosecute international crimes committed abroad, a power exercised in 2022 against an individual for war crimes committed in 1988.
- **United States (Torture and Specific Crimes):** While not adopting a "universal" code for all international crimes, the US allows for prosecution of torture committed outside the US if the perpetrator is found in the country. The Alien Tort Statute (ATS) has also been used in civil litigation as a form of universal jurisdiction.

The principle of universal jurisdiction

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- Piracy *jure gentium*
- The most accepted application of universal jurisdiction
- Distinguished from piracy under domestic law
- Universal jurisdiction over piracy *jure gentium* is a customary rule
- It has been applied since the 16th century
- It has been crystallized by the 1958 Geneva Convention on the High Seas (Article 19) and the 1982 Convention on the Law of the Sea (Article 105 on "Arrest of a ship or aircraft")
- Provides the possibility for each state to arrest pirates, who are considered enemies of international society (*hostes humani generis*), even on the high seas, beyond the limits of state jurisdiction
- International crime of piracy: Article 15 of the 1958 Convention on the High Seas and Article 101 of the UN Convention on the Law of the Sea
- Crystallizes customary law

The principle of universal jurisdiction (6)

- Universal jurisdiction also applies to crimes that are ***delicta juris gentium*** (slavery, drug trafficking, counterfeiting)
- Problems of application: incomplete state practice, conflicting theories, occasional case law, individual treaty provisions
- It is a *desideratum* rather than an established legal rule (?)
- Brownlie: unjust acts so serious and heinous for the entire international community that they should under no circumstances go unpunished.
- The rules that prohibit the commission of these crimes are considered mandatory rules of law – *jus cogens* – which create obligations *erga omnes* on all states, and therefore universal jurisdiction should apply to these crimes due to their nature.

The principle of universal jurisdiction

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- UN practice: UNSC resolution 1366 of 30.8.2001
- Special Court for Serious Crimes (established in 2000 in East Timor by the UN Transitional Administration): right to exercise universal jurisdiction over specific crimes
- ICTY Tadić case / ICTR Ntuyahaga case (both for genocide)
- Arrest Warrant case in the ICC (Congo v. Belgium)
- On 11.4.2000, under the Act on the Suppression of Serious Violations of International Humanitarian Law (universal jurisdiction in *absentia* of the Belgian courts), the judicial authorities of the country issued an international arrest warrant against the Minister of Foreign Affairs of the Congo Yerodia Ndombasi
- Purpose: to be arrested in any state and then extradited to Belgium, to be tried there for serious violations of international humanitarian law.

The principle of universal jurisdiction (8)

- Congo appealed to the ICJ challenging Belgium's "extraterritorial" jurisdiction and citing a violation of the principle of diplomatic immunity of the Minister of Foreign Affairs of a sovereign State
- Congo asked the Court to deal only with the issue of Ndombasi's immunity and not with the jurisdiction of the Belgian authorities
- ICJ: *non ultra petita* rule, did not deal with universal jurisdiction in its Judgment of 14 February 2002
- Common view of Judges Higgins, Kooijmans and Buergenthal: the application of universal jurisdiction beyond piracy is not prohibited by customary international law, but should nevertheless be exercised under certain conditions

Universal Jurisdiction and war crimes

- At the end of World War II, the application of universal jurisdiction to war crimes was developed
- The UN War Crimes Commission accepted that national courts could try war criminals, based on universal jurisdiction, on the argument that the crimes they committed were international
- The first post-war years saw a series of trials in the Allied powers, and particularly in the USA, against war crimes defendants (based on the principle of universality)
- US military courts convicted foreigners for crimes they had committed abroad even before the country entered the war
- Jerusalem District Court and Supreme Court of Israel to convict Adolf Eichmann of war crimes and crimes against humanity committed against the Jewish people
- American case of *Demjanjuk v. Petrovsky* (for the extradition to Israel of a war crimes perpetrator)

Universal Jurisdiction and War Crimes

(2)

- Obligation to exercise universal jurisdiction established by Articles 49, 50, 129 and 146 GC4 respectively
- Obligation for the parties to prosecute serious violations of humanitarian law that they establish, regardless of the place of commission and the nationality of the perpetrator or the victim (principle of *aut dedere aut judicare*)
- Decisions of national courts were issued on the basis of universal jurisdiction for war crimes
- Mainly for the former Yugoslavia (*Djajić, Sokolović, Mahgoub, Habré*, etc. cases)

Treaty-based universality

- Cases of treaty-based universality of international crimes:
- a) Convention on the Suppression and Punishment of the Crime of Apartheid 1973
- b) Tokyo Convention on Hijacking of Aircraft 1963, Hague Convention on Hijacking of Aircraft 1970 and Montreal Convention on Civil Aviation 1971
- Hijacking and international terrorism are now considered international crimes
- c) Convention against the Taking of Hostages 1979 and Convention on the Safety of UN and Associated Personnel 1994 → right of states to prosecute or extradite (aut judicare aut dedere) perpetrators of crimes they prohibit, when on their territory

Universal jurisdiction and torture

- Of great concern to the international community
- Systematic practice of dictatorial governments in the 1970s and 1980s
- UN Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment is considered an international crime with a *jus cogens* character
- ICTY Furundzija Case: the ability of states to investigate, prosecute, punish or extradite torture suspects who are on their territory is a consequence of the *jus cogens* character that the international community has attributed to the prohibition of committing this crime
- Contra: House of Lords in the Pinochet Case
- Majority: refused to accept the existence of a customary rule that obliges States to exercise universal jurisdiction over the international crime of torture
- Great Britain could only exercise jurisdiction under the 1984 Convention against Torture.

Conclusions

- Exercise of universal jurisdiction: a challenge for International Criminal Law
- Raison d'être: the desire of no safe haven & those who commit such crimes should not go unpunished
- Characteristic cases of Pinochet and Hissène Habré (former dictator of Chad, persecuted by the authorities of Senegal, where he had taken refuge)
- State practice remains hesitant: political issues involved / interests at stake