ICRC

The International Committee of the Red Cross (ICRC) presents its compliments to the Under-Secretary-General for Legal Affairs, The Legal Counsel, and has the honour to refer to his letter (ref. LA/COD/59/2) dated 23 January 2014 regarding General Assembly resolution 68/117 of 16 December 2013 entitled "The scope and application of the principle of universal jurisdiction".

The ICRC is pleased to provide its contribution, enclosed herewith, to the report of the Secretary-General as requested in operative paragraph 3 of the above-mentioned Resolution. An electronic version of the ICRC's contribution has also been sent.

The International Committee of the Red Cross avails itself of this opportunity to convey to the Under-Secretary-General for Legal Affairs, The Legal Counsel, the renewed assurance of its high consideration.

New York, 30 April 2014
NYC 14/00020 – JEY/tma

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Information and Observations
on the Scope and Application of the Principle of Universal Jurisdiction
Resolution 68 / 117 of the United Nations General Assembly

Contribution of the International Committee of the Red Cross

The purpose of this submission is to provide an overview of the legal framework on universal jurisdiction and relevant State practice, as examined by the International Committee of the Red Cross (ICRC) on the basis of the available information it has collected. It also details certain ICRC initiatives of the last two years that support States in their domestic efforts to implement international humanitarian law (IHL), including through universal jurisdiction for war crimes.

General Overview of Universal Jurisdiction in International Humanitarian Law

Universal jurisdiction is part of a global system aimed at fighting impunity, and fills any gaps there may be between national and international criminal systems. As such, it is an essential tool for bringing to justice perpetrators of serious violations of IHL, crimes against humanity and genocide. The normative value of universal jurisdiction is defined both in treaty law and in customary IHL.

One of the first appearances of the notion of universal jurisdiction was in the 1949 Geneva Conventions which provide that 'Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.'[1] As the ICRC noted in its previous reports, while the Conventions do not expressly state that jurisdiction is to be asserted regardless of the place of the offence, they have been generally interpreted as providing for universal jurisdiction and the Geneva Conventions are as such among the earliest examples of universal jurisdiction in treaty law.

Customary IHL also recognizes that States have the right to vest universal jurisdiction in their national courts over war crimes committed in both international and non-international conflicts.[2]

A number of other instruments provide a similar obligation for States to vest universal jurisdiction over certain crimes when they are committed during armed conflict. For example, the 1999 Second Protocol to the Hague Convention for the Protection of Cultural Property[3] and the 2006 International Convention for the Protection of all Persons from Enforced Disappearance[4] compel States to prosecute a suspect if this person is on their territory and if they do not extradite him or her.

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[1] Common articles: Art 49 GC I, Art 50 GC II, Art 129 GC III, Art 146 GC IV. Grave breaches are particularly serious violations of IHL, set out in respectively articles 50, 51, 130 and 147 of the four Geneva Conventions, and articles 11 and 85 of the 1977 Additional Protocol I. The latter qualifies all grave breaches as war crimes.
[2] J.M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules*, Rule 157, Cambridge University Press, Cambridge, 2005, pp. 604-607. Available online: http://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf .
[3] Articles 16(1) and 17(1).
[4] Article 9(2).

State Practice

1. National Implementation

Through ratification of relevant international instruments, States have recognised that the exercise of universal jurisdiction is an important means to end impunity for the commission of war crimes, crimes against humanity, genocide and torture. Indeed, by becoming party to the 1949 Geneva Conventions, 196 States have agreed to either prosecute or extradite all individuals who have committed grave breaches defined in these Conventions, regardless of their nationality or the place of the offense. Such obligation also applies to the grave breaches defined in Additional Protocol I of 1977, which has been ratified by 173 States.

The ICRC has identified more than 100 States[5] that have established some form of universal jurisdiction over serious violations of IHL in their national legal order. Most of these States have adopted national legislation granting universal jurisdiction for any or a combination of grave breaches to the Geneva Conventions and Additional Protocol I, crimes under the 1999 Second Protocol to the Hague Convention for the Protection of Cultural Property and the 2006 International Convention for the Protection of all Persons from Enforced Disappearance, and the war crimes listed under article 8 of the Rome Statute of the International Criminal Court. A minority of States have investigated and prosecuted suspected criminals, basing their jurisdiction not on specific national legislation, but directly on international law, a practice which requires precise constitutional provisions determining the status of international customary and treaty law in the domestic system[6].

The laws and measures adopted at national level have not remained speculative. Indeed, although some States have demonstrated reluctance to or have limited the exercise of universal jurisdiction on their territory, recent national court decisions and State initiatives have demonstrated that the exercise of the principle of universal jurisdiction is gaining more acceptance, and that States are willing to prevent and tackle impunity for war crimes perpetrated beyond their borders. In the last two years, investigation and prosecution on the basis of universal jurisdiction have increased, including prosecution for war crimes committed in international and non-international armed conflicts (the Netherlands recently tried an individual for war crimes committed during the Rwandan conflict on the basis of universal jurisdiction[7]).

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[5] ICRC Advisory Service on IHL, *Preventing and Repressing International Crimes: Towards an "Integrated" Approach Based in Domestic Practice; Report of The Third Universal Meeting of National Committees for the Implementation of International Humanitarian Law*, Volume 1, ICRC, Geneva, 2013.

[6] This is a particularity of countries with monist legal tradition according to which the act of ratifying an international treaty immediately incorporates this international law instrument into national law. By contrast, for States with a dualist legal system, international law must first be translated into national legislation before it can be applied by the national courts.

[7] *Public Prosecutor v. Joseph Mpambara* (12/04592 (ECLI:NL:HR:2013:1420)), Supreme Court of the Netherlands, 26 November 2013.

2. *Conditioning Universal Jurisdiction*

While IHL provides for absolute universal jurisdiction, the majority of States, when establishing universal jurisdiction for war crimes in their national legal order, have adopted a more pragmatic approach, attaching conditions to the exercise of such jurisdiction.

The tendency among such States is to require a link between the accused and the forum country, most often the presence of the accused in the prosecuting State. According to the information collected by the ICRC and available on its National Implementation Database[8], over 40 States require, in their legislation and case law, the presence of the presumed perpetrator on their territory before proceedings are instituted (for example Argentina, Austria, Bosnia-Herzegovina, Canada, Colombia, France, India, the Netherlands, the Philippines, Spain, Switzerland and the United States). Some of those States however allow prosecution even in the absence of the accused, as long as his presence at least once during the investigation or trial phase is demonstrated. In some countries, the presence of the presumed perpetrator is not required (Germany, Italy, Luxembourg, New Zealand and the United Kingdom).

A number of other limitations have been attached to the implementation of universal jurisdiction. In many States, prosecution for crimes under universal jurisdiction requires the consent of a governmental or legal authority. Universal jurisdiction can, besides, be limited to certain categories of crimes (*ratione materiae* limitation). It is also generally considered that universal jurisdiction is a subsidiary jurisdictional basis that should be invoked only in cases where national courts that would be competent to prosecute on the basis of territoriality or nationality refuse or are not able to do so.

Additional conditions may be taken into account. First, because State jurisdictions may be concurrent, the implementation of universal jurisdiction should be subject to judicial guarantees – including, but not limited to, the principles of individual responsibility, non-retroactivity, presumption of innocence, *ne bis in idem*, the guarantee of an independent, impartial and properly constituted court, and the guarantees for a fair trial – and should take into account jurisdiction and penalties already exercised or imposed by another State or an international tribunal. Such guarantees are linked to the necessary existence of independent judicial authorities.

The exercise of universal jurisdiction also requires procedural conditions, especially given the difficulties related to the availability and safekeeping of evidence, respect for defendants' rights, and protection of witnesses and victims, in a context where the prosecution and trial of offences is occurring abroad. Such procedural guarantees include suitable provisions to facilitate investigations and the collection and evaluation of evidence. In this respect, strengthening of the law and arrangements for extradition, international judicial cooperation and assistance are essential.

The ICRC, while recognizing the will of States to frame the application of universal jurisdiction, believes that the conditions for opening criminal proceedings, or for justifying a refusal to do so, must be clearly and precisely defined. In addition, the ICRC insists that conditions should enable the principle to gain in effectiveness and predictability, rather than limiting its application. When dealing with effectiveness and

[8] ICRC Advisory Service on IHL, National Implementation Database. Available online: http://www.icrc.org/ihl-nat.

predictability, judicial specialization and cultural sensitivity – including geographical closeness – may be relevant.

The ICRC and Universal Jurisdiction

Since the Advisory Service on IHL was established in 1996, universal jurisdiction has been a subject of particular interest to the ICRC. Indeed, promoting the prevention and repression of serious violations of IHL is among the priority activities led by the Advisory Service, with a particular reflection on the way to establish effective sanctions mechanisms. Universal jurisdiction is considered to be an important aspect of this process. In this context, the Advisory Service has been offering legal and technical advice and assistance to government experts on national implementation of relevant IHL provisions, and has been raising the awareness of States on the application of universal jurisdiction to war crimes.

In addition to its general activities – issuing legal opinions on draft laws, facilitating the exchange of information between States and other actors in IHL, organizing meetings of experts, conducting professional training courses and developing specialized tools (databases, reports, fact sheets, etc.) made available to States and the general public – the Advisory Service undertook, in the last two years, various initiatives aimed at enhancing States' efforts to efficiently implement repression of serious violations of IHL, including by asserting universal jurisdiction.

Since December 2012, the Advisory Service has engaged in consultations with experts regarding individual criminal sanctions, with particular emphasis on universal jurisdiction. These consultations are aimed at assessing the developments in State practice regarding universal jurisdiction since the establishment of the International Criminal Court.

In June 2013, the ICRC *Manual on Domestic Implementation of IHL*[9] was updated, offering a practical tool aimed at assisting policy-makers, legislators and other stakeholders in implementing IHL and meeting all their obligations under that body of law, including the repression of serious violations and the application of universal jurisdiction.

In August 2013, a report of the Third Universal Meeting of National Committees for the Implementation of International Humanitarian Law (October 2010) was published: *Preventing and Repressing International Crimes: Towards an "Integrated" Approach Based in Domestic Practice*[10]. This report, based primarily on national practice, explores the prevention and suppression of international crimes, paying particular attention to the role of domestic law and to the legal mechanisms required to support an 'integrated system' for the repression of these violations. The report also provides reflections on issues such as universal jurisdiction and the role of punishment in the prevention of serious violations of IHL.

The ICRC continues to gather further information on State practices relating to universal jurisdiction.

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[9] ICRC Advisory Service on IHL, *The Domestic Implementation of International Humanitarian Law: A Manual*, ICRC, Geneva, 2011.
[10] *Supra*, note 5.

Conclusion

The ICRC recognizes that under IHL and international criminal law, States are the primary entities in charge of investigating and prosecuting the authors of serious violations of IHL. When States are unable or unwilling to take legal action against individuals suspected of committing such crimes on their territory or under their jurisdiction, and when international courts cannot exercise their jurisdiction, implementing universal jurisdiction has been revealed to be an effective way to ensure accountability and fight impunity.

However, given the existing challenges to the efficient exercise of this principle, it seems fundamental to the ICRC to keep investing in national capacity building and to support States in establishing appropriate national legislation to prosecute war crimes on the basis of both national and universal jurisdiction.

The ICRC reiterates its interest in the issue of universal jurisdiction and its willingness to contribute to future reports of the Secretary-General on this question.