

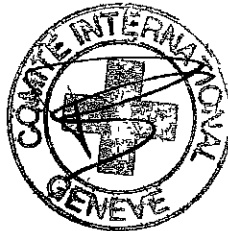


The International Committee of the Red Cross (ICRC) presents its compliments to the Legal Counsel of the United Nations, and has the honour to refer to letters (ref LA/COD/59/1) dated 18 December 2015, and (ref LA/COD/59/2) dated 18 December 2015, regarding General Assembly resolution 70/119 of 14 December 2015, 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 Legal Counsel of the United Nations the renewed assurance of its high consideration.

New York, 20 April 2016
NYC 16/00029 PSP/kha



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Encl ICRC submission

Information and Observations
on the Scope and Application of the Principle of Universal Jurisdiction
Resolution 70/119

Contribution of the International Committee of the Red Cross

Overview

The purpose of this submission, by the International Committee of the Red Cross (ICRC), is to draw attention once more to the principle of universal jurisdiction and to provide a brief update on developments related to the understanding and use of this principle. This submission also describes certain ICRC initiatives to support States' efforts to implement international humanitarian law (IHL), including through the use of the principle of universal jurisdiction.

Universal jurisdiction in international humanitarian law

The principle of universal jurisdiction is one of the key tools for ensuring the prevention and repression of serious violations of IHL.

The "grave breaches" regime, as outlined in the four Geneva Conventions of 1949 and further developed in Protocol I of 8 June 1977 additional to the Geneva Conventions (Additional Protocol I), stipulates that States Parties must search for persons alleged to have committed or to have ordered the commission of violations of the Conventions and Additional Protocol I defined as "grave breaches" and bring them before their own courts – regardless of the nationality of these persons – or hand them over for trial by another State Party concerned.

The obligation to search for and prosecute alleged offenders before a State's own court must be carried out, regardless of their nationality. The effective implementation of these obligations requires that each State Party to the Geneva Conventions extends universal jurisdiction to the list of grave breaches, in its national legislation. The object and purpose of the grave breaches regime, contained in the Geneva Conventions and further developed in Additional Protocol I of 1977, is to give all States Parties the means to prevent impunity and to deny safe havens to alleged perpetrators. This obligation demands an active approach, which rests on States to ensure that a person who is alleged to have committed or to have ordered to be committed a grave breach is investigated and, when so warranted, presented and brought to trial when States are aware that such persons are present on their territory or in places under their jurisdiction.

Other international instruments impose a similar obligation on States Parties to vest some form of universal jurisdiction in their courts over serious violations of the rules contained in these instruments. These include, for example, the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Second Protocol (1999), the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the 2006 International Convention for the Protection of All Persons from Enforced Disappearance.

Over the last twenty years, universal jurisdiction has provided the basis for domestic courts, in States that have enacted the necessary legislation, to try numerous persons alleged to have committed war crimes and other crimes in international and non-international armed conflicts.

In addition, State practice and *opinio juris* have helped to consolidate a customary rule whereby States can vest their courts with universal jurisdiction over other serious violations of IHL.¹ These include, in particular, serious violations of Article 3 common to the four Geneva Conventions of 1949 and of Protocol II of 8 June 1977 additional to the Geneva Conventions, as well as other war crimes, such as those defined in Article 8 of the Statute of the International Criminal Court

The ICRC and universal jurisdiction

Through its Advisory Service on IHL, the ICRC continues to provide to government experts – when requested – legal advice and technical assistance on the domestic implementation of IHL, including the incorporation of war crimes and other international crimes into criminal law and procedure and to promote the application of universal jurisdiction. The ICRC also facilitates the exchange of information between States and other actors on IHL implementation measures, coordinates meetings of experts and conferences, conducts professional training courses and develops specialized tools (such as databases, reports, technical documents) which are made available to States and the general public

In particular, the ICRC undertakes various initiatives to support States' efforts to implement an efficient system for the criminal repression of serious violations of IHL. For instance, it has prepared a manual on the domestic implementation of IHL² to assist policymakers, legislators and other parties concerned in implementing IHL (by repressing serious violations of IHL and applying the principle of universal jurisdiction, as well as through other means). In addition, the ICRC engages the judiciary in various contexts – for instance, by providing training on IHL, inclusive of the principle and use of universal jurisdiction

The ICRC continues, in its various IHL-related activities throughout the world, to address the prevention and repression of serious IHL violations and to promote the application of universal jurisdiction over war crimes. In addition, in a recent issue of the ICRC's *International Review of the Red Cross* titled *Generating Respect for the Law*, various matters relating to the enforcement of IHL and the use of the principle of universal jurisdiction are discussed.³

Recalling the adoption, by consensus, of Resolutions 2 and 4 of the 32nd International Conference of the Red Cross and Red Crescent on the prevention of and response to sexual violence in armed conflict and the protection of health care in armed conflict, respectively, the ICRC is of the view that universal jurisdiction is an effective tool, amongst others, for States to prevent and respond to acts of sexual violence in armed conflict, as well as attacks on the wounded and sick, health-care personnel and facilities and medical transport in armed conflict

Update to the ICRC's Commentaries on the Geneva Conventions of 1949

The ICRC is currently updating its commentaries on the 1949 Geneva Conventions and their Additional Protocols. The updated commentary on the First Geneva Convention of 1949 was launched on 22 March 2016 and contains valuable material on universal jurisdiction, within the framework of Articles 49 and 50 of the Convention

¹ See the ICRC's Study on Customary International Humanitarian Law (2005) at <https://www.icrc.org/eng/resources/documents/misc/customary-law-rules-291008.htm>

² ICRC Advisory Service on IHL, *The Domestic Implementation of International Humanitarian Law A Manual*, ICRC, Geneva, 2011 (updated in June 2013)

³ For example, see Sharon Weill, "Building respect for IHL through national courts", *International Review of the Red Cross*, Vol 96, No 895/896 (*Generating Respect for the Law*), 2014, pp 859–879

The new commentary on Article 49 (penal sanctions) of the First Geneva Convention contains a detailed explanation of the various methods available to States to fulfil the obligation to enact *"legislation necessary to provide effective penal sanctions for persons committing or ordering to be committed, any of the grave breaches listed in these Conventions"*

The commentary also considers, in detail, the principle of universal jurisdiction contained in the "grave breaches" regime and the ways States Parties have implemented it in the last decades. Practice since 1949 shows that some States have made the prosecution of war crimes conditional on the presence – temporary or permanent – of the alleged offenders on their territory. Another condition, sometimes also found in domestic legislation, is that of special prosecutorial discretion. While States may attach conditions to the application of universal jurisdiction to "grave breaches" or other war crimes, such conditions must, in every context, seek to increase the effectiveness and predictability of universal jurisdiction and must not unnecessarily restrict the possibility of prosecuting suspected offenders.

The new ICRC commentaries also address other fundamental issues, such as the time frame for fulfilling the obligation to investigate those alleged to have committed a grave breach and either prosecute or extradite those responsible, the challenges encountered by States when implementing universal jurisdiction, the state of international law today with regard to the potential immunities from jurisdiction and prosecution for alleged perpetrators of war crimes, and the possible applicability of the grave breaches regime in non-international armed conflict.

Conclusion

States bear the primary responsibility for investigating and prosecuting alleged perpetrators of serious violations of IHL. When States – based on more traditional concepts of jurisdiction (the principle of territoriality, the active or passive personality principle and the protective principle) – do not take legal action against individuals suspected of committing such crimes, the use of universal jurisdiction can serve as an effective mechanism to ensure accountability and to limit impunity.

The ICRC recognizes that there may be challenges to the effective exercise of the principle of universal jurisdiction. However, the ICRC reiterates its support to States on establishing appropriate national legislation to respond to IHL violations on the basis of all principles of jurisdiction – including universal jurisdiction.

In consideration of the importance of the principle of universal jurisdiction, the ICRC looks forward to its contribution to future reports of the Secretary-General on this subject.

15 April 2016
International Committee of the Red Cross