

Concepts, tasks and legitimacy of international criminal law (continued)

Universal jurisdiction, the duty to prosecute, and amnesty

- **The power to prosecute and punish, and universal jurisdiction**

Crimes under international law are directed against the **interests of the international community as a whole**. Since every legal system may defend itself with criminal sanctions against attacks on its elementary values, the international community is empowered to prosecute and punish these crimes under international law, **regardless of who committed them or against whom they were committed**.

It follows from the universal nature of crimes under international law that each State is affected by them. **Every country** is thus allowed to prosecute criminals in all cases without restriction; it is not important where the conduct in question took place, who the victims were, or whether any other link with the prosecuting State can be established. Thus the **principle of universal jurisdiction** applies to crimes under international law.

- **The duty to prosecute**

International law not only allows States to prosecute international crimes through universal jurisdiction, but even obligates them to so under certain circumstances.

- The duty to prosecute by the State of commission

Customary international law today recognizes that the State in which a crime under international law is committed has a **duty to prosecute**. This duty also exists under treaty law, e.g. for genocide (Art. 4 of the Genocide Convention), for crimes under international law that constitute torture (Art. 7 of the Torture Convention), and for certain grave breaches of the Geneva Conventions, such as killings, serious bodily injury or unlawful confinement (Art. 146 of Geneva Convention IV).

- Do "Third States" have a duty to prosecute?

Crimes under international law are typically State crimes; leaving it up to the State of commission to prosecute international crimes would often mean making the perpetrators their own judges. Therefore, the question of whether and to what extent there exists a **duty to prosecute on the part of third States** is of supreme legal and practical relevance:

The duty to prosecute has so far been universally recognized only for **war crimes in international armed conflicts**. The Geneva Conventions provide that the contracting States must either prosecute grave breaches of the Conventions themselves, regardless of where, by whom, or against whom they are committed, or "hand such persons over for trial" to another State (see Art. 146 of Geneva Convention IV). This **obligation** is called the principle of *aut dedere aut iudicare*. The scope of the Geneva Conventions' provisions on grave breaches correctly also includes crimes committed in non-international armed conflicts.

It remains in dispute whether a third State also has a **customary law duty** to prosecute genocide and crimes against humanity. In any case, there is no treaty-based requirement. The ICC Statute leaves this question open.

➤ Amnesties and truth commissions

Instead of only relying on criminal law to address past injustices there are other instruments that may be applied, such as the use of amnesties or the establishment of truth commissions. No clear position on the question of whether amnesties or truth commissions can **replace criminal proceedings** has yet emerged in international (criminal) law. It is certain, at least, that an across-the-board exemption from criminal responsibility is **unacceptable** (e.g. general amnesties) to the extent that international law creates a duty to prosecute and punish.

Enforcement of international criminal law

- **"Direct" and "indirect" enforcement**

The rules of international criminal law can be applied by both international and national courts. The prosecution of crimes under international law by international courts is called **direct enforcement**. The prosecution of crimes under international law by national courts is called **indirect enforcement**.

Until recently, international criminal law was almost entirely dependent on indirect enforcement mechanisms. Examples for the direct enforcement of international criminal law are the International Military Tribunals at Nuremberg and Tokyo, the United Nations *ad hoc* Tribunals and – now – the International Criminal Court.

- **National and international criminal justice systems**

The relationship between national and international criminal justice systems can be regulated in various ways.

- **International Military Tribunal at Nuremberg:** This court was endowed with exclusive jurisdiction, as far as the trials of the major German war criminals of World War II were concerned (principle of exclusivity). According to Art. 4 of the London Agreement, jurisdiction was only granted to the country of commission for other perpetrators.
- **United Nations *ad hoc* International Criminal Tribunals:** both the ICTY and ICTR statutes accept the concurrent jurisdiction of national courts. Collisions are resolved according to the principle that international courts take precedence. (see Art. 9 ICTY Statute and Art. 8 ICTR Statute)
- **International Criminal Court:** The ICC aims at supplementing and not replacing national jurisdictions. It only acts – subsidiary – if States are unwilling or unable to genuinely carry out an investigation or prosecution relating to a crime under international law (**principle of complementarity**), see Art. 1 and 17 ICC Statute.

Recommended reading: Werle/Jessberger, Principles of International Criminal Law, 3rd ed., pp. 73-90.