

UNIVERSAL JURISDICTION:

Questions and answers

What is universal jurisdiction?

Traditionally, states have enacted criminal laws which provide that their national courts can prosecute anyone accused of committing crimes on its territory, regardless of the nationality of the accused or the nationality of the victim (territorial jurisdiction).

However, under international law states can also enact national criminal laws which allow national courts to investigate and prosecute people suspected of crimes committed outside of the state's territory, including crimes committed by a national of the state, crimes committed against a national of the state and crimes committed against a state's essential security interests. There is, however, an all inclusive form of jurisdiction called **universal jurisdiction** which provides that national courts can investigate and prosecute a person suspected of committing a crime anywhere in the world regardless of the nationality of the accused or the victim or the absence of any links to the state where the court is located.

Why is Amnesty International calling on states to enact universal jurisdiction legislation?

Amnesty International shares the view broadly expressed by the international community that certain crimes (including, specifically, genocide, crimes against humanity, war crimes, torture, extrajudicial executions and "disappearance") are so serious that they amount to an offence against the whole of humanity and therefore all states have a responsibility to bring those responsible to justice. This view is illustrated in the Preamble of the Rome Statute of the International Criminal Court.

The Preamble to the Rome Statute of the International Criminal Court states in part:

"Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time,

Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,

Recognizing that such grave crimes threaten the peace, security and well-being of the world,

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,

Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes[.]”

To fulfil this responsibility, Amnesty International believes that states should enact the widest reaching jurisdiction - universal jurisdiction - to ensure that their national courts are able to investigate and prosecute, anyone suspected of committing these crimes and to ensure that their country cannot be used as a safe haven to evade justice.

Why has Amnesty International specifically selected the crimes of genocide, crimes against humanity, war crimes, torture, extrajudicial executions and “disappearances”?

Amnesty International has selected these crimes because they represent the gravest crimes under international law. In the last century, there were millions of victims of these crimes, but only a handful of those responsible for the crimes were brought to justice. In this century, it is essential that an effective legal framework be established to bring such persons to justice and to deter such people from planning to commit such crimes in the future.

Universal jurisdiction can be applied to most ordinary crimes (such as murder, manslaughter, theft). However, states have also enacted legislation extending to crimes of international concern, including hijacking and hostage-taking, and crimes under international law (including genocide, crimes against humanity, war crimes, torture, extrajudicial executions and “disappearances”).

The Geneva Conventions and the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (Convention against Torture) place a legally binding obligation on states that have ratified them to exercise universal jurisdiction over persons accused of grave breaches of the Geneva Conventions and torture or to extradite them to a country that will. The Inter-American Convention on Forced Disappearance of Persons, requires Organisation of American States members that have ratified the Convention to exercise universal jurisdiction over persons suspected of the crime of “disappearances” or to extradite suspects.

Although there are no treaties requiring states to exercise universal jurisdiction over genocide, crimes against humanity and extrajudicial executions, taking into account the serious nature of the crimes, which along with “disappearances”, war crimes and torture, are the gravest crimes under international law, states have a logical and moral duty to exercise universal jurisdiction over these crimes as well.

Who can be prosecuted using universal jurisdiction legislation?

The Charter of the Nuremberg and Tokyo Tribunals, the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda and the Rome Statute of the International Criminal Court all confirm that courts can exercise jurisdiction over the crimes (as grave crimes under international law) regardless of the official capacity of the accused at the time of the crime or later, be it a head of state, head or member of government, member of parliament or other elected or governmental capacity. States should, therefore, ensure that national immunities and immunities for people visiting their country, regardless of their status, should not extend to these crimes.

The Pinochet Case

The Pinochet case, is the most well known case where states have exercised universal jurisdiction.

On 16 October 1998, Augusto Pinochet, the former President of Chile was arrested in London in response to an arrest warrant issued by a Spanish court charging Augusto Pinochet with human rights violations including murder, torture and “disappearance” committed during his administration in Chile between 1973 to 1990. Most of the crimes that Augusto Pinochet was charged with were committed in Chile against Chilean nationals. Spain applied for Augusto Pinochet’s extradition to be prosecuted in Spain. Belgium, France and Switzerland also issued extradition requests.

Augusto Pinochet’s lawyers challenged the arrest and extradition on the basis that as a former head of state he was immune from prosecution.

In March 1999 the House of Lords, the UK’s highest court, ruled that Augusto Pinochet’s immunity as a former head of state extends only to acts done in his official capacity as a head of state. The Law Lords ruled that acts of torture as crimes under international law could not be acts within the official capacity of a head of state and that extradition proceedings to Spain should continue.

In March 2000, Augusto Pinochet was returned to Chile on grounds that he was not medically fit to stand trial. The decision was an act of ministerial discretion by the UK Home Secretary who refused to submit the results of Augusto Pinochet’s medical tests to the courts to determine whether he was fit to stand trial. The House of Lords ruling, however, stands as an important precedent on immunities and universal jurisdiction.

In December 2000 a judicial warrant was issued for Augusto Pinochet to be placed under house arrest in Chile for the crimes committed under his rule during the military operation known as the "Caravan of Death". His lawyers successfully appealed this order. Pinochet was however placed under house arrest, following a second warrant, until March 2001 when he was released on bail. The same month the charges were reduced from that of perpetrator of the offences of kidnapping and/or aggravated homicide to one of concealment.

In July 2001 the Santiago Appeals Court "suspended temporarily" all legal proceedings affecting Augusto Pinochet on health grounds. Lawyers for the prosecution have submitted a judicial petition to the Supreme Court to review the temporary suspension of the case. The case was still pending before the Chilean courts in December 2001.

Does the suspected person have to be present in the country for an investigation to begin?

No. If a suspect is not in the territory, international law permits national authorities to conduct an investigation and, if there is sufficient admissible evidence, issue an extradition request to the state where the accused is, or is reported to be.

Amnesty International believes, however, that the trial itself should not take place *in absentia* (if the accused is not present). In particular, the accused should be present during a trial to hear the full prosecution case, to put forward a defence or assist their counsel in doing so.

How should states enact universal jurisdiction?

Amnesty International believes that all states - regardless of the type of legal system - should enact or amend national laws, in accordance with Amnesty International's ***14 Principles on the effective exercise of universal jurisdiction*** (AI Index: IOR 53/01/99)- expressly providing for universal jurisdiction over the crimes.

There are differing legal systems throughout the world, some of which may be able to prosecute a person without universal jurisdiction legislation, for example, because their legal system directly incorporates treaties that the state has ratified and/or customary international law into national law. However, in light of the recent Hisssein Habré case in Senegal, Amnesty International is calling on all states to leave no doubt and expressly provide for universal jurisdiction for the crimes in their national criminal laws.

The case of Hisssein Habré

In February 2000, a Senegalese court relying on the principle of universal jurisdiction, indicted Chad's exiled former President, Hisssein Habré, on charges of torture committed

during his rule between 1982 and 1990. A 1992 Truth Commission Report concluded that 40,000 political murders and 200,000 cases of torture occurred in Chad when Hissein Habré was President.

Although Senegal's criminal law criminalizes torture, it does not expressly provide for universal jurisdiction over the crime. However, Senegal had ratified the Convention against Torture, which requires states parties to exercise universal jurisdiction over persons found in their territory, subject to their jurisdiction, suspected of the crime or to extradite the suspect.

Article 79 of Senegal's Constitution includes a provision:

“The treaties or agreements regularly ratified or approved have, on their publication, an authority superior to that of laws, subject, for each treaty and agreement to its application by the other party.”

Hissein Habré's lawyers challenged the indictment and on 20 March 2001 the Court of Cassation ruled that Senegalese courts have no jurisdiction over acts committed by foreign national outside their territory.

In December 2001, Hissein Habré was still held in Senegal as a result of an appeal by the UN Committee against Torture to Senegal to respect its obligations under the Convention and the UN Secretary-General to extradite him to another country that can prosecute him. Complaints have been filed against Hissein Habré in Belgium.

What are Amnesty International's 14 Principles on the effective exercise of universal jurisdiction?

The following is a brief summary of Amnesty International's *14 Principles on the effective exercise of universal jurisdiction* (AI Index: IOR 53/01/99). For further detail of the principles and legal arguments in favour of them, please refer to the document.

Amnesty International's 14 Principles on the effective exercise of universal jurisdiction

1. States should ensure that their national courts can exercise universal jurisdiction over genocide, crimes against humanity, war crimes, torture, extrajudicial executions and “disappearances.”
2. National laws should ensure that the national courts can prosecute anyone suspected or accused of the crimes whatever their official capacity at the time of the alleged crime or anytime thereafter.

3. National laws should ensure that the national courts can exercise universal jurisdiction over the crimes no matter when the crimes occurred, including crimes committed before the universal jurisdiction law is enacted.
4. National laws should ensure that there is no time limit after which a person accused of the crimes cannot be prosecuted.
5. National laws should ensure that persons on trial in national courts can only raise defences that are consistent with international law. In particular, claiming that the person was acting on superior orders, under duress or out of necessity should not be permissible defences.
6. National laws should ensure that national courts can exercise jurisdiction over the crimes in cases where the suspect or accused is shielded from justice in any other national jurisdiction (for example, a person who has been granted amnesty by the authorities where the crime took place).
7. Decisions to start or stop an investigation or prosecution should be made only by the prosecutor, subject to judicial scrutiny, which does not impair the prosecutor's independence, based solely on legal considerations, without outside political interference.
8. National laws should require national authorities exercising universal jurisdiction to investigate the crimes and, where there is sufficient admissible evidence, to prosecute, without waiting for a complaint by a victim or any other person with a sufficient interest in the case.
9. National laws should ensure that the trial will be fair and prompt in strict accordance with international law and standards for fair trials. All branches of government, including the police, prosecutor and judges must ensure that these rights are fully respected.
10. Intergovernmental and non-governmental organizations should be permitted to attend and monitor trials.
11. National courts must protect victims, witnesses and their families. Investigation of crimes must take into account the special interests of vulnerable victims and witnesses, including children. Courts must award appropriate redress to victims and their families.
12. National law should ensure that the crimes are not punishable by the death penalty or other cruel, inhuman or degrading punishment.
13. States should cooperate fully with other states exercising universal jurisdiction.
14. Judges, prosecutors and investigators should receive effective training in human rights law, international humanitarian law and international criminal law.

Shouldn't the accused person be returned to the country where the crime took place, if that state is willing to prosecute them?

In an ideal world, it is generally preferable for most parties involved if the trial takes place in the country where the crime took place. However, in many cases this will not be possible. For example, in the aftermath of a conflict, the national legal system may not be capable of carrying out an investigation and prosecution. In many cases there will also be a lack of political will to prosecute the person or the person may have been granted an

amnesty for their crime. It may also be the case that the accused may not receive a fair trial in that country.

States exercising universal jurisdiction will, of course, be able to consider extradition requests from the country where the crime took place. The state where the crime occurred - which will usually not have investigated or prosecuted the suspect - should have the burden of proving to the court with custody of the suspect that it can investigate and prosecute them in fair proceedings which will not result in the death penalty.

Won't there be practical difficulties in investigating and prosecuting a person accused of committing a crime in another territory, possibly thousands of miles away?

This is the most commonly used argument against universal jurisdiction. Amnesty International believes that while there often may be challenging aspects of investigating and prosecuting a person accused of a crime committed outside of the territory of the national courts, they should not be used as an excuse for not enacting and implementing universal jurisdiction (this issue is examined in more detail in *Chapter 14 of Universal jurisdiction: The duty of states to enact and implement universal jurisdiction* (AI Index: 53/017/2001)).

In many of the universal jurisdiction cases that have taken place in recent years, the national courts have experienced some difficulties in preparing for a prosecution, including obtaining important evidence from authorities in the country where the crime was committed (especially if they are opposed to the prosecution and unwilling to cooperate) and ensuring the participation of victims and witnesses in the trial.

However, these obstacles will not exist in all cases and where they do arise there are often ways of overcoming them. For example, victims and witnesses located outside the country where the crime occurred have given evidence and evidence has been obtained from other sources, such as satellite photographs.

There may be situations where a prosecutor will be unable to bring a prosecution. However, this situation will, of course, arise when prosecuting crimes committed in the court's territory. The fact that prosecutors in Austria, Belgium, Canada, Denmark, France, Germany, Italy, Senegal, Spain, Switzerland and the United Kingdom, as well as the International Criminal Tribunals for the former Yugoslavia and Rwanda, have successfully investigated and prosecuted cases involving crimes committed abroad, illustrates that with sufficient political will in most cases these obstacles can be overcome.

If a person has been granted an amnesty for crimes by the state where the crimes took place can they still be prosecuted in another state using universal jurisdiction?

National amnesties, pardons or similar national measures to prevent a person from being brought to justice for these worst imaginable crimes not only have no place in the international system of justice, but also are prohibited under international law. Therefore, such steps cannot prevent the courts from another state or an international court from investigating and prosecuting persons accused of such crimes (this issue is examined in detail in *Chapter 14 of Universal jurisdiction: The duty of states to enact and implement universal jurisdiction* (AI Index: 53/017/2001)).

The International Criminal Court is expected to be established shortly, is the enactment of universal jurisdiction legislation still necessary?

Yes. The International Criminal Court is not a replacement for national prosecutions. In fact, the Rome Statute expressly requires states that ratify it to accept the primary responsibility to investigate and prosecute persons suspected of crimes within the Court's jurisdiction in their national courts. The International Criminal Court is designed to be complementary to the national courts and will only investigate and prosecute individuals when the national courts are unable or unwilling to do so.

The International Criminal Court will also have a limited jurisdiction and, in the absence of a UN Security Council referral of a case the Court, will not be able to prosecute people accused of genocide, crimes against humanity and war crimes, who are nationals of a country which has not ratified the Rome Statute or if the crime was committed in a country that has not ratified it.

States with universal jurisdiction legislation, however, would be able to investigate and prosecute such a person in their national courts.

Furthermore, the International Criminal Court will only be able to try people accused of crimes committed after the Court's Statute enters into force (which is expected in 2002). National courts exercising universal jurisdiction can, if enacted in accordance with Amnesty International's *14 Principles on the effective exercise of universal jurisdiction*, prosecute people accused of the crimes no matter when they occurred.

In order for states to cooperate effectively with the International Criminal Court and to ensure that the Court and their national courts are effective in bring people accused of the these crimes to justice, they should enact universal jurisdiction legislation (for more information on the International Criminal Court please refer to Amnesty International's *Fact Sheets on the International Criminal Court* (AI Index: IOR 40/002-010 and 017/2000)).

How many states already have universal jurisdiction under national law over certain crimes?

In September 2001, Amnesty International issued a preliminary study of national criminal laws of over 130 countries and found:

- Over 125 countries had universal jurisdiction over one or more of the crimes listed in Amnesty International's appeal.
- No country had universal jurisdiction over all these crimes.
- No country had legislation which was entirely satisfactory.

The full results of this preliminary study are contained in *Universal Jurisdiction: The duty of states to enact and implement legislation* (AI Index: IOR 53/002-018/2001)

How many states have used universal jurisdiction in their national courts?

Amnesty International's study of universal jurisdiction shows that since the end of the Second World War more than a dozen states have conducted investigations, commenced prosecutions and completed trials based on universal jurisdiction for the crimes or arrested people with a view to extraditing the persons to a state seeking to prosecute them. These states include: **Australia, Austria, Belgium, Canada, Denmark, France, Germany, Israel, Mexico, Netherlands, Senegal, Spain, Switzerland, the United Kingdom, the United States** (for more details of these cases see: *Universal Jurisdiction: The duty of states to enact and implement legislation*).