

MADRID - BUENOS AIRES PRINCIPLES OF UNIVERSAL JURISDICTION

Preamble

In recent decades, Universal Jurisdiction has proved to be a necessary instrument for ensuring a full and completely satisfactory judicial response to international crimes. From the precursors of international law to the present day, the international community has consolidated the idea that, due to their nature and seriousness, certain crimes transcend the responsibility of a particular sovereign State and affect humanity as a whole. Therefore, all States are responsible for identifying and prosecuting those crimes in order to ensure an end to impunity for the perpetrators.

International criminal law has developed considerably, from the establishment of the Courts of Nuremberg and Tokyo to the creation of *ad hoc* tribunals. However, a major advance in International Criminal Law was the adoption of the Rome Statute, which established the International Criminal Court, and its review in the Conference of Kampala. By offering a rational, measured response to criminal offences, it has led to progress in protecting victims and in combating impunity. Nonetheless, the response is still incomplete because of the many limitations of the International Criminal Court. Therefore, its function needs to be strengthened at the local level by applying the principle of Universal Jurisdiction, which is already recognised in various international instruments and national legislation as an appropriate mechanism for enforcing the actions of international justice at the national level.

The application of the principle of Universal Jurisdiction by legal practitioners and its inclusion in national legislation over the past few decades leads us to analyse and reflect on its achievements, failures and challenges. The Princeton Principles and those of Cairo-Arusha went a long way in defining the key ideas of Universal Jurisdiction. However, years after their publication, the application of this principle has undergone new developments, advances, corrections and limitations in various countries, in many cases

increasing the lack of protection. It is therefore vital that these principles be brought up to date and broadened, as well as disseminated and promoted on a political level.

Some of the crimes included in this declaration are already subject to prosecution in accordance with the principle of Universal Jurisdiction, while others, such as those included in Principle 3, have been defined and their prosecution is set out as an aspiration to ensure the full protection and survival of humanity in the face of major economic, financial and environmental aggression.

Consequently, the underlying aim of these Principles and their annex is rooted in three objectives: 1) to reaffirm the doctrinal efforts made thus far, 2) to promote the codification of those elements around which there is consensus, and 3) to report new sources of impunity and the means to prevent it in order to establish an *opinio iuris* to consolidate Universal Jurisdiction as an effective instrument in eradicating impunity and protecting the victims and the ecosystem.

Principle 1 – Concept

Universal Jurisdiction establishes the right or the obligation of a national court to examine and, if appropriate, judge the crimes included in Principles 2, 3 and 4 by implementing national and/or international criminal law, regardless of where those crimes were committed, the nationality of the alleged perpetrator and the victims, or any other connection to the State exercising the jurisdiction.

Principle 2 – Crimes subject to Universal Jurisdiction

Universal Jurisdiction shall apply to international crimes such as genocide, crimes against humanity, war crimes, piracy, slavery, enforced disappearance, torture, human trafficking, extrajudicial executions and the crime of aggression. Such crimes may be committed in many ways, including through economic activities and those that affect the environment.

Principle 3 – Economic and environmental crimes subject to Universal Jurisdiction

Universal Jurisdiction shall also apply to economic and environmental crimes the extent and scale of which seriously affect group or collective human rights or cause the irreversible destruction of ecosystems.

Principle 4 – Scope of Universal Jurisdiction

Without prejudice to the provisions in Principles 2 and 3, States may extend the scope of the Universal Jurisdiction they exercise to include the crimes set out in international agreements they have ratified.

Principle 5 – Connected crimes

Similarly, the exercise of Universal Jurisdiction may also apply to the crimes connected to those included in Principles 2, 3 and 4.

Principle 6 – Criminal and/or civil liability

1. Natural or legal persons may be criminally and/or civilly liable for their actions or omissions in the crimes listed in Principles 2, 3 and 4, regardless of the manner and degree of their participation or concealment of the crime, without prejudice to the potential civil liability of the State.
2. Criminal liability extends to higher ranks in organised power structures, and to their subordinates, who may not allege due obedience.
3. The criminal liability of legal persons for the crimes listed in Principles 2, 3 and 4 shall be recognised by domestic or international law regardless of the trial and, where pertinent, sentencing of the individuals actually committing the crime. In the absence of legal provisions for corporate criminal liability, the legal or *de facto* representative of the legal persons concerned shall be liable.
4. All the assets, property and securities of the party committing the crime that are directly or indirectly related to the crime committed shall be seized, to the extent established in the judicial ruling, to repair in full the damages caused.
5. The competent authorities shall not recognise bank or corporate secrecy, or any other measure that could favour fraudulent corporate flight or lead to the mass withdrawal or transfer of funds in an attempt to circumvent the monetary obligations resulting from committing the crimes listed in Principles 2, 3 and 4.

Principle 7 – Universal civil jurisdiction

Universal Jurisdiction may be applied in civil law separately from criminal law, provided the damage is due to one of the crimes listed in Principles 2 and 3.

Principle 8 – Application of the principle of Universal Jurisdiction when not included in national legislation

1. All States shall include the principle of Universal Jurisdiction in their national laws.

2. The competent authorities should apply the principle of Universal Jurisdiction for the crimes set out in Principles 2 and 3, regardless of whether that principle is included in their national laws.

Principle 9 – Statute of limitations, amnesty, pardon and immunity

1. The provisions of the States where the crimes were committed in relation to the expiry of the statute of limitations, amnesty, pardon and other measures for the exclusion of liability shall not apply to the crimes listed in Principles 2 y 3.
2. Immunity and special procedural guidelines pertaining to the official position of a person that are the subject of national law shall not limit the exercise of Universal Jurisdiction by the judges of the State applying it.

Principle 10 – Principle of legality under international criminal law

The actions or omissions involved in perpetrating the crimes included in Principles 2 and 3 shall be examined and, where applicable, judged in accordance with the principle of Universal Jurisdiction if such actions or omissions constituted crimes under international law when they were committed, despite their not being codified as crimes in domestic law.

Principle 11– Initiation of the investigation and presence of the alleged perpetrator during the proceedings

1. In accordance with the principle of Universal Jurisdiction, the competent authorities shall initiate an examination of the facts and the persons responsible for any of the crimes set out in Principles 2 and 3, irrespective of the extent of their participation and without their needing to be present. In all cases, the alleged perpetrator shall be granted access to the proceedings and allowed the right of defence.
2. If the alleged perpetrator is not present when the investigation begins, the competent authority of the investigation state may agree to the appropriate precautionary measures, with a view to guaranteeing the presence of the alleged perpetrator, the evidence and the reparations for victims.

3. The competent authority of the State where the alleged perpetrator is located shall agree to the precautionary measures necessary to guarantee the presence of the alleged perpetrator, the objective of the proceedings and the reparations for victims, regardless of the existence of a prior request for extradition.

Principle 12 – Complementarity and cooperation with the International Criminal Court and other international criminal justice mechanisms

1. The governing principle of complementarity between the International Criminal Court and national courts shall also apply to those applying Universal Jurisdiction.
2. States shall cooperate, through their national courts and the exercise of Universal Jurisdiction, with the International Criminal Court and other international criminal justice mechanisms in the investigation and/or prosecution of international crimes.

Principle 13 – Conflicts of national jurisdiction

1. The national jurisdictions of two or more States may initiate an investigation into the same fact concurrently, in which case they shall cooperate in full to ensure that the case is resolved in the best possible way.
2. Priority in conducting the investigation should be given to the State that, pursuant to the *pro actione* principle, proves to be in the best position to judge the facts, with no pre-established hierarchy regarding the rights of a given jurisdiction. In evaluating the conditions for the trial, the following aspects shall be considered among others:
 - the effective right of access to justice
 - the possibilities for a credible trial in the country where the facts were committed
 - the location of the alleged perpetrator
 - access to evidence
 - the measures of protection available to victims and witnesses, and
 - the independence and impartiality with which the proceedings are and shall be substantiated.

3. A mechanism for resolving potential jurisdictional conflicts shall be established.

Principle 14 – Mutual legal assistance

1. The competent State authorities shall assist one another in all proceedings initiated by virtue of the principle of Universal Jurisdiction, provided that the petitioner acts in good faith.
2. The principle of cooperation shall be subordinated to the existence of reasonable doubt in believing that the alleged perpetrator could be subjected to cruel, inhuman or degrading punishment or treatment, forced disappearance, sentenced to death or denied a fair trial, even if the petitioning State offers guarantees.
3. The allegation of the absence of double criminality by States shall pose no obstacle to providing legal assistance.
4. Non recognition of the principle of Universal Jurisdiction by the State from which assistance is requested shall pose no obstacle to providing legal assistance.

Principle 15 – Extradition

1. States shall refuse requests for extradition/surrender by another State, even one with Universal Jurisdiction, when there are firm grounds for believing that the alleged perpetrator could be subjected to cruel, inhuman or degrading treatment and punishment, forced disappearance, sentenced to death or denied a fair trial, even if the petitioning State offers guarantees.
2. Any State refusing a request for extradition on any grounds shall investigate and, if appropriate, conduct its own hearing.
3. The allegation by States of the absence of double criminality shall pose no obstacle to granting the extradition/surrender.
4. Failure of the requested State to recognise the principle of Universal Jurisdiction shall not prevent the granting of extradition/surrender.

Principle 16 – *Ne bis in idem*

States applying the principle of Universal Jurisdiction shall not judge any person already judged by another court, unless the purpose of the criminal proceedings before that court were for the purpose of shielding the person concerned from criminal responsibility.

Principle 17 – Transitional Justice

States may apply the principle of Universal Jurisdiction to Transitional Justice systems when impartially and independently applied international standards of justice have failed to be respected, or when they have been used to for the purpose of shielding the person concerned from criminal responsibility.

Principle 18 – Independence of the competent authorities

The competent authorities shall act with total independence and impartiality and without any interference whatsoever in relation to the proceedings initiated by virtue of the principle of Universal Jurisdiction.

Principle 19 – Specialised judicial, prosecution and police institutions

All States shall set up police, judicial and/or prosecution bodies specialised in investigating and judging the crimes listed in Principles 2 and 3.

Principle 20 – Rights of victims and protection of witnesses and experts

1. In applying the principle of Universal Jurisdiction, the term victim refers to all persons who have suffered harm, individually or collectively, as a consequence of the crimes listed in Principles 2, 3 and 4, as well as to their immediate family or dependants of the direct victim, and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization, regardless of whether the alleged perpetrator has been identified, arrested, judged or sentenced.
2. The competent authorities shall safeguard the rights of victims during the proceedings and the execution of the sentence, and in all cases, prevent

secondary victimisation.

3. All efforts shall be made to ensure the widest participation and the victims' right to receive legal information during the proceedings.
4. States investigating, judging and/or cooperating with another State during proceedings initiated by virtue of the principle of Universal Jurisdiction shall take all steps to guarantee the safety, privacy and physical and psychological wellbeing of victims, witnesses and experts.

Principle 21 – Procedural rights and guarantees of the alleged perpetrator

The rights and guarantees of the alleged perpetrator shall be respected during all stages of the investigation and trial, in accordance with international law.

Principle 22 – Interpretation

Nothing in this document shall be interpreted as imposing restrictions on the application of the principle of Universal Jurisdiction pursuant to international law or as limiting the rights of the victims to truth, justice and full redress.

Annex to the Madrid – Buenos Aires Principles of Universal Jurisdiction:

Among the potential crimes that fit the category introduced in Principle 3 mention must be made of the following ones:

- fraudulent adulteration of food or price speculation in relation to staple products on which the survival or health of people in general depend
- child labour and the breach of internationally recognized workers' rights
- the illegal diversion of international funds approved for the alleviation of human disasters
- the illegal sale of weapons to places or zones of conflict, or expressly subject to export bans by the United Nations
- fraudulent corporate bankruptcy or the mass withdrawal of funds in an attempt to circumvent monetary responsibilities arising from the commission of the crimes set out in these Principles

- the illicit use of the property of the victims of the crimes set out in these Principles
- forced displacement of communities for the purpose of exploiting natural resources in their ancestral lands
- the illegal obstruction of the use of cross-border resources such as the severe pollution of international rivers
- the illicit exploitation of natural resources seriously affecting the health, life or the peaceful co-existence of humans with their natural habitat in the area where the exploitation takes place, and
- the irreversible destruction of ecosystems.