

# Universal Jurisdiction over War Crimes

## ➤ Overview

The starting point for this project was the October 2011 report of Amnesty International, entitled *Universal Jurisdiction: a Preliminary Survey of Legislation Around the World*, available at: <https://doc.es.amnesty.org/cgi-bin/ai/BRSCGI/ior530202012en?CMD=VEROBJ&MLKOB=32120785151> (2011 AI Report).

Following the structure of the 2011 AI Report, we organized our findings into two documents:

❖ **WCRO Chart: Excel document summarizing national provisions on war crimes and universal jurisdiction (UJ) composed of two tables:**

- **Table 1** - a chart comparing the national provisions on war crimes of 123 countries with the provisions of Article 8 of the Rome Statute establishing the International Criminal Court.
- **Table 2** - a chart examining the national provisions of those states providing UJ or modified UJ over war crimes<sup>1</sup> and, in particular, whether such jurisdiction extends to international armed conflict (IAC) or non-international armed conflict (NIAC).

The 2011 AI Report identifies 133 states<sup>2</sup> that provide UJ over war crimes. The WCRO chart provides a more detailed description of the domestic legislation of 123 of those states,<sup>3</sup> in particular by comparing the text of national provisions to the provisions of Article 8(2) of the Rome Statute, including whether the national provisions apply to international or non-

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<sup>1</sup> Our definition of universal jurisdiction excludes passive personality jurisdiction, meaning that we did not treat a state as providing for UJ over war crimes if the state only provides for jurisdiction where the perpetrator is a national, where the crime is committed on the territory of the state, and/or where the victim is a national.

<sup>2</sup> Note: although the text of the AI Report states at page 12 that 134 countries have been identified as providing UJ over war crimes, the “Profile Chart” located in Annex I to the Report only includes 133 such countries.

<sup>3</sup> We did not include states that provide for UJ only where the victim is a national of the state (passive personality) and/or where the perpetrator gained citizenship after committing the crime, but before criminal proceedings. We also omitted certain countries based on our understanding that the publicly available version of the state’s legislation did not in fact cover war crimes (*i.e.*, crimes committed in armed conflict), as opposed to aggression or ordinary crimes. Finally, we omitted certain states because we could not locate the relevant legislation.

international armed conflict or both. The WCRO Chart also catalogs the conditions required by each state for them to exercise UJ over war crimes.

## ➤ Organization and Terminology

### *How the charts have been drafted*

#### **Table 1: National War Crimes Provisions**

1) “Existence of Legislation Criminalizing NIAC War Crimes” column - expresses for each state if its law appears to criminalize NIAC war crimes:

- The *states classified as “YES”* are those for which the relevant legislation:
  - ✓ Expressly mentions “internal conflicts,” “non-international conflicts,” “conflicts not of an international character,” etc.;
  - ✓ Directly incorporates or provides some express reference to article 8(2)(c) and (e) of the Rome Statute;
  - ✓ Expressly criminalizes violations of Common Article 3 to the 1949 Geneva Conventions or Additional Protocol II to the Geneva Conventions; or
  - ✓ Expressly criminalizes “any” violation of treaties to which the state is a party, so long as that state is a party to the Geneva Conventions, Additional Protocol II, and/or the Rome Statute.
  
- The *states classified as “UNCLEAR”* are those for which the relevant legislation:
  - ✓ Refers generally to acts committed in “wartime” or during an “armed conflict,” without further explanation;
  - ✓ Refers generally to the “laws and customs of war,” “international humanitarian law,” “international public law,” or to “international treaties to which State X is a party;”
  - ✓ Lacks express reference to “non-international conflicts,” “internal conflicts,” etc. or to article 8(2)(c) and (e) of the Rome Statute,
  - ✓ Does not expressly criminalize violations of Common Article 3 to the 1949 Geneva Conventions or Additional Protocol II; or
  - ✓ Is not readily available in English (Belarus, Sudan, and Turkmenistan only).

- The *states classified as “NO”* are those for which the relevant legislation:

- ✓ Limits war crimes legislation to criminalizing grave breaches of the Geneva Conventions and, in some cases, Additional Protocol I;
- ✓ In the case of Iraq, the only available war crimes legislation is limited to acts that occurred between 1968 and 2003.

*Note: This column only examines whether a state criminalizes war crimes in its domestic law. It is therefore possible that a state may criminalize NIAC violations but not provide UJ or modified UJ over these crimes.*

**2) “Existence of UJ or modified UJ over NIAC War Crimes” column** - summarizes which states provide UJ or modified UJ over NIAC war crimes and which do not.

*Note: A more precise analysis of each state’s UJ provisions can be found in Table 2.*

**3) “Legal provisions for war crimes in national legislations compared with Article 8(2) of the Rome Statute” column** - lists crimes under article 8(2) of the Rome Statute – separating IAC crimes from NIAC crimes – and assesses whether analogous provisions exist in domestic law.

- The designation “**YES**” means that domestic law covers the relevant crime. If it is not followed by any quotation, it means that the state law uses the exact same definition or elements as article 8(2) of the Rome Statute. If it is followed by a quotation, it is because the national law provides a different / broader / more limited definition of the relevant crime.

- The designation “**NO**” means that no analogous provision could be located in national law for a particular crime. Importantly, this does not mean that the state does not criminalize the relevant conduct in armed conflict; it only means that there is no express language in the statutory law analogous to the Rome Statute’s provision relating to such conduct. For instance, the jurisprudence of a country that expressly criminalizes “grave breaches of the four Geneva Conventions” may hold that rape in international armed conflict amounts to torture as a grave breach of the GCs, but that country would appear as a “NO” in our chart under the column listing sexual violence crimes.

- The **grey highlighting** indicates uncertainty. For instance, a box will be highlighted in grey where we lack the text of the domestic law or where the state criminalizes certain conduct in armed conflict, but it is not clear from the legislation whether “armed conflict” (or

“wartime,” etc.) includes non-international armed conflict. A box will also be highlighted in grey where, as in the case of Vietnam, the domestic legislation criminalizes all “serious” violations of international treaties to which a state is a party and we do not know how that state’s courts have interpreted the qualifier “serious.”

- The “*Other*” *column* includes war crimes that are criminalized in national law that are not included in article 8(2) of the Rome Statute.

## **Table 2: Existence of UJ/ modified UJ**

1) “**Legal provisions regarding Universal Jurisdiction & modified UJ**” **column** - refers to each state’s national provisions on UJ or modified UJ, indicating whether those provisions apply to war crimes in IAC or NIAC.

- *IAC column*: includes relevant UJ or modified UJ provision governing war crimes committed in international armed conflict

- *NIAC column*: the designation “*same*” means that the provision(s) listed in the IAC column also provide UJ/ modified UJ over NIAC war crimes. The designation “*No UJ over NIAC war crimes*” means that the provision(s) listed in the IAC column do not apply to NIAC war crimes.

2) “**Summary of conditions**” **column** - lists the different conditions required for the state to exercise its jurisdiction over war crimes committed abroad by foreign citizens. The various conditions were selected through a comparison of each state’s requirements, with the conditions most commonly imposed composing independent columns, while the more particular or unusual being referenced in the column “*Other*.”

*Note: The various UJ provisions of a single state may be divided among separate rows in the chart. This shows that different jurisdictional provisions may be used to prosecute the same war crimes, although usually with different prerequisites.*

## **Conclusions**

Although the Chart provide an in-depth review of national legislation, our findings remain preliminary. A more thorough analysis of national legislation and jurisprudence may alter some of our initial conclusions.

That said, the drafting of the Chart allowed us to derive the following preliminary conclusions:

- Of the approximately 195 countries in the world, 123 criminalize war crimes and provide some form of UJ or modified UJ over those crimes.
- Of these 123 countries, 58 expressly criminalize war crimes committed in non-international armed conflict.
- Of these 58 countries, 50 provide some form of UJ or modified UJ over war crimes committed in NIAC, while the 8 remaining countries only provide jurisdiction over these crimes when committed on the territory of the country and/or by a national of the country.
- It is possible that a more thorough analysis would reveal that 39 additional states criminalize war crimes committed in NIAC. All but 6 of these states possess national provisions providing some form of UJ or modified UJ that could apply to war crimes committed in NIAC.
- Thus, it is possible that a total of 88 states criminalize NIAC war crimes and provide some form of UJ or modified UJ over these crimes.
- Although an increasing number of states appear to provide pure universal jurisdiction over NIAC war crimes (such as New Zealand, Australia, Nicaragua, Peru, Senegal or Slovenia, which do not require any link between the perpetrator of the crime and the state), a majority of states provide some form of modified UJ over these crimes (see the case of France, Spain, Portugal, Canada, Denmark, Kenya, or the United Kingdom, which require one or more links to the crime, such as the presence of the accused in the state, his/her residence in the territory, residence of the victim in the state, etc.).
- The implementation of the Rome Statute by its States Parties has often been accompanied by an extension of the state's jurisdiction over war crimes, but the four 1949 Geneva Conventions remain the most effective means of promoting UJ over such crimes, and these Conventions do not expressly extend UJ over war crimes committed in NIAC.