

Questionnaire on criminal accountability of United Nations officials and experts on mission, pursuant to resolution 70/114, paragraph 23.

Question 1 - Jurisdictional bases

The scope of Malta's criminal jurisdiction is laid out in the Criminal Code, Chapter 9 of the Laws of Malta. Article 5 of the said Code envisages the juridical bases that must exist in order for the Maltese Courts to exercise criminal jurisdiction. This article incorporates in it the personal aspect of jurisdiction which, together with the territorial principle, forms the basis of criminal jurisdiction in Malta.

Article 5(1)(a) states that jurisdiction is exercised "*against any person who commits an offence in Malta or on the sea in any place within the territorial jurisdiction of Malta*". The wording of this sub-article indicates the presence of the territorial as well as the personal principle of jurisdiction. To a limited extent, there is also the application of the self-preservation theory as well as the application of universal jurisdiction. As regards offences committed on ships within the territorial waters of Malta, the nationality of the ship is irrelevant. Maltese courts would still assume jurisdiction. The situation is different with regards to warships (which are considered to be exempt from domestic jurisdiction unless the state to which the ship belongs waives the exemption).

In accordance with paragraphs (b) and (c) of sub-article 5(1), Maltese courts have jurisdiction to try and punish offenders, whether Maltese or foreign, whose *locus delicti* is committed on board any ship or vessel belonging to Malta even beyond the limits of Malta's territorial jurisdiction. Local law in fact extends the jurisdiction of our courts to offences committed on the high seas, provided the offender and the ship are Maltese. Jurisdiction also extends to offences committed on board any aircraft, whatever its nationality, while within the airspace of Malta or on board any aircraft belonging to Malta, wherever it may be (this is an extension of the nationality principle).

Under Article 5(1)(d), Maltese courts have jurisdiction against any citizen of Malta or permanent resident in Malta who in any place or on board any ship or vessel or on board any aircraft wherever it may be commits an offence against the safety of the Government, discloses official secrets, tortures or commits any other inhuman or degrading treatment, forges Government debentures or forges documents and commits bigamy. This article places emphasis on the personal theory of jurisdiction, in particular, on the active nationality principle and the protective principle of jurisdiction.

Article 5(1)(e) is an article whereby jurisdiction is exercised against a person who is in Malta and commits one or more offences listed therein against a protected person (head of State, Minister for Foreign Affairs, etc). Article 5(1)(f)(i) speaks of jurisdiction being exercised against a person who commits an offence in a premises or in a building outside Malta having diplomatic immunity due to the fact that it being used as such whilst Article 5(1)(f)(ii) speaks of jurisdiction being exercised against a person enjoying diplomatic immunity who commits an offence in a place outside Malta. This sub-article reflects one of the principles established in article 3(1) of the Vienna Convention on Diplomatic Relations (1961) meaning that any injured party may commence legal proceedings against a diplomat in the sending state. As such, jurisdiction under Maltese law, in accordance with article 5(1)(f)(ii), is exercised locally by our courts even though the offences in question took place outside Maltese territorial limits.

By virtue of Article 5(1)(g), the nationality of the agent is irrelevant provided that he/she, being in Malta shall be a principal or an accomplice in any of the following offences: aggravated illegal arrest, detention or confinement, torture and other cruel, inhuman or degrading treatment or punishment, rape, abduction, wilful homicide, bodily harm, grievous bodily harm followed by death, threats by means of writings, blackmail and private violence, commercial or industrial fraud, causing explosion likely to endanger life or property, arson, possession, use of nuclear and radiological material and destruction by the springing of a mine.

Jurisdiction is also extended to cover accomplices or certain conspirators apart from the principal offender, with regard to the above-mentioned crimes. This applies to an offender who is subject to Maltese jurisdiction, even though the crimes may have been committed outside Malta.

In Malta there are no trials ‘in absentia’ and the requirement of the offender to be present in Malta is fundamental for jurisdiction to be exercised (article 360B of the Code which provides for proceedings in absentia only when the charges refer to offences that are subject to a punishment of imprisonment not exceeding two years has not yet come into force). If such requisite is lacking, then no form of jurisdiction is allowable, and the only option would be to seek the offender’s extradition.

Article 5(1)(h) allows the Maltese authorities to exercise jurisdiction over a person whose extradition was requested but denied by the Minister responsible for justice either because the offender is a Maltese citizen or because of the possibility of the death penalty. This provision provides the basis for the application of the “*aut dedere aut judicare*” rule. However, this provision is interesting in that it gives jurisdiction to the Maltese courts even if there is no other provision in domestic law which would allow the local courts to assume jurisdiction. It seems that this provision fills in a jurisdictional *lacuna* in the case, for example, where the Maltese courts would have jurisdiction under international law; however, the particular provision has not yet been incorporated into domestic law. Of course, the act would have to be a crime under Maltese law, since the provision indicates that the only reason that the person is not extradited is on account of the individual being a Maltese citizen, or on account of the fact, that the offence is subject to the death penalty in the jurisdiction requesting the individual’s return. This reference to the death penalty is a manifestation of the position taken by the Maltese courts.

Finally, Article 5(1)(i) confers jurisdiction against any person who commits an offence which, by express provision of law, constitutes an offence even when committed outside Malta. This is an application of the principle of extra-territoriality. This sub-article allows the Maltese legislator to extend his legislative jurisdiction over certain offences when committed outside Malta and its territorial sea. It could, therefore, provide the basis for the exercise of legislative jurisdiction over crimes committed outside Maltese jurisdiction, provided there is an express provision establishing the crime as an offence under Maltese law (e.g. piracy and conspiracy to traffic narcotic drugs or psychotropic substances).

Question 2 – Jurisdiction rationae personae

Under Maltese criminal law, jurisdiction over offences committed abroad may be based on a number of different jurisdictional principles. Article 5 applies the nationality principle, or more precisely the active nationality principle, whereby criminal jurisdiction is exercised by virtue of the fact that the offender is a Maltese national. The passive personality principle is also applied as this article refers to offence against the person of a citizen of Malta or any permanent resident in Malta. It is noteworthy that this article also extends the nationality principle to

permanent residents. Though limited, the protective principle is also covered by this article through protection of safety and debentures of the Government of Malta or government or infrastructure facilities including buildings outside Malta having diplomatic immunity.

The above principles provide the necessary jurisdictional link even if the person concerned is on a foreign ship or vessel or beyond the territorial sea of Malta.

The Criminal Code does not contain any express provisions on offences committed by stateless persons as a jurisdictional basis. Therefore, an offence committed by a stateless person falls under the scope of Article 5 of the Code if it fulfills any of the requirements for jurisdictional basis in terms of Maltese Law.

Also, the Maltese Criminal Code does not contain any specific provisions on offences committed by foreign nationals as a jurisdictional basis. Thus, the general provisions contained in Article 5 of the Code apply to such offences. It is to be noted however, that under Article 5(1)(d) which concerns offences directed at a Maltese national, a foreigner permanently resident in Malta in terms of the Immigration Act, Chapter 217 of the Laws of Malta, is comparable as a Maltese citizen.

Article 54E of the Criminal Code provides for the responsibility of military commanders and other superiors and encapsulates ‘in toto’ the elements indicated in Article 6 of the International Criminal Court Treaty. In fact, a criminal action for the offences of genocide, crimes against humanity, war crimes and crimes of aggression may be prosecuted in Malta if committed by a person subject to military law in terms of the Malta Armed Forces Act, Chapter 221 of the Laws of Malta, or against any citizen of Malta or permanent resident in Malta, who outside Malta, conspires to commit the offence, even if the offence is committed outside Malta.

Question 3 – Jurisdiction *ratione materiae*

As described above, the general jurisdictional bases under Article 5 of the Criminal Code determine the scope of jurisdiction. As a rule, Maltese Criminal Law follows the rule that criminal law is applicable only within the territory of a particular state, since it is limited by geography as well as time. However, there are instances, recognised by Maltese Law where the courts may have jurisdiction on grounds other than the purely territorial principle. As one can infer from a general reading of Article 5, Maltese courts can extend their jurisdiction *ratione materiae* to offences committed abroad, taking into consideration the Maltese nationality of the offender (or permanent residency in Malta) and the nature and gravity of the offence. This is manifested in Articles 5(1)(d)(g)(h) and (i) of the Criminal Code (see the above commentary on these sub-articles).

Under Maltese law, jurisdiction is not only exercised on the basis of the provisions of Article 5 of the Criminal Code. However, this article does not preclude the power of the Maltese legislature to provide for other grounds of jurisdiction by way of special legislation in circumstances which do not fall under Article 5 of the Criminal Code, as in the case of the Dangerous Drugs Ordinance. The Criminal Code also provides, for example, in Article 121C, for granting jurisdiction to the Maltese courts of criminal jurisdiction (over an offence established in the Criminal Code) in relation to unlawful exaction, extortion and bribery (Articles 112 to 141) even if only part of the action giving execution to the offence took place in Malta.

In so far as criminal jurisdiction is concerned, mention should also be made to Article 328O of the Criminal Code with respect to the offence of piracy as well as to Article 7(3) of the International Criminal Court Act (Chapter 453 of the Laws of Malta) which provides that without prejudice to the provisions of Article 5 of the Criminal Code, a criminal action may also be prosecuted in Malta against any citizen of Malta or permanent resident in Malta who shall become guilty of an offence against genocide, crimes against humanity and crimes of aggression although the offence may have been committed outside Malta.

Malta, has also, over the years, become a State party to a number of international conventions and has incorporated them in its domestic laws, thereby rendering its jurisdictional powers and competence more far reaching. To mention just a few conventions which enforce extra-territorial jurisdiction and which Malta is a state party, one may indicate: the Tokyo Convention 1963, the Hague Convention 1971, the Protocol to the Montreal Convention 1988, the International Convention for the Suppression of the Financing of Terrorism, the Convention on the Territorial Sea and Contiguous Zone, the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988).

Question 4II - Pre-requisites for extraterritorial jurisdiction

Article 5 of the Criminal Code does not make jurisdiction conditional upon the extraditability of the perpetrator, but one of the preconditions for the jurisdictional basis, as laid down in Article 5(1)(h) of the Criminal Code is where the extradition of the perpetrator has been requested but the request has not been granted. In such a situation, the perpetrator would still remain in Malta. In such a case, the '*aut dedere aut judicare*' rule may apply. Extradition under Maltese law is regulated by the Extradition Act, Chapter 276 of the Laws of Malta. Naturally, certain rules and principles governing extradition inter alia the double criminality rule, applicable extradition offences, the political offence exception and the speciality principle, apply also under Maltese law.

Question 5 – Rules of immunity to United National officials or experts on mission

The legal basis for the application of rules of immunity to United Nations officials or experts on mission is the Convention on Privileges and Immunities of the United Nations, 1946 applicable to Malta, through succession, on 27 June 1968. In Malta, the United Nations, as an organisation per se, is also covered by diplomatic immunity in terms of the Diplomatic Immunities and Privileges Act, Chapter 191 of the Laws of Malta.

Question 6 – Applicability of the provisions on military personnel

The Malta Armed Forces Act, Chapter 220 of the Laws of Malta Article 181(1) states that certain military offences falling under Part III of the Act (i.e. treachery, cowardice, mutiny and sub-ordination, desertion, absence without leave, etc.) shall be triable by court-martial or otherwise dealt with as provided by the Act, whether they are committed in Malta or outside Malta and the jurisdiction and powers conferred by the Malta Armed Force Act to courts-martial, officers and authorities (other than civil courts) in respect of such offences shall be exercisable both in Malta and outside Malta. Nevertheless, the civilian courts also have jurisdiction to try other criminal offences, in terms of the Criminal Code, in respect of persons subject to military law.

Question 7 – Other comments

N/a