



ICRC

ADVISORY SERVICE

ON INTERNATIONAL HUMANITARIAN LAW

Obligations in terms of penal repression

International humanitarian law (IHL) is a set of rules designed to protect persons who are not, or no longer, participating in hostilities and to limit the methods and means of waging war. It also sets out mechanisms designed to ensure compliance with the rules of this branch of law. Of these, the prevention and, repression of serious violations are particularly important. Under IHL, individuals, including commanders and other superiors, bear individual responsibility for the violations they commit, and those that they order. Those guilty of serious violations must be prosecuted and punished. Besides the customary rule which requires each party to the conflict to respect and ensure respect for IHL, there are specific obligations regarding penal repression of serious violations in the four Geneva Conventions of 1949 (GC I-IV), their Additional Protocol I of 1977 (AP I) and in other treaties. The nature and extent of these obligations differ from one treaty to another, especially regarding the jurisdiction to prosecute or try offenders.

1. The Geneva Conventions of 1949 and their Additional Protocols of 1977

States Parties to the Geneva Conventions of 1949 (GC) and their Additional Protocols (AP) must prevent and halt acts contravening these instruments no matter whether they are committed in an international or non-international armed conflict. The measures that States must take to this end may vary in nature and may include penal sanctions or disciplinary sanctions where appropriate.

States Parties have further obligations relating to certain flagrant violations of IHL committed in international armed conflicts, termed as "grave breaches". These are precise acts listed in the Geneva Conventions of 1949 and their Additional Protocol I and include wilful killing, torture and inhuman treatment, wilfully causing great suffering or serious injury to body or health, and certain violations of the basic rules for the conduct of hostilities (GC I, Art. 50; GC II, Art. 51; GC III, Art. 130; GC IV, Art. 47; AP I, Art. 11 and 85). "Grave

breaches" are regarded as war crimes (AP I, Art. 85, para. 5)¹.

Repressing «grave breaches» of the Geneva Conventions and Additional Protocol I

The Geneva Conventions and Additional Protocol I stipulate that "grave breaches" must be punished. States Parties must search for and try persons accused of having committed or having ordered the commission of "grave breaches". (GC I, Art. 49; GC II, Art. 50; GC III, Art. 129; GC IV, Art. 146 and AP I, Art. 85, para. 1).

In order to meet these obligations, States Parties must adopt the legislative measures needed to punish persons responsible for "grave breaches". They must in particular:

- enact laws which prohibit and repress "grave breaches" and which apply to anyone, irrespective of his nationality, who has committed or ordered the commission of such offences, and ensure that these laws relate to acts

¹ For more information on grave breaches, refer to the Advisory Service factsheet entitled "Penal repression: Punishing war crimes".

committed in national territory and elsewhere, in accordance with the principle of universal jurisdiction²;

- endeavour to trace persons alleged to have committed "grave breaches", start legal proceedings against them before their own courts, or extradite them so that they may be tried in another State which has made out a *prima facie* case. For States party to AP I, this obligation also covers "grave breaches" resulting from a failure to act when under a duty to do so (Art. 86, para. 1).;

- instruct their military commanders to prevent or put an end to "grave breaches" and to take steps against persons under their authority who are guilty of such offences³;

- afford one another judicial assistance in any proceedings related to "grave breaches"⁴;

² For more information, refer to the Advisory Service factsheet entitled "Universal jurisdiction".

³ For more information, refer to the Advisory Service factsheet entitled "Command responsibility and failure to act".

⁴ For more information, refer to the Advisory Service factsheet entitled "Cooperation in extradition and judicial assistance in criminal matters".

- take measures necessary to suppress all violations of IHL other than "grave breaches".

States must honour these obligations both in peacetime and during armed conflict. In order to be effective, appropriate steps must be taken before there is any opportunity for "grave breaches" to occur.

Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II (non-international armed conflicts)

While treaty law contains no specific obligation to repress such violations, the duty to suppress them has been interpreted to include their repression. It has also been judicially recognised that individuals can be held criminally responsible for violations of common Article 3 and Additional Protocol II. Article 8 of the ICC Statute reflects this.

2. The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954 and the Second Protocol thereto of 1999

Violations of the Convention

The Convention obliges States Parties to take, within the framework of their criminal jurisdiction, all the steps needed to prosecute and impose penal or disciplinary sanctions on persons of whatever nationality who have committed or ordered the commission of a breach of the Convention (Art. 28).

This obligation takes in violations committed in situations of international armed conflict and, as far as provisions related to respect of cultural property are concerned, also when perpetrated during a non-international armed conflict (Art. 19).

Violations of the Second Protocol

States Parties to the 1954 Convention and its Second Protocol in the event of an international or non-international armed conflict are required:

- to establish as criminal offences under their domestic law serious violations of the Protocol, intentionally committed, in the form of attacks against property under enhanced protection, or the extensive destruction or appropriation of property, as specified in Article 15, paragraph 2 of the Protocol (Art. 15, para. 2);

- to bring to trial or extradite nationals of a State Party (Art. 16, para. 2, b) who have allegedly committed the violations referred to in Article 15, paragraph 1 of the Protocol (Art. 17).

- to adopt such legislative, administrative or disciplinary measures as may be necessary to suppress other prohibited conduct, in particular that defined in Article 21 of the Protocol;

- to prohibit and prevent, in occupied territory, the conduct defined in Article 9, paragraph 1 of the Protocol.

When adopting legislation criminalizing the violations referred to in Article 15, paragraph 1 of the Protocol, States must establish the jurisdiction of their courts as follows:

- for the violations defined in Article 15, paragraph 1 (d) and (e), on the basis of territoriality and nationality;

- for the violations defined in Article 15, paragraph 1 (a), (b) and (c), also on the basis of the mere presence of the alleged offender in the territory of the State in question (Art. 16, para. 1).

3. The Convention on biological weapons of 1972

States Parties are obliged to take any measures needed to prohibit and prevent, in their territory, or in any other place under their control or jurisdiction, the development, production, stockpiling, acquisition or retention of agents, toxins or biological weapons, or the equipment for and means of delivering them (Art. IV). This ban applies in all circumstances (Art. I). They are further required to consult one another and to cooperate in the application of the Convention.

4. The Convention on environmental modification techniques of 1976

States Parties are obliged to take any measures they consider necessary to prohibit and prevent any activity in violation of the Convention anywhere under their jurisdiction or control (Art. 4), that is to say any military or other hostile use of environmental modification techniques having widespread, long-lasting or severe effects, as the means of causing destruction, damage or injury to any other State

party (Art. 1). They are further required to consult one another and to cooperate in the application of the Convention.

5. Protocol on Prohibition or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II to the Convention prohibiting Certain Conventional Weapons of 1980)

States Parties must take all appropriate steps, including legislative measures, to prevent and suppress violations of the Protocol by persons, or in territory, under their jurisdiction or control (Art. 14, para. 1). Such measures imply establishing penal sanctions for perpetrators.

States Parties have the further obligation to impose penal sanctions against persons who, in connection with an armed conflict and contrary to the provisions of the Protocol, wilfully kill or cause serious injury to civilians (Art. 14, para. 2). This obligation applies in respect of persons or territory under the jurisdiction or control of the State in question, regardless of whether the violation has been committed in an armed conflict of international character or not (Art. 1, para. 2).

State Parties are further required to consult one another and to cooperate in the application of the Convention.

6. The Convention on chemical weapons of 1993

States Parties must enact penal legislation so as to punish violations of the Convention by natural or legal persons anywhere in their territory or in any other place under their jurisdiction or control, or by their nationals in any place whatsoever (Art. VII, para. 1).

States Parties are also obliged to cooperate with each other by affording mutual legal assistance to facilitate the implementation of obligations for repression (Art. VII, para. 2).

The ban contained in this Convention on the development, production, acquisition by other means, stockpiling, transfer or use of chemical weapons, or on the engaging in military preparations to

use such weapons, applies in all circumstances (Art. 1).

7. The Mine Ban Convention of 1997

States Parties must take all appropriate legal, administrative and other measures, including the imposition of penal sanctions, to prevent and suppress any prohibited activity by persons, or in territory under their jurisdiction or control (Art. 9). The prohibition on the use, development, production, acquisition by any other means, stockpiling, retention or transfer of anti-personnel mines applies in all circumstances (Art. 1).

States Parties have a right to seek and receive assistance from other States Parties in order to fulfill its obligations under the Convention (Art. 6)

8. The Convention on Cluster Munitions of 2008

States Parties must take all appropriate legal, administrative and other measures, including the imposition of penal sanctions, to prevent and suppress any activity prohibited to a State Party under this Convention undertaken by persons or on territory under its jurisdiction or control (Art.9). States Parties shall take measures to prohibit all use, stockpiling, production, acquisition, retention and transfer of cluster munitions, as defined in the Convention (Art.1), and take specific action to ensure that these weapons claim no future victims.

States Parties have a right to seek and receive assistance from other States Parties in order to fulfill its obligations under the Convention (Art. 6)

9. The Statute of the ICC of 1998

The ICC Statute gives the Court jurisdiction over the crime of genocide, crimes against humanity, war crimes committed during an international or non-international armed conflict, as defined in the Statute, and the crime of aggression once a definition thereof has been adopted (Articles 5 to 9). The jurisdiction of the ICC is complementary to that of States: it may be exercised in three circumstances. When a) a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State

Party; b) such a situation is referred by the Security Council or c) the Prosecutor has initiated an investigation in respect of such a crime (Art. 13).

A case is admissible solely when a State is unable genuinely to carry out the investigation or prosecution of alleged criminals under its jurisdiction, or is unwilling to do so (Art. 17). If the State wishes to avail itself of its own courts' jurisdiction, the State must have suitable legislation enabling it to bring these persons to trial in accordance with the requirements of the Statute.

States Parties are also obliged to cooperate fully with the ICC in its investigation and prosecution of crimes within its jurisdiction (Art. 86). In addition, they must repress offences against the administration of justice by the ICC which have been committed in their territory or by one of their nationals (Art. 70, para. 4).

10. The Arms Trade Treaty of 2013

The Treaty establishes international standards for regulating and improving the regulation of the international trade in conventional arms (Art.1), referring to seven major categories of conventional arms already included in the UN Register of Conventional Arms, plus small arms and light weapons (Art.2). The activities of international trade comprise export, import, transit, trans-shipment, and brokering (Art.2.2).

Transfers of conventional arms, ammunition and parts and components are prohibited if the transfer would violate the State's relevant international obligations under international agreements to which it is a party. In addition, a State party shall not authorize any transfer if it has knowledge at the time of authorization that the arms would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians, or other war crimes defined by international agreements to which the State is a party (Art.6).

If a transfer has not been prohibited pursuant to Article 6, each exporting State Party must assess whether the arms could be used to commit or facilitate a serious violation of IHL or International human rights law. If

there is a significant risk, the State shall not authorize an export (Art.7).

States Parties shall take all appropriate legal, administrative and other measures to implement the Treaty (Art. 14). This obligation does not exclude the establishment of penal sanctions.

Furthermore, States Parties are required to consult one another and cooperate in the application of the Treaty. This obligation includes granting wide measures of assistance regarding investigations, prosecutions and judicial proceedings relating to violation of domestic law established pursuant to the Treaty (Art. 15).

11. Customary law

Under Customary law, serious violations of international humanitarian law constitute war crimes, both in times of international as well as non-international armed conflicts. States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction, and, if appropriate, prosecute the suspects. States must make every effort to cooperate, to the extent possible, with each other in order to facilitate the investigation of war crimes and the prosecution of suspects. States have the right to vest universal jurisdiction in their national courts over war crimes, and no statutes of limitations may apply to war crimes (ICRC Customary International Law Study, Rules 156 - 158, 160 and 161)