

Penal Repression: Punishing War Crimes

International humanitarian law sets out detailed rules aimed at protecting the victims of armed conflict and restricting the means and methods of warfare. It also establishes mechanisms to ensure that these rules are respected. In particular, international humanitarian law holds individuals responsible for violations which they commit, or which they order to be committed. It requires that those responsible for serious violations should be prosecuted and punished as criminals. In this aim, States have the obligation to suppress all violations of international humanitarian law and to repress those that are considered the most serious, called "grave breaches" and regarded as war crimes.

War crimes and the Geneva Conventions

Many of the rules relating to international armed conflicts are set out in the four Geneva Conventions of 1949 and in Additional Protocol I of 1977. States are obliged to suppress all violations of these instruments. There are however specific obligations relating to certain serious violations called grave breaches.

Grave breaches represent some of the most serious violations of international humanitarian law. They are specific acts listed in the Geneva Conventions and Additional Protocol I, including willful killing, torture or inhuman treatment, and willfully causing great suffering or serious injury to body or health. A full list of grave breaches is set out in the attached table. Grave breaches are regarded as war crimes.

Grave breaches must be punished

The Geneva Conventions and Additional Protocol I make clear that grave breaches must be punished. However they do not themselves set out specific penalties nor do they create a tribunal to try offenders. Instead they expressly require States to enact criminal legislation to punish those responsible for grave breaches. States are also required to search for persons accused of grave breaches, and either to bring them before their own courts or to hand them over for trial in another State.

In general, a State's criminal law only applies to acts committed within its territory or by its own nationals. However international humanitarian law goes further. It requires States to search for and punish all those who have committed grave breaches regardless of the nationality of the perpetrator or where the crime was committed. This principle, called **universal jurisdiction**, is a key element in ensuring the effective repression of grave breaches¹.

International humanitarian law requires States to take the following specific action in relation to grave breaches:

¶ **First**, a State must enact national legislation prohibiting and punishing grave breaches - either adopting a separate law or by amending existing laws². Such legislation must cover all persons, regardless of nationality, committing grave breaches or ordering them to be committed and including instances where violations result from a failure to act when under a legal duty to do so. It must cover acts committed both within and outside the territory of the State.

¹ For more information, refer to the Advisory Service factsheet titled "Universal jurisdiction over war crimes".

² For more information, refer to the Advisory Service factsheet titled "Methods of incorporating punishment into criminal law".

¶ **Second**, a State must search for and prosecute those alleged to be responsible for grave breaches. It must prosecute such persons or extradite them for trial in another State³;

¶ **Third**, a State must require its military commanders to prevent, suppress, and take action against those under their control who commit grave breaches⁴;

¶ **Fourth**, States should assist each other in connection with criminal proceedings relating to grave breaches⁵.

States are required to fulfill these obligations in times of peace as much as in time of armed conflict. In order to be effective the above measures must be adopted before grave breaches have the opportunity to occur.

³ For more information, refer to the Advisory Service factsheets titled "Cooperation in extradition and judicial assistance in criminal matters" and "Universal jurisdiction over war crimes".

⁴ For more information, refer to the Advisory Service factsheet titled "Command responsibility and failure to act".

⁵ For more information, refer to the Advisory Service factsheets titled "Cooperation in extradition and judicial assistance in criminal matters".

All violations of international humanitarian law must be suppressed

States must ensure compliance with all provisions of humanitarian law including those applicable to non-international armed conflict and those regulating the use of weapons. For example, the Mines Protocol to the 1980 Conventional Weapons Convention requires States to impose penal sanctions against those killing or injuring civilians in violation of the Protocol. States must ensure compliance with rules arising under customary international law, as well as those set out in international agreements. States must take whatever measures are necessary to prevent and suppress all violations thereof. Such measures may include military regulations, administrative orders and other regulatory measures. However criminal legislation is the most appropriate and effective means of dealing with all serious violations of international humanitarian law.

A number of States have already enacted criminal law to punish violations of the provisions of Article 3 common to the Geneva Conventions and Additional Protocol II which apply to non-international armed conflict.

International and national tribunals

The United Nations Security Council has established two international tribunals to try certain crimes committed within the territory of the former Yugoslavia and in connection with the events in Rwanda, including violations of International humanitarian law. Moreover, a permanent International Criminal Court (ICC) competent to try the serious violations of international humanitarian law that constitute war crimes (Art.8 of the Rome Statute) was set up in 1998.

"Mixed" courts such as the Special Court for Sierra Leone or the Extraordinary Chambers in the Courts of Cambodia

have also been established. Such courts comprise both international and domestic elements.

These measures supplement the repressive mechanisms provided for under international law and are a major step forward in efforts to prevent and punish serious violations of international humanitarian law. As the Statute of the ICC states in its preamble, however, it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes, including war crimes. States will therefore have to enact appropriate national criminal legislation, take steps to facilitate inter-State judicial cooperation and also work together with international jurisdictions. Only by effective action at the national level will it be possible to ensure full respect for international humanitarian law.

Grave breaches specified in the 1949 Geneva Conventions and in additional protocol I of 1977		
Grave breaches specified in the four Geneva Conventions of 1949. (Art. 50, 51, 130, 147 respectively)	Grave breaches specified in the third and fourth Geneva Conventions of 1949. (Art. 130 and 147 respectively)	Grave breaches specified in the fourth Geneva Convention of 1949. (Art. 147)
<ul style="list-style-type: none"> - willful killing; - torture or inhuman treatment; - biological experiments; - willfully causing great suffering; - causing serious injury to body or health; - extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly <p><i>(This provision is not included in Art.130 of the third Geneva Convention).</i></p>	<ul style="list-style-type: none"> - compelling a prisoner of war or a protected civilian to serve in the armed forces of the hostile Power; - willfully depriving a prisoner of war or a protected person of the rights of fair and regular trial prescribed in the Conventions. 	<ul style="list-style-type: none"> - unlawful deportation or transfer; - unlawful confinement of a protected person; - taking of hostages.

Grave breaches specified in the Additional Protocol I of 1977 (Art. 11 and Art. 85)

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| <ul style="list-style-type: none"> - Seriously endangering, by any willful and unjustified act or omission, physical or mental health and integrity of persons who are in the power of the adverse Party or who are interned, detained or otherwise deprived of liberty as a result of an armed conflict, in particular physical mutilations, medical or scientific experiments, removal of tissue or organs for transplantation which is not indicated by the state of health of the person concerned or not consistent with generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the Party conducting the procedure and in no way deprived of liberty; - <i>When committed willfully and if they cause death or serious injury to body and health:</i> - making the civilian population or individual civilians the object of attack; - launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects; - launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage civilian objects; - making non-defended localities and demilitarized zones the object of attack; | <ul style="list-style-type: none"> - making a person the object of an attack in the knowledge that he is <i>hors de combat</i>; - the perfidious use of the distinctive emblem of the red cross and red crescent or other protective signs; - <i>When committed willfully and in violation of the Conventions and the Protocol:</i> - the transfer by the occupying power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory; - unjustifiable delay in the repatriation of prisoners of war or civilians; - practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination; - attacking clearly recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of people and to which special protection has been given, causing as a result extensive destruction thereof when such objects are not located in the immediate proximity of military objectives or used by the adverse party in support of its military effort; - depriving a person protected by the Conventions or by Protocol I of the rights of fair and regular trial. |
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