



ADVISORY SERVICE

ON INTERNATIONAL HUMANITARIAN LAW

Methods of incorporating punishment into criminal law

In order to respect their obligations under international humanitarian law (IHL), States must incorporate punishment for international crimes into their domestic criminal law. From a legislative perspective, incorporating punishments into domestic law for violations of IHL raises two problems: the **definition of the criminal offence** (the method of criminalization) and the form and **the place in which it is to be introduced into the legal system**. Further, issues related to sanctions also need to be addressed. It should also be noted that States benefit from several sources, both external and internal, that may aid them in properly incorporating these issues into their domestic legislation.

Method of criminalizing violations of international humanitarian law

There are a number of options for implementing serious violations of international humanitarian law into national penal legislation:

Application of the existing military or ordinary national criminal law

This option takes the view that domestic criminal law provides adequate punishment for serious violations of IHL and that it would be superfluous, therefore, to make them a specific offence. This option is therefore a default option. However, on the assumption that the precedence of international law over national law is recognized, domestic legislation must be interpreted in accordance with the provisions of international law by which the State is bound and any gaps in the law must be closed.

Advantage:

- penal codes provide for the punishment of a number of different types of conduct, including serious violations of such fundamental human rights as the rights to life, health, mental

and physical integrity, personal liberty, and property;

- this option requires little modification of existing national legislation, and the population and judiciary are thus familiar with its application and scope.

Disadvantages:

- offences introduced under domestic criminal law often correspond only roughly to criminal offences normally associated with the conduct of hostilities;
- the procedures and conditions whereby offenders may be punished under domestic criminal law do not always correspond to the requirements of IHL, nor are the penalties always appropriate to the context of armed conflicts or to the seriousness of the crimes in question;
- some forms of responsibility may not exist at the national level that are required under IHL and certain defences may be allowed at the national level that are prohibited under IHL.

If a State, which follows this option is to comply fully with its treaty obligations, a detailed examination of its criminal law must yield affirmative answers to the following questions:

- are grave breaches of the Geneva Conventions of 1949 and Additional Protocol I of 1977 and Additional Protocol III of 2005 covered fully and with sufficient clarity?
- in establishing guilt and determining sentences, is due account taken of lawful conduct in combat, such as killing an enemy soldier fighting within the framework of an international armed conflict?
- do the laws in force allow special circumstances provided for by IHL regarding general principles of criminal law to be taken into account (in particular, the form in which individuals commit or take part in the offence, the inadmissibility of certain defences, the responsibility of superiors, etc.)?
- from the point of view of the accused, does this option, which requires the judge to interpret the law in the light of international law, in other words broadly, satisfy the requirements of the principle of *nullum crimen et nulla poena sine lege* (no crime and no punishment without a pre-existing penal law)?

Criminalization in domestic law by a generic provision

Grave breaches and other serious violations of IHL may be criminalized in domestic law by containing a reference to the relevant provisions of IHL, to international law in general, or to the laws and customs of war (customary law) and specifying a range of penalties.

Advantages:

- this option is simple and economical. All breaches of IHL are made punishable by a reference to the relevant instruments and, where applicable, to customary law;
- no new national legislation is needed when the treaties are amended or new obligations arise for a State which becomes party to a new treaty.

Disadvantages:

- criminalization by a generic provision may be inappropriate depending on how the States interpret the principle of legality, wherein the penalty for any offense must be known and predictable. Moreover, the degree of specificity required at the national level regarding criminal proscriptions could simply not be achieved with such an approach.
- it requires the judge of the national court to clarify and interpret the law in the light of the provisions of international law, thereby allowing considerable room for manoeuvre. The judge's task is further complicated by the fact that the definitions or formulations of crimes contained in international instruments may not correspond to those with which he is generally confronted in the national law.
- It also requires the prosecutor to be familiar with violations under IHL, in order to investigate and initiate proceedings.

Specific criminalization of types of conduct

This method consists of criminalizing, in national law, the types of conduct treated as crimes in international law. This can be achieved in various ways. In particular:

- by transcribing the whole list of offences into national law with the identical wording of the treaties and laying down the penalties

applying to them, whether individually or by category;

- by separately redefining or rewriting in national law the description of the types of conduct constituting the offences.

Advantages:

- when these offences are separately defined in national criminal law, the independence of the definition from international law means that repression of a treaty violation can take place even if the treaty in question has not been ratified by the prosecuting State;
- as far as the accused is concerned, specific criminalization better respects the principle of legality, since it lays down clearly and predictably which types of conduct are considered criminal and thus subject to punishment;
- this approach facilitates the task of those charged with applying the law by partly relieving them of the often tedious burden of research and interpretation in the field of international law.
- the legislator is given the opportunity to adapt the international law definitions of crimes to the national practice or even to add to those crimes included in international legislation.

Disadvantages:

- specific criminalization is a major task for the legislator, requiring considerable effort in research and drafting. It may entail an extensive review of existing penal legislation;
- if the criminalization is too detailed and specific, it may lack the flexibility needed to incorporate related developments in international law at a later stage.

Combining options

A mixed approach involves combining criminalization by a generic provision with the explicit and specific criminalization of certain serious offences.

On the whole, the generic provision is residual in the sense that it concerns facts which are not specifically criminalized and subjected to sanction (in accordance with the principle *lex specialis derogat lege generali*). The combination of general and specific criminalization may also be complemented by the subsidiary

application of other provisions of the common criminal law.

Advantage:

- under the various forms which it may take, this method permits treaty obligations relating to the repression of breaches of IHL to be carried out fully and with due differentiation.

Disadvantage:

- this method requires that the judge be able to interpret simultaneously the provisions of both domestic and international law.

Direct application of international law by domestic courts

This option allows domestic courts to apply international law without the requirement of specific references to these rules in national legislation. Such practice is generally authorized by statute or a provision in the Constitution, which, either recognizes international law (written and / or customary) as a legitimate legal basis for the criminalization of certain acts, or gives international law precedence over national law.

Advantage:

- this is another option for prosecution in the absence of other bases.

Disadvantage:

- this option creates uncertainty as illustrated by the often inconsistent judicial decisions of different States.

Form and place of criminalization

The various methods of making violations of IHL punishable – especially the options of criminalization through a generic provision and/or specific criminalization – mainly take the form of:

- a special stand-alone law separate from penal codes; or
- an insertion into the existing criminal legislation (ordinary penal codes, and/or the military penal code).

Evaluation of the two methods

The combination in one piece of legislation of both criminalization and the formal and material principles of criminal law, in accordance with the

specific requirements of international criminal law, certainly facilitates the work of legal practitioners in those States in which such a legislative method can be used. However, the adoption by a State of a special stand-alone law separate from the penal codes does not always fit readily into the structure of the legislative system in criminal matters. Moreover, it runs counter to the trend in certain countries to concentrate provisions of criminal law as far as possible into a single body of law.

The option of incorporation into existing legislation, apart from obliging the legislator to determine the form of incorporation (specific section or chapter, complements to existing crimes and so on), also raises the issue of where the punishable offence is to be placed and especially whether it is to be placed in ordinary criminal law or military criminal law.

Since the persons responsible for violations of international humanitarian law may be either military personnel or civilians, some States have placed the relevant provisions in both ordinary criminal law and military criminal law, or they have extended one of these bodies of law so that it covers both military personnel and civilians.

As the criminal legislative system and the relationship between ordinary criminal law and military criminal law vary from country to country, it is difficult to favour either variant in the abstract. The important thing is to ensure that the choice does not result in a vacuum of jurisdiction *in personam*.

Sanctions

Penal sanctions are indispensable to ensure respect for IHL. However, they are insufficient in themselves to put an end to acts contrary to the provisions of this body of law. In all cases, the provisions of criminal law need to be placed within a suitable regulatory framework allowing persons amenable to the jurisdiction of a country's courts, whether they be military personnel or civilians, to know the rules of conduct, their legal responsibility and the consequences of their conduct in the event of armed conflict even before they potentially engage in such conduct.

It is equally important that judges and prosecutors are adequately trained on how to adjudicate and plead cases involving IHL so that they may apply the sanctions required when necessary. Other important actors, like parliamentarians, should also be

made aware of the role of sanctions in relation to IHL as they may be able to help in reinforcing their effectiveness as well as their value as deterrents at the national level.

Characteristics of sanctions¹:

Sanctions must be designed in such a way as to fulfill their role as both enforcement and deterrent incentives that promote compliance with the law. As such, States must ensure that, once the offence has been committed, immediate action will be taken with regard to sanctioning the violation and that the sanction will be imposed in a timely manner. Sanctions should be imposed without distinction based on the nature of the armed conflict and must apply to everyone, without discrimination of any kind. Further, the sanctions imposed should be tailored to the gravity of the offence and the role played by the person accused, and must reflect the reprehensible nature of the offence. It is also important to note that sanctions for violations of IHL should be penal in nature, but this does not exclude the possibility of using disciplinary, administrative or other forms of sanctions in complement to the penal sanctions.

Assistance in incorporation

The effective incorporation of sanctions into domestic criminal law usually requires intervention from various national government organs, civil society, and armed forces, among others.

For further practical assistance in the incorporation of punishment into criminal law, States may wish to refer to any of the following entities:

- ICRC Advisory Services²;
- Other Intergovernmental and Non-governmental organisations;
- National Committees on the Implementation of International Humanitarian Law³.

¹ For a more in depth discussion of the effectiveness of sanctions, please refer to the Advisory Service Fact sheet entitled "Elements to render sanctions more effective".

² <http://www.icrc.org/eng/what-we-do/building-respect-ihl/advisory-service/index.jsp>.

³ <http://www.icrc.org/eng/resources/documents/misc/table-national-committees.htm>.