



ICRC

ADVISORY SERVICE ON INTERNATIONAL HUMANITARIAN LAW

Criminal procedure

The repression of war crimes, crimes against humanity, and genocide, whatever the nationality of the offender and the place where they are committed, is crucial to ensuring respect for international law and to the interests of justice. The chief responsibility for this repression lies with States. The substantive and procedural criminal law and the judicial system of each State must enable it to prosecute and bring to trial persons allegedly responsible for these crimes. States must also be able to offer the assistance required from them when procedures to that end are undertaken abroad or by an international jurisdiction. International law, especially in view of the very nature of these crimes, lays down certain conditions that prosecution and sentencing by national courts must meet. To the extent that these are respected, States are free to decide their own rules in this matter.

Prosecution of war crimes: a classic criminal procedure for specific crimes

In State practice there is generally no procedure relating specifically to the repression of offences under international law. The prosecution and sentencing of these offences generally follow the usual procedure in the courts of jurisdiction, whether they be military or ordinary. However, the nature of the crimes to be prosecuted and the specific characteristics of the system of repression provided for must be taken into account, with regard to:

- initiating prosecution;
- choice of competent court;
- taking / evaluation of evidence;
- judicial guarantees;
- cooperation and international legal assistance.

Initiating prosecution

War crimes may be committed by members of armed forces or by civilians, on the national territory or abroad, in the course of an international or non-international armed conflict. Similarly, genocide

and crimes against humanity may be committed by members of armed forces or by civilians, however the commission of these crimes are not limited to instances of armed conflict. Authorities desiring to prosecute a person allegedly responsible for any of the abovementioned crimes must give prior consideration to a certain number of questions.

First, it must be determined whether the alleged act constitutes a criminal offence under the national criminal law, and whether the national courts are competent to hear such cases. The question of competent jurisdiction is particularly important for crimes committed outside the national territory, especially serious violations of international humanitarian law, such as grave breaches of the four Geneva Conventions of 1949 and their Additional Protocol I of 1977, for which universal jurisdiction must be provided in legislation.

Then it must be decided whether prosecutions must be brought; the main factor in such a decision should be the quality of the evidence

gathered and the probability of obtaining a conviction.

When the defendant is a member of the armed forces, it must be decided whether military or ordinary law is applicable and by what court he will be tried.

All defendants must benefit from procedural safeguards, known as judicial guarantees, aimed at ensuring that the accused due process rights are respected. These guarantees are considered a minimum protection that does not prevent a more favourable treatment from being granted.¹

The independence and impartiality of the body charged with implementing public action are of crucial importance in ensuring an effective system for the repression of crimes of international concern. In certain countries, for example, the bringing of a criminal prosecution for such crimes is subject to the approval of an executive authority.

¹ For a more in depth discussion of judicial guarantees, please refer to the Advisory Service Factsheet titled "Judicial Guarantees and safeguards "

To overcome possible inactivity on the part of the government, for example for reasons of political expediency, the criteria to which the bringing of criminal action is subject, or the justification of a refusal to do so, should be set out in a clear and strict manner in national legislation. It is also essential that the judiciary and legal counsel (both for the accused and the prosecution) be properly trained for prosecuting these international crimes. Finally, it is important that the victims of these crimes be given easy and direct access to justice as well as information regarding the outcome of trials.

Choice of competent court

International law takes no clear stand on the choice of competent court. While at the national level the establishment of exceptional tribunals is generally in conflict with the requirement for an impartial and regularly constituted court, the assignment of competence to military or civilian jurisdiction is left to the discretion of the States. It is by no means easy to declare *a priori* or as a general rule that one solution is preferable to another. With a view to the repression of war crimes, national legislators will nevertheless bear in mind the following considerations:

- war crimes, crimes against humanity and genocide can be committed by civilians as well as by military personnel;
- they can be prosecuted in time of peace as well as in time of war, especially where the principle of universal jurisdiction is applied;
- they may involve carrying out investigations abroad or having recourse to international judicial cooperation in cases where universal jurisdiction is applied or where judgment is passed on the State's own troops sent abroad.²

Possible solutions will depend on the relationship between military and ordinary law and between military and civilian power within the organization of the State.

² For a more in depth discussion on cooperation, please refer to the Advisory Service Factsheet entitled "Cooperation with extradition and judicial assistance in criminal matters"

Taking / evaluation of evidence

Trials of offences committed abroad raise particular issues relating to the taking of evidence and to the right of the defence to review it. It is important to look into these issues and, if necessary, to make provision for suitable procedures such as taking evidence by video or executing letters rogatory abroad, and to bolster international judicial cooperation agreements.

To establish the defendant's guilt in war crimes cases, it must be demonstrated, among other things that the act in question occurred in the course of an armed conflict or in connection with it. National legislation should therefore specify which authority is empowered to qualify a given situation as an armed conflict.

In addition, victims should be allowed to participate actively in the procedure. Like the accused and the witnesses, they should also benefit from protection if needed. Situations where resentment and the risk of revenge are increasing would justify such a measure.

The need to protect military secrets must also be taken into account in criminal procedure, but confidentiality must not be invoked with the sole aim of preventing prosecution. *In camera* proceedings may be held if necessary.

Participation of victims in trials

In Common Law countries, since crimes are considered committed against the State, as a result it is the State that brings the prosecution. The role of the victims is limited to providing evidence and they are not considered as parties to the proceedings. Upon request of the prosecution or the defence, they may participate as witnesses.

By contrast, in Civil Law countries, the victims may initiate criminal proceedings and therefore become parties to the proceedings ("*constitution de partie civile*"). In this context, victims have the power to request the authorities, for example, to perform investigative acts or question witnesses and experts.