

JUDICIAL GUARANTEES AND SAFEGUARDS



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 criminal law and judicial system of each State must allow for the prosecution and trial of persons accused of committing these crimes. All persons accused and/or brought to trial must, however, benefit from a series of procedural safeguards and fundamental guarantees designed to ensure that individuals receive a fair trial and are protected from being unlawfully or arbitrarily deprived of their fundamental human rights and freedoms.

Currently, State practice establishes that in both international and non-international armed conflicts no one may be convicted or sentenced, except pursuant to a fair trial affording all essential judicial guarantees. Persons accused of serious violations of any of the four Geneva Conventions (GC I–IV) or of Additional Protocol I (AP I) are entitled to benefit from the minimum legal safeguards laid down in those treaties (Art. 49 GC I; Art. 50 GC II; Art. 129 GC III; Art. 146 GC IV). Article 75 of AP I contains a list of guarantees afforded to persons under these treaties and to persons accused of war crimes. These guarantees are minimal requirements that do not in any way prevent more favourable treatment from being granted in accordance with other provisions of the GCs and AP I. In fact, depriving protected persons of a fair and regular trial is a grave breach under the GCs III and IV (Art. 130 GC III; Art. 147 GC IV).

International humanitarian law applicable to non-international armed conflicts (Art. 3 common to the GCs) prohibits executions in violation of “judicial guarantees which are recognized as indispensable” and, more specifically, sentencing or executions without previous judgement pronounced by a regularly constituted court. Additional Protocol II of 1977 (AP II) stipulates, concerning offences committed in connection with a non-international armed conflict, that no sentence may be passed and no penalty executed in the absence of a conviction previously pronounced by a court offering the essential guarantees of independence and impartiality. In addition, it spells out the procedural safeguards that must be respected (Art. 6).

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The Statutes of the International Criminal Tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR) extend these guarantees to all persons brought before those courts (Arts 10, 20 and 21 ICTY Statute; Arts 9, 19 and 20 ICTR Statute). The same provisions have been incorporated in the Statute of the United Nations Mechanism for International Criminal Tribunals (MICT), which was created to carry out certain essential functions of both the ICTY and the ICTR as a part of their completion strategy (Arts 7, 18 and 19). The Statutes of the Special Court for Sierra Leone (SCSL) and of the Special Tribunal for Lebanon (STL) do the same for all persons prosecuted by the judicial bodies (Arts 9 and 17 SCSL Statute and Arts 5, 16 and 20 STL). The Kosovo Specialist Chambers protects the rights of the accused in Arts 17, 20 and 40(2) of its Law. Finally, the Rome Statute of the International Criminal Court (ICC) clarifies and develops these guarantees (Arts 20, 22, 23, 25, 66, 67, 76(4) and 81, and Rules of Procedure and Evidence).

Many of these guarantees and procedural safeguards are already part of the domestic law of States party to the Geneva Conventions, and roughly correspond to those offered by instruments of human rights law, such as the Universal Declaration of Human Rights (Arts 9–11) and the International Covenant on Civil and Political Rights (Art. 14). The fundamental guarantees and principles provided for by international humanitarian law must be applied without exception and may not be derogated from (Art. 75.4 AP I). Further, the strict criteria for their application must be recognized by national law.

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The main legal principles and judicial guarantees and safeguards are the following:




- the principle of individual criminal responsibility (Art. 75(4)(b) AP I; Art. 6(2)(b) AP II; Art. 25 ICC Statute; Rule 102 ICRC Study CIHL);¹
- the principle of *nullum crimen, nulla poena sine lege* (no crime without a law, no punishment without a law) (Art. 99.1 GC III; Art. 75(4)(c) AP I; Art. 6(2)(c) AP II; Arts 22(1) and 23 ICC Statute; Rule 101 ICRC Study CIHL);
- the principle of *non bis in idem* (double jeopardy) (Art. 86 GC III; Art. 117.3 GC IV; Art. 75(4)(h) AP I; Art. 6(2)(a) AP II; Art. 20 ICC Statute; Rule 100 ICRC Study CIHL);
- the right of the accused to be judged by an independent and impartial court and without undue delay (Art. 84.2 GC III; Art. 75(4) AP I; Art. 6(2) AP II; Arts 67(1) and 67(1)(c) ICC Statute; Rule 100 ICRC Study CIHL);
- the right of the accused to be informed of the nature and cause of the offence alleged against him (Art. 104.2 GC III; Art. 71(2) GC IV; Art. 75(4)(a) AP I; Art. 6(2)(a) AP II; Art. 67(1)(a) ICC Statute; Rule 100 ICRC Study CIHL);
- the rights and means of defence, for example the right to be assisted by a qualified lawyer freely chosen (Arts 99 and 105 GC III; Arts 72 and 74 GC IV; Art. 75(4)(a) and (g) AP I; Art. 6(2)(a) AP II; Art. 67(1)(b), (d) and (e) ICC Statute; Rule 100 ICRC Study CIHL);
- the right to free legal assistance when the interests of justice so require (Art. 105(2) GC III; Art. 72(2) GC IV; Art. 67(1)(d) ICC Statute; Rule 100 ICRC Study CIHL);
- the right of the accused to have the assistance of an interpreter, if so needed (Arts 96.4 and 105.1 GC III; Arts 72.3 and 123.2 GC IV; Art. 67(1)(f), ICC Statute; Rule 100 ICRC Study CIHL);
- the right of the accused to communicate freely with counsel (Art. 105.3 GC III; Art. 72.1 GC IV; Art. 67(1)(b), ICC Statute; Rule 100 ICRC Study CIHL);
- the right to sufficient time and facilities to prepare the defence (Art. 105.3 GC III; Art. 72.1 GC IV; Art. 67(1)(b) ICC Statute; Rule 100 ICRC Study CIHL);
- the right of the accused to examine witnesses and to have witnesses examined (Arts 96.3 and 105.1 GC III; Art. 72.1 GC IV; Art. 75(4)(g) AP I; Art. 67(1)(e) ICC Statute; Rule 100 ICRC Study CIHL);
- the presumption of innocence (Art. 75(4)(d) AP I; Art. 6(2)(d) AP II; Art. 66 ICC Statute; Rule 100 ICRC Study CIHL);
- the right of the accused to be present at their trial (Art. 75(4)(e), AP I; Art. 6(2)(e), AP II; Art. 67(1)(d) ICC Statute);
- the right of the accused not to testify against themselves or to confess guilt (Art. 75(4)(f) AP I; Art. 6(2)(f) AP II; Art. 67(1)(g) ICC Statute; Rule 100 ICRC Study CIHL);
- the right of the accused to have the judgment pronounced publicly (Art. 75(4)(i) AP I; Art. 76(4) ICC Statute; Rule 100 ICRC Study CIHL);
- the right of the accused to be informed of their rights of appeal (Art. 106 GC III; Art. 73 GC IV; Art. 75(4)(j) AP I; Art. 6(3) AP II; Rule 100 ICRC Study CIHL).

There are slightly different standards for judicial guarantees as they apply to specific categories of persons such as children or women. Article 40 of the Convention on the Rights of the Child in particular lists the judicial guarantees applicable to children. For women, international humanitarian law specially provides that “pregnant women and mothers having dependent infants who are arrested, detained or interned for reasons related to the armed conflict, shall have their cases considered with the utmost priority” (Art. 76(2) AP I).

¹ ICRC Study on customary international humanitarian law (CIHL) (2005): <http://www.icrc.org/customary-ihl/eng/docs/home>.

MISSION

The International Committee of the Red Cross (ICRC) is an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of armed conflict and other situations of violence and to provide them with assistance. The ICRC also endeavours to prevent suffering by promoting and strengthening humanitarian law and universal humanitarian principles. Established in 1863, the ICRC is at the origin of the Geneva Conventions and the International Red Cross and Red Crescent Movement. It directs and coordinates the international activities conducted by the Movement in armed conflicts and other situations of violence.

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ICRC

International Committee of the Red Cross
19, avenue de la Paix
1202 Geneva, Switzerland
T +41 22 734 60 01
shop.icrc.org
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