

COOPERATION IN EXTRADITION AND JUDICIAL ASSISTANCE IN CRIMINAL MATTERS



In order to ensure respect for international humanitarian law (IHL), States must establish mechanisms to punish violations of that law. The repression of violations of IHL often requires the cooperation of different States, not only because the persons involved in the trials (the accused, the victims, the witnesses, etc.) may be of different nationalities, or in different countries, but also because the most serious violations of IHL are considered to affect the international community as a whole. Cooperation between States is also essential where the evidence relating to such crimes is located in a State other than the prosecuting State, or in several different countries. Given these concerns, international law provides for cooperation procedures in matters of extradition and transfer of prisoners, international judicial cooperation, and cooperation with the ad hoc international criminal tribunals and the International Criminal Court.

EXTRADITION

The obligation of States to cooperate in extradition matters is inherent in the *aut dedere aut judicare* obligation of the repression mechanism laid down in the Geneva Conventions of 1949 for serious violations of those treaties.

The possibility of handing over an accused person for trial to another State wishing to prosecute the individual offers an opportunity to the State on whose territory or in whose power the person is, to fulfil its obligations to prosecute or to extradite.¹

The obligation of States to cooperate in extradition matters is inherent in their obligation to either prosecute or extradite (aut dedere aut judicare) those suspected of having committed grave breaches of the Geneva Conventions of 1949.

This option is further confirmed by the wording of Art. 88(2) of Additional Protocol I of 1977 to the Geneva Conventions (AP I), which explicitly establishes that, when circumstances permit, the High Contracting Parties shall cooperate in extradition matters. This duty includes the obligation to examine favourably any request for extradition from a country with a proven legal interest in prosecution, provided that the conditions laid down by the law of the State requested are satisfied.

Rule 161 of the ICRC's Customary international Humanitarian Law Study² says that 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 the suspects. State practice establishes this rule as a norm of customary international law applicable in relation to war crimes committed in both international and non-international armed conflicts.

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State practice shows that cooperation in prosecuting suspected war criminals should include extradition when requested, but potentially subject to conditions.

Though the Geneva Conventions provide for the possibility of extradition, they are silent on the question of the application of the exceptions traditionally provided for under national law, which may prove an obstacle in certain circumstances. For example, exceptions relating to the nationality of the person whose extradition is requested, exceptions connected with the political nature of the crime, statute of limitations or other conditions to which extradition is subject under domestic law (e.g. the existence of a bilateral or multilateral extradition treaty). AP I did not help to close this gap, although Article 78 of the draft treaty precluded the exception of extradition where a grave breach is deemed a political crime.

This question needs to be settled by appropriate national legislation which, in the case of "grave breaches" of IHL, would rule out the political motives or aims of an offence as a justification for refusing extradition.

¹ See the annexed *Table with aut dedere aut judicare provisions of IHL treaties and other relevant instruments*.

² See <http://www.icrc.org/customary-ihl/eng/docs/home>.

JUDICIAL ASSISTANCE IN CRIMINAL MATTERS

Judicial assistance in criminal matters is specifically considered in Article 88(1) of AP I, which stipulates that “the High Contracting Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of grave breaches of the Conventions or of this Protocol.” The parties to AP I must help each other in the most complete manner possible in any procedure relating to a “grave breach”. Such assistance covers both mutual assistance for criminal proceedings conducted abroad and the execution of foreign criminal sentences.

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 the suspects.

A system of repression such as that laid down by IHL for war crimes, which is based on the principle of universal jurisdiction with regard to the prosecution and judgement of criminal acts and is, in consequence, of a cross-border nature, will owe much of its effectiveness to the quality of the cooperation and mutual judicial assistance between the prosecuting authorities of the different States. Indeed, cooperation and assistance between States is often impossible without effective and flexible legal frameworks at the national level allowing for such collaboration.

In the context of incorporating punishments for breaches of IHL into national law, States will have to evaluate the legislation in force in matters of extradition and judicial cooperation and, if necessary, adapt it so as to fulfil the obligations imposed by IHL.

It should be noted that other treaties relevant for the protection of persons and certain types of property in the event of armed conflict provide for the possibility of extradition and impose the obligation to cooperate in the prosecution of serious violations of those instruments’ provisions. This is the case, for example, in the Second Protocol (1999) to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (Arts 18 and 19) which urges States to assist one another in connection with investigations or criminal or extradition proceedings, including in obtaining evidence. Further, it encourages States, in the absence of treaties or arrangements to this effect, to afford one another assistance in accordance with their domestic law.

Customary IHL does not establish an absolute obligation to cooperate, but rather an expectation that States should make every effort to do so, in good faith and to the extent possible.

COOPERATION WITH THE AD HOC INTERNATIONAL CRIMINAL TRIBUNALS

The United Nations Security Council set up International Criminal Tribunals to try crimes committed in the former Yugoslavia (International Criminal Tribunal for the former Yugoslavia – ICTY) and in Rwanda (International Criminal Tribunal for Rwanda – ICTR), which have since completed their mandates in 2017 and 2015, respectively. These tribunals had primacy over national courts: at any stage of the procedure, they could formally request national courts to defer to their competence (Art. 9(2) ICTY Statute; Art. 8(2) ICTR Statute). Articles 29 and 28 of the ICTY and ICTR Statutes, respectively, obliged States to cooperate with these tribunals in the investigation and prosecution of persons accused of committing serious violations of IHL. States were under obligation to comply without delay with any request for assistance issued by a trial chamber, including in particular:

- the identification and location of persons;
- the taking of testimony and the production of evidence;
- the service of documents;
- the arrest or detention of persons;
- the surrender or the transfer of the accused to the Tribunal in question.

In grave breaches-related procedures, the parties to AP I must provide to each other mutual assistance for criminal proceedings conducted abroad and the execution of foreign criminal sentences.

Since 1 July 2012 for the ICTR and since 1 July 2013 for the ICTY, the UN Mechanism for International Criminal Tribunals (the MICT) has been mandated with responding to requests for assistance from national authorities in relation to national investigations, prosecutions and trials. This function comprises all the provisions listed above.

COOPERATION WITH THE INTERNATIONAL CRIMINAL COURT (ICC)

Unlike the ad hoc Tribunals', the ICC's jurisdiction is complementary to that of States: the ICC will exercise its jurisdiction only when a State is unwilling or unable genuinely to carry out investigation or prosecution (Art. 17(1)(a) 1998 Rome Statute of the ICC). The ICC's effectiveness will depend to a large extent on the cooperation of States, the terms and conditions for which are laid down in Part 9 of the ICC Statute.

Article 86 of the Statute stipulates that the States Parties must cooperate fully with the ICC in its investigation and prosecution of crimes within its jurisdiction, namely genocide, crimes against humanity, war crimes and the crime of aggression. The ICC may also invite any State not party to its Statute to provide assistance on the basis of an ad hoc arrangement, an agreement or on any other appropriate basis (Art. 87(5)(a) ICC Statute).

Article 86 of the Statute stipulates that the States Parties must cooperate fully with the ICC in its investigation and prosecution of crimes within its jurisdiction.

The ICC may thus transmit a request for the arrest and surrender to the Court of a person to any State on the territory of which that person may be found, and must request the cooperation of that State in the arrest and surrender of such a person (Art. 89 ICC Statute). It may also request the provisional arrest of the person sought, pending presentation of the request for surrender and the documents supporting the request as specified in Article 91 (Art. 92 ICC Statute).

In addition, States Parties must comply with requests for assistance concerning:

- the identification and whereabouts of persons or the location of items;
- the taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the ICC;
- the questioning of any person being investigated or prosecuted;
- the service of documents, including judicial documents;
- facilitating the voluntary appearance of persons as witnesses or experts before the ICC;
- the temporary transfer of persons as provided in Article 93(7) of the ICC Statute;
- the examination of places or sites, including the exhumation and examination of grave sites;
- the execution of searches and seizures;
- the provision of records and documents, including official records and documents;
- the protection of victims and witnesses and the preservation of evidence;
- the identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties; and
- any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the ICC (Art. 93(1) ICC Statute).

According to Article 88 of the Statute, States Parties must ensure that there are procedures available under their national law for all of these forms of cooperation.

Conversely, upon the request of a State party to the Statute, the ICC may provide assistance to that State in an investigation into or a trial in respect of conduct which constitutes a crime within the jurisdiction of the ICC or which constitutes a serious crime under the national law of the requesting State. The ICC may also grant a request for assistance from a State which is not party to the ICC Statute (Art. 93(10) ICC Statute).




Finally, the ICC may also ask any intergovernmental organization to provide information, documents, or other forms of assistance (Art. 87(6) ICC Statute).

TABLE WITH *AUT DEDERE AUT JUDICARE* PROVISIONS OF IHL TREATIES AND OTHER RELEVANT DOCUMENTS

Geneva Convention I of 1949	Art.49, Art.50
Geneva Convention II of 1949	Art.50, Art.51
Geneva Convention III of 1949	Art.129, Art. 130
Geneva Convention IV of 1949	Art.146, Art.147
Additional Protocol I of 1977 to the Geneva Conventions	Art.80, Art.85(1), Art.88(2) and (3)
Second Protocol of 1999 to the Hague Convention for the protection of Cultural Property in the event of armed conflict of 1954	Art.16(1), Art.16(2), Art.17(1)
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984	Art.4, Art.5(2), Art.6, Art.7(1)
Convention for the Protection of all Person from Enforced Disappearances of 2006	Art.9(2), Art.10, Art.11(1)

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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