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of International Humanitarian Law

Information kit

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Obligations in terms of penal repression

International humanitarian law (IHL) is a set of rules designed to protect persons who are not, or no longer, participating in hostilities and to limit the methods and means of waging war. It also sets out mechanisms designed to ensure compliance with the rules of this branch of law. Of these, the prevention and, if necessary, repression of serious violations are particularly important. Under IHL, the perpetrators bear individual responsibility for the violations they commit, and those guilty of serious violations must be prosecuted and punished. The four Geneva Conventions of 1949 (GC I-IV), their Additional Protocol I of 1977 (AP I) and other treaties set forth the States Parties' explicit obligations regarding penal repression of serious violations of the rules they contain. The nature and extent of these obligations differ from one treaty to another, especially regarding the jurisdiction to prosecute or try offenders and the repression's material and personal field of application.

The Geneva Conventions of 1949 and their Additional Protocols of 1977

The States party to the Geneva Conventions and Additional Protocols must prevent and halt acts contravening these instruments no matter whether they are committed in an international or non-international armed conflict. The measures that States must take to this end may vary in nature and may include penal sanctions if appropriate.

The States Parties have further obligations relating to certain flagrant violations of IHL, the "grave breaches". These are precise acts listed in the Geneva Conventions and Additional Protocol I. They include wilful killing, torture and inhuman treatment, wilfully causing great suffering or serious injury to body or health, and certain violations of the basic rules for the conduct of hostilities (GC I, Art. 50; GC II, Art. 51; GC III, Art. 130; GC IV, Art. 47; AP I, Art. 11 and 85). "grave breaches" are regarded as war crimes (AP I, Art. 85, para. 5).

Repressing «grave breaches» of the Geneva Conventions and Additional Protocol I

The Geneva Conventions and Additional Protocol I plainly stipulate that "grave breaches" must be punished. The States Parties must search for persons accused of having committed or having ordered the commission of "grave breaches", regardless of the nationality of the perpetrator or the locus of the crime, in accordance with the principle of universal jurisdiction. They must bring these persons before their own courts, or hand them over for trial to another State which has made out a *prima facie* case (GC I, Art. 49; GC II, Art. 50; GC II, Art. 129; GC IV, Art. 146 and AP I, Art. 85, para. 1). For States party to Additional Protocol I, this obligation also covers "grave breaches" resulting from a failure to act when under a duty to do so (Art. 86, para. 1).

In order to meet these obligations, the States Parties must adopt the legislative measures needed to punish persons responsible for "grave breaches". They must in particular:
enact laws which prohibit and repress "grave breaches" and which apply to anyone, irrespective of his nationality, who has committed or ordered the commission of such offences, and ensure that these laws relate to acts committed in national territory and elsewhere;
endeavour to trace persons alleged to have committed "grave breaches", start legal proceedings against them, or extradite them so that they may be tried in another State;
instruct their military commanders to prevent or put an end to "grave breaches" and to take steps against persons under their authority who are guilty of such offences;
afford one another judicial assistance in any proceedings related to" grave breaches".

The States must honour these obligations both in peacetime and during armed conflict. In order to be effective, appropriate steps must be taken before there is any opportunity for "grave breaches" to occur.

Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II (non-international armed conflicts)

While treaty law contains no obligation to repress such violations, customary law authorizes States to prosecute the perpetrators of these violations in accordance with the principle of universal jurisdiction. These violations are included in the definition of war crimes to be found in Article 8 of the Statute of the International Criminal Court, and they are increasingly being criminalized by national legislation.

The 1954 Hague Convention for the protection of cultural property in the event of armed conflict, and the Second Protocol thereto of 1999

Violations of the Convention

The Convention obliges the States Parties to take, within the framework of their criminal jurisdiction, all the steps needed to prosecute and impose penal or disciplinary sanctions on persons of whatever nationality who have committed or ordered the commission of a breach of the Convention (Art. 28).

This obligation takes in violations committed in situations of international armed conflict and, as

far as provisions related to respect of cultural property are concerned, also when perpetrated during a non-international armed conflict (Art. 19).

Violations of the Second Protocol

States party to the 1954 Convention and its Second Protocol are obliged, in the event of an international or non-international armed conflict:
to establish as criminal offences under their domestic law serious violations of the Protocol, intentionally committed, in the form of attacks against property under enhanced protection, or the extensive destruction or appropriation of property, as specified in Article 15, paragraph 1 of the Protocol (Art. 15, para. 2);
to adopt such legislative, administrative or disciplinary measures as may be necessary to suppress other prohibited conduct, in particular that defined in Article 21 of the Protocol;
to prohibit and prevent, in occupied territory, the conduct defined in Article 9, paragraph 1 of the Protocol.

When adopting legislation criminalizing the violations referred to in Article 15, paragraph 1 of the Protocol, the States must establish the jurisdiction of their courts as follows:
for the violations defined in Article 15, paragraph 1 (d) and (e), on the basis of territoriality and nationality;
for the violations defined in Article 15, paragraph 1 (a), (b) and (c), also on the basis of the mere presence of the alleged offender in the territory of the State in question (Art. 16, para. 1).

In addition, the States Parties have an obligation, similar to that regarding "grave breaches" of the GC and AP I, to bring to trial or extradite persons who have allegedly committed the violations referred to in Article 15, paragraph 1 of the Protocol (Art. 17).

The 1972 Convention on biological weapons

The States Parties are obliged to take any measures needed to prohibit and prevent, in their territory, or in any other place under their control or jurisdiction, the development, production, stockpiling, acquisition or retention of agents, toxins or biological weapons, or the equipment for and means of delivering them (Art. IV). This ban applies in all circumstances (Art. I).

The 1976 Convention on environmental modification techniques

The States Parties are obliged to take any measures they consider necessary to prohibit and prevent any activity in violation of the Convention anywhere under their jurisdiction or control (Art. 4), that is to say any military or other hostile use of environmental modification techniques having widespread, long-lasting or severe effects, as the means of causing destruction, damage or injury to any other State party (Art. 1).

Amended Protocol II (on mines, booby-traps and other devices) to the 1980 Convention on certain conventional weapons

The States Parties must take all appropriate steps, including legislative measures, to prevent and suppress violations of the Protocol by persons, or in territory, under their jurisdiction or control (Art. 14, para. 1).

The States Parties have the further obligation to impose penal sanctions against persons who, in connection with an armed conflict and contrary to the provisions of the Protocol, wilfully kill or cause serious injury to civilians (Art. 14, para. 2). This obligation applies in respect of persons or territory under the jurisdiction or control of the State in question, regardless of whether the violation has been committed in an armed conflict of international character or not (Art. 1, para. 2).

The 1993 Convention on chemical weapons

The States Parties must take the measures needed to implement their obligations under the Convention. They must, in particular, enact penal legislation so as to punish violations of the Convention by natural or legal persons anywhere in their territory or in any other place under their jurisdiction or control, or by their nationals in any place whatsoever (Art. VII, para. 1).

The States Parties are also obliged to cooperate with each other by affording mutual legal assistance to facilitate the implementation of obligations for repression (Art. VII, para. 2).

The ban contained in this Convention on the development, production, acquisition by other means, stockpiling, transfer or use of chemical weapons, or on the engaging in military preparations to use such weapons, applies in all circumstances (Art. I).

The 1997 Ottawa Convention on anti-personnel mines

The States Parties must take all appropriate legal, administrative and other measures, including the imposition of penal sanctions, to prevent and suppress any prohibited activity by persons, or in territory under their jurisdiction or control (Art. 9). The prohibition on the use, development, production, acquisition by any other means, stockpiling, retention or transfer of anti-personnel mines applies in all circumstances (Art. 1).

The Statute of the International Criminal Court (ICC)

The ICC Statute gives the Court jurisdiction over the crime of genocide, crimes against humanity, war crimes committed during an international or non-international armed conflict, as defined in the Statute, and the crime of aggression once a definition thereof has been adopted (Articles 5 to 9). The jurisdiction of the ICC is complementary to that of States: it may be exercised solely when a State is unable genuinely to carry out the investigation or prosecution of alleged criminals under its jurisdiction, or is unwilling to do so (Art. 17). If they wish to avail themselves of their own courts' jurisdiction, the States Parties must have suitable legislation enabling them to bring these persons to trial in accordance with the requirements of the Statute.

The States Parties are also obliged to cooperate fully with the ICC in its investigation and prosecution of crimes within its jurisdiction (Art. 86). In addition, they must repress offences against the administration of justice by the ICC which have been committed in their territory or by one of their nationals (Art. 70, para. 4).

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Method of incorporating punishment into criminal law

From a legislative point of view, incorporating punishments into domestic law for violations of international humanitarian law involves 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**.

Method of criminalizing violations of international humanitarian law

The legislator has a number of options for translating serious violations of international humanitarian law into national penal legislation and for making the criminal acts constituting them subject to domestic law:

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 international humanitarian law and that it would be superfluous, therefore, to make them a specific offence. 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:

- modern 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.

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 international humanitarian law, nor are the penalties appropriate to the context of armed conflicts or to the seriousness of the crimes in question.

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 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 international humanitarian law 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*?

In some cases, these questions were resolved by including aggravating circumstances in already existing offences so as to take into account the special conditions encountered in situations of armed conflict.

Criminalization in domestic law by a generic provision

Grave breaches and other violations of international humanitarian law may be criminalized in domestic law by containing a reference to the relevant provisions of international humanitarian law, 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 international humanitarian law are made punishable by simple 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 prove insufficient in view of the principle of legality, particularly as this method does not permit any differentiation of the penalty in accordance with the gravity of the act, unless this is left to be decided by the judge in application of strict criteria laid down by law;
- it requires the judge of the national court to clarify and interpret the law in the light of the provisions of international law, leaving him with considerable room for manoeuvre. His task is not made any easier by the fact that the definitions of war crimes

contained in the international instruments may not correspond exactly to the type of formulation with which he is generally confronted.

Specific criminalization of types of conduct

This method consists in criminalizing in national law the types of conduct treated as crimes in international treaties. 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;
- it 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.

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 with regard to the repression of breaches of international humanitarian law 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.

Form and place of criminalization

Civil-law countries

Methods

The various methods of making violations of international humanitarian law 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;
- 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 and the same 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 poses the problem 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.

Because 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 so much 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.*

Common-law countries

In common-law countries, where the legal system is not based on codes, serious violations of international humanitarian law are sanctioned by primary legislation transposing and executing the treaty in the domestic legal system (in a Geneva Conventions Act, for example). This kind of legislation generally defines both the material scope of the offences and the jurisdiction to which they are subject.

* * *

Though penal sanctions are indispensable to ensure respect for international humanitarian law, 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 and their legal responsibility in the event of armed conflict.

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Universal jurisdiction over war crimes

The repression of war crimes is essential to ensuring respect for international humanitarian law. The incorporation into that body of law of the principle of universal jurisdiction, which entitles a State to prosecute offenders even in the absence of any link between the crime committed and the forum, is one means of facilitating and securing the repression of war crimes.

State jurisdiction

A State may exercise jurisdiction within its own territory. Such jurisdiction includes the power to make law (legislative jurisdiction), the power to interpret or apply law (adjudicative jurisdiction) and the power to take action to enforce law (enforcement jurisdiction). However, while the assertion of enforcement jurisdiction is generally limited to national territory, international law recognizes that in certain circumstances a State may legislate for, or adjudicate on, events arising outside its territory (extraterritorial jurisdiction).

In relation to criminal law, a number of principles have been invoked as the basis for such extraterritorial jurisdiction. These include jurisdiction over acts:

- committed by persons having the nationality of the forum (nationality or active personality principle);
- committed against nationals of the forum (passive personality principle) or
- affecting the security of the State (the protective principle).

While these principles enjoy varying levels of support in practice and opinion, they all require some form of link between the act committed and the State asserting jurisdiction. However universality, a further basis for asserting extraterritorial jurisdiction, requires no such link.

Universal jurisdiction

Universal jurisdiction refers to the assertion of jurisdiction over offences regardless of the place where they were committed or the nationality of the perpetrator. It is held to apply to a range of offences whose repression by all States is justified, or required, as a matter of international public policy.

A distinction can be made between the offences that States are obliged to investigate in application of universal jurisdiction (mandatory universal jurisdiction) and those with respect to which they may choose to do so (permissive universal jurisdiction). Universal jurisdiction may be provided for by a rule of customary or treaty-based international law. In cases where it is established by treaty, it is generally mandatory.

The exercise of universal jurisdiction may either take the form of the enactment of national law (legislative universal jurisdiction) or the investigation and trial of alleged offenders (adjudicative universal jurisdiction). The former is far more common in State practice and is generally a necessary basis for investigation and trial. It is however feasible, at least in principle, for a court to base its jurisdiction directly on international law and to exercise adjudicative universal jurisdiction without any reference to national legislation.

Universal jurisdiction over war crimes

The basis for the assertion of universal jurisdiction over war crimes is to be found in both treaty law and in customary international law.

Treaty law

The treaty basis for the assertion of universal jurisdiction was introduced by the four Geneva Conventions of 1949 for the protection of war victims in relation to those violations of the Conventions defined as grave breaches. Under the relevant article of each Convention (Arts 49, 50, 129 and 146, respectively), States are required to search for alleged offenders "regardless of their nationality," and either bring them before their own courts or hand them over for trial by another State Party which has made out a *prima facie* case (principle of *aut dedere aut judicare*). While the Conventions do not expressly state that jurisdiction is to be asserted regardless of the place of the offence, they have been generally interpreted as providing for universal jurisdiction. As such they are among the earliest examples of universal jurisdiction in treaty law.

The Geneva Conventions provide for mandatory universal jurisdiction, since they oblige States to try those who have allegedly committed grave breaches or institute the necessary procedures to extradite such persons. States may institute legal enquiries or proceedings even against persons outside their territory. Given that extradition to another State may not be an option, States must in any event have in place penal legislation enabling them to try alleged offenders, regardless of their nationality or the place of the offence.

Protocol I of 1977 additional to the Geneva Conventions of 1949 extends the principle of universal jurisdiction to grave breaches of the rules relating to the conduct of hostilities. It also qualifies all grave breaches as war crimes (Art. 85).

Other instruments relevant to international humanitarian law, such as the Hague Convention of 1954 for the protection of cultural property in the event of armed conflict, and its Second Protocol, provide for a similar obligation for States Parties to repress serious violations of these instruments on the basis of the principle of universal jurisdiction.

Customary international law

While the relevant treaty law provisions are restricted to grave breaches, universal jurisdiction in customary international law may be regarded as extending to all violations of the laws and customs of war which constitute war crimes. This would include certain serious violations of applicable law, in particular Article 3 common to the Geneva Conventions and Additional Protocol II of 1977, committed in non-international armed conflict.

In contrast with treaty law, there do not appear to be any grounds for concluding that customary international law *requires* States to exercise jurisdiction. Thus in relation to war crimes which do not constitute grave breaches of international humanitarian law, States may choose whether to exercise universal jurisdiction.

Legislative methods

States have adopted a range of methods to provide for universal jurisdiction under their national law.

Constitutional provisions are of central importance in determining the status of customary or treaty law in the domestic legal system. It is conceivable that courts might rely directly on such provisions or on international law to exercise universal jurisdiction where permitted or required. However, because the relevant provisions of international law are not self-executing, it is preferable to specify in national law the jurisdiction applicable to war crimes.

A number of States with a (code-based) civil-law system provide for universal jurisdiction within their ordinary and/or military penal code. This code may define the jurisdictional and material scope of the offence in the same section. More frequently however, the provisions on universal jurisdiction are included in the general section of the code and refer to substantive offences defined elsewhere in the same instrument. Universal jurisdiction may also be laid down in criminal procedural law or in a law on the organization of the courts. Some States have granted their courts universal jurisdiction with regard to certain offences by means of a special stand-alone law.

In countries without code-based systems – generally those with a common-law system – it is the usual practice to provide for universal jurisdiction in primary legislation defining both the jurisdictional and material scope of the offence.

Legislative issues

Whatever the method adopted, a number of issues need to be addressed in providing for universal jurisdiction in national law:

- In order to prevent impunity, all war crimes, whether committed in connection with international or non-international armed conflict, should be subject to universal jurisdiction.
- It is important to make clear that jurisdiction extends to all persons directly or indirectly responsible for committing the offences concerned, whatever their nationality and regardless of whether the offence was committed within the State's territory or abroad.
- The criteria for opening criminal proceedings, or for justifying a refusal to do so, must be set forth in clear and precise manner.
- Given that the jurisdiction of States may be concurrent, the exercise of jurisdiction by any one State may be subject to certain conditions, such as respecting the principle of *ne bis in idem,* and taking into account penalties already imposed abroad, previous exercise of jurisdiction by another State or by an international tribunal, and the defendant's presence – even temporary – in the territory of the prosecuting State.

The condition of double criminal liability, however, according to which the offence prosecuted must also be an offence in the place where it occurred, is incompatible with the requirements of international humanitarian law.

The prosecution and trial of offences occurring abroad imposes particular problems in relation to the gathering of evidence, respect for the defendant's rights, and protection of witnesses and victims. Appropriate procedures for prosecutions and trials under universal jurisdiction must address these issues by means of suitable provisions to facilitate investigations as well as the gathering and evaluation of evidence. In this respect, arrangements for international judicial cooperation are essential and may in some cases require reinforcing.

Universal jurisdiction of national courts and of the International Criminal Court

The right, or in some cases the obligation, to prosecute war crimes under universal jurisdiction existed before the adoption of the 1998 Rome Statute of the International Criminal Court (ICC). In its preamble, the Statute affirms that national courts have primary responsibility for trying such crimes. The ICC's jurisdiction over war crimes is thus considered to be complementary: the ICC will exercise its jurisdiction only when a State is unwilling or unable genuinely to carry out the investigation or prosecution (ICC Statute, Art. 17.1(a)).

It is important, therefore, that States have appropriate legislation, which meets the requirements of international humanitarian law and the ICC Statute and allows them to undertake investigations and criminal prosecutions and to bring to trial anyone accused of a war crime.

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Time-barring

Time-barring, or the application of a statutory limitation on legal action in the event of an offence, may relate to either of two aspects of legal proceedings. On the one hand, the time bar may apply to prosecution. If a certain time has elapsed since a breach was committed, this would mean no public action could be taken, and that no verdict could be reached. On the other hand, the limitation may apply only to the application of the sentence itself. In this case the fact that a certain amount of time had elapsed would mean the criminal sentence could not be applied. Because the repression of serious violations of international humanitarian law is essential to ensuring respect for this branch of law, the issue of a time bar for these violations must be raised. This is all the more important in view of the gravity of certain violations, qualified as war crimes, that run counter to the interests of the international community as a whole.

Time-barring in national criminal law systems

Most legal systems make allowances for a time bar for minor offences. But for serious crimes, several legal systems, and in particular those based on common law, do not permit a time bar for prosecution. Legislatures in countries where civil law prevails have either established time bars for serious crimes that are much longer than those for misdemeanours, or excluded this type of crime altogether from the effect of statutory time limitations.

The time-barring of the application of criminal penalties is less prevalent in the various legal systems. This type of statutory limitation does not exist at all in common law, and indeed it is extremely restricted in the other systems. Where it does exist, the time limitations are generally very long for the most serious offences. Generally, the statute of limitations does not apply for certain types of offence or in cases involving dangerous or repeat offenders.

The lack of statutory limitation for war crimes in international law

Treaty law

The Geneva Conventions of 1949 and their Additional Protocols of 1977 say nothing on the subject of time bars for war crimes.

On 26 November 1968, the United Nations General Assembly adopted the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity. The convention applies to both prosecution and the application of sentences, and covers war crimes – in particular, grave breaches of the Geneva Conventions – and crimes against humanity, including apartheid and genocide, committed in times of war and of peace. It is retroactively effective, insofar as it abolishes time bars that had previously been established pursuant to laws or to other enactments.

At the regional level, the European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes of 25 January 1974 deserves to be mentioned. The convention, which entered into force on 27 June 2003, covers both prosecution and the application of sentences, but applies only to crimes against humanity "specified in the Convention on the Prevention and Punishment of the Crime of Genocide" of 9 December 1948.

As for war crimes, the convention establishes the non-applicability of statutory limitations to:

- grave breaches of the Geneva Conventions, or
- any comparable violations of the laws of war having effect at the time of the convention's entry into force and of the customs of war existing at that time, which are not grave breaches of the Geneva Conventions,

"when the specific violation under consideration is of a particularly grave character by reason either of its factual and intentional elements or of the extent of its foreseeable consequences."

The convention may also, by declaration of a contracting State, be extended to any other violation of international law which the contracting State concerned considers as being of a comparable nature to the crimes against humanity and war crimes specified in the convention.

The United Nations and Council of Europe conventions do not directly make the absence of statutory limitations effective in the legal systems of the States party to them. The States have to take the appropriate legislative measures within their domestic legal systems.

The 1998 Rome Statute of the International Criminal Court (ICC) states that "[t]he crimes within the jurisdiction of the Court shall not be subject to any statute of limitations" (Art. 29). In this case, then, the non-applicability of statutory limitations concerns war crimes, crimes against humanity, genocide and the crime of aggression.

States desiring to maintain jurisdiction over the crimes defined in the Statute as within the

jurisdiction of the ICC, and thus to take advantage of the principle of complementary relationship on which the ICC is based, must abolish time bars for these crimes in their national legislation.

Customary international law

Several factors have contributed to bring to the fore the customary nature of war crimes and crimes against humanity and the non-applicability of statutory limitations to them:

- the growing number of States having stipulated the non-applicability of statutory limitations to these crimes in their penal legislation;
- the codification of this concept in Article 29 of the ICC Statute, which its drafters considered crucial to preventing impunity for these crimes;
- the growing number of States party to the United Nations and Council of Europe conventions.

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Command responsibility and failure to act

International humanitarian law provides a system for repressing violations of its rules based on the individual criminal responsibility of those responsible. The violations can also result from a failure to act. In armed conflict situations, armed forces or groups are generally placed under a command that is responsible for the conduct of subordinates. It is reasonable, then, in order to make the repression system effective, that the hierarchical superiors should be held individually responsible when they fail to take proper measures to prevent their subordinates from committing serious violations of international humanitarian law.

Perpetrator responsibility for failing to act

The system established in the Geneva Conventions of 1949 for repressing grave breaches targets persons who have committed or ordered the commission of such a breach. Persons who by failing to act have allowed a grave breach to happen can also be held criminally liable. Just as it is possible to kill someone by withholding food or proper care, the grave breach of depriving a prisoner of war of his right to a fair and regular trial can be and usually is committed simply by failing to take action.

Additional Protocol I of 1977 is more explicit; Article 86.1 specifies that:

"The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol ***which result from a failure to act when under a duty to do so***".

The grave breaches referred to in Article 85 of Additional Protocol I also include those generally committed by a failure to act, such as the unjustified delay in repatriating prisoners of war or civilians.

Command responsibility for failing to act

At issue is the responsibility of a superior who fails in his duty by doing nothing to prevent a subordinate from committing a violation of international humanitarian law.

The trials held after the Second World War

The problem of command responsibility became a burning issue during the Second World War. Although the Charter of the Nürnberg International Military Tribunal contains no rules on this subject, the trials held after the war laid down broad outlines.

Without reviving the controversy to which those decisions inevitably gave rise, the mechanism of command responsibility may be summarized as follows:

- it involves a superior, i.e. a person having authority over a subordinate;
- the superior knew or should have known that the crime was being or was going to be committed;
- the superior had the ability to prevent the criminal conduct or put a stop to it; and
- the superior failed to take all necessary and reasonable measures within his power to prevent the criminal conduct or put a stop to it.

The Geneva Conventions of 1949

The Geneva Conventions are silent on this point and it is for national legislation to regulate the matter by express provision or by application of the general rules of criminal law.

Additional Protocol I of 1977

Principles that came out of the trials held after the Second World War were incorporated in Article 86.2 of Additional Protocol I:

"The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach."

Article 87 of Additional Protocol I spells out the duties and obligations of military commanders with respect to their subordinates. The superiors must prevent and, where necessary, suppress and report to competent authorities grave breaches committed by their subordinates. Only in the event that he failed in these duties does a commander risk being held criminally responsible for taking no action.

A "superior" is understood as someone personally responsible for the acts committed by subordinates placed under his control.

The issue of how much knowledge the superior should have of the acts or intentions of his subordinates is difficult to resolve. It should be borne in mind in this connection that the superior who fails to keep himself

informed is also liable to be held responsible.

The superior's duty to act consists in initiating "such steps as are necessary" to prevent or suppress the crimes of his subordinates. Only those steps that are within his power are required; it is not a matter of making every superior a judge.

A superior's failure to act considered as a grave breach

The limits to criminal responsibility for failing to act are not clearly specified in criminal law. In international humanitarian law, a further difficulty stems from the fact that failure to act on the part of a superior is not expressly qualified as a grave breach, whereas the obligation of States to repress offences or extradite persons in the exercise of universal jurisdiction concerns grave breaches only.

In the system of repression established by international humanitarian law the superior's criminal liability is considered as a form of participation in the commission of the crime. A superior held responsible for one of his subordinates committing a grave breach should himself be charged with committing a grave breach. States have a duty to punish the superior or extradite him, regardless of his nationality or the place where the offence occurred.

Case law of the ad hoc international criminal tribunals

The case law of the ad hoc international criminal tribunals has clarified the conditions under international humanitarian law for holding superiors responsible for offences committed by their subordinates. In particular, it establishes that it is not necessary to be the hierarchical superior *de jure* of the direct perpetrator of a crime to be held criminally responsible for his actions; it is sufficient to exercise authority over such a person *de facto*. The same case law has also made it clear that belonging to the military is not a necessary condition, as a civilian hierarchical superior can also be held responsible for war crimes committed by subordinates. Finally, the case law has confirmed that there need be no direct causal relationship between a superior failing to take action and a subordinate committing a crime for the superior to be held responsible.

Command responsibility according to the Statute of the International Criminal Court (ICC)

The Statute of the International Criminal Court distinguishes two kinds of hierarchical responsibility.

Responsibility of military commanders

Article 28 of the Statute lays down that a military commander or a person "effectively" acting as a military commander is criminally responsible for crimes within the jurisdiction of the ICC committed by forces or persons under his effective command and control, or effective authority and control, where:

- he either knew, or owing to the circumstances, should have known that the forces or persons were committing or about to commit such crimes; and
- he failed to take all necessary and reasonable measures within his power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

Responsibility of civilian superiors

Similarly, a hierarchical superior in a non-military relationship with subordinates is criminally responsible for crimes within the jurisdiction of the ICC committed by subordinates under his effective authority and control, where:

- he knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
- the crimes concerned activities that were within his effective responsibility and control; and
- he failed to take all necessary and reasonable measures within his power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

Responsibility for failing to act during a non-international armed conflict

The Geneva Conventions and 1977 Protocol II additional thereto make no explicit mention of any criminal responsibility on the part of hierarchical superiors for breaches committed by their subordinates during a non-international armed conflict. It should be noted, however, that the principle of responsible command within armed groups is one of the terms of application of Additional Protocol II. In addition, national criminal legislation in an increasing number of States provides for holding superiors criminally responsible for all war crimes, regardless of whether the armed conflict in which they are committed is international or non-international.

The Statutes of the International Criminal Tribunal for the former Yugoslavia (Art. 7.3), the International Criminal Tribunal for Rwanda (Art. 6.3), the Special Court for Sierra Leone (Art. 6.3), and the ICC (Art. 28) expressly state that superiors bear responsibility, in particular if they fail to take action, for crimes committed by their subordinates in a non-international armed conflict. That form of responsibility applies to all the crimes submitted to the jurisdiction of those tribunals. Article 4 of the Statute of the International Criminal Tribunal for Rwanda expressly asserts the Tribunal's power to prosecute grave breaches of Article 3 common to the Geneva Conventions and of Additional Protocol II, which apply to non-international armed conflict. The same power is claimed by the Special Court for Sierra Leone in Articles 3 and 4 of its Statute; in addition, the Court has jurisdiction in respect of other specified serious violations of international humanitarian law committed within the country. Article 8.2(c) and (e) of the ICC Statute asserts the ICC's jurisdiction in respect of serious violations of Article 3 common to the Geneva Conventions and of other serious violations of the laws and customs applicable in armed conflicts not of an international character, for which a hierarchical superior can therefore be held responsible.

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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. Persons accused of committing these crimes must benefit from a whole series of procedural safeguards. 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. Authorities desiring to prosecute a person allegedly responsible for such 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.

The independence of the body charged with implementing public action is of crucial importance in ensuring an effective system for the repression of war crimes. In certain countries, for example, the bringing of a criminal prosecution for war crimes is subject to the approval of an executive authority. 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. Finally, it is important that the victims of war crimes be given easy and direct access to justice.

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 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 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.

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

Taking / evaluation of evidence

Trials of offences committed abroad pose particular problems 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.

Judicial guarantees laid down in international humanitarian law

Persons accused of serious violations of any of the four Geneva Conventions (GC I-IV) or of Additional Protocol I (P I) are entitled to benefit from minimum legal safeguards laid down in these treaties (Art. 49, GC I; Art. 50, GC II; Art. 129, GC III; Art. 146, GC IV). Article 75 of Additional Protocol I contains a list of guarantees benefiting persons protected by these treaties and also persons accused of war crimes. These guarantees are minimal requirements that do not in any way prevent a more favourable treatment from being granted in accordance with other provisions of the Geneva Conventions and of Additional Protocol I.

International humanitarian law applicable to non-international armed conflicts prohibits the passing of sentences and the carrying out of executions in violation of "judicial guarantees which are recognized as indispensable" and which it specifies (Art. 3 common to the Geneva Conventions). Additional Protocol II of 1977 (P II) stipulates, concerning offences committed in connection with an 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).

The Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) and that of the International Criminal Tribunal 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 Statute of the Special Court for Sierra Leone does the same for all persons prosecuted in that court (Arts 9 and 17). The 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).

These legal safeguards roughly correspond to those offered by instruments of human rights law. Together with the procedural principles provided for by international humanitarian law, they must be applied without exception. The strictness of their application must be recognized by national law. The main principles and judicial guarantees are the following:

- the principle of individual criminal responsibility (Art. 75.4(b), P I; Art. 6.2(b), P II; Art. 25, ICC Statute);
- the principle of *nullum crimen et nulla poena sine lege* (Art. 99.1, GC III; Art. 75.4(c), P I; Art. 6.2(c), P II; Arts 22.1 and 23, ICC Statute);
- the principle of *non bis in idem* (Art. 86, GC III; Art. 117.3, GC IV; Art. 75.4(h), P I; Art. 6.2(a), P II; Art. 20, ICC Statute);
- 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, P I; Art. 6.2, P II; Art. 67.1 and 67.1(c), ICC Statute);
- the right of the accused to be informed of the offence he is charged with (Art. 104.2, GC III; Art. 71.2, GC IV; Art. 75.4(a), P I; Art. 6.2(a), P II; Art. 67.1(a), ICC Statute;
- the rights and means of defence, for example the right to be assisted by a qualified lawyer freely chosen and by a competent interpreter (Arts 99 and 105, GC III; Arts 72 and 74, GC IV; Art. 75.4(a) and (g), P I; Art. 6.2(a), P II; Art 67.1(b), (d), (e) and (f), ICC Statute);
- the presumption of innocence (Art. 75.4(d), P I; Art. 6.2(d), P II; Art. 66, ICC Statute);
- the right of the accused to be present at his trial (Art. 75.4(e), P I; Art. 6.2(e), P II; Art. 67.1(d), ICC Statute);
- the right of the accused not to testify against himself or to confess guilt (Art. 75.4(f), P I; Art. 6.2(e), P II; Art. 67.1(g), ICC Statute);
- the right of the accused to have the judgment pronounced publicly (Art. 75.4(i), P I; Art. 76.4, ICC Statute);
- the right of the accused to be informed of his rights of appeal (Art. 106, GC III; Art. 73, GC IV; Art. 75.4(j), P I; Art. 6.3, P II).

Cooperation, international legal assistance and extradition

Cooperation between States and with international jurisdictions is essential to the smooth running of the system of repression of war crimes. Various forms of assistance may be required, from the taking of evidence abroad to the enforcement of foreign judgments.

The need for mutual assistance is especially evident in the case of offences where those allegedly responsible must be brought to trial or extradited by States. Article 88 of Additional Protocol I provides for the broadest possible mutual legal assistance among States Parties in all proceedings brought in respect of grave breaches of the Geneva Conventions or their Additional Protocols, and the specific obligation to cooperate in the matter of extradition. Similarly, Articles 18 and 19 of the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict concern extradition and judicial cooperation.

The Statute of the ICTY and that of the ICTR also contain provisions on cooperation and legal assistance that States must offer at all stages of proceedings brought by these tribunals (Art. 29, ICTY Statute; Art. 28, ICTR Statute). Many States have passed legislation for this purpose.

The ICC's effectiveness depends in large part on the cooperation of States. The States party to the ICC Statute have a general obligation to cooperate (Art. 86) and must ensure that there are procedures available under their national law for all of the forms of cooperation specified in the Statute (Art. 88).

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Cooperation with extradition and judicial assistance in criminal matters

In order to ensure full respect for international humanitarian law, it is important that violations are punished. The repression of these violations often requires the cooperation of different States or instances, 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 international humanitarian law, such as war crimes, are considered to be attacks on the international community as a whole. From this standpoint, international law provides for cooperation procedures in matters of extradition, international judicial cooperation, and cooperation with the ad hoc international criminal tribunals and the International Criminal Court.

Extradition

The obligation of the 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 the treaties. The possibility of handing over accused persons for trial by another Contracting Party wishing to prosecute them is an opportunity offered to the State on whose territory or in whose power such persons may be to fulfil its treaty obligations.

This option is further confirmed by the wording of Art. 88.2 of Additional Protocol I, which explicitly establishes that the High Contracting Parties have a duty to 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.

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. In this context, we might mention examples such as 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). Additional Protocol I did not help to close this gap, although Article 78 of the draft treaty precluded the exception of political crime as an obstacle to extradition in the case of grave violations.

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

Judicial assistance in criminal matters

Cooperation in judicial assistance is specifically considered in Article 88. 1 of Additional Protocol 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 the Protocol 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.

A system of repression such as that laid down by international humanitarian law for war crimes, which is based on the principle of universal competence 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.

In the context of incorporating punishments for breaches of international humanitarian law 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 international humanitarian law.

Finally, 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 to the Hague Convention of 1954 for the protection of cultural property in the event of armed conflict (Arts 18 and 19).

Cooperation with the ad hoc international criminal tribunals

The United Nations 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). These tribunals have primacy over national courts: at any stage of the procedure, they may 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, oblige States to cooperate with these tribunals in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law. States must 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.

Cooperation with the International Criminal Court (ICC)

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 the 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 (once a provision is adopted defining that crime). 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).

The ICC may thus transmit a request for the arrest and surrender to the ICC 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 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, paragraph 7;
- 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;
- 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).

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