

PENAL REPRESSION OF SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW



International humanitarian law (IHL) is the set of rules designed to limit the human cost of armed conflict. It protects people who are not, or are no longer, directly participating in hostilities; and it restricts the methods and means of warfare. IHL also sets out mechanisms designed to ensure compliance with its rules, and to punish serious violations, which are also referred to as 'war crimes'. Under IHL, individuals are criminally responsible for the war crimes they commit. In addition, under IHL commanders and other superiors are criminally responsible for war crimes committed pursuant to their orders, as well as for war crimes committed by their subordinates when they fail to take adequate measures to prevent or punish those crimes. Customary IHL affirms the right of States to vest their courts with universal jurisdiction over war crimes, and requires them to exercise that jurisdiction where appropriate. In addition, the four Geneva Conventions of 1949 (GC I–IV), their Additional Protocol I of 1977 (AP I) and other treaties contain specific obligations regarding penal repression of serious violations of IHL.

CUSTOMARY LAW

Under customary law today, serious violations of IHL – whether committed in international or non-international armed conflicts – constitute war crimes. States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. Furthermore, states have the right to vest their courts with universal jurisdiction for war crimes. If a State decides to vest its courts with universal jurisdiction, its domestic prosecutors and judicial authorities must investigate war crimes committed by non-nationals on the territory of another state and, if appropriate, prosecute the suspects.¹ States must make every effort to cooperate with each other to facilitate the investigation of war crimes and the prosecution of suspects. No statutes of limitations apply to war crimes (ICRC study on customary IHL, Rules 156–158, 160 and 161).

Under customary law, serious violations of IHL – whether committed in international or non-international armed conflicts – constitute war crimes. States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and prosecute the suspects if appropriate. States also have the right to vest their courts with universal jurisdiction for war crimes.

THE GENEVA CONVENTIONS OF 1949 AND THEIR ADDITIONAL PROTOCOLS OF 1977

Grave breaches of the Geneva Conventions and Additional Protocol I relating to the protection of victims of international armed conflicts

The Geneva Conventions and Additional Protocol I stipulate that states parties must punish serious violations of IHL committed in international armed conflicts, termed “grave breaches” (GC I, Art. 49; GC II, Art. 50; GC III, Art. 129; GC IV, Art. 146; and AP I, Art. 85(1)). These violations are listed in the Geneva Conventions and Additional Protocol I and include wilful killing, torture and inhuman treatment, willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer, and certain violations of the rules governing the conduct of hostilities (GC I, Art. 50; GC II, Art. 51; GC III, Art. 130; GC IV, Art. 147; AP I, Arts 11 and 85).

The Geneva Conventions and Additional Protocol I stipulate that states parties must punish serious violations of IHL committed in international armed conflicts, termed “grave breaches”. States parties must search for and try persons accused of having committed or having ordered the commission of such grave breaches.

In order to meet the obligation to punish grave breaches, states parties must:

- enact laws that prohibit and punish grave breaches. These laws shall apply to anyone who has committed or ordered the commission of such offences, or failed to prevent them (when under a legal duty to do so). They must criminalize acts committed in national territory and elsewhere, irrespective of the nationality of the alleged perpetrator, in accordance with the principle of universal jurisdiction. Indeed, states party to Additional Protocol I have an obligation to provide for universal jurisdiction over grave breaches in their national legislation.²

¹ The customary right of states to vest universal jurisdiction in their national courts over war crimes in no way diminishes the obligation of states party to Additional Protocol I to provide for universal jurisdiction in their national legislation over those war crimes known as “grave breaches”.

² For more information, see the ICRC Legal Division’s factsheet entitled “Universal jurisdiction over war crimes”, <https://www.icrc.org/en/document/universal-jurisdiction-over-war-crimes-factsheet>.

- search for and prosecute persons alleged to have committed or ordered the commission of grave breaches or failed to prevent them (when under a legal duty to do so). Alternatively, states party to Additional Protocol I must extradite the persons to another state party that has made a *prima facie* case.
- instruct their military commanders to prevent and put an end to grave breaches and to take steps against persons under their authority who have committed such offences.³
- assist each other in any judicial proceedings related to grave breaches.⁴

States must honour these obligations both in peacetime and during armed conflict. 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 relating to the Protection of Victims of Non-International Armed Conflicts

Additional Protocol II does not contain a specific obligation to repress violations of IHL. However, under customary IHL, individuals can be held criminally responsible for violations of Article 3 common to the Geneva Conventions (common Article 3) and of Additional Protocol II. Many states have adopted domestic legislation criminalizing such violations as war crimes. Furthermore, Article 8(c) and (e) of the Statute of the International Criminal Court (ICC) criminalizes, as war crimes in non-international armed conflicts, serious violations of common Article 3 and other serious violations of the laws and customs of war. It also sets out a list of such offences.

OTHER IHL AND RELATED TREATIES

THE HAGUE CONVENTION FOR THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT OF 1954 AND ITS SECOND PROTOCOL OF 1999

Violations of the Convention

The 1954 Convention obliges states parties to take, within the framework of their criminal jurisdiction, all necessary steps 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 encompasses violations committed in situations of international armed conflict and, as far as the provisions related to respect for cultural property are concerned, also those perpetrated during a non-international armed conflict (Art. 19).

Violations of the Second Protocol

In the event of an international or non-international armed conflict, states party to the 1954 Convention and its Second Protocol are required to:

- establish as criminal offences under their domestic law (Art. 15 (2)) serious violations of the Protocol (as defined in Art. 15(1), such as attacks against cultural property under enhanced protection, or the extensive destruction or appropriation of cultural property

³ For more information, refer to the ICRC Legal Division's factsheet entitled "Command responsibility and failure to act", <https://www.icrc.org/en/document/command-responsibility-and-failure-act-factsheet>.

⁴ For more information, refer to the ICRC Legal Division's factsheet entitled "Cooperation in extradition and judicial assistance in criminal matters", <https://www.icrc.org/en/document/cooperation-extradition-and-judicial-assistance-criminal-matters-factsheet>.

- establish jurisdiction over such offences and, where appropriate, prosecute or extradite alleged offenders (Arts 16 and 17)
- adopt such legislative, administrative or disciplinary measures as may be necessary to suppress other conduct prohibited by the Protocol (Art. 21)
- prohibit and prevent specific conduct in occupied territory, such as illicit exports, archaeological excavations or change of use of cultural property (Art. 9).

States parties shall establish their jurisdiction over serious violations committed in their territory, or by a national of their state. In addition, for certain serious violations, states parties are required to establish jurisdiction when the alleged offender is present in their territory, regardless of nationality and of the country where the violations were committed. (Art. 16).

THE INTERNATIONAL CRIMINAL COURT (ICC) STATUTE OF 1998

The ICC Statute (known as the “Rome Statute”) gives the Court jurisdiction over the crime of genocide, crimes against humanity, crimes of aggression, and war crimes committed during an international or non-international armed conflict, as defined in the Statute (Arts 5–9). For international armed conflicts, the list of war crimes includes grave breaches of the Geneva Conventions (Art. 8(a)) and of Additional Protocol I (Art. 8(b)), as well as some acts that are prohibited under customary IHL or under other conventions, such as the 1954 Convention on the Protection of Cultural Property in the event of an Armed Conflict. For non-international armed conflicts, the war crimes listed in the Rome Statute include serious violations of common Article 3 (Art. 8 (c)) and other serious violations of IHL (Art. 8 (e)), which correspond to acts prohibited under Additional Protocol II, or under customary IHL or under other relevant treaties, such as the 1989 Convention on the Rights of the Child.⁵

The ICC Statute gives the Court jurisdiction over the crime of genocide, crimes against humanity, crimes of aggression, and war crimes committed during an international or non-international armed conflict.

The Court may exercise its jurisdiction in three circumstances: a) when a situation involving the apparent commission of one or more crimes of this kind is referred to the Prosecutor by a state party; b) when such a situation is referred to the Prosecutor by the UN Security Council; or c) when the Prosecutor has initiated an investigation in respect of such a crime (Art. 13).⁶

States parties must cooperate fully with the ICC in the investigation and prosecution of crimes within its jurisdiction (Art. 86). In addition, they must criminalize offences against the administration of justice by the ICC that have been committed on their territory or by one of their nationals (Art. 70(4)).

The jurisdiction of the ICC is complementary to that of states: a case is admissible only when a state is unwilling or genuinely unable to carry out the investigation or prosecution of alleged criminals under its jurisdiction (Art. 17). Even if the Rome Statute does not expressly impose an obligation on states parties to incorporate crimes into their domestic legislation, such incorporation may facilitate the fulfilment of their duty to exercise criminal jurisdiction over these crimes.⁷

⁵ For a detailed comparison of the Rome Statute with the Geneva Conventions and its Additional Protocols, see the comparative table prepared by the ICRC's Legal Division, “War crimes under the Rome Statute of the International Criminal Court and their source in international humanitarian law,” https://www.icrc.org/sites/default/files/document/file_list/war-crimes-comparative-table.pdf.

⁶ Additional jurisdictional rules apply to crimes of aggression. For more information, see the ICRC Legal Division’s factsheet, “Statute of the International Criminal Court,” <https://www.icrc.org/en/document/statute-international-criminal-court>.

⁷ ICC Office of the Prosecutor, “Policy on complementarity and cooperation”, 2024, p. 66, <https://www.icc-cpi.int/sites/default/files/2024-04/2024-comp-policy-eng.pdf>.

THE CONVENTION ON THE PROHIBITION OF BIOLOGICAL WEAPONS OF 1972

States parties must take any necessary measures 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 prohibition applies in all circumstances (Art. I).

THE CONVENTION ON THE PROHIBITION OF ENVIRONMENTAL MODIFICATION TECHNIQUES OF 1976

States parties must 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), i.e. 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). In particular, each state should enact criminal legislation to outlaw and repress the use of prohibited techniques within its territory and anywhere else under its jurisdiction or control.

PROTOCOL ON PROHIBITION OR RESTRICTIONS ON THE USE OF MINES, BOOBY-TRAPS AND OTHER DEVICES AS AMENDED ON 3 MAY 1996 (PROTOCOL II TO THE CONVENTION PROHIBITING CERTAIN CONVENTIONAL WEAPONS OF 1980)

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(1)). Such measures imply establishing penal sanctions for perpetrators.

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(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(2)).

THE CONVENTION ON THE PROHIBITION OF CHEMICAL WEAPONS OF 1993

The Convention prohibits, in all circumstances, the development, production, acquisition by other means, stockpiling, transfer or use of chemical weapons, It also prohibits engaging in military preparations to use such weapons. These prohibitions apply in all circumstances (Art. I).

States parties must enact penal legislation 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(1)).

States parties are also obliged to cooperate with each other by providing mutual legal assistance to facilitate the implementation of their obligations under the Convention (Art. VII(2)).

THE ANTI-PERSONNEL MINE BAN CONVENTION OF 1997

The Convention prohibits, in all circumstances, the use, development, production, acquisition by any other means, stockpiling, retention or transfer of anti-personnel mines (Art. 1).

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 CONVENTION ON CLUSTER MUNITIONS OF 2008

States parties shall, in all circumstances, take measures to prohibit the use, stockpiling, production, acquisition, retention and transfer of cluster munitions, as defined in the Convention (Art. 1), and take action specifically to ensure that these weapons claim no future victims. States parties must take all appropriate legal, administrative and other measures, including the imposition of penal sanctions, to prevent and suppress any activity prohibited under this Convention undertaken by persons or on territory under their jurisdiction or control (Art. 9).

THE ARMS TRADE TREATY OF 2013

The Treaty establishes international standards for regulating and improving the regulation of the international trade in conventional arms (Art. 1), referring to seven major categories of conventional arms already included in the UN Register of Conventional Arms, plus small arms and light weapons (Art. 2). The activities of international trade comprise export, import, transit, trans-shipment and brokering (Art. 2(2)).

Transfers of conventional arms, ammunition and parts and components are prohibited if the transfer would violate a state's obligations under international agreements to which it is a party. In addition, a state party must not authorize any transfer if it has knowledge at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians, or other war crimes defined by international agreements to which the state is a party (Art. 6).

If a transfer has not been prohibited pursuant to Art. 6, each exporting state party must assess whether the arms or items could be used to commit or facilitate a serious violation of IHL or international human rights law. If there is a significant risk, the state must not authorize the export (Art. 7).

States parties must take all appropriate legal, administrative and other measures to implement the Treaty (Art. 14). This obligation includes establishing penal sanctions.

Furthermore, states parties are obliged to consult one another and cooperate in the application of the Treaty. This obligation includes granting wide measures of assistance in investigations, prosecutions and judicial proceedings relating to violations of domestic law established pursuant to the Treaty (Art. 15).

THE TREATY ON THE PROHIBITION OF NUCLEAR WEAPONS OF 2017

The Convention prohibits, in all circumstances, the use or the threat of using nuclear weapons or other nuclear explosive devices, as well as the development, testing, production, manufacture, acquisition by other means, possession or stockpiling of such weapons or explosive devices. It also prohibits states parties from transferring nuclear weapons, receiving the transfer of or control over nuclear weapons or allowing the stationing, installation or deployment of nuclear weapons in their territory or at any place under their jurisdiction or control (Art. 1.1).

State parties shall take all legal and administrative necessary to implement the Treaty's provisions. This includes the imposition of penal sanctions to prevent and suppress any violations committed by persons, or on territory, under states parties' jurisdiction or control (Art. 5).

THE OPTIONAL PROTOCOL TO THE CONVENTION ON THE RIGHTS OF THE CHILD ON THE INVOLVEMENT OF CHILDREN IN ARMED CONFLICT OF 2000

The Optional Protocol prohibits the recruitment or use in hostilities of persons under the age of 18 by armed groups (Art. 4.1), and requires states parties to take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices (Art. 4.2).

With regard to the recruitment of children and their use in hostilities by state armed forces, the Optional Protocol prohibits both direct participation in hostilities and compulsory recruitment under the age of 18 (Arts 1 and 2). It also places strict limits on voluntary recruitment (Art. 3). Every state party shall take all necessary legal, administrative and other measures to ensure the effective implementation and enforcement, within its jurisdiction, of the provisions of the Protocol (Art. 6.1).

THE ICRC'S ROLE

The ICRC has been engaging with state organs and with domestic, regional and international accountability mechanisms, with the following objectives: advising lawmakers on IHL rules that must be reflected in domestic laws on criminal repression; raising awareness of IHL rules through exchanges with judges, prosecutors and legal professionals; and urging the ratification of treaties that strengthen and clarify states' obligations to repress IHL violations.





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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