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**Punishing Violations of International
Humanitarian Law at the National Level:
A Guide for Common Law States**

ICRC Advisory Service on International Humanitarian
Law, Geneva, 2001, 199 pages

The last decade has seen renewed recognition of the value of international criminal justice as a way of punishing perpetrators of international crimes, deterring those who might be tempted to commit such crimes in the future and thereby contributing to international peace and security. However, while commentators may laud recent developments in this area, a great gap remains between the potential of an international system of accountability and the practical reality of one. The principle of complementarity, affirmed in the Statute of the International Criminal Court, means that it is basically up to individual States to ensure that those suspected of international crimes are investigated, prosecuted, and, if found guilty, punished accordingly. In order to assist States in their duties in this regard, the ICRC Advisory Service, having already published a report on national implementation for civil law States in its 1997 *Annual Report*, has now produced a practical guide for common law States on the punishment of violations of international humanitarian law and other serious crimes such as genocide, torture and crimes against humanity through national criminal and military law. Although the Guide draws on the meeting of experts held in Geneva from 11 to 13 November 1998, it is not a summary of proceedings but is meant to be a tool or resource for common law States.

The Guide begins by reviewing the treaty provisions requiring States to punish international crimes at the national level. In addition to these provisions, which are usefully summarized in a table in the Annexes, the Guide outlines the obligation States have to ensure compliance with rules arising under customary law — an obligation which does not require States to enact criminal legislation or punish offenders, although they may do so if they wish. The crucial point is repeatedly made that while the Rome Statute does not impose an

obligation on States Parties to ensure that the crimes under the International Criminal Court's jurisdiction are also crimes in domestic law, States Parties that wish to take advantage of the principle of complementarity will need to review their national criminal law to ensure that prosecutions can be brought in national courts. Moreover, this in itself may not be enough to satisfy a State's existing obligations under such treaties as the 1954 Cultural Property Convention and its Second Protocol, the 1972 Biological Weapons Convention, the 1976 Environmental Modification Techniques Convention, the 1980 Conventional Weapons Convention and its Protocols, the 1993 Chemical Weapons Convention and the 1997 Ottawa Convention.

The Guide goes on to discuss the central issue of jurisdiction over international crimes, universal jurisdiction in particular. Again a distinction is drawn between treaty-based obligations to prosecute (mandatory universal jurisdiction) and the capacity which States have to prosecute under customary law (permissive universal jurisdiction). While the Guide is fairly conservative in its treatment of universal jurisdiction, its clarity on this issue will facilitate the task of policy and law makers. The Guide also points out that the comprehensive definition of crimes against humanity provided in the Rome Statute will make it easier to adopt national legislation. Hopefully, this will encourage more States to do so.

The chapter devoted to individual responsibility for international crimes looks at general principles of individual criminal responsibility in international humanitarian law, including liability for omissions and the liability of commanders and superiors. Regrettably, its focus on the law of war means that scant attention is paid to the concept of individual responsibility for other serious crimes such as genocide, torture and crimes against humanity. The mental element required to establish individual criminal responsibility is also dealt with in this chapter, although any prosecutor wishing to prove its existence in a court of law would have to delve further into jurisprudential tests. Finally, the defences and immunities which may be raised in proceedings for international crimes are passed under review. It might have been useful to include defences and immunities under national law, such as amnesty decrees, which could arguably be raised in such

proceedings as well. States will have to make their own assessments of the validity of such defences and immunities instead.

The Guide sets out the general principles for incorporating international law into domestic law and compares the legislation that common law States have adopted to implement international humanitarian law treaties and certain arms control and disarmament treaties. It also provides examples of national legislation to punish genocide, torture and crimes against humanity and gives guidance on how to frame national legislation providing for universal jurisdiction over such crimes. The incorporation of the Geneva Conventions and their additional Protocols into the domestic law of common law States is examined in a specific chapter containing a Model Geneva Conventions Act in which square brackets are used to indicate where information needs to be inserted or references modified for individual States. This is perhaps the most practical part of the Guide.

Whereas many existing Geneva Conventions Acts draw a procedural distinction between the treatment of grave breaches (the prosecution of which usually requires the consent of the Attorney-General) and other breaches, the Model Act treats all breaches in the same fashion and imposes the same maximum penalties. This is important as it has the effect of extending criminal responsibility beyond grave breaches of the Conventions and Protocol I to all violations of the Conventions and their Protocols.

It is also worth noting that in dealing with the question of “proof of application” — or how to determine whether there is an armed conflict to which the Conventions and their Protocols apply — the Model Act endorses the approach taken by the Australian Geneva Conventions Act, which provides that a certificate issued by the Minister for Foreign Affairs is *prima facie* evidence of the existence of an armed conflict. While such an approach does not entirely depoliticize the issue, it constitutes an improvement over the Geneva Conventions Acts of other States (e.g. Ireland) in that the certificate is not necessarily determinative. Interestingly, the ICRC Advisory Service provided no role for the ICRC in determining the existence of an armed conflict for the purposes of the domestic prosecution of violations of international humanitarian law, but left this fully up to

the discretion of individual governments. However, this is probably the only politically feasible option.

The jurisdiction of military law and courts over war crimes is examined in some detail, the Guide noting that failure to enforce international humanitarian law may only be partly remedied through the military justice system given its particular scope of application. The law applicable to prisoners of war is also outlined, including rules to determine the status of prisoners in case of doubt.

In discussing the steps a State must take in bringing a case to trial, the Guide looks at issues pertaining to the decision to prosecute and stresses the importance of mutual assistance in such areas as the extradition of suspects and cooperation with international tribunals. Regarding the actual preparation of the case, it examines the relevant questions of evidence that may arise in a common law State. It also lists the fundamental judicial guarantees in international humanitarian law, although a State wishing to hold proceedings for international crimes should also bear in mind the fundamental due process rights which are binding under international human rights law.

It is noted in the conclusion that prosecution is not the only way of holding offenders accountable for their acts. Truth commissions and immigration and citizenship laws may also be used to this end, and in some countries it is possible for victims to seek damages in civil proceedings. However, these alternatives to prosecution should be seen as additional possibilities in the fight against impunity and not as a substitute for trial and punishment. It might have been helpful for the Guide to explain how the establishment of truth commissions that may grant amnesties for disclosure of facts squares with a State's legal obligation to prosecute and punish those responsible for international crimes.

As a practical guide to the enforcement of international humanitarian law at the national level, this is an important and timely publication. Complex legal issues are clearly and simply explained with a view to making the Guide as accessible and "user-friendly" as possible. While some readers may find the treatment of the subject matter too succinct to cover the many difficult issues that arise in trials

dealing with international crimes, it is some measure of the development of international criminal law that concrete rules may be set out and steps formulated for the prosecution of such crimes at the national level in such a matter-of-fact fashion and it is encouraging to be able to read a comprehensive manual on the subject rather than just another theoretical treatise.

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