

REPORTS AND DOCUMENTS

Analysis of the punishments applicable to international crimes (war crimes, crimes against humanity and genocide) in domestic law and practice

This analysis of the punishments applicable to international crimes (war crimes, crimes against humanity and genocide) covers 64 countries. The sample is satisfactory in terms of geographical distribution and covers countries with a Romano-Germanic (civil law) tradition and others with a common law tradition. The relevant legislation and case law of these States, where such exists and is available, have been studied in order to examine as accurately as possible the punishments applied or applicable by the competent courts. For each of the countries examined, the following questions were explored:

- the main laws applicable;
- the texts of heads of indictment where they are provided for in the laws;
- the persons targeted;
- the competent court(s);
- what provision is made in respect of command responsibility;
- what provision is made regarding the exclusion of the “superior orders” defence;
- the scales of punishments applicable;
- applicable attenuating and aggravating circumstances;
- the objectives of the punishment.

Detailed tables by country and region have prepared and are available at the Advisory Service of the ICRC. The main observations concerning the punishments applicable to these crimes are summarized below.

States' obligations under IHL to prosecute and punish international crimes

A substantial number of the IHL rules are set out in the four 1949 Geneva Conventions and the 1977 Additional Protocols. States are obliged to put an end to all the violations set out in these texts. There are special obligations in respect of certain serious violations referred to as "grave breaches".

Grave breaches comprise some of the most flagrant violations of IHL. These are specific acts, listed in the Geneva Conventions and Protocol I, and include wilful killing, torture and inhuman treatment as well as wilfully causing great suffering or serious injury to body or health. The annexed table provides a full list of such grave breaches. Grave breaches are considered war crimes. War crimes can also be committed in non-international armed conflicts.

Both the Conventions and the Protocol clearly stipulate that grave breaches must be punished. However, these texts do not themselves define specific penalties. Nor do they institute jurisdiction to try the perpetrators. It is up to States to take the necessary legislative measures to punish those responsible for grave breaches of humanitarian law.

Generally, the criminal law of a State applies only to acts committed on its territory or by or against its nationals. IHL goes further because it requires of States that they seek out and punish all those who have committed serious breaches, irrespective of the nationality of the perpetrator and the place of the offence. This principle, known as the principle of *universal jurisdiction*, is essential to ensure effective prosecution and punishment of serious breaches.

IHL imposes on States the obligation to take the following specific measures in respect of grave breaches:

Firstly, the State must promulgate national laws that prohibit and provide for prosecution and punishment of grave breaches, either by enacting laws to that effect or by amending existing laws. These laws must cover all persons, whatever their nationality, who commit or order others to commit grave breaches, including cases where the breaches resulted from dereliction of a duty to act. The laws must cover acts committed both inside and outside the State's own territory.

Secondly, the State must seek out and prosecute persons alleged to have committed grave breaches. It must prosecute these persons itself or extradite them to another State where they will be tried.

Thirdly, the State must institute a responsibility on the part of its military commanders to prevent the perpetration of grave breaches, to stop them when they occur and to take measures against persons under their authority who perpetrate such offences.

Fourthly, States must provide each other with judicial assistance in any procedures relating to serious breaches.

States must perform these obligations in peacetime as well as in time of armed conflict. To be effective, the measures set out above must be adopted before the grave breaches have occurred. Finally, it can be affirmed that, with the

exception of some minor differences, the same obligations apply in respect of genocide and crimes against humanity.

National legislation

Although the Geneva Conventions enjoy practically universal adherence and ratification, the national legislation of a great many States is not in compliance with the above requirements of IHL. For example, several countries have not incorporated into their criminal law the provisions necessary for the prosecution and punishment of international crimes, including grave breaches, and the punishments that apply to them.

Where measures have been taken, the solutions adopted vary from country to country. Most of the provisions relating to the implementation of IHL, particularly as regards the prosecution and punishment of the most serious breaches, are dispersed in a number of implementing texts (penal code, code of military justice, code of military discipline, special laws...). These provisions are rarely to be found in a single text. The relevant crimes are sometimes included in general criminal law texts or in military ones or in both. In some cases, the ordinary courts have exclusive jurisdiction to try the perpetrators of these crimes (even for members of the military, as is the case for example in South Africa, Belgium, Canada and in a number of Central European countries, such as Bosnia and Herzegovina, Estonia, Lithuania, Macedonia, Montenegro, Serbia and Slovenia), whereas in others, it is the military courts that have jurisdiction (even for civilians, as is the case in Switzerland and the Democratic Republic of the Congo (DRC)). Other systems have instituted concurrent jurisdiction, the division of labour following the status of the accused (civilian or military) or the fact that he was on duty or not.

Since the adoption of the Rome Statute, there has been a tendency for States to use the crimes included in the Statute as a vehicle for implementing a large part of the IHL obligations incumbent on them, even in the case of States that have not ratified the Rome Statute. This trend is particularly marked when it comes to the implementation of the criminal law provisions in respect of war crimes in non-international armed conflicts.

It is also interesting to note that the clarity of the system adopted, particularly in terms of the sharing of jurisdiction between the civil and military courts, may depend on whether or not the State has had relevant practical experience (Colombia, Peru). In the case of Columbia, for instance, it is expressly stated that international crimes may be committed on duty and therefore fall under the jurisdiction of civilian tribunals. The same observation may be made with regard to the impact of some form of international technical assistance on the degree to which domestic law is in line with international law (Rwanda, Timor Leste, Cambodia).

However, it may be observed that, regrettably, in many cases, the measures taken are incomplete. For example:

- the list of crimes included in national law is frequently incomplete;
- the laws often do not contain references to the general principles of international criminal law. Consequently, the general provisions of national criminal law remain applicable to international crimes and provide a basis for obstacles to be placed in the way of criminal prosecutions. Such obstacles may be contrary to international law, for example the application of a statute of limitations (Kenya, Argentina, Peru and Poland) or the defence of superior orders (Nicaragua, Guatemala, Brazil, Thailand);
- in some cases the necessary amendments and adjustments are not made to all the relevant texts, particularly those that apply to members of the military. As a result, the door is left open to parallel prosecution on the basis of the same facts under both the law on international crimes and the law on military offences. These crimes are generally tried by distinct tribunals and give rise to very different sanctions (for example, in some instances, the serious breach committed against the civilian population is punished by life imprisonment, whereas the military offence against the civilian population based on the same facts carries a maximum sentence of two years' imprisonment).

As regards punishments provided for in the case of international crimes, they cover a wide range. Almost systematically, national legislation provides the most severe punishments for genocide and crimes against humanity. Capital punishment is sometimes the only one provided for (Burkina Faso, Burundi, Congo-Brazzaville, Côte d'Ivoire, Mali, Niger). Some States reserve the most severe punishment for cases of genocide and crimes against humanity involving death (Canada, United Kingdom (UK), India). A very small number of systems provide for scales of punishment covering a significantly wide range. It is the case, for instance, for Central and Eastern European countries. Finally, some national law systems have introduced a reduced sentence for incitation to or complicity in genocide (the United States (US), El Salvador, Guatemala, Honduras, Mexico, Brazil, Nicaragua and France).

There is a wide variety in the sentencing systems for war crimes. Some systems make no distinction between the various crimes and impose the most severe sentence, be it the death penalty (Burundi, Congo-Brazzaville, Côte d'Ivoire and Mali) or life imprisonment (Congo-Brazzaville, as an alternative to capital punishment) or lifelong penal servitude (DRC). Other laws make a distinction between war crimes that have caused death and others. The death penalty (Nigeria, DRC, the US, India) or life imprisonment (Uganda, Canada, the UK, and as an alternative to the death penalty in the US and India) are reserved for the former category, while limited-duration prison sentences or lifelong penal servitude (DRC) are prescribed for the latter. By the same token, other regimes provide for differentiated penalties for the various crimes depending on whether they targeted the civilian population or prisoners of war. The former attract life imprisonment and the latter limited-duration prison sentences (Kenya). Finally, some legal systems provide a detailed scale of sentences for each of the crimes identified as war crimes (very detailed: Belgium, Colombia, Niger and Rwanda; less detailed:

Poland, Slovakia, Lithuania, Bulgaria, Estonia, Macedonia, Czech Republic and Russia).

Some war crimes can also be military offences under military texts and tried as such by the competent courts or tribunals. The crimes to which this dual regime applies and which are among the most frequently encountered are pillage, acts of violence against a person *hors de combat* with a view to despoiling him or her, and abuse of the emblem and distinctive signs. Pillage with violence attracts severe penalties, including lifelong penal servitude and life imprisonment (Burundi, Congo-Brazzaville, DRC, Honduras, Algeria, Côte d'Ivoire and Niger). In these cases, the heaviest sentence is often expressly reserved for the instigator(s). Other types of pillage are generally associated with limited-duration prison sentences ranging from five to 20 years. Acts of violence against a person *hors de combat* also carry severe penalties: death (Algeria, Côte d'Ivoire), life imprisonment (Niger), lifelong forced labour (Congo-Brazzaville) or limited-duration forced labour (Burundi) and limited-duration prison sentences (El Salvador, China). Abuse of the distinctive emblem carries a limited-duration prison sentence ranging from one to 10 years (Algeria, Congo-Brazzaville, Côte d'Ivoire, Niger, DRC and Mexico). In some cases, a military tribunal is left full discretion regarding the sentence to be imposed for certain military offences (US, Honduras), while other legal systems provide excessively flexible sentencing scales for the same crime, ranging in some cases from 60 days to 20 years or internment (for an indefinite period) (Peru).

Some judicial systems provide for additional optional penalties, generally in the form of fines (South Africa, Timor Leste, US, Colombia, Mexico) or deprivation of certain rights (US, Peru, Honduras, Mexico, Romania). Some military texts also include accessory penalties that generally affect the individual's military grade and status (Rwanda, Colombia). Finally, some texts add remedies for and compensation of victims (Belgium, US, UK, Burundi), including the institution of a fund to provide aid for victims (Canada, Timor Leste).

National practice

Whereas the international criminal courts and tribunals publish copious case law, the case law published by national courts in relation to international crimes is much more meagre, even though the situation tends to change in some regions which were affected by conflicts (former Yugoslavia, Rwanda). It is therefore more difficult to identify trends. Furthermore, some decisions have been handed down in highly politicized contexts and should accordingly be interpreted with some caution. Others that might be relevant eliminate all discussion about international crimes, particularly war crimes, by refusing to acknowledge the existence of an armed conflict and applying the law on ordinary crimes (murder, manslaughter, assault). Finally, it should be borne in mind that national courts apply national law, which limits or in some cases reduces to a minimum the exercise of discretion

on the part of the judiciary when it comes to applying sentences for the most severe crimes.

Both military and civilian courts have been involved in prosecution and punishment of international crimes at national level. The choice does not seem to be systematically guided by the status of the person being tried. It is interesting to note that, in one case, the civilian courts have been seized with cases, the purpose of which was to determine whether a civilian court or a military tribunal had jurisdiction on the merits (United States, *Hamdam* case (2005)). Moreover, civilian courts can also be called upon to hear cases of torture, where responsibility for the acts in question lies with superior military officers, in order to grant compensation and damages to the victims. (United States, *Ford v. Garcia* (2002) and *Romagoza v. Garcia* (2006)).

With respect to the superior orders defence, many courts consider that such defence can be entertained where the order is not manifestly illegal. Also, in some countries (for example the United States courts, when judging the responsibility of Salvadoran commanders for acts of torture committed by their subordinates – see cases of *Ford v. Garcia* and *Romagoza v. Garcia* referred to above), the principle of command responsibility has been confirmed, even if this form of participation is not specified in the legislative texts. The US courts rely on, i.e., the case law of international criminal courts and tribunals (ICTY – *Delalic* case (2001)) to reaffirm the need for there to have been effective control of the superior over the subordinate.

As regards the sentences applied, they depend in the first instance on national legislation and cover the death sentence and prison sentences of varying lengths. For example, the sentences handed down in the case of crimes against humanity by the Dili Special Chamber in Timor Leste are generally 10-year prison sentences, whereas the law prescribes a maximum sentence of 25 years. The Belgian courts condemned four people accused of war crimes to sentences ranging from 12 to 20 years in prison. Few of the decisions specify the objectives of the sanctions applied. In Timor Leste, for example, the decisions specify that the sentence aims at a deterrent effect and to further the struggle against impunity, the advent of peace and the promotion of national reconciliation. On this last point, a controversial South African decision considers that amnesty helps to serve the same objective while encouraging disclosure of the truth (*Azapo* case (1996)).

Several of the decisions examined accompany these sentences with other, accessory ones: payment of sums towards reparation for the damage caused (US, Philippines, Rwanda), including payments into a special fund for the victims (Belgium, Rwanda); confiscation or seizure of the condemned persons' property (Rwanda); perpetual and full deprivation of civil rights (Rwanda). Finally, whenever a soldier is sentenced, he is dismissed or stripped of his rank (Belgium, US, Philippines).

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ANNEX

 Grave breaches defined by the 1949 Geneva Conventions and
the Additional Protocol I of 1977

Grave breaches defined by the four 1949 Geneva Conventions (articles 50, 51, 130 and 147 respectively)	Grave breaches defined by the III and IV 1949 Geneva Conventions (articles 130 and 147 respectively)	Grave breaches defined by the IV Geneva Convention of 1949 (article 147)
<ul style="list-style-type: none"> - wilful killing; - torture or inhuman treatment; - biological experiments; - wilfully causing great suffering; - (wilfully) causing serious injury to body or health; - extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly. <i>(this provision does not feature in article 130 of the III Geneva Convention)</i> 	<ul style="list-style-type: none"> - compelling a prisoner of war to serve in the armed forces of the hostile Power; - wilfully depriving a prisoner of war or a protected person of the rights of fair and regular trial prescribed in the Conventions. 	<ul style="list-style-type: none"> - unlawful deportation or transfer; - unlawful confinement of a protected person; - taking hostages.

 Grave breaches defined in Additional Protocol I of 1977 (Articles 11 and 85)

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| <ul style="list-style-type: none"> - Endangering by any unjustified act or omission the physical and mental health of persons who are in the power of the adverse Party or who are interned, detained or otherwise deprived of liberty as a result of a situation of armed conflict; in particular, carrying out on such persons: physical mutilations; medical or scientific experiments; | <ul style="list-style-type: none"> - making a person the object of attack in the knowledge that he is hors de combat; - the perfidious use of the distinctive emblem of the red cross, red crescent or other recognized protective signs. - <i>The following acts shall be regarded as grave breaches of this Protocol, when committed wilfully, in violation of the relevant provisions of the</i> |
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removal of tissue or organs for transplantation, except where these acts are indicated by the state of health of the person concerned and are consistent with generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the Party conducting the procedure and who are in no way deprived of liberty.

- ***The following acts, when committed wilfully and causing death or serious injury to body or health:***
- making the civilian population or individual civilians the object of attack;
- launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects;
- launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects;
- making non-defended localities and demilitarized zones the object of attack.

Conventions or the Protocol:

- the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;
- unjustifiable delay in the repatriation of prisoners of war or civilians;
- practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination;
- making the clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, the object of attack, causing as a result extensive destruction thereof, when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives;
- depriving a person protected by the Conventions or Protocol I of the rights of fair and regular trial.