

What makes criminal repression crucial to address violations of international humanitarian law (IHL)? How does this obligation stemming from main IHL treaties materialize through domestic and international law? These questions are central to IHL implementation. Investigation, prosecution and adjudication of such violations do more than respond to past atrocities—They reinforce the preventive aspect and credibility of IHL by deterring possible future breaches. Through universal jurisdiction and the collaboration between national and international mechanisms, criminal repression remains a powerful tool against impunity. This highlight introduces readers to the scope, principles, and implementation of the criminal repression obligation under IHL. It also provides readers with additional resources from How Does Law Protect in War? and beyond to explore this critical issue further.

Definitions and Sources

At the outset, the distinction between grave breaches, war crimes, and violations of IHL should be clarified. In essence, these terms reflect a gradation of severity, as not all breaches of IHL are grave, nor do all violations amount to war crimes. As per Rule 156 of the ICRC's Customary IHL Study, serious violations of IHL constitute war crimes, however not every violation will reach this threshold. Violations are considered serious, and thus amounting to war crimes, when they endanger protected persons, such as civilians, prisoners of war, the wounded and sick, or protected objects or if they breach important values. War crimes represent one category of international crimes, alongside with genocide, crimes against humanity, and the crime of aggression. Grave breaches are a sub-category of war crimes.

It is important to note that, while the IHL rules applicable to international and to non-international armed conflicts remain in some respects different, serious violations of those IHL rules that also apply in non-international armed conflicts constitute war crimes under customary law. The commission of a war crime gives rise to individual criminal responsibility, a necessary prerequisite for the repression of such acts.

The duty to repress war crimes and suppress other violations of IHL is explicitly codified in key legal instruments, such as the four Geneva Conventions of 1949 (Articles 49, 50, 129 and 146 respectively). It is also anchored in the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (Article 28). Complementing these provisions, the Rome Statute reinforces this obligation in its preamble. The obligation to investigate war crimes and, if appropriate, prosecute suspects, has also been identified in the ICRC's Customary IHL Study (Rule 158). Beyond criminal repression, one should not overlook that States must also suppress other violations of IHL. This duty extends to a broad spectrum of measures, including enquiries to address breaches of IHL that do not necessarily entail individual criminal responsibility.

The Scope of Criminal Repression

As for national prosecutions, states exercise criminal jurisdiction over war crimes based on rules established in their domestic legislation and generally admitted in international law. Such rules include that of territoriality, which establishes jurisdiction based on the location where the crime occurred or had its effects; active personality, which does so based on the nationality of the alleged perpetrator; and passive personality, which establishes jurisdiction based on the nationality of the victim. However, IHL introduces an additional, distinctive basis for jurisdiction: the universality principle. This principle sets an obligation explicitly recognized in key legal instruments, including, for grave breaches, the abovementioned provisions of the four Geneva Conventions of 1949, their Additional Protocol I of 1977 (Article 85), and the Hague Convention of 1954 (Article 28). Additionally, customary IHL provides the right for states to vest universal jurisdiction in their national courts over all war crimes (Rule 157).

Under universal jurisdiction, serious violations of IHL are understood not merely as offenses against individual victims or specific communities but as grave transgressions that affect the international community as a whole. Universal jurisdiction underscores that those who commit such violations are accountable not only to the states who have jurisdiction over such crimes but also to all of humankind. Consequently, under IHL treaty law, all states bear the obligation to adjudicate war crimes, irrespective of where they were committed or the nationality of the victims or the alleged perpetrators. Universal jurisdiction thus enables states to combat impunity and uphold justice for serious violations of IHL. For grave breaches, they are even obliged to do so.

In addition, the temporal scope of accountability for such crimes is characterized by the principle that statutory limitations do not apply to such crimes. This principle is enshrined in key instruments, including the 1968 UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity and the 1974 European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes. The Rome Statute further codifies this rule, explicitly stating in Article 29 that the crimes within the Court's jurisdiction are not subject to any statute of limitation. Additionally, the ICRC's Customary IHL Study has identified this rule to be of customary nature (Rule 160).

Furthermore, IHL is complemented by domestic law and implemented, for war crimes, by international criminal law (ICL), forming a consolidated framework that strengthens accountability. While national jurisdictions, when willing and able to, should remain the primary enforcers of IHL, ICL has proven indispensable in bridging gaps where domestic systems fall short to repress IHL violations. By establishing institutions, such as the ICTY, ICTR and the International Criminal Court, the international community ensured that accountability could extend beyond national systems through ICL. In this fashion, IHL establishes the foundational obligations to repress violations, domestic law operationalizes them through the work of national jurisdictions, and ICL implements and clarifies those obligations and establishes rules for the prosecution of such cases at the international level. It should be noted however, that while advancements of international criminal justice are remarkable, IHL makes states retain their prerogative and obligation to

investigate and prosecute violations through their jurisdictions, which predates the Rome Statute, reinforcing the universal and enduring scope of this obligation. Indeed, war crimes codified in the Rome Statute originate from IHL rules, emphasizing the foundational role of IHL in shaping ICL.

Criminal repression: a key part of IHL implementation

While key to implement IHL, the obligation to prosecute violations of IHL is today far from being enacted in a uniform manner. The Geneva Conventions do not provide any specific instructions on how states ought to implement their duty to repress such crimes. This has led to differing degrees of success, reflecting the complexity of enforcement and the need for a nuanced understanding of these mechanisms. Nonetheless, the prosecution of IHL violations should, to the degree possible, ensure justice is served in a manner compatible with IHL procedures and guidelines. Moreover, the effectiveness of investigating and prosecuting such crimes depends significantly on several factors, such as the cooperation states accept to provide to both international and domestic judicial bodies—spanning all stages from investigation and enforcement of arrest warrants to sentencing. One recent example of such collaborative will is the Ljubljana-The Hague Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes Against Humanity, War Crimes, and Other International Crimes.

However, as indispensable as criminal repression is, it should not be considered separately from other dimensions of the implementation of IHL. Indeed, criminal repression works along with a number of other measures enacting IHL obligations contained in treaties and customary law. Some of them are preventive in nature, such as domestic legal frameworks and measures giving effects to IHL obligations on each state's territory, or IHL education seeking to address root causes of IHL violations, such as dehumanization of the enemy. Others are operational, such as the confidential and bilateral dialogue the International Committee of the Red Cross (ICRC) maintains with parties to armed conflict to address and put an end to serious violations of IHL, or the humanitarian services the ICRC and other actors provide to persons affected by such violations or by lawful acts of war. Indeed, along with criminal repression, all of these approaches collectively strive to prevent, reduce and remedy serious violations of IHL and uphold dignity of persons affected by armed conflict.

In this regard, though the commission of war crimes tragically highlights some of the darkest deeds humankind can commit in armed conflict, criminal repression remains a vital mechanism to counter and deter such acts: it stands as a powerful assertion that war crimes are not an unavoidable consequence of warfare, but reprehensible actions that demand redress. Beyond the legal obligation it represents, the prosecution of IHL violations—whether through national courts or international tribunals—remains a key guarantor for both the efficiency and credibility of IHL as the 'ultimate safety net' for humanity in armed conflict.

Criminal Repression: resources

The following sections highlight various resources and tools that allow exploring criminal repression further in diverse ways.

1. The law

Criminal repression provides a detailed outline on various aspects of the topic, including the definitions of crimes, aspects linked to the participation in such crimes, defences, criminal prosecution and the role of international criminal courts.

2. The Practice

The following case studies explore various facets of, and questions linked to criminal repression in practice. While not criminal cases exclusively, they engage with interconnected themes and issues that are highly relevant to criminal repression.

- Material scope: United States, Hamdan v. Rumsfeld, Netherlands, In re Pilz.
- Personal scope: Canada, Sivakumar v. Canada.
- Geographic scope: Judgment on the Appeal against the Decision on the Authorization of an Investigation into the Situation in the Islamic Republic of Afghanistan.
- Temporal scope: Chile, Prosecution of Osvaldo Romo Mena.
- Universal jurisdiction: France, Legislative Developments on Universal Jurisdiction, United States, War Crimes Act, Belgium, Law on Universal Jurisdiction, Spain, Universal Jurisdiction over Grave Breaches of the Geneva Conventions, Switzerland, The Immunity of General Nezzar, Sweden/Syria, Can Armed Groups Issue Judgments?.
- Domestic criminal repression: Colombia, Special Jurisdiction for Peace, Crimes against the Environment in Cauca, Switzerland, X. v. Federal Office of Police, Switzerland, Criminal Code, Germany, International Criminal Code.

A more complete list of cases in which war crimes were prosecuted at the national level can be found here and here.

- Cooperation with international criminal tribunals: Luxembourg, Law on Cooperation with the International Criminal Courts.
- International criminal repression: The Prosecutor v. Jean-Paul Akayesu, The Prosecutor v. Tadić, The Prosecutor v. Jean-Pierre Bemba Gombo.

3. A to Z

The following notions provide additional insights on criminal repression:

Amnesty, Breach, Command responsibility, Court, Crimes against humanity, Criminal repression, Defence, Enquiry, Extradition, Geneva Conventions, Genocide, Grave breaches, Immunities, Individual criminal responsibility, International Criminal Court, International criminal law, International Criminal Tribunal for Rwanda, International Criminal Tribunal for the Former Yugoslavia, Judicial guarantees, Necessity (as a

defence), Non-international armed conflict, Protected persons, Rape and sexual violence, Repression of breaches, Rome Statute, State responsibility, Statutory limitations, Superior orders, Universal jurisdiction, Violations, War crimes.

4. To go further

Browse the following additional sources for more on criminal repression and related issues:

1. International Committee of the Red Cross, "Penal Repression: Punishing War Crimes", 31 March 2014.
2. International Committee of the Red Cross, "Obligations in terms of penal repression - Factsheet", 31 August 2018.
3. International Committee of the Red Cross, "General principles of international criminal law – Factsheet", 21 May 2021.
4. H.D.T. Gutierrez, "The relationship between international humanitarian law and the international criminal tribunals", *International Review of the Red Cross*, Vol. 88, No. 861, March 2006, pp.65-86.
5. R. Geiß and N. Bulinckx, "International and internationalized criminal tribunals: a synopsis", *International Review of the Red Cross*, Vol. 88, No. 861, March 2006, pp.49-63.
6. International Committee of the Red Cross, "War crimes under the Rome Statute of the International Criminal Court and their source in international humanitarian law – Table", 31 October 2012.
7. International Committee of the Red Cross, "Analysis of the punishments applicable to international crimes (war crimes, crimes against humanity and genocide) in domestic law and practice", *International Review of the Red Cross*, Vol. 90, No. 870, June 2008, pp.461-468.
8. A.-M. La Rosa, "Humanitarian organizations and international criminal tribunals, or trying to square the circle", *International Review of the Red Cross*, Vol. 88, No. 861, March 2006, pp.169-186.
9. International Committee of the Red Cross, "International Criminal Justice: The Institutions", 21 May 2021.
10. International Committee of the Red Cross, "Universal jurisdiction over war crimes – Factsheet", 21 May 2021.
11. X. Philippe, "The principles of universal jurisdiction and complementarity: how do the two principles intermesh?", *International Review of the Red Cross*, Vol. 88, No. 862, June 2006, pp.375-398.
12. International Committee of the Red Cross, "Methods of incorporating punishment into criminal law - Factsheet", 31 October 2013.
13. International Committee of the Red Cross, "Criminal procedure – Factsheet", 14 October 2013.
14. International Committee of the Red Cross, "Guidelines on investigating violations of IHL: Law, policy and good practice", 16 September 2019.
15. International Committee of the Red Cross, "Cooperation in extradition and judicial assistance in criminal matters – Factsheet", 21 May 2021.
16. Z. Wenqi, "On co-operation by states not party to the International Criminal Court", *International Review of the Red Cross*, Vol. 88, No. 861, March 2006, pp.87-110.
17. International Committee of the Red Cross, "Elements to render sanctions more effective – Factsheet", 31 October 2008.
18. International Committee of the Red Cross, "Judicial guarantees and safeguards – Factsheet", 21 May 2021.
19. International Committee of the Red Cross, "Command responsibility and failure to act – Factsheet", 21

May 2021.

20. International Committee of the Red Cross, "Prevention and Criminal Repression of Rape and Other forms of Sexual Violence during Armed Conflicts", 11 March 2015.

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