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Both international human rights law and international humanitarian law specify that all persons accused ^[1] and/or brought to trial must benefit from a series of procedural safeguards and fundamental guarantees designed to ensure that they receive a fair trial and are protected from being unlawfully or arbitrarily deprived of their liberty.

Examples of judicial guarantees and safeguards include the principle of *nullum crimen, nulla poena sine lege* (prohibiting punishment that was not set out in legislation at the time a crime was committed), the requirement that trials be conducted by independent, impartial and regularly constituted tribunals, the presumption of innocence, the right of the accused to be informed of the nature and cause of the offence against him/her, the right to an appeal ^[2], and the right of the accused to be present at their trial.

Currently, IHL treaty law and State practice establish that in both international and non-international armed conflicts no one may be convicted ^[3] or sentenced, except pursuant to a fair trial affording all essential judicial guarantees. IHL treaties foresee detailed judicial guarantees for prisoners of war and for protected civilians in occupied territories. Persons accused of serious violations of any of the four Geneva Conventions or of Additional Protocol I are entitled to benefit from the minimum legal safeguards laid down in those treaties. Article 75 of Additional Protocol I contains a list of guarantees afforded to persons under these treaties and to persons accused of war crimes. These guarantees are minimal requirements that do not in any way prevent more favourable treatment from being granted

in accordance with other provisions of the Geneva Conventions and Additional Protocol I.

International humanitarian law applicable to non-international armed conflicts (Art. 3 common to the Geneva Conventions) prohibits the passing of sentences and executions in violation of “judicial guarantees which are recognized as indispensable” and, more specifically, sentencing or executions without previous judgement pronounced by a regularly constituted court ^[4]. Additional Protocol II of 1977 stipulates, concerning offences committed in connection with a non- international 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).

See Accused ^[1]; Appeals ^[2]; Detainees ^[5]; Detention ^[6]; Internment ^[7]; Indicted or convicted persons ^[8]; War crimes ^[9];

OUTLINE

Chapter 8, IV. 5. c) bb) – detailed judicial guarantees ^[10]

Chapter 8, IV. 6. b) aa) judicial guarantees ^[11]

Chapter 12, II. 3. a) ee) judicial guarantees ^[12]

Chapter 12, IV. 2. c) judicial guarantees ^[13]

Chapter 12, IV. 3. a) bb) judicial guarantees ^[14]

Chapter 13, X. 4. c) judicial guarantees for all those accused of war crimes ^[15]

Chapter 14, I. 1. b) bb) no derogations from the “hard core” – but controversy whether and to what extent judicial guarantees belong to the “hard core” [16]

Chapter 14, II. 1. b) bb) judicial guarantees in case of trial [17]

LEGAL SOURCE

BY PERSON OR SITUATION

POWs

GCIII, 84 [18]-88 [19] and 102 [20]-107 [21]

PI, 44/4 [22]

CIHL, 100 [23]-102 [24]

civil internees and protected persons

GCIV, 71 [25]-78 [26], 123/2 [27] and 126 [28]

CIHL, 100 [23]-102 [24]

minimum judicial guarantees for persons who do not benefit from more favourable treatment

PI, 45/3 [29] and 75/3-4 [30]

CIHL, 100 ^[23]-102 ^[24]

persons suspected of activities hostile to the security of the State

GCIV, 5/3 ^[31]

charges of grave breaches

GCI, 49/4 ^[32] (see ICRC updated Commentary ^[33])

GCII, 50/4 ^[34] (see ICRC updated Commentary ^[35])

GCIII, 129/4 ^[36]

GCIV, 146/4 ^[37]

PI, 85/1 ^[38]

in NIAC

common 3/1 ^[39] (see ICRC updated Commentary ^[40])

PII, 6 ^[41]

CIHL, 100 ^[23]-102 ^[24]

DETAILS OF GUARANTEES

impartial tribunal

PI, 75/4 ^[30]

PII, 6/2 ^[41]

notification of charges and particulars

GCIII, 105/4 ^[42]

GCIV, 71/2 ^[25]

PI, 75/3 ^[30] and 75/4a ^[30]

PII, 6/2(a) ^[41]

presumption of innocence

PI, 75/4(d) ^[30]

PII, 6/2(d) ^[41]

principle of individual criminal responsibility

HR, 50 ^[43]

PI, 75/4(b) ^[30]

PII, 6/2(b) ^[41]

CIHL, 102 ^[24]

principle of non bis in idem

GCIII, 86 ^[44]

GCIV, 117/3 ^[45]

PI, 75/4(h) ^[30]

principle of non retroactivity

GCIII, 99 ^[46]

GCIV, 65 ^[47] and 67 ^[48]

PI, 75/4(c) ^[30]

PII, 6/2(c) ^[41]

CIHL, 101 ^[49]

right of appeal and notice of post trial remedies

GCIII, 106 ^[50]

GCIV, 73 ^[51]

PI, 75/4(j) ^[30]

PII, 6/3 ^[41]

right of defence

GCIII, 96 ^[52] and 105 ^[42]

GCIV, 72 ^[53], 123 ^[27] and 126 ^[28]

PI, 75/4 ^[30]

right to interpreter

GCIII, 96/4 ^[52] and 105/1 ^[42]

GCIV, 123/1 ^[27]

TYPE OF COURT

competent court for trial of POWs

GCIII, 102 ^[20]

trial of protected persons by non-political military court in occupied territory

GCIV, 66 ^[54]

DOCUMENT

United States, Closure of Guantanamo Detention Facilities ^[55]

CASES

The International Criminal Court ^[56] (Part A., Arts 20, 22-25 ^[57], and 30-32 ^[58])

Chile, Prosecution of Osvaldo Romo Mena ^[59]

United States, The Schlesinger Report ^[60]

Iraq, Occupation and Peacebuilding (Part B. 1) ^[61]

Iraq, The Trial of Saddam Hussein ^[62]

UN, Statute of the ICTY (Part C., Art. 21) ^[63]

Case Study, Armed Conflicts in the Great Lakes Region (Part I. F.) ^[64]

Switzerland, X. v. Federal Office of Police ^[65]

United States, President's Military Order ^[66]

United States, Hamdan v. Rumsfeld ^[67]

United States, Military Commissions ^[68]

United States, Habeas Corpus for Guantanamo Detainees ^[69]

Mali, Conduct of Hostilities ^[70]

Syria, Code of Conduct of the Free Syrian Army ^[71]

Libya, Report of the Office of the UN High Commissioner for Human Rights (2014/15) ^[72]

Sweden/Syria, Can Armed Groups Issue Judgments? ^[73]

United Kingdom, The Case of Serdar Mohammed (Court of Appeal and Supreme Court Judgments) ^[74]

USA, Jawad v. Gates ^[75]

Central African Republic, Report of the UN Independent Expert, July 2016 ^[76]

Syria, Report by UN Commission of Inquiry (March 2017) ^[77]

UN/Colombia, Human Rights Committee Clarifications and Concluding Observations (2016) ^[78]

Eastern Ukraine, OHCHR Report on the Situation: November 2016 - February 2017 ^[79]

United States of America, Military Commissions Trial Judiciary, Guantanamo Bay, Cuba: United States of America v. Khalid Shaikh Mohammad et al. ^[80]

Eastern Ukraine: Detention And Death Sentences By Armed Groups ^[81]

ECCC, Detention Sites in Cambodia ^[82]

BIBLIOGRAPHIC RESOURCES

Suggested readings:

Case Western Reserve Journal of International Law, "Security Detention", Vol. 40, No. 3, 2009, pp. 315-650.

CRAWFORD Emily, *The Treatment of Combatants and Insurgents under the Law of Armed Conflict*, Oxford, OUP, 2010, 213 pp.

FARRELL Norman, "International Humanitarian Law and Fundamental Judicial Guarantees", in *Annual Conference/The African Society of International and Comparative Law*, Vol. 10, 1998, pp. 130-141.

GASSER Hans-Peter, "Respect for Fundamental Judicial Guarantees in Time of Armed Conflict: the Part Played by ICRC Delegates", in *IRRC*, No. 287, March-April 1992, pp. 121-142

ICRC, Chatam House, "Expert Meeting on Procedural Safeguards for Security Detention in Non-International Armed Conflict", in *IRRC*, Vol. 91, No. 876, December 2009, pp. 859-881.

PEJIC Jelena, "Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence", in *IRRC*, No. 858, June 2005, pp. 375-391.

OSWALD Bruce, "The Detention of Civilians in Military Operations: Reasons for and Challenges to Developing a Special Law of Detention", in *Melbourne University Law Review*, Vol. 32, 2008, pp. 524-553.

SASSÒLI Marco, "La peine de mort en droit international humanitaire et dans l'action du Comité international de la Croix-Rouge", in *Revue internationale de droit pénal*, Vol. 58, 1987, pp. 583-592.

SAYAPIN Sergey, "The Application of the Fair Trial Guarantees to Alleged Terrorists in Non-International Armed Conflicts", in *Humanitäres Völkerrecht*, Vol. 3, 2004, pp. 152-159.

VIERUCCI Luisa, "Prisoners of War or Protected Persons qua Unlawful Combatants? The Judicial Safeguards to which Guantánamo Bay Detainees

[25]

<https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=102B74614C048640C12563CD00>

[26]

<https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=0DFFF94F559B0D17C12563CD00>

[27]

<https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=55F0405F88FE15A1C12563CD00>

[28]

<https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=AC4D35D7ED42E43DC12563CD00>

[29]

<https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=DD198B7E9C5EE792C12563CD00>

[30]

<https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=086F4BB140C53655C12563CD00>

[31]

<https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=3F78F96145A77442C12563CD00>

[32]

<https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=3F6C2B8B20272F58C12563CD00>

[33] [https://ihl-](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=3ED0B7D33BF425F3C1257F7D00)

[databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=3ED0B7D33BF425F3C1257F7D00](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=3ED0B7D33BF425F3C1257F7D00)

[34]

<https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=58854E245CB34B82C12563CD00>

[35] [https://ihl-](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=939B22235997C68FC125811500)

[databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=939B22235997C68FC125811500](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=939B22235997C68FC125811500)

[36]

<https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=C083F579BD003884C12563CD00>

[37]

<https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=6F96EE4C7D1E72CAC12563CD00>

[38]

<https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=73D05A98B6CEB566C12563CD00>

[39]

<https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=BAA341028EBFF1E8C12563CD00>

[40] [https://ihl-](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6CDFA490736C1C1257F7D00)

[databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6CDFA490736C1C1257F7D00](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6CDFA490736C1C1257F7D00)

[41]

<https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=DDA40E6D88861483C12563CD00>

[42]

<https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=5CF3FFAD4325DDB6C12563CD00>

[43]

<https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=B2D5C9BD27F0DC51C12563CD>

[44]

<https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=8CEA485E19F745D4C12563CD>

[45]

<https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=EF6217023074896BC12563CD>

[46]

<https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=57CAB484520D699FC12563CD>

[47]

<https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=7CFC01CACB1E32A6C12563CD>

[48]

<https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=44E67A17D850B35CC12563CD>

[49] https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule101

[50]

<https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=35E07D2E9C36B1F8C12563CD>

[51]

<https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=98628780BD4803E5C12563CD>

[52]

<https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=C8A733B8DA660AFCC12563CD>

[53] <https://www.icrc.org/applic/ihl/ihl.nsf/ART/380-600079?OpenDocument>

[54]

<https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=30151E36E88B6BCCC12563CD>

[55] <https://casebook.icrc.org/case-study/united-states-closure-guantanamo-detention-facilities>

[56] <https://casebook.icrc.org/case-study/international-criminal-court>

[57] https://casebook.icrc.org/case-study/international-criminal-court#part_a_art_20

[58] https://casebook.icrc.org/case-study/international-criminal-court#part_a_art_30

[59] <https://casebook.icrc.org/case-study/chile-prosecution-osvaldo-romo-mena>

[60] <https://casebook.icrc.org/case-study/us-schlesinger-report>

[61] https://casebook.icrc.org/case-study/iraq-occupation-and-peacebuilding#part_b_1ter

[62] <https://casebook.icrc.org/case-study/iraq-trial-saddam-hussein>

[63] <https://casebook.icrc.org/case-study/un-statute-icty>

[64] https://casebook.icrc.org/case-study/case-study-armed-conflicts-great-lakes-region-1994-2005#part_i_f

[65] <https://casebook.icrc.org/case-study/switzerland-x-v-federal-office-police>

[66] <https://casebook.icrc.org/case-study/united-states-presidents-military-order>

[67] <https://casebook.icrc.org/case-study/united-states-hamdan-v-rumsfeld>

[68] <https://casebook.icrc.org/case-study/united-states-military-commissions>

- [69] <https://casebook.icrc.org/case-study/united-states-habeas-corpus-guantanamo-detainees>
- [70] <https://www.icrc.org/casebook/doc/case-study/mali-conduct-of-hostilities.htm>
- [71] <https://casebook.icrc.org/case-study/syria-code-conduct-free-syrian-army>
- [72] <https://casebook.icrc.org/case-study/libya-report-office-un-high-commissioner-human-rights-201415>
- [73] <https://casebook.icrc.org/case-study/swedensyria-can-armed-groups-issue-judgments>
- [74] <https://casebook.icrc.org/case-study/united-kingdom-case-serdar-mohammed-court-appeal-and-supreme-court-judgments>
- [75] <https://casebook.icrc.org/case-study/usa-jawad-v-gates>
- [76] <https://casebook.icrc.org/case-study/central-african-republic-report-un-independent-expert-july-2016>
- [77] <https://casebook.icrc.org/case-study/syria-report-un-commission-inquiry-march-2017>
- [78] <https://casebook.icrc.org/case-study/uncolombia-human-rights-committee-clarifications-and-concluding-observations-2016>
- [79] <https://casebook.icrc.org/case-study/eastern-ukraine-ohchr-report-situation-november-2016-february-2017>
- [80] <https://casebook.icrc.org/case-study/united-states-america-military-commissions-trial-judiciary-guantanamo-bay-cuba-united>
- [81] <https://casebook.icrc.org/case-study/eastern-ukraine-detention-and-death-sentences-armed-groups>
- [82] <https://casebook.icrc.org/case-study/eccc-detention-sites-cambodia>