

## Section XVII: International Criminal Law



### Rule 146

**Those who decide upon, plan, order or execute military operations during an armed conflict bear individual criminal responsibility for war crimes they have committed.**

### Commentary

1. Under International Criminal Law (ICL), persons may be individually accountable for international crimes (e.g., war crimes, crimes against humanity and genocide) provided, *inter alia*, that the following basic conditions are satisfied:
  - a. That the conduct, at the time it took place, constituted a crime according to law, referred to as the principle of *nullum crimen sine lege*.<sup>1</sup>
  - b. That punishment can only be imposed following a conviction in accordance with the principle of *nulla poena sine lege*.<sup>2</sup>
  - c. That they are not to be tried twice for the same conduct that formed the basis for the crime, referred to as the principle of *ne bis in idem*.<sup>3</sup>
  - d. That they acted with the mental element(s) required for the specific crime and that no situation existed to negate the element(s).<sup>4</sup>
  - e. That there are no reasons to exclude criminal responsibility (e.g., self-defence or mental disease).<sup>5</sup>

---

<sup>1</sup>Expressed in the Rome Statute, see chapter “Section XI: Destruction of Property”, fn. 1, Article 22.

<sup>2</sup>Expressed in the Rome Statute, *ibid*, Article 23.

<sup>3</sup>Expressed in the Rome Statute, *ibid*, Article 20.

<sup>4</sup>Expressed in the Rome Statute, *ibid*, Articles 30 and 32.

<sup>5</sup>Expressed in the Rome Statute, *ibid*, Article 31.

2. This chapter deals only with war crimes. However, it must be borne in mind that a war crime may also constitute a crime against humanity or genocide.
3. The construct of “war crimes” is well embedded in customary international law as confirmed by the judgment of the International Military Tribunal at Nuremburg. War crimes have been defined by the 1998 Rome Statute of the International Criminal Court for the purposes of that treaty. However, Article 10 of the Rome Statute provides that the definition of war crimes in that treaty shall not be interpreted as limiting or prejudicing in any way existing or developing rules of international law. Some States apply different definitions of war crimes under customary international law.
4. The reference to “decide upon, plan, order or execute” is understood to encompass, in principle, the whole spectrum of involvement in military operations. This includes individuals who assist in the commission of conduct constituting a crime and who may, depending on the circumstances, be guilty of aiding and abetting a crime.<sup>6</sup> The mere presence in a place where an international crime occurs does not in itself amount to a commission of that crime. See, in this regard, Rule 147 on the notion of command responsibility.
5. The text of the Rome Statute binds only States Parties. Irrespective of the Statute, war crimes are incorporated in the domestic criminal law of many States. In many instances, States punish war criminals through the ordinary application of their criminal law by using common domestic offences such as murder or assault. Although a war crime can only be committed within the context of an armed conflict (whether international or non-international), a crime against humanity or genocide can be committed outside situations of armed conflict.

### **Rule 147**

**Military commanders bear individual criminal responsibility if they knew or, owing to the circumstances at the time, had reason to know that their subordinates were committing, were about to commit, or had committed any war crime, and failed to take necessary and reasonable measures to prevent their commission or to punish the perpetrators thereof.**

### **Commentary**

1. This Rule addresses command responsibility, *i.e.* the responsibility of superiors for acts committed by their subordinates. However, all commanders obviously also bear direct responsibility for their own actions under Rule 146.
2. This Rule is derived from case law after WWII (in particular, the “Subsequent Proceedings” at Nuremburg and the judgment of the International Military Tribunal for the Far East at Tokyo). The construct of command responsibility has been codified in Article 7(3) of the Statute of the ICTY, Article 6(3) of the

---

<sup>6</sup>See Rome Statute, *ibid*, Article 25.

Statute of the ICTR, as well as Article 28 of the Rome Statute. Although this construct is embedded in customary international law, the Rome Statute articulation of command responsibility is binding only in the application of the Rome Statute itself.

3. Command responsibility is applicable in both international and non-international armed conflict.
4. Command responsibility relies on three cumulative criteria: (a) the superior-subordinate relationship between the commander and the forces under his or her effective control; (b) the fact that the commander or superior knew or had reason to know about the crimes or potential crimes in the circumstances at the time; and (c) the commander or superior's failure to take necessary and reasonable measures to prevent or punish the crimes.
5. Article 28(b) of the Rome Statute applies a similar rule to civilian superiors provided that a clear link is established between the crimes committed by subordinates and the effective authority and control of the civilian superiors. Similarly, with respect to the attribution of knowledge to the civilian superior, there is a strict requirement of conscious disregard of the information available.
6. Commanders may be punished directly for their failure to take necessary and reasonable measures to ensure that their subordinates do not commit violations of LOAC.
7. Command responsibility is not a form of strict liability. The commander's personal dereliction of duty must have contributed to or failed to prevent the offence committed by his subordinates. There must be a personal neglect amounting to a wanton, disregard of the action of his or her subordinates amounting to a crime *per se*.

### **Rule 148**

**The fact that a war crime has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, does not, as such, relieve that person of criminal responsibility.**

### **Commentary**

1. This Rule is based on Nuremberg Principle IV,<sup>7</sup> which reflects customary ICL, as distinct from the rule in Article 33 of the Rome Statute which provides for an exclusion of criminal responsibility if specified circumstances apply.
2. The fact that a war crime has been committed under superior orders may be considered in mitigation of punishment. Mitigation of punishment may also depend on a variety of other circumstances the accused was acting under, e.g., the gravity of the crime, his/her rank, and knowledge of the overall military operation that the

---

<sup>7</sup>Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, Adopted by the International Law Commission of the United Nations (Nuremberg Principles) (1950), *The Laws of Armed Conflicts*, page 1265.

conduct was a part of, as well as military experience and what could reasonably have been expected from a soldier in a similar situation.

3. The phrase “as such” was added in order to emphasize that other circumstances may preclude criminal responsibility, as referred to in paragraph 1 of the Commentary to Rule 146.

#### **Rule 149**

**A person’s official position does not relieve that person of criminal responsibility for a war crime.**

#### **Commentary**

1. This Rule is based on Nuremberg Principle III, later repeated in Article 27 of the Rome Statute, as well as Article 7(2) of the Statute of the ICTY and Article 6 (2) of the Statute of the ICTR. “Official position” includes that of both Heads of State as well as other governmental officials.

#### **Rule 150**

**No statutory limitation applies to certain war crimes, irrespective of the date of their commission.**

#### **Commentary**

1. The 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, as well as the European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes, prohibit statutory limitations with regard to certain international crimes.<sup>8</sup> The same prohibition is repeated in Article 29 of the Rome Statute.
2. The non-application of statutory limitation applies to traditional war crimes, as defined in Article 1(a) of the 1968 Convention. There is no sufficient State practice indicating that it can be extended to other war crimes.

#### **Rule 151**

**Any person charged with a war crime has the right to be tried by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure.**

#### **Commentary**

1. This wording expresses customary law minimum fair trial guarantees and is based on the wording of Article 75 of AP/I. Minimum fair trial guarantees must be

---

<sup>8</sup>Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (1968), *Laws of Armed Conflict*, page 1267, Article 1. European Convention on the Non-Applicability of Statutory Limitations to Crimes Against Humanity and War Crimes (1974), *Laws of Armed Conflicts*, page 1281, Article 1.

enforced in any prosecution of any crime, including war crimes, crimes against humanity or genocide.

2. The phrase “regularly constituted court” appears in Common Article 3 of the Geneva Conventions and is repeated in the Rome Statute of the International Criminal Court.
3. The generally recognized principles of regular judicial procedure include, *inter alia*:<sup>9</sup>
  - a. The right to be informed without delay, in an understandable language, of the particulars of the offence alleged against him/her.
  - b. The right not to be convicted by a tribunal or a court that does not satisfy the basic conditions mentioned in paragraph 1 of the Commentary to Rule 146.
  - c. The right to be presumed innocent until proved guilty according to law.
  - d. The right to be tried in his/her own presence with the necessary rights and means of defence.
  - e. The right not to be compelled to testify against himself/herself or to confess guilt.

## **Rule 152**

**Individual criminal responsibility for war crimes may lead to penal proceedings before competent international, domestic or hybrid courts.**

### **Commentary**

1. Many States are currently bound by the 1998 Rome Statute of the International Criminal Court. However, many States are not Contracting Parties to the Rome Statute, and have not accepted its jurisdiction in respect of their personnel. For example, the United States has rejected any assertion of ICC jurisdiction over nationals that are not parties to the Rome Statute, absent a UN Security Council referral or the consent of that State.<sup>10</sup>
2. Hybrid courts are characterized by both international and domestic elements and have been established, *inter alia*, in Sierra Leone and Cambodia.
3. Proceedings before an international court or tribunal or a hybrid court are subject to the respective statute establishing the forum.
4. War crimes proceedings before international and domestic courts are subject to jurisdictional limitations and immunities imposed by international law.
5. A crucial issue in trials before international and domestic courts is whether there exists universal jurisdiction over war crimes. The issue is controversial, and the Group of Experts decided not to address it.
6. Domestic and international courts must observe applicable jurisdictional immunities found in international law. In this regard, it should be pointed out that the

<sup>9</sup>See for example AP/I, chapter “Section I: Outer Space”, fn. 13, Article 75(3) and (4).

<sup>10</sup>U.S Statement to the 16<sup>th</sup> Sessions of the Assembly of States Parties to the Rome Statute.

International Court of Justice, in the *Arrest Warrant* case, recognized immunities from foreign jurisdictions for high-ranking officials (in that case, a Foreign Minister).<sup>11</sup> Jurisdictional immunity under international law is subject to waiver by the respective State.

7. The enforcement of international criminal law by international or foreign courts is subject to the fundamental principles of complementarity and subsidiarity, respectively. Accordingly, the State with the strongest jurisdictional links to a particular incident should be given the opportunity to conduct criminal proceedings. Only if it does not do so, or is unwilling or unable to do so, international or foreign proceeding would be considered a legitimate course of action.

**Open Access** This chapter is licensed under the terms of the Creative Commons Attribution 4.0 International License (<http://creativecommons.org/licenses/by/4.0/>), which permits use, sharing, adaptation, distribution and reproduction in any medium or format, as long as you give appropriate credit to the original author(s) and the source, provide a link to the Creative Commons licence and indicate if changes were made.

The images or other third party material in this chapter are included in the chapter's Creative Commons licence, unless indicated otherwise in a credit line to the material. If material is not included in the chapter's Creative Commons licence and your intended use is not permitted by statutory regulation or exceeds the permitted use, you will need to obtain permission directly from the copyright holder.



---

<sup>11</sup> *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, *I.C.J. Reports* 2002, page 3, para 51–52 and 61.