

International Criminal Law

Magdalena Perkowska

International Criminal Law



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1. International Criminal Law

BASIC DEFINITIONS:

International Law - governs the relations and dealings of nations with one another, international organizations and other international entities.

International Criminal Law - a complex of legal norms which define individual responsibility for international crimes. Legal norms define:

- material rules and principles which define international crimes, penalties, principles of jurisdiction;
- procedural rules and principles which define international criminal judicial procedure;
- system rules which define the institutional system established to prosecute international perpetrators.

Sources of International Law - sources of international law according to Article 38 of the Statute of the International Court of Justice are:

- a. international conventions, whether general or particular, establishing rules expressly recognized by contesting states;
- b. international custom, as evidence of general practice accepted as law;
- c. general principles of law recognized by civilized nations;
- d. judicial decisions and opinions of authority figures from various nations, as subsidiary means for determining the rules of law.

Sources of Criminal International Law - sources of criminal international law according to Article 21 of the Rome Statute of the International Criminal Court of Justice are:

- a. In the first instance, the Rome Statute, Elements of Crimes and its Rules of Procedure and Evidence;
- b. In the second instance, where appropriate, applicable treaties and the principles and rules of international law,

including the established principles of the international law of armed conflict;

- c. Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and with internationally recognized norms and standards.

INTRODUCTION:

There are two models of criminal law sources as mentioned above: general sources of international law and sources of international criminal law. Their application depends on the competence of the court. International ad hoc Tribunals act under general sources of the international law. However, the International Criminal Court acts on the grounds of sources mentioned in Article 21 of the Rome Statute of the International Criminal Court of Justice. This catalogue is a compromise between member states experienced in such sources through working for ad hoc Tribunals and also through their judicial duties. The catalogue mentioned in Article 21 of the Rome Statute results from the ratification of the Rome Statute by a large number of states and also from different international authorities.

The introduction of “applicable treaties and the principles and rules of international law” as a source of international criminal law means that in addition to the Rome Statute other treaties could be applicable when they directly concern the case that is examined by the ICC or when the treaty is used in evidence of principles and rules of international law.

2. Criminal Jurisdiction

BASIC DEFINITIONS:

Jurisdiction - competence of state to govern persons and property by its municipal law (criminal). This competence embraces jurisdiction to prescribe, to adjudicate and to enforce the law.

Double jeopardy (*ne bis in idem*) - rule that signifies that no one shall be twice tried for the same offence; that is, when a party accused has been tried once by a tribunal in the last resort, and either convicted or acquitted, s/he shall not be tried again.

Extradition - is the handing over of an alleged offender by one state to another, if the alleged offender is in a territory other than state seeking to exercise its jurisdiction.¹

Immunity - sovereign immunity and diplomatic immunity are principal exceptions to the territorial jurisdiction. Sovereign immunity refers to immunities enjoyed by foreign heads of states. Diplomatic immunity refers to the immunities enjoyed by their official representatives.²

INTRODUCTION:

There are five bases on which jurisdiction may be exercised:

Territorial principle - events occurring within a state's territorial boundaries and persons within that territory, albeit their presence is temporary, are as a rule subject to the application of local law.

1 R.M.M. Wallace, *International Law*, London 2005, p.128.

2 *Ibidem* p. 130

Objective territorial principle - gives jurisdiction to the state in which the crime has been completed and has effect - the forum of injury.

Subjective territorial principle - allows the exercise of jurisdiction by the state in which a crime was commenced.

Nationality principle - jurisdiction relates to the nationality of the offender. A state may exercise jurisdiction over any of its nationals wherever they may be and in respect of offences committed abroad.

Protective (or security) principle - a state may exercise jurisdiction in respect of offences which, although occurring abroad and committed by non-national are regarded as injurious to the state's security.³

Universality principle - a state may exercise jurisdiction on particularly offensive acts which are contrary to international law and prohibited by the international community. Crimes subject to universal jurisdiction are: piracy, slave trading, war crimes, crimes against humanity, genocide, hijacking, torture, apartheid.⁴

Passive personality principle - a state may exercise jurisdiction over non-national in respect of an act against its national which has taken place out with its boundaries.⁵

2.1. Jurisdiction

*Draft Code of Crimes against the Peace and Security of Mankind*⁶

Article 8 Establishment of jurisdiction

Without prejudice to the jurisdiction of an international criminal court, each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set out in articles 17 (Crime

3 Ibidem p.117 ff

4 W. Slawinski, Universal Jurisdiction in international Criminal Law, Review of Comparative Law, Vol. VIII, 2003 p. 265ff.

5 R.M.M. Wallace, ibid. p.117 ff.

6 Draft Code of Crimes against the Peace and Security of Mankind, United Nations, Yearbook of the International Law Commission, 1996, vol. II (Part Two).

of genocide), 18 (Crimes against humanity), 19 (Crimes against United Nations and associated personnel) and 20 (War crimes), irrespective of where or by whom those crimes were committed. Jurisdiction over the crime set out in article 16 (Crime of aggression) shall rest with an international criminal court. However, a State referred to in article 16 is not precluded from trying its nationals for the crime set out in that article.

Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse

Article 25 - Jurisdiction

1. Each Party shall take the necessary legislative or other measures to establish jurisdiction over any offence established in accordance with this Convention, when the offence is committed:

- a. in its territory; or*
- b. on board a ship flying the flag of that Party; or*
- c. on board an aircraft registered under the laws of that Party; or*
- d. by one of its nationals; or*
- e. by a person who has his or her habitual residence in its territory.*

2. Each Party shall endeavour to take the necessary legislative or other measures to establish jurisdiction over any offence established in accordance with this Convention where the offence is committed against one of its nationals or a person who has his or her habitual residence in its territory.

2.2. Extradition

European Convention on Extradition⁷

Article 2 - Extraditable offences

1. Extradition shall be granted in respect of offences punishable under the laws of the requesting Party and of the requested Party by

7 European Convention on Extradition, Paris 13.12.1957 CETS No.: 024.

deprivation of liberty or under a detention order for a maximum period of at least one year or by a more severe penalty. Where a conviction and prison sentence have occurred or a detention order has been made in the territory of the requesting Party, the punishment awarded must have been for a period of at least four months.

2. If the request for extradition includes several separate offences each of which is punishable under the laws of the requesting Party and the requested Party by deprivation of liberty or under a detention order, but of which some do not fulfil the condition with regard to the amount of punishment which may be awarded, the requested Party shall also have the right to grant extradition for the latter offences.

Article 6 - Extradition of nationals

1a. A Contracting Party shall have the right to refuse extradition of its nationals.

b. Each Contracting Party may, by a declaration made at the time of signature or of deposit of its instrument of ratification or accession, define as far as it is concerned the term “nationals” within the meaning of this Convention.

c. Nationality shall be determined as at the time of the decision concerning extradition. If, however, the person claimed is first recognised as a national of the requested Party during the period between the time of the decision and the time contemplated for the surrender, the requested Party may avail itself of the provision contained in sub-paragraph a of this article.

2. If the requested Party does not extradite its national, it shall at the request of the requesting Party submit the case to its competent authorities in order that proceedings may be taken if they are considered appropriate. For this purpose, the files, information and exhibits relating to the offence shall be transmitted without charge by the means provided for in Article 12, paragraph 1. The requesting Party shall be informed of the result of its request.

Article 9 - Ne bis in idem

Extradition shall not be granted if final judgment has been passed by the competent authorities of the requested Party upon the person claimed in respect of the offence or offences for which extradition is

requested. Extradition may be refused if the competent authorities of the requested Party have decided either not to institute or to terminate proceedings in respect of the same offence or offences.

Useful links:

Draft Code of Crimes against the Peace and Security of Mankind
http://untreaty.un.org/ilc/texts/instruments/English/draft%20articles/7_4_1996.pdf

European Convention on Extradition

<http://conventions.coe.int/treaty/en/treaties/html/024.htm>

3. International Crimes

BASIC DEFINITIONS:

International Crimes - "crimes against international law" all violations affecting legal interests in whose preservation humanity has a general interest and for which criminal law protection is provided in an international treaty or under customary international law.

Crimes against peace - war of aggression, preparation and purchase of war of aggression.

War crimes - punishable offence under international law, for violations of the laws of war by any person or persons, military or civilian.⁸

Crimes against humanity - genocide and other acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group.

International crimes in broad sense - all crimes which are not crimes against peace, war crimes, crimes against humanity, but for which criminal law protection is provided in an international treaty or under customary international law (e.g. international terrorism, slave-trading, traffic in persons, narcotic offences, pollution, international hostage taking).⁹

INTRODUCTION:

The idea of punishing aggressive war and acts of war in conventions of international law originated during World War I and led

8 R. Szawiłowski, Rafał Lemkin - twórca pojęcia „ludobójstwo” i główny architekt konwencji z 9 XII 1948 (w czterdziestolecie śmierci), Państwo i Prawo 1999, zeszyt 10, pp. 74-86.
J. Waszczyński, Zbrodnie przeciw ludzkości (Narodziny i rozwój pojęcia), Palestra 1986, zeszyt 10-11, pp. 63-75.

9 R. Bernhardt ed., Encyclopedia of Public International Law. Vol. 5, Amsterdam 2003, 1119 ff.

to the inclusion in the Versailles Peace Treaty (1919) of a provision for the arraignment of Kaiser Wilhelm II “for a supreme offence against international morality and the sanctity of treaties and for the trail of German military and civilian personnel accused of having committed acts in violation of the “laws and customs of war”.¹⁰ After World War II numerous leading German and Japanese figures were put on trial before the Allies’ courts in Nuremberg and Tokyo for crimes against peace, war crimes, and crimes against humanity and were in some cases sentenced to severe penalties.

The concept of international crimes must be distinguished from that of international torts. An international tort is an unlawful act by a subject of international law violating the international legal rights of another subject of international law and giving rise to a duty to make reparation on the part of the state to which the individual perpetrator of the act belongs. An international tort does not of its own accord give rise to responsibility under criminal law (e.g. war crimes).¹¹

3.1. Crimes against peace, war crimes, crimes against humanity

CRIMES AGAINST PEACE: namely, planning, preparation, initiation, or waging of wars of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

WAR CRIMES: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity;

10 Tom II p. 1119

11 R. Bernhardt ed., *Encyclopedia of Public International Law*. Vol. 5, Amsterdam 2003, p. 1125.

CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecution on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of domestic law of the country where perpetrated.¹²

3.2. International crimes in broad sense

The United Nations has adopted (or at least considered) a number of variations on the definition of crimes against humanity. Among these are a General Assembly resolution endorsing the standards of the Nuremberg Charter, the International Law Commission's Draft Code of Crimes Against the Peace and Security of Mankind, and the Statutes of the two ad hoc international criminal tribunals established by the United Nations in the 1990s. Negotiations leading to the 1998 adoption of the Statute of the International Criminal Court (ICC) produced consensus on a very narrowly defined core concept of crimes against humanity to be applied by that institution.¹³

Torture - the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention) defines torture as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person by, or with the consent or acquiescence of, a public official in order to achieve certain purposes. The most common purposes are to obtain information or a confession, punishment, intimidation, coercion, or discrimination/persecution. This definition of torture does not include pain or suffering arising only from, inherent in, or incidental to lawful penal sanctions.

The Torture Convention has achieved very broad acceptance by states. It establishes an enforcement regime similar to that of the 1949 Geneva Conventions, in which the parties agree to make torture

12 The Charter of the International Military Tribunal Article 6.

13 R. Bernhardt ed., Encyclopedia of Public International Law. Vol. 5, Amsterdam 2003 p. 1122.

punishable under their domestic law and also agree to take the steps necessary to prosecute those offenders within their jurisdiction.

The convention's definition of torture is extremely narrow. It excludes acts of torture committed by individuals in a personal capacity, except in cases where there is some government, or official, complicity. The concept of torture as an international crime is correspondingly constrained.

Drug offence - the international community has adopted a number of treaties designed to control the illicit production, manufacture, trade, and use of drugs. The 1961 Single Convention on Narcotic Drugs, as amended by its 1972 Protocol, established the International Narcotics Control Board to regulate the production and sale of narcotics, cannabis, and coca leaves. The 1971 Convention on Psychotropic Substances extended this regime to chemical drugs. The 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances defines internationally recognized drug trafficking offences and requires the parties to criminalize them under their domestic law. The United States has signed all three of these conventions and incorporated their provisions into law.

Terrorism and threats to civil aviation - terrorism is an extremely dangerous form of criminal activity that needs suppression at both national and international levels. Unfortunately states have found it impossible, thus far, to agree on a general definition of terrorism as an international crime. The 1999 International Convention for the Suppression of the Financing of Terrorism came closer than ever before to this goal when it defined the offence of providing or collecting funds to be used to carry out terrorist acts. The European Convention on the Suppression of Terrorism, a regional initiative, incorporates a functional definition of terrorism among its parties and creates a relatively strong regional enforcement regime.

There has been broad international acceptance of effective international criminal standards relating to at least two forms of terrorism. The principal treaties on threats to civilian aviation define aircraft hijacking and a number of related crimes, and require the parties to suppress them under their national law. This system has

become a cornerstone of international civil aviation. Similarly, the International Convention against the Taking of Hostages outlaws this form of terrorism.

Bribery of foreign public officials - the bribery of foreign public officials, first outlawed by the United States in the Foreign Corrupt Practices Act of 1977, is gaining recognition as a crime under international law. The 1997 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions has been signed by thirty-four countries and entered into effect in February 1999. This treaty sets a general standard to be met by its parties in outlawing such bribes, but does not explicitly require states to impose sanctions on corporations as opposed to individuals. It has also been criticized for its failure to establish any uniform penalties for bribery, and for its failure to ban the tax deductibility of bribes paid to foreign officials. Another concern is that only a small number of states have ratified the treaty so far.

Other international crimes - other crimes defined by international conventions include counterfeiting, the theft of cultural property or archaeological treasures, the crime of apartheid, and the threat or use of force against internationally protected persons such as diplomats.¹⁴

Sources:

Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 U.N.T.S. 277.

Geneva Convention Relative to the Treatment of Civilian Persons in Time of War, 12 August 1949, 6 U.S.T. 3316, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

Convention for the Suppression of the Unlawful Seizure of Aircraft, signed at the Hague on 16 December 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192.

Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971, U.N.T.S. No. 14118, vol. 974, pp. 178-184, 24 U.S.T. 565, T.I.A.S. No. 7570.

14 <http://law.jrank.org/pages/1392/International-Criminal-Law-Defining-international-crimes.html>>International Criminal Law - Defining International Crimes<

- International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, G.A. Res. 3068, 28 U.N. GAOR (No. 50), U.N. Doc.A/9233/Add.1 (1973).
- Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, 14 December 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532.
- Definition of Aggression, General Assembly Res. 3314 (XXIX) of 14 December 1974, U.N. G.A.O.R. 29th Sess., Supp. No. 31 (A/9631), p. 142.
- International Convention against the Taking of Hostages, 17 December 1979, G.A. Res. 146, UN, GAOR (XXXIV), U.N. Doc. A/34/819.
- Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984).
- United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, U.N. Doc. E/CONF.82/15 (1988), reprinted in 28 I.L.M. 493 (1989).
- Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, opened for signature 18 December 1997, reprinted in 37 I.L.M. 1 (1998).
- International Convention for the Suppression of the Financing of Terrorism, Adopted by the General Assembly of the United Nations in resolution 54/109 of 9 December 1999, 39 I.L.M. 270 (2000).

Useful links:

Council of Europe

www.conventions.coe.int

4. International Criminal Tribunals

BASIC DEFINITIONS:

Tribunals in status *creandi* - tribunals that had their statute established but have never started their activity, e.g. the Versailles Tribunal, the Permanent Court of International Justice.

Military Tribunals - tribunals that were established by victorious states (parties of a military conflicts) to judge the perpetrators of crimes committed on citizens of defeated states: the International Military Tribunal in Nuremberg, the International Military Tribunal for the Far East in Tokyo.

Ad hoc tribunals - established by international community (United Nations) to judge the perpetrators of crimes committed during particular conflict: the International Tribunal for former Yugoslavia, the International Criminal Tribunal for Rwanda.

Permanent tribunal - tribunal with universal jurisdiction, established directly by states: the International Criminal Court.¹⁵

INTRODUCTION:

The development of international criminal jurisdiction shows that the concepts of punishing international perpetrators were very different among the states. The main reason for such a situation were differing political and social grounds in every state. The consequence of this situation was the creation of various institutions over the centuries that could be classified as international criminal tribunals.

15 M. Płachta, Międzynarodowy Trybunał Karny, Tom I, Zakamycze 2004, p. 89 ff. M. Płachta Międzynarodowe trybunały Karne próba: typologii i charakterystyka, Państwo i Prawo 2004, zeszyt 3, pp. 14-31.

4.1. Military Tribunals

The International Military Tribunal (Nuremberg Tribunal) - established on 8 August 1945 to judge of the major war criminals of the European Axis. The Nuremberg Tribunal, was the first international tribunal in history¹⁶. It was a military tribunal due to the fact, that there was then no civil power in German's territory. There were 24 accused, and 22 judged. The defendant had the right to know in detail the charges, the right to give any explanation relevant to the charges made against him, the right to have the trial translated, the right to conduct his own defence before the Tribunal or to have the assistance of Counsel, the right to present evidence at the Trial in support of his defence, and to cross-examine any witness called by the Prosecution. The defendant did not have a right to appeal. The legal definition of war crimes and crimes against humanity could be applicable to acts committed by the USSR on Polish citizens, but they never were.¹⁷

The International Military Tribunal for the Far East (Tokyo Tribunal) - established on 19th January 1946 convened to try the leaders of the Empire of Japan for three types of crimes: crimes against peace, war crimes, crimes against humanity, committed during the World War II. There were 28 accused, and 25 military and political leaders were sentenced during the two first years. More than 5000 criminals were judged. The Tribunal did not have jurisdiction over foreign citizens.¹⁸

The common sense of mankind demands that law shall not stop with the punishment of petty crimes by little people. It must also reach men who possess themselves of great power and make deliberate and concerted use of it to set in motion evils which leave no home in the world untouched. It is a cause of that magnitude that the United Nations will lay before Your Honours [...]. But the ultimate step in avoiding periodic wars, which are inevitable in a system of international lawlessness, is to make statesmen responsible to law. And let me make clear that while this law is first applied against German aggressors,

16 T. Cyprian, Prawo norymberskie. Bilans i perspektywy, Kraków 1948, p. 202.

17 M. Królikowski, P. Wiliński, J. Izydorczyk, Podstawy prawa karnego międzynarodowego, Warszawa 2008, pp.54-57.

18 Ibid. 58 ff.

*the law includes, and if it is to serve a useful purpose it must condemn aggression by any other nations, including those which sit here now in judgment. We are able to do away with domestic tyranny and violence and aggression by those in power against the rights of their own people only when we make all men answerable to the law. This trial represents mankind's desperate effort to apply the discipline of the law to statesmen who have used their powers of state to attack the foundations of the world's peace and to commit aggressions against the rights of their neighbours.*¹⁹ Justice Robert H. Jackson, Chief of Counsel for the United States, made his opening statement to the International Military Tribunal in Case No. 1, The United States of America, the French Republic, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics v. Hermann Wilhelm Göring, et al. November 21, 1945.

The Nuremberg Tribunal was created by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland, and the Government of the Union of Soviet Socialist Republics for the trial and punishment of the major war criminals of the European Axis countries with the power to try and punish persons who acted in the interests of the European Axis countries.

Its indisputable credit was punishing four major war criminals and six criminal organizations - the leadership of the Nazi party, the Schutzstaffel (SS) and Sicherheitsdienst (SD), the Gestapo, the Sturmabteilung (SA) and the High Command of the German armed forces. Creation, and actions taken by this Tribunal had enormous influence on International Criminal Law. Especially the seven principles established in 1950.

Principles of International Law Recognized in the Charter of the Nüremberg Tribunal and in the Judgment of the Tribunal, 1950.

Principle I

Any person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment.

19 <http://www.roberthjackson.org/Man/theman2-7-8-1/>

Principle II

The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.

Principle III

The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.

Principle IV

The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.

Principle V

Any person charged with a crime under international law has the right to a fair trial on the facts and law.

Principle VI

The crimes hereinafter set out are punishable as crimes under international law:

(a) Crimes against peace:

- (i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;*
- (ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).*

(b) War crimes:

Violations of the laws or customs of war include, but are not limited to, murder, ill-treatment or deportation to slave-labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war, of persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.

(b) Crimes against humanity:

Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connexion with any crime against peace or any war crime.

Principle VII

Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law.

Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal. London, 8 August 1945. (The Charter of the International Military Tribunal)

Article 6

The Tribunal establishment by the Agreement referred to in Article I hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) CRIMES AGAINST PEACE: namely, planning, preparation, initiation, or waging of wars of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) WAR CRIMES: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder

of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity;

(c) CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecution on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of domestic law of the country where perpetrated.

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

4.2. International ad hoc Criminal Tribunals for Former Yugoslavia and Rwanda

Ad hoc Tribunals:

- International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia between 1st January 1991 and the date to be determined by the security Council upon the restoration of peace.²⁰
- International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other such Violations Committed in the Territory of Neighbouring States between 1st January 1994 and 31st December 1994.

The International Tribunal for Former Yugoslavia:

It was established to judge crimes committed during the civil war in Yugoslavia between 1991-1995. The most significant crime

20 More information in: J. Nowakowska, Międzynarodowy Trybunał Karny dla osądzenia sprawców naruszeń prawa humanitarnego w byłej Jugosławii od 1991 r., Przegląd sądowy 1997, No.3 pp. 69-90. J. Nowakowska, Postępowanie przed Trybunałem Karnym dla osądzenia sprawców naruszeń prawa humanitarnego w byłej Jugosławii, Prokuratura I prawo 1996, No 5. pp. 61-72.

was the Srebrenica Massacre, also known as Srebrenica Genocide in July 1995. Killing of an estimated 8,000 Bosnian men and boys in the region of Srebrenica in Bosnia and Herzegovina by units of the Army of Republika Srpska (VRS) under the command of General Ratko Mladić during the Bosnian War. In addition to the VRS, a paramilitary unit from Serbia known as the Scorpions participated in the massacre. Prior to the genocide, the United Nations had declared Srebrenica a UN protected “safe area”, but that did not prevent the massacre, even though 400 armed Dutch peacekeepers were present at the time. The Srebrenica massacre is the largest mass murder in Europe since World War II.²¹

In 1992, the UN Security Council adopted Resolution 808 which states that international tribunal shall be established for the prosecution of persons responsible for serious violation of international humanitarian law committed in the territory of former Yugoslavia since 1991. Resolution 827, adopted in 1993 by the UN Security Council, established the International Tribunal for former Yugoslavia as an ad hoc authority. The Tribunal was neither recognized by the government of Yugoslavia, nor by the Srpska Republika.²²

Two officers of the Army of Republika Srpska have been convicted by the ICTY for their involvement in the Srebrenica genocide - Radislav Krstić and Vidoje Blagojević. General Radislav Krstić, who led the assault on Srebrenica alongside Ratko Mladić, was convicted by the tribunal for aiding and abetting genocide and received a sentence of 35 years imprisonment. Colonel Vidoje Blagojević received a sentence of 18 years imprisonment for crimes against humanity. Krstić was the first European to be convicted on a charge of genocide by an international tribunal, and only the third person ever to have been convicted by an international tribunal under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. The ICTY’s final ruling was that the Srebrenica massacre was indeed an act of genocide.

21 More information in: R. Wieruszewski, Międzynarodowy Trybunał Karny dla osądzenia sprawców naruszeń prawa humanitarnego w byłej Jugosławii, Państwo i Prawo 1998, pp. 60-63.

22 I. Gawłowicz, M.A. Wasilewska, Międzynarodowa współpraca w walce z przestępczością (międzynarodowe trybunały karne, Interpol), Uniwersytet szczeciński, Rozprawy i studia T. 508, p. 145 ff.

Slobodan Milosevic (the President of the Federal Republic of Yugoslavia) was accused of genocide or complicity in genocide in territories within Bosnia and Herzegovina, including Srebrenica, but he died on 11 March 2006 during his ICTY trial and so no verdict was returned.²³

At the ICTY, the trial of seven senior Serb military and police officers, facing charges ranging from genocide to murder and deportation for the crimes committed in Srebrenica, began on 14 July, 2006. Their names are: Vujadin Popovic, Ljubisa Beara, Drago Nikolic, Ljubomir Borovcanin, Vinko Pandurevic, Radivoje Miletic and Milan Gvero.

Radovan Karadzic and Ratko Mladic have been indicted by the ICTY for genocide and complicity in genocide in several municipalities within Bosnia and Herzegovina, including Srebrenica. Radovan Karadzic was captured in Serbia on 21 July 2008²⁴ but to date Ratko Mladic remains at large.²⁵

The Criminal Tribunal for Rwanda:

There was mass killing of hundreds of thousands of Rwanda's minority Tutsis and the moderates of its Hutu majority in 1994. Over the course of approximately 100 days, from April 6 through to mid July, at least 500,000 people were killed. Most estimates are of a death toll between 800,000 and 1,000,000, which is 10% of Rwanda's population. The majority of victims were killed by Hutus armed only with machetes, but these were some of the most effective killers.

Bearing in mind the serious violation of international humanitarian law, the UN Security Council adopted Resolution 955 S/RES/955, which established the International Criminal Tribunal for Rwanda. The Tribunal started functioning in 1996, but it was not effective. During

23 The International Criminal Tribunal for the Former Yugoslavia Case No. It-02-54-T the Prosecutor of the Tribunal against Slobodan Milosevic amended indictment <http://www.un.org/icty/indictment/english/mil-ai040421-e.htm>

24 The International Criminal Tribunal for the Former Yugoslavia the Prosecutor of the Tribunal against Radovan Karadzic amended indictment <http://www.un.org/icty/indictment/english/kar-ai000428e.htm>

25 The International Criminal Tribunal for the Former Yugoslavia Case No. IT-95-5/18-I the Prosecutor of the Tribunal against Ratko Mladic amended indictment, <http://www.un.org/icty/indictment/english/mla-ai021010e.htm>

its seven years of activity, only 11 people were tried. The situation resulted in restoring local *gacaca*, or on the grass, tribunals. The trials were conducted according to classic justice procedures in Rwanda, and all criminals were judged in places where their crime was committed. There was no capital punishment.²⁶

Sources:

International Criminal Tribunal for former Yugoslavia:

United Nations Security Council *Resolution* 808 S/RES/808(1993) on 22 February 1993

United Nations Security Council *Resolution* 827 S/RES/827(1993) on 25 May 1993

United Nations Security Council *Resolution* 1166(1998) on 13 May 1998

International Criminal Tribunal for Rwanda:

United Nations Security Council *Resolution* 955 S-RES-955(1994) on 8 November 1994

United Nations Security Council *Resolution* 977 S-RES-977(1995) on 22 February 1995

United Nations Security Council *Resolution* 1165 S-RES-1165(1998) on 30 April 1998

United Nations Security Council *Resolution* 1824 S-RES-1824(2008) on 18 July 2008

United Nations General Assembly *Document* 315 session 54 Fourth Annual Report of ICTR on 7 September 1999

Useful links:

International Criminal Tribunal for Former Yugoslavia

www.un.org/icty

International Criminal Tribunal for Rwanda

www.ictt.org

The Charter of the International Military Tribunal <http://www.icrc.org/ihl.nsf/FULL/350?OpenDocument>

Nuremberg principles

<http://www.icrc.org/ihl.nsf/FULL/390?OpenDocument>

26 M. Królikowski, p. 63 and the following.

5. International Criminal Court

BASIC DEFINITIONS:

The International Criminal Court (ICC) - a permanent institution with the power to exercise its jurisdiction over persons for the most serious crimes of international concern namely genocide, crimes against humanity, war crimes, and the crime of aggression.

INTRODUCTION:

The experience of both the ICTY and ICTR heightened calls for the creation of a permanent Criminal Court. The General Assembly adopted a resolution on January 16, 1997 which confirmed its commitment to establish an International Criminal Court. The General Assembly renewed the mandate of the Preparatory Committee and decided to convene a diplomatic conference of plenipotentiaries in Italy in 1998, with the task of finalizing and adopting a Convention on the establishing of a permanent International Court (the Rome Statute of the International Criminal Court). The convention, once finalized and opened to signature, received the requisite number of ratifications to enter into force on July 1, 2002.

5.1. The International Criminal Court structure

5.1.1. Presidency

The Presidency is responsible for the overall administration of the Court, with the exception of the Office of the Prosecutor, and for specific functions assigned to the Presidency in accordance with the Statute. The Presidency is composed of three judges of the Court, elected to the Presidency by their fellow judges, for a term of three years.

5.1.2. Judicial Divisions

The Judicial Divisions consists of eighteen judges organized into the Pre-Trial Division, the Trial Division and the Appeals Division. The judges of each Division sit in Chambers which are responsible for conducting the proceedings of the Court at different stages. Assignment of judges to Divisions is made on the basis of the nature of the functions each Division performs, and the qualifications and experience of the judge. This is done in a manner ensuring that each Division benefits from an appropriate combination of expertise in criminal law and procedure and international law.

5.1.3. Office of the Prosecutor

The Office of the Prosecutor is responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court.

5.1.4. Registry

The Registry is responsible for the non-judicial aspects of the administration and servicing of the Court. The Registry is headed by the Registrar who is the principal administrative officer of the Court. The Registrar exercises his or her functions under the authority of the President of the Court.

5.1.5. Other Offices

The Court also includes a number of semi-autonomous offices, such as the Office of Public Counsel for victims and the Office of Public Counsel for Defence. These Offices fall under the Registry for administrative purposes but otherwise function as wholly independent offices. The Assembly of States Parties has also established a Trust Fund for the benefit of victims of crimes within the jurisdiction of the Court, and of victims' families.²⁷

27 J. Izydorczyk, P. Wiliński, Międzynarodowy Trybunał Karny. Powstanie, organizacja, jurysdykcja, akty prawne. Zakamycze 2004, p. 40 ff.

5.2. Jurisdiction and Admissibility

5.2.1. Jurisdiction *ratione personae*

The Court shall have jurisdiction over natural persons over 18 years old pursuant to its Statute. This Statute of the Court applies equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, do not bar the Court from exercising its jurisdiction over such a person.

5.2.2. Jurisdiction *ratione temporis*

The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute. If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under Article 12 (3).

5.2.3. Jurisdiction *ratione materiae*

Jurisdiction *ratione materiae* is limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: the crime of genocide, crimes against humanity, war crimes, the crime of aggression.

5.2.4. Principle of complementarity

Principle of complementarity - provides that certain cases will be inadmissible even though the Court has jurisdiction. In general, a case will be inadmissible if it has been or is being investigated or prosecuted

by a State with jurisdiction. However, a case may be admissible if the investigating or prosecuting State is unwilling or unable to genuinely to carry out the investigation or prosecution.

5.2.5. Universal jurisdiction

The Court does not have universal jurisdiction. The Court may only exercise jurisdiction if:

- the accused is a national of a State Party or a State otherwise accepting the jurisdiction of the Court;
- the crime took place on the territory of a State Party or a State otherwise accepting the jurisdiction of the Court; or
- the United Nations Security Council has referred the situation to the Prosecutor, irrespective of the nationality of the accused or the location of the crime.

5.2.6. Case admissibility

The conditions of case admissibility are defined in Article 17 of the Rome Statute:

The Court shall determine that a case is inadmissible where:

- (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;*
- (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;*
- (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under Article 20 (3);*
- (d) The case is not of sufficient gravity to justify further action by the Court.*

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due

process recognized by international law, whether one or more of the following exist, as applicable:

- (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in Article 5;*
- (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;*
- (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.*

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

Useful links:

International Criminal Court

www.icc-cpi.int

6. Principles of ICC Jurisdiction

- a. *Ne bis in idem* Article 17 of the Rome Statute
- b. *Nullum crimen sine lege* Article 22 of the Rome Statute
- c. *Nulla poena sine lege* Article 23 of the Rome Statute
- d. Non-retroactivity *ratione personae* Article 24 of the Rome Statute
- e. Individual criminal responsibility Article 25 of the Rome Statute
- f. Exclusion of jurisdiction over persons under eighteen Article 26 of the Rome Statute
- g. Irrelevance of official capacity Article 27 of the Rome Statute
- h. Responsibility of commanders and other superiors Article 28 and 33 of the Rome Statute
- i. Non-applicability of statute of limitations Article 29 of the Rome Statute
- j. Mental element (deliberate offence) Article 30 of the Rome Statute

7. Penalties

The aims of penalties in international criminal law are very similar to the aims of penalties in national criminal law. The most common aim is prevention and indemnity. However, indemnity can not be a revenge, but should express the condemnation of perpetrator by the international community. Indemnity is not the most important aim of a penalty. The main aim should be the restoration of peace.

Prevention is the most important factor that influences penalties for violation of international criminal law. Judgement should deter not only the perpetrator that committed the crime, but also potential perpetrators.

The offender's rehabilitation influences the dimension of imprisonment. Therefore, the individualisation of penalty for international crime is *conditio sine qua non* of international peace.²⁸

The Rome Statute of the International Criminal Court

Article 77 Applicable penalties

1. Subject to Article 110, the Court may impose one of the following penalties on a person convicted of a crime referred to in article 5 of this Statute:

- (a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or*
- (b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.*

2. In addition to imprisonment, the Court may order:

28 M. Płachta, Międzynarodowy Trybunał Karny, Tom I, Zakamycze 2004.pp. 608-611.

- (a) A fine under the criteria provided for in the Rules of Procedure and Evidence;*
- (b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.*

Article 78

Determination of the sentence

1. In determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.

2. In imposing a sentence of imprisonment, the Court shall deduct the time, if any, previously spent in detention in accordance with an order of the Court. The Court may deduct any time otherwise spent in detention in connection with conduct underlying the crime.

3. When a person has been convicted of more than one crime, the Court shall pronounce a sentence for each crime and a joint sentence specifying the Total period of imprisonment. This period shall be no less than the highest individual sentence pronounced and shall not exceed 30 years imprisonment or a sentence of life imprisonment in conformity with Article 77, paragraph 1 (b).

Article 79 Trust Fund

1. A Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.

2. The Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund.

3. The Trust Fund shall be managed according to criteria to be determined by the Assembly of States Parties.

Article 80 Non-prejudice to national application of penalties and national laws

Nothing in this Part affects the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties prescribed in this Part.

8. Responsibility of individuals²⁹

BASIC DEFINITIONS:

Elements of international responsibility - the Rome Statute of International Criminal Court established three elements of international responsibility of individuals:

- a. Material elements - related to crime;
- b. Mental elements - related to criminal;
- c. Grounds for excluding criminal responsibility.³⁰

INTRODUCTION:

The responsibility of individuals is admissible if the Statutes and Charters of Tribunals state that. In this case they are brought before the International Tribunal. The individual can be responsible only for the crimes defined in the sources of international criminal law. Alternatively an individual can be found responsible, according to the universality principle, for acts which are contrary to international law and prohibited by the international community - so called *delicta iuris gentium*. In this case, criminals are brought before a national tribunal.³¹

Material elements are:

- conduct,
- consequence,
- circumstances.

Mental elements are:

29 More information on this topic can be found in: M. Płachta, Międzynarodowy Trybunał Karny, Tom I, Zakamycze 2004.

30 Królikowski, *ibid.* p. 161.

31 E. Socha, Odpowiedzialność osób fizycznych w międzynarodowym prawie karnym, Nowa Kodyfikacja Prawa Karnego pod red. L. Boguni, Tom. XII, Wrocław 2006, pp. 84-85.

- intent - when a person means to engage in the conduct, or when a person means to cause a consequence, or is aware that it will occur in the ordinary course of events,
- knowledge - when person is aware that a circumstance exists, or that a consequence will occur in the ordinary course of events.

The grounds for excluding criminal responsibility are only:

- self-defence,
- necessity,
- duress,
- mistake of fact,
- mistake of law,
- superior orders,
- prescription of law,
- mental illness or condition that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law,
- state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law.

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- J. Nowakowska, *Międzynarodowy Trybunał Karny dla osądzenia sprawców naruszeń prawa humanitarnego w byłej Jugosławii od 1991 r.*, *Przegląd sądowy* 1997, No.3 pp. 69-90.
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- R. Szawiłowski, Rafał Lemkin - twórca pojęcia „ludobójstwo” i główny architekt konwencji z 9.XII 1948 (w czterdziestolecie śmierci), *Państwo i Prawo* 1999, zeszyt 10, pp. 74-86.
- J. Waszczyński, *Zbrodnie przeciw ludzkości (Narodziny i rozwój pojęcia)*, *Palestra* 1986, zeszyt 10-11, pp. 63-75.
- R. Wieruszewski, *Międzynarodowy Trybunał Karny dla osądzenia sprawców naruszeń prawa humanitarnego w byłej Jugosławii*, *Państwo i Prawo* 1998, pp. 60-63.

10. Glossary

| | | |
|------------------|---|---|
| albeit | - | conceding the fact that; even though |
| arraignment (n.) | - | accusation |
| assault (n.) | - | a violent physical attack |
| at large | - | free |
| bribery (n.) | - | a crime in which money, a favour or something else of value is promised to, given to, or taken from an individual or corporation to influence somebody's opinions or decisions. |
| capacity (n.) | - | legal competency |
| complicity (n.) | - | association or participation in |
| convene (v.) | - | to gather |
| counterfeit (v.) | - | make a fraudulent copy, forge (i.e. money or documents) |
| draft (n.) | - | a preliminary version |
| genocide (n.) | - | extermination of a large group of people (particularly those belonging to a certain race, religion, etc.) |
| hostage (n.) | - | a person taken by force to secure the taker's demands |
| measure (n.) | - | action |
| perpetrator (n.) | - | a person who committed a crime |
| suppression (n.) | - | the conscious intentional exclusion |

Based on:

Merriam-Webster: www.merriam-webster.com

Babylon: www.dictionary.babylon.com

11. Quiz

I. Decide if the following sentences are true or false (10 pts)

1. The general principles of law recognized by civilized nations are one of the sources of international law.
2. Violation of the laws are crimes against humanity.
3. Due to different political and social grounds, the states present differing concepts of punishing international perpetrators.
4. The Nuremberg Tribunal dealt with both military and civil cases.
5. The Srebrenica Massacre was one of the largest mass murders in Europe since the World War II.
6. The International Criminal Court has universal jurisdiction.
7. Indemnity is the most important aim of penalties in international criminal law.
8. The Rome Statute of the International Criminal Court established two elements of international responsibility.
9. The material elements of international responsibility of individuals refer to criminal responsibility.
10. Duress excludes criminal responsibility.

II. Match the words to form the names of institutions or legal acts (5 pts)

- | | |
|------------------|-------------|
| a) Rome | 1) Assembly |
| b) Trust | 2) Crimes |
| c) General | 3) Statute |
| d) Judgment of | 4) Fund |
| e) Draft Code of | 5) Tribunal |

III. Complete the extract with the words given below (5 pts)

jurisdiction

measures

offence

residence

territory

1. Each Party shall take the necessary legislative or other measures to establish _____ over any offence established in accordance with this Convention, when the offence is committed:

a. in its _____; or

b. on board a ship flying the flag of that Party; or

c. on board an aircraft registered under the laws of that Party; or

d. by one of its nationals; or

e. by a person who has his or her habitual residence in its territory.

2 Each Party shall endeavour to take the necessary legislative or other _____ to establish jurisdiction over any _____ established in accordance with this Convention where the offence is committed against one of its nationals or a person who has his or her habitual _____ in its territory.

IV. Match the phrases with the definitions given below. There are some extra words (5 pts)

ad hoc tribunals

crimes against peace

jurisdiction

crimes against humanity

extradition

immunity

permanent tribunal

war crimes

- the handing over of an alleged offender by one state to another, if the alleged offender is in a territory other than the state seeking to exercise jurisdiction
- competence of state to govern persons and property by its municipal law (criminal)
- punishable offence under international law, for violations of the laws of war by any person or persons, military or civilian
- genocide and other acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group

- e. established by the international community (United Nations) to judge the perpetrators of crimes committed during particular conflict;

V. Match the columns (5 pts)

- | | |
|-----------------|--------------------|
| 1) territorial | a) complementarity |
| 2) military | b) principle |
| 3) drug | c) divisions |
| 4) judicial | d) offences |
| 5) principle of | e) tribunals |

VI. Complete the gaps with an appropriate preposition (5 pts)

by for in of upon

Extradition shall not be granted if final judgment has been passed _____ the competent authorities of the requested Party _____ the person claimed _____ respect _____ the offence or offences _____ which extradition is requested. Extradition may be refused if the competent authorities of the requested Party have decided either not to institute or to terminate proceedings in respect of the same offence or offences.

Both glossary and quiz were prepared by Halina Sierocka.