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Introductory text

Under its traditional structure, international law prescribes certain rules of conduct for States, and it is up to every State to decide on practical measures or penal or administrative legislation to ensure that individuals whose behaviour is attributable to it, or under some primary rules even all individuals under its jurisdiction, comply with those rules – indeed, ultimately only human beings can violate or respect rules. There is, however, the growing branch of international criminal law, which consists of rules of international law specifically criminalizing certain individual behaviour and obliging States to criminally repress such behaviour. IHL was one of the first branches of international law to contain rules of international criminal law.

IHL obliges States to suppress all its violations. Certain violations, called war crimes, are criminalized by IHL. The concept of war crimes includes – but is not limited to – the violations listed and defined in the Conventions and Protocol I as grave breaches. [1] All war grave breaches are war crimes [2] but not all war crimes are grave breaches. IHL requires States to enact legislation to punish such grave breaches, to search for persons who have allegedly committed such crimes, and to bring them before their own courts or to extradite them to another State for prosecution. [3] IHL moreover contains provisions on the legal qualification of an individual's failure to act and on group criminality, such as the responsibility of commanders. [4] While normally a State has criminal jurisdiction only over acts committed on its territory or by its nationals, IHL confers universal jurisdiction over grave breaches on all States. Moreover, it not only permits, it even requires all States to prosecute war criminals, regardless of their nationality, the nationality of the victim, and where the crime was committed. For this reason, too, national legislation is necessary.

Unfortunately, a number of States have not adopted the necessary legislation and many belligerents allow – or even order – their organs to violate IHL, with complete impunity. The efforts to set up international criminal courts are therefore understandable. As we will see, they have met with success.

According to the text of the Conventions and of the Protocols, the concept of grave breaches does not apply in non-international armed conflicts. However, international instruments, [5] judicial decisions, [6] national legislation [7] and doctrine count serious violations of the IHL of non-international armed conflicts under the

broader concept of war crimes, to which a regime would apply under customary international law that is similar to that applicable under the Conventions and Protocol I to grave breaches, except that the exercise of universal jurisdiction would not be an obligation - as it is for grave breaches – but only an option.

The regular prosecution of war crimes would have an important preventive effect, deterring violations and making it clear even to those who think in categories of national law that IHL is law. It would also have a stigmatizing effect, and would individualize guilt and repression, thus avoiding the vicious circle of collective responsibility and of atrocities and counter-atrocities against innocent people. Criminal prosecution places responsibility and punishment at the level of the individual. It shows that the abominable crimes of the twentieth century were not committed by nations but by individuals. By contrast, as long as the responsibility was attributed to States and nations, each violation carried within it the seed of the next war. That is the civilizing and peace-seeking mission of international criminal law favouring the implementation of IHL. Unfortunately, most war crimes are still left unpunished today. Nevertheless, there has been progress in recent years, mainly in terms of countries adopting national legislation enabling them to prosecute war crimes, in many cases even based upon universal jurisdiction, more rarely in terms of actual prosecutions of suspected war criminals, very rarely based on universal jurisdiction. The most spectacular progress has been the establishment of international criminal tribunals with jurisdiction over, *inter alia*, war crimes.

The spectacular rise of international criminal law in recent years constitutes an invaluable contribution to the credibility of IHL and to its effective implementation. It would be wrong and dangerous, however, to see IHL solely from the perspective of criminal law. IHL must be applied above all during conflicts – by the belligerents, third States and humanitarian organizations – to protect the victims. As is the case for national law, ex post criminal prosecution of violations is crucial to implementation but is also an admission of failure. It should not discourage the fundamental work of endeavouring to prevent violations and protect the victims by means other than criminal law. As for national law, action under criminal law can be only one of the ways of upholding the social order and common interest. The increasing focus of public opinion on criminal prosecution of violations of IHL – which may turn into disappointment and cynicism - may also have reinforced the reluctance of States and their military to use existing mechanisms for fact-finding, such as the International Humanitarian Fact-Finding Commission. Although the ICRC stresses that it will not provide information for the purpose of prosecuting perpetrators and has obtained the corresponding immunities, States and armed groups may also have become more reluctant to give the ICRC access to victims of IHL violations in places of detention and in conflict areas. Proposals to develop new mechanisms for the implementation of IHL or to clarify vague concepts of IHL may also meet resistance in military circles because they could facilitate criminal prosecution, although this is not their aim.

An exclusive focus on criminal prosecution may also give the impression that all behaviour in armed conflict is either a war crime or lawful. That impression heightens feelings of frustration and cynicism about the effectiveness of IHL, which in turn facilitate violations. More importantly, that impression is simply wrong. Indeed, an attack directed at a legitimate military objective that is not expected to cause excessive incidental

harm to civilians is not a war crime, even if many civilians die. Except in cases of recklessness, targeting errors are not war crimes. For the protection of the civilian population, it is nevertheless crucial for all those launching attacks to take all feasible measures to minimize incidental civilian harm or mistakes, for instance by verifying targets, selecting tactics, timing and ammunition, and giving the civilian population an effective warning, although a violation of that obligation is not a war crime. Similarly, it is crucial for war victims that occupying powers respect the existing legislation of the occupied territory and legislate themselves only in the very limited instances admitted by IHL, that the ICRC be given access to protected persons, that detainees be allowed to exchange family news, that families separated by frontlines be allowed to reunite, that (former) parties to a conflict cooperate to clarify the fate of missing persons, that mortal remains be if possible identified, that humanitarian organizations be given access to persons in need, that children be provided with appropriate education and that civilians, both in occupied and on enemy territory, have the opportunity to find employment. All the aforementioned is prescribed by IHL, but violations of such prescriptions are not war crimes. In addition, it is much easier to prove that an IHL violation of a rule the violation of which constitutes a war crime has been committed by a party to an armed conflict than to determine who is the responsible individual, to bring that individual before a court and to prove his or her guilt beyond reasonable doubt.

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Footnotes

- [1] See GC I-IV, Arts 50/51/130/147 respectively; P I, Arts 11(4), 85 and 86
- [2] See P I, Art.85(5)
- [3] See GC I-IV, Arts 49/50/129/146 respectively; P I, Art. 85(1)
- [4] See P I, Arts 86 and 87
- [5] See e.g., UN, Statute of the ICTY; Art. 3 as interpreted by the Tribunal in ICTY, The Prosecutor v. Tadic [Part A.]; and see also UN, Statute of the ICTR [Art. 4], and The International Criminal Court [Part A., Art. 8(2)(c) and 8(2)(e)]
- [6] See infra, cases referred to under Implementation Mechanisms, IX. Implementation in time of non-international armed conflict, 6. Repression of individual breaches of IHL, in particular ICTY, The Prosecutor v. Tadic [Part A.], and Criminal repression: 1. Definition of crimes: b. the extension of the concept of grave breaches to non-international armed conflicts
- [7] See Germany, International Criminal Code, Section 8; United States, War Crimes Act, B. 1997 Amendment to the War Crimes Act of 1996; Canada, Crimes Against Humanity and War Crimes Act, section 4(3); Belgium, Law on Universal Jurisdiction, A. 2003 Criminal Code, Art 136(c)

I. Definition of crimes

a. **the concept of grave breaches of IHL and the concept of war crimes**

GC I-IV, Arts 50 /51/130/147 respectively; PI, Arts 11(4), 85 and 86 [CIHL, Rule 151 and 156]

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a. **the extension of the concept of grave breaches to non-international armed conflicts?**

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a. **crimes against humanity**

Introductory text

Compared with war crimes or common crimes, the specific feature of crimes against humanity is that they are

committed systematically, in accordance with an agreed plan, by a State or an organized group. Perpetrators of crimes against humanity are aware that the acts they are committing are part of a general policy of attacking a civilian population. They are therefore particularly serious crimes, especially because they can claim a large number of victims.

The concept of crimes against humanity evolved over the course of the twentieth century. The Charter of the International Military Tribunal of 8 August 1945 enabled punishment of those who had committed particularly odious crimes during the Second World War, which it defined as “crimes against humanity”.

The concept of crimes against humanity was subsequently recognized as forming part of customary law and being universally applicable. Moreover, it is no longer necessarily associated with the existence of an armed conflict. [8] Finally, the concept of crimes against humanity has also developed in terms of the acts which it makes criminal offences by including, in particular, apartheid [9] and sexual violence. [10]

The legal definition of crimes against humanity, as they are understood today, can be found in the ICC Statute. A crime against humanity is one of the acts listed below when committed “as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”: [11] murder; extermination; enslavement; deportation; persecution on political, racial, national, ethnic, cultural, religious, gender or other grounds; apartheid; arbitrary imprisonment; torture; rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence; enforced disappearance of persons; or other inhumane acts intentionally causing great suffering or serious injury to the body or to mental or physical health. Genocide, for its part, may be understood as a particularly serious crime against humanity (see infra, e) genocide, p. 403).

This definition allows us to understand the particular nature of crimes against humanity as opposed to war crimes: they may be committed at any time and target the civilian population, regardless of nationality or bonds of allegiance. The mens rea also contributes to the specific nature of those crimes: the perpetrator of the crime must be aware that it is linked to a widespread or systematic attack directed against the civilian population.

This is not the place to review all of the above-mentioned acts, which are defined in the ICC Statute. However, the crime of persecution deserves particular attention to the extent that it is, by definition, relatively close to the crime of genocide. Indeed, it is the only crime against humanity that requires a specifically discriminatory intention. As a crime against humanity, persecution must be committed “on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court”. [12] It differs from genocide in that the latter requires an intention to eliminate the group and that group can only be racial, national, ethnic or religious.

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a. **genocide**

Introductory text

Coined by Raphaël Lemkin in the early 1940s, the term “genocide” is derived from the word genos, meaning “race” in Greek, and the Latin verb caedere, meaning “to kill”. In the face of the barbarity of the first half of the twentieth century, a neologism was needed to describe situations in which one group of individuals decides to annihilate another.

For a legal definition of genocide, the best source is the Convention on the Prevention and Punishment of the Crime of Genocide, [13] which entered into force in 1951 and is today part of customary international law. The definition given in Arts II and III of the Convention is repeated verbatim in the statutes of the international criminal tribunals. [14] The explanations given below are broadly based on the case law of those courts.

The fact that international law was once again “one war late” may be lamented. However, can it be blamed for failing to foresee what remains the “ultimate crime”, the “gravest violation of human rights that it is possible to commit”? [15]

By virtue of its scale, the crime of genocide goes beyond the strict framework of IHL, and it is not actually essential that an armed conflict exist for an act of genocide to be committed. It is nonetheless important to define genocide in a work such as this since most such acts are committed in conflict situations.

The definition of genocide includes a list of acts, i.e. “killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; forcibly transferring children of the group to another group”. However, committing one of these acts is not enough for it to be deemed genocide.

The specific nature of the crime of genocide lies in the specific intention (dolus specialis) underlying its perpetration. The acts committed may, in fact, be “straightforward” killings, acts of torture, rape or crimes against humanity, for example, but their distinctive feature is that the specific intention of the perpetrators is not to kill or ill-treat one or more individuals but to annihilate the group to which those individuals belong. It is thus that intention which distinguishes genocide from murder and crimes against humanity.

The specific character of the crime of genocide does not therefore lie in the nature of the act itself but in the thinking (mens rea) behind its perpetration. That thinking is the “intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”. The different elements that go together to make up this definition deserve to be clarified in greater depth.

The intention cannot be easily identified. It may be deduced from the words or the general behaviour of the perpetrator (for example, insults directed at a particular group), the systematic and methodical manner in which the crimes were committed, the fact that the choice of victims excluded members of other groups, the premeditated nature of the crimes, etc. Thus, when killing someone (for example), the person committing genocide does not desire the death of that individual in particular but rather the destruction of the group “as such” to which that person belongs.

Moreover, the perpetrator’s intention does not necessarily have to be to destroy the whole of the group – the intention to destroy it “in part” is sufficient for the act to be called genocide. Here again, it is not easy to

determine what is meant by “intent to destroy in part”. As things stand with regard to case-law interpretations of the definition of genocide, the intent to destroy must be aimed at a substantial part of the targeted group, at a significant part of the group in terms of quantity or quality. It follows that the expression “in part” also implies that genocide may be carried out within a defined geographical area such as a city.

Finally, how the “group” targeted by those committing genocide is determined is also an essential element of the definition. In the current state of customary international law, the categories referred to in the definition must be considered to be exhaustive. Political, economic or other groups of people that may be considered to be “distinct” from the rest of the population cannot be the target of genocide from a legal viewpoint. This is because groups that are not “national, racial, ethnical or religious” are considered to be “unstable” or “fluctuating”. It is true that the composition of the groups referred to in the definition of genocide is not easily determined in every case and that adherence to a political or economic group is probably even more difficult to establish.

Objective and subjective criteria may be used to identify the four groups targeted in the definition. For example, adherence to a religious group may be ascertained through objective factors such as the holding of services. Membership of other groups can mostly be ascertained in a more subjective manner, by virtue of the stigmatization of those groups by “others”, in particular those committing genocide.

It is important to stress that certain types of conduct related to the direct perpetration of acts of genocide are also deemed to be criminal. These are: conspiracy to commit genocide; direct and public incitement to commit genocide; attempted genocide; and complicity in genocide. Thus, for example, an individual may be sentenced for “conspiracy to commit genocide” or for “direct and public incitement to commit genocide” even if no act of genocide has been committed by himself or others. These are distinctive crimes which do not require the incitement or conspiracy to be followed by an actual effect. The implication of these acts is that it is the specific intention of those involved in the incitement or the conspiracy to destroy in whole or in part a group as such. By contrast, complicity in genocide – which may be characterized by giving instructions or by providing the means, aid or assistance to commit genocide – may not be deemed criminal unless the main crime has been committed. The accomplice did not necessarily have to have been motivated by the specific intent to commit genocide. He had to be – or should have been – aware of it.

Those reading these lines will probably be shocked to note the extent to which, coldly and mechanically, the law manages to apply concepts and definitions that may appear to have little to do with the atrocity of genocide itself. This had to be done, however, to achieve the objectives targeted by the Convention on Genocide, i.e. to prevent the crime and universally repress instances of it without making any concessions. The Convention, which is recognized as having customary force [16] and whose obligations are erga omnes in nature, requires all States to punish the crime of genocide. It is indeed essential for the law to be an uncompromising – fair and differentiated – instrument for repressing ordinary crimes, war crimes, crimes against humanity and the crime of genocide. The seriousness of the crime of genocide is such that a precise

definition and universal repression were required. That is why the legal concept takes the liberty of putting into words what nonetheless remains absolutely unspeakable.

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Footnotes

- [8] See, in particular, ICTY, The Prosecutor v. Tadic [Part C.]
- [9] See International Convention on the Suppression and Punishment of Apartheid, 30 November 1973, Article 1; available at treaties.un.org
- [10] See Article 7(1)(g) of the Statute of the International Criminal Court (ICC), see The International Criminal Court [Part A.]
- [11] See Article 7(1) of the ICC Statute, see The International Criminal Court [Part A.]
- [12] See Article 7(1)(h) of the ICC Statute, see The International Criminal Court [Part A.]
- [13] The text of the Convention is available on treaties.un.org
- [14] See UN, Statute of the ICTY (Part C., Art. 4), and UN, Statute of the ICTR (Art. 2). See also The International Criminal Court (Part A. Arts 6 and 25)
- [15] United Nations, E/CN.4/Sub.2/1985/6, 2 July 1985, paragraph 14: “Revised and updated version of the Study on the question of the prevention and repression of the crime of genocide”, generally referred to as the “Whitaker Report”.
- [16] See, in particular, ICTY, The Prosecutor v. Jean-Paul Akayesu [Part A., para. 495]

II. Participation in war crimes

a. **Participation, complicity and instigation**

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- ICTY, The Prosecutor v. Galic [Part A., paras 168-169 and 609-749]
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- ICTY, The Prosecutor v. Mrksic and Sljivancanin [Part B., para. 49]
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a. **Command responsibility**

P I, Arts 86(2) and 87(3) [CIHL, Rules 152 and 153]

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- ECtHR, Milanović v. Croatia
- The International Criminal Court [Part A., Art. 28]
- Germany, International Criminal Code [Paras 4 and 13]
- Canada, Crimes Against Humanity and War Crimes Act [Section 5]
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III . Defences

Introductory text

Some defences normally available to an accused are excluded, restricted or raise particular problems in case of war crimes.

For example, contrary to what is applied at the national level in most States, justifying an act on the grounds that it was prescribed by the law of the land is something that has no application in international criminal law. Nor does the official position of the accused – even if he acted as head of State or government – relieve him or her of responsibility or constitute grounds for reducing the punishment. [17] By the same token, international criminal law holds that the fact that a crime has been committed by a subordinate does not exonerate his superiors if they knew or had reason to know that the subordinate was committing or was going to commit a crime and did not try to prevent him from doing so. This rule was not set out in the Charter of the Nuremberg Tribunal. However, it was subsequently reflected in various post-World War II decisions.

[18] The duty of commanders vis-à-vis their subordinates is stipulated in Art. 87 of Protocol I, whereas Art. 86 stipulates the criminal responsibility of commanders who have failed to fulfil their duty. [19]

The acceptability of a defence based on superior orders seems less clear. This defence consists of arguing that the accused was obeying orders issued by a government or a superior. Historically, some have considered it a valid defence while others have considered it to be a mitigating circumstance, or both. The Charter of the Nuremberg Tribunal explicitly ruled it out as a valid defence but allowed it to be a mitigating circumstance. [20] However, the Nuremberg Tribunal refused to enforce that rule and to take account of superior orders when deciding the sentence. More recently, the decisions regarding Eichmann [21] and Barbie [22] confirmed the rule. Until recently, the fact that orders were given by a hierarchical superior was therefore systematically ruled out as a defence. This was demonstrated by the Allied Control Council Law No. 10 (Art. II.4[b]), the Statute of the International Military Tribunal in Tokyo (Art. 6), the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Art. 2[3]), the various versions of the Draft Code of Crimes against Peace and the Security of Humanity (Art. 5) and, more recently, the Statutes of the International Criminal Tribunal for Rwanda (ICTR, Art. 6(3)) and the International Criminal Tribunal for the former Yugoslavia (ICTY, Art. 7(4)). The adoption of the Statute of the International Criminal Court (ICC) has perhaps changed matters. The Statute allows a defendant to cite superior orders in his defence on three conditions: that the subordinate was under a legal obligation to obey the order, that he did not know that the order was unlawful and that the order was not obviously unlawful. [23] A priori that restriction suggests that a defence of this kind will not easily pass the acceptability test. What is more, the ICC Statute limits the presentation of such a defence all the more since an order to commit genocide or a crime against humanity is obviously unlawful. [24]
The ICC Statute allows other defences: mental defect, illness, [25] a state of intoxication depriving the person of the ability to appreciate the criminal nature of his conduct, [26] a state of distress, [27] and irresistible duress. [28]

A defence based on duress has frequently been associated with a defence citing superior orders. However, a defence based on duress has its own definition and consequently an independent application. In fact, the difference is to be found in particular at the level of whether or not a moral choice was available. A soldier who is ordered to set off a bomb in a hospital is not morally obliged to carry out the order and can decide whether to follow it or not. By contrast, if the soldier in question carries out the order to avoid being exposed to a direct threat to his life or other serious consequences, this is a case of duress. Although the ICTY decided by three votes to two that the duress-based defence was not grounds for exoneration in the case of crimes against humanity or war crimes, [29] the ICC Statute stipulates that duress may justify relieving the individual of criminal responsibility. [30] Thus, when the actual will of an individual is worn down or destroyed completely by a situation, this will be deemed a case of irresistible duress and thus grounds for lifting criminal responsibility.

A defence explicitly accepted by the ICC Statute for war crimes, is self-defence, i.e. when the accused has

acted with the intention of defending himself or another person, or even items essential to survival or to the accomplishment of a military mission, against an imminent and unlawful use of force and the act is proportionate to the danger. [31] This is very astonishing in case of international crimes. The provision fortunately but ambiguously clarifies that, to use this defence, it is not 'in itself' sufficient for an act to be carried out as self-defence in the sense of *ius ad bellum*. Even given this restriction, it is difficult to imagine the circumstances in which that defence could actually be advanced to justify a war crime (and even less how it could justify genocide or a crime against humanity). Indeed, using force against a person who unlawfully resorts to force is not even prohibited under IHL and can therefore not possibly constitute a war crime which would have to be justified by the defence of self-defence. If the person is a civilian, he or she will cease to enjoy protection against attacks, [32] and - and therefore even killing him or her will not constitute a war crime. If the attacker is a combatant attacking a civilian in violation of IHL, such conduct of the civilian attacked does not even constitute direct participation in hostilities, which is anyway not a war crime. As for defence of property essential to survival or to the accomplishment of a military mission, it too is not prohibited by IHL and we do not understand why it would necessitate the commission of war crimes (which would need to be justified by a defence)

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- Canada, Crimes Against Humanity and War Crimes Act [Sections 11-14]
- ICTY, The Prosecutor v. Kupreskic et al. [Paras 511-520]

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a. **Self-defence?**

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- International Law Commission, Articles on State Responsibility [Part A., para. 3 of the commentary of Art. 21]
- ICTY, The Prosecutor v. Martic [Part C., para. 268]

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a. **Superior orders?**
[CIHL, Rules 154 and 155]

CASES AND DOCUMENTS

- The International Criminal Court [Part A., Art. 33]
- Germany, International Criminal Code [Para. 3]
- Canada, Crimes Against Humanity and War Crimes Act [Section 14]
- Belgium, Law on Universal Jurisdiction [Part A., Art. 136(g)(2)]
- British Military Court at Hamburg, The Peleus Trial
- United States Military Tribunal at Nuremberg, United States v. Wilhelm List [Part 3.(ii)]
- Belgium, Public Prosecutor v. G.W.
- United States, United States v. William L. Calley, Jr.
- Belgium, Belgian Soldiers in Somalia
- Canada, R. v. Brocklebank [Paras 5, 11 and 96-101]
- UN, Statute of the ICTY [Part C., Art. 7(4)]
- ICTY, The Prosecutor v. Mrksic and Sljivancanin [Part A., paras 669 and 673; Part B., paras 64 and 74]
- Colombia, Constitutional Conformity of Protocol II [Paras 36-40]
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a. **Defence of necessity?**

CASES AND DOCUMENTS

- The International Criminal Court [Part A., Art. 31(1)(c) and 31(1)(d)]
- Belgium, Law on Universal Jurisdiction [Part A., Art. 136(g)(1)]
- British Military Court at Hamburg, The Peleus Trial
- United States Military Tribunal at Nuremberg, United States v. Alfried Krupp et al. [4 (vii)]
- Canada, Ramirez v. Canada

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- [17] Agreement for the prosecution and punishment of the major war criminals of the European Axis, Article 7, available at http://www.icrc.org/ihl; Charter of the International Military Tribunal for the Far East, reproduced at http://avalon.law.yale.edu; Statute of the ICTY [UN, Statute of the ICTY, p. 1742], Art. 7(2); Statute of the ICTR [UN, Statute of the ICTR, p. 2104], Art. 6(2); ICC Statute [The International Criminal Court [Part A.]], Art. 27
- [18] See, in particular, United States, In re Yamashita; United States Military Tribunal at Nuremberg, United States v. Wilhelm List; The Tokyo War Crimes Trial
- [19] See also ICTY Statute, Art. 7; ICTR Statute, Art. 6;ICC Statute, Art. 28, referred to supra, note 406
- [20] See Charter of the Nuremberg Tribunal, Art. 8 (available at http://www.icrc.org/ihl)
- [21] A.G. Israel v. Eichmann, in ILR, Vol. 36, 1968, p. 18
- [22] Barbie, 8 July 1983, Journal du Droit International, 1983, p. 791; that decision was confirmed by the Court of Appeal: Barbie, 6 October 1983, in *RGDIP*, 1984, p. 507
- [23] See Art. 33(1), The International Criminal Court [Part A.]
- [24] See Art. 33(2), The International Criminal Court [Part A.]
- [25] See Art. 31(1) (a), The International Criminal Court [Part A.]
- [26] See Art. 31(1)(b), The International Criminal Court [Part A.]
- [27] See Art. 31(1)(c), The International Criminal Court [Part A.]. See also “Atelier sur l’article 31, par. 1c) du Statut de la Cour pénale internationale, coordonné par Éric David”, in *RBDI*, 2000-02, pp. 335-488
- [28] See Art. 31(1)(d), The International Criminal Court [Part A.]
- [29] See ICTY, Prosecutor v. Drazen Erdemovic, (IT-96-22-T), Judgement of the Appeals Chamber of 7 October 1997, para. 19, available on http://www.icty.org
- [30] See Art. 31(3), The International Criminal Court [Part A.]
- [31] See Art. 33(1)(c), The International Criminal Court [Part A.]
- [32] See P I, Art. 51(3)

IV. The prosecution of war crimes

a. **The universal obligation to repress grave breaches**

GC I-IV, Arts 49/50/129/146 respectively; P I, Art. 85(1) [CIHL, Rules 157 and 158]

CASES AND DOCUMENTS

- UN, Secretary-General's Reports on the Protection of Civilians in Armed Conflict
- Switzerland, Military Penal Code
- Germany, International Criminal Code
- Canada, Crimes Against Humanity and War Crimes Act [Sections 6-8]
- Belgium, Law on Universal Jurisdiction [Part B., Arts 10.1(a) and 12(a) and Part C.]
- United States, War Crimes Act
- Canada, Ramirez v. Canada [Para. 11]
- Sudan, Report of the UN Commission of Enquiry on Darfur [Paras 613-615]
- Sudan, Arrest Warrant for Omar Al-Bashir [Part A.]
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aa) relation to amnesty

[CIHL, Rule 159]

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bb) no statutory limitations

[CIHL, Rule 160]

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cc) link with international immunities

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a. **Mutual assistance in criminal matters**
P I, Art. 88 [CIHL, Rule 161]

CASES AND DOCUMENTS

- Luxembourg Law on Cooperation with the International Criminal Courts,
- Switzerland, X. v. Federal Office of Police
- Spain, Universal Jurisdiction over Grave Breaches of the Geneva Conventions

a. **Judicial guarantees for all those accused of war crimes**
GC I-IV, Arts 49(4), 50(4), 129(4) and 146(4) respectively; GC III, Arts 105-108; P I, 75(7)

CASES AND DOCUMENTS

- The International Criminal Court [Part A., Arts 20, 22-25, and 30-32]
- Chile, Prosecution of Osvaldo Romo Mena
- United States, The Schlesinger Report
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- UN, Statute of the ICTY [Part C., Art. 21]
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V. The international criminal courts

Introductory text

IHL does not mention international criminal justice. It requires that war crimes be prosecuted, and this may be done independently of the existence of international criminal courts. In reality, however, IHL provisions on the prosecution of war crimes were largely ignored until 1990. The armed conflicts in the former Yugoslavia, with their range of systematic atrocities, brought about a radical change in that respect. The international community felt duty-bound to respond. It established the ICTY through the sole emergency procedure known to current international law: a Security Council resolution. [33] Once the ICTY had been set up, the double standard would have been too obvious if a similar tribunal, the ICTR, had not been set up following the armed conflict and the genocide that took hundreds of thousands of lives in Rwanda. [34] There is certainly room for doubt about the way in which those ad hoc international criminal tribunals were set up. However, if steps had been taken to establish them according to the traditional method of constituting new international institutions – by means of a convention – the world would have waited long for them to come into existence and to have jurisdiction over - and a real possibility to apprehend - most persons suspected of war crimes in those contexts. And without those ad hoc tribunals, which served as precursors, the ICC Statute would probably not yet have been adopted.

The ICTY had the authority to take cognizance of acts of genocide, crimes against humanity, grave breaches of the Geneva Conventions and violations of the laws and customs of war. The concept of grave breaches

applies only to international armed conflicts. Surprisingly, the ICTY Statute did not mention grave breaches of Protocol I, despite the fact that the former Yugoslavia and its successor States were parties thereto. It should be recalled that the Protocol expands the concept of grave breaches to many violations of the rules governing the conduct of hostilities, which it brought up to date. The ICTY, however, plugged the gaps as far as non-international armed conflicts and the conduct of hostilities were concerned by applying a broad interpretation to the concept of "violations of the laws or customs of war". [35]

For its part, the ICTR had the authority to take cognizance of acts of genocide, crimes against humanity and serious violations of Art. 3 common to the Conventions and of Protocol II. The concept of "serious violations" is different from that of "grave breaches". The latter applies only in international armed conflicts, whereas the conflict in Rwanda was not of an international character. It was the first explicit reference, in an international document, to the fact that violations of IHL committed during non-international armed conflicts may constitute international crimes.

The ICTY had authority with regard to any person who has committed one of the crimes listed in its Statute on the territory of the former Yugoslavia since 1991. By contrast, the ICTR is authorized only to deal with crimes committed during 1994 in Rwanda or by Rwandan citizens in the territory of neighbouring States.

The ICTR closed at the end of 2015 and the ICTY at the end of 2017. Since then, an "International Residual Mechanism for Criminal Tribunals" [36] is mandated to perform residual functions and to ensure that that the closure of the ad hoc tribunals does neither mean impunity nor curtails the rights of those being tried or having been sentenced.

All tribunals develop and refine the law they apply. In so doing, they demonstrate the realism of that law and heighten its credibility. In that respect, the ICTY and the ICTR have exceeded all expectations. In a short space of time they have *inter alia*: considerably developed the law of non-international conflicts through customary rules it identified; clarified the meaning of many substantive rules of IHL, modified the distinction between international and non-international armed conflicts; redefined the concept of protected persons; made more explicit the active and passive scope of application of IHL; built up and coordinated the foundations of general principles of international criminal law and clarified the concepts of genocide and crimes against humanity. ICTY and ICTR case law may well be criticized from many points of view, but it has given a remarkable boost to IHL, which is now referred to daily by defence lawyers and public prosecutors, discussed in learned articles and finally forms the basis for well-reasoned verdicts.

It was only logical that such a development could not be limited to crimes committed in the former Yugoslavia and Rwanda, which would have seriously undermined the credibility of international criminal law and therefore indirectly also of IHL. It is therefore fortunate that during a window of opportunity in international relations, in 1998, the Statute of a permanent International Criminal Court (ICC) was adopted.

The ICC Statute – the successful outcome of more than 50 years of effort – entered into force on 1 July

2002, having been ratified by 60 States and it had in 2017 124 States parties. [37] As a treaty, it is binding only on the States party to it and persons under their jurisdiction. The Court is authorized to deal with genocide, crimes against humanity, war crimes and aggression.

In international armed conflicts, all grave breaches of the Geneva Conventions fall within the jurisdiction of the Court. [38] Conversely, Protocol I is not mentioned and the other serious violations of the law of international armed conflicts listed by the ICC Statute do not cover all the grave breaches defined by Protocol I. For example, the Statute makes no reference to unjustified delays in repatriating prisoners of war and civilians. On the other hand, it clarifies that rape, sexual slavery, enforced prostitution, forced pregnancy and enforced sterilization are war crimes. [39] Moreover, the Statute defines the enlistment of children under 15 years of age and making them participate actively in the hostilities as war crimes. [40] The rules concerning the use of certain weapons cover chemical weapons, poison and dum-dum bullets. [41] States remained however opposed to referring to nuclear weapons, biological weapons and laser weapons and have relegated the definition of weapons likely to cause superfluous injury to a list which has yet to be drawn up by the States Parties. [42] As far as non-international armed conflicts are concerned, the ICC Statute represents spectacular progress in terms of IHL. It is the first treaty to contain a detailed list of war crimes in those situations and confirms once and for all that the concept of war crimes also applies to such situations. The list covers serious violations of Art. 3 common to the Conventions [43] as well as, in a distinct letter of the Statute, a large number of other violations, including crimes committed on the battlefield. [44] However, crimes such as attacks against civilian objects, attacks with clearly excessive effects on civilians, using human shields and starving civilians are missing. In 2010, the limited list of crimes consisting of using certain weapons in IACs has been extended to NIACs in an amendment ratified (as of 2017) only by 34 States. [45]

War crimes in NIACs have been divided up into two lists, one covering all armed conflicts not of an international character [46], the other armed conflicts not of an international character “that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups”. [47] Under the normal rule of treaty interpretation according to which a provision (or distinction) is to be presumed to have an “effet utile”, one would conclude that there are two different scopes of application for the listed rules of the ICC Statute (and therefore possibly equally for the underlying rules of IHL). However, the ICC has decided differently [48]. This interpretation may be correct, because non-international armed conflicts must perforce take place on the territory of a State, must always be protracted in the sense of fulfilling certain conditions of intensity and armed groups participating in an armed conflict must always fulfil a minimum of organization.

The Court may exercise its authority vis-à-vis the States Parties without having to obtain consent for each case of application. If the State on whose territory the acts or omissions being prosecuted took place or the State of which the person accused of a crime is a national is bound by the Statute or recognizes in a separate declaration the authority of the ICC, the ICC may exercise its jurisdiction. [49] It is therefore not always necessary that the State of which the accused is a national is a party of the ICC Statute or gives its

consent to the prosecution. That the territorial State or the national State of the accused are parties to the ICC Statute or have accepted the jurisdiction of the ICC is also unnecessary when the Security Council refers a situation to the ICC by means of a resolution adopted in application of Chapter VII of the UN Charter. [50] Conversely, the Security Council may also ask, through such a resolution, that no inquiry be opened and proceedings be deferred for a renewable period of 12 months. [51] In a final provision, which we consider regrettable, the Statute stipulates that a State which becomes party to it may declare that, for a period of seven years from the entry into force of the text, it does not accept the Court's jurisdiction with respect to war crimes when it is alleged that those crimes have been committed on its territory or by its nationals. [52] Thus, even the international crimes most firmly established in current treaty law may evade the authority of the ICC for seven years.

The admissibility of a case before the ICC is equally limited by the principle of complementarity. It entails that prosecutions for the same crime for domestic courts have the priority, except if the prosecuting State is unwilling or unable genuinely to carry out the investigation or prosecution. [53]

Only the Prosecutor, who is elected by the States Parties, may refer a specific case to the Court. Situations may be referred to the Prosecutor by any State Party and by the Security Council, but the Prosecutor may also open enquiries on his or her own initiative. [54] In the latter case, the Prosecutor must, however, present a request for authorization to the Pre-Trial Chamber. If the Chamber decides to authorize the opening of an enquiry, or if a State has referred a matter to the Prosecutor and he intends to conduct the enquiry, the Prosecutor must notify all the States Parties aswell as the other States concerned. If one of those States informs the Prosecutor that proceedings concerning the matter in question are already under way at the national level, the Prosecutor must place the proceedings under the authority of the State concerned, unless the ICC Pre-Trial Chamber authorizes her to continue the enquiry herself. There may be serious doubts about whether, on the one hand, that procedure contributes to the efficacy of the prosecutions and, on the other, whether it means that the right of the accused to have his case heard within a reasonable time can be respected. However, it does reflect the States' fears of any jurisdiction which might judge the conduct of their agents independently of their wishes.

One of the outstanding features of the ICC Statute is that it codifies – for the first time in a treaty whose framers intended it to be universal – the general part of international criminal law. [55] It succeeds in bringing together the general principles of criminal law existing in the world's various legal systems and those deriving from the instruments of International Human Rights Law.

In the traditional view of international law, even when certain individual acts had been declared international crimes, the obligation or the right to prosecute the perpetrators used to be the task of one, several or – e.g. in the case of pirates - all the States. The State was thus a vital intermediary between the rule of international law and the individual who had violated that law. It was only with the establishment of international criminal courts that this veil was lifted and the responsibility of the individual before international law and the

international community became visible. These courts are therefore the most obvious manifestations of that new layer of international law – which superimposes itself on traditional international law governing the coexistence of and cooperation between States, but without replacing it – namely, the internal law of the international community of more than seven billion human beings. Compared with the typical response to violations from the traditional layer – sanctions – criminal trials before international tribunals have obvious advantages: they are governed by law and do not depend on the good intentions of States; they are set in train in a regular, formalized procedure which is the same for everyone; they are not subject to veto and are influenced far less by political considerations than Security Council resolutions, the only body of international society empowered to decree sanctions; they are directed against the guilty individuals and do not affect innocent individuals, as military or economic sanctions inevitably do.

Despite all this, internal jurisdictions will retain a key role in the prosecution of war crimes – even when the ICC functions more effectively and is empowered to deal with every situation in which international crimes are committed. First, that role will be quantitative, as international justice will never be able to cope with the hundreds of thousands of crimes which, unfortunately, blemish every major conflict. It will be able only to select a few specific, symbolic cases in order to put a stop to impunity. All the rest must be dealt with by national systems. Moreover, a policy of international criminal law and defence of international society implemented by the international judicial bodies alone would run counter to the principle of subsidiarity and would require disproportionate funds. The role of national justice will also be qualitative, however. Just as in each country the rule of law and its credibility depend on the quality, the independence and the effectiveness of the courts of first instance, international justice will continue to depend on national courts. Without them, the international courts will at most function as a fig leaf when it comes to war criminals. For those reasons, the existence of international courts should under no circumstances discourage the States, their prosecutors and their courts from fulfilling their obligations with regard to war crimes.

In conclusion, war crimes and the obligation to prosecute them already existed before international courts were set up. However, those courts constitute an institution for the implementation of the existing rules and have therefore ensured that those rules become reality. As in so many other areas, setting up an institution, and paying its staff for the sole purpose of dealing with a problem is an important step toward finding a solution, but not sufficient in itself. Until recently, international criminal courts existed for only two of the many situations requiring them. Those two ad hoc courts represented a vital initial step. Once the ICC Statute has been universally accepted, other steps will follow. Currently, the ICC is confronted to a dilemma which is difficult to resolve. The first alternative is to continue to prosecute the most widespread crimes in the situations over which it has complete jurisdiction and it will be accused to apply double standards and to prosecute mainly Africans. In our opinion, those accusations brought forward by certain African governments are not justified, because most cases in Africa are dealt with by the ICC on the basis of the request of an African State and in all cases the aim is to deliver justice to African victims. It is however true that the current caseload of the ICC gives the erroneous impression that war crimes are mainly committed in Africa. The second alternative for the ICC is therefore to prosecute equally (in terms of the crimes it has jurisdiction for)

less widespread crimes committed in situations for which it has only jurisdiction over certain segments, to demonstrate that there is no impunity for representatives of powerful States. It will then run into serious political resistance from permanent members of the UN Security Council and other powerful States, into accusations that it is politicized and into even greater difficulties than now to obtain the necessary evidence and the transfer of the suspects to The Hague. A similar dilemma appears between the current tendency to prosecute mainly rebels and the fact that the ICC was mainly needed to prosecute those in government. On all those avenues, the very credibility of international justice is at stake because justice which is not the same for everyone is not justice. A genuine solution would be an acceptance of the ICC by all States and their genuine will to prosecute those who commit war crimes in their name themselves or based upon the principle of universal jurisdiction. We are still incredibly far from realizing this dream, but closer than 20 years ago.

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- Special Panels for Serious Crimes in Timor-Leste

  In March 2000, following the establishment of the United Nations Transitional Administration of East-Timor (UNTAET), Special Panels functioning within the framework of the Dili District Court were created in Timor-Leste. The Panels are composed of one national and two international judges and are tasked with prosecuting serious crimes committed in 1999, including genocide, war crimes, crimes against humanity and torture.

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Footnotes

- [33] See UN, Statute of the ICTY
- [34] See UN, Statute of the ICTR
- [35] See ICTY, The Prosecutor v. Tadic [Part A., paras 86-136]
- [36] See UNSC Resolution 1966 (2010) and the IMCT available at www.unmict.org
- [37] See The International Criminal Court [Part A.]

- [38] Ibid., Art. 8(2)(a)
- [39] Ibid., Art. 8(2)(b)(xxii)
- [40] Ibid., Art. 8(2)(b)(xxvi)
- [41] Ibid., Art. 8(2)(b)(xvii)-(xix)
- [42] Ibid., Art. 8(2)(b)(xx)
- [43] Ibid., Art. 8(2)(c)
- [44] Ibid., Art. 8(2)(e)
- [45] Amendment to the Rome Statute of the International Criminal Court on War Crimes, amended article 8, 10 June 2010, which added Art 8(2)(e) (xiii) to 2 (e) (xv)
- [46] Ibid, Art. 8(2)(c), whose scope of application is defined in letter (d)
- [47] Thus the definition in ibid., Art. 8(2)(f) of the scope of application of letter (e)
- [48] See International Criminal Court, Trial Judgment in the Case of The Prosecutor v. Jean-Pierre Bemba Gombo, paras 132 and 133
- [49] Ibid., Art. 12(2)
- [50] See the first case of application in Sudan, Arrest Warrant for Omar Al-Bashir [Part A.]
- [51] See The International Criminal Court [Part A., Art. 16, and Part D.]
- [52] Ibid., A., Art. 124
- [53] Ibid., Art. 17
- [54] Ibid., Arts 13-15
- [55] Ibid., Arts 22-33