

# Curriculum on International Criminal Justice



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# Foreword

International criminal justice (ICJ) or international criminal law (ICL) discourse has been dominated by Western writing and commentary, often to the exclusion of African voices. Textbooks and published articles are primarily written by academics, scholars and practitioners outside the continent. It is rare to find a university in Africa that has a specific law course dedicated to ICJ. The best a student can hope for is a component on the International Criminal Court (ICC) as part of their elective international law course.

This is an anomaly that requires urgent attention as Africa has made a large contribution to the development of this area of law. The tribunals for Sierra Leone and Rwanda have ensured that there is an extensive record of case law and precedent relating to international crimes. All cases currently before the ICC emanate from Africa. The ICC currently has 14 cases in seven situations, all of which are in Africa: Uganda, Democratic Republic of Congo, Sudan, Libya, Côte d'Ivoire, Central Africa Republic and Kenya. Moreover, of the eight cases in which the ICC is conducting preliminary investigations two are in Africa: Nigeria and Guinea.

The continent also provides a rich source of complementarity cases. In the DRC, one of the countries with the largest number of cases before the ICC, the state is undertaking prosecutions, both military and civil, that complement the work of the ICC. These national prosecutions take place using legislation with wording that is similar, if not identical, to that contained in the Rome Statute. In the eastern Congo, members of armed groups, government security forces, and increasing numbers of civilians have been responsible for the highest rape rates in the world. In 2006, in response to the DRC's rape crisis and the general incidence of sexual and gender-based violence, the government passed a national law on sexual violence that clearly defines rape and other forms of sexual and gender-based violence, provides expedited judicial proceedings, and greater protection for victims. Initiatives have been ongoing for over two years to bring perpetrators of mass rape and murder to trial. The challenge has not been a lack of willingness, but the perceived inability of the DRC to undertake domestic prosecutions of international crimes. To overcome this problem, the DRC authorities, with the assistance of international partners, set in motion a process of creating sufficient capacity to enable it to launch these prosecutions.

As many of the perpetrators of mass rape in the eastern Congo are soldiers in the Congolese army, they are prosecuted in terms of military law before a military tribunal. In November 2002, the DRC adopted a new military code, the Military Penal Code Law 024/2602, that includes war crimes, crimes against humanity and genocide. The wording in the Code defining crimes against humanity, genocide and war crimes is very similar to that contained in the Rome Statute. It is this Code that has been used to prosecute members of the Congolese military for crimes against humanity, rape and murder. Despite a myriad of seemingly insurmountable challenges facing the Congolese legal system, there has been both the willingness and the ability to conduct these prosecutions in remote areas of the two eastern Kivu provinces.

One of the greatest challenges facing the courts in the DRC was (and to a large extent, still is) the lack of training and expertise in international criminal justice. None of the universities offer a law course that focuses on ICL. Judges and lawyers had to receive week-long courses (often offered by foreign legal experts) to enable them to effectively prosecute, defend and hear these cases. In a part of the world where infrastructure and resources are extremely limited it is difficult for judicial officers to have access to the latest case law and contemporary developments in ICL that would greatly aid their work. NGOs working in the criminal justice arena in the DRC print notes and articles that are circulated to lawyers but their distribution is irregular and limited in its reach. This has resulted in the application of law that is sometimes far from optimal.

The Open Society Initiative for Southern Africa (OSISA) has been working in the area of ICL for the last four years, through the provision of grants to Bar Associations and civil society organisations that focus on ICL, as well as supporting other initiatives such as international justice conferences and capacity building for judges and lawyers. Through this work it became clear that universities in the region needed to offer a specialised course on ICJ to law students and that the development of a curriculum would be essential for this to be successful.

To this end, the International Crime in Africa Programme at the Institute for Security Studies (ISS) was provided with a grant to develop the curriculum and to meet with a select number of universities to introduce the course as part of their law degree. The project was conducted in partnership with the Institute for Practical Legal Training (IPLT) in Durban. The universities in southern Africa that have either begun to offer the course, or will commence in 2012 are Eduardo Mondlane University in Mozambique, Chancellors College in Malawi, University of Botswana and Midlands State University in Zimbabwe.

During the curriculum development process, the ISS and IPLT conducted a vigorous process of consulting with regional lawyers and academics who have ICL experience and were keen to continue working in this field of law. Thus the final product has benefitted from the input of people from a variety of countries in the region. It will undergo translation into Portuguese and French and should become the pre-eminent source of information and knowledge for law students who are studying ICL. It is hoped that this curriculum will also be a valuable tool for lawyers who are in practice and wish to ensure that their knowledge is current and accurate. OSISA is committed to its wide distribution and implementation and

believes that this curriculum will make a valuable contribution to a discourse on ICL that is informed, progressive and addresses some of the major challenges facing international justice on our continent.

**Louise Olivier**

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*Johannesburg, 8 February 2012*

# Acronyms

AU	African Union
ASP	Assembly of States Parties (of the ICC)
CAT	Convention Against Torture (1984)
DPP	Director of public prosecutions
IAC	International armed conflict
ICC	International Criminal Court
ICJ	International Court of Justice
ICL	International criminal law
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ICRC	International Committee of the Red Cross
IHRL	International human rights law
IHL	International humanitarian law
ILC	International Law Commission
IMT	International Military Tribunal
IPLT	Institute for Practical Legal Training
ISS	Institute for Security Studies
NATO	North Atlantic Treaty Organisation
NIAC	Non-international armed conflict
NPA	National Prosecuting Authority (South Africa)
OTP	Office of the Prosecutor (of the ICC)
PCIJ	Permanent Court of International Justice
PCLU	Priority Crimes Litigation Unit (in South Africa's National Prosecuting Authority)
SADC	Southern African Development Community
UN	United Nations



# Module 1

## Introduction to public international law





# Introduction to public international law



## *Teaching notes*

This module is designed to give students with varying levels of exposure to international law a broad, common introduction to and overview of the discipline. The aim is to provide students who have no prior engagement with the discipline with the necessary knowledge to be able to understand its relationship with international criminal law. It will also serve as a 'refresher' for students who are already familiar with international law.

The focus of the module is on the aspects of international law implicated within international criminal law, and it is not a substitute for a general exposition of international law.

The module begins with a brief history of international law starting with the Peace of Westphalia in 1648, covering the major developments of the 19th and 20th centuries (with a focus on international criminal law) and ending with the establishment of the International Criminal Court (ICC). The module then goes on to address the founding principles of international law, namely state sovereignty, equality of states and peaceful settlement of disputes. Grasping these founding principles will be crucial to the students' ability to understand the creation of the system of international criminal law, its operation and most importantly its limitations.

The module then discusses the subjects of international law (states, international organisations and individuals). Here students must understand the continued centrality of the state within the international legal order and be able to contrast this with the rise of international criminal law. Finally, the sources of international law are discussed in order for students to understand the role that treaty and custom play in international criminal law.

The final portion of the module deals with international law within the domestic legal order generally, with a specific focus on Botswana, Malawi and South Africa. This section begins with a discussion of the different theories of domestication of international law, in the form of both treaties and custom, and then discusses the particularities of each of the above countries. The module concludes with a brief discussion of the relationship between domestic and international law.

## LEARNING OUTCOMES

At the end of this module, students must be able to:

- Outline the history of international law, with a particular focus on the developments that lay the foundations for modern international criminal law.
- Be familiar with the principles of sovereignty, equality of states, non-interference in domestic affairs, and peaceful settlement of disputes.
- Relate these principles to the development and structure of international criminal law.
- Identify the subjects of international law and the importance for international criminal law.
- Identify and distinguish between the sources of international law.
- Explain the relationship between domestic and international law, with a particular focus on their own country.

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# Introduction to public international law

## 1. INTRODUCTION

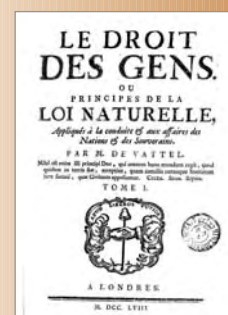
Historically, international law was a ‘body of rules and principles binding upon states in the[ir] relations with one another’.<sup>1</sup> Today, international law governs not only the relationship between states, but also that between states and international organisations, states and individuals (most notably in the field of human rights), and between organisations (which include the International Criminal Court (ICC)) and individuals. Nevertheless, as will be seen, the state and its statist concerns continue to be the primary drivers in the development (and enforcement) of international law. This module introduces the general principles and concepts of international law upon which international criminal justice principles examined in later modules are founded.

In order to understand better these general principles and concepts, a brief outline of their historical evolution is given here. Commonly, the starting point for any abbreviated history of international law<sup>2</sup> begins with the Peace of Westphalia in 1648, which ended 30 years of war that took place within modern-day Germany, and 80 years of war between Spain and the Dutch Republic.<sup>3</sup> Although the peace was agreed to ‘within the framework of the Holy Roman Empire’,<sup>4</sup> its terms became the subsequent blueprint for the modern nation state and the international legal order, which are founded on the interlocking principles of sovereignty, equality, and non-interference – although this system was realised much later.<sup>5</sup> Around the same time as the Peace of Westphalia, the Dutch jurist Hugo Grotius – the ‘father of international law’ – wrote what is widely considered to be the founding treatise of international law: *On the Law of War and Peace*.<sup>6</sup> The following two centuries were dominated by natural law thinkers who developed and modified Grotius’ law of nations,<sup>7</sup> the most famous of whom was Emmerich de Vattel who wrote the ‘greatest international-law textbook ever written’ – the *Law of Nations* – in 1758.<sup>8</sup>

The next important phase in the development of international law as it exists today was during the 19th century (1815–1919) which witnessed the rise of legal positivism,<sup>9</sup> led by international lawyers committed to ‘unshackling international law from its natural-law heritage and making it something like a science in the modern sense of that term’.<sup>10</sup> Significantly, this ‘golden age’ of positivism brought about the concretisation of the notions of sovereignty, (formal) equality of states,



Dutch jurist Hugo Grotius – the ‘father of international law’.



Title page of the original *Law of Nations*, 1758.

At the turn of the 20th century, the most important development for our purposes was the rise of the individual in international law



Trial of major war criminals before the International Military Tribunal at Nuremberg, 1945.

and the correlative principle of non-interference, which had been the basis of the Peace of Westphalia two centuries previously.<sup>11</sup>

More specifically, these earlier positivists viewed international law solely as the product of the will of states expressed in treaties and custom. The result was a more restrictive conception of international law, compared with the previously dominant understanding of a complete (natural) legal system, as a ‘world of fragments, an accumulation of specific, agreed rules, rather than as a single coherent picture.’<sup>12</sup> The state was the principal subject of international law, with individuals occupying no discernable role, nor possessing any rights and obligations.<sup>13</sup> This statist, consent-based approach to international law continues today, albeit in a modified form.<sup>14</sup> This period witnessed also two further developments of particular relevance to the existence and operation of modern-day international criminal law (ICL), namely: the ‘international community “legislating” by way of multilateral treaties’<sup>15</sup> (the majority of which related to armed conflict and formed the basis of both international humanitarian law and the law of war crimes);<sup>16</sup> and the use of inter-state arbitration in the settlement of disputes.<sup>17</sup>

At the turn of the 20th century, three developments took place which would not only reshape international law, but also lay the foundation for contemporary ICL in general and for the ICC in particular. The first was the establishment of international institutions as a means of collectively resolving disputes and ensuring stability. This development, inspired by the outbreak of World War I which led to the formation of the League of Nations in 1919, culminated in the establishment of the United Nations (UN) in 1945 in the aftermath of World War II.<sup>18</sup>

The second, and perhaps the most important from an ICL perspective, was the rise of the individual in international law: as the bearer of rights under international human rights law (IHRL); and with rights and obligations under international humanitarian law (IHL), with accompanying punitive sanctions for egregious violations of these legal norms under ICL.<sup>19</sup>

The third was the resurgence of natural law thinking – as the philosophical foundation, to varying degrees, for IHRL, IHL, and ICL – amongst international lawyers and statesmen in reaction to the horrors committed by Nazis in World War II (and the instability they occasioned in Europe and beyond). Most immediately, and relevantly, the Allied powers established the International Military Tribunal (IMT) at Nuremberg<sup>20</sup> for the ‘just and prompt trial and punishment of the major war criminals of the European Axis,’<sup>21</sup> together with the IMT for the Far East.<sup>22</sup>

Following World War II, ‘international law entered upon a period of unprecedented confidence and prestige,’<sup>23</sup> in which it promised to bring about a ‘new world order.’ Its centrepiece was the UN, which was established in order:

[T]o save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and

to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and

to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and

to promote social progress and better standards of life in larger freedom.<sup>24</sup>

To this end, and with the exception of self-defence under article 51 and action taken by the UN Security Council under article 42 in the name of ‘international

peace and security, article 2(4) of the UN Charter prohibits states from using force against the territorial integrity and political independence of other states.<sup>25</sup>

Although the principle of non-interference survived in article 2(7) of the UN Charter, it was made subject to the coercive powers of the UN Security Council.<sup>26</sup> The UN Charter also established a number of mechanisms for promoting and protecting human rights, including the UN Commission on Human Rights.<sup>27</sup>

However, the promise of a ‘new world order’ was quickly tempered by the onset of the Cold War, during which time the principles of the UN Charter and international law commonly were subjected to the dictates of geopolitics, and flatly ignored at times. Notwithstanding this, international law continued to develop (albeit often in paper form only) during the Cold War, for example through the International Law Commission’s activities on the codification of various aspects of international law (including IHRL, IHL, and ICL).<sup>28</sup> During this period also the accession of newly independent states – particularly from the African continent – to the UN gave the body greater legitimacy in the eyes of many. Concurrently, the denial of the independence of others (chiefly under apartheid South Africa) became a rallying point for many states in the relatively new international community, contributing to the development of certain international law principles in the process. Throughout this time the ‘the basic positivist outlook continued to have great staying power,’<sup>29</sup> with state sovereignty continuing to play a prominent role.<sup>30</sup>

The end of the Cold War in 1989 ushered in what the UN General Assembly triumphantly (and prematurely) labelled the ‘Decade of International Law.’<sup>31</sup> However, although the détente amongst the ‘Great Powers’<sup>32</sup> allowed the UN Security Council to act effectively against Iraq’s invasion of Kuwait at the beginning of the 1990s, that unanimity unravelled with the collapse of the former Yugoslavia, and divided the UN Security Council (and international lawyers) once again at the end of the decade with respect to the bombing of Kosovo by NATO in 1999.<sup>33</sup> In the midst of this sits the UN’s failure to prevent the Rwandan genocide in 1994, which not only called into question the effectiveness of the UN’s institutional framework for responding to such events, but also the real extent of the international community’s commitment to its own normative framework for the protection of individuals. The re-emergence of ICL during this period – illustrated by the creation of the two ad hoc international tribunals for the former Yugoslavia<sup>34</sup> (ICTY) and Rwanda<sup>35</sup> (ICTR), and the establishment of a permanent ICC<sup>36</sup> – stands in contrast to the failings of the UN collective security regime.

During the past decade, the performance of the UN’s collective security system has continued to be patchy, with the US-led invasion of Iraq in 2003 once again calling into question its efficacy, and the relevance of the so-called ‘War on Terrorism.’ In parallel, regional integration (particularly in Europe) and the growth of regional international law have presented entirely different challenges to international law. These are illustrated by the *Kadi* case,<sup>37</sup> in which the European Court of Justice determined that it could in effect ‘review’ (albeit indirectly) the UN Security Council’s sanction regime created by UN Security Council Resolution 1267 (1999) *et seq.* for its compatibility with the fundamental rights guarantees in the European Community Treaty.<sup>38</sup> In doing so, it challenged existing theories on the supremacy of the UN Charter under article 103 over other inter alia treaty provisions where any normative conflict arises. Not to be outdone, Africa has

The UN’s failure to prevent the Rwanda genocide in 1994 called into question the effectiveness of the UN’s institutional framework for responding to such events



Former Rwandan Army Col. Theoneste Bagosora (right) and his co-defendant Col. Anatole Nsengiyumva at the ICTR, 2008.

sought to carve out a degree of autonomy for itself in security matters, through the African Union's peace and security architecture, that challenges the centrality given to the UN Security Council in such matters under the UN Charter.<sup>39</sup>

However, amidst these challenges, ICL has continued to gain momentum internationally, securing support from a broad cross-section of the international community in an almost unparalleled fashion, notwithstanding its sometimes difficult interaction with the principle of sovereignty which 'continues to operate as the basic premise of the international legal system.'<sup>40</sup>

### International law and Africa

Much of international law, at least historically, has been reflective of a European tradition. This is unsurprising given its historical development. At the time Hugo Grotius was writing about the 'law of nations', the world looked very different to how it is today. The 'nations' were those of Christian Europe. Only in the late 18th century did the emerging states of North and South America make an appearance, with other states from the 'east' (middle and far) gradually joined the emerging 'Family of Nations' during the 19th century. However, it was not until de-colonisation in the late 1950s – when international law was more or less established – that African states began to participate in its development in a meaningful way.

That said, the true extent of African influence on international law norms remains contentious. Notably, far from being epiphenomenal to its development, the post-colonial theorist Antony Anghie is of the strong opinion that international law was made in and on Africa. In particular, he argues that the notions of positivism and sovereignty that continue to ground international law were shaped by the encounter between the European 'Family of Nations' and the 'uncivilised' colonial world. On this basis, Anghie criticises the claim made by international law to be universal in nature, arguing that it is based on European values.

To date, African (and non-African) states have chosen to engage within the international legal order (rather than withdrawing from it, not least due to economic and political realities). Their concerns regarding it have tended to focus on the structural inequalities of the system (such as the composition of the UN Security Council) and, to a lesser extent, the role that the current legal order plays in maintaining global economic disparities. Many of these fundamental questions remain unresolved and have re-emerged with the resurgence of ICL and Africa's discontent with aspects of its operation, most prominently the role afforded to the UN Security Council, especially in view of its imbalance of power (see Module 4).

In the following sections, an overview of key international law principles and concepts is given, beginning with subjects of international law, moving on to its general principles and sources. The nature of the relationship existing between international and domestic legal orders, including in the event of conflicting norms, is then addressed. Where possible, these issues are examined from an ICL perspective.

## 2. SUBJECTS OF INTERNATIONAL LAW

As noted above, historically international law was aimed at governing inter-state relations and therefore only states were the subjects of international law. In contrast, modern international law addresses a wide range of actors, which include states, international organisations, regional organisations, non-governmental organisations, public companies, private companies, and individuals. However, not all such entities constitute legal subjects of international law,<sup>41</sup> and their activities are influenced to varying degrees by international law.



ICC Assembly of States Parties in session, 2009.



## 2.1 States

States remain the principal actors in, and subjects of, international law. For example, only states can make treaties,<sup>42</sup> join the UN,<sup>43</sup> and appear before the International Court of Justice in contentious proceedings.<sup>44</sup> A state has legal personality provided the conditions for statehood exist. The traditional criteria for statehood are described in the Montevideo Convention (1933), which provides that '[t]he state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states.'<sup>45</sup>

## 2.2 International organisations

International organisations are playing an increasingly pivotal role in the international legal order. In particular, since 1949 it has been accepted that international organisations, which include the UN and its specialised agencies, possess international legal personality independent of the states that formed them.<sup>46</sup> Notably, the ICC is such an international organisation, as recognised in article 4(1) of the Rome Statute: 'The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes.'<sup>47</sup> As such, the ICC is subject to the same rules applicable to any international organisation<sup>48</sup> – the 'common law of international organisations' – developed largely in respect of the UN, although its internal acts and functions largely are governed by the Rome Statute.<sup>49</sup>



### The United Nations

The most important and largest international organisation is the UN. Its key organs – not least in terms of influencing the creation and development of ICL institutions and norms – are the General Assembly, the Security Council, and the International Court of Justice.

The General Assembly is the UN's parliamentary body. It consists of one representative from each of its 193 member states, the most recent member being the Republic of Southern Sudan which joined on 14 July 2011 following its secession from the rest of Sudan. Article 4 of the UN Charter provides that membership of the UN is open to 'peace-loving states which accept the obligations contained in the present charter and, in the judgement of the organisation, are able and willing to carry out these obligations'. Voting in the General Assembly is governed by article 18(1) of the UN Charter which stipulates that each member has one vote only, irrespective of its population size and wealth. Decisions are made by a two-thirds majority of members present and voting (article 18(2)-(3)).

The Security Council is the UN's executive organ, with primary responsibility for the maintenance of international peace and security (see especially article 39). The Security Council consists of 15 members, five of whom are permanent members (article 23(1) – the USA, Russia, China, France, and the United Kingdom, known as the 'P5'). The P5 were chosen on the basis of the strength of political power as it existed in 1945. They have a veto right, which means that a negative vote by any of the P5 on any non-procedural issue will prevent the adoption of a resolution by the Security Council. The issue of whether or not a matter is procedural is itself subject to a veto. Furthermore, Security Council members may abstain from voting without being regarded as having exercised their veto (see article 27). Security Council decisions are binding upon all member states (article 24(1)).

As a result of the Hague Conferences of 1897 and 1907 a decision was made to create a 'world court'. This resulted in the establishment of the Permanent Court of Arbitration, which was superseded in 1920 by the Permanent Court of International Justice. After World War II, the International Court of Justice (ICJ) was created, as provided for in article 92 of the UN Charter, and all UN member states are automatically parties to the ICJ Statute (article 93). The ICJ is the UN's principal judicial organ. It is composed of 15 members, elected regardless of their nationality, from among persons of high moral character, who possess the necessary qualifications or are jurisconsults of recognised competence in international law.<sup>50</sup>

## 2.3 Individuals

Historically, individuals were not the concern of international law. Therefore, under the principle of non-interference, any violations perpetrated by states against their own nationals were neither the concern of other states nor did they permit third party states to intervene in the domestic affairs of the violating state. To the extent that individuals were the victims of mistreatment by other states, these were framed in terms of violations of their own state's rights under the doctrine of diplomatic protection rather than as a violation of individual rights. However, as noted previously, during the past century individuals have become increasingly the holders of rights and the bearers of obligations under international law. This is attributable to a number of separate, yet related, developments.

First, the introduction by ICL of the notion and accompanying system of assigning *individual* criminal responsibility for violations of international law norms.<sup>51</sup> Such an approach was reflected in the sentiments of the judges of the Nuremberg Tribunal:

To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished.<sup>52</sup>

In adopting such an approach, the judges assumed that international law was capable of imposing criminal liability on individuals. Although such an assumption was controversial in international law terms at the time, it was to become foundational to many subsequent ICL developments.

Second, the growing status of individuals in international law is closely related to the increase in the international protection of human rights. Numerous international law and regional human instruments and treaties – notably the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966),<sup>53</sup> the International Covenant on Economic Social and Cultural Rights (1966),<sup>54</sup> and the African Charter on Human and Peoples' Rights (1981) – grant individuals a range of diverse civil, political, social, economic, and cultural rights. Moreover, a number of these instruments have established mechanisms for remedies for violations of their provisions that apply to individuals without a state intermediary.

Third, the development of IHL, especially the four Geneva Conventions of 1949<sup>55</sup> and Additional Protocols I and II (1977),<sup>56</sup> has significantly changed the legal status of individuals in international law. Not only has IHL explicitly recognised and afforded individuals specific protections in times of both international and non-international armed conflict,<sup>57</sup> but it has developed the concept of individual criminal responsibility also.

## 3. FOUNDING PRINCIPLES OF INTERNATIONAL LAW

### 3.1 State sovereignty and consent

State sovereignty is a founding precept, and basic organising principle, of international law, which expresses the legal personality and capacity of states.<sup>58</sup> It

State sovereignty is a founding precept and basic organising principle of international law



The African Charter on Human and Peoples' Rights was adopted in 1981.



has both internal and external dimensions. The internal dimension of state sovereignty provides that within the border of any state, that state is sovereign and has a monopoly on the exercise of power (such as jurisdiction) over both the territory and the body politic. The external dimension of state sovereignty protects a state from interference by, and within, other states. Three principles can be said to be derived from the notion of state sovereignty.

First is the notion of jurisdiction as a function of sovereignty. This refers to the competence of a state to exercise its governmental functions by legislative, executive, and enforcement actions, as well as to issue judicial decrees over persons and property. In enforcing the provisions of ICL, domestic and international courts are exercising criminal jurisdiction over individuals. As will be seen, the proper exercise of such jurisdiction is a central pre-occupation of the discipline.

Second, a corollary of the principle of sovereignty is the principle of non-intervention in the internal affairs of other sovereign countries. In this regard, the UN Charter prohibits any intervention in the internal affairs of a state by other states, both forcibly and through other means,<sup>59</sup> and ICL criminalises interventions that involve the use of force (save for limited exceptions, see *infra*) through the crime of aggression.<sup>60</sup>

Third, the prominent role of state consent in the creation of international law flows from the principle of sovereignty. The classical notion that international law emanates from the will of states was clearly expressed in the *Lotus* case where the court stated that: ‘The rules of international law binding upon states ... emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law.’<sup>61</sup> This is a foundational concept in the current international legal order in which much of international law is created by states expressly agreeing to specific normative standards, most obviously by entering into treaties.<sup>62</sup> These obligations must be adhered to on the basis of *pacta sunt servanda*. Notably, the operation of this principle means that the ICC’s ordinary<sup>63</sup> jurisdiction is limited to the territory of those states that have ratified the Rome Statute and their nationals.

### 3.2 Equality of states

A necessary consequence of sovereignty is that all states are formally equal and, irrespective of size or power, have the same juridical capacities and functions. This is illustrated by the fact that within the UN General Assembly each member state has a single vote. Therefore, the international system is technically ‘horizontal’, consisting of sovereign, (formally) equal states, rather than ‘vertical’ in the sense of some states being formally dominant over others. According to the Declaration on Principles of International Law (1970): ‘All states enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature.’

The notion of equality before the law means formal equality in the sense of equality of legal personality and capacity. However, the practice is often different from the theory, with major states often exercising greater influence in law-creation by virtue of their political status, broader concerns, deeper interests, and more effective powers.<sup>64</sup>

Much of international law is created by states expressly agreeing to specific normative standards, most obviously by entering into treaties



Signing of the fourth Geneva Convention, 1949.

### 3.3 Peaceful settlement of disputes

Under the UN Charter, international law is regarded primarily as a means to ensure the establishment and preservation of international peace and security.<sup>65</sup> For this reason article 2(4) of the UN Charter prohibits the use of force (or the threat thereof) by states. As noted previously, this prohibition on the use of force by states is subject to (at least) two exceptions, namely the right of self-defence carried out by states individually or collectively in conformity with article 51 of the UN Charter,<sup>66</sup> and the measures taken by the UN Security Council acting under Chapter VII of the UN Charter in order to restore and maintain international peace and security.<sup>67</sup>

Notably, international law does not merely outlaw the use of force by states in a manner inconsistent with the UN Charter, it criminalises such action as the crime of aggression.<sup>68</sup> Although the ICC does not yet have active jurisdiction over this crime, by way of an amendment to the Rome Statute adopted in Kampala in 2010, the court will likely exercise jurisdiction in this regard after 2017.<sup>69</sup>

## 4. SOURCES OF INTERNATIONAL LAW

Identifying the sources and rules of international law is a more complex process than any comparable exercise in the domestic sphere, especially because there is 'no single body able to create laws internationally binding on everyone, nor a proper system of courts with comprehensive and compulsory jurisdiction to interpret and extend the law'.<sup>70</sup> Article 38 of the ICJ Statute is widely regarded as the 'most authoritative and complete statement of the sources of international law'.<sup>71</sup> Some argue, however, that article 38 no longer 'accurately reflects all the materials and forms of state practice that comprise today's sources of international law';<sup>72</sup> nor does the growing and increasingly influential corpus of, for example, international institutional law fit entirely comfortably within its parameters. There are four primary forms of international law sources under article 38(1):

- (a) international conventions, whether general or particular, establishing rules expressly recognised by particular states
- (b) international custom, as evidence of a general practice accepted as law
- (c) general principles of law
- (d) judicial decisions and the teachings of 'the most highly qualified publicists

### 4.1 Treaties

The most frequent method of creating international rules is by concluding agreements known as treaties.<sup>73</sup> Article 2(1)(a) of the Vienna Convention on the Law of Treaties (1969) defines a treaty as: 'An international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.' This definition points to several important features of treaties. First, treaties are agreements concluded between states. Second, treaties must be written. Third, it is irrelevant whether the document is called a treaty or some other designation, for example 'covenant'.<sup>74</sup>

Under the UN Charter, international law is regarded primarily as a means to ensure international peace and security



Press conference following the adoption of the Rome Statute on 17 July 1998 in Rome, Italy.

Treaties may either be bilateral or multilateral. A bilateral treaty is a treaty between two states, for example an extradition agreement between two states; whereas a multilateral treaty is one between more than two states, such as the Rome Statute which established the ICC.

The general rules of treaty interpretation are found in the Vienna Convention on the Law of Treaties (1969), which are then applied, interpreted, and developed by judicial and state practice. According to article 31(1) of that treaty, the general rule of interpretation is that '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. Sometimes interpretative tensions arise where it is necessary to balance strict textual and teleological (which permits legal norms to be interpreted in a manner reflective of changing societal attitudes from when the text was originally drafted) approaches.<sup>75</sup>

## 4.2 Custom

International custom – also known as customary international law – plays a very significant role in international law. Unlike a treaty where states give express consent to be bound by the particular rules, consent to international custom is inferred from the conduct of states.<sup>76</sup> Accordingly, Kelsen referred to custom as 'unconscious and unintentional lawmaking'.<sup>77</sup>

Under article 38(1)(b) of the ICJ Statute, there is a two limb test for establishing customary international law. First, the particular rule must be settled practice among states (*usus*); and second, there must be acceptance of an obligation to be bound (*opinio juris sive necessitates*). Meeting these requirements often involves complex evidential questions.

The *state practice* element refers to the actual behaviour of states, that is, what states actually do. When determining whether or not the necessary threshold of practice has been crossed, several factors are considered, which include the duration, consistency, repetition, and generality of the particular practice.<sup>78</sup> With regard to duration, in international law 'there is no rigid time element and it will depend upon the circumstances of the case and the nature of the usage in question'.<sup>79</sup> Accordingly, duration is not the decisive factor when determining state practice.

As far as the generality of the practice is concerned, in the *Asylum* case the ICJ set out the general rule on continuity and repetition, namely that of 'constant and uniform usage practiced by the States in question'.<sup>80</sup> The meaning of these concepts were clarified in the *North Sea Continental Shelf* cases, where the ICJ stated that an essential requirement for the creation of customary international law is that state practice, 'including that of states whose interests are specially affected', must be 'both extensive and virtually uniform in the sense of the provision invoked; and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved'.<sup>81</sup> In *Nicaragua v United States*, however, the ICJ further clarified this requirement by stating that absolute rigorous conformity of the practice in question was not required. Rather, it stated that:

In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State

Customary international law plays a very significant role in international law



Vienna Convention on the Law of Treaties, 1969.

Customary rules  
potentially bind  
all members of  
the world  
community  
whereas treaties  
only bind  
member states

conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way *prima facie* incompatible with a recognised rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.<sup>82</sup>

Additionally, some commentators, such as Shaw, argue that the 'threshold that needs to be attained before a legally binding custom can be created will depend both upon the nature of the alleged rule and the opposition it arouses.'<sup>83</sup> In other words, an unsubstantiated claim by a particular state that a practice exists will not be sufficient to satisfy the *state practice* requirement.

With respect to the *opinio juris* requirement, this will be satisfied when states not only act in a particular way, but when they do so because they believe that they are legally obliged to do so. As Shaw notes, 'the bare fact that such things are done does not mean that they have to be done.'<sup>84</sup> The test to be met here was articulated by the ICJ in the *Nicaragua* case where it stated that:

... for a new customary rule to be formed, not only must the acts concerned "amount to a settled practice", but they must be accompanied by the *opinio juris sive necessitates*. Either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is "evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it". The need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitates*.<sup>85</sup>

In terms of the relationship between treaties and customary international law, a number of important observations are made here. The first is that no hierarchy exists between them whereby, for example, treaty provisions prevail over comparable customary international law norms.<sup>86</sup> Another is that customary rules potentially bind 'all members of the world community', in contrast to treaties, which only bind states which ratify or adhere to them.<sup>87</sup> There are two important exceptions to this general principle: the first is the concept of the persistent objector;<sup>88</sup> the other is the notion of 'special' or 'regional' custom which only binds a set group of states (for example, within a particular region) or even just two states.<sup>89</sup>

Customary international law has played an instrumental, albeit sometimes controversial, role in the development of ICL. For example, as a result of the principle of *nullem crimen sine lege*<sup>90</sup> – in terms of which no individual can be punished for a crime that was not criminalised at the time of its commission – customary international law has been used to plug the holes in treaty law in order to facilitate prosecutions of international crimes. This was especially important during the earlier years of ICL development when many customary international law norms were yet to be codified or included within treaty provisions. One reason for related controversies is that reliance upon claimed customary norms in ICL has sometimes been made where there is very little evidence of state practice, with judges often relying unduly upon *opinio juris*.<sup>91</sup>



Public hearing at the ICJ.



### 4.3 General principles of law

In situations in which there are no rules from treaties or customary law which are applicable, international tribunals may draw on general principles of law. This means that, for example, tribunals may ‘turn to common principles of law found in municipal systems – in so far as they are capable of application to relations between states – in order to fill the gaps in international law’.<sup>92</sup> As Shaw notes: ‘In such instances the judge will proceed to deduce a rule that will be relevant, by analogy from already existing rules or directly from the general principles that guide the legal system, whether they be referred to as emanating from justice, equity or considerations of public policy’.<sup>93</sup> A controversial aspect of the *general principles of law* is that, unlike treaties and custom, they do not have a consensual basis.<sup>94</sup>

While reliance on this source of law is not as prevalent as treaties or custom, international courts have relied upon various general principles on occasion,<sup>95</sup> not least during the formative years in the development of ICL norms.

### 4.4 Judicial decisions and the teachings of the most highly qualified publicists

This final source of international law is not uncontroversial. However, it has been used to great effect in the development of ICL. A notable example is Antonio Cassese, who has greatly influenced the development of the field both in his capacity as a ‘highly qualified publicist’ and as a judge in international courts (he was the first president judge of the ICTY, and is currently the president judge of the Special Tribunal for Lebanon).<sup>96</sup>

## 5. RELATIONSHIP BETWEEN INTERNATIONAL LAW AND DOMESTIC LAW

The issue of how international law relates to domestic law is complex and has been the subject of much debate. The first thing to note in this regard is that the way a particular international legal obligation operates domestically is a question of domestic law.<sup>97</sup> Put differently, international law does not dictate how international obligations are implemented or applied under domestic law.<sup>98</sup> The second is that there is no uniformity of practice in this regard, not least because some states adopt monist and others adopt dualist approaches to the implementation of international law norms.

### 5.1 Monism and dualism

According to the monist school, there is one unified legal order rather than two distinct systems, whereby ‘international and municipal law ... must be regarded as manifestations of a single conception of law’.<sup>99</sup> Therefore, international law is automatically ‘incorporated into [domestic] law without any act of adoption by the courts or transformation by the legislature,’<sup>100</sup> and domestic courts are obliged to apply international law directly.

The dualist school emphasises that there are two distinct legal arenas: international law and municipal law.<sup>101</sup> Its proponents tend to stress the overwhelming importance of the state, and regard international law as regulating

International law does not dictate how international obligations are applied under domestic law



Antonio Cassese greatly influenced the development of international criminal law.

the interactions between sovereign states, whereas municipal law regulates the interactions between citizens of a particular state and that particular state.<sup>102</sup> Under a dualist approach, international law may be applied by domestic courts only if adopted by such courts or transformed into local law by national legislation.<sup>103</sup> When municipal law provides that international law applies in whole or in part within the jurisdiction, this is ‘merely an exercise of the authority of municipal law, an adoption or transformation of the rules of international law.’<sup>104</sup> In this way a rule of international law can never per se become part of the law of the land; it must be made so by the express or implied authority of the state.<sup>105</sup>

The usefulness of these theoretical distinctions has been criticised in recent times. As Denza notes:

There is no indication that either theory has had a significant input into the development of national constitutions, into the debates in national parliaments about the ratification of international agreements, or into the decisions of national courts on questions of international law. Except as shorthand indications of the general approach within a particular state of implementation or application of international rules, these theories are not useful in examining the relationship between international law and national laws.<sup>106</sup>

## 5.2 Customary international law: incorporation and transformation

As far as customary international law is concerned, two different approaches exist. The first, and more prominent, is the doctrine of incorporation, under which ‘customary rules are to be considered part of the law of the land and enforced as such, with the qualification that they are incorporated only so far as is not inconsistent with Acts of Parliament or prior judicial decisions of final authority.’<sup>107</sup> Under this doctrine, international law is treated automatically as part of the municipal law without the necessity for any constitutional ratification procedure.<sup>108</sup> Conversely, the doctrine of transformation is based on a strict dualist conception of international and national law, with the consequence that before any rule or principle of international law can have any effect within the domestic jurisdiction, it must be expressly and specifically transferred into municipal law by the use of the appropriate constitutional machinery, such as an act of parliament.<sup>109</sup>

### The relationship between international law and national law in Botswana, Malawi, and South Africa

As former commonwealth countries, Botswana, Malawi and South Africa are all dualist states as far as treaty obligations are concerned, but follow the doctrine of incorporation with regard to customary international law.

Although Botswana’s constitution is silent on the matter, the country’s courts have consistently held that Botswana is a dualist state (see *Attorney General v. Dow*, [1992] BLR 119; *Kenneth Good v. The Attorney General*, [2005] 1 BLR 462). Therefore, treaties ratified by Botswana are not automatically enforceable by domestic courts, although they can be considered for the purpose of, for example, interpreting ambiguous legislation even where not yet implemented. As far as customary international law is concerned, Botswana follows the doctrine of incorporation (see *Republic of Angola v. Springbok Investments (Pty) Ltd*, [2005] 2 BLR 159 (HC)).

Similarly, according to section 211(1) of the Constitution of Malawi: ‘Any international agreement ratified by an Act of Parliament shall form part of the law of the Republic if so provided for in the Act of Parliament ratifying the agreement.’ However, Kanyangolo notes: ‘Neither the Constitution nor other legislation provides guidance on the form that the legislation for domesticating treaties should take. Thus, in practice, Parliament has the discretion to choose whether to reproduce the content of treaties in their incorporating acts, to incorporate by



reference to the treaties, or to incorporate by implication, without direct reference to the treaty in question. This has resulted in a lack of uniformity in Parliament's approach to domestication and creates uncertainty as to whether particular international standards have been incorporated at all.<sup>110</sup> Malawi also follows the doctrine of incorporation insofar as customary international law is concerned, provided that it is consistent with Acts of Parliament and the Constitution (see section 211(3) of the Constitution of Malawi).

Finally, section 231(4) of the Constitution of the Republic of South Africa (1996) states: 'Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament'. Furthermore, section 232 provides that '[c]ustomary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament'.

## 6. NORMATIVE HIERARCHY

As will have become evident from the discussion so far, the development, application, and enforcement of international law is not straightforward, not least due to its diverse sources and influences. One of the resultant challenges is that divergent national, regional, and/or international law norms can exist which are not easily reconciled. The issue then becomes whether a hierarchy exists within international law whereby one norm prevails over another in the event of any conflict of norms.<sup>111</sup>

### 6.1 Norm conflict within international law

The issue of how to resolve normative conflicts in international law is a controversial one. While there is widespread agreement regarding the identification of legal obligations – guided in large measure by article 38 of the ICJ Statute – the matter of resolving any related conflicts is less settled. As Milanovic notes:

[I]nternational law lacks the key method for resolving genuine norm conflict that is used in domestic law: a centralised system with a developed hierarchy, and at that a hierarchy based on the sources of norms. Thus, in domestic systems a constitutional norm will prevail over a statutory one, while legislation will ordinarily prevail over executive orders or decrees. Not so in international law, where all sources of law are considered equal.<sup>112</sup>

The two exceptions to a horizontal, non-hierarchical relationship between norms in international law relate to obligations of a *jus cogens* nature and those arising under article 103 of the UN Charter.

#### 6.1.1 *Jus cogens*

A *jus cogens* norm is a peremptory norm of general international law which has been 'accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'.<sup>113</sup> Further, according to article 53 of the Vienna Convention on the Law of Treaties (1969): 'A treaty is void if ... it conflicts with a peremptory norm of general

The issue of how to resolve normative conflicts in international law is controversial



The ICJ, The Hague.

international law'. The related concept of obligations *erga omnes* was first expounded in 1970, in the *Barcelona Traction* case,<sup>114</sup> in which the ICJ indicated *obiter dictum* that a litigant state would not be required to prove a national interest in the subject matter of its claim where an obligation of concern to all states – an *obligation erga omnes* – was involved:

[A]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State ... By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.<sup>115</sup>

From the perspective of ICL, the prohibition of genocide or the prohibition of torture, the prohibition on apartheid, and the prohibition on the use of force are all generally considered *jus cogens* norms.<sup>116</sup>

### 6.1.2 Article 103 of the UN Charter

The other exception to the non-hierarchical nature of international legal norms is the so-called 'supremacy clause' of the UN Charter.<sup>117</sup> Article 103 of the Charter states:

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

As Liivoja notes: 'Essentially, Article 103 is a rule prescribing that certain obligations, when in conflict with certain other obligations, prevail over the latter.'<sup>118</sup> Further, as Milanovic notes:

Article 103 is not a simple rule of priority – it also precludes or removes any wrongfulness due to the breach of the conflicting norm. In other words, a state cannot be called to account for complying with its obligations under the Charter, even if in doing so it must violate some other rule – any rule, that is, except a rule of *jus cogens*.<sup>119</sup>

In the context of ICL, article 103 has potential application both in cases of the ad hoc tribunals created by the UN Security Council and in situations referred to the ICC by the Council.<sup>120</sup>

## 6.2 Relationship between national and international law

The general rule regarding the relationship between municipal law and international law is that a state may not invoke the provisions of its internal law as justification for its failure to carry out an international agreement.<sup>121</sup> Further, article 46(1) of the Vienna Convention on the Law of Treaties (1969) provides that a state may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties.<sup>122</sup> As Brownlie explains:

A state may not invoke the provisions of its internal law as justification for its failure to carry out an international agreement



Signing of the UN Charter, 1945.

Arising from the nature of treaty obligations and from customary law, there is a general duty to bring internal law into conformity with obligations under international law ... However, in general a failure to bring about such conformity is not in itself a direct breach of international law, and a breach arises only when the state concerned fails to observe its obligations on a specific occasion.<sup>123</sup>



## Further reading

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## NOTES

- 1 J Dugard, *International law: a South African perspective*, Cape Town: Juta, 2006, 1.
- 2 Where the history of international law begins depends on how it is defined. See S Neff, A Short History of International Law, in M Evans (ed), *International Law*, Oxford: Oxford University Press, 2010, 4.
- 3 A more thorough review of the discipline might begin in ancient times with 'the three areas of ancient Eurasia that were characterised by dense networks of small, independent States sharing a more or less common religious and cultural value system: Mesopotamia (by, say, the fourth or third millennium BC), northern India (in the Vedic period around about 1600 BC), and classical Greece'. Ibid.
- 4 Neff, A Short History of International Law, 12.
- 5 The key significance of the Treaties of Westphalia 1648 was that they marked a shift in the locus of ultimate power away from higher religious authorities in whom it had been vested formerly, to a new secular framework of sovereign states governed by independent rulers which has become the basis of current inter-state relations. See, for example, L Gross, The Peace of Westphalia, 1648-1948, *American Journal of International Law* 42 (1948), 20-41, 40.
- 6 *De jure belli ac pacis libri tres*, first published in Paris in 1625. Grotius' contribution was the 'transformation of the old jus gentium into something importantly different, called the law of nations'. Further, 'most significantly, this law of nations was not regarded (like the old jus gentium) as a body of law governing human social affairs in general. Instead, it was a set of rules applying specifically to one particular and distinctive category of human beings: rulers of States. Now, for the first time in history, there was a clear conception of a systematic body of law applicable specifically to the relationship between nations.' Neff, A Short History of International Law, 9.
- 7 Curzon notes: 'Natural Law theory seeks to explain law as a phenomenon which is based upon and which ought to approximate to some higher law contained in certain principles of morality'. LB Curzon, *Jurisprudence*, London: Routledge, 2002, 19.
- 8 Ibid, 11. ED Vattel, *The Law of Nations*, London, 1758.
- 9 Legal positivism is 'the approach to the study of law which regards valid legal laws as being only those laws that have been 'posited', that is, created and put forward by human beings in positions of power in society'. Curzon, *Jurisprudence*, 11.

- 10 Neff, *A Short History of International Law*, 14.
- 11 For a critical reflection on this period see A Anghie, *Imperialism, sovereignty, and the making of international law*, Cambridge: Cambridge University Press, 2007.
- 12 Neff, *A Short History of International Law*, 15.
- 13 Ibid.
- 14 See *infra*.
- 15 Neff, *A Short History of International Law*, 20.
- 16 For example, the two Hague Peace Conferences. See *infra*, Module 3.
- 17 Neff, *A Short History of International Law*, 21.
- 18 See *infra*.
- 19 This aspect will be fully explored below and in Modules 2 and 3. See A Clapham, *The Role of the Individual in International Law*, *European Journal of International Law* 21(1) (2010), 25-30.
- 20 See the *Charter of the International Military Tribunal* (1945), established by way of the London Agreement signed on the 8 August 1945 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 (hereinafter 'the Nuremberg Tribunal').
- 21 Article 1, *Charter of the International Military Tribunal* (1945).
- 22 See the *Charter of the International Military Tribunal for the Far East* (1946), established by military proclamation by General McArthur – as the Supreme Commander of Allied Powers in Japan – on 19 January 1946 (hereinafter 'the Tokyo Tribunal').
- 23 Neff, *A Short History of International Law*, 24.
- 24 Preamble, UN Charter (1945).
- 25 Article 2(4), UN Charter states: 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.'
- 26 Notably, it was these powers – contained in Chapter VII UN Charter – that the UN Security Council used to establish the International Criminal Tribunals for the former Yugoslavia and Rwanda in the 1990s (see *infra* and Module 2). Similarly, the same provisions must be used to 'refer' a matter to the ICC for prosecution under article 13(b) of the Rome Statute (see Module 4).
- 27 Replaced by the UN Human Rights Council in 2006.
- 28 Neff, *A Short History of International Law*, 25.
- 29 Ibid.
- 30 In this regard Neff notes: 'Some of the most important political and intellectual upheavals of the twentieth century left strangely little mark on international law. Socialism, for example, far from being a major challenge to lawyers, was actually a conservative force... Nor did the massive influx of developing States onto the world scene bring about any fundamental conceptual upheaval. For the most part, the developing countries readily accepted established ways...' Neff, *A Short History of International Law*, 25-26.
- 31 General Assembly Resolution 44/23 of 17 November 1989.
- 32 The United States of America, Russia, France, China, and the United Kingdom, all of which are permanent members of the UN Security Council and enjoy a unique 'veto' power in respect of decisions of the Council (known as the 'P5').
- 33 See further B Simma, *NATO, the UN and the Use of Force: Legal Aspects*, *European Journal of International Law* 10(1) (1999), 1-22; A Cassese, *Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, *European Journal of International Law* (1999), 23-30; A Cassese, *A follow-up: forcible humanitarian countermeasures and opinio necessitates*, *European Journal of International Law* 10(4) (1999), 791-799; L Henkin, *Kosovo and the Law of 'Humanitarian Intervention'*, *American Journal of International Law* 93(4) (1999), 824-828; R Wedgwood, *NATO's Campaign in Yugoslavia*, *American Journal of International Law* 93(4) (1999), 828-834; J Charney, *Anticipatory Humanitarian Intervention in Kosovo*, *American Journal of International Law* 93(4) (1999), 834-841; C Chinkin, *Kosovo: A 'Good' or 'Bad' War?*, *American Journal of International Law* 93(4) (1999), 841-847; R Falk, *Kosovo, World Order, and the Future of International Law*, *American Journal of International Law* 93(4) (1999), 847-857; T Franck, *Lessons of Kosovo*, *American Journal of International Law* 93(4) (1999), 857-860; M Reisman, *Kosovo's Antinomies*, *American Journal of International Law* 93(4) (1999), 860-862; V Gowlland-Debbas, *Community Objectives in the Framework of UN Peace Maintenance*, *European Journal of International Law* 11 (2000), 361-383; and C Greenwood, *Humanitarian Intervention: The Case of Kosovo*, *Finnish Yearbook of International Law* 10 (2000), 145.
- 34 International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, commonly known as the International Criminal Tribunals for the former Yugoslavia (hereinafter 'the ICTY'), was established by UN Security Council Resolution 827 (1993).

- 35 The 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 1 January 1994 and 31 December 1994, commonly known as the International Criminal Tribunal for Rwanda (hereinafter 'the ICTR'), was established by UN Security Council Resolution 955 (1994).
- 36 A project that began in the wake of World War I, it regained some urgency after World War II, but ultimately could not gain sufficient political support until the end of the Cold War. See Module 4.
- 37 ECJ, *Kadi & Al Barakaat International Foundation v Council and Commission*, Joined Cases C-402/05 P & C-415/05 P, Judgment of 3 September 2008 (hereinafter *Kadi I*).
- 38 Although the ECJ in *Kadi I* was keen to stress it was not reviewing the legality of the UN Security Council resolutions themselves, but rather the EC regulations giving effect to them (see *Kadi I*, para 287), this distinction is spurious. The Court itself noted the criticisms levelled at this reasoning in the subsequent decision of the ECJ (now the General Court). (General Court, *Kadi v The Commission*, Case T-85/09, Judgment of the General Court (Seventh Chamber) 30 September 2010 (hereinafter *Kadi II*, at para. 116): 'In that regard, it has in particular been asserted that, even though the Court of Justice stated, at paragraph 287 of *Kadi*, that it was not for the Community judicature, under the exclusive jurisdiction provided for by Article 220 EC, to review the legality of a resolution adopted by the Security Council under Chapter VII of the Charter of the United Nations, the fact remains that a review of the legality of a Community act which merely implements, at Community level, a resolution affording no latitude in that respect necessarily amounts to a review, in the light of the rules and principles of the Community legal order, of the legality of the resolution thereby implemented.' See *infra*.
- 39 See article 4 Constitutive Act of the African Union (2002); African Union, The Common African Position on the Proposed Reform of the United Nations: The Ezulwini Consensus, 7th Extraordinary Session (2005). J Allain, The True Challenge to the United Nations System of the Use of Force: The Failures of Kosovo and Iraq and the Emergence of the African Union, *Max Planck United Nations Yearbook* 8 (2004), 237-289, 284.
- 40 A Anghie, Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law, *Harvard International Law Journal* 40(1) (1999), 1-69, 2.
- 41 Dugard, *International Law*, 2.
- 42 Article 2(1)(a) Vienna Convention on the Law of Treaties (1969) defines a treaty as: '[A]n international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.'
- 43 Article 4(1) UN Charter states: 'Membership in the United Nations is open to ... peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organisation, are able and willing to carry out these obligations.'
- 44 Article 34(1) Statute of the International Court of Justice (1945) provides that: 'Only states may be parties in cases before the Court.'
- 45 Article 1, Montevideo Convention on the Rights and Duties of States (1933).
- 46 See the ICJ, *Reparations for Injuries suffered in the Service of the United Nations*, ICJ Reports (1949), 174 at 185.
- 47 *Rome Statute of the International Criminal Court* (1998), A/CONF.183/9, adopted on 17 July 1998 and entered into force on 1 July 2002.
- 48 See D Akande, International Organizations, in Malcom Evans (ed), *International Law*, Oxford: Oxford University Press, 2010, 271.
- 49 Akande notes: 'It is true that these "constitutions" regulate matters such as membership, competences, and financing, in disparate ways. However, it is equally true that customary international law and, to a much lesser degree, treaties have generated principles of general application. These common principles concern matters such as the legal personality of international organizations, implied competences, interpretations of constituent instruments, employment relations, immunities and privileges, and the liability and responsibility of the organisation and its member States.' *Ibid.* See Jan Klabbers, *An introduction to international institutional law*, New York: Cambridge University Press, 2002, 25.
- 50 Article 2, ICJ Statute, 1945.
- 51 This is discussed in detail in Module 2.
- 52 *Trial of the Major War Criminals before the International Military Tribunal-Nuremberg*, 14 November 1945-1 October 1946, 219. The Judges went on to state (at 223): 'the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State.'
- 53 Adopted by the United Nations General Assembly on December 16, 1966, and entered into force on March 23, 1976.
- 54 Adopted by the United Nations General Assembly on December 16, 1966, and entered into force on January 3, 1976.



- 55 The four Geneva Conventions are: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Convention (III) relative to the Treatment of Prisoners of War; and Convention (IV) relative to the Protection of Civilian Persons in Time of War; adopted at the Diplomatic Conference of Geneva of 1949 and entered into force on 21 October 1950.
- 56 Adopted at the Diplomatic Conference of Geneva of 1949 and entered into force on 21 October 1950.
- 57 See *infra* Module 3, War Crimes.
- 58 See, for example, I Brownlie, *Principles of Public International Law* (7th ed), Oxford: Oxford University Press, 2008, 105-6.
- 59 Article 2(4) UN Charter provides: 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations'. Under article 2(7) UN Charter: 'Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the members to submit such matter to settlement under the present Charter...'
- 60 See Module 4.
- 61 *Lotus Case (France v Turkey)*, 1927 PCIL Rep Ser. A no 10, para. 44.
- 62 M Shaw, *International Law*, Cambridge: Cambridge University Press, 2008,
- 63 Exceptionally, jurisdiction can be granted by the UN Security Council under article 13(b) Rome Statute, although even this power has its basis in article 25 UN Charter. See Module 4.
- 64 Shaw, *International Law*, 193.
- 65 Shaw, *International Law*, 101.
- 66 Article 51 states, *inter alia*: 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security...'
- 67 Article 42 UN Charter grants the UN Security Council the power to 'take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security'.
- 68 See Module 4.
- 69 C Gevers and A Plessis, The Codification of the Crime of Aggression: A Pyrrhic Victory for Africa?, *African Legal Aid Quarterly* 2 (2010), 28-39.
- 70 Shaw, *International Law*, 70
- 71 *Ibid.*; See also Brownlie, *Principles of public international law*, 5.
- 72 Dugard, *International Law*, 27.
- 73 A Cassese, *International Law*, Oxford: Oxford University Press, 2005, 171.
- 74 Shaw, *International Law*, 93.
- 75 Klabbers, *Introduction to international institutional law*, 96.
- 76 Dugard, *International Law*, 29.
- 77 Cassese, *International Law*, 156.
- 78 Shaw, *International Law*, 72
- 79 Shaw, *International Law*, 76.
- 80 *Asylum Case (Colombia v. Peru)*, Judgment, 20 November 1950, ICJ Rep. 1950, 266 at 277.
- 81 *North Sea Continental Shelf cases (Germany v Denmark, Germany v. Netherlands)*, Judgment, ICJ Reports 1969, 3 at para. 74.
- 82 *Case Concerning Military And Paramilitary Activities In And Against Nicaragua (Nicaragua v. United States Of America)*, Judgment, ICJ Reports 1986, 14, para. 186.
- 83 Shaw, *International Law*, 78.
- 84 *Ibid.* 75.
- 85 *Case Concerning Military And Paramilitary Activities In And Against Nicaragua (Nicaragua v. United States Of America)*, Judgment, ICJ Reports 1986, 14, para. 207.
- 86 See M Villiger, *Customary International Law and Treaties*, Dordrecht: Martinus Nijhoff, 1985, 35.
- 87 Cassese, *International Law*, 157.
- 88 In its *Statement of Principles Applicable to the Formation of General Customary International Law*, the International Law Association explained this principle as follows: 'If whilst a practice is developing into a rule of general law, a State persistently and openly dissents from the rule, it will not be bound by it.' ILC, Final Report of The Committee on Formation of Customary International Law, 2000.
- 89 Shaw, *International Law*, 92. For example, in *Asylum Case (Colombia v. Peru)*, Judgment, ICJ Rep 1950, 266 (*Asylum case*) Colombia argued in favour of a regional or local custom which was particular to the Latin American states. However, the International Court of Justice held that: '[t]he facts brought to the knowledge of the Court disclose so much uncertainty and contradiction... and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law, with regard to the alleged rule of unilateral and definitive qualification of the offence.' (277).
- 90 See *infra*, Module 2.



- 91 See *infra* Module 3 and discussion on war crimes in non-international armed conflicts.
- 92 Dugard, *International Law*, 38.
- 93 Shaw, *International Law*, 98.
- 94 Dugard, *International Law*, 39.
- 95 As Dugard notes, the list of principles invoked include: unjust enrichment, reparation for breach of an undertaking, *res judicata*, the limited liability of a corporation, estoppel, and *nemo iudex in re sua*. Dugard, *International Law*, 38.
- 96 See T Hoffman, The Gentler Humanizer of Humanitarian Law: Antonio Cassese and the Creation of the customary Law of Non-International Armed Conflicts, in C Stahn and L van den Kerik (eds), *Future Perspectives on International Criminal Justice*, Cambridge: Cambridge University Press, 2009, 58-80.
- 97 As Denza notes: '[F]or each national legislature and court, the starting point for any examination of the relationship [between international and domestic law] is its own constitution.' E Denza, The Relationship Between International and National Law, in M Evans (ed), *International Law*, Oxford: Oxford University Press, 2010, 428.
- 98 Although it does require states to take such measure to give effect to those obligations in certain instances.
- 99 Dugard, *International Law*, 47
- 100 Dugard, *International Law*, 43.
- 101 Brownlie, *Principles of public international law*, 31.
- 102 Brownlie, *Principles of public international law*, 32.
- 103 Dugard, *International Law*, 47
- 104 Brownlie, *Principles of public international law*, 32.
- 105 Dugard, *International Law*, 47
- 106 Denza, The Relationship Between International and National Law, 421.
- 107 Brownlie, *Principles of public international law*, 41.
- 108 Shaw, *International Law*, 140
- 109 Shaw, *International Law*, 139
- 110 F Kanyongolo, Malawi: *Justice Sector and the Rule of Law*, Open Society Initiative for Southern Africa, 2006, 4.
- 111 For detailed discussion of these issues see, for example, J Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law*, Cambridge: Cambridge University Press, 2003.
- 112 M Milanovic, Norm Conflict in International Law: Whither Human Rights?, *Duke Journal of Comparative & International Law*, 20 (2009), 69-131, 74.
- 113 Article 53 Vienna Convention on the Law of Treaties (1969).
- 114 *Case Concerning The Barcelona Traction, Light And Power Company, Limited (New Application: 1962) (Belgium v. Spain)*, Second Phase Judgment, ICJ Rep 1970, 3.
- 115 *Case Concerning The Barcelona Traction*, para. 33.
- 116 Milanovic, Norm Conflict, 97.
- 117 R Liivoja, The Scope of The Supremacy Clause of the United Nations Charter, *International and Comparative Law Quarterly* 57 (2008), 583-612, 584.
- 118 Liivoja, The Scope of The Supremacy Clause of the United Nations Charter, 585.
- 119 Milanovic, Norm Conflict, 100.
- 120 See further Module 4.
- 121 Article 27 Vienna Convention on the Law of Treaties (1969). See *Polish Nationals in Danzigcase*, PCIJ Series A/B No. 44, 209.
- 122 Shaw, *International Law*, 134.
- 123 Brownlie, *Principles of public international law*, 35.



## Module 2

# International criminal law: definition, history and general principles





# International criminal law: definition, history and general principles



## Teaching notes

The aim of this module is to give a comprehensive introduction to international criminal law. It begins with a discussion of the definitions of ‘international criminal law’, concluding that the term refers to the domestic and international prosecution of the international crimes of genocide, crimes against humanity and war crimes.

The module then sets out a history of international criminal law, beginning with the orthodox history of the discipline. Thereafter, it shows the prominent and undervalued role played by domestic prosecutions within this history. The section concludes with a discussion of how the dominance of international aspects not only devalues the importance of domestic prosecution but misrepresents the role of such prosecutions under the principle of complementarity.

The module then discusses what are, loosely termed, the general principles of international criminal law, namely jurisdiction, international crimes as collective phenomena, the individual criminal responsibility and *nullem crimen sine lege*. These general principles go beyond those contained in part 3 of the Rome Statute; rather they more broadly seek to animate the common features of international criminal law that both ground the discipline and delimit its operation domestically and internationally.

## LEARNING OUTCOMES

At the end of this module, students must be able to:

- Discuss the various ways in which international criminal is defined, in both the broader and narrower sense, and reflect critically on these definitions.
- Set out the history of international criminal law, with a focus on the institutional turning points of Versailles, Nuremberg and Rome.
- Critically discuss the role of domestic international criminal law in the development of the discipline.
- Understand the principle of jurisdiction, the notion of crimes as collective phenomena, individual criminal responsibility, and the principle of *nullem crimen* and how they apply in both a domestic and international context.
- Critically reflect on the history and structure of international criminal law with regard to contemporary issues within the field.





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# International criminal law: definition, history and general principles

## 1. DEFINING INTERNATIONAL CRIMINAL LAW

The field of ICL defies basic definition. As Cryer et al have noted: ‘The meaning of the phrase “international criminal law” depends on its use, but there is a plethora of definitions, not all of which are consistent.’<sup>1</sup> The matter is further complicated by the fact that the discipline is referred to sometimes under-inclusively as ‘war crimes law’ or over-inclusively as ‘international criminal justice’. Definitional challenges, it seems, are endemic to the discipline.<sup>2</sup> In an influential essay entitled ‘The problem of an international criminal law’, written in the shadow of the Nuremberg and Tokyo tribunals when the field was in its infancy, Schwarzenberger ascribed six possible meanings to the term<sup>3</sup> before concluding that ‘international criminal law in any true sense does not exist’.<sup>4</sup> Whatever uncertainties may have existed then, the developments over the past 60 years mean that it can safely be said today that ICL ‘exists’. Definitional challenges, however, remain.

Most scholars define ICL *functionally* (i.e. by what it does). For example, Cassese defines it as ‘a body of international rules designed both to proscribe certain categories of conduct (war crimes, crimes against humanity, genocide, torture, aggression, terrorism) and to make those persons who engage in such conduct criminally liable’.<sup>5</sup> Similarly, Werle describes the field thus: ‘International criminal law encompasses all norms that establish, exclude or otherwise regulate responsibility for crimes under international law’.<sup>6</sup> Bassiouni suggests that ‘[w]hat is contemporarily meant by [the term<sup>7</sup>] is the application of the principle of accountability for certain international crimes, whether before an international or national judicial body’.<sup>8</sup>

Others approach their definition of ICL with reference to its place within the international legal order: generally at the intersection of a number of sub-fields of international law (i.e. IHL, IHRL law, and general public international law).<sup>9</sup> In this regard, Van Schaak and Slye describe the field ‘as a subset of public international law involving the use of criminal sanctions to enforce law that is *primarily* international in its origins. We thus define ICL as the body of law that assigns individual criminal responsibility for breaches of public international law’.<sup>10</sup> Such definitions, however, often exclude from their remit the domestic prosecution of

Most scholars define ICL *functionally* – that is, by what it does



In 1999 M Cherif Bassiouni was nominated for the Nobel Peace Prize for his work in the ICL field and contribution towards the ICC's creation.

Historically,  
pirates are the  
original 'enemies  
of all mankind'

these crimes which, as will be seen, have not only been instrumental to the development of the field, but remain a key aspect of its enforcement.<sup>11</sup>

In the light of these challenges, Cryer et al suggest that '[d]ifferent meanings of international criminal law have their own utility for their different purposes and there is no reason to decide upon one meaning as the "right" one. Nevertheless, it is advisable from the outset to be clear about the sense in which the term is used in any particular situation.'<sup>12</sup>

With that in mind, for the purpose of the current syllabus, ICL is defined as the prosecution of the international crimes of genocide, crimes against humanity, war crimes, and aggression by domestic and international courts. This definition is both broader and narrower than those discussed above. It is broader in the sense that it covers the prosecution of these crimes by both international *and* domestic tribunals (*contra* Cassese, Van Schaak, and Slye); and it is narrower in the sense that it focuses on four 'core crimes': war crimes, crimes against humanity, genocide, and aggression (*contra* Cassese).

Cassese is not alone in this respect; many scholars include torture and terrorism within the definition of international crimes.<sup>13</sup> However, two factors counsel against adopting a more expansive definition of 'international crimes'. First, the four 'core crimes' are undoubtedly crimes under customary international law and therefore 'subject to the *ius puniendi* of the international community as a whole';<sup>14</sup> whereas there is lingering doubt about the customary character of other putative international crimes.<sup>15</sup> Second, these four crimes are the crimes currently (or in the case of aggression likely to be from 2017 onwards) within the subject-matter jurisdiction of the Rome Statute of the ICC. Given that the implementing legislation for the Rome Statute (both present and future) of many states will form the basis of domestic prosecutions of international crimes, this selection of crimes by the drafters of the Rome Statute will undoubtedly influence and shape domestic prosecutions as well, not least in terms of their scope.

## 2. HISTORY OF INTERNATIONAL CRIMINAL LAW

### 2.1 Orthodox history of international criminal law

Given the debates on its definition, it is not surprising that the history of ICL is equally complex and contested.<sup>16</sup> Its reactionary nature, contested origins, and lack of a unifying theory make a plain, linear rendition of its history difficult. Depending on how it is defined, it might reach back to antiquity or merely a decade prior to the formation of the ICC.

The approach of some ICL scholars – perhaps as an overreaction to the perennial allegations of retrospectivity that plague the discipline – is to stretch the origins of the discipline as far back in time as is possible. The usual suspect in this regard is the international prohibition on piracy, its offenders being the original *hostis humanis generis* (enemies of all mankind).<sup>17</sup> Another candidate for a clearly dated antecedent is the 19th century prohibition of slavery.<sup>18</sup> However, while ICL might be inspired by, or share an affinity with, these early injunctions in international law, the true beginnings of the current discipline lie in its more recent history.<sup>19</sup>



19th century prohibition of slavery: an antecedent of ICL.

It is suggested here that a more appropriate starting point for ICL – both substantively<sup>20</sup> and institutionally – is the Treaty of Versailles (1919).<sup>21</sup> In particular, articles 227-30 contained the first normative expression of modern-day ICL<sup>22</sup> calling for the prosecution of Emperor William II of Hohenzollern ‘for a supreme offence against international morality and the sanctity of treaties’, and further proclaiming ‘the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war’.<sup>23</sup> It contained also the first, subsequently aborted, attempt at a supranational institutional response to (what would become) ‘international crimes’. More specifically, article 227 called for the establishment of a ‘special tribunal ... to try the accused’, ‘composed of five judges, one appointed by each of the following Powers: namely, the United States of America, Great Britain, France, Italy and Japan’. It stated further that ‘the tribunal will be guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality’.<sup>24</sup> These provisions were, however, never used because the Emperor found sanctuary in the Netherlands which refused to extradite him for trial, and the contemplated trials of German war criminals were ultimately left to German domestic courts.<sup>25</sup>

What generally follows from Versailles in any orthodox approach to the history of ICL is a focus on the international (and predominantly institutional) developments.<sup>26</sup> For example, Werle refers to the Nuremberg tribunal, the ad hoc ICTY and ICTR, and permanent ICC as the ‘[t]hree milestones [that] have marked the power of international criminal law’.<sup>27</sup>

The centrepiece of this orthodox history is the trial of defeated German and Japanese leaders in the aftermath of World War II at Nuremberg and Tokyo respectively. The Nuremberg Tribunal – established by Britain, France, the United States, and Russia under the London Agreement on 8 August 1945 – imposed international criminal responsibility on members of the high command for violations of the laws of war, crimes against the peace, and crimes against humanity.<sup>28</sup> In contrast, the approach and outcome of the Tokyo Tribunal – which took place between 1946 and 1948, and was modelled on the Nuremberg Tribunal – are less respected by international lawyers, especially due to the absence of appropriate legal standards which makes its findings highly questionable.<sup>29</sup> This post World War II period, according to Van Schaak, ‘is nothing less than a watershed moment in the development’ of the ICL field.<sup>30</sup> Similarly, Werle notes that the Nuremberg trials ‘can be considered the birth certificate of international criminal law’.<sup>31</sup>

Following a Cold War freeze, the discipline was revitalised in the 1990s following the creation of the ICTY and the ICTR. If Nuremberg was an imperfect beginning, then these UN-created tribunals were its redemption, in the sense of being the first truly international institutions established to prosecute international crimes; and its revival, by precipitating ‘a renaissance of international criminal law, which many had thought a dead letter’.<sup>32</sup> In this regard Alvarez notes:

There is ... widespread consensus among international lawyers that the flaws of prior proceedings at Nuremberg and Tokyo have been largely corrected and that the new ad hoc tribunals for the former Yugoslavia and Rwanda are more credible instruments of the international community in terms of their respective bases of jurisdiction, rules and procedures, bench, and bar.<sup>33</sup>

An appropriate starting point for ICL is the Treaty of Versailles (1919)



Treaty of Versailles, 1919.

For much of the 20th century ICL was primarily the concern of domestic courts



Charles Taylor at the Special Court of Sierra Leone, 2008.

Brief mention must be made also of the ‘hybrid tribunals’ established in Sierra Leone,<sup>34</sup> Cambodia,<sup>35</sup> Lebanon,<sup>36</sup> and East Timor,<sup>37</sup> which lie ‘in the intersection between national and international law’.<sup>38</sup> Unlike the ad hoc tribunals which were created by the UN Security Council, these courts are established by treaties, special agreements, or under the domestic legal regimes. As Shraga notes: ‘While similar to the [ad hoc] tribunals in their organisational structure, subject-matter jurisdiction and international legitimacy, mixed tribunals are distinguished from the former by their legal status, their mixed jurisdiction and composition and their funding mechanism.’<sup>39</sup>

For most international lawyers, these historical developments form the backdrop against which the ICC emerged in 1998. The faith and hope placed in the ICC by lawyers, academics, and civil society cannot be overstated: it represents a turning point in ICL, both institutionally and normatively.<sup>40</sup> As Kress notes: ‘With the birth of the ICC, the international community attempted to cut the cord that linked ICL to the criticisms that previously plagued it.’<sup>41</sup>

## 2.2 ‘Hidden history’ of international criminal law

What is missing, however, in this historical version of the discipline up until the creation of the ICC is the formative influence of domestic law and prosecutions in the field’s development: the so-called ‘hidden history of international criminal law’.<sup>42</sup> Through an overemphasis on international developments – especially on Versailles, Nuremberg, and Rome – insufficient attention has been paid to the important role that domestic prosecutions and developments have played both in establishing the substantive norms of, and in enforcing, ICL. In contrast, these activities have sometimes been regarded as setbacks in the progression towards ‘true’ ICL (i.e. the prosecution of international crimes by international courts).<sup>43</sup>

Despite such negative attitudes, the fact remains that for much of the 20th century ICL was primarily the concern of domestic courts.<sup>44</sup> In particular, in the absence of an international enforcement mechanism for international crimes, ‘the international community [resorted] ... to the traditional institutional framework of specific treaties or treaty rules aimed at imposing on states the duty to criminalise the prohibited conducts, and organising judicial cooperation for their repression.’<sup>45</sup> In this way, ‘international law was used as a tool for the coordination of the exercise of criminal jurisdiction by states.’<sup>46</sup> This has been termed *indirect enforcement* of ICL.<sup>47</sup> This was done primarily through domestic prosecution provisions in treaties.<sup>48</sup> As Bianchi notes: ‘It is clear that even when these [treaties] mention the possibility of establishing an international court (as do the Genocide and Apartheid Conventions) such compacts were drafted under the assumption that the international crimes they cover will be prosecuted by national courts.’<sup>49</sup>

In addition, in order to facilitate these national prosecutions, the customary rules of jurisdiction were modified to allow states to exercise jurisdiction over individuals accused of certain international crimes in situations where they would otherwise not have been able to do so.<sup>50</sup> There were various examples of domestic prosecutions, some less successful than others.<sup>51</sup>



In terms of their relationship with ICL, these were not just incidental domestic prosecutions of international crimes, but rather they impacted upon the substantive aspects of the field through the development of custom: both in terms of the existence and nature of particular crimes and their general principles.<sup>52</sup> While there is unanimity amongst lawyers, academics, and states that customary international law *directly criminalises* the core international crimes – in the sense that international law imposes direct criminal sanctions on individuals (without the intermediary of a state) – how (and when) this came to be is contested.<sup>53</sup> What is clear is that the institutional ‘high points’ mentioned above are not themselves sufficient indicators of states’ practice and *opinio juris* to support a customary international law rule criminalising this conduct.<sup>54</sup>

The significance of domestic prosecutions is illustrated by the general principles relied upon and developed further by the Nuremberg Tribunal. While it regarded itself as enforcing existing international law, in fact these principles must have originated from domestic antecedents.<sup>55</sup> As a result, a number of scholars look to more recent history for the point in time that crimes were criminalised internationally. For example, according to Gaeta, ‘at the international level, the criminalisation of individual conduct is a recent phenomenon that evolved in the early 1990s’, only once the threat of criminal sanction existed in the forms of the ad hoc tribunals and the ICC.<sup>56</sup> That said, the founding statutes of the ad hoc tribunals were worded in such a manner that they could not be interpreted as themselves forming custom. As Milanovic notes with regard to the ICTY: ‘[T]he UN secretary general and the Security Council went [sic] to great pains to emphasise that by adopting the Statute ... the Council was not making any new law and then it would be applying pre-existing customary law.’<sup>57</sup>

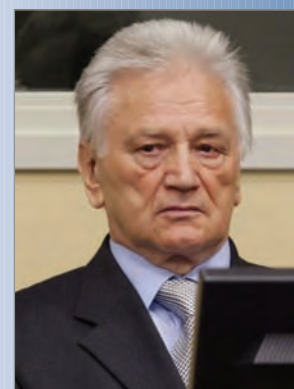
Even the Rome Statute’s substantive relationship with customary law is contentious. On one reading, the Statute consolidated and codified a number of offences which already existed under customary international law and imposed obligations on individuals directly.<sup>58</sup> However, on another reading, the Rome Statute is merely jurisdictional, namely that instead of directly binding individuals it merely sets the limits of the ICC’s subject-matter jurisdiction. The crimes themselves therefore lie in another source of law (i.e. pre-existing custom).<sup>59</sup>

As such, the significance of the indirect enforcement of ICL norms by domestic courts, together with relevant institutional milestones (such as Versailles, Nuremberg, and Rome) – as evidence of both state practice and *opinio juris* – in the formation of customary ICL cannot be overstated. It is for these reasons that Jessberger notes:

International criminal justice is usually perceived as justice delivered by international courts. ... Yet there are reasons to believe that the popular equation of international criminal justice with prosecution by international criminal courts is foreshortened, and may be misleading. In fact, the contribution of states to the enforcement of ICL is crucial. History ... shows notable domestic efforts to address international crimes by means of criminal law space notable in terms of the numbers of trials and convictions as well as in terms of their significance for the development of ICL.<sup>60</sup>

Accordingly, international criminal justice and the application and development of its principles should not be understood as being restricted to the domain of

International criminal justice should not be understood as being restricted to the domain of international institutions



Former Yugoslav army chief Momcilo Perisic was sentenced to 27 years in prison by the ICTY, 2011.

The tendency to emphasise the international aspects of ICL is the normative choice of many international lawyers

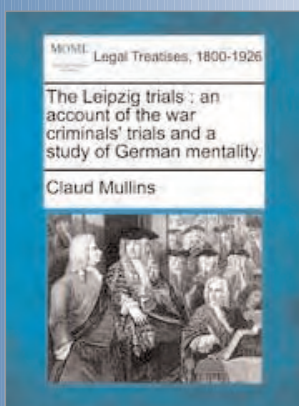
international institutions. Instead, international and national prosecutions, rather than being regarded as alternatives, should be considered to be formally distinct, yet substantively intertwined mechanisms in pursuit of a common goal: the enforcement of ICL.

In addition, there is arguably more to this hidden history of ICL than merely the under-appreciation of the role and influence of domestic courts as just described. Simpson argues that not only is the domestic domain the arena where many trials take place, but further that the field of ICL itself is constituted ‘by this opposition or movement between the domestic and the international.’<sup>61</sup> By this he means that even moments framed as ‘international’ have unmistakable domestic undertones or underpinnings. For example, the first modern ICL project – the Leipzig Trials – took place as a result of the failures of the Allies to give effect to the provisions of the Versailles Treaty regarding international prosecution.<sup>62</sup> Even the internationalists’ centrepiece of Nuremberg, with its international significance for many, was arguably ‘more akin to municipal war crime trials’<sup>63</sup> than to an international court, with the Allies exercising a form of temporary sovereignty over defeated Germany.<sup>64</sup>

Once again, this institutional moment was buttressed by domestic enforcement in the form of the Control Council Law Number 10 trials,<sup>65</sup> which ‘were more numerous and represented a shift from the co-operative (albeit, limited) internationalism of the IMT to the local administration of justice ...’<sup>66</sup> Moreover, the ICC – which has no inherent jurisdiction – could be regarded as merely an aggregation of domestic jurisdiction in respect of international crimes, rather than as having proper international jurisdiction (with the exception of UN Security Council referrals). In summary, the history of ICL as outlined above could be described as ‘a series of undulations between recourse to the administration of local justice and grand gestures towards the international law.’<sup>67</sup>

Finally, it must be noted that this tendency to emphasise the international aspects of the field is not just a historical preference or institutional bias. Rather, it is the normative choice on the part of many international lawyers driven by their conviction that international rather than domestic courts are the “natural” forum to prosecute crimes that ... disrupt the legal order by threatening the peace, security and well-being of the world’.<sup>68</sup> For those lawyers adopting such a viewpoint, national prosecutions are considered to be retrogressive setbacks.<sup>69</sup> The history of ICL on this reading is, therefore, one of progression away from the domestic and towards the international sphere,<sup>70</sup> with the ICC being regarded as the endpoint for ICL.<sup>71</sup>

Such an approach, with its ‘internationalising impulse’,<sup>72</sup> is problematic. Not only does it risk mischaracterising the history of ICL, but also blinding its followers to the flaws of previous institutional highpoints such as Nuremberg. More specifically, it risks misrepresenting the construction of the Rome system in at least two ways. First, by creating the false impression that the domestic prosecution of such crimes is a new phenomenon, it downplays the responsibility of domestic courts which is pivotal to the Rome Statute’s principle of complementarity.<sup>73</sup> On this reading, there is the risk that complementarity is not regarded as an organising principle of the Rome system, but rather as an unfortunate concession to state sovereignty or as a practical compromise driven by scarce resources. Second, there is the risk that if too much weight is given to the ICC’s function – which itself is not institutionally



The Leipzig Trials, 1921 – the first modern ICL project.

beyond reproach<sup>74</sup> – in the application and development of ICL, that any of its failings will be projected onto, or assimilated within, the discipline as a whole.<sup>75</sup> Therefore, the adoption of a balanced and accurate historical approach is important.

### 3. GENERAL PRINCIPLES OF INTERNATIONAL CRIMINAL LAW

#### 3.1 Introduction

Given the diffused and reactive historical nature of ICL it is unsurprising that general principles were, until recently, underdeveloped.<sup>76</sup> For example, because historically the discipline reacted to moments of unprecedented violence or social upheaval, there was little emphasis on developing a coherent, accompanying theoretical framework in which to further develop these emerging principles. As a result, ‘general principles were of secondary importance in efforts to codify international criminal law’,<sup>77</sup> with even the ad hoc tribunals being ‘regulate[d] by the general principles of ICL in only a rudimentary way’.<sup>78</sup>

Therefore, the Rome Statute presented an opportunity to apply a more conceptual and systematic approach to its underpinning principles, which had been developed previously ‘within a thicket of parallel national laws’.<sup>79</sup> Consequently, Part 3 of the Rome Statute on ‘General Principles of Criminal Law’ has been described in terms of ‘constitut[ing] the first attempt in the history of ICL to formulate a general part of substantial criminal law’.<sup>80</sup> In doing so, Kress argues that the drafters of the Rome Statute demonstrated a clear desire not to align ICL with any particular common or civil law judicial traditions.<sup>81</sup>

The current module adopts a broad approach to applicable general principles in the sense that it not only considers common features to all international crimes, but also those underpinning and delimiting principles upon which ICL is founded. They apply (albeit differently at times) equally to both domestic and international prosecutions of international crimes. In particular, the following key principles are considered in this section: jurisdiction, which provides the basis for the prosecution of international crimes by either an international or national court; the contextual and collective aspects of international crimes; individual criminal responsibility; and *nullem crimen sine lege* and the corresponding principle of *nulla poena sine lege* which impose legal limits upon who may be prosecuted, for what crimes, and with what resultant punishment.

#### 3.2 Jurisdiction

The concept of jurisdiction is recurrent in international law, yet is often not (adequately) defined. In its most basic form, the term is used to mean ‘the extent of each state’s right to regulate conduct or the consequences of events’.<sup>82</sup> However, more recently it has been used interchangeably in the fields of IHRL, ICL, and the law of state responsibility. For the current purposes, the term ‘jurisdiction’ is used both in the traditional sense of delineating the power of a state, as well as in the broader sense of the power of an international body (such as the ICC) to prosecute international crimes.

‘Jurisdiction’ delineates the power of a state, as well as an international body, to prosecute international crimes



One way in which the ICC can gain jurisdiction is through a UN Security Council referral.

For war crimes,  
the necessary  
context is the  
occurrence of an  
armed conflict



Special Tribunal for Lebanon prosecutor  
Daniel Bellemare, 2009.

In order for a domestic or international court to prosecute any international crime, it must first establish its jurisdiction to do so. The consideration of jurisdiction under ICL must at the outset distinguish between domestic prosecutions of international crimes and the prosecution of such crimes at the international level (for example, by the IMTs or the ICC). The former are governed by the general rules of international law relating to the jurisdiction of states, considered in detail in Module 5. As far as the prosecution of international crimes by international mechanisms is concerned, the powers of a particular judicial body (including on jurisdictional matters), will depend on the provisions of its founding legal instrument. In this regard two types of international tribunals can be identified: those established by the UN Security Council acting under Chapter VII of the UN Charter; and those established by states themselves, usually through a treaty.

The powers of the former category (for example, the ICTR, ICTY, and STL) are sourced ultimately in the UN Charter, although the exact scope of their jurisdictional reach will be specified within each founding instrument. Conversely, the powers of international courts established by states (e.g. the ICC) are grounded in the treaty establishing them, requiring the consent of states as an exercise of their sovereignty.

### 3.3 International crimes: context and collective phenomena

#### 3.3.1 Context of international crimes

All international crimes have a contextual element to them. Although the acts that are punished as crimes against humanity, genocide, and war crimes are criminal acts generally prohibited under domestic criminal law, it is the context within which they take place that makes them international crimes.

This contextual element takes on a different form in each of the core crimes. For war crimes, the necessary context is the occurrence of an armed conflict, the factual and legal existence of which is not always easy to determine in practice. This seems fairly straightforward, although in reality it can prove more complicated. In some instances, the existence of armed conflict will be self-evident and uncontested, whereas in others it might be the subject of dispute (factually and legally).

There are two types of armed conflict: international armed conflict (IAC) which generally occurs between states; or non-international armed conflict (NIAC) which takes place between a state and another organised armed group(s), or between such groups within a particular state. The correct classification of the conflict is important because this determines the applicable rules of IHL and therefore the criminal sanctions applicable.<sup>83</sup> War crimes differ somewhat from the other two core crimes of genocide and crimes against humanity in that the context of an armed conflict is a precondition for the prosecution of war crimes.

#### 3.3.2 Collective phenomena of international crimes

As Swart notes: 'International crimes are largely collective phenomena. They usually require the cooperation of many actors, who are more often than not members of collectivities.'<sup>84</sup>



In the case of crimes against humanity, the collective element is contained in the requirement of a systematic or widespread attack against a civilian population. The Rome Statute has added an additional contextual element: that the attack must be ‘pursuant to or in furtherance of a State or organisational policy.’<sup>85</sup> This addition is the subject of some controversy.<sup>86</sup>

The collective aspect of genocide is more complicated. Genocide is the commission of certain underlying acts with the intent to destroy a protected group in whole or in part. Whereas factually genocide takes place within a broader context, there is some dispute over whether or not the collective element of genocide is a (formal) legal requirement of genocide. Schabas has argued consistently and convincingly that an inherent requirement of genocide is the existence of a state policy.<sup>87</sup> However, there are different perspectives within the jurisprudence of the ICTY and the ICC on this requirement. Nevertheless, it seems to have been accepted implicitly as a ‘factual’ condition that must be present, although there are those who still suggest that it is theoretically possible to have a ‘lone *genocidaire*’.<sup>88</sup>

Finally, in respect of war crimes, article 8(1) of the Rome Statute states that: ‘The Court shall have jurisdiction in respect of war crimes *in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.*’

It is important to note that insofar as war crimes and crimes against humanity are concerned, initially these crimes required a nexus to a state in order to be prosecuted. In the instance of war crimes, these were only punishable if committed in the context of IAC (i.e. between two states) as grave breaches of the Geneva Conventions; whereas under the Nuremberg Charter, which contained the first formulation of crimes against humanity, such crimes had to be ‘connected to another crime within the jurisdiction of the Court’ (i.e. to war crimes or the crime of aggression which may only be perpetrated by a state).<sup>89</sup>

In contrast, both war crimes and crimes against humanity may now be committed by non-state actors (subject to meeting certain criteria, such as some form of organisation).<sup>90</sup> Furthermore, modern war crimes law extends to both IAC and NIAC,<sup>91</sup> although the prohibited conduct under each is not exactly the same, with IAC being more comprehensively provided for. Similarly, crimes against humanity, which may be perpetrated during peacetime or armed conflict, may be committed by a state or an organisation.<sup>92</sup>

### 3.4 Individual criminal responsibility

A pivotal and foundational principle of ICL is the criminal responsibility of individuals (not states), because ultimately it is concerned with the punishment of individuals. As the Nuremberg Tribunal stated: ‘Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.’<sup>93</sup> This was perhaps the most important normative legacy of Nuremberg, because at that time the concept of imposing individual responsibility as a matter of international law was itself novel. As Bianchi notes:

A pivotal and foundational principle of ICL is the criminal responsibility of individuals



The punishment of individuals was perhaps the most important normative legacy of Nuremberg.

A balance must be struck between assigning individual criminal responsibility, and providing a collective account of the crimes

Individual criminal responsibility under international law emerged after the end of World War II as part and parcel of the process of transformation of international law, by which individuals eventually came to the fore as subjects of the international legal order with their own set of rights and responsibilities. The idea that individuals have duties that transcend national boundaries, set forth in the Nuremberg IMT judgment, paved the way for the consolidation of their autonomous status in international law.<sup>94</sup>

There are a number of principles forming the contours of individual criminal responsibility. First, an elementary, uncontroversial general principle of criminal law is that only those who are proven to be criminally responsible for a given crime in which they have personally engaged or in some way participated in may be convicted (the principle of *nulla poena sine culpa*).<sup>95</sup> As previously noted, however, unlike many domestic criminal acts, international crimes are usually ‘collective phenomena’, thereby making it ‘both inevitable and legitimate for international criminal law to approach the phenomenon of individual liability for international crimes from an organisational perspective.’<sup>96</sup> Nevertheless, such trials demand the establishment of individual criminal responsibility within the confines of law. In this regard Swart notes:

When discussing the criminal liability of members of criminal organisations, the Nuremberg international tribunal remarked that “criminal liability is personal” and that “mass punishment should be avoided”. Similarly, the case law of the ad hoc International Tribunals takes the view that nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated. The [Rome Statute] does not explicitly mention a similar principle. It may, however, safely be assumed to be one of the general principles to which article 21 [of] the ... statute refers.<sup>97</sup>

This requires an uncomfortable, and sometimes normatively awkward, balance to be struck between assigning individual criminal responsibility and providing a collective account of the crimes in question.<sup>98</sup> Therefore, the establishment of individual liability in the context of collective crimes requires complex and sometimes tenuous legal doctrines of participation,<sup>99</sup> primarily by employing modes of responsibility largely developed by the IMTs. Broadly stated, these are: commission; joint commission; commission through another person; encouragement; assistance; and superior responsibility.<sup>100</sup> With the exception of superior responsibility, which is a unique construct of ICL,<sup>101</sup> these modes of responsibility have been drawn largely from domestic legal systems.

This responsibility is further qualified, at least under the Rome Statute, by the principle of prosecuting those who bear the greatest responsibility for particular criminal acts. There are grounds also which mitigate or exclude responsibility, namely: mental disease or defect, intoxication, self-defence, duress and necessity.<sup>102</sup>

There are two further limbs which need to be satisfied, namely the presence of individual actor(s) and the commission of criminal acts. With regard to the individual element, it must be noted that given the nature of international crimes, an overlap often exists between issues of state and individual responsibility for such acts under international law. As Bianchi notes:



General Krstić at the ICTY, 2001.



It is not infrequent that different jurisdictions are seized with the same set of facts which may give rise to both state and individual responsibility. In this context, it is worth recalling that General Krstić had been condemned by the ICTY for the crime of aiding and abetting the genocide committed in Srebrenica in 1995. For the genocide in Srebrenica the ICJ has recently condemned Serbia for its failure to prevent it, under article III of the Genocide Convention.<sup>103</sup>

However, although both state responsibility and individual criminal liability may arise on the same set of facts, a clear distinction exists between the responsibility of states as a matter of general international law, which may not be attributed to individuals,<sup>104</sup> and the responsibility of individuals as a matter of international criminal law.

Second, the focus here is on establishing criminal responsibility rather than civil liability. This does not mean that civil liability cannot be established for international crimes. Examples of civil proceedings can be found both internationally (e.g. in the *Genocide* case<sup>105</sup>) and domestically (e.g. in the US under the Alien Tort Statute<sup>106</sup>). Notably, civil liability in this regard can be established in terms of both individuals and corporations.

### 3.5 *Nullem crimen sine lege, nulla poena sine lege*

The concept of individual criminal responsibility is further delimited by the closely related principles of *nullem crimen sine lege* and *nulla poena sine lege*. The principle of *nullem crimen sine lege* provides that a person cannot be held criminally responsible for conduct that was not a crime within the jurisdiction of the court or tribunal concerned at the time of its commission.<sup>107</sup> Therefore, this principle of ICL requires that ‘the act of the accused must have constituted an international crime at the time he performed the act, that the prohibition is sufficiently clear and precise as to enable the accused to know what it entails, and that the accused was able to be aware of its existence.’<sup>108</sup> Note, this principle applies to both the crimes and modes of responsibility alleged.<sup>109</sup> *Nullem poena sine lege* requires that an individual can only be punished in terms of an existing law.<sup>110</sup>

Aside from claims that the outcomes of the IMTs represented victors’ justice, the most consistent and significant criticisms of these trials in ICL due process and fairness terms were that they violated the *nullem crimen* and *nulla poena* principles, in particular on the basis that the crimes charged under their statutes were not crimes at the time they were committed. Therefore, some allege that the law was applied retrospectively; certainly there is a plausible argument to be made in regard to the crimes against humanity and crimes against the peace (aggression). Nor did, for example, the Nuremberg Tribunal adequately counter such criticisms through its own less than satisfactory reasoning<sup>111</sup> and emphasis on the war crimes charges, which were on a slightly better legal footing. Certainly, such criticisms and weaknesses arguably hindered the development of ICL until the creation of the ad hoc tribunals in the early 1990s.

For many, however, any unresolved issues of retrospectivity finally have been laid to rest by the Rome Statute. As Kress notes: ‘[t]he international criminal court has finally put to bed the uncomfortable problems the discipline has had with [the principle of *nullem crimen sine lege*] ... since Nuremberg.’<sup>112</sup> More specifically, article 22(1) of the Rome Statute states that: ‘A person shall not be criminally

A consistent criticism of the IMTs was that the crimes charged were not crimes at the time they were committed



Japanese war leaders are made to rise from their seats during their arraignment at the International Military Tribunal at Tokyo, 1946.

The Nuremberg Tribunal's founding charter did contain a provision to ensure a fair trial for the defendants



Richard Harvey, defence lawyer for accused at the ICTY.

responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.' This principle is clarified further in article 24, which recognises the temporal limitations of the Rome Statute as being from 1 July 2002.<sup>113</sup> As far as the principle of *nullem poena* is concerned, article 23 states that: 'A person convicted by the Court may be punished only in accordance with this Statute.'

Nevertheless, as Milanovic argues, it is possible that issues may re-emerge in relation to the principle of *nullem crimen sine lege*:

If the Statute is only jurisdictional in nature, ... then the source of substantive norms of criminal law binding on individuals must be elsewhere, primarily in customary law. If this is so, then the Statute could never go beyond customary law, and any individual accused before the Court will at least in principle have to be able to mount a challenge as to whether the charges against him have a basis in customary law. If, on the other hand, the Statute is seen as being substantive in nature, then it may well go beyond customary law, but it would arguably run afoul of the *nullem crimen sine lege* principle in at least two cases – when a particular situation has been referred to the court by the UN Security Council or by a non-state party – since the supposedly substantive Statute would not have been binding on the individuals concerned at the time that they allegedly committed the offense.<sup>114</sup>

## 4. PRINCIPLES OF INTERNATIONAL HUMAN RIGHTS LAW

### 4.1. Relationship between international criminal law and international human rights law

The relationship between international human rights law (IHRL) and ICL is complex and multifaceted. At a general level, there are philosophical, legal and historical commonalities between the two fields. As de Than and Shorts note: '[T]here is a clear, visible cross-pollination and cross-referencing between international criminal law, international humanitarian law and international human rights, the first and last of which are really different perspectives on the same problem.'<sup>115</sup>

What this denotes is that ICL is a means of protecting human rights through the criminal punishment of those individuals who commit egregious human rights violations in the form of international crimes. However, as Zappala notes, 'human rights must be ensured not only through, but also during criminal prosecutions.'<sup>116</sup> With this in mind, ICL has developed procedures and provisions to protect the rights of the accused in criminal proceedings. Nevertheless, the level of protection granted in this regard differs between and within international and domestic proceedings.

### 4.2. Protection of human rights by international courts

Although the Nuremberg Tribunal has been decried as an exercise of *ex post facto* 'victor's justice' – and not without some merit – its founding charter did contain a provision 'to ensure a fair trial for the Defendants'. Furthermore, article 16 of the Charter provided, inter alia, that the accused be given a detailed copy of the indictment within a 'reasonable time before the Trial';<sup>117</sup> that the accused have the right to conduct his own defence or to have the assistance of legal representative;<sup>118</sup>

and that the accused be afforded the right to cross-examine any witness called by the prosecution.<sup>119</sup>

When the ICTY and ICTR Statutes were drafted, the climate was quite different to when the corresponding charters of the IMTs had been drafted some 40 years previously. In particular, the impact of human rights on the international and domestic legal orders had grown considerably, thereby requiring appropriate respect for human rights by the ICTY and ICTR from the outset of their operations.<sup>120</sup> As a result, the ICTY and ICTR Statutes contain a detailed provision – based on article 14 of the ICCPR (right of fair trial) – on the rights of the accused.<sup>121</sup> This was supplemented by other articles (see article 9 of the ICTR Statute, and article 10 of the ICTY Statute), as well as by the Rules of Procedure and Evidence (see rule 42 of the ICTY Rules).<sup>122</sup> These protections have been elaborated on in practice by the tribunals. However, this does not mean that the ad hoc tribunals are beyond reproach in terms of their IHRL compliance. Rather, the absence of effective remedies for violations of these human rights protections limits their value considerably.<sup>123</sup>

As far as the ICC is concerned, the Rome Statute contains provisions detailing the rights of persons applicable during the investigative stage of proceedings; the rights of an accused during trial; and offers specific remedies for persons wrongfully prosecuted. With respect to the former, under article 55, a person under investigation by the prosecutor enjoys protection against self-incrimination; duress, coercion and torture; and arbitrary arrest and/or detention. Further, he or she has a right to an interpreter in the case of questioning and in such instances must be informed, prior to being questioned, that he/she: is a suspect; has a right to remain silent (without prejudice); has a right to legal assistance (free of charge if necessary); and has a right to be questioned in the presence of counsel.<sup>124</sup>

Once it is confirmed that a person will stand trial, the accused has a number of other rights which include the right to be present at the trial;<sup>125</sup> the right to be presumed innocent until proven guilty beyond a reasonable doubt;<sup>126</sup> as well as other detailed fair trial rights provided under article 67 of the Rome Statute. These include, in addition to those rights provided at the investigative stage, the right to a fair hearing conducted impartially. They include also a number of minimum guarantees, including: full equality; to be tried without undue delay; to be given sufficient time to prepare a defence; the right not to be subject to any reversal of the burden of proof or any onus of rebuttal; and the right to disclosure by the prosecutor of evidence that ‘shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence’.

Crucially, article 85 of the Rome Statute provides an ‘enforceable right to compensation’ for any person who is the victim of unlawful arrest or detention,<sup>127</sup> as well as a right to compensation for anyone falsely convicted of a crime as a result of a miscarriage of justice.<sup>128</sup> Further, in exceptional circumstances – where there has been a ‘grave and manifest miscarriage of justice’ – compensation may be awarded following an unsuccessful prosecution.<sup>129</sup>

### 4.3. Protection of human rights in domestic proceedings

The protection afforded to those subject to domestic prosecution for international crimes will depend on the legal regime in place in that country. Arguably, article 14

The Rome Statute protects the rights of persons during investigation and trial and offers remedies for those wrongfully prosecuted



Duty defense lawyer Xavier Jean Keita (left) with accused, Germain Katanga, at the ICC, 2007.

of the ICCPR is part of customary international law, while the prohibition on the use of torture to obtain evidence or a confession most certainly is. Notably, South Africa, Malawi and Botswana are all party to the ICCPR.



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## NOTES

- 1 R Cryer, H Friman, D Robinson and E Wilmhurst, *Introduction to international criminal law and procedure*, Cambridge: Cambridge University Press, 2007, 1.
- 2 Van Schaak and Slye explain: 'Contemporary practitioners and scholars have entered the field from different origins, including domestic criminal law, international human rights law, and international humanitarian law. Their definition of the field is heavily influenced by their point of entry. So, domestic criminalists tend to build the field outward from a domestic law foundation to cover the transnational dimensions of domestic criminal law and the various ways that states endeavour, and are permitted, to extend their domestic penal law abroad ... Individuals who approach the field from the human rights tradition tend to focus on the prosecution of so-called "atrocities crimes" – genocide, war crimes against civilians, and crimes against humanity ... Finally, individuals who approach international criminal law from the perspective of military justice are primarily interested in crimes committed in the context of armed conflict involving prohibited tactics of war and protected persons.' B Van Schaak & R Slye, *Defining International Criminal Law*, SSRN eLibrary, 1.
- 3 These are: the extraterritorial jurisdiction of national laws; internationally prescribed national laws; internationally authorised national laws operating in any international or foreign territory; national rules common to civilisations; inter-state cooperation in criminal matters; and 'international criminal law' in the material sense of the word.
- 4 G Schwarzenberger, *The Problem of an International Criminal Law*, *Current Legal Problems* 3 (1950), reprinted in G Simpson (ed), *War Crimes Law* 1, 2004, edited by G Simpson (2004), 5-38, 37.
- 5 A Cassese, *International Criminal Law*, Oxford: Oxford University Press, 2008, 3.
- 6 G Werle, *Principles of international criminal law*, The Hague: TMC Asser Press, 25.
- 7 Notably Bassiouni uses the term 'international criminal justice'.
- 8 C Bassiouni, *International Criminal Justice in Historical Perspective: The Tension Between States' Interests and the Pursuit of International Justice*, in A Cassese (ed), *The Oxford companion to international criminal justice*, Oxford: Oxford University Press, 2009, 131.
- 9 B Van Schaak & R Slye, *Defining International Criminal Law*, 1.
- 10 Ibid. The authors go on to note: 'We recognise, however, that ICL is not purely a field of international law. Many substantive norms of ICL have been incorporated – with varying degrees of fealty to their international origins – into the domestic penal codes of the nations of the world.' Ibid.
- 11 As Simpson notes: 'It must surely now be legitimate to include extradition proceedings involving Senator Pinochet, the Belgium legislation criminalising acts of genocide, wherever they happen to be committed, and the various legal instruments purporting to implement the new [ICC] statute into domestic law as part of any study of international criminal law. Purists may cavil but no comprehension of the field is possible without a study of a broad range of legal techniques and institutions.' G Simpson, *Law, war and crime: war crimes trials and the reinvention of international law*, Cambridge: Polity, xv.
- 12 Cryer et al, *An introduction to international criminal law and procedure*, 2.
- 13 See, for example, J Dugard, *International Law: a South African perspective*, Cape Town: Juta, 2006, 159; P Gaeta, *Internationalization of Prohibited Conduct*, in A Cassese (ed), *The Oxford companion to international criminal justice*, Oxford: Oxford University Press, 2009, 65; W Schabas, *Genocide in International Law*, New York, Cambridge University Press, 2009, 26.
- 14 C Kress, *The International Criminal Court as a Turning Point in the History of International Criminal Justice*, in A Cassese (ed), *The Oxford companion to international criminal justice*, Oxford: Oxford University Press, 2009, 146.
- 15 With the possible exception of torture which is covered, in any event, under war crimes and crimes against humanity. See Module 3.
- 16 At the risk of triteness, when mention is made here to the history of these crimes, reference is being made to their emergence as a matter of law, not of fact. Crimes that would meet the definition of war crimes, genocide, and crimes against humanity have been perpetrated by mankind prior to and since recorded history.
- 17 Piracy was arguably the concern of the international community because of its transnational rather than its heinous nature as many have argued. In fact, there are notable differences between the normative bases of piracy and the crimes of genocide, war crimes, and crimes against humanity. As Simpson notes: 'pirates were the enemies of empire or particular states, rather than humanity'. See Simpson, *Law, war and crime*, 159-177.
- 18 See B Van Schaak & R Slye, *A Concise History of International Criminal Law: Chapter 1 of Understanding International Criminal Law*, Santa Clara University Legal Studies Research Paper No. 07-42, 11.
- 19 See Schwarzenberger, *The Problem of an International Criminal Law*, 280-283. Conversely, see C Bassiouni, *International Criminalization of Prohibited Conduct*, in A Cassese (ed), *The Oxford companion to international criminal justice*, Oxford: Oxford University Press, 2009, 132. These antecedents, however, are relevant insofar as the histories of specific substantive crimes are concerned, and are discussed in more detailed in Module 3.

- 20 An alternative modern antecedent for substantive ICL (and war crimes in particular) is the Protocol of the Brussels Conference 1874 which provided for 'the immediate punishment of ... persons who are guilty' of violations of the laws of war. The Protocol, however, never came into force. Van Schaak & Slye, *A Concise History of International Criminal Law*, 19.
- 21 Signed on 28 June 1919. See further GJ , 40-41; Werle, *Principles of international criminal law*, 3-4; Van Schaak & Slye, *A Concise History of International Criminal Law*, 20-26.
- 22 Although war crimes were outlawed previously under customary IHL, the Treaty of Versailles was 'the first time, the idea of individual criminal responsibility under international law was explicitly recognised in a treaty'. Werle, *Principles of international criminal law*, 5. For pure 'domestic' prosecutions, see Van Schaak & Slye, *A Concise History of International Criminal Law*, 19.
- 23 Article 228 Treaty of Versailles (1919).
- 24 Article 227 Treaty of Versailles (1919).
- 25 These trials took place in the German Supreme Court in Leipzig from 23 May to 16 July 1921 (hereinafter 'the Leipzig Trials'). See also article 230 Peace of Sevres (1920) (with Turkey). Van Schaak & Slye, *A Concise History of International Criminal Law*, 25-26.
- 26 Note, for those who define ICL as a 'subset of international law' the exclusive focus on these international aspects is deliberate.
- 27 Werle, *Principles of international criminal law*, 3.
- 28 The Tribunal indicted 24 German military and political leaders, 21 of whom were brought to trial. When its judgment was handed down on 30 September 1946: 12 defendants were sentenced to death; 3 to life imprisonment; 4 to extended prison sentences; and 3 were acquitted. *Ibid.* 9.
- 29 See Schwarzenberger, *The Problem of an International Criminal Law*, 31-32.
- 30 Van Schaak & Slye, *A Concise History of International Criminal Law*, 15.
- 31 Werle, *Principles of international criminal law*, 6.
- 32 Van Schaak & Slye, *A Concise History of International Criminal Law*, 15.
- 33 J Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, *Yale Journal of International Law* 24(2) (1999), 365-483, 424.
- 34 The Special Court for Sierra Leone was established by the Government of Sierra Leone and the UN (pursuant to Security Council resolution 1315 (2000) of 14 August 2000) to try those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.
- 35 The Extraordinary Chambers in the Courts of Cambodia was established pursuant to an agreement between the Royal Government of Cambodia and the UN to try senior members of the Khmer Rouge for serious violations of Cambodian penal law, international humanitarian law and custom, and violation of international conventions recognised by Cambodia, committed during the period between 17 April 1975 and 6 January 1979.
- 36 The Special Tribunal for Lebanon (STL) was established by an agreement between the UN and the Lebanese Republic (pursuant to Security Council Resolution 1664 (2006) of 29 March 2006) to try those responsible for the assassination of Rafic Hariri on 14 February 2005. The STL has jurisdiction also over a series of other attacks in Lebanon (between 1 October 2004 and 12 December 2005) if they are proven to be connected with the Hariri assassination. It is based in Leidschendam in the Netherlands.
- 37 The East Timor Tribunal – officially the 'Special Panels of the Dili District Court' – was established in 2000 by the UN Transitional Administration in East Timor (UNTAET) to try cases of 'serious criminal offences' – including murder, rape, and torture – which took place in East Timor in 1999.
- 38 D Shraga, *Mixed or Internationalized Courts*, in A Cassese, *The Oxford companion to international criminal justice*, Oxford: Oxford University Press, 2009, 424. For a full discussion see Werle, *Principles of international criminal law*; Cryer et al, *An introduction to international criminal law and procedure*.
- 39 Shraga, *Mixed or Internationalized Courts*, 424.
- 40 C Kress, *The International Criminal Court as a Turning Point in the History of International Criminal Justice*, in A Cassese, *The Oxford companion to international criminal justice*, Oxford: Oxford University Press, 2009, 143-145.
- 41 *Ibid.*
- 42 Simpson, *Law, war and crime*, 40.
- 43 See *infra*.
- 44 These crimes were 'international' in the sense that they were of concern to the international community as a whole. The subject of treaties created legal obligations to prosecute them and allowed states to exercise 'extraordinary' jurisdiction over those who transgressed them.
- 45 Gaeta, *International Criminalization of Prohibited Conduct*, 64.
- 46 *Ibid.*
- 47 Here a distinction is drawn between the obligation to exercise jurisdiction over such crimes under international law contained in many treaties under the *aut dedere* principle – so-called indirect enforcement – and the actual criminalisation thereof under international law – direct enforcement.
- 48 Including *aut dedere aut judicare* (extradite or prosecute) provisions. See *infra*, Module 5.



- 49 A Bianchi, State Responsibility and Criminal Liability of Individuals, in A Cassese (ed), *The Oxford companion to international criminal justice*, Oxford: Oxford University Press, 2009, 28.
- 50 See *infra* General Principles – Jurisdiction and Module 5.
- 51 For a discussion of some of the prominent domestic trials see Cryer et al, *An introduction to international criminal law and procedure*, 37-90.
- 52 See *infra*.
- 53 The question of when and how international law criminalises these core crimes remains a relatively underexplored aspect of the discipline. It is not essential for the purposes of defining the field as the unifying aspect of ICL adopted here are the crimes themselves, not their source. See F Jessberger, National Legislation on International Crimes, in A Cassese, *The Oxford companion to international criminal justice*, Oxford: Oxford University Press, 2009, 429. See further Module 5.
- 54 See further, M Milanovic, Is the Rome Statute Binding on Individuals? (And Why We Should Care), *Journal of International Criminal Justice* 9(1) (2011), 25-52.
- 55 Notably, at a meeting of the Allied Powers prior to the creation of the Nuremberg Tribunal, Sir David Maxwell Fyfe (the UK representative) noted: ‘What we want to abolish at the trial is a discussion as to whether the acts are violations of international law or not. We declare what the international law is so that there won’t be any discussion on whether it is international law or not’. United States, Dept of State. International Conference on Military Trials, London, (1945) 19, quoted in Schwarzenberger, *The Problem of an International Criminal Law*, 290. See, however, Werle, *Principles of international criminal law*, 11.
- 56 Regarding criminalisation internationally, see Gaeta, *Internationalization of Prohibited Conduct*, 65-67.
- 57 Milanovic, *Is the Rome Statute Binding on Individuals?*, 32.
- 58 Kress notes: ‘[T]he tradition of ... directly applying customary law by resting it on the mantle of broad jurisdiction phrases was replaced with an essentially code-based approach to criminal law. The [Rome Statute] codifies the applicable customary law and statutory definitions that are further specified in so-called Elements of Crimes.’ Kress, *The International Criminal Court as a Turning Point in the History of International Criminal Justice*, 146.
- 59 For a discussion on whether the Rome Statute itself is a substantive treaty or merely jurisdictional, see further Milanovic, *Is the Rome Statute Binding on Individuals?*.
- 60 Jessberger, *International v. National Prosecutions of International Crimes*, in A Cassese (ed), *The Oxford companion to international criminal justice*, Oxford: Oxford University Press, 2009, 208.
- 61 Simpson, *Law, war and crime*, 31.
- 62 As Van Schaak and Slye explain: ‘In the face of continued Allied equivocation over war crimes trials and fierce objections amongst the German public ..., Germany artfully proposed hosting domestic trial before the German Supreme Court in Leipzig. The Allies, desperate to salvage some vestige of the project, agreed.’ Van Schaak & Slye, *A Concise History of International Criminal Law*, 25. These trials, however, were not ideal. Only 12 of the over 900 accused were tried, with very few convictions. *Ibid.* 25. Werle, *Principles of international criminal law*, 4. In addition, the trial applied German national law.
- 63 Schwarzenberger notes: ‘As was pointed out in the Nuremberg Judgement, the signatories to the Charter of the Tribunal only did jointly what each of them, if in sole control Germany, could have done alone ... For these very reasons, however, both these International Military Tribunals were in substance more akin to municipal war crime courts that truly international tribunals.’ Schwarzenberger, *The Problem of an International Criminal Law*, 32-33.
- 64 Simpson, *Law, war and crime*, 39.
- 65 Control Council Law No. 10 – which came into force on 20 December 1945 – was adopted in order to provide for the prosecution of ‘lesser offences’ than those tried at the Nuremberg Tribunal.
- 66 Simpson, *Law, war and crime*, 37-38.
- 67 Simpson, *Law, war and crime*, 33.
- 68 Jessberger, *International v. National Prosecutions*, 208. See too Simpson, *Law, war and crime*, 30-53.
- 69 See A Cassese, *Reflections on International Criminal Justice*, *Modern Law Review* 61(1) (1998), 1-10, 1. For a conciliatory approach see Alvarez, *Crimes of State/Crimes of Hate*, 365. See generally Simpson, *Law, war and crime*, Chapter 2, Simpson notes: ‘This question of place has hovered over the war crimes field since its inception.’ *Ibid.* 30.
- 70 Simpson notes: ‘For some international lawyers, these are not arbitrary historical tensions but rather a working through of the cosmopolitan trajectory. Domestic trials, court-martials, amnesties, or political settlements are viewed, quite often, as “setbacks” for international justice ... The future said to lie with international criminal courts and the supercession of the provincialism of domestic courts. The ICC itself, then, is not simply a high point of international criminal law but something of an endpoint, too (the domestic finally ceding to the international).’ Simpson, *Law, war and crime*, 34.
- 71 *Ibid.* Werle describes the ICC as ‘the final milestone in the development of international criminal law’. Werle, *Principles of international criminal law*, 18.
- 72 Simpson, *Law, war and crime*, 30.

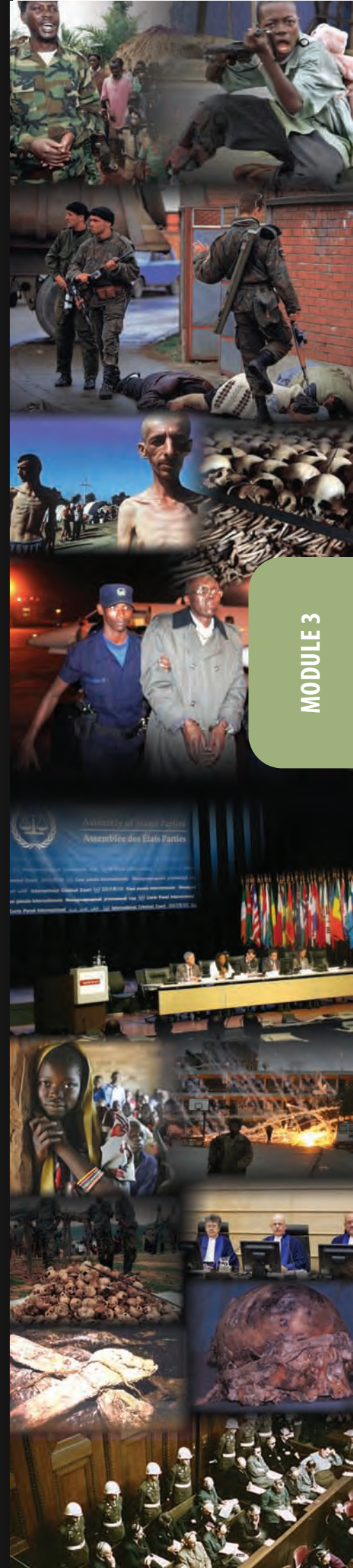
- 73 The ICC will only be able to admit a case (where the other jurisdictional bases of nationality and territoriality are present) if the State Party concerned is unwilling or unable to prosecute the offender nationally. See Preamble and article 17 of the Rome Statute.
- 74 See generally F Megret, Three Dangers for the International Criminal Court: A Critical Look at a Consensual Project, *SSRN eLibrary*.
- 75 Simpson states that: 'international criminal law's most recent innovation, then, is simply a physical rehearsal of a movement between the domestic and international that constitutes the field itself. The modalities of international justice involve a perpetual negotiation between the claims of the cosmopolitan and the needs of the local, the former constantly threatened to collapse into hegemony, the latter into parochialism ... This negotiation is the very stuff of international criminal law.' Simpson, *Law, war and crime*, 53.
- 76 Van Schaak & Slye, *A Concise History of International Criminal Law*, 8.
- 77 Werle, *Principles of international criminal law*, 25. As Werle explains: '[T]here was at first no need to develop a comprehensive set of general principles for international criminal law. Where necessary, the international criminal Tribunals turned to rules common to domestic legal systems. Since national courts were anyway responsible for implementing international criminal law, the application of national "general principles" was to be expected.' Werle, *Principles of international criminal law*, 90.
- 78 Kress, The International Criminal Court as a Turning Point in the History of International Criminal Justice, 148.
- 79 Werle, *Principles of international criminal law*, 91.
- 80 Kress, The International Criminal Court as a Turning Point in the History of International Criminal Justice, 148. See further Werle, *Principles of international criminal law*, 90-92.
- 81 Kress, The International Criminal Court as a Turning Point in the History of International Criminal Justice, 148.
- 82 R Jennings & A Watts, *Oppenheim's International Law*, 9th Edition, Longman, 2008, 456.
- 83 Although this divide has become increasingly tenuous. See Module 3, War Crimes.
- 84 B Swart, Modes of International Criminal Responsibility', in A Cassese, *The Oxford companion to international criminal justice*, Oxford: Oxford University Press, 2009, 89.
- 85 See article 7(2)(a), Rome Statute.
- 86 See *infra*.
- 87 See W Schabas, State Policy as an Element of International Crimes, *Journal of Criminal Law and Criminology Journal of criminal law and criminology* 98 (3) (2008), 953-982.
- 88 See discussion *infra* Module 3, Genocide.
- 89 See article 6 IMT Charter (1945).
- 90 See, for example, article 1(4) Additional Protocol I 1977; and article 8(2)(f) Rome Statute with respect to NIAC.
- 91 See article 8(2), Rome Statute.
- 92 See *infra* Module 3, Crimes Against Humanity.
- 93 Trial of the Major War Criminals before the International Military Tribunal-Nuremberg, 14 November 1945-1 October 1946, at 223.
- 94 Bianchi, State Responsibility and Criminal Liability of Individuals, 16. Notably, according to Cassese: 'This whole corpus of rules is premised on the general notion that international legal prescriptions are capable of imposing obligations directly on individuals, without the intermediary of the state wielding authority over such individuals.' Further, the Judges at Nuremberg stated that: 'the essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state'. *Trial of the Major War Criminals before the International Military Tribunal-Nuremberg*, 14 November 1945-1 October 1946, at 223.
- 95 See, for example, *Prosecutor v. Tadic*, IT-94-1, Appeals Chamber, 15 July 1999, 186.
- 96 Swart, Modes of International Criminal Responsibility, 9.
- 97 *Ibid*.
- 98 See M Koskeniemi, Between Impunity and Show Trials, *Max Planck Yearbook of United Nations Law* 6(1) (2002), 1-32.
- 99 See *infra*, Chapter 3. See further Swart, Modes of International Criminal Responsibility, 89.
- 100 See further Werle, *Principles of international criminal law*, 116-164.
- 101 *Ibid*.
- 102 See article 31 Rome Statute.
- 103 Bianchi, State Responsibility and Criminal Liability of Individuals, 18.
- 104 Article 58 ILC Articles on State Responsibility 2001 places 'any question of the individual responsibility... of any person acting on behalf respect state' beyond the reach of the regime'. *Ibid*.
- 105 *Application of the Convention on the prevention and punishment of the crime of genocide (Bosnia and Herzegovina v. Yugoslavia [Serbia and Montenegro])*, Judgment, (26 February 2007).
- 106 28 U.S.C 1350.
- 107 See articles 22 and 24 Rome Statute.
- 108 Bianchi, State Responsibility and Criminal Liability of Individuals, 91-92.

- 109 Swart, Modes of International Criminal Responsibility, 92.
- 110 See article 23, Rome Statute.
- 111 As Milanovic notes: 'The London Charter was either declaratory of existing pre-existing custom, or a substantive retroactive imposition of criminal responsibility. The possession of the International Military Tribunal (IMT) itself on this point is ambiguous, as it both stated that the Charter "is the expression of international law existing at the time of its creation", and that *nullem crimen* was a "principle of justice" that was satisfied merely on the count that the defendants knew that what ... they were doing was wrong.' Milanovic, *Is the Rome Statute Binding on Individuals?*, 4.
- 112 Kress, *The International Criminal Court as a Turning Point in the History of International Criminal Justice*, 145-146.
- 113 Further, article 24(1) Rome Statute states: 'No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.'
- 114 Milanovic, *Is the Rome Statute Binding on Individuals?*, 2.
- 115 C De Than and E Short, *International Criminal Law and Human Rights*, London: Sweet & Maxwell, 2003, 12.
- 116 S Zappala, *Respect for Human Rights in International Criminal Proceedings*, in A Cassese (ed), *The Oxford companion to international criminal justice*, Oxford: Oxford University Press, 2009, 489.
- 117 Article 16(a), Charter of the IMT (1945).
- 118 Article 16(c), Charter of the IMT (1945).
- 119 Article 16(e), Charter of the IMT (1945).
- 120 See 'Report of the Security General to the Security Council', UN Doc. S/25704 (3 May 1994), at para. 106.
- 121 Article 20, ICTR Statute and article 21, *Respect for Human Rights in International Criminal Proceedings*.
- 122 Zappala, *Respect for Human Rights in International Criminal Proceedings*, 489.
- 123 *Ibid.*
- 124 Article 55(2), Rome Statute.
- 125 Article 63, Rome Statute.
- 126 Article 66, Rome Statute.
- 127 Article 85(1), Rome Statute.
- 128 Article 85(2), Rome Statute.
- 129 Article 85(3), Rome Statute.



# Module 3

# Substantive international criminal law



MODULE 3





# Substantive international criminal law



## *Teaching notes*

This module considers the three ‘core’ international crimes – war crimes, crimes against humanity, genocide – in some detail. In doing so considerable reliance is placed on the Rome Statute, which contains the most comprehensive and systematic exposition of genocide, crimes against humanity and war crimes, drawn from a range of written and unwritten sources.

Although the degree of knowledge required from students will depend on their level and time assigned to the course, key aspects of these crimes must be emphasised. Chief among these aspects are their common structure: i.e. they consist of ‘acts constituting crimes’ and contextual elements. Although contextual elements differ between each of the three core crimes, appreciating the common structure will allow the students to better understand the unique nature of international crimes, as well as systematise their understanding of specific crimes.

With regard to the specific acts, these have been set out in detail in order to be comprehensive. Instructors should, however, indicate those most relevant/commonly used in practice.

## LEARNING OUTCOMES

At the end of this module students must be able to:

- Set out the different elements of each of the three core crimes.
- In respect of genocide:
  - Understand the requirement of genocidal intent as the defining aspect of the crimes of genocide, as well as how it differs from general intent required in respect of the underlying acts.
  - Understand the different protected groups and their interaction.
  - Be able to list and distinguish the five underlying acts of genocide.
  - In the case of the more advanced students, be familiar with the controversies surrounding the limitations placed on the crime’s definition, as well as the evidentiary difficulties involved in its prosecution.
- In respect of crimes against humanity:
  - Understand the different contextual requirements of crimes against humanity.
  - Understand how these contextual elements have been interpreted and how they interact with one another.

- Understand the different acts constituting crimes against humanity.
- In respect of war crimes:
  - Define international and non-international armed conflict, as well as have an understanding of the reasons for the different regulatory regimes governing them.
  - Understand the relationship between international humanitarian law and ICL.
  - Be familiar with the different categories of war crimes.

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# Substantive international criminal law

## 1. GENERAL INTRODUCTION

This module considers the three core international crimes introduced in Module 2 – war crimes, crimes against humanity, and genocide – in greater detail. As it was noted previously, they share a common structure in that they are made up of acts which when committed in conjunction with certain specified contextual elements are elevated from the realm of ordinary to international criminal conduct.

As is examined below, these contextual elements differ, in substance and form, between each of the three core crimes. In particular, an important distinction exists between war crimes and crimes against humanity – the contextual elements of which are material aspects of the crimes – and genocide, for which the contextual element is either predominantly or wholly mental.<sup>1</sup>

The primary focus of this module is on the existence and application of these crimes within the context of the Rome Statute for three principal reasons:

- The Rome Statute – together with its elements of crimes – contains the most comprehensive and systematic exposition of genocide, crimes against humanity, and war crimes to date.
- It has been argued that the Rome Statute is itself a substantive source of law; that is to say that its adoption by 120 states (and subsequent ratification by 117 states<sup>2</sup>) met the two requirements discussed in Module 2 for the formation of customary international law. In other words, the Rome Statute did not merely collate existing ICL, it created it as well.<sup>3</sup>
- Since its adoption, numerous states have used the substantive criminal provisions of the Rome Statute as a template for their domestic legislation for the prosecution of international crimes.

The Rome Statute did not merely collate existing ICL, it created it as well

It was only after the Nuremberg trials that the term 'genocide' became recognised as an international crime

## 2. GENOCIDE

### Article 6 of the Rome Statute (1998): Genocide

For the purpose of this Statute, 'genocide' means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group.
- (b) Causing serious bodily or mental harm to members of the group.
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.
- (d) Imposing measures intended to prevent births within the group.
- (e) Forcibly transferring children of the group to another group.

### 2.1 Introduction

The practice of genocide is at least as old as recorded history. Numerous religious texts contain references, sometimes in disturbingly positive terms, to acts that would constitute genocide as they are understood today. As Werle notes: 'The systematic annihilation of entire groups of people has cut a broad swathe of blood through human history'.<sup>4</sup> The term 'genocide',<sup>5</sup> however, is a more recent term. It was coined by Raphael Lemkin – a prominent Polish lawyer – when referring to the Nazi crimes of extermination committed against European Jews during World War II,<sup>6</sup> although an earlier genocide had in fact occurred of up to one million Armenians living in Turkey at the start of World War I.<sup>7</sup> At the time, Lemkin defined genocide as: '[A]ctions aimed at the destruction of essential foundations of the life of a group and guided by a plan to annihilate the group'.<sup>8</sup>

Despite the classification and developing norms of an international crime of genocide, it was not prosecuted as such during the Nuremberg Tribunal. Instead, acts that would today be considered to constitute genocidal crimes were prosecuted as the war crime of extermination and as the crime against humanity of persecution.<sup>9</sup> It was only after the Nuremberg trials that the term 'genocide' became recognised as an international crime in its own right. In 1946, the UN General Assembly adopted Resolution 96(I) which affirmed that 'genocide is a crime under international law which the civilised world condemns, and for the commission of which principals and accomplices – whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds – are punishable'.<sup>10</sup> It invited UN member states to 'enact the necessary legislation for the prevention and punishment of this crime'.<sup>11</sup>

This process culminated in the Convention for the Prevention and Punishment of the Crime of Genocide (1948) ('Genocide Convention'),<sup>12</sup> the adopted definition of which formed the basis of article 6 of the Rome Statute on genocide. Despite the existence of significant state consensus as to its substantive terms and the need to prevent a reoccurrence of such atrocities,<sup>13</sup> the Genocide Convention was unable to prevent the occurrence of three probable genocides in more recent history: the Rwandan genocide which took place between April and July 1994, during which approximately 800 000 Tutsis and moderate Hutus were killed, which led to the establishment of the ICTR; the possible episode(s) of genocide which followed the



The term 'genocide' was coined by Raphael Lemkin after WWII.



collapse of the former Yugoslavia and resultant conflicts that followed (for example, of 8 000 men and boys at Srebrenica in July 1995);<sup>14</sup> and the conflict that erupted in Darfur in 2004 that has been characterised as genocide, both politically and in a preliminary decision of the ICC when it issued an arrest warrant for Sudanese President Omar Hassan al-Bashir for his role in the conflict.<sup>15</sup>

While the existence of the crime of genocide is settled in international law, its exact contours remain remarkably contested by states, academics, and within the jurisprudence of international and domestic courts. There is disagreement also regarding how to structure a discussion of the crime of genocide. One approach is to separate the underlying acts of genocide and the protected groups (the material elements of genocide) from the special intent (the mental element of genocide); another is to divide the crime into its objective elements (the underlying acts and protected groups) and its subjective elements (*mens rea* in respect of the underlying act and specific intent).<sup>16</sup> For the sake of consistency of approach with the other core crimes covered here, the discussion is separated into the underlying acts of genocide, followed by consideration of its contextual elements. The latter is made up of the protected groups, specific intent, and the existence of a state policy as a possible additional element. The mental aspects are therefore considered in two places, first as part of the underlying act and then as regards the contextual element of specific intent.

## 2.2 Acts constituting genocide

### 2.2.1 Introduction

The Genocide Convention lists five underlying acts of genocide which are repeated verbatim in article 6 of the Rome Statute and are accepted as part of customary international law, namely: killing members of a protected group; causing serious bodily or mental harm to members of a protected group; deliberately inflicting on a protected group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within a protected group; and forcibly transferring children of a protected group to another group. Although these are classified as acts of genocide, they include both their commission and omission (e.g. article 6(1)(c) states that deliberately imposing conditions of life designed to destroy the group may involve omissions such as the denial of food and water).<sup>17</sup>

Before discussing the underlying acts of genocide in more detail, it must be noted that each listed act must be committed with intent (*mens rea*) in the ordinary criminal law sense.<sup>18</sup> This is not to be confused with the separate mental requirement of specific intent. In this regard, certain underlying acts contain explicit mental considerations.<sup>19</sup> As the ICJ noted in the *Genocide* case:

It is well established that the [underlying] acts ... themselves include mental elements. “Killing” must be intentional, as must “causing serious bodily or mental harm”. Mental elements are made explicit in paragraphs (c) and (d) of Article II by the words “deliberately” and “intended”, quite apart from the implications of the words “inflicting” and “imposing”; and forcible transfer too requires deliberate intentional acts. The acts, in the words of the [International Law Commission], are by their very nature conscious, intentional or volitional acts.<sup>20</sup>

The Genocide Convention lists five underlying acts of genocide which are repeated verbatim in article 6 of the Rome Statute



State representatives sign the Genocide Convention, 1950.

According to the ad hoc tribunals' jurisprudence, what constitutes 'serious bodily harm' must be assessed on a case by case basis

In addition, at times the necessary intent for such acts is more than just volitional, requiring the wilful seeking of a particular outcome (e.g. 'deliberately inflicting on a protected group conditions of life calculated to bring about its physical destruction in whole or in part'). In such instances the distinction between intention and motive, and between intent in respect of the underlying act (*mens rea*) and the broader requirement of specific intent, becomes blurred.

### 2.2.2 Killing

The inclusion of killing members of the group was the least controversial of the underlying acts of genocide when the Genocide Convention was drafted in 1948. As Schabas notes: '[T]he Sixth Committee agreed to killing as the first form of genocide, after little discussion and without a vote.'<sup>21</sup>

With respect to its meaning, in *Akayesu* the ICTR Trial Chamber noted that: '[T]he term "killing" used in the English version [of the Genocide Convention] is too general, since it could very well include both intentional and unintentional homicides, whereas the term "meurtre", used in the French version, is more precise. It is accepted that there is murder when death has been caused with the intention to do so...'<sup>22</sup> In contrast, according to the ICC Elements of Crimes, '[t]he term "killed" is interchangeable with the term "caused death".'<sup>23</sup> Notably, the killing of a single person is sufficient for the purposes of this underlying act. Finally, in order for an act of killing to meet the requirements of an underlying act of genocide, the person killed must be a member of the protected group targeted (see *infra*).<sup>24</sup>

### 2.2.3 Causing serious bodily or mental harm

According to the jurisprudence of the ad hoc tribunals, what constitutes 'serious bodily or mental harm' must be assessed on a case by case basis.<sup>25</sup> Although it is clear from this part of the test that any harm caused must be more than trifling, there has been disagreement as to what type of harm qualifies as being 'serious'. The ad hoc tribunals have held that while any harm caused need not be permanent or irremediable,<sup>26</sup> it must nevertheless 'resul[t] in a grave and long-term disadvantage to a person's ability to lead a normal and constructive life'<sup>27</sup> and constitute more than a minor or temporary impairment of mental faculties.<sup>28</sup> On the other hand, the International Law Commission (ILC) suggested a higher threshold, namely that: 'The bodily harm or the mental harm inflicted on members of a group must be of such a serious nature as to threaten its destruction in whole or in part.'<sup>29</sup> Similarly, the ICC Elements of Crimes – in respect of both physical and mental harm – state that any harm caused must take place 'in the context of a manifest pattern of similar conduct directed against that group' or must have the potential to 'effect such destruction'.

In terms of the types of conduct which may fall within the category of serious harm, both ad hoc tribunals have found that this may include 'acts of torture, inhuman or degrading treatment, sexual violence including rape, interrogations combined with beatings, threats of death, and deportation.'<sup>30</sup>

Although the phrase 'bodily or mental harm' is used conjunctively in most of the jurisprudence on this underlying act, and the ICC's Elements of Crimes make no distinction between physical and mental harm,<sup>31</sup> there is support for viewing the



Jean-Paul Akayesu was found guilty of genocide by the ICTR, 1998.

phrase disjunctively in the Genocide Convention's *travaux préparatoires*. The inclusion of 'causing serious bodily harm' as an underlying act of genocide was not surprising, nor was it controversial during the drafting process.<sup>32</sup> In contrast, the inclusion of 'mental harm' was.<sup>33</sup> It was first proposed as an underlying act by China, with specific reference to drug use, explaining that this was based on the crimes committed against the Chinese people by Japan through 'promoting the consumption of narcotics'.<sup>34</sup> Whilst the proposal was defeated initially, it was resurrected subsequently and successfully by India through its proposal that the original draft wording be amended to 'or mental'. This wording was adopted, notwithstanding the protestations of the UK.<sup>35</sup> Subsequent jurisprudence, however, has done little to clarify this concept.

Given its controversial provenance, it is not surprising that the concept of mental harm has been the subject of controversy since its introduction, much of which has related to whether 'mental harm' needs to be the result of a 'physical permanent injury' and not merely a psychological or emotional harm.<sup>36</sup> Certainly, the ICTY Trial Chamber in *Blagojevic* adopted a low threshold test for the level of bodily or mental harm necessary to establish genocide under article 4(2)(b) of the ICTY Statute, considering non-pathological emotional trauma in the context of 'ethnic cleansing' to suffice.<sup>37</sup>

Notably, in terms of establishing the underlying physical element of genocide associated with ethnic cleansing (which includes expulsion from one's home or forcible transfer), while this may be done by classifying such acts in terms of 'serious bodily or mental harm' under article 4(2)(b), it is certainly not the only, or indeed the most appropriate, approach. Arguably, the better underlying act for this practice would be the one considered in the next section, namely 'deliberately inflicting conditions of life calculated to bring about physical destruction'. Indeed, it is not even legally certain whether the element of a 'forcible transfer' in the context of ethnic cleansing satisfies the requirement of 'serious physical or mental harm' under article 4(2)(b). Similarly, there is some ongoing debate regarding whether or not rape and other sexual violence may qualify as 'causing serious bodily or mental harm'.<sup>38</sup>

#### 2.2.4 *Deliberately inflicting conditions of life calculated to bring about physical destruction*

This underlying act was included within the Genocide Convention to cover acts that are intended to bring about the destruction of the group, or part thereof, indirectly or consequentially, and was influenced by various specific historical examples of such acts. During the debate leading up to its adoption, reference was made (by France) to the horrific conditions in the so-called ghettos during World War II.<sup>39</sup> Although there was some debate regarding its formulation, the inclusion of this provision was not subject to considerable opposition when the Genocide Convention was drafted.<sup>40</sup> That said, translating consensus on the existence of this act into a consistent and agreed interpretative approach has been more difficult.

The approach of the ICTR, as reflected in *Akayesu*, has been that: '[T]he expression "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part", should be construed as the

The concept of mental harm has been the subject of controversy since its introduction



Vidoje Blagojevic at the ICTY, 2008.

The Nazis aimed to physically prevent births through forced sterilisation and castration

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methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction.<sup>41</sup>

Such an understanding of this underlying act is both unique and problematic in a number of respects. Although it is an underlying act – and part of the physical element or *actus reus* of genocide – it contains a mental aspect that overlaps considerably with the specific intent element of genocide, namely the requirement of the act being ‘calculated to bring about physical destruction.’ Therefore, unlike other underlying acts which may be satisfied by omissions, this one requires a deliberate calculation and mental intention to destroy the group.<sup>42</sup> Furthermore, unlike the underlying acts of ‘killing’ or ‘causing serious bodily or mental harm’, the focus here is on the methods employed rather than on their sought outcome; yet if that result is achieved (i.e. destruction) the more appropriate underlying element will be that of ‘killing’.

In terms of the physical acts which may meet the requirements of this underlying act, the ICTR has held the following to do so: subjecting a group to a subsistence diet; systematic expulsion from homes; and the reduction of essential medical services below minimum requirement;<sup>43</sup> rape; the starving of a group of people; and withholding sufficient living accommodation for a reasonable period.<sup>44</sup> Furthermore, the ICC Elements of Crimes state that: ‘The term “conditions of life” may include, but is not necessarily restricted to, deliberate deprivation of resources indispensable for survival, such as food or medical services, or systematic expulsion from homes.’<sup>45</sup>

More specifically on the issue of ‘ethnic cleansing’, as previously noted, this underlying act is arguably the most appropriate to the extent that genocide can be committed by way of ethnic cleansing. There is considerable support for such an approach. Notably, the ILC Commentary to the Draft Codes of Crimes against the Peace and Security of Mankind (1996) notes that: ‘[T]he forcible transfer of members of a group, particularly when it involves the separation of family members, could also constitute genocide under subparagraph (c)’.<sup>46</sup>

Similarly, the ILC considered that this underlying act covered deportation when carried out with the intent to ‘destroy the group in whole or in part.’<sup>47</sup> In addition, the practice of ‘systematic expulsion from homes’ was included in the ICC’s Elements of Crimes under ‘deliberately inflicting conditions of life calculated to bring about physical destruction.’<sup>48</sup> With the exception of the *Blagojevic* case (discussed supra), the ICTY also considers that underlying acts associated with ethnic cleansing as genocide should fall within the scope of article 4(2)(c).<sup>49</sup> Moreover, although the ICJ in the *Genocide* case ultimately dismissed the allegation that the ‘deportation and expulsion’ of Bosnian Muslims and Croats met the requirements of genocide on the evidence before it, it dealt with these acts under the underlying act of ‘deliberately inflicting conditions on a group calculated to bring about its destruction.’<sup>50</sup> The more difficult question remains whether ethnic cleansing satisfies the specific intent element of genocide, which is considered below.

### 2.2.5 Measures intended to prevent births

This underlying act was part of Nazi practices aimed at physically preventing births through forced sterilisation and castration. Notably, the related provision of the Genocide Convention does not include an exhaustive list of acts that may qualify under section 2(d). As a result, the measures adopted ‘need not be the classic action



In WWII, Nazis performed experiments on prisoners.



of sterilisation, separation of the sexes, prohibition of marriage and the like are measures equally restrictive and produce the same results.<sup>51</sup>

The exact parameters of this provision are unclear. Indeed, some scholars, for example Schabas, argue that the measure in question need not even result in the prevention of births in order to satisfy the material element of the offence.<sup>52</sup> Unsurprisingly, this interpretation is not uncontested. Furthermore, disputes exist as to whether or not the ‘intention’ element of this act requires the intention to destroy the protected group *through* preventing births, or merely the intention to prevent births.<sup>53</sup>

These issues foreshadowed another closely related debate as to whether or not rape and other forms of sexual assault, which meet the requirements of other underlying acts, may qualify also as measures intended to prevent births.<sup>54</sup> Certainly, in the *Genocide* case, Bosnia contended that rape and sexual violence against women led to physical trauma which interfered with victims’ reproductive functions and in some cases resulted in infertility. Such infertility, as a physical consequence of such action, may well qualify under section 2(d). However, the other aspect of Bosnia’s argument – that the psychological and social effects of rape and sexual violence would lead to a decline in births within such communities – is a much more remote causal connection in terms of qualifying as the underlying act of measures intended to prevent births. Ultimately, because the ICJ dismissed these arguments on factual (i.e. insufficient evidence) rather than legal grounds, they remain to be determined judicially.<sup>55</sup>

### 2.2.6 Forcibly transferring children from one group to another

Of the underlying acts of genocide, this one is the most unclear and the one least relied upon. Schabas suggests that ‘this provision was added to the Genocide Convention almost as an afterthought with little substantive debate or consideration.’<sup>56</sup>

What is relatively clear is that the act of forcibly transferring children need not be done directly, or even physically. This is reflected in the ICC Elements of Crimes which state that: ‘The term “forcibly” is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment.’<sup>57</sup> Further, in *Akayesu* the ICTR Trial Chamber suggested that this provision included acts of threats or trauma which, by effect, would lead to the forcible transfer of children from one group to another.<sup>58</sup> In terms of other qualifying criteria for this underlying act, it is also necessary that it achieved its intended purpose of transferring children to another group;<sup>59</sup> and that the subjects of this act were children under the age of 18.<sup>60</sup>

## 2.3 Contextual elements

### 2.3.1 Protected groups

The groups that merit protection were by far the most controversial aspects of the drafting of the Genocide Convention, as much for the nature and contours of those

The act of forcibly transferring children need not be done directly, or even physically



Rwanda genocide, 1994.

Under ICL none of the core crimes are more important than another

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groups included, as for those implicitly or explicitly excluded. So far as the groups included are concerned, four exist under article 2 of the Genocide Convention (and article 4(2) of the Rome Statute), namely: national, racial, ethnic, or religious.<sup>61</sup>

Significantly, in *Akayesu* the ICTR Trial Chamber found that the protected groups were not limited to these four groups, but rather included ‘any stable and permanent group’.<sup>62</sup> This expansive construction of the term ‘group’ was initially followed in subsequent decisions of the ICTR. Furthermore, the Darfur Commission endorsed the *Akayesu* approach. However, this has been heavily and rightly criticised as judicial law-making. Similarly, the push to include the concept of cultural genocide within the scope of this crime – the inclusion of which was rejected explicitly during the drafting of the Genocide Convention – has led some courts to adopt expansive interpretations of specific intent in order to include this crime in substance.

Such continued attempts by some activists, politicians, and academics to expand the current scope of ‘protected groups’ are often influenced by a misperception that either there is no other international crime that covers such targeting of these other groups, or that genocide is somehow a more suitable crime under which to prosecute such acts. Certainly, any conviction under the crime of genocide carries with it significant gravitas, as ‘the crime of crimes’. As the Appeals Chamber in *Krstic* opined:

Among the grievous crimes this Tribunal has the duty to punish, the crime of genocide is singled out for special condemnation and opprobrium. The crime is horrific in its scope; its perpetrators identify entire human groups for extinction. Those who devise and implement genocide seek to deprive humanity of the manifold richness its nationalities, races, ethnicities and religions provide. This is a crime against all humankind, its harm being felt not only by the group targeted for destruction, but by all of humanity.<sup>63</sup>

However, while it may be true politically that genocide is considered to be more serious than other crimes, under ICL none of the core crimes are more important or attract more draconian levels of punishment than another. As the Darfur Commission – aware of the political consequences of its finding that there was no genocidal policy on the part of the Sudanese Government in respect of Darfur – noted:

It is indisputable that genocide bears a special stigma, for it is aimed at the physical obliteration of human groups. However, one should not be blind to the fact that some categories of crimes against humanity may be similarly heinous and carry a similarly grave stigma. In fact, the Appeals Chamber of the ICTR reversed the view that genocide was the “crime of crimes”. In *Kayishema* and *Ruyindana*, the accused alleged “that the Trial Chamber erred in finding that genocide is the ‘crime of crimes’ because there is no such hierarchical gradation of crimes”. The Appeals Chamber agreed: “The Appeals Chamber remarks that there is no hierarchy of crimes under the Statute, and that all of the crimes specified therein are serious violations of international humanitarian law, capable of attracting the same sentence.”<sup>64</sup>

That said, as Schabas suggests, this tendency to regard genocide as the ‘crime of crimes’ may pass with time, as other crimes – particularly persecution as a crime against humanity<sup>65</sup> – become part of popular political discourse.<sup>66</sup>



UN Secretary General Kofi Annan (centre) stands with members of the Commission of Inquiry on Darfur, 2004.



In terms of how existing groups are established or defined, jurisprudence points to the existence of both subjective and objective elements for the identification of groups.<sup>67</sup> The subjective element is generally considered from the perspective of the perpetrator, as it is the intent of the perpetrator that underpins the crime of genocide. However, in some cases the courts have considered whether the targeted individuals identified themselves as belonging to one of the protected groups. It appears that the emerging consensus is that both subjective and objective indicators are to be considered. In *Stakic* the Appeals Chamber found that:

Contrary to what the Prosecution argues, the *Krstic* and the *Rutagunda* trial judgments do not suggest that target groups may only be defined subjectively, by reference to the way the perpetrator stigmatises victims. The trial chamber in *Krstic* found only that stigmatization ... by the perpetrators can be used as a criterion when defining target groups – not that stigmatisation can be used as the sole criterion. Similarly while the *Rutagunda* Trial Chamber found national, ethnic, racial, and religious identity to be largely subjective concepts, suggesting that acts may constitute genocide so long as the perpetrator perceives the victim as belonging to the targeted national, ethnic, racial, or religious group, it also held that a subjective definition alone is not enough to determine victim groups, as provided for in the Genocide Convention.<sup>68</sup>

With this in mind the four protected groups – national, ethnic, racial and religious – will be examined next in more detail. In doing so, it is important to keep in mind from the outset that often an overlap exists between these different categories of groups, both conceptually and in practice. In this regard Schabas notes: ‘The four terms in the [Genocide] Convention not only overlap, they also help to define each other, operating much as four corner posts that delimit an area within which a myriad of groups covered by the Convention find protection.’<sup>69</sup>

### 2.3.1.1 National groups

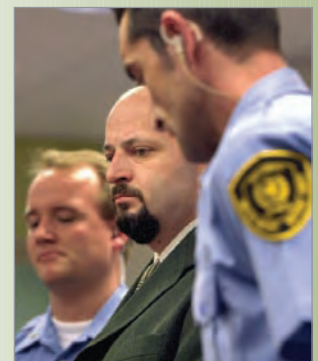
In *Akayesu* the Trial Chamber defined a national group as: ‘A collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties.’<sup>70</sup> While the inclusion of ‘national group’ is not surprising given the backdrop of history to the Genocide Convention’s adoption, in particular the role played by Raphael Lemkin, nevertheless concerns were expressed regarding the imprecision of this term even at the time of the Convention’s drafting.<sup>71</sup>

In terms of one interpretative approach, Schabas argues that ‘national group’ must be considered in the context within which the Genocide Convention was written and not be defined by contemporary understandings of nationality that have evolved since then: ‘Set within the context of 1948 and the writings of Raphael Lemkin, the term “national group” dictates a large scope corresponding to the concept of minorities or national minority. One that in reality is broad enough to encompass racial, ethnic and religious groups as well.’<sup>72</sup>

### 2.3.1.2 Racial groups

The very notion of race is a controversial one. Although there was little debate over the inclusion of racial groups as a protected group in the Genocide Convention,

The four protected groups are national, ethnic, racial and religious



Milomir Stakic (centre) during his initial appearance before the ICTY, 2001.

reaching a universally or even widely accepted definition of what ‘race’ means has proved much more difficult. Reference to the International Convention on the Elimination of All Forms of Racial Discrimination is of little assistance in this regard, as it defines ‘racial discrimination’ as ‘any distinction, exclusion, restriction or preference based on race, colour, dissent or national or ethnic origin.’ Again, this counsels against viewing these grounds as distinct; rather – at least insofar as national, racial, and ethnic grounds are concerned – seeing them as Schabas suggested as corner posts that delimit a general category of ‘protected grounds’.

### 2.3.1.3 Ethnic groups

Defining the term ‘ethnic group’, or ‘ethnic group’ is similarly problematic. This definitional challenge is further compounded by the use of the term ‘ethnic’ in a pejorative manner in some modern language. Consequently, Shaw argues that: ‘[I]t is probably preferable to take the two concepts (race and ethnicity) together to cover relevant cases rather than attempting to distinguish between these so that unfortunate gaps appear.’<sup>73</sup>

The difficulties of delimiting the concept of ethnicity, and distinguishing it from that of race, were clearly evident in the debates within the ICTR regarding whether or not the Tutsi and Hutu groups were ethnic or racial. In the end, the ICTR decided, extraordinarily, to take judicial notice of the fact that both of these two groups (as well as the Twa) met the requirements of ‘ethnic groups’ for the purposes of the Genocide Convention.<sup>74</sup>

### 2.3.1.4 Religious groups

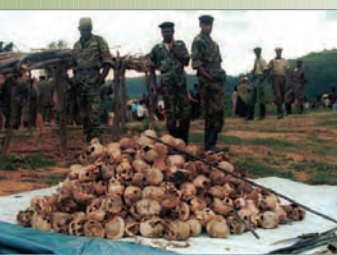
The inclusion of religious groups was controversial due to the fact that individuals may join and leave such groups freely, unlike the other protected groups which are permanent or at least more stable. Unsurprisingly, the tendency has been to define religious groups broadly rather than narrowly in order to expand the scope of protection available under the Convention. Consequently, the concept has been interpreted to even include those who reject religious beliefs (i.e. atheists).<sup>75</sup> One further point to note here is that due to the overlap which exists between religion and culture, this goes some way to affording protection for cultural genocide in practice despite the fact that it has been rejected per se as a formal category to be protected under the Genocide Convention.

## 2.3.2 Specific intent (*dolus specialis*)

The requirement for intent to commit crimes of genocide exists at two levels: there must be intent to commit the specific underlying act as with any ordinary crime (*mens rea*, as discussed above); and specific intent (*dolus specialis*) ‘to destroy a protected group in whole or in part’, as a distinguishing element of genocide. In this regard, the ICJ in the *Genocide* case noted:

[Genocide] requires a further mental element. It requires the establishment of the “intent to destroy, in whole or in part, ... [the protected] group, as such”. It is not enough to establish, for instance in terms of paragraph (a), that deliberate unlawful killings of members of the group

The act of genocide requires specific intent to destroy a protected group in whole or in part



Mass grave of hundreds of Tutsi victims exhumed for reburial, Rwanda, 1995.

have occurred. The additional intent must also be established, and is defined very precisely. It is often referred to as a special or specific intent or *dolus specialis*; ... . It is not enough that the members of the group are targeted because they belong to that group, that is because the perpetrator has a discriminatory intent. Something more is required. The acts listed in Article II must be done with intent to destroy the group as such in whole or in part. The words “as such” emphasize that intent to destroy the protected group.<sup>76</sup>

This requirement of specific intent will now be broken down into its constituent parts, namely: ‘the intent to destroy’; ‘a protected group’; and ‘in whole or in part ... as such’. It should be noted, however, that while such a division is useful analytically, each element of the phrase ultimately must be considered and satisfied in its entirety.

### 2.3.2.1 *Intent to destroy*

This element of specific intent has attracted considerable controversy. The central debate amongst lawyers and academics is whether or not the destruction contemplated in specific intent is limited to physical or biological destruction; or whether the intention to destroy can include the destruction of a group, as a group, through means other than physical or biological destruction of its constituents, such as displacement.

Despite the fact that ‘the Genocide Convention, and customary international law in general, prohibit only the physical or biological destruction of a human group’,<sup>77</sup> and that inclusion of the notion of ‘cultural genocide’ was rejected, some judges and scholars have adopted formulations of the crime that seek to include the destruction of a group in non-physical and non-biological ways.

An illustration of such an approach is the theoretical approach to such issues described in the dissenting opinion of Judge Shahabuddeen in the *Krstic* Appeal Judgement. In the main, it relies completely on delinking the underlying act and special intent criteria of genocide; and on limiting the requirement that destruction be ‘physical or biological’ (introduced as the bulwark against cultural genocide) to the physical element, thereby giving the court a free hand to consider non-physical/biological means of destroying the group for the purpose of establishing intent to destroy. Therefore, ‘[w]hile the listed acts indeed must take a physical or biological form, the same is not required for the intent.’<sup>78</sup> In this regard, Judge Shahabuddeen noted that, with the exceptions of the acts listed in article 4(2)(c) and (d) of the ICTY Statute, ‘the Statute itself does not require an intent to cause physical or biological destruction of the group in whole or in part.’<sup>79</sup> Instead, he argued that:

It is the group which is protected. A group is constituted by characteristics – often intangible – binding together a collection of people as a social unit. If those characteristics have been destroyed in pursuance of the intent with which a listed act of a physical or biological nature was done, it is not convincing to say that the destruction, though effectively obliterating the group, is not genocide because the obliteration was not physical or biological.<sup>80</sup>

Notably, there are a number of reasons why this approach should be rejected. First, the majority of the court in *Krstic* implicitly rejected Judge Shahabuddeen’s

The ‘intent to destroy’ element has attracted considerable controversy



Krstic was convicted of aiding and abetting genocide for the 1995 Srebrenica massacre, 2001.

It is not necessary to achieve the final result of the destruction of a group in order for a crime of genocide to have been committed

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hypothesis.<sup>81</sup> Second, there is a compelling argument that the ‘underlying act’ and the ‘intent with which it was done’ cannot be separated as the learned judge suggested, because such an interpretation was rejected implicitly by the drafters of the Genocide Convention.<sup>82</sup> On a more practical level, although these two elements are notionally distinct, they are often considered together. Therefore, the existence of the mental element, more often than not, is inferred from the physical acts, because it is seldom possible to prove specific intent by direct evidence.<sup>83</sup> Most notably, in stark contrast to *Blagojevic*, the Trial Chamber in *Brdanin* found that the forcible transfer of Bosnian Muslims – especially when compared to the number subjected to such underlying acts – demonstrated the *absence* of intention to destroy.<sup>84</sup>

### 2.3.2.2 Protected group

As previously described, the recognised protected groups are national, ethnic, religious, and racial. Clearly, such groups must form the objects of any intent to destroy.

### 2.3.2.3 In whole or in part

Importantly, this element relates to the intention and not to the result of such destruction. As Schabas notes: ‘It is not necessary to achieve the final result of the destruction of a group in order for a crime of genocide to have been committed. It is enough to have committed one of the acts listed in the article with the clear intention of bringing about the total or partial destruction of a protected group as such.’<sup>85</sup>

While the concept of an intent to destroy the protected group as a whole is reasonably self-explanatory, some disagreement exists regarding the meaning of ‘in part’, specifically whether the sub-group (i.e. the ‘part’ of the group) targeted is qualitatively or quantitatively relevant (or both).

Those who favour the quantitative construction of this element suggest that the ‘part’ should be substantial. The US, for example, suggests that the threshold for such a test is that ‘a part of a group [is] of such numerical significance that the destruction or loss of that part would cause the destruction of the group as a viable entity within the nation of which such a group is part.’<sup>86</sup> This has been the approach adopted within the jurisprudence of the international tribunals.<sup>87</sup>

Others focus on the qualitative aspect of the targeted sub-group. As Schabas notes, under this construction the ‘part’ targeted for destruction must be significant rather than numerically substantial.<sup>88</sup> Such significance must be gauged in terms of the sub-group’s importance to the continued survival of the group as a whole. The ILC has given several examples of what might constitute a significant ‘part’ of a group: ‘political and administrative leaders, religious leaders, academics and intellectuals, business leaders, and others.’<sup>89</sup> Others have suggested that a group’s law enforcement and military personnel might constitute a significant part of a group because neutralising them would render a group defenceless. Ultimately, the test of a sub-group’s significance is ‘whether the destruction of a social strata threatens the group’s survival as a whole.’<sup>90</sup>

A third approach, as illustrated by the ICJ’s endorsement in the *Genocide* case, is a mixed approach with both quantitative and qualitative aspects:



William Schabas, an internationally respected expert on international criminal law and human rights law.

In the first place, the intent must be to destroy at least a substantial part of the group. That is demanded by the very nature of the crime of genocide since the object and purpose of the convention as a whole is to prevent the intentional destruction of groups, and the part targeted must be significant enough to have an impact on the group as a whole.<sup>91</sup>

A further construct is to consider the scope of destruction from a geographical perspective. Under this approach, the element of ‘in whole or in part’ becomes relative to the area concerned and not to the group generally. As the ICJ further noted in the *Genocide* case: ‘It is widely accepted that genocide may be found to have been committed when the intent is to destroy the group within a geographically limited area.’<sup>92</sup>

Ultimately, there is no unanimity within either national or international jurisprudence as to the correct approach to this sub-element of genocidal intent. Perhaps, therefore, the best approach is one that considers this element on a case by case basis, having regard to the quantitative, qualitative, and possibly geographic aspects of the group targeted for destruction.

As far as establishing the existence of specific intent is concerned, in the absence of a public declaration of such specific intent or other documentary evidence, courts have inferred its existence from the context within which the crime took place. In *Jesic*, the ICTY listed ‘the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts’ as the basis upon which specific intent may be inferred.<sup>93</sup> This, however, does not mean that specific intent should be inferred lightly. Indeed, the ICTY Appeals Chamber counselled against this in *Krstic*, noting that: ‘Genocide is one of the worst crimes known to humankind, and its gravity is reflected in the stringent requirements of specific intent. Convictions for genocide can be entered only where intent has been unequivocally established.’<sup>94</sup>

### 3. CRIMES AGAINST HUMANITY

#### Article 7 of the Rome Statute (1998): Crimes against humanity

1. For the purpose of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
  - (a) Murder
  - (b) Extermination
  - (c) Enslavement
  - (d) Deportation or forcible transfer of population
  - (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law
  - (f) Torture
  - (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity
  - (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court
  - (i) Enforced disappearance of persons.

In the absence of a public declaration or other documentary evidence, courts have inferred the existence of specific intent from the crime’s context



### 3.1 Introduction

Crimes against humanity are ‘as old as humanity itself’<sup>95</sup> but were only first described as such in 1915 when France, Great Britain, and Russia issued a joint condemnation of the atrocities committed against Armenians by Turkey.<sup>96</sup> Shortly thereafter, in 1919, the Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties – established by the Entente Powers after World War I – referred once again to ‘violations of the laws of humanity’ committed by the Central Powers. However, the notion was a political label rather than a legal classification. It was only after the end of World War II that the concept of crimes against humanity took on legal features and significance,<sup>97</sup> primarily through its inclusion in the Nuremberg Charter and its subsequent application to those responsible for Nazi atrocities, although its exact legal basis and contours were unclear.<sup>98</sup> This was done in order to cover the most heinous crimes committed by the Nazis which war crimes law – as it stood then – did not address. Article 6 of the Nuremberg Charter defined a crime against humanity as:

[M]urder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds ... in connection with any crime within the jurisdiction of the tribunal, whether or not in violation of the law of the country where perpetrated.<sup>99</sup>

In terms of this basic definition, Cryer et al suggested that:

Three major features may be noted. First the reference to any civilian population meant that even the crimes committed against a country’s own population were included. ... Second, the requirement of connection to war crimes or the crime of aggression meant in effect that crimes against humanity could occur with some nexus to armed conflict. Third, the reference to population was understood to create some requirement of scale, but the precise threshold was specified neither in the Charter nor the Nuremberg Judgement.<sup>100</sup>

Following the Nuremberg and Tokyo Tribunals, Control Council Law No. 10 further developed the definition of crimes against humanity. In particular, it added rape, imprisonment, and torture to the growing list of ‘prohibited acts’ and, more importantly, removed the requirement that crimes against humanity be committed in connection with war crimes or an act of aggression.<sup>101</sup>

Although the UN General Assembly affirmed ‘the principles of international law recognised by the [Nuremberg Charter] ... and the judgment of the Tribunal’, which included the concept of crimes against humanity, in its Resolution 95(1) (1946) it was the least developed of the Nuremberg crimes in the years to follow. That said, certain aspects of the crime – namely those concerned with ‘persecutions on political, racial or religious grounds’ – were developed into what became the self-standing crime of genocide as described in the previous section.<sup>102</sup> The only other significant international development for the following 40 years was the addition of ‘apartheid’ as an underlying act by way of the Convention on the Suppression and Punishment of the Crime of Apartheid (1973).<sup>103</sup>

It was not until the advent of the ad hoc tribunals in the 1990s that crimes against humanity were revived at the international level. Somewhat controversially at the time, article 5 of the ICTY Statute included reference to a jurisdictional link

Crimes against humanity were first described as such in 1915 in condemnation of the atrocities committed against Armenians by Turkey



The Ottoman Turks murdered approximately 1,5 million Armenians between 1915 and 1923.



with an armed conflict as a necessary element of crimes against humanity. Similarly, article 3 of the ICTR Statute required that the attack must be committed against a civilian population on national, political, ethnic, racial, or religious grounds in order to constitute a crime against humanity.

Fortunately, not least in terms of the scope of such crimes, the definition of crimes against humanity in article 7 of the Rome Statute removed these limiting factors – the link to an armed conflict<sup>104</sup> (ICTY), and the discriminatory aspect of the attack<sup>105</sup> (ICTR) – defining crimes against humanity as the attack against a civilian population that is widespread or systematic.<sup>106</sup> However, article 7(1) did add an element, namely that the attack must be pursuant to a state or organisational policy. Furthermore, the Rome Statute enumerated additional underlying acts of crimes against humanity: the forced transfer of populations, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, sexual violence, enforced disappearances, and the crime of apartheid.

As noted previously, genocide, war crimes, and crimes against humanity share a common structure. Therefore, given their common heritage, it is unsurprising that crimes against humanity and genocide especially are similar, both in structure (they share underlying acts and contextual elements) and substance (the underlying acts overlap substantially).<sup>107</sup> Their common underlying acts include murder, torture, rape, and sexual slavery. In fact, Cryer et al go so far as to suggest that ‘almost any conceivable example of genocide would also satisfy the requirements of crimes against humanity’.<sup>108</sup>

That said, an important difference exists between crimes against humanity and genocide in relation to their contextual aspects. For genocide, the underlying acts are accompanied by specific or genocidal intent; whereas crimes against humanity are committed as part of a widespread or systematic attack directed against a civilian population pursuant to a state or organisational policy. In addition, in order to establish a crime against humanity, a nexus must exist between the underlying act (or specific crime) and the contextual elements, and such act must be committed with knowledge of the attack.<sup>109</sup> As in the case of genocide, it is this contextual aspect of crimes against humanity that elevates otherwise ordinary criminal acts to the level of international crimes.

Finally, while crimes against humanity and genocide share a common philosophical and historical basis, crimes against humanity differ from the other core crimes of genocide and war crimes in one key respect. In contrast to the other two core crimes, which have been subjected to comprehensive treaty codification, there is currently no treaty dedicated to the definition and the delimitation of crimes against humanity. For this reason, the ad hoc tribunals and article 7 of the Rome Statute is particularly important in that it represents the most substantial attempt at codifying crimes against humanity in terms of both its contextual elements and the underlying acts.

## 3.2 Contextual elements

### 3.2.1 Attacks against civilians

This requirement, referred to more broadly in the Nuremberg Charter as ‘any civilian population’, has two sub-elements: first, the underlying acts must be committed in the context of an attack; and second, the attack must be directed

Crimes against humanity and genocide are similar, both in structure and substance



The crime of apartheid is an underlying act of crimes against humanity.

Attacks may be either widespread or systematic and need not be both



In March 2010, in the Kenya Decision, the ICC's Pre-Trial Chamber II supported a narrow construction of the 'civilian' element.

against civilians. The former sub-element is rarely controversial, because it is widely accepted that the attack must be more than just one single, isolated act and that it can take many different forms.

The sub-element of 'against civilians' is, however, the subject of some debate. Cryer et al suggest that '[t]he term "*civilian population*" connotes crimes directed against civilians rather than combatants'.<sup>110</sup> In contrast, others argue that crimes against humanity need not be committed against civilians per se, and that members of the military can also be the victims of these crimes. One significant problem with this more expansive interpretative approach is that IHL not only permits, but in fact facilitates widespread and systematic attacks, including killing, against members of the military under certain conditions in times of armed conflict.<sup>111</sup>

The better approach is perhaps to interpret the 'civilian' aspect of 'civilian population' expansively, so as to include mixed groups made up of both civilians and military personnel. This was the approach taken in *Tadic* by the ICTY Trial Chamber, which noted that the 'presence of certain non civilians in the vicinity does not change the character of the population'.<sup>112</sup> Further, the term 'civilian' should be defined negatively, as is the approach in IHL, whereby all individuals who do not fall within its criteria for 'combatants' are civilians.<sup>113</sup> This would include combatants who no longer take part in hostilities, who are rendered *hors des combat*, and prisoners of war.<sup>114</sup>

As far as the ICC's approach to these issues is concerned, the initial decisions of the ICC support a narrow construction of this 'civilian' element; indeed, it requires some form of discriminatory intent. For example, Pre-Trial Chamber II, in the Kenya Decision, noted:

The Chamber considers that the potential civilian victims of a crime under article 7 of the Statute are groups distinguished by nationality, ethnicity or other distinguishing features. The Prosecutor will need to demonstrate, to the standard of proof applicable, that the attack was directed against the civilian population as a whole and not merely against randomly selected individuals.<sup>115</sup>

In terms of the requirements of 'attack', while article 7(2)(a) of the Rome Statute specifically requires 'the multiple commission of acts' against a civilian population in order for the threshold of crimes against humanity to be met, the Elements of Crimes clarifies that such acts 'need not constitute a military attack'.<sup>116</sup>

### 3.2.2 Widespread or systematic

The contextual element of 'widespread or systematic' first appeared in article 3 of the ICTR Statute,<sup>117</sup> which empowered the ICTR to prosecute certain acts as crimes against humanity 'when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds'. The first thing to note about the contextual element of 'widespread or systematic' is that it must be considered disjunctively, namely that the attack may be either widespread or systematic and need not be both.<sup>118</sup>

With respect to the meaning of these terms, in *Akayesu* the Trial Chamber defined the concept of 'widespread' as 'massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of

victims.’<sup>119</sup> As such an approach illustrates, the term ‘widespread’ is generally understood to refer to the scale of the attack. As with the quantitative aspect of genocide, there is no gold standard or ‘numerical limit’,<sup>120</sup> but rather what amounts to ‘widespread’ must be determined on a case by case basis. That said, while ‘widespread typically refers to the cumulative effect of numerous inhumane acts, it could also be satisfied by a singular massive attack of extra-ordinary magnitude.’<sup>121</sup> Further clarification has been given by the ICC’s Pre-Trial Chamber II in its Kenya Decision where it was noted that: ‘This ... element refers to both the large-scale nature of the attack and the number of resultant victims. The assessment is neither exclusively quantitative nor geographical, but must be carried out on the basis of the individual facts.’<sup>122</sup>

Conversely, ‘systematic’ refers to the nature of the attacks (not their scale) and ‘the improbability of their random occurrence.’<sup>123</sup> In *Akayesu* the Trial Chamber defined the concept of ‘systematic’ as ‘thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources.’<sup>124</sup> The ICTY’s approach is more detailed, stating that ‘systematicity’ requires: (i) a political objective or plan, (ii) large-scale or continuous commission of crimes which are linked, (iii) use of significant public or private resources, and (iv) the implication of high-level political and/or military authorities.<sup>125</sup>

Clearly, as is evident in the next section, potential for overlap exists between the requirement of ‘systematic’ and the contextual element of ‘pursuant to a state or organisational policy’.<sup>126</sup>

### 3.2.3 Pursuant to a state or organisational policy

In contrast to the ICTY and ICTR, the Rome Statute’s definition of crimes against humanity includes an additional contextual element, namely that the attack directed against a civilian population must be ‘pursuant to a state or organisational policy’.<sup>127</sup> That said, there is some controversy as to whether this is in fact a contextual requirement of crimes against humanity.

As a result, questions can be asked about whether or not this is part of the customary international law definition of crimes against humanity, or whether it is limited to the Rome Statute regime. Cryer et al note:

[T]he main indicators of customary law are now undivided. On the one hand, the ICC statute indicates that policy is required. The statute was adopted by a great number of states purporting to codify existing customary law, and hence it is a strong indicator of customary law ... On the other hand, tribunal jurisprudence, which also purports to reflect customary law, and which is also a strong indicator, rejects the policy element. In addition, article 10 of the ICC statute indicates that its definitions shall not be interpreted as limiting or prejudicing in way existing rules of international law for purposes other than the statute.<sup>128</sup>

In terms of the effects of this, Cryer et al suggest that these differing interpretations relate to *means* that ultimately reach the same *end*.<sup>129</sup> However, such an attempt to reconcile these divergent interpretations is predicated on the understanding of ‘organisational’ as relating to the conduct and not to the entity, namely that the conduct must be organised and not necessarily committed by an organisation. Notably too, such an approach is not supported by the initial jurisprudence of the

Unlike the tribunals, the Rome Statute holds that crimes against humanity must be ‘pursuant to a state or organisational policy’



Chief prosecutor Luis Moreno-Ocampo, front row centre, in the courtroom of the ICC, 2011.

To qualify as a crime against humanity there must be some nexus between the act and the contextual elements

ICC on this issue, which has interpreted this element to mean the requirement for the existence of an organisation, rather than merely organised conduct.<sup>130</sup>

Furthermore, the ICC Pre-Trial Chamber has listed certain considerations that may (rather than must) be taken into account in determining if a collectivity meets the requirement of an organisation for the purpose of article 7(2)(a), namely:

- (i) Whether the group is under a responsible command, or has an established hierarchy
- (ii) Whether the group possesses, in fact, the means to carry out a widespread or systematic attack against a civilian population
- (iii) Whether the group exercises control over part of the territory of a state
- (iv) Whether the group has criminal activities against the civilian population as a primary purpose
- (v) Whether the group articulates, explicitly or implicitly, an intention to attack a civilian population
- (vi) Whether the group is part of a larger group, which fulfils some or all of the abovementioned criteria.<sup>131</sup>

The Pre-Trial Chamber held, however, that the defining criterion of an organisation is not the 'formal nature of a group and the level of its organisation', but rather 'whether [it] ... has the capability to perform acts which infringe on basic human values'.<sup>132</sup>

### 3.2.4 *Nexus between the individual acts and the attack*

This contextual element establishes the broader aspects of crimes against humanity, and is not required in respect of each individual act. As Cryer et al note:

Only the attack, and not the acts of the individual accused, must be widespread or systematic. A single act by an accused may constitute a crime against humanity if it forms part of the attack. The act of the accused may also in itself constitute the attack, if it is of great magnitude, for example, the use of a biological weapon against a civilian population.<sup>133</sup>

However, in order for the underlying act to qualify as a crime against humanity there must be some nexus between the act (i.e. murder, mass killing, torture, etc.) and the contextual elements (widespread/systematic, attack on civilian population, and pursuant to a state policy). This is reflected in the approach of the Pre-Trial Chamber II in the *Kenya* case:

In determining whether an act falling within the scope of article 7(1) of the Statute forms part of an attack, the Chamber must consider the nature, aims and consequences of such act. Isolated acts which clearly differ, in their nature, aims and consequences, from other acts forming part of an attack, would fall outside the scope of article 7(1) of the Statute.<sup>134</sup>

Further, there is the requirement to establish the necessary relationship between the accused and the contextual elements, especially those most responsible for the commission of such criminal acts in keeping with the ethos of the prosecution of international crime, including under the Rome Statute.



Crimes against humanity were allegedly committed in Kenya in 2007/8.

### 3.2.5 Knowledge of the attack

As with all criminal offences, the underlying act must be committed with general intent (*mens rea*). In respect of certain underlying acts (see in particular persecution, *infra*) there are additional intent requirements. Further, in addition to the general intent required in respect of the underlying act, a perpetrator must be shown to have knowledge of the context within which the acts take place in order to be guilty of committing a crime against humanity. In this regard the ICC Elements state:

The last two elements for each crime against humanity describe the context in which the conduct must take place. These elements clarify the requisite participation in and knowledge of a widespread or systematic attack against a civilian population. However, the last element should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization. In the case of an emerging widespread or systematic attack against a civilian population, the intent clause of the last element indicates that this mental element is satisfied if the perpetrator intended to further such an attack.<sup>135</sup>

## 3.3 Acts constituting crimes against humanity

### 3.3.1 Introduction

The list of acts constituting crimes against humanity (or prohibited acts) has developed and expanded since the original five acts enumerated in the Nuremberg Charter. Importantly, and in contrast with the underlying acts of genocide, the list of acts specified in article 7 of the Rome Statute is not closed due to inclusion of the catch-all phrase ‘other inhumane acts’.

### 3.3.2 Murder

According to the ICC Elements of Crimes, murder encompasses the notions of ‘killing’ and ‘causing death’.<sup>136</sup> Therefore, the underlying act of murder as a crime against humanity is the same as that of ‘wilful killing’ as a war crime and ‘killing’ as an underlying act of genocide, the difference being the context within which these attacks take place.

Further guidance on the definition of murder for the purpose of establishing a crime against humanity is given in *Akayesu*, where the ICTR Trial Chamber defined it as ‘the unlawful, intentional killing of a human being’.<sup>137</sup> More specifically, the Trial Chamber identified the elements of murder as: the victim is dead; the death resulted from an unlawful act or omission of the accused or a subordinate; and at the time of the killing the accused or a subordinate had the intention to kill or inflict grievous bodily harm on the deceased having known that such bodily harm was likely to cause the victim’s death, and being reckless whether death ensued or not.<sup>138</sup>

### 3.3.3 Extermination

Defining extermination, and differentiating it from the underlying act of murder, is not a simple task. That said, according to the jurisprudence of the ad hoc tribunals

Defining extermination, and differentiating it from the underlying act of murder, is not a simple task



Unburied bones of victims of the Rwandan genocide at a memorial centre.



There are notable differences between the definition of torture in the Convention Against Torture and the Rome Statute

## MODULE 3

and the ICC Elements of Crimes, the distinction appears to be qualitative, quantitative, and mental.

The difference is qualitative in the sense that extermination includes both direct and indirect ‘methods of killing.’<sup>139</sup> Specifically, ‘the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, [is] calculated to bring about the destruction of part of a population.’<sup>140</sup> While such a definition is useful in distinguishing the underlying act of extermination from that of murder for the purposes of crimes against humanity, it does confuse further the difference between the underlying act of extermination and the underlying act of genocide, which is phrased in the same way.

The difference is quantitative in that the ICC Elements of Crimes state that extermination involves an act of killing that either constituted or took place as part of ‘a mass killing of members of a civilian population.’<sup>141</sup>

Finally, with respect to the mental element, there is also a difference between extermination and murder. With respect to the former, the individual accused of extermination must, according to the Elements of Crimes, have known that ‘the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.’<sup>142</sup>

### 3.3.4 Torture

As noted in Module 2, torture is recognised universally as a violation of international law, which some argue should be viewed as a self-standing international crime. Under the Rome Statute, however, only those acts of torture which occur within the context of crimes against humanity, genocide, or war crimes, and which meet the requisite contextual requirements, may be prosecuted and punished.

Further, although the definition of torture as an underlying act of a crime against humanity is substantially similar to the definition of torture under the Convention Against Torture (1984) (CAT),<sup>143</sup> there are notable differences. Under CAT the conduct must be ‘inflicted by or at instigation of than with the consent or acquiescence of a public official other person acting in an official capacity’;<sup>144</sup> whereas under the Rome Statute there is no corresponding requirement that torture must be committed by a public official or linked to a public official.<sup>145</sup> That said, the contextual requirements of a state or organisational policy may well revive indirectly the link between torture and public officials. A further difference between torture under CAT and torture as a crime against humanity is that there is no requirement under the latter regime that the act must be carried out with a specific purpose.<sup>146</sup> It is worth noting, however, that the definition of torture as a war crime does include this requirement of purpose.<sup>147</sup>

In terms of its scope, any ‘pain or suffering arising only from, inherent in or incidental to, lawful sanctions’ may not qualify as torture for the purpose of establishing a crime against humanity;<sup>148</sup> but under certain conditions rape may qualify as a form of torture, as suggested by the Trial Chamber in *Akayesu*.<sup>149</sup>

### 3.3.5 Sexual violence

Sexual violence within the context of crimes against humanity includes ‘rape, sexual slavery, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity includes.’<sup>150</sup>



Systematic torture is alleged to have occurred during Operation Mavhoterapapi in Zimbabwe in 2008.



### 3.3.5.1 Rape

As far as rape as a crime against humanity is concerned, the approach in *Akayesu* represents the locus classicus. In that case the Trial Chamber found:

The Chamber considers that rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts. The Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment does not catalogue specific acts in its definition of torture, focusing rather on the conceptual frame work of state sanctioned violence. This approach is more useful in international law. Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.<sup>151</sup>

There are physical and contextual (in a narrow sense) aspects to rape. According to the ICC Elements of Crimes, rape is defined in the following terms: ‘The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.’<sup>152</sup> In addition to the physical aspect of rape, the Elements of Crimes require that it must be:

[C]ommitted by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.<sup>153</sup>

As far as the mental element is concerned, according to the Elements of Crimes, ‘a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity’.<sup>154</sup> Notably, the definition of rape in ICL differs from that of most domestic systems in that it focuses on the act of the perpetrator in delimiting its scope, as opposed to the more simple formulation of requiring the lack of consent of the victim.<sup>155</sup>

### 3.3.5.2 Sexual slavery

Sexual slavery is an aggravated form of enslavement.<sup>156</sup> There is an additional requirement that ‘[t]he perpetrator caused such person or persons to engage in one or more acts of a sexual nature’.<sup>157</sup>

### 3.3.5.3 Enforced prostitution

According to the Elements of Crimes, ‘enforced prostitution’ takes place when a perpetrator:

Causes one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention,

The definition of rape in ICL focuses on the act of the perpetrator as opposed to requiring the lack of consent of the victim



Zaha Mary is making a fresh start after a year as a captive of the messianic Lord's Resistance Army, Uganda, 2010.

The sexual offence of forced pregnancy was controversial during the drafting stage of the Rome Statute

psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.<sup>158</sup>

In addition, the 'perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature'.<sup>159</sup>

#### 3.3.5.4 Forced pregnancy

The sexual offence of forced pregnancy was controversial during the drafting stage of the Rome Statute. Nevertheless, the drafters agreed eventually on the following definition: "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.<sup>160</sup> Such interpretation, however, is subject to the caveat that it 'shall not in any way be interpreted as affecting national laws relating to pregnancy'.<sup>161</sup>

#### 3.3.5.5 Enforced sterilisation

The inclusion of enforced sterilisation as a crime against humanity – already included as an underlying act of genocide – was novel. It is defined in the Elements of Crimes as the deprivation of 'one or more persons of biological reproductive capacity',<sup>162</sup> that was 'neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent'.<sup>163</sup>

#### 3.3.5.6 Sexual violence

The Rome Statute contains a residual category of 'sexual violence' for conduct 'of a gravity comparable to the other offences in article 7, paragraph 1(g), of the Statute'.<sup>164</sup> This conduct is defined by the Elements of Crimes in the following terms:

[A]n act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.<sup>165</sup>

### 3.3.6 Deportation or forcible transfer of the population

Article 7(2)(d) of the Rome Statute defines this underlying act thus: "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law'.

The concept of 'deportation' involves the displacement of a group across a border; whereas 'forcible transfer' is traditionally understood to mean the displacement of people within a single state. The key aspect of this underlying act



Deportation of German Jews to Riga, Latvia, 1941.

is that the deportation or transfer must be ‘forcible’, although this is defined broadly. For example, according to the Element of Crimes, “forcibly” is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment.<sup>166</sup>

The practice of ethnic cleansing, discussed earlier with respect to genocide, probably is more appropriately located within this act of ‘deportation or forcible transfer’ as a crime against humanity than as one of genocide, unless it is committed ‘with the intent to destroy the group in question in whole or in part’ as previously explained.

### 3.3.7 *Enslavement*

Like torture, slavery is prohibited universally under international law. In fact, some argue that the antecedents of ICL more generally may be traced back to the anti-slavery movement in international law.<sup>167</sup>

In terms of its meaning, the term ‘enslavement’, upon which this crime against humanity is based, was first defined in the Slavery Convention (1926).<sup>168</sup> For the purposes of the ICC, article 7(2)(c) of the Rome Statute defines enslavement as: ‘[T]he exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.’

The Elements of Crimes elaborate on the concept of ‘powers attaching to the right of ownership over a person’ to include the ‘purchasing, selling, lending or bartering [of] such a person or persons, or by imposing on them a similar deprivation of liberty’.<sup>169</sup> This definition includes forced labour.<sup>170</sup> Finally, as previously noted, any such enslavement in the context of sexual violence should be considered as the act of sexual slavery.<sup>171</sup>

### 3.3.8 *Imprisonment or other severe deprivation of physical liberty*

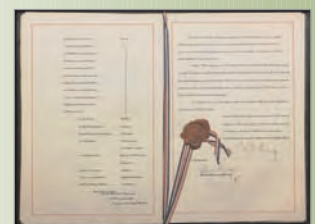
In order to constitute a crime against humanity, imprisonment or the deprivation of physical liberty must be both ‘severe’ and unlawful. With reference to the former, according to the ICC Elements of Crimes, the imprisonment or deprivation must be of sufficient gravity to amount to a ‘violation of fundamental rules of international law’ (i.e. severe).<sup>172</sup> As far as the issue of lawfulness is concerned, any such imprisonment or deprivation of physical liberty must not be lawful under domestic law.

In terms of its relationship with other crimes, ‘imprisonment’ as a crime against humanity is materially the same as the war crime of ‘unlawful confinement’.<sup>173</sup>

### 3.3.9 *Enforced disappearance*

The inclusion of enforced disappearance as a crime against humanity in the Rome Statute was an important development. Despite the fact that it had been considered to be a crime against humanity since Nuremberg,<sup>174</sup> this has done little to deter its

Like torture, slavery is prohibited universally under international law



Slavery Convention (1926) ratification by Liberia, 1930.

Enforced disappearances are crimes against humanity even when committed by non-state actors

commission. The practice has been widespread in low-intensity internal conflicts during the past few decades, particularly in Latin America.

The Rome Statute defines the practice of enforced disappearance in the following terms:

“Enforced disappearance of persons” means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organisation, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.<sup>175</sup>

Crucially, article 7(2)(i) of the Rome Statute does not require that the act be commissioned, authorised, supported or allowed by a state.<sup>176</sup> Therefore, enforced disappearances are crimes against humanity even when committed by non-state actors.<sup>177</sup>

### 3.3.10 Persecution

The crime of persecution, as a crime against humanity, is complex in both its formulation and its relationship to the crime of genocide. As noted above, acts that do not meet the requirements of genocide insofar as specific intent is concerned might well meet the requirements of persecution as a crime against humanity. In this regard the ICTY has held:

[T]he *mens rea* requirement for persecution is higher than for ordinary crimes against humanity, although lower than for genocide. In this context the Trial Chamber wishes to stress that persecution as a crime against humanity is an offence belonging to the same genus as genocide. Both persecution and genocide are crimes perpetrated against persons that belong to a particular group and who are targeted because of such belonging. In both categories what matters is the intent to discriminate: to attack persons on account of their ethnic, racial, or religious characteristics (as well as, in the case of persecution, on account of their political affiliation). While in the case of persecution the discriminatory intent can take multifarious inhumane forms and manifest itself in a plurality of actions including murder, in the case of genocide that intent must be accompanied by the intention to destroy, in whole or in part, the group to which the victims of the genocide belong. Thus, it can be said that, from the viewpoint of *mens rea*, genocide is an extreme and most inhuman form of persecution. To put it differently, when persecution escalates to the extreme form of wilful and deliberate acts designed to destroy a group or part of a group, it can be held that such persecution amounts to genocide.<sup>178</sup>

As far as the formulation of the crime of persecution is concerned, article 7(2)(g) of the Rome Statute defines it as ‘the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity’. This definition was developed from the earlier jurisprudence of the ad hoc tribunals.<sup>179</sup>

What remains controversial are the specific acts that may amount to a severe deprivation of fundamental rights contrary to international law.<sup>180</sup> Under article 7(1)(h) persecution must be connected to ‘any act referred to in this paragraph or any crime within the jurisdiction of the Court’. What this means is that persecution



Bernice Dockendorff stands next to photographs of people who have disappeared in Chile. Bernice's sister, Muriel, was first detained in June 1974 without being charged. Muriel then disappeared on 6 August 1974.

will always be based on some other underlying act constituting a crime against humanity.

There is an additional prerequisite to establish discriminatory intent on one or more of the accepted grounds, with article 7(2)(g) requiring that any such persecution be on 'political, racial, national, ethnic, cultural, religious, gender' (i.e. male or female) grounds. The inclusion of the phrase 'or other grounds that are universally recognised as impermissible under international law' means that this list remains open-ended.

### 3.3.11 Apartheid

Under article 7(2)(h) of the Rome Statute, apartheid is included expressly as a crime against humanity. Under this article, it is defined as meaning: '[I]nhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalised regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime'.

As with the crime against humanity of persecution, apartheid is dependent upon the commission of some other 'inhumane acts' at least similar to those listed in article 7(1) which of themselves constitute crimes against humanity. The distinguishing features of the crime of apartheid is the additional requirement that the act be committed 'in the context of an institutionalised regime of systematic oppression and domination by one racial group over any other racial group or groups'; and the mental element that such an act is committed 'with the intention of maintaining that regime'. Arguably, while the inclusion of apartheid as a crime against humanity was important, these defining features are conceptually more akin to contextual elements than underlying acts.

### 3.3.12 Other inhumane acts

Finally, the underlying acts of crimes against humanity specified within article 7(1) of the Rome Statute are not exhaustive, but rather may be expanded to include any other inhumane act that inflicts 'great suffering, or serious injury to body or to mental or physical health',<sup>181</sup> which is of a similar character to one or more of those underlying acts listed.

## 4. WAR CRIMES

### Article 8 of the Rome Statute (1998): War crimes

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.
2. For the purpose of this Statute, 'war crimes' means:
  - (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention: ...
  - (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: ...

As with persecution, apartheid is dependent on the commission of other 'inhumane acts' similar to those listed in article 7(1) which constitute crimes against humanity



- (c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause: ...
- (d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.
- (e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts: ...

## 4.1 Introduction

War crimes are unique in that they have emerged out of an older (and more established) body of international law – IHL – making it the ‘most codified area of [ICL]’.<sup>182</sup> Nevertheless, it would be an oversimplification solely to consider ICL, insofar as war crimes are concerned, as the enforcement arm of IHL. While the two fields share common applications, they are by no means coextensive. Historically, although IHL has outlawed certain conduct in custom since time memorial and in various treaties since the turn of the 20th century, it was only at a later date that violations of these rules came to be considered ‘international crimes’.<sup>183</sup> Further, as will become evident here, there are marked differences between the operating principles of the two systems.

The history of war crimes requires a brief overview of the history of IHL. Despite the belief of some that pre-modern wars were lawless, ‘[a]ncient societies had legal codes with humanitarian provisions similar to those found in the modern laws of war’.<sup>184</sup> As van Schaak and Slye note:

As long as groups of people, and later states, have waged war, there have been rules in place governing acceptable behaviour in armed conflicts. Although the history of the law of war is often told from the perspective of international conferences held in The Hague and Geneva, ...all human cultures manifest efforts to regulate this seemingly inherent aspect of our shared humanity.<sup>185</sup>

Until the turn of the 20th century, the rules of war (that would later form the basis of modern day IHL) were predominantly custom based.<sup>186</sup> The advent of positivism and positive law, as described in Module 1, inspired the attempts to codify the hitherto unwritten war codes during the Hague Peace Conferences of 1899 and 1907.<sup>187</sup> These culminated in agreement on the wording of a number of treaties governing the means and methods of warfare, the most notable being the fourth treaty – Respecting the Rules and Customs of War on Land (1907) – which codified a number of IHL rules in its annex. In addition, the Preamble to the 1899 and 1907 Hague Conventions contained the ‘Martens clause’, the legal value and meaning of which remains contested, as does the ‘humanitarian’ nature of these developments.<sup>188</sup>

Around the same time as the Hague conferences, the work of Henry Dunant led to the Geneva Conference in 1864 that resulted in the adoption of the first of a series of subsequent Geneva Conventions – Geneva Convention (1864) – and the



First Geneva Convention, 1864.



formation of the International Committee of the Red Cross (ICRC) to monitor its implementation.<sup>189</sup> In particular, this early treaty ‘established rules governing the duty to grant relief to the wounded without distinction of nationality, confirmed the neutrality of medical units, and designated the red cross symbol as a protected insignia.’<sup>190</sup> This was followed by the next Geneva Convention in 1927.

Following World War II, the most comprehensive codification of IHL took place in the form of the four Geneva Conventions 1949.<sup>191</sup> As Van Schaack and Slye note: ‘Although the Fourth Hague Convention retains modern currency, today’s rules of IHL are largely founded on the four Geneva Conventions of 1949.’<sup>192</sup> To date, most states have ratified these Geneva Conventions and their provisions largely are considered to be part of customary international law. Although the primary focus of these conventions is on the detailed regulation of IAC, states did accept some degree (albeit minimal) of regulation of NIAC through the inclusion of article 3 common to all four Geneva Conventions. Up until this point – with the (possible) exception of the Lieber Code – IHL had been applied exclusively to IAC.

The Geneva Conventions were augmented by two additional protocols in 1977: Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I); and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II). As with common article 3, the adoption of Additional Protocol II marked an important step towards the increased regulation of NIAC.

The criminalisation of violations of IHL is a more recent development, with important distinctions existing between international and non-international armed conflicts.

With regard to international armed conflicts (IACs), the Treaty of Versailles 1919 contemplated the prosecution of war crimes, and the IMTs prosecuted violations of the law of war. The Geneva Conventions (1949) put beyond any doubt the possibility of prosecuting such violations with the inclusion of its grave breaches regime. This regime not only considered certain grave breaches of IHL to be criminal in nature, but also placed an obligation on states to prosecute such breaches. In contrast, although Additional Protocol I was important for the development of IHL, its impact on the criminalising of IHL violations was minimal. The development of this has been assisted greatly through the advent of the ad hoc tribunals which have interpreted and applied them. The concept and content of such IHL violations were assisted further through their comprehensive cataloguing, or perhaps even their codification, during the drafting of the Rome Statute. Certainly, article 8 of the Rome Statute contains a comprehensive list of war crimes which may be committed during IAC.

As far as non-international armed conflicts (NIACs) are concerned, the criminalisation of IHL violations is less settled. Indeed, at the time of the Nuremberg Tribunal, ‘[b]ecause the entire concept of legal regulation of non-international armed conflict was in its infancy, it was not considered that there could be international criminal liability for violations of humanitarian law in non-international armed conflict.’<sup>193</sup> The imbalance between the attention given to the regulation of IAC compared with NIAC is reflected in the fact that ‘the 1949 Geneva Conventions and the 1977 Protocols contain close to 600 articles, of which

The criminalisation of violations of IHL is a more recent development



The International Committee of the Red Cross was founded in 1863 to monitor implementation of the Geneva Conventions.

The Rome Statute includes a comprehensive list of war crimes relating to both international and non-international armed conflict

only article 3 common to the 1949 Geneva Conventions and the 28 articles of Additional Protocol II apply to internal conflicts.<sup>194</sup>

Much of this unevenness is attributable to not only the historically statist character of international law, but also the underpinning ethos of IHL which relies on symmetry and reciprocity between states for its enforcement. Although Additional Protocol II elaborated on the laconic provisions of common article 3, it contained no provision for the criminalisation of breaches of such provisions.<sup>195</sup> As a result, the criminalisation of breaches of IHL applied to IACs only.<sup>196</sup>

Consequently, at the time of the ICTY's establishment even the ICRC acknowledged that 'according to humanitarian law as it stands today, the notion of war crimes is limited to situations of international armed conflict'.<sup>197</sup> Nevertheless, when the ICTR was created, article 4 of the ICTR Statute granted the tribunal jurisdiction over violations of common article 3 of the Geneva Conventions and Additional Protocol II.<sup>198</sup>

The jurisprudence of the ICTY has been instrumental here also. Here, the Appeal Chamber's decision in *Tadic* is important, in that it extended the applicability of war crimes to NIAC under the guise of customary international law. It noted that:

... it cannot be denied that customary rules have developed to govern internal strife. These rules ... cover such areas as protection of civilians from hostilities, in particular from indiscriminate attacks, protection of civilian objects, in particular cultural property, protection of all those who do not (or no longer) take active part in hostilities, as well as prohibition of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities.<sup>199</sup>

What is more, the ICTY's Appeal Chamber further affirmed the entailment of individual criminal responsibility when such customary norms were breached.<sup>200</sup>

The significance of the *Tadic* decision cannot be overstated. As Schabas notes: '[W]ell into the 1990s, it was widely believed that there was simply no individual criminal liability – as a matter of international law – during non-international armed conflict'.<sup>201</sup> It is perhaps unsurprising, therefore, that the legal basis of the ICTY's decision in *Tadic* continues to be debated by some. As Hoffmann notes:

[T]he *Tadic* Chamber based its finding of the existence of individual criminal responsibility on a rather brief perusal of state practice, with a special reliance on the Nuremberg precedent of criminalising breaches of humanitarian law even without an express treaty provision. This relaxed approach was palpable also at the finding of the existence of a wide range of customary norms extending beyond the existing treaty rules ... The adduced evidence hardly satisfies the classical requirement of "extensive and virtually uniform" state practice. ... The proof of custom is apparently mainly undertaken by reliance on *opinio juris*.<sup>202</sup>

Despite such concerns, this decision is widely cited and relied upon. Significantly too, the debate has to a large extent been overtaken by subsequent developments, chiefly the adoption of article 8 of the Rome Statute which includes a comprehensive list of war crimes relating to both IAC and NIAC. That said, this was by no means an uncontroversial inclusion. As Hoffmann notes: 'The negotiations of the Rome Statute proved that the inclusion of war crimes committed



Serbs killed hundreds of Bosniak civilians in the Bijeljina massacre, 1992.

in non-international armed conflicts was one of the most controversial and debated questions.<sup>203</sup>

#### 4.1.1 Defining armed conflict

War crimes must be committed in the context of an armed conflict. In defining this term, the Appeals Chamber in *Tadic* stated that: '[A]n armed conflict exists whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organised armed groups or between such groups within a state.'<sup>204</sup>

While such a definition is of great assistance to the establishment of war crimes, no universally accepted definition of what constitutes an armed conflict exists; rather it depends on the nature of the conflict.

#### 4.1.2 International armed conflicts

IAC is defined by the Geneva Conventions as: '[A]rmed conflict ... between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them.'<sup>205</sup>

Further, the laws of IAC apply 'to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.'<sup>206</sup> The concept was extended further by article 1(4) of the Additional Protocol I, which refers to 'armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination.'<sup>207</sup>

#### 4.1.3 Non-international armed conflicts

The Geneva Conventions 1949 define NIAC briefly as: '[A]rmed conflict not of an international character occurring in the territory of one of the High Contracting Parties'. In contrast, article 1(1) of the Additional Protocol I adopted a more detailed, and arguably more demanding, definition of NIAC as a conflict that:

... take[s] place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

When the Rome Statute was drafted, there were two different types of NIAC: those covered by common article 3; and those covered by both common article 3 and article 1(1) Additional Protocol II (the latter states expressly that it 'develops and supplements [common article 3] ... without modifying its existing conditions of application'). The drafters of the Rome Statute, presented with two possible definitions for NIAC, elected to formulate their own.

NIAC is defined in the Rome Statute as: 'armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organised armed groups or between such groups.'<sup>208</sup> It should be noted that, unlike the definition of IAC, this definition is not drawn from existing

War crimes must be committed in the context of an armed conflict



The ICC alleges that war crimes were committed in Darfur, Sudan.

The three categories of war crimes are: crimes against persons, crimes against property, and prohibited methods and means of warfare

IHL treaties, but rather is a formulation introduced by the drafters of the Rome Statute. Such a definition is, nevertheless, reflective of the exclusion in Additional Protocol II of ‘situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature’ from their definition of non-international armed conflict.<sup>209</sup>

The formulation adopted by the drafters was based on the definition of armed conflict adopted in *Tadic* (supra) and ‘clarifies that the parties participating in the conflict must achieve a certain degree of organisation.’<sup>210</sup> As Werle notes:

The language chosen in the [Rome Statute] ... is not as narrow as the definition in article 1(1) of Additional Protocol II, which demands an accountable military leadership as well as the ability, resulting from the occupation of part of a states territory, to carry out a “sustained” and “concerted” military operation. In particular, the requirement of occupying part of a territory proved too narrow, because this only covered classic civil wars ... but not modern guerrilla wars. In contrast to article 1 of Additional Protocol II, article 8(2)(f) of the [Rome Statute] ... includes conflicts in which no government forces are involved.<sup>211</sup>

In addition, the Rome Statute’s definition of NIAC includes the requirement that it must be ‘protracted’. In this sense, it might be considered broader than the definition in Additional Protocol II. Werle, however, suggests that this provision ‘should not be understood as a purely temporal component.’<sup>212</sup> Furthermore, it has been suggested that this requirement for ‘protracted armed conflict’ must apply to both article 8(2)(e) and article 8(2)(c) in order to allow for ‘uniform definition of non-international armed conflict under the ICC statute.’<sup>213</sup>

#### 4.1.4 Plan or policy

Finally, article 8(1) of the Rome Statute deserves brief consideration, which states that: ‘The Court shall have jurisdiction in respect of war crimes *in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.*’

The use of the term ‘in particular’ is unfortunate in the context of jurisdiction as it implies that there are different degrees of jurisdiction when it is clearly a binary determination (i.e. either the court has jurisdiction over war crimes or it does not). Consequently, this provision should be read as: ‘[T]he Court *shall exercise jurisdiction in respect of war crimes in particular when committed as part of a plan or policy*’, although this formulation is not without its own problems.

## 4.2 Acts constituting war crimes

The multitude of war crimes contained in article 8 of the Rome Statute can be systematised in a number of ways. Werle, for example, suggests that they may be divided into three categories: crimes against the person; crimes against property; and crimes involving methods of warfare and crimes involving means of warfare. Drawing upon Werle’s categorisation as the basis for analysis here, three categories of war crime will be considered: crimes against persons; crimes against property and other rights; and prohibited methods of warfare and prohibited means of warfare.<sup>214</sup>



Thomas Lubanga is on trial at the ICC for alleged war crimes committed in the DRC between 2002-3.



### 4.2.1 Crimes against persons

War crimes against persons can be divided into: crimes against persons who by their nature cannot be targeted under IHL (i.e. civilians); persons who are not absolutely protected as with civilians, but who have gained protection by their conduct/incapacitation (*hors de combat*); and crimes against persons who are lawful targets, but the nature of the act itself is unlawful (i.e. crimes that involve mistreatment of some form or another).

#### 4.2.1.1 Killing or wounding of protected persons

The killing of civilians – ‘wilful killing’ in IAC, and ‘murder’ in NIAC – is the first order war crime. Any deadly attack against a civilian would be a breach of the fundamental principle of distinction and a violation of customary international law punishable as a war crime, subject to the principle of collateral damage (see *infra*).

To this end, article 8(2)(a)(i) of the Rome Statute prohibits the ‘wilful killing’ of persons ‘protected under one or more of the Geneva Conventions of 1949’<sup>215</sup> – which includes civilians – in IAC. Similarly, in situations of NIAC, article 8(2)(c)(i) of the Rome Statute prohibits ‘violence to life and person, in particular murder of all kinds’ committed against persons taking no active part in hostilities (i.e. civilians) as a violation of common article 3 of the Geneva Conventions (1949). In this regard Werle notes that: ‘Although the wording of [common] article 3 (“murder”) differs from that of the grave breaches provision of the Geneva Conventions, which speaks of “wilful killing,” the substance of the crime is the same.’<sup>216</sup>

Furthermore, the prohibition on ‘killing’ and ‘murder’ in IAC and NIAC respectively applies not only to civilians, but to members of the armed forces who are not ‘protected persons’ *per se*, but who have gained protective status by virtue of their surrender or incapacitation (e.g. through being wounded). In the case of IAC, this would include members of the armed forces who no longer participate in hostilities or who have been rendered *hors de combat*. In the case of NIAC, this would include ‘persons taking no active part in hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause.’<sup>217</sup>

The provisions of the Rome Statute extend to the wounding of such persons also. In IAC, article 8(2)(a)(iii) prohibits ‘wilfully causing great suffering, or serious injury to body or health’ of persons protected under the Geneva Conventions of 1949, and article 8(b)(vi) explicitly prohibits ‘[k]illing or wounding a combatant who, ha[s] laid down his arms or ha[s] no longer means of defence’ (i.e. *hors de combat*). Similarly, the inclusion of the phrase ‘violence to life and person’ in article 8(2)(c)(i) would cover non-lethal injuries in respect of such persons in NIAC.

In addition to criminalising the ‘killing’ or ‘wounding’ of civilians and other protected persons, the Rome Statute prohibits ‘[i]ntentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities’ in IAC (article 8(2)(b)(i)) and NIAC (article 8(2)(e)(i)). More specifically, the Rome Statute criminalises ‘[i]ntentionally directing attacks against personnel ... involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled

The killing of civilians is the first order war crime



Joseph Kony is wanted by the ICC for alleged war crimes and crimes against humanity committed in Uganda.

Conscripting or enlisting children under the age of 15 into armed forces, or using them to participate in hostilities, is a war crime

to the protection given to civilians ... under the international law of armed conflict...’, both in IAC (article 8(2)(b)(iii)) and NIAC (article 8(2)(e)(iii)).

Finally, it must be noted that these prohibitions relate to the intentional targeting of civilians or protected persons in armed conflicts. Where the death or wounding of such persons occurs unintentionally in the pursuit of a legitimate military objective – termed ‘collateral damage’ – no war crime is committed provided that the effect on civilians is not excessive in relation to the objective. This will be discussed further below.

#### 4.2.1.2 War crimes of mistreatment

There are a number of war crimes that are criminalised not on the basis of the object of the attack (e.g. civilians and protected persons, as discussed in the previous section), but rather on the basis of the nature of their conduct. In contrast to the former category, these offences involving mistreatment may differ depending on the nature of the conflict (i.e. whether IAC or NIAC).

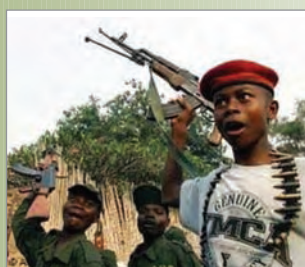
According to Werle, the following acts are prohibited regardless of the nature of the conflict: torture; mutilation; biological/medical/scientific experiments; inhuman or cruel treatment; sexual violence; humiliating and degrading treatment; slavery; punishment without regular trial; hostage-taking; deportation or forcible transfer; and the use of child soldiers.<sup>218</sup> In addition, the following acts are prohibited expressly in IAC only: causing suffering or injury to health, compelled service in military forces and operations of war; forced labour; unlawful confinement; delayed repatriation of prisoners of war and civilians and the transfer of a party’s own civilian population.<sup>219</sup>

Arguably other forms of mistreatment, specifically the transfer into occupied territory of a party’s own civilian population in NIAC, the forcible transfer of populations in NIAC, and hostage taking, fall more appropriately under the heading of ‘methods of war’ and are therefore discussed below. Another form of mistreatment, which exists uniquely as a war crime, is the act of conscripting or enlisting children under the age of 15 years of age into armed forces or groups, or using them to participate actively in hostilities, which is prohibited under article 8(2)(b)(xxvi) (IAC) and article 8(2)(e) (vii) (NIAC).

Many of these forms of prohibited conduct – such as torture, inhuman and degrading treatment, slavery, unlawful confinement, and sexual violence – are also underlying acts of genocide and crimes against humanity. Conversely, as noted below, sometimes the interpretation of the same act (see e.g. torture) differs depending upon whether it is committed as a crime against humanity or as a war crime.

#### 4.2.2 Crimes against property and other rights<sup>220</sup>

Certain offences committed against property may constitute war crimes as well. Some objects are protected because of their relationship to protected persons. For example, in IAC the targeting of civilian objects (article 8(2)(b)(ii)) and ‘[a]ttacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives’ (article 8(2)(b)(v)) are war crimes.



Child soldiers from DRC.



A number of property-related crimes exist in both IAC and NIAC. One important example is the deliberate targeting of objects used for humanitarian assistance or peacekeeping missions under the UN Charter, which is prohibited regardless of the nature of the conflict under article 8(2)(b)(iii) (IAC) and 8(2)(e)(iii) (NIAC). Similarly, directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law is prohibited by article 8(2)(b)(xxiv) (IAC) and article 8(2)(e)(ii) (NIAC).

More broadly, buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected have long since been protected under customary law, which is reflected within article 8(2)(b)(ix) (IAC) and article 8(2)(e)(iv) (NIAC) unless these buildings can be shown to be military objectives.

Finally, destroying or seizing the enemy's property – unless 'imperatively demanded by the necessities of war' – is a war crime under both IAC (article 8(2)(b)(xiii) and NIAC (article 8(2)(e)(xii)).

#### 4.2.3 Prohibited methods of warfare

The prohibition on certain methods of warfare is considered to be reflective of Hague law, with most such methods being prohibited because of their impact upon persons. As noted above, an overlap exists between the substance of certain war crimes against persons and war crimes involving prohibited methods of warfare. In terms of their classification, what distinguishes these two categories of crimes is the existence of a military purpose in the instance of war crimes, which need not necessarily be a legitimate one. If there is some coordinated military purpose to such acts then, it is argued, such acts are best characterised as crimes under the umbrella of methods of warfare, notwithstanding the effects that they may have on individuals, rather than as crimes against humanity. Given their heavy reliance on the Hague Regulations (see *supra*), it is not surprising that the prohibited methods of warfare are mainly aimed at regulating IAC. A number of key prohibited methods are examined next.

##### 4.2.3.1 Use of excessive force

In IAC the use of military force is guided by two principles. First, an attack must be directed at a legitimate target. For this reason, the Rome Statute prohibits '[i]ntentionally directing attacks against civilian objects, that is, objects which are not military objectives' (article 8(2)(b)(ii)). Second, even if the target is legitimate, the attack must be proportional to the intended military objective and must not cause excessive harm. To this end, article 8(b)(iv) of the Rome Statute prohibits the intentional 'launching [of] an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated ...'. Furthermore, article 8(2)(a)(iv) criminalises '[e]xtensive destruction expropriation of property, not justified by military necessity and carried out unlawfully and wantonly'.

The deliberate targeting of objects used for humanitarian assistance or peacekeeping missions under the UN Charter, is a war crime



Rebel leaders from Darfur are on trial at the ICC for war crimes after an attack on the AU Haskanita peacekeepers' camp in 2007.

The Rome Statute criminalises intentionally using the starvation of civilians as a method of warfare

The rules that govern targeting in NIAC are far less developed. For this reason, the Rome Statute does not contain corresponding war crimes for excessive damage caused by military operations in times of NIAC.

#### 4.2.3.2 *Perfidy*

The crime of perfidy similarly is limited to IAC. This crime is unique in the sense that its origins as a prohibited act in IHL can be traced back to the notion of chivalry in pre-modern conflicts. In the Rome Statute it is reflected within article 8(2)(b)(vii) which prohibits '[m]aking improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury'.

The fact that there is no corresponding crime in NIAC is unsurprising because, unlike in IAC which predominantly is fought by regular armed forces, NIAC usually involves unconventional forces which often do not wear military insignia and uniform as originally envisaged under the Geneva Conventions 1949.

#### 4.2.3.3 *Transfer of population*

Article 8(2)(b)(viii) of the Rome Statute provides that in IAC the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, is criminal.

#### 4.2.3.4 *Starvation as a method of war*

Article 8(2)(b)(xxv) of the Rome Statute criminalises intentionally using the starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions (1949).

#### 4.2.3.5 *Forced displacement in NIAC*

Article 8(2)(e)(viii) of the Rome Statute specifies that ordering the displacement of the civilian population in IAC – 'for reasons related to the conflict' – is a war crime, 'unless the security of the civilians involved or imperative military reasons' requires such displacement.

#### 4.2.3.6 *Taking of hostages*

The taking of hostages is prohibited in both IAC (article 8(2)(a)(viii)) and NIAC (article 8(2)(c)(iii)). The reason this is considered a war crime relating to prohibited methods is that according to the Elements of Crimes, it must be aimed at achieving some military purpose.

#### 4.2.3.7 *Other prohibited methods of warfare amounting to war crimes*

A number of other prohibited methods of warfare are specified under article 8 of the Rome Statute. One is the crime of killing or wounding treacherously, which is



Israeli forces have been accused of committing war crimes during Operation Cast Lead in Gaza, in December 2008.

prosecutable in both IAC and NIAC under article 8(2)(b)(xi) and article 8(2)(e)(ix) respectively; another is the crime of pillaging under article 8(2)(b)(xvi) (IAC) and article 8(2)(e)(v) (NIAC). Similarly, the crime of ‘declaring that no quarter will be given’ is included under articles 8(2)(b)(xii) and 8(2)(e)(x). Another significant prohibited method is the use of human shields – defined in article 8(2)(b)(xxiii) as ‘utilising the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations’ – which, perhaps somewhat surprising in the light of recent conflicts, is an express war crime in IAC only.

#### 4.2.4 Prohibited means of warfare

Finally, IHL prohibits (and ICL criminalises) the use of certain weapons in armed conflicts. Conceptually, if there is one area of IHL where the traditional opposition of states loses some purchase it is in the realm of prohibited weapons. Firstly, some of the major concerns of states regarding the application of IHL norms in NIAC – such as providing combatant immunity and prisoner of war status – are not applicable to the regulation of the means of warfare. Moreover, due to the comprehensive nature of many applicable treaties – for example, the Ottawa Convention<sup>221</sup> which outlaws the production, acquisition, stockpiling, and transfer of anti-personnel mines – maintaining the distinction somehow in internal conflicts appears illogical in the extreme. The heart of the matter was captured in *Tadic*, when the Trial Chamber stated that:

Elementary considerations of humanity and common sense make it preposterous that the use by States of weapons prohibited in armed conflicts between themselves be allowed when States try to put down rebellion by their own nationals on their own territory. What is inhuman, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife.<sup>222</sup>

This notwithstanding, during the Rome Conference, states were reticent to do away with the distinction between prohibited means in IAC and NIAC altogether. The main debate in this regard was the inclusion of nuclear weapons in the list of prohibited weapons. Ultimately, neither nuclear weapons, nor chemical and biological weapons, were included in the list of prohibited weapons in IAC. However, article 8(2)(b)(xx) was inserted to allow for the matter to be reconsidered at a later stage.<sup>223</sup> Notably, no such provision was included in the list of crimes in NIAC.

Another significant prohibited method is the use of human shields



### Further reading

Cryer, R. *An introduction to international criminal law and procedure*. Cambridge: Cambridge University Press, 2007.

Schabas, W. *Genocide in international law: the crime of crimes*. Cambridge, UK; New York: Cambridge University Press, 2009.

Van Schaack, B and Slye, R. A Concise History of International Criminal Law: Chapter 1, *Understanding International Criminal*

*Law*. Santa Clara University Legal Studies Research Paper No. 07-42, 2007.

Werle, G. *Principles of international criminal law*. The Hague: TMC Asser Press, 2005.

## NOTES

- 1 G Werle, *Principles of international criminal law*, The Hague: TMC Asser Press, 2005, 95. As a result, with respect to genocide the distinction and relationship between the 'act' and the 'context' is not exact and has been the source of some confusion, which is reflected within case law.
- 2 As of September 2011.
- 3 See Module 2 discussion on the jurisdictional or substantive nature of the Rome Statute. See further M Milanovic, Is the Rome Statute Binding on Individuals? (And Why We Should Care), *Journal of International Criminal Justice* 9(1) (2011), 25-52.
- 4 Werle, *Principles of international criminal law*, 188.
- 5 The term's etymology is a combination of the Greek word for race – 'genos' – and the Latin for killing – 'caedere'.
- 6 Werle, *Principles of international criminal law*, 190. The status of the Armenian genocide remains highly politicised and contested. Turkey continues to deny its occurrence; and the US refuses to label the massacres 'genocide'.
- 7 Werle, *Principles of international criminal law*, 188.
- 8 Werle, *Principles of international criminal law*, 95.
- 9 Ibid. See IMT, *Judgement in the High Command Case* (1946).
- 10 UN General Assembly Resolution 96(I) (1946), para 4. The Resolution defined it as follows: '[A] denial of the right of existence of entire human groups' adding: 'as homicide is the denial of the right to live of individual human beings, such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the United Nations'. (para 1).
- 11 Ibid.
- 12 Adopted on 9 December 1948 as General Assembly Resolution 260, entered into force on 12 January 1951 once 20 states had ratified it (article XIII Genocide Convention).
- 13 In 1951, the ICJ declared that: 'the principles underlying the Convention are principles which are recognised by civilised nations as binding on States, even without any conventional obligation'. Today, the prohibition on genocide is widely considered to be a *jus cogens* norm of international law. See *Reservation to the Convention on the Prevention and Punishment of Genocide*, Advisory Opinion, ICJ Rep 1951, 23.
- 14 See *Prosecutor v. Blagojevic and Jokic* (Trial Judgment), IT-02-60-T (17 January 2005) (Blagojevic Trial); and *Prosecutor v. Blagojevic and Jokic* (Appeal Judgment), IT-02-60-A (9 May 2007). (Blagojevic Appeal). See further C Gevers and M du Plessis, Blagojevic and Jokic, in G Sluiter and A Klip (eds), *Annotated Leading Cases of International Criminal Tribunals Vol. XXVI*, Intersentia, 2011, 494-504.
- 15 In *Prosecutor v Omar Hassan Ahmad Al Bashir*, Second Decision on the Prosecution's Application for a Warrant of Arrest, ICC-02/05-01/09-9 (12 July 2010) paras 15-16, the ICC Pre-Trial Chamber examined the alleged attacks on the targeted ethnic groups which impacted upon hundreds of thousands of individuals in the Darfur region during a period of over five years.
- 16 See International Commission of Inquiry on Darfur, Report to the Secretary-General, 25 January 2005, paras 490-491.
- 17 See further W Schabas, *Genocide in international law: the crime of crimes*, Cambridge: Cambridge University Press, 2009, 177-8.
- 18 Article 30 Rome Statute.
- 19 Schabas, *Genocide in international law*, 176 & 263.
- 20 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, para 186, (Genocide case), citing the Commentary on Article 17 of the 1996 Draft Code of Crimes against the Peace and Security of Mankind, ILC Report 1996, Yearbook of the International Law Commission, 1996, Vol II, Part Two, 44, para 5.
- 21 Schabas, *Genocide in international law*, 179.
- 22 *Prosecutor v Akayesu*, Trial Judgment, ICTR-96-4-T (2 September 1998), para 500 (*Akayesu* Trial).
- 23 ICC Elements of Crimes, article 6(a) at fn 2.
- 24 Schabas, *Genocide in international law*, 180.
- 25 *Prosecutor v. Radislav Krstic*, Trial Judgment, IT-98-33-T, (2 August 2001), para 513 (*Krstic* Trial).
- 26 *Prosecutor v. Clément Kayishema and Obed Ruzindana* (Trial Judgment), ICTR-95-1-T (21 May 1999), para 108 (Kayishema and Ruzindana Trial); *Akayesu* Trial, para 502; *Krstic* Trial, para 513.
- 27 *Krstic* Trial, para 513.
- 28 *Prosecutor v. Laurent Semanza* (Judgment and Sentence), ICTR-97-20-T (15 May 2003), para 321-322 (*Semanza* Trial).
- 29 International Law Commission, *Draft Code of Crimes Against the Peace and Security of Mankind, Commentary*, UN Doc. A/51/10, 26 July 1996, 46.

- 30 *Krstic* Trial, para 513. See also *Prosecutor v. Georges Anderson Nderubumwe Rutaganda* (Judgment and Sentence), ICTR-96-3-T (6 December 1999), para 51 (*Rutaganda* Trial).
- 31 According to the Elements of Crimes: ‘This conduct may include, but is not necessarily restricted to, acts of torture, rape, sexual violence or inhuman or degrading treatment.’ ICC, Elements of Crimes at 2, note 3.
- 32 Schabas, *Genocide in international law*, 181.
- 33 See S Gorove, The Problem of ‘Mental Harm’ in the Genocide Convention, *Saskatchewan University Law Quarterly* 4 (1951), 174-185. See further Schabas, *Genocide in international law*, 183-188.
- 34 Schabas, *Genocide in international law*, 181.
- 35 *Ibid.*
- 36 When ratifying the Genocide Convention, the United States entered the following ‘understanding’: ‘That the term “mental harm”... means permanent impairment of mental faculties through drugs, torture or similar techniques.’ Schabas, *Genocide in international law*, 184.
- 37 *Blagojevic* Trial, para 647.
- 38 See Schabas, *Genocide in international law*, 185-188.
- 39 Schabas, *Genocide in international law*, 189.
- 40 *Ibid.*
- 41 *Akayesu* Trial, para 505.
- 42 Schabas, *Genocide in international law*, 196.
- 43 *Akayesu* Trial, paras 505-506.
- 44 *Kayishema* Trial, para 116.
- 45 ICC Elements of Crimes. at 3, note 4.
- 46 International Law Commission, *Draft Code of Crimes Against the Peace and Security of Mankind*, Commentary, UN Doc. A/51/10, 26 July 1996, 47.
- 47 *Ibid.*
- 48 ICC Elements of Crimes. at 3.
- 49 See *Akayesu* Trial para 506; *Rutaganda* Trial, para 52.
- 50 See *Genocide Case*, paras 329-334. The ICJ held: ‘However, even assuming that deportations and expulsions may be categorised as falling within Article II, paragraph (c), of the Genocide Convention, the Court cannot find, on the basis of the evidence presented to it, that it is conclusively established that such deportations and expulsions were accompanied by the intent to destroy the protected group in whole or in part.’
- 51 N Robinson, *The Genocide Convention: a commentary*, New York: Institute of Jewish Affairs, 1960, 64.
- 52 Schabas, *Genocide in international law*, 198.
- 53 *Ibid.*
- 54 Schabas, *Genocide in international law*, 199.
- 55 Schabas, *Genocide in international law*, 199-200.
- 56 *Ibid.*
- 57 *Ibid.*
- 58 *Ibid.*
- 59 Schabas, *Genocide in international law*, 202.
- 60 See ICC Elements of Crimes, 15: ‘[t]he perpetrator knew, or *should have known*, that the person or persons were under the age of 18 years’, 115.
- 61 The groups excluded explicitly from the protection of this crime during its drafting included political groups, ideological groups, linguistic groups, and economic groups.
- 62 *Akayesu* Trial, para 515.
- 63 *Krstic* Appeal, para 36.
- 64 International Commission of Inquiry on Darfur, ‘Report to the Secretary-General’, 25 January 2005, para 506.
- 65 ‘Persecution’, as defined by the Rome statute, is committed against ‘any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender ... or other grounds that are universally recognised as impermissible under international law’. Article 7(1)(h) Rome Statute.
- 66 Schabas, *Genocide in international law*, 119.
- 67 The group need not be a minority. See Schabas, *Genocide in international law*, 122-123.
- 68 *Prosecutor v. Stakic*, Judgment, IT-97-24-A (22 March 2006), para 25. (*Stakic* Appeal).
- 69 Schabas, *Genocide in international law*, 111.
- 70 *Akayesu* Trial, para 511.
- 71 Schabas, *Genocide in international law*, 134.
- 72 *Ibid.*
- 73 M Shaw, *International Law*, Cambridge: Cambridge University Press, 2008, 807.
- 74 Schabas, *Genocide in international law*, 125.
- 75 *Ibid.*



- 76 *Genocide Case*, para 187. Here, the ICJ cautioned that: '[S]pecific intent is ... to be distinguished from other reasons or motives the perpetrator may have. Great care must be taken in finding in the facts a sufficiently clear manifestation of that intent.' (para 189).
- 77 *Krstic* Appeal, para 33.
- 78 *Blagojevic* Trial, para 659.
- 79 *Krstic* Appeal, Dissenting Opinion of Shahabuddeen, para 50.
- 80 *Ibid.*
- 81 The Appeals Chamber in *Krstic* held that: 'The Genocide Convention, and customary international law in general, prohibit only the physical or biological destruction of a human group.' The Trial Chamber expressly acknowledged this limitation, and eschewed any broader definition. The Chamber stated that: 'customary international law limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of the group. [A]n enterprise attacking only the cultural or sociological characteristics of a human group in order to annihilate these elements which give to that group its own identity distinct from the rest of the community would not fall under the definition of genocide.' (para 25).
- 82 In this regard, Schabas notes that: 'The words of the [Genocide] Convention certainly bear such an interpretation ... The *travaux préparatoires* of the Convention do not, however, sustain this construction. While these questions were not specifically debated during the drafting of article II, the spirit of the discussions resists extending the concept of destruction beyond physical or biological acts.' Schabas, *Genocide in international law*, 271.
- 83 *Jeliscic* Appeal Judgment, para 47; see also *Rutaganda* Appeal Judgment, para 528. The Appeals Chamber in *Krstic* noted that: 'The proof of the mental state with respect to the commission of the underlying act can serve as evidence from which the fact-finder may draw the further inference that the accused possessed the specific intent to destroy.' (para 706).
- 84 *Brdanin* Trial, paras 975-979.
- 85 Schabas, *Genocide in international law*, 277.
- 86 *Ibid.*
- 87 Schabas, *Genocide in international law*, 279.
- 88 *Ibid.*
- 89 Schabas, *Genocide in international law*, 282.
- 90 *Ibid.*
- 91 *Genocide Case*, para 198.
- 92 *Genocide Case*, para 199.
- 93 *Jeliscic* Trial, para 47.
- 94 *Krstic* Trial, para 134.
- 95 R Cryer, H Friman, D Robinson and E Wilmhurst, *Introduction to international criminal law and procedure*, Cambridge: Cambridge University Press, 2007, 187.
- 96 *Ibid.*, 188.
- 97 Whether it was an 'international' crime at the time of the IMTs remains debatable.
- 98 The Tribunal argued that the crime already existed and was merely codified. Cryer et al suggest that: 'Perhaps because of this uncertainty in the status of crimes against humanity, the Nuremberg judgment tended to blur the discussion of crimes against humanity and war crimes and providing very little guidance on the particular elements of the crime.' Cryer et al, *An introduction to international criminal law*, 189.
- 99 The Statute of the Tokyo Tribunal contained a slightly modified definition of crimes against humanity so as to exclude reference to racial and religious persecution, and the term 'any civilian population' See article 5(c).
- 100 Cryer et al, *An introduction to international criminal law*, 188.
- 101 *Ibid.*
- 102 *Ibid.*
- 103 Adopted on 30 November 1973, entered into force 18 July 1976, following the deposit of the twentieth instrument of ratification.
- 104 See *ibid.* 191-192 for a full discussion of this 'former' element of crimes against humanity.
- 105 See further *ibid.*, 192.
- 106 Although the Pre-Trial Chamber of the ICC appears to have resurrected this element, noting in its *Decision Authorizing the Investigation into PEV*: 'The Chamber considers that the potential civilian victims of a crime under article 7 of the Statute are groups distinguished by nationality, ethnicity or other distinguishing features.' See also Pre-Trial Chamber II, *Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-424, para 76; Pre-Trial Chamber I, *Decision on the confirmation of charges*, ICC-01/04-01/07-717, para 399.

- 107 In addition, there are commonalities between war crimes and underlying acts of crimes against humanity as well. On the relationship between crimes against humanity and war crimes, see Cryer et al, *An introduction to international criminal law*, 190.
- 108 Cryer et al, *An introduction to international criminal law*, 191.
- 109 See *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*. ICC-01/09. Pre-Trial Chamber II (31 March 2010), para 79.
- 110 Cryer et al, *An introduction to international criminal law*, 192.
- 111 See Cryer et al, *An introduction to international criminal law*, 192.
- 112 *Tadic* Trial, para 68.
- 113 Article 50 Additional Protocol I.
- 114 See War Crimes, *infra*.
- 115 ICC, *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*. ICC-01/09. Pre-Trial Chamber II (31 March 2010), para 75. See also, ICC, *Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo* ICC-01/05-01/08-424. Pre-Trial Chamber II, para 76.
- 116 Article 7: Introduction, para 3. This must, however, be committed 'pursuant to or in furtherance of a State or organisational policy to commit such attack'. See *infra*.
- 117 It was not included as an element in article 5 ICTY Statute.
- 118 *Akayesu* Trial, para 579.
- 119 *Akayesu* Trial, para 580.
- 120 Cryer et al, *An introduction to international criminal law*, 194.
- 121 Cryer et al, *An introduction to international criminal law*, 195.
- 122 ICC, *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*. ICC-01/09. Pre-Trial Chamber II (31 March 2010). para 95.
- 123 ICC, *Decision on the confirmation of charges*. ICC-01/04-01/07-717. Pre-Trial Chamber I, para 397.
- 124 *Akayesu* Trial, para 580.
- 125 *Prosecutor v. Blaskic*, Case No. IT-95-14-T, Judgment (3 March 2000), para 203.
- 126 See *infra*.
- 127 Article 7(2)(a) Rome Statute. According to the Elements of Crimes: 'It is understood that "policy to commit such attack" requires that the State or organisation actively promote or encourage such an attack against a civilian population.' (article 7, Introduction, para 3).
- 128 Cryer et al, *An introduction to international criminal law*, 197.
- 129 They note: 'On one route, the term policy is rejected, but it is implicit that random criminal acts of individuals do not amount to an attack. On the other route, the policy element is a requirement but as noted by various commentators its stands for the very same proposition: indeed, the necessary logical corollary of excluding isolated individual acts is to require some instigation or encouragements by something other than individuals, namely a state or organisational.' *Ibid*.
- 130 ICC, *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*. ICC-01/09. Pre-Trial Chamber II (31 March 2010), para 80.
- 131 *Ibid*, para 93.
- 132 *Ibid*, para 80. See, however, the Dissenting Judgment of Judge Kaul, para 53.
- 133 Cryer et al, *An introduction to international criminal law*, 199.
- 134 ICC, *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*. ICC-01/09. Pre-Trial Chamber II (31 March 2010), para 98.
- 135 ICC Elements of Crimes, 5.
- 136 ICC Elements of Crimes, fn 7.
- 137 *Akayesu* Trial, para 588.
- 138 *Ibid*.
- 139 ICC Elements of Crimes, fn 8.
- 140 Article 7(2)(b) Rome Statute. See further ICC Elements of Crimes, fn 9.
- 141 ICC Elements of Crimes. article 7(1)(b), Element 2.
- 142 *Ibid*, article 7(1)(b), Element 4.
- 143 Adopted on 10 December 1984, came into force on 26 June 1987.
- 144 Article 1(1) Convention Against Torture 1984.
- 145 Although article 7(2)(e) does require that the victim must be 'in the custody or under the control of the accused'.
- 146 The ICC Elements of Crimes state that: '[i]t is understood that no specific purpose need be proved for this crime'. (Fn 14, ICC, Elements of Crimes).
- 147 See further ICC Elements of Crimes, fn 114.
- 148 See article 7(2)(e).
- 149 *Akayesu* Trial, para 597.
- 150 Article 7(1)(g) Rome Statute.
- 151 *Akayesu* Trial, para 597.
- 152 ICC Elements of Crimes, article 7(1)(g), Element 1. The Elements clarify that: 'The concept of

- “invasion” is intended to be broad enough to be gender-neutral’. (fn 15). Further, according to article 7(3): ‘For the purpose of this Statute, it is understood that the term “gender” refers to the two sexes, male and female, within the context of society. The term “gender” does not indicate any meaning different from the above.’
- 153 ICC Elements of Crimes, 9.
- 154 ICC Elements of Crimes, fn 16.
- 155 Cryer et al, *An introduction to international criminal law*, 210.
- 156 See *infra*.
- 157 ICC Elements of Crimes, article 7(1)(g)-2, Element 2.
- 158 *Ibid*, article 7(1)(g)-3, Element 1.
- 159 *Ibid*, article 7(1)(g)-3, Element 2.
- 160 Article 7(2)(f) Rome Statute.
- 161 *Ibid*.
- 162 Adding: ‘The deprivation is not intended to include birth-control measures which have a non-permanent effect in practice’. (ICC Elements of Crimes, article 7(1)(g)-5, fn 19).
- 163 ICC Elements of Crimes, article 7(1)(g). They further clarify, at fn 20, that “genuine consent” does not include consent obtained through deception’.
- 164 ICC Elements of Crimes, article 7(1)(g)-6 – Element 2.
- 165 ICC Elements of Crimes, article 7(1)(g)-6 – Element 1.
- 166 ICC Elements of Crimes, fn 12.
- 167 See *supra*, Module 2 – History of International Criminal Law.
- 168 Signed at Geneva on 25 September 1926, came into force on 9 March 1927.
- 169 ICC Elements of Crimes, 6.
- 170 The Elements of Crimes add that: ‘It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.’ ICC Elements of Crimes, article 7(1)(c), fn 11.
- 171 See *supra*.
- 172 ICC Elements of Crime, article 7(1)(e) – Element 2. Further, ‘The perpetrator was aware of the factual circumstances that established the gravity of the conduct’. (article 7(1)(e) – Element 3).
- 173 Cryer et al, *An introduction to international criminal law*, 206.
- 174 *Ibid*, 216.
- 175 Article 7(2)(i) Rome Statute. The ICC Elements of Crimes contain a much more elaborate definition of this underlying act. This definition is based on the UN Declaration on the Protection of All Persons from Enforced Disappearance 1992. See further the International Convention on the Protection of All Persons from Enforced Disappearances 2006 which contains a similar definition (adopted on 20 December 2006, entered into force on 23 December 2010).
- 176 *Ibid*, 217.
- 177 Note, however, that the act still would have to be pursuant to a state or organisational policy as required under this article.
- 178 *Prosecutor v. Kupreskic et al*, (Trial Judgment), IT-95-16-T (14 January 2000), para. 636.
- 179 Cryer et al, *An introduction to international criminal law*, 213.
- 180 *Ibid*, 213.
- 181 ICC Elements of Crimes, article 7 (1) (k) – Element 1.
- 182 See B Van Schaak & R Slye, A Concise History of International Criminal Law: Chapter 1 of *Understanding International Criminal Law*, Santa Clara University Legal Studies Research Paper No. 07-42, 2007, 13.
- 183 As noted above, the domestic prosecution of ‘war crimes’ dates back much further in time.
- 184 N Af-Jochnik and R Normand, The Legitimization of Violence: A Critical History of the Laws of War, *Harvard International Law Journal* 35 (1994), 1-60.
- 185 See Van Schaak & Slye, A Concise History of International Criminal Law, 13.
- 186 The exceptions to this being the Lieber Code 1863 which regulated the American Civil War (see *infra*); and the Paris Declaration Respecting Maritime Law 1856, *Ibid*, 14.
- 187 *Ibid*, 15.
- 188 For some, notwithstanding the promise of the ‘golden age’ of legal positivism, these treaties reveal a remarkable consistency pattern of military necessity trumping putative humanitarian values. The scant limitations placed on the means of warfare generally related to obsolete practices, or ones disfavoured by the great powers. Af-Jochnik & Notmand, The Legitimization of Violence, 65.
- 189 See Van Schaak & Slye, A Concise History of International Criminal Law, 14.
- 190 *Ibid*, 15.
- 191 The four Geneva Conventions are: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Convention (II) for the Amelioration of the

- Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Convention (III) relative to the Treatment of Prisoners of War; and Convention (IV) relative to the Protection of Civilian Persons in Time of War. Adopted on 12 August 1949, entered in force on 21 October 1950.
- 192 See Van Schaak & Slye, A Concise History of International Criminal Law, 17.
- 193 W Schabas, Punishment of Non-State Actors in Non-International Armed Conflict, *Fordham International Law Journal* 26 (2003), 907, 917.
- 194 J Stewart, Towards a single definition of armed conflict in international humanitarian law, *International Review of the Red Cross* 850 (2003), 313-350, 320.
- 195 An option expressly rejected by the drafters. Schabas, *Introduction to the International Criminal Court* (2001), 141.
- 196 See articles 146-147, Geneva Convention IV.
- 197 See Werle, *Principles of international criminal law*, 282.
- 198 *Ibid.*, 283.
- 199 *Prosecutor v. Dusko Tadic* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), IT-94-1 (2 October 1995), para 127.
- 200 *Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, paras 128-129. For an overview of these developments see Cryer et al, *An introduction to international criminal law*, 229-232.
- 201 W Schabas, Punishment of Non-State Actors in Non-International Armed Conflict, *Fordham International Law Journal* 26(4) (2002), 907-933, 918. For an overview of these developments see Cryer et al, *An introduction to international criminal law*, 229-232.
- 202 T Hoffman, The Gentler Humanizer of Humanitarian Law: Antonio Cassese and the Creation of the Customary Law of Non-International Armed Conflicts, in C Stahn and L van den Kerik (eds), *Future Perspectives on International Criminal Justice*, Cambridge: Cambridge University Press, 2009, 58-80. The most immediate rebuke came in the form of the Dissenting Judgment of Judge Li, who stated that: '[t]he Decision on this question is in fact an unwarranted assumption of legislative power which has never been given to this Tribunal by any authority' – *Prosecutor v Tadic*, Separate Opinion of Judge Li on the Defence Motion for an Interlocutory Appeal on Jurisdiction, IT-94-1-AR72, para 13.
- 203 T Hoffman, The Gentler Humanizer of Humanitarian Law, 58-80.
- 204 *Tadic* Appeal, para 70.
- 205 See Common Article 2 Geneva Conventions 1949.
- 206 *Ibid.*
- 207 Article 1(4) Addition Protocol I.
- 208 Article 8(2)(f) Rome Statute.
- 209 Article 8(2)(d) Rome Statute.
- 210 Werle, *Principles of international criminal law*, 288.
- 211 *Ibid.*, 289.
- 212 *Ibid.*
- 213 *Ibid.*
- 214 *Ibid.*
- 215 ICC, Elements of Crimes, article 8(2)(a)(i), sub-Element 2.
- 216 Werle, *Principles of international criminal law*, 302.
- 217 Article 8(2)(c) Rome Statute.
- 218 Werle, *Principles of international criminal law*, 302.
- 219 *Ibid.*
- 220 Werle, *Principles of international criminal law*, 334.
- 221 Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction.
- 222 *Tadic* Appeal, para 45.
- 223 See further P Kirsch and J Holmes, The Rome Conference on an International Criminal Court: The Negotiating Process, *American Journal of International Law* 93 (1999), 2-12, 11.

