INTERNATIONAL CRIMINAL LAW

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1.1. INTRODUCTION:

1.1.1. What is International Criminal Law?

International Criminal Law (ICL) is a body of international rules designed both to proscribe certain categories of conduct (war crimes, crimes against humanity, genocide, torture, aggression and terrorism) and to make those persons who engage in such conduct criminally liable.[1]

ICL provides both enforcement and regulation at a State and international level. At a State level, ICL authorises or imposes an obligation upon States to prosecute and punish such criminal conduct.[2] At an international level, ICL regulates international proceedings before international courts and tribunals that prosecute persons accused of such crimes.[3]

1.1.2. Principles and Features of International Criminal Law

As a branch of public international law, the rules that make up ICL originate from the sources of international law discussed below including treaties, customary international law and general principles of law. Hence they are subject, among other things, to the principles of interpretation proper to that law.

The applicable rules in international criminal proceedings were first laid down in the Statutes of the International Military Tribunal at Nuremberg (IMT) and the International Military Tribunal for the Far East (IMTFE), then in those of the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and more recently in the Rome Statute of the International Criminal Court (ICC). It is important to note that they only pertain to the specific criminal court for which they have been adopted, that is they have no general scope.

General principles of international criminal law include principles specific to criminal law, such as the principles of legality (*nullum crimen sine lege*), of specificity, the

[1] A. Cassese, *International Criminal Law*, 2nd Edition (Oxford: Oxford University Press, 2008), at p. 3.
[2] N. Boister, 'Transnational Criminal Law?' 14(5) *European Journal of International Law* 953-976 (2003) at 967-977.
[3] B. Broomhall, *International Justice and the International Criminal Court: Between State Sovereignty and the Rule of Law* (Oxford: Oxford University Press, 2003) at pp. 44-51.

presumption of innocence, equality of arms, *ne bis in idem* and individual criminal responsibility. Although these principles are now firmly entrenched in the international system, their application and execution at the international level has occurred as a result of the gradual interchange over time from national legal systems on to the international legal platform.

Legality of Crimes (*nullum crimen sine lege*) – postulates that a person may only be held criminally liable and punished if at the moment when he/she performed a certain act, the act was regarded as a criminal offence by the relevant legal order, or under the applicable law.[4]

Specificity – refers to the need for both the objective element (*actus reus*) and the subjective element (*mens rea*) of a crime to be as specific and detailed as possible so as to indicate that the relevant conduct is prohibited.

Presumption of innocence – is the fundamental principle that any accused person is presumed innocent until proven guilty.[5]

Equality of arms – refers to the right of both parties in a criminal prosecution to be afforded a reasonable opportunity to fairly present their case in circumstances where no undue advantage is given to either side. With respect to the defence, this includes, among others, the right to know full particulars specifying the charges preferred against an accused in an indictment, the right to examine the evidence gathered by the prosecution in support of the charges in the timeliest manner, the right to appoint one or more defence counsel, the right to call witnesses and to cross-examine any witnesses called by the prosecution.[6]

[4] This principle can be traced back to Article 39 of *Magna Carta Libertatum* (Magna Carta) of 1215. See also *Prosecutor v. Delalić et al.*, Trial Judgement, Case No. IT-96-21-T, 16 November 1998, para. 402.
[5] See Article 21(3), Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY); Article 20(3), Statute of the International Criminal Tribunal for Rwanda (ICTR); Article 17(3), Statute of the Special Court for Sierra Leone (SCSL); Article 35 new, Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia (ECCC); Article 16(3)(a), Statute of the Special Tribunal for Lebanon (STL); Article 66(1), Rome Statute of the International Criminal Court (ICC).
[6] See Article 16, Charter of the International Military Tribunal ('IMT'); Article 9, Charter of the International Military Tribunal for the Far East ('IMTFE'); Article 21(4), ICTY Statute; Article 20(4), ICTR Statute; Article 17(4), SCSL Statute; Article 35 new, ECCC Law; Article 16(4), STL Statute; Article 67(1), ICC Statute.

Ne bis in idem – no person may be tried more than once for the same criminal conduct (double jeopardy).[7]

Individual criminal responsibility – refers to the fundamental notion that criminal liability attaches only to individuals as a result of their conduct and not to any State or abstract entity. This is particularly important in the context of international criminal law, since in many instances crimes are committed either under the cloak of governmental authority or with their acquiescence or tacit support.[8]

1.1.3. The Content of International Criminal Law

ICL comprises of two limbs. The first limb is made up of *substantive* international criminal law. Professor Cassese refers to it as "the set of rules indicating what acts are prohibited, with the consequence that their authors are criminally accountable for their commission; they also set out the subjective elements required for such acts to be regarded as criminalised, the possible circumstances under which persons accused of such crimes may nevertheless not be held criminally liable, and also the conditions on which states may or must, under international rules, prosecute or bring to trial persons accused of one of those crimes."[9]

The second limb of ICL is made up of *procedural* international criminal law. This serves to regulate criminal proceedings before international criminal courts and tribunals, to govern the actions of prosecuting authorities and the various stages of international trials.[10] For the purposes of this book we will be focusing on the substantive law of ICL.

1.2. SOURCES OF INTERNATIONAL CRIMINAL LAW:

Given that international criminal law is a subset of public international law, the rules, which constitute this body of law, emanate from the authoritative list of sources of international law

[7] See Article 10, ICTY Statute; Article 9, ICTR Statute; Article 9, SCSL Statute; Article 5, STL Statute; Article 20, ICC Statute.
[8] See Article 6, IMT Charter; Article 5, IMTFE Charter; Article 7(1), ICTY Statute; Article 6(1), ICTR Statute; Article 6(1), SCSL Statute; Article 29, ECCC Law; Article 3(1), STL Statute; Article 25(2), ICC Statute. But see Article 9, IMT Charter; Article 25(4) ICC Statute.
[9] A. Cassese, *International Criminal Law*, 2nd Edition (Oxford: Oxford University Press, 2008), at p. 3..
[10] *Ibid*.

in Article 38(1) of the Statute of the International Court of Justice (ICJ)[11] and should be employed in the order contained therein. One should first look for treaty rules or rules enumerated by binding international instruments. Reference should next be made to customary law, followed by the general principles of international criminal law (which may be deduced from treaty/convention provisions, the rules of customary international law or from the practice of States). Finally, if one still cannot identify the applicable rule, reference is permitted to judicial decisions and the opinions of eminent scholars.

1.2.1. Treaties/Conventions

The Statute of the International Criminal Court (ICC) (1998) identifies both a list of crimes subject to the jurisdiction of that Court and outlines some general principles of international criminal law.[12] Other treaties assist in defining the scope of international criminal law by codifying international humanitarian law. These include the Regulations annexed to the Fourth Hague Convention of 1907, the four Geneva Conventions of 1949, the two Geneva Additional Protocols of 1977 and various treaties prohibiting the use of certain weapons. In addition, treaties have more recently been established which deal specifically with internationally criminal conduct, such as the Convention on the Prevention and Punishment of Genocide (1948) and the Convention Against Torture (1948). When seeking to interpret such treaties, resort must be had to the rules of interpretation as stated in Articles 31-33 of the Vienna Convention on the Law of Treaties (1969). Furthermore, it is important for practitioners to remember that although States are only bound by treaties and conventions that they have signed and ratified, in certain instances they merely serve to codify what is already customary international law and binds all States. Conversely, what might have originally been contained in treaties and conventions can ultimately become customary international law provided that a sufficient level of state practice and *opinio juris* exists.

1.2.2. Customary International Law

Given that international criminal law is a relatively young and rudimentary field, with its content slowly becoming codified in treaties and conventions, there has been a heavy reliance

[11] This list of sources is also reflected in Article 21, ICC Statute.
[12] There are also other international instruments which establish and regulate international criminal tribunals, including the resolutions passed respectively in 1993 (Resolution 827) and 1994 (Resolution 955) by the UN Security Council to adopt the ICTY and the ICTR Statutes.

upon customary rules to clarify that content.[13] However, such custom can only emanate from the practice of States and corresponding *opinio juris* (the belief that such practice is legally binding). Most customary rules of international criminal law have thus evolved primarily from domestic case law and State conduct relating to international crimes. Over time, the principles emanating from such judicial decisions and State conduct have permeated through to international law. Given that each State tends to apply its own domestic notions of criminal law even when deciding a matter of international law, it will often be difficult for practitioners to identify a uniform set of views with regard to the alleged existence of an international crime or the treatment thereof. Thus, proving the "crystallisation" of an offence under international law, other than an act clearly established as criminal under international law (such as a war crime), or that customary international law demands particular outcomes with respect to international crimes, will therefore often be a fraught process.

1.2.3. General Principles of Law

Notwithstanding reliance on treaties and conventions together with customary international law, there may still nonetheless be instances where neither of these two sources provides an adequate solution or answer, particularly in the area of international criminal procedure. In such cases, in order to avoid a *lacuna* or a *non liquet* situation, resort may be had to "general principles of law". When operating within this prism, one looks for evidence that the major legal systems of the world (common law, civil law and perhaps Islamic law) recognise and apply the legal principle at issue or approach the legal matter in question in a particular manner. Complete uniformity is not required, rather the crux of the principle or legal issue should be identifiable across the legal systems of the world; it is substance and not form that is determinative. In addition, such general principles of domestic States should also be capable of being transposed into international criminal law by taking into account the distinct features and particular considerations that exist when dealing with crimes under international law. In other words, general principles applied in domestic cases should be compatible with the needs and objectives of international criminal cases.

1.2.4. Eminent Jurists and Judicial Decisions

Given that there is no strict doctrine of precedent under international law, judicial decisions (even of the same court) do not, *per se*, constitute a binding source of international criminal

[13] A. Cassese, *International Criminal Law*, 2nd Edition (Oxford: Oxford University Press, 2008), at pp. 4-5.

law. As identified in Article 38(1)(d) of the Statute of the ICJ, judicial decisions may only amount to a "subsidiary means for the determination of [international] rules of law." An international court or tribunal may therefore depart from a previous decision if it has forceful reasons for doing so. However, as was identified earlier, given the developing nature of this body of international law and the consequent difficulty in ascertaining its scope and content, judicial decisions undoubtedly prove invaluable in identifying not only whether a customary rule has evolved, but also as a means of determining the most appropriate interpretation to be placed on a treaty rule. Indeed, all international courts and tribunals consistently refer to previous international case law when supporting their conclusions.[14] It would therefore seem that although a preceding decision of an international court may not be strictly binding, it is nevertheless persuasive authority for a later court.

In addition, the writings of the most highly qualified legal scholars and jurists may also be employed in the process of identifying the relevant law. However, this should not be interpreted as referring to *all* jurists or scholars, but those who are the most prominent in their academic fields. In international criminal law, this would refer to scholars such as Professors Antonio Cassese, M. Cherif Bassiouni, Yoram Dinstein and William A. Schabas. Such sources will, however, obviously carry less influence than the other sources referred to earlier.

1.3. PROSECUTIONS IN NATIONAL COURTS:

1.3.1. Jurisdiction

It is widely accepted that there are five general principles upon which criminal jurisdiction can be claimed. These are:

1. the territorial principle – determining jurisdiction by reference to the territory on which the offence is committed or by reference to the territory on which a crime takes effect where the offence is perpetrated beyond the territory's borders (objective territorial principle);
2. the active personality/nationality principle – determining jurisdiction by reference to the nationality or national character of the person committing the offence;

[14] Further, Article 21(2) ICC Statute specifically allows the International Criminal Court to 'apply the principles and rules as interpreted in its previous decisions'.

3. the passive personality principle – determining jurisdiction by reference to the nationality or national character of the person injured by the offence.
4. the protective principle – determining jurisdiction by reference to the national interest injured by the offence; and
5. the universality principle – determining jurisdiction by reference to the character of the offence committed as being a crime against all nations, punishable by any State.

The first and second principles are universally accepted, although interpretation varies depending on the State. The *Lotus Case*,[15] considered both of these principles. In that case, a Turkish (the *Boz-Kourt*) and French ship (the *Lotus*) collided on the high seas, which resulted in the death of a number of Turkish sailors and passengers on the *Boz-Kourt*. On arrival at Constantinople (modern-day Istanbul), criminal proceedings were commenced under Turkish law against the *Lotus'* officer of the watch at the time of the collision (a French national). France disputed Turkey's right to commence proceedings claiming that it had no jurisdiction. The Permanent Court of International Justice (the precursor to the ICJ), applying the objective territorial principle, held that Turkey did have a right to bring proceedings under its laws as the Turkish vessel was considered, for the purposes of jurisdiction, Turkish territory.

The protective and universality principle are generally accepted by all States, however there are misgivings, as State sovereignty issues often arise. The protective principle relates to the notion that States may punish acts which threaten or injure their national interest or security, even when committed outside the state by non-nationals. In this context, issues arise where certain conduct is a crime in one State but not in another. The universality principle (also known as "universal jurisdiction") refers to the prosecution of crimes which are *jus cogens.* Because of their character, such crimes are crimes against the whole of humanity and can be tried by any State, irrespective of where the crime was committed and against whom. Notwithstanding, for the prosecution of crimes under this jurisdiction many nations require some form of connection with the State. The key cases which consider both these principles are the *Eichmann Case*[16] and the *Arrest Warrant Case*.[17] The universality principle is also

[15] *S.S. Lotus (France v. Turkey)*, Judgment, Permanent Court of International Justice, 7 September 1927, PCIJ Reports (1927), Series A, No. 10, p. 2.
[16] *Attorney-General of the Government of Israel v. Eichmann*, District Court of Jerusalem, 12 December 1961, 36 International Law Reports 5; *Attorney-General of the Government of Israel v. Eichmann*, Supreme Court of Israel, 29 May 1962, 36 International Law Reports 277.
[17] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, International Court of Justice, 14 February 2002, ICJ Reports (2002), p.3.

considered in the *Rwandan Genocide Case*,[18] the *Pinochet Case*[19] and the *Guatemalan Genocide Case.*[20]

The passive personality principle is not widely accepted, however some States such as the United States, Spain and France have invoked the principle in some circumstances, particularly where it involves the disappearance, killing and/or torture of its citizens: *US v Yunis (No. 2)*[21] (involving the killing of two U.S. citizens in the hijacking of a plane); *Re Pinochet*[22] (involving the disappearance and murder of, *inter alia*, Spanish citizens by the Pinochet regime in Chile); *Re Astiz*[23] (involving the disappearance and torture of two French nuns by the military regime in Argentina).

1.3.2. National Prosecution of International Crimes

Australia has traditionally relied upon the territorial principle when invoking jurisdiction for international crimes, although the other principles, notably universal jurisdiction, are also evident within the Australian system. This is reflected in a number of Acts which enable the prosecution of international crimes. The table below provides an overview of the relevant Acts and the jurisdictional limits.

Act (Cth)	Purpose of Act	Jurisdiction	Scope
War Crimes Act 1945	Prosecution of war crimes committed during World War II.	Section 11	Only Australian citizens or residents can be prosecuted.
Geneva Conventions Act 1957	Implemented the 1949 Geneva Conventions	Section 7	Allowed for prosecution of all persons regardless of nationality. However, these provisions were repealed by the *International*

[18] *Prosecutor v. Ntezimana et al.*, Assize Court of the Administrative District of Brussels, 8 June 2001.
[19] *R v. Bow Street Magistrates; Ex Parte Pinochet Ugarte (No. 3)*, House of Lords, 24 March 1999, [2000] 1 AC 147.
[20] Sentencia del Tribunal Supremo sobre el caso Guatemala por genocidio, Appeal No. 327/2003, 25 February 2003, available at http://www.derechos.org/nizkor/guatemala/doc/gtmsent.html (accessed 30 September 2011).
[21] (1988) 82 International Law Reports 344.
[22] Auto de la Sala de lo Penal de la Audiencia Nacional confirmando la jurisdicción de España para conocer de los crímenes de genocidio y terrorismo cometidos durante la dictadura chilena, Appeal No. 173/98, Criminal Investigation No. 1/98, 5 November 1998, available at http://www.derechos.org/nizkor/chile/juicio/audi.html (accessed 30 September 2011).
[23] Judgment of the *Court D'Assises de Paris*, Case No. 1893/89, 16 March 1990.

			Criminal Court Act 2002.
International Criminal Court Act 2002	Creates the offences of genocide, crimes against humanity, war crimes and crimes against the administration of justice of the International Criminal Court.	Section 3	Provides that jurisdiction will be covered by the *Criminal Code Act 1995*.
Criminal Code	Provides for prosecution of core ICC crimes, including genocide, crimes against humanity, and war crimes.	Sections 268.117, 15.4 and 16.1	Allows for the prosecution of conduct constituting an international crime committed outside of Australia and which does not directly affect Australia, subject to the Commonwealth Attorney General's consent.
Crimes (Torture) Act 1988	Implements the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1988)	Section 7	Allows for prosecution of an Australian citizen or a person present in Australia.
Crimes Act 1914	Enables the prosecution of child sex crimes committed outside of Australia.	Section 50AD and Division 2	Allows for the prosecution of Australian citizens, residents, Australian companies or a company whose activities are principally in Australia.
International War Crimes Tribunals Act	Provides for co-operation in the	Section 7 and section 16	Allows the arrest and extradition of a person in Australia.

1995	investigation and prosecution of persons accused of committing Tribunal offences (Former Yugoslavia Tribunal and Rwanda Tribunal).		

Although Australia has a fairly wide range of legislative instruments to prosecute international crimes, they are not in wide use. Since the immediate post-World War II period, the High Court decision of *Polyukhovich v Commonwealth*[24] is the only case that involved the prosecution of war crimes in Australia in modern times.[25] Polyukhovich was ultimately acquitted of crimes arising out of World War II and the *War Crimes Act 1945* (as amended), but the court did consider the concept of universal jurisdiction for war crimes in an Australian context. Justices Toohey and Brennan in their respective opinions dismissed the assertion that Australia is obliged under customary international law to try and punish foreign perpetrators of war crimes and crimes against humanity. Justice Brennan did however find that Australia had a right "to exercise [its] jurisdiction to try and to punish offenders against the law of nations whose crimes are such that their subjection to universal jurisdiction is conducive to international peace and order."[26]

However, any domestic prosecution in Australia of international crimes is conditional on their domestic criminalisation, otherwise such conduct is not a crime under Australian law. Thus, in *Nulyarimma v Thompson* the Full Court of the Federal Court of Australia determined that genocide was not a crime under Australian law (at that time) in the absence of legislation criminalising it, even in spite of its *jus cogens* status.[27] However, with the ratification of the Rome Statute of the International Criminal Court and the inclusion of

[24] (1991) 172 CLR 501.
[25] Between 1946-1951 Australia tried 807 Japanese defendants for war crimes, leading to 579 convictions. See G. Boas, 'War Crimes Prosecutions in Australia and Other Common Law Countries: Some Observations', 21(2) *Criminal Law Forum* 313-330 (2010).
[26] *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 563 (per Brennan J).
[27] *Nulyarimma v. Thompson* [1999] FCA 1192, paras 32, 57; but see separate opinion of Justice Merkel, para. 186. This is also the position in the United Kingdom: *R v. Jones*, House of Lords, 29 March 2006, [2006] UKHL 16. In that case, the House of Lords (as it then was) held that although aggression is a crime under customary international law, in the absence of its domestic criminalisation, acts seeking to prevent its occurrence were not lawfully justified on the basis that they were committed in order to prevent a crime – the invasion of Iraq – from taking place.

international crimes within the *Criminal Code* (Cth), Australia not only has the legislative instruments available for the domestic prosecution of international crimes but Australian courts now also have jurisdiction over such crimes. In particular, Australian law permits the prosecution of international crimes whose commission and effects take place wholly outside of Australia even by non-citizens, provided that the Commonwealth Attorney-General consents to such prosecutions ("conditional" universal jurisdiction).[28] Lastly, practitioners should keep in mind that international law permits the retroactive prosecution of international crimes, so long as the conduct was criminal under international law at the time of the commission of the offence.[29]

1.3.3. Inter-State Cooperation with respect to National Proceedings

Strictly speaking, Australia is not obliged to cooperate with respect to proceedings outside its borders unless it has entered into an agreement or treaty with the relevant State. However, due to their nature, international crimes lend themselves to such inter-State assistance. Thus, most international criminal law-related treaties include mutual assistance and/or extradition provisions and in some cases oblige States to either prosecute persons on their territory for international crimes or extradite them to a country that will (*aut dedere aut judicare*).[30] Thus, it may be that, at a minimum, inter-State cooperation with respect to international crimes is in the process of crystallising into a rule of customary international law.

In Australia the principle is codified into national law through the *Extradition Act 1988* (Cth) which enables the extradition of persons from Australia as well as persons to Australia. Part II of the act provides for the extradition of persons from Australia. Such

[28] See Sections 268.117, 15.4, 16.1, *Criminal Code* (Cth).

[29] Article 15(2), International Covenant on Civil and Political Rights (1966). See *Polyukhovich v. Commonwealth* (1991) 172 CLR 501, 572-576 (finding that the retroactive application of the *War Crimes Act 1945* (Cth) was consistent with international law); *Kolk and Kislyiy v. Estonia (Admissibility)*, European Court of Human Rights, 17 January 2006, *Reports of Judgments and Decisions* 2006-I (interpreting Article 7(2) of the European Convention on Human Rights which provides for the same exception as Article 15(2) of the ICCPR); *R v. Finta*, Supreme Court of Canada, 24 March 1994, [1994] 1 SCR 701, para. 343 (interpreting section 11(g) of the Canadian Constitution which provides for the same exception as Article 15(2) of the ICCPR).

[30] Examples of both include: Article VII, Convention on the Prevention and Punishment of Genocide (1948), 78 UN Treaty Series 277; Article 88, Additional Protocol I to the Geneva Conventions of 12 August 1949 (1977), 1125 UN Treaty Series 3; Article 7, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), 1465 UN Treaty Series 112; Article 7, Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (1971), 974 UN Treaty Series 177; Article 49, First Geneva Convention (1949), 75 UN Treaty Series 31; Article 50, Second Geneva Convention (1949), 75 UN Treaty Series 85; Article 129, Third Geneva Convention (1949), 75 UN Treaty Series 135; Article 146, Fourth Geneva Convention (1949), 75 UN Treaty Series 287; Article 11(1), International Convention for the Protection of All Persons from Enforced Disappearance (2006); Article 10(1), International Convention for the Suppression of the Financing of Terrorism (1999), 2178 UN Treaty Series 197; Article 8(1), International Convention for the Suppression of Terrorist Bombings (1997), 2149 UN Treaty Series 256.

extradition is only available for certain offences and it cannot be subject to an extradition objection, such as subject to race, religious, nationality or political persecution.[31] Part IV relates to the extradition of persons to Australia. Requests for persons to Australia must relate to offences against the law of Australia of which the person is accused or of which the person has been convicted.[32]

Australia is fairly active within the extradition sphere. A recent example is the High Court case of *Republic of Croatia v Snedden*,[33] where the court considered an extradition request from Croatia in relation to an Australian citizen who had been accused of war crimes against prisoners of war and civilians in Croatia between 1991 and 1993. Snedden, who was at the time of the alleged offences a Serbian paramilitary commander, objected to his extradition under section 7(c) of the *Extradition Act 1988* (Cth), claiming that his political opinions at the time meant that his punishment would be harsher than what it would be if he had not held such political opinions. The court rejected this as being insufficient to satisfy an objection under section 7(c), as it did not show a sufficient connection with the crime.

1.4. INTERNATIONAL PROSECUTIONS:

1.4.1. History of International Criminal Prosecutions: The Nuremburg and Tokyo Tribunals

1.4.1.1 International Military Tribunal (Nuremberg Tribunal)

Amidst the final stages of World War II and Nazi Germany, and after it had become clear that atrocities on a massive and systematic scale had taken place, the International Military Tribunal (IMT) at Nuremberg was established via the London Agreement (1945) negotiated and concluded by the United Kingdom, France, the United States of America and the (then) Union of Soviet Socialist Republics (USSR). Annexed to the Agreement was the Charter of the IMT that declared its mandate: "the just and prompt trial and punishment of the major war criminals of the European Axis."[34] Pursuant to this mandate the IMT was given jurisdiction over three crimes: crimes against peace (aggression), war crimes and crimes against

[31] Section 6, *Extradition Act 1988* (Cth).
[32] Section 40, *Extradition Act 1988* (Cth).
[33] (2010) 241 CLR 461.
[34] Article 1, IMT Charter.

humanity.[35] Subsequently, 24 persons[36] were indicted representing different facets of the German Nazi regime – military, media, industry, politics, economics and ideology – on four counts of conspiracy or common plan to commit crimes against peace, crimes against peace, war crimes and crimes against humanity. The proceedings lasted from 20 November 1945 until 1 October 1956 in Nuremberg, Germany and gave birth to what we now identify as international criminal law.

The IMT was a ground-breaking and novel attempt to hold senior public officials and military officers accountable their actions before an international court. It marked the first time in history that such a joint endeavour has been undertaken and by nations that did not necessarily share legal systems or traditions. The IMT's bench was composed of judges of the common law tradition (United Kingdom and the United States of America), civil law (France) and socialist law (the USSR). The court sat without a jury, with the judges being the arbiters of law and the finders of fact. The Prosecution was composed of these same nations, which the four charges levelled against the accused divided amongst them – the United States prosecuted the conspiracy or common plan count, France and the USSR jointly prosecuted the crimes against humanity count and the United Kingdom prosecuted the count of crimes against peace. The Defendants were represented by German counsel. In the end, the trial resulted in 19 convictions with penalties ranging from 10 years imprisonment to death by hanging as well as 3 acquittals.[37] The IMT did not provide for a right to appeal but did allow a review of sentence.[38]

In addition and subsequent to the IMT, another 12 war crimes trials[39] in post-World War II Germany were undertaken pursuant to Control Council Law No. 10 with the United States taking the lead, however these were separate and independent from the IMT.

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[35] Article 6, IMT Charter.

[36] The indictees were as follows: Hermann Göring, Rudolf Hess, Joachim von Ribbentrop, Robert Ley (committed suicide before the beginning of the trial), Wilhelm Keitel, Ernst Kaltenbrunner, Alfred Rosenberg, Hans Frank, Wilhelm Frick, Julius Streicher, Walter Funk, Hjalmar Schacht, Gustav Krupp von Bohlen und Halbach (subsequently declared medically unfit for trial), Karl Dönitz, Erich Raeder, Baldur von Schirach, Fritz Sauckel, Alfred Jodl, Martin Bormann (tried *in absentia*), Franz von Papen, Arthur Seyss-Inquart, Albert Speer, Constantin von Neurath and Hans Fritzsche.

[37] Acquittals were entered for Hjalmar Schacht, Franz von Papen and Hans Fritzsche.

[38] Article 29, IMT Charter.

[39] The were: the Medical Case (*United States v. Brandt et al.*), the Milch Case (*United States v. Milch*), the Justice Case (*United States v. Altstötter et al.*), the Einsatzgruppen Case (*United States v. Ohlendorf et al.*), the RuShA Case (*United States v. Greifelt et al.*), the Pohl Case (*United States v. Pohl et al.*), the Flick Case (*United States v. Flick et al.*), the I.G. Farben Case (*United States v. Krauch et al.*), the Krupp Case (*United States v. Krupp et al.*), the High Command Case (*United States v. von Leeb et al.*), the Hostage Case (*United States v. List et al.*) and the Ministries Case (*United States v. von Weizsäcker et al.*).

1.4.1.2. International Military Tribunal for the Far East (Tokyo Tribunal)

Just after the IMT was established, a similar process was envisaged and implemented for those who committed crimes under the banner of Imperial Japan in Asia. However, unlike the IMT, the International Military Tribunal for the Far East (IMTFE) was created by a proclamation of General Douglas MacArthur in his capacity as the Supreme Commander of the Allied Powers on 19 January 1946. Under the Charter of the IMTFE its establishment was "for the just and prompt trial and punishment of the major war criminals in the Far East"[40] and was given jurisdiction over crimes against peace (aggression), war crimes and crimes against humanity.[41] The composition of the IMTFE was more diverse than that of the IMT, with a bench of 11 judges from a broader number of Allied nations including the United States of America, Australia, Canada, China, France, India, the Netherlands, New Zealand, the Philippines, the United Kingdom and the USSR. The Prosecution team was composed of the same nations, but in contrast to the IMT, the Defence was composed of three-quarters Japanese and one-quarter Americans.

Pursuant to its mandate, the IMTFE indicted 28 persons[42] representative of the highest echelons of the Japanese civilian authority and military (classified as "Class A" war criminals) with 55 counts of war crimes, crimes against humanity and crimes against peace (aggression). The proceedings lasted from 29 April 1946 until 12 November 1948 in Tokyo, Japan and resulted in 25 convictions and no acquittals with sentences that ranged from 7 years imprisonment to death by hanging. Like the IMT, there was no provision for an appeals process but rather a review of sentence.[43]

Following the trial of the Class A war criminals, a number of other trials took place for those deemed to bear lower responsibility for atrocities committed by Imperial Japan during World War II; these persons were classified as "Class B" or "Class C" war criminals.

1.4.2. The *ad hoc* International Criminal Tribunals

[40] Article 1, IMTFE Charter.
[41] Article 5, IMTFE Charter.
[42] The indictees were as follows: Sadao Araki, Kenji Doihara, Kingorō Hashimoto, Shunroko Hata, Kiichirō Hiranuma, Kōki Hirota, Naoki Hoshino, Seishirō Itagaki, Okinori Kaya, Kōichi Kido, Heitarō Kimura, Kuniaki Koiso, Iwane Matsui, Yōsuke Matsuoka (died during the trial), Jirō Minami, Akira Muto, Osami Nagano (died during the trial), Takasumi Oka, Shūmei Ōkawa (subsequently declared medically unfit for trial), Hiroshi Ōshima, Kenryō Satō, Mamoru Shigemitsu, Shigetarō Shimada, Toshio Shiratori, Teiichi Suzuki, Shigenori Tōgō, Hideki Tōjō and Yoshijirō Umezu.
[43] Article 17, IMTFE Charter.

1.4.2.1. International Criminal Tribunal for the former Yugoslavia (ICTY)

From the time of the IMT and the IMTFE until the creation of the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993, international criminal law lay relatively dormant; it remained a topic of academic interest but lacked substantive international enforcement. However, this began to change with the armed conflict that resulted in the breakup of the former Yugoslavia in the early 1990s and the consistent reports and images that emerged of serious crimes being committed against civilian populations and protected persons. As a result, the UN Security Council, acting pursuant to Chapter VII of the UN Charter, passed Resolution 827 (1993) on 25 May 1993 thereby bringing the ICTY into existence. Contrary to original expectations, the ICTY now sits at the very forefront of international criminal jurisprudence. Its cases have served to breathe new life and interest into an area of international law that had otherwise existed mostly in the abstract.

According to its Statute, the ICTY has the power "to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991"[44] and sits in The Hague, The Netherlands. With regard to substantive crimes, it has jurisdiction to prosecute war crimes,[45] crimes against humanity[46] and genocide.[47] In terms of organisational structure, it is composed of three independent but interrelated organs: the Registry, Office of the Prosecutor and Chambers, the latter being composed of three Trial Chambers and one Appeals Chamber. The international nature of the ICTY means that it also represents a mix of civil law and common law with staff and judges hailing from both traditions. Thus, trials are conducted in an adversarial setting with judges applying the law, making factual findings and being able to actively participate in the proceedings (for example, by directly questioning and calling witnesses).

Pursuant to its mandate, the ICTY has indicted a total of 161 persons, all of which have either been brought to trial at the ICTY, transferred to a jurisdiction in the former Yugoslavia to stand trial or have had proceedings terminated due to ill-health or death. Having almost completed its mandate, the ICTY is currently undergoing the process of closing down. Its latest Completion Strategy Report (18 May 2011)[48] envisages all of its

[44] Article 1, ICTY Statute.
[45] Articles 2-3, ICTY Statute.
[46] Article 5, ICTY Statute.
[47] Article 4, ICTY Statute.
[48] Letter dated 12 May 2011 from the President of the 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, addressed to the President of the Security Council, UN. Doc. S/2011/316, 18 May 2011.

remaining trials to conclude by 2014 and appeals proceedings by 2018. In addition, the UN Security Council recently passed Resolution 1966 (2010) which created the "International Residual Mechanism for Criminal Tribunals" that would take over the essential functions of the ICTY after its closure in order to complete its remaining and ongoing work.

1.4.2.2. International Criminal Tribunal for Rwanda (ICTR)

On 6 April 1994, a plane carrying the Rwandan President Juvénal Habyarimana was shot down over the capital Kigali, killing him and other senior members of his government. The fallout from this assassination led to mass slaughter in Rwanda with ethnic Hutu militias systematically and brutally killing the minority Tutsi and moderate Hutu in the area controlled by the government. Between April-July 1994 it is estimated that approximately 800,000 were killed. These horrific events prompted the UN Security Council, upon the request of a subsequent Rwandan government, to create the ICTY's "sister tribunal", the International Criminal Tribunal for Rwanda (ICTR). This took place on 8 November 1994 with Resolution 955 (1994) (to which the ICTR's Statute was annexed). Like in the case of the ICTY, Chapter VII powers were employed.

The ICTR is mandated "to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994".[49] It has jurisdiction over the crimes of genocide,[50] crimes against humanity[51] and war crimes[52] and sits in Arusha, Tanzania. Modelled predominantly on the ICTY, the ICTR shares its features and structures. It is composed of the Registry, Office of the Prosecutor and Chambers (made up of three Trial Chambers and an Appeals Chamber) and represents the same mix of civil and common law traditions within an adversarial setting with staff and judges from both legal systems. The ICTR and the ICTY also share the same Appeals Chamber, with the same judges simultaneously sitting on both benches.

Pursuant to its mandate, the ICTR has indicted a total of 92 persons of which, only nine remain at large.[53] Like the ICTY, the ICTR is also undergoing the process of closing

[49] Article 1, ICTR Statute.
[50] Article 2, ICTR Statute.
[51] Article 3, ICTR Statute.
[52] Article 4, ICTR Statute.
[53] ICTR fugitives include Augustin Bizimana, Félicien Kabuga, Fulgence Kayishema, Protais Mpiranya, Pheneas Munyarugarama, Aloys Ndimbati, Ladislas Ntaganzwa, Charles Ryandikayo and Charles Sikubwabo.

down. Its latest Completion Strategy Report (18 May 2011)[54] expects its trials to be finished by 2012 and the last of its appeals to conclude by 2014. UN Security Council Resolution 1966 (2010) also applies to the ICTR, with the "International Residual Mechanism for Criminal Tribunals" taking over both the ICTY's and the ICTR's essential functions and ongoing work after they close.

1.4.3. The "Hybrid" International Tribunals

1.4.3.1. Special Court for Sierra Leone (SCSL)

From 1991-2002 the country of Sierra Leone was engulfed in a civil war between government forces and rebel groups. In August 2000, the President of Sierra Leone requested the United Nations' assistance in creating a special court so as to prosecute those responsible for atrocities during the war. This request and subsequent negotiations led to the creation of the Special Court for Sierra Leone (SCSL) via an agreement between the United Nations and the government of Sierra Leone signed on 16 January 2002, annexed to which was the SCSL's Statute. Its establishment marked the first of the "new wave" of international criminal tribunals known as "hybrid" international tribunals because of their incorporation of elements of domestic law, inclusion of national judges within an international(ised) court setting, and their statutes being negotiated between the relevant State and the United Nations.

The SCSL is mandated "to prosecute persons 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".[55] It has jurisdiction over crimes against humanity,[56] war crimes[57] and crimes under Sierra Leonean law (specifically the abuse of girls and wanton destruction of property).[58] The SCSL has indicted 13 individuals of which only one remains on the run (Johnny Paul Koroma). Those indicted included members of the Civil Defence Forces of Sierra Leone (including the Minister of the Interior) – a notable exercise of prosecutorial independence – and the (then) President of Liberia, Charles Taylor. The SCSL

[54] Letter dated 12 May 2011 from the President of the International Criminal Tribunal for Rwanda addressed to the President of the Security Council, UN Doc. S/2011/317 (18 May 2011).
[55] Article 1, SCSL Statute.
[56] Article 2, SCSL Statute.
[57] Articles 3-4, SCSL Statute.
[58] Article 5, SCSL Statute.

is unique in that juveniles aged 15 years and older can be brought to trial,[59] however no juvenile has ever been indicted.

The SCSL is structured and operates much like the ICTY and the ICTR. It is composed of the Registry, Office of the Prosecutor and Chambers (two Trial Chambers and one Appeals Chamber). Its judges are a mix of international and Sierra Leoneans with a majority being international judges.[60] The SCSL is considered to be an international court operating independently of the Sierra Leonean judicial system, but sitting in Freetown, Sierra Leone. Notwithstanding, the SCSL's final trial (*Prosecutor v. Taylor*)[61] was moved to The Netherlands (first to The Hague and then to Leidschendam) because of domestic security concerns. As of September 2011, all of the trials and appeals have been concluded with the exception of the *Prosecutor v. Taylor* case, where a trial judgment is currently pending, after which an appeal is likely.

1.4.3.2. Extraordinary Chambers in the Courts of Cambodia (ECCC)

In 1997, the government of Cambodia requested the United Nations' assistance in setting up a court to try those most responsible for the crimes committed during the time of the Khmer Rouge regime (1975-1979) when an estimated 1.8 million Cambodians were killed through starvation, torture, execution and forced work in labour camps. This initial request led to years of protracted negotiations, during which the Cambodian National Assembly passed "The Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia" (2001) (ECCC Law) that would later become the governing document of the Extraordinary Chambers of the Courts of Cambodia (ECCC) (after it was amended in 2004). On 6 June 2003, the United Nations and Cambodia concluded an agreement that created the ECCC as an internationalised court operating independently within the Cambodian court structure and sitting in Phnom Penh.

The mandate of the ECCC is "to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979."[62] It has jurisdiction over genocide,[63] crimes against humanity,[64] war

[59] Article 7, SCSL Statute.
[60] Article 12, SCSL Statute.
[61] *Prosecutor v. Taylor*, Case No. SCSL-2003-01.
[62] Article 1, ECCC Law.

crimes,[65] crimes under the Cambodian Penal Code (1956) (specifically homicide, torture and religious persecution),[66] as well as crimes committed against internationally protected persons pursuant to the Vienna Convention on Diplomatic Relations (1961).[67] The ECCC has currently indicted five persons in two separate cases.[68] As of September 2011, the trial of Case 001 has been completed and is undergoing the appeals process whilst the trial in Case 002 has commenced. Two additional cases (Cases 003 and 004) are undergoing investigative phases.

In terms of structure and operation, the ECCC is somewhat different from other modern tribunals. It is composed of the Office of the Co-Prosecutors (one Cambodian, one international), Co-Investigative Judges (one Cambodian, one international), Office of Administration (Registry), and Chambers. The latter consists of a Pre-Trial Chamber, Trial Chamber and a Supreme Court Chamber with Cambodian and international judges sitting on each bench, with a majority of them being Cambodian judges.[69] However, the voting procedure is unique in that although the majority are Cambodian, in order to make decisions a "super-majority" (majority plus one) is required rather than a simple majority.[70] In addition, the prosecutorial and investigative model resembles that of civil law: Co-Prosecutors request the initiation of an investigation to the Co-Investigative Judges who then carry out the actual investigation and subsequently indict the accused or dismiss the case. The ECCC also allows the direct participation of victims as Civil Parties in proceedings.

1.4.3.3. Special Tribunal for Lebanon (STL)

On 14 February 2005, in the midst of a wave of political assassinations and terrorist bombings in Lebanon, former Lebanese Prime Minister Rafiq Hariri and 22 others were killed in an explosion in a Beirut suburb. The fallout from the assassination led the Lebanese government to ask for the United Nation's assistance in investigating the killing and then to create a tribunal to prosecute those responsible. Like the SCSL and ECCC models, an agreement was negotiated between the government of Lebanon and the United Nations,

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[63] Article 4, ECCC Law.
[64] Article 5, ECCC Law.
[65] Articles 6-7, ECCC Law.
[66] Article 3 new, ECCC Law.
[67] Article 8, ECCC Law.
[68] The first (Case 001) involves Kaing Guek Eav and the second (Case 002) involves Nuon Chea, Khieu Samphan, Ieng Thirith and Ieng Sary.
[69] Article 9 new, ECCC Law.
[70] Article 14 new, ECCC Law.

however the Lebanese parliament did not convene so as to ratify it. As a means to overcome the deadlock, the UN Security Council, acting under Chapter VII, passed Resolution 1757 (2007), annexed to which was both the agreement between the United Nations and Lebanon and the Statute of the Special Tribunal for Lebanon (STL). The Resolution stipulated that if the agreement was not ratified by Lebanon by 10 June 2007 then it would enter into force at that time. The agreement was not ratified and thus the STL was born.

The STL's jurisdiction is "over persons responsible for the attack of 14 February 2005 resulting in the death of […] Rafiq Hariri and in the death or injury of other persons."[71] It also has potential jurisdiction over "other attacks that occurred in Lebanon between 1 October 2004 and 12 December 2005, or any later date decided by the Parties and with the consent of the Security Council, [which] are connected in accordance with the principles of criminal justice and are of a nature and gravity similar to the attack of 14 February 2005".[72] In contrast to other international tribunals, the STL's jurisdiction over substantive crimes are limited to those contained within the Lebanese Criminal Code relating to terrorism, offences against life and personal integrity, illicit associations and failure to report offences;[73] it has no jurisdiction over international crimes. At present, the STL has yet to commence its first trial.[74]

In terms of structure, the STL is composed of the Registry, Office of the Prosecutor, Defence Office and Chambers. The latter consists of a Pre-Trial Chamber, a Trial Chamber and an Appeals Chamber with its judges being a mix of international and Lebanese judges with a majority of international judges.[75] The STL is the first international tribunal to have a separate Defence Office as an official organ of the court on par with the others. Like the ECCC and the ICC, the STL provides for the participation of victims in proceedings and allows them to bring compensation claims to competent national bodies upon a judgment of the STL.[76] Significantly, for the first time since the IMT in Nuremberg, the STL allows trials

[71] Article 1, STL Statute.
[72] Article 1, STL Statute. Pursuant to this provision, in August 2011 the Pre-Trial Judge ruled that three car bombings that had targeted prominent Lebanese politicians in 2004 and 2005 fell within the STL's jurisdiction and ordered the Lebanese authorities to defer their investigation and prosecution to the STL.
[73] Article 2(a), STL Statute.
[74] In June 2011 the Pre-Trial Chamber confirmed the Prosecutor's first indictment relating to the assassination of Rafiq Hariri, issued warrants of arrest and transmitted them to the Lebanese authorities for execution. In August 2011 the indictment was made public and revealed the identities of the accused: Salim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi and Assad Hassan Sabra. They all remain on the run.
[75] Article 8, STL Statute.
[76] Article 25, STL Statute.

to take place *in absentia*, provided that active steps are taken to locate and inform the accused.[77] The STL is situated in Leidschendam, The Netherlands.

1.4.4. The International Criminal Court

The creation of the permanent International Criminal Court (ICC) marked the culmination of a long progress that officially began in the 1940s and was revived 1989 when the International Law Commission (ILC) was asked by the UN General Assembly to consider the creation of such a court. This eventually led the ILC to be tasked with preparing a draft statute, after which numerous negotiations and preparatory meetings were held. This process culminated in the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court held in Rome, Italy during June-July 1998. At the conference, countries (as well as non-governmental and inter-governmental organisations) came together to review and vote on the final version of what became the Rome Statute of the International Criminal Court (1998) (Rome/ICC Statute). In the end, the Statute was overwhelmingly approved and came into force on 1 July 2002 following the 60th State ratification.

The ICC model is that of an independent treaty-based court (not part of the UN) that is composed of four organs: the Presidency, Judicial Divisions (Pre-Trial, Trial and Appeals), the Office of the Prosecutor and the Registry. In addition, the ICC has an oversight and "legislative" body known as the Assembly of State Parties, composing of States that have signed and ratified (or acceded to) the Rome Statute as well as other States who can attend as observers.[78] This body is responsible for *inter alia*, the election of the ICC's judges, Prosecutor and Deputy-Prosecutor as well as its budget and the review of, and amendments to, the Rome Statute.[79] The seat of the ICC in is The Hague, The Netherlands however "[t]he Court may sit elsewhere, whenever it considers it desirable".[80]

The ICC is mandated "to exercise its jurisdiction over persons for the most serious crimes of international concern, […] and shall be complementary to national criminal jurisdictions."[81] This principle of complementarity is at the very heart of the ICC; States are expected to take the lead with respect to investigating and prosecuting international crimes.

[77] Article 22, STL Statute.
[78] As of September 2011, there are 118 State Parties to the International Criminal Court.
[79] Articles 112, 121-123, ICC Statute.
[80] Article 3(3), ICC Statute.
[81] Article 1, ICC Statute.

Only if the relevant State is unwilling or unable to do so, can the ICC potentially step in. It is a court of last – not first – resort. Pursuant to this mandate, the ICC has jurisdiction over the crimes of genocide,[82] crimes against humanity,[83] war crimes[84] and, in due course, aggression.[85] However, it may only exercise jurisdiction after the entry into force of the Statute (1 July 2002) or after the date upon which the Rome Statute entered into force for the relevant State;[86] it cannot act retroactively.[87] Importantly, the ICC is not a court endowed with universal jurisdiction. Its ability to investigate and prosecute international crimes is limited to a number of defined circumstances: 1) if they are committed on the territory of a State party,[88] 2) if they are committed by a national of a State party, [89] 3) if a State party refers a situation to the ICC;[90] 4) if a situation is referred to the ICC by the UN Security Council acting under Chapter VII of the UN Charter[91] or 5) if a State that is not a party to the Rome Statute accepts the ICC's jurisdiction on an *ad hoc* basis.[92] Having no police force of its own, the ICC obliges State parties to cooperate with the Court in its investigative and prosecutorial endeavours, particularly in the arrest and surrender of suspects.[93]

Within this framework, the ICC has a number of interesting features. Of particular note is the Prosecutor's independent ability to commence investigations and prosecutions *proprio motu* (of his/her own accord) contingent upon prior authorisation being given by the Pre-Trial Chamber.[94] In addition, the Rome Statute calls for fair global and gender representation among the judges who sit on the ICC bench[95] and it allows the participation of victims through legal representatives[96] who are subsequently eligible for monetary reparations through the ICC Trust Fund.[97] The ICC also adds a layer of litigation between the issuance of an arrest warrant or a summons to appear and the trial proper; a Pre-Trial

[82] Article 6, ICC Statute.
[83] Article 7, ICC Statute.
[84] Article 8, ICC Statute
[85] Article 5(2), ICC Statute stipulates that the ICC has jurisdiction over the crime of aggression when a definition and the conditions for the exercise of jurisdiction have been agreed. At the recent ICC Review Conference (2010) consensus on aggression was reached (see discussion on the crime of aggression below).
[86] Article 11, ICC Statute.
[87] Article 124(1), ICC Statute.
[88] Article 12(2)(a), ICC Statute.
[89] Article 12(2)(b), ICC Statute.
[90] Article 14, ICC Statute. The relevant situation must be in the referring state or in another State party.
[91] Article 13(b), ICC Statute.
[92] Article 12(3), ICC Statute.
[93] Articles 86-102, ICC Statute.
[94] Articles 15, 53, ICC Statute.
[95] Article 36(8), ICC Statute.
[96] Article 68(3), ICC Statute.
[97] Article 79, ICC Statute.

Chamber is required to determine whether there are "substantial grounds to believe" that the accused is responsible for the crime of which he/she is alleged before a trial can begin (this is known as the "confirmation of charges").[98] Once a trial commences, it takes place in an adversarial setting with judges being arbiters of fact and law.

As of September 2011, the ICC is currently seized of six situations: the Democratic Republic of the Congo, the Darfur region of Sudan, Kenya, Uganda, Libya and the Central African Republic.[99] From these situations, the ICC has publicly charged 26 individuals: 11 have outstanding warrants of arrest,[100] 7 are undergoing the confirmation of charges process,[101] 6 are either standing trial or awaiting trial,[102] one has not had the charges against him confirmed (Bahar Idriss Abu Garda) and one has had the charges against him withdrawn due to death (Raska Lukwiya). The ICC is yet to hand down judgment in its first trial.

1.5. SUBSTANTIVE LAW OF INTERNATIONAL CRIMES

Crimes which are regulated or created by international law are usually of concern to the international community as they threaten international interests or fundamental values. The ICC Statute uses the term "the most serious crimes of concern to the international community as a whole" and recognizes that such crimes "threaten the peace, security and well-being of the world."[103] The following are considered international crimes: genocide, crimes against humanity, war crimes, aggression, terrorism and torture.

1.5.1. Genocide

Genocide is the intentional destruction of a national, ethnic, racial or religious group of people as such. Genocide acquired autonomous significance as a specific crime in 1948 when

[98] Article 61, ICC Statute.
[99] In addition, the ICC Pre-Trial Chamber is currently considering an application by the Office of the Prosecutor to open an investigation into the situation in Côte D'Ivoire.
[100] Bosco Ntaganda, Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen, Ahmad Muhammad Harun, Ali Muhammad Ali Abd-Al-Rahman, Omar Hassan Ahmad Al Bashir, Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi.
[101] Callixte Mbarushimana, William Samoei Ruto, Henry Kiprono Kosgey, Joshua Arap Sang, Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali.
[102] Thomas Lubanga Dyilo, Germain Katanga, Mathieu Ngudjolo Chui, Jean-Pierre Bemba Gombo, Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus.
[103] Preamble, ICC Statute.

the UN General Assembly adopted the Genocide Convention.[104] The Convention was instrumental as it:

(i) Sets out a careful definition of the crime;[105]

(ii) Punishes other acts connected with genocide (conspiracy, complicity, direct and public incitement and attempt);[106]

(iii) Prohibits genocide regardless of whether it is perpetrated in time of war or peace;[107]

(iv) Considers genocide both as a crime involving the criminal responsibility of the perpetrator (and other participants), and as an internationally wrongful act entailing the responsibility of the State which authorizes, engages, otherwise participates or fails to prevent the commission of genocide.[108]

The crime of genocide can be committed (*actus reus*) by killing, causing serious harm (bodily or mentally), inflicting conditions of life calculated to bring about the whole or partial destruction of the above groups, by imposing measures intended to prevent births, or by forcibly transferring children from the group, with the intention of completely or partially destroying the targeted group of people as such.[109] Therefore, genocide is not simply confined to mass killings, but can encompass non-fatal acts, such as rape, so long as they are accompanied with the requisite *mens rea*.[110] It is in this *mens rea* that we perhaps find genocide's most distinctive feature: the requirement of a specific intent (*dolus specialis*). It is this *dolus specialis* that sets genocide apart from other international crimes.

For genocide to have occurred, the perpetrator is required to have acted with the specific intent to "destroy, in whole or in part, a national, ethnical, racial or religious group, as such". This element has been subject to criticism, as groups can be specifically targeted for destruction and yet the perpetrators thereof cannot be prosecuted for genocide if the targeted

[104] However even prior to this UN General Assembly Resolution 96(I), 11 December 1946 had already affirmed that genocide was a crime under international law.

[105] Article II, Convention on the Prevention and Punishment of the Crime of Genocide (1948), 78 UN Treaty Series 277.

[106] Article III, Convention on the Prevention and Punishment of the Crime of Genocide (1948), 78 UN Treaty Series 277. It should be noted that genocide is unique in that it is the only international crime for which conspiracy to commit is punishable at international law.

[107] Article I, Convention on the Prevention and Punishment of the Crime of Genocide (1948), 78 UN Treaty Series 277.

[108] Article IX, Convention on the Prevention and Punishment of the Crime of Genocide (1948), 78 UN Treaty Series 277. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, International Court of Justice, 26 February 2007, ICJ Reports (2007), p. 43.

[109] Article II, Convention on the Prevention and Punishment of the Crime of Genocide (1948), 78 U.N. Treaty Series 277. This treaty definition also reflects customary international law.

[110] *Prosecutor v. Akayesu*, Trial Judgment, Case No. ICTR-96-4-T, 2 September 1998, paras 731-733.

groups do not fit within one or more of the above categories (for example the elimination of political or opposition groups by military regimes). Notwithstanding, the four protected groups are subject to interpretation. Thus the ICTR in *Akayesu* held that any stable and permanent group is a protected group for the purposes of the Genocide Convention.[111] On the other hand, some countries (particularly in South America) have opted for an expansive interpretation of "national" groups so as to include within it political and other groups.[112] However, this interpretation ignores the *travaux préparatoires* of the Genocide Convention whereby it is clear that political and other non-stable groups were specifically excluded from the definition of genocide.[113] The preferred approach in resolving some of these problems has been to adopt a subjective approach to the protected groups. Thus, even though the group targeted for destruction may not objectively belong to any of the four protected groups, it is sufficient if the victims and the perpetrators *subjectively* believed that they so belonged. Thus, in Darfur, Sudan, the different tribal groups targeted share the same nationality, ethnicity, religion and race as their attackers, yet because they viewed themselves as a distinct group (as did their attackers), they can fall within the Genocide Convention's protected groups.[114]

In addition, it should be emphasised that the intent with respect to a protected group cannot be defined negatively. The relevant group must be targeted for who they are, not for who they are not.[115] For example, the intent must be to destroy Bosnian Muslims because they are Bosnian Muslims, not because they are not Bosnian Serbs. Practitioners should also keep in mind that genocide at international law denotes the *physical* or *biological* destruction of a protected group. That a perpetrator intended the *social* destruction of the protected group

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[111] *Prosecutor v. Akayesu*, Trial Judgment, Case No. ICTR-96-4-T, 2 September 1998, para. 516. This interpretation has, however, proved controversial and has only been followed in two subsequent cases (*Prosecutor v. Rutaganda*, Trial Judgment and Sentence, Case No. ICTR-96-3-T, 6 December 1999, para. 57; *Prosecutor v. Musema*, Trial Judgment and Sentence, Case No. ICTR-96-13-T, 27 January 2000, para. 162).

[112] See the Argentinian cases of *Etchecolatz* (Case No. 2251/06, 19 September 2006); *Von Wernich* (Case No. 2506/07, 1 November 2007) and *Dupuy et al.* (Case No. 2901/ 09, 24 November 2010), decided by the Federal Oral Criminal Tribunal N° 1 of La Plata. The Criminal Chamber of the National Court of Cassation has since upheld both the *Etchecolatz* (Case No. 7896, 18 May 2007) and *Von Wernich* (Case No. 9517, 27 March 2009) cases and left the findings on genocide undisturbed. Leave to appeal both cases to the Supreme Court of Justice of Argentina was denied; see *Etchecolatz* (Case No. E. 191. XLIII., 17 February 2009 and *Von Wernich* (Case No. V. 411. XLV., 19 May 2010). Litigation in the *Dupuy et al.* case is ongoing.

[113] See UN Doc. E/AC.25/SR.4 (15 April 1948) per Azoul (Lebanon), Ruzinski (Poland); UN Doc. A/C.6/SR.69 (7 October 1948) per Amado (Brazil), Pérez Perozo (Venezuela), Wikborg (Norway).

[114] Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, 25 January 2005, paras 494-501, 508-512.

[115] *Prosecutor v. Stakić*, Appeal Judgment, Case No. IT-97-24-A, 22 March 2006, paras 20-28; *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, p. 43 at pp. 124-126, paras 193-196.

is not enough. Thus, "cultural genocide" – the destruction of a group as a social unit by ethnic cleansing, forcible removals and/or the destruction of structures of cultural significance – does not amount to genocide at international law[116] (although it may be considered as a war crime or a crime against humanity when committed together with the relevant contextual elements).

For its part, Australian law accurately reflects and criminalises the commonly accepted notion of genocide at international law by codifying the elements contained in the Genocide Convention (1949) in sections 268.1–268.7 of the *Criminal Code* (Cth). The prescribed penalty for genocide under the *Criminal Code* (Cth) is life imprisonment.

1.5.2. Crimes against Humanity

The essential characteristic that underlies crimes against humanity is the concept of humanity as the victim rather than just the individual person upon whom crimes have been committed.[117] Therefore, crimes against humanity as an international crime can be distinguished from a domestic crime on the basis that its breach is of concern to the whole of the international community and as a consequence invokes international jurisdiction.[118] They cover actions that share a set of common features:

(i) They are particularly odious offences;

(ii) They are not isolated or sporadic events but are part of a widespread or systemic practice of attacks and atrocities (which can be pursuant to a State or organisational policy) ("contextual element");[119]

(iii) They may be punished regardless of whether they are committed in times of war or peace;[120]

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[116] *Prosecutor v. Krstić*, Appeal Judgment, Case No. IT-98-33-A, 19 April 2004, para. 25; but see Partial Dissenting Opinion of Judge Shahabuddeen, paras 45-54 and the *Jorgić* conviction for cultural genocide in Germany: *Jorgić*, Bundesverfassungsgericht (Federal Constitutional Court), 2 BvR 1290/99, Absatz- Nr. (1-49), 12 December 2000 (this was subsequently held not to violate the *nullum crimen sine lege* principle: *Jorgić v. Germany*, European Court of Human Rights, Application No. 74613/01, 12 July 2007).

[117] *Prosecutor v. Erdemović*, Sentencing Judgement, Case No. IT-96-22-T, 29 November 1996, paras 27-28.

[118] M. C. Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application* (New York: Cambridge University Press, 2011), at p. 8.

[119] As will be discussed below, the requirement of a "State or organisational policy" exists under the Rome Statute of the ICC but not under customary international law.

[120] *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, 2 October 1995, at para. 140; *Prosecutor v. Tadić*, Appeal Judgement, Case No. IT-94-1-A, 15 July 1999, paras 251, 272.

(iv) The victims of the crime(s) may be *civilians* or in the case of crimes committed during armed conflict, persons who do not take part or no longer take part (*hors de combat*) in armed hostilities.[121]

These atrocities and attacks (*actus reus*) can take a number of forms, including murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecution on political, racial or religious grounds, enforced disappearances, apartheid or other inhumane acts.[122] However, they must be perpetrated as part of a widespread or systematic attack directed against a civilian population, with knowledge of the existence of such an attack and with knowledge that the acts committed constitute part of the attack.[123]

As originally stipulated in the Charter of the IMT (Nuremberg), crimes against humanity required a nexus or link to an armed conflict;[124] they could not take place in times of peace. This precluded, for example, instances where a State committed systematic attacks against its own people in the absence of war. Over time, this nexus requirement gradually faded and was definitely severed by the ICTY's seminal judgment in *Tadić*.[125] However, the exact historical date of this severance remains in academic dispute. Over time the significance of this date will disappear, however it still continues to raise *nullum crimen* problems where persons are prosecuted for crimes against humanity that took place prior to *Tadić* but not in the context of an armed conflict, such as in proceedings against former Khmer Rouge members at the ECCC.[126]

One of the notable features of crimes against humanity is that the list of proscribed 'acts' is explicitly (and purposefully) non-exhaustive with the inclusion of "other inhumane acts".[127] Thus, it remains open as to what acts can constitute crimes against humanity, provided they meet the following criteria: i) they must cause serious mental or physical suffering or constitute a serious attack on human dignity, ii) they must be of a similar gravity

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[121] *Prosecutor v. Martić*, Appeal Judgement, Case No. IT-95-11-A, 8 October 2008, para. 313; *Prosecutor v. Mrkšić and Šljivančanin*, Appeal Judgement, Case No. IT-95-13/1-A, 5 May 2009, paras 29-32.
[122] Article 7(1)(a)-(k), ICC Statute.
[123] *Prosecutor v. Kunarac et al.*, Appeal Judgement, Case No. IT-96-23 & IT-96-23/1-A, 12 June 2002, para. 85.
[124] Article 6(c), IMT Charter. See also Article 5(c), IMTFE Charter.
[125] *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, 2 October 1995, paras 140-141; *Prosecutor v. Tadić*, Appeal Judgement, Case No. IT-94-1-A, 15 July 1999, para. 272.
[126] In its first trial judgment, the ECCC held that the severance of the nexus between crimes against humanity and armed conflict took place by at least 1975. See Trial Judgement, Case No. 001/18-07-2007/ECCC/TC/E188, 26 July 2010, paras 291-294.
[127] See Article 6(c), IMT Charter; Article 5(c), IMTFE Charter; Article 5(i), ICTY Statute; Article 3(i), ICTR Statute; Article 2(i), SCSL Statute; Article 5, ECCC Law; Article 7(1)(k), ICC Statute.

as the existing enumerated acts that qualify as crimes against humanity and iii) they must be performed with intent.[128] Using this formula, numerous non-enumerated acts have been held to constitute crimes against humanity including forcible transfers,[129] forced marriages,[130] the use of human shields[131] and mutilation.[132]

With respect to the contextual element for crimes against humanity, practitioners should note that differences exist between customary international law and the Rome Statute of the ICC. In the former, the widespread or systematic attack need not be pursuant to a "State or organisational policy".[133] In contrast, the Rome Statute explicitly requires it.[134] Thus at custom, an individual person can theoretically commit murder as a crime against humanity if he/she detonates nuclear bombs in various cities, whereas under the Rome Statute the person must be acting pursuant to a State or organisational policy – he/she cannot act in isolation. However, in practice (excluding such extreme examples) it would be very difficult to carry out a "widespread or systematic attack" without some form of governmental acquiescence or assistance or completely outside any organisational policy.

Australian law criminalises crimes against humanity in sections 268.8–268.23 of the *Criminal Code* (Cth). It should be pointed out that the great majority of the underlying acts as contained in the *Criminal Code* (Cth) do not explicitly contain a State or organisational policy element,[135] they merely require that they be committed as part of a "widespread or systematic attack directed against a civilian population." Thus it would appear that Australia has codified crimes against humanity at customary international law, not as set out in the Rome Statute of the ICC. The prescribed penalty under the *Criminal Code* (Cth) ranges from 17 years to life imprisonment, depending on the specific offence.

1.5.3. War Crimes

War crimes are serious violations of the laws of warfare/usages or customs of war (also referred to as "international humanitarian law") committed by either military personnel or

[128] *Prosecutor v. Kordić and Čerkez*, Appeal Judgement, Case No. IT-95-14/2-A, 17 December 2004, para. 117.
[129] *Prosecutor v. Blagojević and Jokić*, Trial Judgement, Case No. IT-02-60-T, 17 January 2005, paras 629-630.
[130] *Prosecutor v. Brima et al.,* Appeal Judgment, Case No. SCSL-2004-16-A, 22 February 2008, paras 200-202.
[131] *Prosecutor v. Naletilić and Martinović*, Trial Judgment, Case No. IT-98-34-T, 31 March 2003, para. 334.
[132] *Prosecutor v. Kajelijeli*, Trial Judgment, Case No. ICTR-98-44A-T, 1 December 2003, paras 934-936.
[133] *Prosecutor v. Kunarac et al.*, Appeal Judgement, Case No. IT-96-23 & IT-96-23/1-A, 12 June 2002, paras 98-101; but see M. C. Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application* (New York: Cambridge University Press, 2011), at pp. 25-28.
[134] Article 7(2)(a), ICC Statute.
[135] With the possible exceptions of enforced disappearances (section 268.21) and apartheid (section 268.22).

other persons actively engaging in hostilities.[136] They can be committed in either international (inter-state) or non-international (or intra-state) armed conflict. International humanitarian law itself consists of a vast body of substantive rules comprising of what are traditionally called "the law of the Hague" and "the law of Geneva" (named after the relevant treaties listed below) much of which have become rules of customary international law.[137] The core applicable rules of international humanitarian law differ depending on the type of armed conflict, as set out below:

International armed conflicts	Non-international armed conflicts
• Hague Conventions (1899 and 1907) (relating to methods and means of warfare) • First Geneva Convention (1949) (relating to wounded and sick members of armed forces on land) • Second Geneva Convention (1949) (relating to wounded, sick and shipwrecked members of armed forces at sea) • Third Geneva Convention (1949) (relating to the treatment of prisoners of war) • Fourth Geneva Convention (1949) (relating to the protection of civilians) • Additional Protocol I to the Geneva Conventions (1977) (relating to the protection of victims of international	• Common Article 3 of the Geneva Conventions (1949) (relating to minimum protections afforded in non-international armed conflict) • Additional Protocol II to the Geneva Conventions (1977) (relating to the protection of victims of non-international armed conflicts) • Customary international humanitarian law

[136] *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, 2 October 1995, at para. 140. At the onset, one should keep in mind that war crimes only refer to serious breaches of the laws of war (*jus in bello*) committed during armed conflict and should be separated from the law concerning the initiation of war itself (*jus ad bellum*).

[137] C. de Than and E. Shorts, *International Criminal Law and Human Rights* (London: Sweet and Maxwell, 2003), at pp. 117-123. For a full exposition of the rules of customary international humanitarian law see the definitive study of the International Committee of the Red Cross: J. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law – Volume I: Rules* (Cambridge: Cambridge University Press, 2009).

armed conflicts) • Customary international humanitarian law	

While a full exposition of all the specific acts amounting to war crimes is beyond the scope of this chapter,[138] broadly speaking, they include criminal conduct relating to:

(i) Military weapons and tactics (e.g. use of expanding bullets, poisonous gases and weapons, human shields, perfidy);

(ii) Persons no longer engaged in hostilities (*hors de combat*) (e.g. denial of quarter, mistreatment and killing of prisoners of war);

(iii) Persons not engaged in hostilities (civilians, medical personnel, peacekeepers) (e.g. targeting of civilians, mistreatment and deportation of civilian populations, attacking peacekeepers); and

(iv) Religious and cultural sites, property and the environment (e.g. wanton destruction of property, pillaging, attacking civilian objects).

As the name implies, war crimes require the existence of an armed conflict. In determining whether an armed conflict exits, the test set out in *Tadić* is widely considered definitive: "an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."[139] This serves to distinguish armed conflict from sporadic and disorganised acts of violence against a State. Once armed conflict has broken out, international humanitarian law is applicable in all the territory of the opposing States, or the whole territory under the control of a party (in the case of non-international armed conflicts), irrespective of whether combat operations actually take place there.[140]

However, it is insufficient that prohibited conduct simply take place during an armed conflict for it to qualify as a war crime. Unless the conduct is linked to, or has a nexus with, the armed conflict, it is merely criminal conduct committed against the backdrop of armed

[138] A comprehensive list of the prohibited conduct in war can be found in Article 8, ICC Statute.
[139] *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, 2 October 1995, para. 70; *Prosecutor v. Boškoski and Tarčulovski*, Appeal Judgement, Case No. IT-04-82-A, 19 May 2010, para. 21.
[140] *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, 2 October 1995, para. 70.

conflict, punishable by the domestic criminal law of the relevant state. In order to demonstrate this nexus it is necessary for the conduct to be shaped by, or be dependent on, the armed conflict.[141] "The armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed."[142]

It is also important to keep in mind that not all breaches of the laws of war qualify as war crimes. For example, killing prisoners of war[143] and not allowing them to smoke[144] are both breaches of Fourth Geneva Convention (1949), but only the former amounts to a war crime. The distinguishing feature is that the conduct must amount to a *serious* or *grave* violation of the laws of war; "it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim."[145] Although each of the four Geneva Conventions and one of the Additional Protocols themselves provide a list of what constitutes grave breaches,[146] "new" war crimes can emerge under customary international law provided they meet the "serious/grave" criterion and entail individual criminal responsibility (together with the requisite state practice and *opinio juris*). An example of a relatively "new" war crime can be found in the SCSL's decision on the recruitment and use of child soldiers.[147]

Australian criminal law reflects the international/non-international divide under international humanitarian law discussed above. Thus, sections 268.24–268.68, 268.95–268.101 of the *Criminal Code* (Cth) apply to war crimes committed in international armed conflicts, whereas sections 268.69–268.94 apply to non-international armed conflicts. The prescribed penalty for war crime offences ranges from 10 years to life imprisonment, depending on the specific crime.

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[141] *Prosecutor v. Kunarac et al.*, Appeal Judgement, Case No. IT-96-23 & IT-96-23/1-A, 12 June 2002, para. 58.
[142] *Prosecutor v. Kunarac et al.*, Appeal Judgement, Case No. IT-96-23 & IT-96-23/1-A, 12 June 2002, para. 58.
[143] Article 32, Fourth Geneva Convention (1949), 75 UN Treaty Series 287.
[144] Article 89, Fourth Geneva Convention (1949), 75 UN Treaty Series 287.
[145] *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, 2 October 1995, para. 94.
[146] Article 50, First Geneva Convention (1949), 75 UN Treaty Series 31; Article 51, Second Geneva Convention (1949), 75 UN Treaty Series 85; Article 130, Third Geneva Convention (1949), 75 UN Treaty Series 135; Article 147, Fourth Geneva Convention (1949), 75 UN Treaty Series 287; Article 85, Additional Protocol I to the Geneva Conventions of 12 August 1949 (1977), 1125 UN Treaty Series 3.
[147] *Prosecutor v. Norman*, Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), Case No. SCSL-2004-14-AR72(E), 31 May 2004. The crime of recruiting and using child soldiers is now contained in Articles 8(2)(b)(xxvi), 8(2)(e)(vii), ICC Statute.

1.5.4. Aggression

The origins of aggression (or crimes against peace as it was originally coined) can be found in the general prohibition of inter-state war pursuant to historical international treaties such as bilateral or multilateral treaties of alliance, the Covenant of the League of Nations and the Paris (Kellogg-Briand) Pact (1928). However, the breach of such treaties only resulted in an internationally wrongful act for which state responsibility ensued. The real turning point was the IMT at Nuremberg that held – for the first time – that such internationally wrongful acts also engaged *individual* criminal responsibility. As the IMT put it, "[aggression] is not only an international crime; it is the supreme international crime".[148]

Despite the fact that individuals were found guilty of crimes against peace (aggression) under the IMT Charter, no general agreement was reached in the world community on an exhaustive definition of aggression, despite many years of discussions and negotiations. UN General Assembly Resolution 3314 (XXIX) (1974) provided for a generic definition, but it has proven to be contentious and was in any event non-binding. As a result, since 1946 there have been numerous instances in which states have in all likelihood engaged in acts of aggression but there have been no corresponding national or international trials for such acts. Nevertheless, this lack of definition did not preclude aggression from being a customary international crime, as was rightly held by the House of Lords (as it then was) in *R v Jones*.[149]

The issue of a definition of aggression resurfaced in the process leading up to the creation of the ICC. Despite wide agreement on its criminal character, a comprehensive definition also eluded the drafters of the Rome Statute. However, instead of excluding the crime from the ICC Statute altogether, it was added but with a proviso: the ICC could not exercise jurisdiction over the crime of aggression until the Rome Statute was amended so as to define the crime and set out the conditions under which the ICC could exercise jurisdiction over it.[150] ICC State Parties returned to the issue in light of the first ICC Review Conference held in Kampala, Uganda in 2010. At that conference, a definition, applicable at the ICC, was finally agreed upon by consensus:

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[148] *United States of America et al. v. Göring et al.*, Judgment, in *Trial of the Major War Criminals before the International Military Tribunal – Volume 1: Official Documents* (Nuremberg: International Military Tribunal, 1947), at p. 186.
[149] House of Lords, 29 March 2006, [2006] UKHL 16.
[150] Articles 5(1)(d), 5(2), ICC Statute.

> [The] "crime of aggression" means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.[151]

An "act of aggression" was defined as: "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations."[152]

Since no person has ever been prosecuted for aggression since the Nuremberg and Tokyo trials and the ICC definition has yet to enter into force,[153] its contours and intricacies remain judicially unexplored. However, a number of basic features can be identified. First, aggression cannot be committed by mere foot soldiers (in contrast to other international crimes). At the ICC it is specifically restricted to person in high authority that have the capacity and ability to initiate and execute war.[154] Second, aggression can only be committed within the context of inter-state conflict; non-state actors are excluded. Lastly, it is important to distinguish the crime of aggression from the use of force. They are not synonymous. Although the use of force can amount to an "act of aggression", such acts will not amount to the *crime* of aggression unless they constitute a "manifest violation" of the UN Charter. The character, gravity and scale must be sufficient to satisfy this element: "[n]o one component can be significant enough to satisfy the manifest standard by itself."[155] Thus, not every instance of the use of force will automatically constitute the crime of aggression. For example, the firing of a single conventional missile across an international boundary would not in all likelihood pass the "manifest violation" criterion.

As of September 2011, Australia has yet to ratify the Rome Statute's amendment incorporating the definition of aggression (neither has any other ICC State party), thus the *Criminal Code* (Cth) does not presently contain the offence.

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[151] ICC Assembly of States Parties, Resolution RC/Res.6 (11 June 2010), Annex I, para. 2 (the new Article 8(1) *bis*, ICC Statute).
[152] ICC Assembly of States Parties, Resolution RC/Res.6 (11 June 2010), Annex I, para. 2 (the new Article 8(2) *bis,* ICC Statute). This article goes on to list a number of acts that qualify as "acts of aggression".
[153] Practitioners should be mindful to the fact the ICC cannot start exercising jurisdiction over the crime (as contained in the new Articles 8 *bis*, 15 *bis*, 15 *ter*, ICC Statute) until two conditions are met: one year must elapse after 30 states have ratified the amendment and two thirds of the ICC Assembly of States Parties must decide to activate the ICC's jurisdiction over aggression after 1 January 2017.
[154] However, under customary international law this may be different. See K. J. Heller, 'Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression' 18(3) *European Journal of International Law* 477-497 (2007).
[155] ICC Assembly of States Parties, Resolution RC/Res.6 (11 June 2010), Annex III, para. 7.

1.5.5. Other International Crimes: Torture and Terrorism

Terrorism and torture do not currently fall under the jurisdiction of any international criminal tribunal or court as autonomous international crimes. Consequently they are not usually regarded as being included in the "core crimes" such as genocide, war crimes and crimes against humanity and aggression. The reasons for the current exclusion of these crimes (as autonomous crimes) from international jurisdiction differ for each class. With respect to torture, this is probably due to the fact that it is already explicitly provided for as a war crime, as a crime against humanity and can also constitute genocide. As for terrorism, the main issue has been the problem of a definition. However, this may soon be about to change since the STL handed down its landmark decision on the definition of terrorism under customary international law (discussed below).

1.5.5.1. Torture:

There are four documented contexts in which torture is prohibited, each consisting of distinct elements:

(i) When it is committed with the specific intent to destroy in whole or in part a national, ethnical, racial or religious group as such (genocide);[156]

(ii) When it is part of a widespread or systematic attack directed against a civilian population (a crime against humanity);[157]

(iii) When it is perpetrated as a single act, outside any large-scale practice, in time of armed conflict (a war crime);[158]

(iv) When it is committed as a single act irrespective of whether in time of peace or in time of armed conflict (a discrete crime under international law).[159]

However, the differences come not from the underlying act of torture itself, but rather from the different contextual elements required so that it becomes a war crime or a crime against humanity or the *dolus specialis* so that it qualifies as genocide. Aside from this, the underlying definition of torture is relatively uniform in all of the above contexts. This is

[156] *Prosecutor v. Akayesu*, Trial Judgement, Case No. ICTR-96-4-T, 2 September 1998, para. 504; *Prosecutor v. Stakić*, Trial Judgement, Case No. IT-97-24-T, 31 July 2003, para. 516.
[157] Article 5(f), ICTY Statute; Article 3(f), ICTR Statute; Article 2(f), SCSL Statute; Article 5, ECCC Law; Article 7(1)(f), ICC Statute.
[158] Article 2(b), ICTY Statute; Article 4(a), ICTR Statute; Article 3(a), SCSL Statute; Article 6, ECCC Law; Articles 8(2)(a)(ii), 8(2)(c)(i), ICC Statute.
[159] Article 1, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), 1465 UN Treaty Series 112.

derived from the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (1984):

> "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is 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.[160]

This definition has been explored in some depth by the various international tribunals, from which we can draw some general features.

First, the requirement of "severe pain or suffering" does not denote a specific and/or rigid threshold – it is dependent on the specific facts of each case. It is to be considered in light of both the objective severity of the harm inflicted (including the nature, purpose and consistency of the acts committed) and subjective criteria (such as the physical and mental condition of the victim, the effects of the act committed, the victim's age, sex, state of health and position of inferiority).[161] The harm inflicted need not be permanent or even visible after the fact.[162] Second, torture requires that it be committed in order to achieve a particular purpose or result ("prohibited purpose").[163] The list provided for in CAT (to obtain information or a confession, punish, intimidate, coerce or to discriminate) should not be viewed as exhaustive, merely illustrative.[164] Thus, humiliation has also been found to satisfy this element.[165] It should also be borne in mind that torture need not be carried out exclusively to achieve such prohibited purposes, but "must simply be part of the motivation behind the conduct".[166] Lastly, the definition of torture as an autonomous international crime under CAT requires the consent or acquiescence of a public official or a person in an official

[160] Article 1(1), Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), 1465 UN Treaty Series 112.
[161] *Prosecutor v. Brđanin*, Trial Judgement, Case No. IT-99-36-T, 1 September 2004, paras 483-484.
[162] *Prosecutor v. Kvočka*, Trial Judgement, Case No. IT-98-30/1-T, 2 November 2001, para. 148; *Prosecutor v. Kunarac et al.*, Appeal Judgement, Case No. IT-96-23 & IT-96-23/1-A, 12 June 2002, para. 150.
[163] Except for torture as a crime against humanity pursuant to the ICC Statute: *Prosecutor v. Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08-424, 15 June 2009, para. 195.
[164] *Prosecutor v. Delalić et al.*, Trial Judgement, Case No. IT-96-21-T, 16 November 1998, para. 470.
[165] *Prosecutor v. Furundžija*, Trial Judgement, Case No. IT-95-17/1-T, 10 December 1998, para. 162; *Prosecutor v. Kvočka*, Trial Judgement, Case No. IT-98-30/1-T, 2 November 2001, paras 140-141
[166] *Prosecutor v. Delalić et al.*, Trial Judgement, Case No. IT-96-21-T, 16 November 1998, para. 470.

capacity. However, it is not a requirement under customary international law.[167] Therefore when operating outside the context of CAT – when prosecuting torture as a war crime, crime against humanity or genocide – it need not be shown that torture was carried out "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

The *Criminal Code* (Cth) prohibits torture in all the four forms noted above: as a discrete crime as per CAT in section 274.2; as a war crime in sections 268.25 (international armed conflict) and 268.73 (non-international armed conflict); as a crime against humanity in section 268.13; and as genocide in section 268.4. The prescribed penalty is between 20 years to life imprisonment.

1.5.5.2. Terrorism:

Terrorism has been described as possessing 'chameleon-like' characteristics.[168] Like torture, terrorism can fall under a number of different categories of crimes: terror as a war crime, terrorism (as other inhumane acts) as a crime against humanity or terrorism as a discrete standalone international crime. Which of these best characterises the relevant terrorist acts at issue ultimately depends on the particular circumstances and context in which they are performed.

For its part, terror as a war crime finds its origin in Article 51(2) of Additional Protocol I to the Geneva Conventions (1977) and Article 13(2) of Additional Protocol II to the Geneva Conventions (1977), which provide that:

> The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.[169]

Such conduct, "giv[es] rise to individual criminal responsibility pursuant to customary international law"[170] so long as it is committed in time of war. Although terror as a war crime overlaps somewhat with unlawful attacks on civilians, the major difference is that it requires specific intent (*dolus specialis*), which is to "spread terror among the civilian population".[171] In addition, indiscriminate or disproportionate attacks not directly targeting civilians can also

[167] *Prosecutor v. Kunarac et al.*, Appeal Judgement, Case No. IT-96-23 & IT-96-23/1-A, 12 June 2002, paras 146-148.
[168] A. Roberts, 'Can We Define Terrorism?' 14(1) *Oxford Today* 18 (2002).
[169] See also Article 4(d), ICTR Statute; Article 3(d), SCSL Statute.
[170] *Prosecutor v. Galić*, Appeal Judgement, Case No. IT-98-29-A, 30 November 2006, para. 86; *Prosecutor v. Sesay et al.*, Appeal Judgment, Case No. SCSL-04-15-A, 26 October 2009, para. 889.
[171] *Prosecutor v. Galić*, Appeal Judgement, Case No. IT-98-29-A, 30 November 2006, para. 104.

amount to the *actus reus* of the crime.[172] Further, the crime does not require civilians to be actually terrorised and it need not be the sole purpose for the acts or threats, but must be the primary or principal purpose.[173]

Outside of war, terrorism is problematic because unlike torture, there is no one treaty that provides for a universal definition of "terrorism". Instead, there is a plethora of terrorism-related treaties that fragment the crime into particularised contexts.[174] This in turn has given rise to the notion that terrorism is not defined at international law. However, after reviewing state practice and *opinio juris*, a recent landmark decision of the STL has held that terrorism has indeed "crystallised" into an autonomous international crime, at least in time of peace, under customary international law, requiring the following three key elements:

> (i) The perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or threatening such an act;
>
> (ii) The intent [*dolus specialis*] to spread fear among the population (which would generally entail the creation of public danger) or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it;
>
> (iii) When the act involves a transnational element.[175]

No person has yet been convicted of terrorism as an international crime pursuant to the above definition. Notwithstanding, it can be utilised in another context: defining terrorism as a crime against humanity. Although crimes against humanity does not include "terrorism" as an enumerated underlying act,[176] a series or wave of terrorist attacks of a sufficient gravity directed against a civilian population could amount to "other inhumane acts".[177] For example,

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[172] *Prosecutor v. Galić*, Appeal Judgement, Case No. IT-98-29-A, 30 November 2006, para. 102.
[173] *Prosecutor v. Galić*, Appeal Judgement, Case No. IT-98-29-A, 30 November 2006, para. 104.
[174] These include, among others: Convention for the Suppression of Unlawful Seizure of Aircraft (1970), 860 UN Treaty Series 105; International Convention Against the Taking of Hostages (1979), 1316 UN Treaty Series 205; International Convention for the Suppression of Terrorist Bombings (1997), 2149 UN Treaty Series 256; International Convention for the Suppression of the Financing of Terrorism (1999), 2178 UN Treaty Series 197; International Convention for the Suppression of Acts of Nuclear Terrorism (2005), 2445 UN Treaty Series 89.
[175] *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, Special Tribunal for Lebanon, Appeals Chamber, 16 February 2011, Case No. STL-11-01/I, para. 85. However, this definition has been subject to academic debate. See B. Saul, 'Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism' 24(3) *Leiden Journal of International Law* 677-700 (2011) and M. J. Ventura, 'Terrorism According to the STL's Interlocutory Decision on the Applicable Law: A Defining Moment or a Moment of Defining?' 9(5) *Journal of International Criminal Justice* 1021-1042 (2011).
[176] See Article 7(1)(a)-(k), ICC Statute.
[177] Indeed, terrorism (as murder or other inhumane acts) as a crime against humanity was seriously considered for inclusion in the STL Statute, the STL being an internationalised tribunal created in response to a wave of terrorist bombings targeting and killing prominent Lebanese politicians. However, despite the fact that the events in Lebanon "could meet the prima facie definition of the crime", it was not included in the final text, but only because of a lack of political support from the UN Security Council. See *Report of the Secretary-General on the Establishment of a Special Tribunal for Lebanon*, UN Doc. No. S/2006/893, 15 November 2006, paras 23-25.

an argument can be made that the terrorist attacks of 11 September 2001, because of their scale and magnitude, meet both the requisite contextual elements as well as the requirements for "other inhumane acts",[178] thus making it a crime against humanity. Practitioners should be mindful to the fact that while no prosecution of terrorism as a crime against humanity has ever been attempted, it nonetheless remains a theoretical possibility. In any event, it remains to be seen whether the STL's definition of terrorism at customary international law will be influential in future terrorism prosecutions, both international and domestic.

The *Criminal Code* (Cth), like the ICC Statute, does not include terror as a war crime. Terrorism as a discrete offence, together with related offences, can be found in sections 72.3, 101.1–101.6 and 102.2–102.8 of the *Criminal Code* (Cth). The prescribed penalty is between 3 years to life imprisonment, depending on the specific offence. However, the Australian definition of terrorism differs from that under customary international law in that it requires a "political, religious or ideological" element,[179] but not a transnational element. Therefore, Australia can be understood as having criminalised terrorism as a domestic crime but not as an international crime.[180]

[178] See above discussion for the requirements of crimes against humanity.
[179] Section 100.1(1), *Criminal Code* (Cth).
[180] The STL has held that the distinguishing feature between terrorism as a domestic crime and terrorism as an international crime is that the latter requires a 'transnational' element. See *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, Special Tribunal for Lebanon, Appeals Chamber, 16 February 2011, Case No. STL-11-01/I, para. 89.