

# Jurisdiction of International Criminal Court on Various Crimes

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## ABSTRACT

The International Criminal Court (ICC) has jurisdiction over the most serious crimes of concern to the international community as a whole, namely genocide, crimes against humanity and war crimes, when committed after 1 July 2002. Each of these crimes is clearly defined in the Rome Statute and other relevant texts. The Court will also have jurisdiction over the crime of aggression once the conditions adopted at the Rome Statute Review Conference held at Kampala (Uganda) in 2010 are fulfilled. The Court may exercise jurisdiction over such international crimes only if they were committed on the territory of a State Party or by one of its nationals. These conditions, however, do not apply if a situation is referred to the Prosecutor by the United Nations Security Council, whose resolutions are binding on all UN member states, or if a State makes a declaration accepting the jurisdiction of the Court.

This paper gives a brief of various crimes that are punishable under the Rome Statute Of International Criminal Court.

## 1. Introduction

The International Criminal Court has jurisdiction over 'the most serious crimes of international concern': genocide, crimes against humanity, war crimes and aggression (Article 5(1))<sup>1</sup>. The Court cannot, however, exercise jurisdiction over the crime of aggression until the Statute has been amended by the addition of a definition of that crime and the inclusion of preconditions for the ICC to take jurisdiction (Article 5(2)).<sup>2</sup>

Whereas the Statutes of the two ad hoc Tribunals and the ILC draft statute for the ICC do not provide detailed definitions of crimes, the ICC Statute defines war crimes and crimes against humanity in unprecedented detail. The negotiators cited reasons of certainty and the principle of legality, having in mind also that clear definitions would help to limit unexpected exposure to prosecution. They also wanted to avoid judicial creativity of too broad a nature and Article 22(2) therefore provides that the definitions 'shall be strictly construed and shall not be extended by analogy'<sup>3</sup>. The definitions of crimes do not represent the whole picture.

The oft-stated aim of the process of definition was to codify existing customary law for the purpose of the new Court and the definitions are therefore by and large conservative. But in crystallizing and clarifying those provisions which had not been previously expressed as written criminal law, the process inevitably moved the law along. There are provisions which arguably go beyond a mere codification of existing law as it stood in 1998, but some of them have since been referred to as customary law in the jurisprudence. The Rome Statute has thus contributed to the development of customary law. On the other hand there are provisions which are arguably not as extensive as customary law allows. Article 10 attempts to address this point by providing that the Statute does not limit or

prejudice existing or developing rules of international law 'for purposes other than this Statute'<sup>4</sup>. This both mitigates the concern that the Statute will in some way freeze the development of customary international law and confirms that so far as the Court is concerned it must apply the provisions in the Statute even if customary law creates wider offences. The position is perhaps best described by an ICTY (International Criminal Tribunal for the former Yugoslavia) Trial Chamber in the Furundžija case.<sup>5</sup>

The International Criminal Court deals with the most serious crimes committed by individuals - *genocide, crimes against humanity, war crimes and aggression*. These crimes are specified in the Statute and are carefully defined to avoid ambiguity and vagueness. Crimes of aggression will also be dealt with by the Court when State parties have agreed on the definition, elements and conditions under which the Court will exercise jurisdiction.<sup>6</sup>

The Statute contains the first precisely negotiated and exactly defined catalogue of crimes under international law. It is particularly important that genocide and crimes against humanity, for the first time exactly defined in a treaty, may be prosecuted in all circumstances and not just when committed in an armed conflict. Therefore, especially the definition of crimes against humanity, as contained in Article 7<sup>7</sup> of the Statute, constitutes a very important, unprecedented breakthrough in the codification of international law in this area. It is also very significant that war crimes fall under the jurisdiction of the Court committed in international or in non-international, internal armed conflicts i.e. civil wars. Since about ninety per cent of all modern conflicts are of a predominantly internal nature, this

<sup>1</sup> Robert Cryer, Håkan Friman, Darryl Robinson, Elizabeth Wilmshurst-An Introduction To International Criminal Law And Procedure 150 (United States Of America By Cambridge University Press, New York, 2010)

<sup>2</sup> ibid

<sup>3</sup> Kelly D. Askin, "Crimes Within The Jurisdiction Of The International Criminal Court" Volume 10, Issue 1 CLF 33 (March 1999)

<sup>4</sup>

<https://childrenandarmedconflict.un.org/keydocuments/english/romestatuteofthe7.html> (visited 1<sup>st</sup> august 2019)

<sup>5</sup> Supra Note 2 151-152

<sup>6</sup> [https://en.wikipedia.org/wiki/International\\_Criminal\\_Court#Subject-Matter\\_Jurisdiction\\_Requirements](https://en.wikipedia.org/wiki/International_Criminal_Court#Subject-Matter_Jurisdiction_Requirements)

<sup>7</sup> See Article 7 of Rome Statute in <https://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf>

wide scope of jurisdiction is of particular importance. The Statute contains in Article 8<sup>8</sup> fifty individual war crimes and thus a very comprehensive definition, including grave breaches of the Geneva Conventions.<sup>9</sup>

Although the Statute makes no mention of adding other crimes in the future, there has been discussion among State parties for the need to include crimes involving terrorism, the use of nuclear weapons, the trafficking of narcotics and psychotropic substances and crimes against the United Nations and associated personnel. Despite the arguments for including these additional crimes, the consensus among State parties was to restrict the Court's jurisdiction to a few core crimes in order to facilitate a broader acceptance of ICC.<sup>10</sup>

## 2. Crimes within the jurisdiction of ICC-

### A. Genocide-

ICC's inclusion of the crime of genocide and its definition is largely inspired by the Genocide Convention of 1948, the Geneva Convention of 1949 and the application of the crime of genocide by the *ad hoc* Tribunal in Rwanda.<sup>11</sup> *Genocide* is any one of a number of acts aimed at the destruction of all or part of certain groups of people. It is this intent that distinguishes genocide from other crimes against humanity. Under Article 6<sup>12</sup> of the Statute, the following five prohibited acts, if committed with the intention to *destroy in whole or part a national, ethnical, racial or religious group*, as such, may constitute genocide — killing, causing serious bodily or mental harm to the members of a group; deliberately inflicting conditions of life calculated to bring about physical destruction of a group; imposing measures intended to prevent births within a group; and forcibly transferring children of a group to another group. While some delegates at the Rome Conference rallied to have acts against social and political groups included in this definition, the majority of State parties felt these acts could be addressed under crimes against humanity.<sup>13</sup>

Anyone can be tried for genocide, no matter what the person's position. This means that not only those who pulled the trigger, whether foot soldiers or next-door neighbours, can be guilty of the crime, but also the head of State or government minister who planned or ordered the act. ICC jurisdiction does not allow for immunity afforded to heads of State. Following illegal orders of superiors is not a defence to genocide. Under Article 25(3) (b) of the Statute, anyone who orders, solicits, or induces someone who committed the acts of genocide, is also guilty of genocide.<sup>14</sup>

### B. Crimes Against Humanity-

ICC's definition of crimes against humanity is not influenced by treaties, but by precedents such as the

Nuremberg Charter and the *ad hoc* Tribunals for the former Yugoslavia and Rwanda.<sup>15</sup> *Crimes against humanity* have been clearly defined in the Rome Statute under Article 7 and are distinguished from ordinary crimes in three ways. Firstly, the acts constituting the said crimes such as murder, must have been *committed as part of a widespread or systematic attack*. Secondly, they must be knowingly directed *against a civilian population* and thirdly, they must have been committed pursuant to a *State or organizational policy*. Thus, they can be committed by State agents or by persons acting at their instigation or with their acquiescence, such as vigilantes or paramilitary units. Crimes against humanity can also be committed pursuant to policies of organizations, such as rebel groups, which have no connection with the Government.<sup>16</sup>

The Rome Statute covers eleven types of acts, which may amount to crimes against humanity including murder, extermination, enslavement, unlawful imprisonment, torture, deportation of population, sexual violence, persecution against an identifiable group, enforced disappearance of persons apartheid and other inhumane acts that cause "great suffering" or "serious bodily or mental injury"<sup>17</sup>. Unlike the crime of genocide, these acts need not be committed in persecution of any particular group to establish liability for punishment. The Statute also does not require the acts be committed during an armed conflict in order to establish a conviction for crimes against humanity because systematic attacks against civilians can also occur during peacetime. Further, there is no requirement that the inhumane acts constituting crimes against humanity other than "persecutions" be perpetrated on "discriminatory grounds" or with "discriminatory intent".<sup>18</sup>

In addition, ICC definition contains an expanded, but still open-ended, enumeration of acts. Of particular note is the expansion of the list of crimes of sexual violence to include "sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity". Another important expansion took place in the list of cognizable grounds for persecution. For the first time, this list includes "gender" as a ground of persecution. Most importantly, the list of grounds is left open-ended with the inclusion of "other grounds that are universally recognized as impermissible under international law".<sup>19</sup>

### C. War Crimes-

War crimes have been punishable by national courts since the middle ages. There have been numerous international humanitarian treaties developed in the 1990s in this regard, notably The Hague Convention IV of 1907 and its Regulations, the four Geneva Conventions of 1949 and their

<sup>8</sup> *ibid*

<sup>9</sup> Michael P. Scharf -Results Of The Rome Conference For An International Criminal Court At The Wayback Machine. The American Society Of International Law. 15 May 2012

<sup>10</sup> *ibid*

<sup>11</sup> <http://legal.un.org/avl/ha/cppcg/cppcg.html>

<sup>12</sup> *Supra* note 8

<sup>13</sup> <https://www.ushmm.org/M/Pdfs/20110210-What-Is-Genocide.Pdf>

<sup>14</sup> [http://archive.iccnw.org/documents/FS-AI-ProsecutingGenocide.pdf#targetText=Under%20Article%2025%20\(3\)%20\(others%20to%20commit%20genocide\)](http://archive.iccnw.org/documents/FS-AI-ProsecutingGenocide.pdf#targetText=Under%20Article%2025%20(3)%20(others%20to%20commit%20genocide))

<sup>15</sup>

<https://www.icrc.org/en/doc/resources/documents/article/other/57jnz3.htm>

<sup>16</sup> [https://www.ohchr.org/Documents/Countries/CD/FS-2\\_Crimes\\_Final.Pdf](https://www.ohchr.org/Documents/Countries/CD/FS-2_Crimes_Final.Pdf)-DEMOCRATIC REPUBLIC OF THE CONGO 1993-2003, UN Mapping Report

<sup>17</sup> <https://www.refworld.org/pdfid/3dd90e650.pdf>

<sup>18</sup> Darryl Robinson "The American Journal of International Law" Vol. 93, No. 1 (Jan., 1999), pp. 43-57

<sup>19</sup> [https://en.wikipedia.org/wiki/Crimes\\_Against\\_Humanity](https://en.wikipedia.org/wiki/Crimes_Against_Humanity)

1977 Protocols.<sup>20</sup> Article 8 of the Rome Statute gives ICC jurisdiction over a wide range of war crimes committed during international armed conflicts, which are recognised in these treaties and international customary law. It also reaffirmed recent developments in international law by giving by ICC the power to try war crimes committed in internal armed conflicts, such as civil wars, which are the most common conflicts today. *War crimes* are, as the name suggests, crimes committed during armed conflict including acts such as torture, sexual violence, pillage, employing poisonous weapons and intentionally starving civilians.<sup>21</sup> Unlike crimes against humanity, which are committed in the context of widespread and systematic attacks against the civilian population, a single, isolated dispersed or random act may be considered a war crime if committed during armed conflict.<sup>22</sup>

Article 8 of the Rome Statute divides war crimes into four sections — grave breaches, other war crimes committed in international conflict, violations of Common Article 3 of the Geneva Conventions and other war crimes committed in non-international armed conflicts. The division of international and non-international conflicts mirrors the distinction enshrined in humanitarian treaty law. This distinction, which exists as a result of the historical context from which the treaties emerged, is becoming increasingly blurred as humanitarian law develops. The Statute, in creating an institution for the future reflects this trend and establishes the Court's jurisdiction over serious war crimes, whether committed in internal or international conflicts.<sup>23</sup>

Serious violations of the laws and customs of international armed conflict include acts such as "intentional direct attacks against civilian population not directly involved in the hostilities, transferring the civilian population of the occupying power into the territory it occupies, and employing certain weapons which cause superfluous injury or unnecessary suffering"<sup>24</sup>. When there is armed conflict not of an international nature, the Statute forbids acts committed against persons taking "no active part in the hostilities", including members of armed forces who have surrendered their arms<sup>25</sup>. *Grave breaches* are acts against persons or property including wilful killing, torture or inhumane treatment, willfully causing great suffering, extensive destruction and appropriation of property not justified by military necessity, compelling prisoners of war to serve in the forces of a hostile power, depriving prisoners of war the right to a fair trial, unlawful deportation, transfer or confinement and taking of hostages. However, ICC's jurisdiction does not apply to "internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature" which are not considered as "armed conflicts not of an international nature".<sup>26</sup>

#### D. The Crime of Aggression-

<sup>20</sup> <http://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/human-rights-in-relation-to-other-topics/human-rights-and-armed-conflict>

<sup>21</sup> [https://www.icrc.org/en/doc/assets/files/other/icrc\\_002\\_0467.pdf](https://www.icrc.org/en/doc/assets/files/other/icrc_002_0467.pdf)

<sup>22</sup> A.Von Bogdanday And R.Wolfurm (Eds), Max Planck Yearbook Of United Nations Law, Volume 7, 343 (2003)

<sup>23</sup> Ibid 346

<sup>24</sup> <https://www.ebc-india.com/lawyer/articles/812.htm>

<sup>25</sup> [https://www.icrc.org/en/doc/assets/files/other/icrc\\_002\\_0703.pdf](https://www.icrc.org/en/doc/assets/files/other/icrc_002_0703.pdf)

<sup>26</sup> <https://www.un.org/en/genocideprevention/war-crimes.shtml>

The Statute does not define the *crime of aggression* and therefore leaves a potentially explosive issue unresolved. What constitutes the crime of aggression will still be discussed by signatories to the Rome Statute. Defining aggression has historically been a very controversial and extremely political undertaking.<sup>27</sup> In international law, the concept of aggression has been slowly taking shape particularly in cases involving military actions involving the United States, Nicaragua, Costa Rica and El Salvador. Some countries such as the United States, voted against the inclusion of the crime of aggression in the Statute, fearful that it would expose military commanders who conduct military operations in other countries.<sup>28</sup>

Several proposals have been considered in this regard. Some countries feel that, in line with the UN Charter and the mandate it gives to the Security Council, only the Council has the authority to find that an act of aggression has occurred. If this is agreed, then such a finding by the Council would be required before the Court itself could take any action. Other countries feel that such authority should not be limited to the Security Council. There are proposals under consideration that would give that role to the General Assembly or to the International Court of Justice, if an accusation of aggression were made and the Security Council did not act within a certain time.<sup>29</sup>

Some scholars feel that a non-political judiciary created by consenting States could help protect against abuse by the Security Council by its independent authority to determine if an individual is guilty of the crime of aggression. Whatever is the result of these discussions, the trial and punishment of violators of the crime of aggression can only be enforced once State signatories agree on its definition and elements.<sup>30</sup>

### 3. Conclusion

There exists a debate on whether ICC should have Universal Jurisdiction or State- consent regime in order to decide international crimes. The State Consent regime requires obtaining the custodial and territorial consent of other States before the Court can exercise its jurisdiction. However, under the existing principle of Universal Jurisdiction, any State has the right to prosecute persons alleged to have committed war crimes and no consent is required from any other State. This principle reaffirms the deep-seated notion that war criminals are not immune from prosecution but those responsible for the commission of war crimes are answerable for their acts and must be brought to justice.

Finally, the emphasis now should be to provide unambiguous definitions of crimes that would come within the ICC's jurisdiction. Also, there should be a solution for the simple collection of evidence. A method must be devised for appointing impartial prosecutors acceptable to the entire international community.

<sup>27</sup> <http://www.coalitionfortheicc.org/explore/icc-crimes/crime-aggression>

<sup>28</sup> file:///C:/Users/USER/Downloads/5917-Article%20Text-7844-1-10-20090319.pdf

<sup>29</sup> [https://www.un.org/en/sc/repertoire/46-51/46-51\\_11.pdf](https://www.un.org/en/sc/repertoire/46-51/46-51_11.pdf)

<sup>30</sup> Sergey Sayapin "The Crime Of Aggression In International Criminal Law- Historical Development, Comparative Analysis And Present State" ISBN 978-90-6704-926-9 -ISBN 978-90-6704-927-6 (Ebook) (T.M.C. Asser Press, The Hague,2014)