Law enforcement at war crimes, crimes against humanity & genocide

an outline

Vasileios G. Makris
Mil. Judge, Athens AF Mil. Tribunal
Contents of the presentation

• Definition of "crime"
• International Crimes
• International Law – Int. Penal Law
• Who prosecutes International Crimes?
Contents of the presentation

- Some history...
- ICC and genocide, war crimes & crimes against humanity
- "Trigger mechanism" of the ICC (initiation of proceedings)
- From the ICC Charter: genocide, war crimes & crimes against humanity
Contents of the presentation

- A few more key facts on ICC
Definition of the term "crime"

- An action or omission which constitutes an offense and is considered "grave enough" to be punishable by law.
Definition of "crime"

• We are in the territory of penal law ◊ "state violence" ◊ strict rules & specifications.

• See, for example, ICC Charter /art. 11:
  The Court has jurisdiction **only** with respect to crimes committed **after** the entry into force of this Statute.
Defintion of "crime"

• ICC Charter, art. 22: 1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.

   2. The definition of a crime shall be strictly construed and shall NOT be extended by ANALOGY.

   In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.
Definition of "crime" — International crimes

- International crimes are breaches of international rules of such magnitude that entail the personal responsibility of the individuals concerned.
Defintion of "crime" — **International crimes**

- ...an international crime is such act universally recognized as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the State that would have control over it under ordinary circumstances *(US Mil. Tribunal at Nuremberg, 1948)*
Defintion of "crime" — International crimes

Such crimes (the so called ‘core crimes’) are:

• **War crimes**
• **Crimes against humanity**
• **Genocide**
• [The Crime of Aggression]

...we are in the territory of International Penal Law

(which is often bizarre and contradictory...)
Defintion of "crime" — **International crimes**

- “Under present International Law it is clear that States, by definition, cannot be the subject of criminal sanctions” (ICTY)
- States may be liable under the Int. Law of state responsibility:
  - Int. Wrongful act $\rightarrow$ claim /right for reparation /satisfaction etc.
- The perpetraoton of an international crime, apart from personal responsibility on the part of certain physical persons, may constitute an action which founds state responsibility according to the Int. Law of State Responsibility.
- **Personal and State responsibility may emanate from the SAME action.**
Defintion of "crime" — International crimes

International crimes differ from ‘International delicts’ or ‘crimes of international concern’:
[indicatively]

Slave trade, piracy, illegal seizur of aircraft, hostage taking, torture, crimes against diplomats, illegal acts against int. navigation, int. trade /finance crimes, crimes against the environment etc.
International Law – Int. Penal Law

- **Treaty law** + **Customary law** (: uniform practice + “opinio juris”) ➞ identical in strength – interplay /interaction
- **General Principles of law** (derived from national laws, when needed)
- **Jurisprudence (case law)** (int. & national courts): *secondary source*
  (the jurisprudence of ICTY & ICTR is of the utmost importance for the interpretation of IHL)
International Law – Int. Penal Law

Key facts to remember...

• **International Law is not necessarily "just" and equitable law at all times.**

• **It is just a set of rules, born & matured through conflicts, confrontations and political & economical compromise.**
It is much better than a "legal void", though!

...if modern society wants to have a last chance at eliminating situations like the one in the bottom right picture!
International Law – Int. Penal Law

➔ **Key facts to remember...**

• In the context of today, the administration of international Penal justice is primarily connected to the maintenance of peace & security and the respective *political balance*.

• Such a fact means compromise and delays and even abstention from penal prosecution...
International Law – Int. Penal Law

→ Key facts to remember...

• For example the then *ICTY* Prosecutor, Carla del Ponte, after evaluation of the relevant investigation report, *decided not to prosecute* any NATO official for the Kosovo bombing campaign (2000).
Key facts to remember...

- Int. Humanitarian Law has not always been at the stage we experience it today...
International Law – Int. Penal Law

→ Key facts to remember...

• It took a great lot of blood and pain and hundreds of int. treaty and customary rules.

• 2nd half of the 19th century – all of the 20th century (approx. 150 – 180 years).
Who prosecutes international crimes?

• National legal systems.
• International Criminal Courts /Tribunals.
• "Internationalized" Criminal Courts /Tribunals.

How are they established?
• Unilateral /forceful mode: UN S.C. Resolutions (see ICTY, ICTR)
Some history...

• **End of 19th century:** first codifications of rules for the conduct of hostilities.

• Conventions of Geneva **1864**, St. Petersberg, **1868**.

• Hague Conventions **1899 & 1907**, esp. Hague IV "respecting the laws and customs of war on land" and attached Regulations.

[ its Preamble contains the "**Martens clause**" (see next slides) ]

• Geneva Conventions, **1929**.
Some history…

• General provisions for "responsibility" for breaches – namely "state responsibility. **No mention of personal responsibility (responsibility of physical persons).**

• Yet, these clauses and the "Martins clause", **formed the basis for the adjudication of war crimes at the Nuremberg Military Tribunal (1946), founded on personal penal liability!**
Some history...

Martens clause

• “Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience”

Friedrich Martens, the Russian delegate at The Hague Peace Conferences, 1899
Some history...

- **After WW I:** *failure* to establish an International criminal institution /tribunal (Treaty of Versailles, 28-06-**1919**)
- **League of Nations** (predecessor of the UN): *failure*
- Briand-Kellogg Pact, 27 Aug. **1928:** no use of force in international relations.
- **WW II:** *extensive extremities* and immense suffering...
- **International Military Tribunal, Nuremberg, 1946**
Some history...

• **London Agreement** for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 08, 1945 (Fr, USSR, US, UK – later, 19 more States): **led to the establishment of the International Mil. Tribunal, Nuremberg**

• Its Charter was annexed to the Agreement.
Some history...

- The birth certificate of modern Int. Criminal Law

*Charter, art. 6:*

- Crimes against peace
- War crimes
- Crimes against humanity
Some history...

• Tokyo Mil. Tribunal.

• **1948**, UN Convention for the punishment etc of genocide.

• **1949**, Four Geneva Conv. (: special ref. to the punishment of war crimes + legal obligation to pass legislation + "aut dedere aut judicare" – art. 49 /50 /129 /146.)

• **1968**, UN Convention on the **Non-Applicability of Statutory Limitations** to War Crimes and Crimes Against Humanity.

• **1977**, Protocols Additional to the Geneva Conv. of 1949 (IAC /NIAC).

• **1989 /1990…, end of the "cold war"**, the UN S.C. in gear again…
Some history...

UN G.A. Resolutions of 1946 & 1947 ➔ "Nuremberg Principles".
Some history...
Nuremberg principles: int. customary law!

(1) **Personal liability** for international crimes.

(2) **Internal legislation to the contrary, does not relieve** the person under international law.

(3) The fact that a person who committed an act which constitutes an int. crime acted as **Head of State** or responsible **Government official does not** relieve him from responsibility...

(4) The fact that a person acted pursuant to **order of his Government or of a superior does not** relieve him from responsibility.... provided a moral choice was in fact possible to him.
Some history...

Nuremberg principles: int. customary law!

(5) Right to a **fair trial** on the facts and law.

(6) Punishable: crimes against peace, war crimes, crimes against humanity.

(7) **Complicity** [to the above crimes]... is also a crime under international law.
Who prosecutes international crimes these days...

• **Ad hoc International Tribunals**
  
  → International Criminal Tribunal for the former Yugoslavia – ICTY
  
  → International Criminal Tribunal for Rwanda – ICTR

Established with UN S.C. Resolutions

• **International Criminal Court / ICC**

Who prosecutes international crimes these days...

**Internationalized Criminal Tribunals**: Between internationalization & decentralization (for social & fiscal reasons, security concerns etc).

- **2002 – Special Court for Sierra Leone** ➔ major perpetrators – grave breaches of IHL, since Nov. 30, 1996
Who prosecutes international crimes these days...

2001 – Extraordinary Chambers in the Courts of Cambodia ➔
Who prosecutes international crimes these days...

- **Special Tribunal for Lebanon:** for the prosecution of the perpetrators of the attack which resulted in the death of Prime Min. Rafik Hariri and 22 other persons, on Feb. 14, 2005 (failure of an agreement with the Gov. Of Lebanon → UN S.C. Res., Chapter VII, UN Charter.

- ... "terrorist acts", Lebanon Penal Code.

- Situated out of Lebanon.

- Very interesting jurisprudence on the elements of 'terrorism' as a crime.
Who prosecutes international crimes these days...

Judicial Panels for East Timor & Kosovo (to augment inadequate or unwilling internal judicial systems.)
Who prosecutes international crimes these days...

But...

- The **Iraqi Special Tribunal - IST**, Dec. 10, 2003, is **not accepted as a proper Tribunal**.

- **Death penalty & no judicial guarantees**...

IST sentenced Saddam Hussein to death – Iraq, 'year of the Lord' 2006
ICC and genocide, war crimes & crimes against humanity
"TRIGGER MECHANISM" for prosecution before the ICC

1. Referral of a "situation" by a member-State.

2. Referral of situation by the UN S.C. (e.g. the situation in Darfur, Sudan)

3. Proprio motu by the Prosecutor.

! Deferral of investigation or prosecution by a UN S.C. Resolution (12 months + renewal)
Crimes within the jurisdiction of the Court

The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with [its] Statute with respect to the following crimes:

• (a) The crime of genocide;
• (b) Crimes against humanity;
• (c) War crimes;
• (d) The crime of aggression.
...from the ICC Charter

Core crimes
Genocide (term devised by R. Lemkin, 1944)
For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
Genocide

• (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
• (d) Imposing measures intended to prevent births within the group;
• (e) Forcibly transferring children of the group to another group.
Crimes against humanity
Crimes against humanity (irrespectively of "war" or peace time)

For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
Crimes against humanity (irrespective of "war" or peace time)

- (d) **Deportation** or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
Crimes against humanity (irrespectively of "war" or peace time)

- (f) Torture;

- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
Crimes against humanity (irrespective of "war" or peace time)

- (h) **Persecution** against any identifiable **group or collectivity** on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
Crimes against humanity (irrespectively of "war" or peace time)

• (i) Enforced **disappearance** of persons;
• (j) The crime of **apartheid**;
• (k) Other **inhumane acts** of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.
War Crimes
War crimes

- The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.
War Crimes – Grave breaches, GC, 1949

For the purpose of this Statute, "war crimes" means:

• (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
War Crimes – Grave breaches, GC, 1949

- (i) Wilful killing;
- (ii) Torture or inhuman treatment, including biological experiments;
- (iii) Wilfully causing great suffering, or serious injury to body or health;
- (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
War Crimes – Grave breaches, GC, 1949

- (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
- (vii) Unlawful deportation or transfer or unlawful confinement;
- (viii) Taking of hostages.
• b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

• (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
War Crimes – violations of laws & customs of IAC

• (ii) Intentionally directing attacks against **civilian objects**, that is, objects which are not military objectives;

• (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a **humanitarian assistance or peacekeeping mission** ... so long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
War Crimes – violations of laws & customs of IAC

- (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
War Crimes – violations of laws & customs of IAC

• (v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are **undefended** and which are **not military** objectives;

• (vi) Killing or wounding a **combatant who**, having laid down his arms or having no longer means of defence, **has surrendered** at discretion;
War Crimes – violations of laws & customs of IAC

- (vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;

- (viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;
War Crimes – violations of laws & customs of IAC

(ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
War Crimes – violations of laws & customs of IAC

• (x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
...the infamous Japanese Unit 731

What is Unit 731?

- during the Second Sino-Japanese War (1937–1945) and World War II.
- Unit 731 was a covert biological and chemical warfare research and development unit of the Imperial Japanese Army.
- lead by the commander Shiro Ishii
...the infamous Japanese Unit 731
**War Crimes — violations of laws & customs of IAC**

- (xi) Killing or wounding *treacherously* individuals belonging to the hostile nation or army;
- (xii) **Declaring that no quarter will be given**;
- (xiii) Destroying or seizing *the enemy's property* unless such destruction or seizure be imperatively demanded by the necessities of war;
War Crimes — violations of laws & customs of IAC

- (xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;

- (xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;

- (xvi) Pillaging a town or place, even when taken by assault;
War Crimes – violations of laws & customs of IAC

- (xvii) Employing poison or poisoned weapons;
- (xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
War Crimes – violations of laws & customs of IAC

• (xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;

(JHP, SJ munitions, dum – dum, etc)
War Crimes – violations of laws & customs of IAC

• (xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, ... ... ;
War Crimes – violations of laws & customs of IAC

- (xxi) Committing outrages upon personal dignity, in particular **humiliating and degrading treatment**;
- (xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, **or any other form of sexual violence** also constituting a grave breach of the Geneva Conventions;
War Crimes – violations of laws & customs of IAC

• (xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations; [human shields]

• (xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
War Crimes – violations of laws & customs of IAC

• (xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;
War Crimes – violations of laws & customs of IAC

- (xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.
War Crimes – common art. 3, NIAC

• (c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions... namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:
War Crimes – common art. 3, NIAC

• (i) **Violence to life and person**, in particular murder of all kinds, mutilation, cruel treatment and torture;

• (ii) Committing **outrages upon personal dignity**, in particular humiliating and degrading treatment;

• (iii) Taking of **hostages**;
War Crimes – common art. 3, NIAC

• (iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.
War Crimes — violations of the laws & customs of NIAC

• (e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:
  
  • (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
War Crimes – violations of the laws & customs of NIAC

- (ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions...;

- (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission... so long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
War Crimes – violations of the laws & customs of NIAC

• (iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

• (v) Pillaging a town or place, even when taken by assault;
War Crimes – violations of the laws & customs of NIAC

- (vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;
War Crimes — violations of the laws & customs of NIAC

- (vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;

- (viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
War Crimes – violations of the laws & customs of NIAC

- (ix) Killing or wounding treacherously a combatant adversary;
- (x) Declaring that no quarter will be given;
War Crimes – violations of the laws & customs of NIAC

• (xi) Subjecting persons who are in the power of another party to the conflict to **physical mutilation** or to **medical or scientific experiments of any kind** which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
War Crimes – violations of the laws & customs of NIAC

• (xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;

• (xiii) Employing poison or poisoned weapons;
War Crimes – violations of the laws & customs of NIAC

- (xiv) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
- (xv) Employing bullets which expand or flatten easily in the human body, ...
A few more key facts on ICC...

- Mixture of law & politics.
- Slow & expensive judicial system.
- "Opt out" clause for war crimes for 7 years...
- Yet, a MAJOR step forward. If it hadn't been established, things would be much worse...
- International legal personality, distinct from the UN.
A few more key facts on ICC...

- Situated in The Hague (NL).
- **Penalties:**
  - *No death penalty*
  - Imprisonment up to 30 yrs
  - Life imprisonment
  - Fines
  - Forfeiture of assets, property etc
A few more key facts on ICC...

- **Composition of the Court:**
  - (a) The Presidency;
  - (b) An Appeals Division, a Trial Division and a Pre-Trial Division;
  - (c) The Office of the Prosecutor; [1 Pr. - 2 DPrs]
  - (d) The Registry.
A few more key facts on ICC...

- Non-applicability of statute of limitations.
- Jurisdiction only on crimes committed after July 1st, 2002.
- The court "steps in" when States are unwilling or unable to prosecute.
- The Court shall satisfy itself that it has jurisdiction in any case brought before it (ever by referral by the UN S.C.).
• Superior orders do not relieve a person, unless:
  
  • (a) The person was under a legal obligation to obey orders of the Government or the superior in question;

  • (b) The person did not know that the order was unlawful; and

  • (c) The order was not **manifestly unlawful**.