



Concepts, tasks and legitimacy

- **What are "crimes under international law?"**

Crimes under international law encompass all crimes that involve direct individual criminal responsibility under international law, namely, **genocide, crimes against humanity, war crimes, and the crime of aggression**. These so-called core crimes are "the most serious crimes of concern to the international community." [Preamble and Article 5 of the Rome Statute].

A comprehensive set of **general principles** of international criminal law has emerged in recent years. These principles are now fully codified in Part 3 of the Rome Statute of an International Criminal Court (Articles 22-33).

- **Protected values**

International criminal law protects "**peace, security and [the] well-being of the world**" as the fundamental values of the international community. (see Preamble (3) of the ICC Statute). International criminal law is thus based on a broad concept of peace, which means not only the **absence of conflict** between States, but also the **conditions within** a State. Therefore, a threat to world peace can be presumed even as a result of **massive violations of human rights** within one State.

Crimes under international law affect "**the international community as a whole**." (see Preamble (4) and (9), and Art. 5 (1) of the ICC Statute). An attack on the fundamental values of the international community lends a crime an international dimension and turns it into a crime under international law. For this reason, the norms of international criminal law **penetrate the "armor of State sovereignty"** (Jeschek). Thus, its link to the interests of the international community lends international criminal law its specific legitimacy.

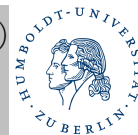
- **The "international element" of crimes under international law**

A connection to the most important values of the international community is established for all crimes under international law through one common characteristic, the so-called **international element**: all international crimes presume a context of systematic or large-scale use of force. As a rule, it is a collective that is responsible for this use of force, typically a State.

- **Purposes of punishment**

International criminal law gains its legitimacy as criminal law from **the purposes of punishment**, which can be transferred from domestic criminal law.

International criminal law undeniably serves the idea of **retribution**. However, the **preventive effect** of international criminal law is even more important (deterrence, norm



stabilization). It may also have a specific preventive effect on individual (potential) perpetrators.

Two specific effects of the punishment of crimes under international law are a trial proceeding's **acknowledgment** and **truth-finding functions**. Convictions represent official acknowledgment of past injustices and the suffering of victims. They destroy the foundation for denial of atrocities and prevent falsification of history.

Finally, **individual accountability** makes it clear that it was not an abstract entity, such as a State, that committed the crimes under international law but certain individuals, working together. As such, it helps avoid charges of collective guilt.

- **The principle of legality in international criminal law (*nullum crimen, nulla poena sine lege*)**

The principle of legality (*nullum crimen sine lege*) is part of customary international law: at the time the crime was committed, a **written or unwritten norm** must have existed on which to base criminality under international law. In addition, the **principle forbids retroactive punishment** or analogies as a basis for punishment. It also extends to sanctions (*nulla poena sine lege*).

Recommended reading: Gerhard Werle: *Principles of International Criminal Law*, (2005), Part One (B); M. Cherif Bassiouni: The Sources and Content of International Criminal Law: A Theoretical Framework, in M. Cherif Bassiouni (ed.), *International Criminal Law*, Vol. 1, 2nd edn., (1999), pp. 1 et seq.; Daniel Joyce: The Historical Function of International Criminal Trials: Re-thinking International Criminal Law, in: *Nordic Journal of International Law* 73 (2004), pp. 461-484

Universal jurisdiction, the duty to prosecute, and amnesty

- **The power to prosecute and punish, and universal jurisdiction**

Crimes under international law are directed against the **interests of the international community as a whole**. Since every legal system may defend itself with criminal sanctions against attacks on its elementary values, the international community is empowered to prosecute and punish these crimes under international law, **regardless of who committed them or against whom they were committed**.

It follows from the universal nature of crimes under international law that each State is affected by them. **Every country** is thus allowed to prosecute criminals in all cases without restriction; it is not important where the conduct in question took place, who the victims were, or whether any other link with the prosecuting State can be established. Thus the **principle of universal jurisdiction** applies to crimes under international law.



- **The duty to prosecute**

International law not only allows States to prosecute international crimes through universal jurisdiction, but even obligates them to so under certain circumstances.

- The duty to prosecute by the State of commission

Customary international law today recognizes that the State in which a crime under international law is committed has a **duty to prosecute**. This duty also exists under treaty law, e.g. for genocide (Art. 4 of the Genocide Convention), for crimes under international law that constitute torture (Art. 7 of the Torture Convention), and for certain grave breaches of the Geneva Conventions, such as killings, serious bodily injury or unlawful confinement (Art. 146 of Geneva Convention IV).

- Do “Third States” have a duty to prosecute?

Crimes under international law are typically State crimes; leaving it up to the State of commission to prosecute international crimes would often mean making the perpetrators their own judges. Therefore, the question of whether and to what extent there exists a **duty to prosecute on the part of third States** is of supreme legal and practical relevance:

The duty to prosecute has so far been universally recognized only for **war crimes in international armed conflicts**. The Geneva Conventions provide that the contracting States must either prosecute grave breaches of the Conventions themselves, regardless of where, by whom, or against whom they are committed, or “hand such persons over for trial” to another State (see Art. 146 of Geneva Convention IV). This **obligation** is called the principle of *aut dedere aut judicare*. The scope of the Geneva Conventions’ provisions on grave breaches correctly also includes crimes committed in non-international armed conflicts.

Whether a third State also has a **customary law duty** to prosecute for genocide and crimes against humanity remains in dispute. In any case, there is no treaty-based requirement. The ICC Statute leaves this question open.

- Amnesties and truth commissions

Instead of only relying on criminal law to address past injustices there are other instruments that may be applied, such as the use of amnesties or the establishment of truth commissions. No clear position on the question of whether amnesties or truth commissions can **replace criminal proceedings** has yet emerged in international (criminal) law. It is certain, at least, that an across-the-board exemption from criminal responsibility is **unacceptable** (e.g. general amnesties), to the extent that international law creates a duty to prosecute and punish.

Recommended reading: Gerhard Werle: *Principles of International Criminal Law* (2005), Part One (E); M. Cherif Bassiouni: Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice, 42 *Virginia Journal of International Law* (2001), pp. 81 et seq.; Helmut Gropengießer / Jörg Meißner: Amnesties and the Rome Statute of the International Criminal Court, in: *International Criminal Law Review* 5 (2005), 267-300



Enforcement of international criminal law

- **"Direct" and "indirect" enforcement**

The rules of international criminal law can be applied by both international and national courts. The prosecution of crimes under international law by international courts is called **direct enforcement**. The prosecution of crimes under international law by national courts is called **indirect enforcement**.

Until recently, international criminal law was almost entirely dependent on indirect enforcement mechanisms. Examples for the direct enforcement of international criminal law are the International Military Tribunals at Nuremberg and Tokyo, the United Nations *ad hoc* Tribunals and – now – the International Criminal Court.

- **National and international criminal justice systems**

The relationship between national and international criminal justice systems can be regulated in various ways.

- **International Military Tribunal at Nuremberg:** This court was endowed with exclusive jurisdiction, as far as the trials of the major German war criminals of World War II were concerned (principle of exclusivity). According to Art. 4 of the London Agreement, jurisdiction was only granted to the country of commission for other perpetrators.
- **United Nations *ad hoc* International Criminal Tribunals:** both the ICTY and ICTR statutes accept the concurrent jurisdiction of national courts. Collisions are resolved according to the principle that international courts take precedence. (see Art. 9 ICTY Statute and Art. 8 ICTR Statute)
- **International Criminal Court:** The ICC aims at supplementing and not replacing national jurisdictions. It only acts – subsidiary – if States are unwilling or unable to genuinely carry out an investigation or prosecution relating to a crime under international law (**principle of complementarity**), see Art. 1 and 17 ICC Statute

- **International criminal law in practice**

- The International Criminal Court

The International Criminal Court came into being on 1 July 2002, when the ICC Statute entered into force. On 11 March 2003, it took up operations in The Hague. The court has jurisdiction over genocide, crimes against humanity, and war crimes, committed after 1 July 2002 on the territory of a State party or by a citizen of a State party. If situations in which it appears that such crimes have been committed are referred to the Prosecutor by the U.N. Security Council under Chapter VII of the U.N. Charter, the court has jurisdiction over the crimes regardless of the place of commission or the nationality of the perpetrator.



➤ The Yugoslavia Tribunal

The International Criminal Tribunal for the former Yugoslavia was created on the basis of Security Council Resolution 827 and is located in The Hague. It has jurisdiction to prosecute war crimes, genocide, and crimes against humanity, committed after 1 January 1991 on the territory of the former Yugoslavia.

➤ The Rwanda Tribunal

The International Criminal Tribunal for Rwanda, created by U.N. Security Council Resolution 955 and based in Arusha, Tanzania, has jurisdiction over genocide, crimes against humanity and violations of Common Article 3 and Additional Protocol II of the Geneva Conventions, committed between 1 January and 31 December 1994. In addition, its jurisdiction extends to crimes committed by Rwandan citizens within this period but on the territory of neighboring States.

The organization and procedure of the Tribunal resemble the model of the Yugoslavia Tribunal. In addition, the Appeals Chamber of the Yugoslavia Tribunal also serves as the Appeals Chamber for the Rwanda Tribunal.

Recommended reading: Gerhard Werle: *Principles of International Criminal Law* (2005), Part One (F); Antonio Cassese: On the Current Trend Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law, 10 *European Journal of International Law* (1998), pp. 1 et seq.; Mahnoush H. Arsajani / W. Michael Reisman, The Law-in-Action of the International Criminal Court, in: *American Journal of International Law* 99 (2005), 385-403