IHL, ICL and the ICC in a glimpse¹

The purpose of this leaflet is to provide the participants of the ICC Moot Court Competition² with rudimentary knowledge of the terms “International Humanitarian Law” (IHL) and “International Criminal Law” (ICL), a brief introduction to the International Criminal Court (ICC), and a general understanding of the interrelation between them.

Since the leaflet provides an overview and does not cover all the issues, theories and aspects that are relevant to IHL and ICL, it is suggested that participants review the non-exhaustive list of “recommended reading” at the end of each topic.

International Humanitarian Law

“Conflict is by its nature chaotic, and it is incumbent on the participants to reduce that chaos and to respect international humanitarian law.”³

IHL is a branch of public international law that regulates the conduct of hostilities (jus in bello) whether on land, in the sea or in the air. IHL strikes a delicate balance between the legitimate military objectives of the parties “to weaken the military forces of the enemy” (also known as the principle of military necessity) and the aspiration to alleviate “as much as possible the calamities of war” (also known as the principle of humanity).⁴

“IHl governs the conduct of both internal and international armed conflicts. It applies from the moment armed conflicts are initiated and extends beyond the cessation of hostilities, until a general conclusion of peace has been reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, IHL continues to apply throughout the

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² http://iccmoot.com/
³ ICTY (Appeals Chamber), Blaškić, Judgement, 29 July 2004, § 711.
⁴ Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, Saint Petersburg, 1868. See also, e.g., Hague Convention IV, 18 October 1907, Preamble (also known as the ‘Martens Clause’).
territory of the warring States or, in the case of internal conflicts, the entire territory under the control of a party, whether or not actual combat takes place there.⁵

“A large number of customary rules have been developed by the practice of States and are an integral part of the international law relevant to the question posed. The ‘laws and customs of war’ - as they were traditionally called - were the subject of efforts at codification undertaken in The Hague (including the Conventions of 1899 and 1907), and were based partly upon the St. Petersburg Declaration of 1868 as well as the results of the Brussels Conference of 1874. This ‘Hague Law’ and, more particularly, the Regulations Respecting the Laws and Customs of War on Land, fixed the rights and duties of belligerents in their conduct of operations and limited the choice of methods and means of injuring the enemy in an international armed conflict. One should add to this the ‘Geneva Law’ (the Conventions of 1864, 1906, 1929 and 1949), which protects the victims of war and aims to provide safeguards for disabled armed forces personnel and persons not taking part in the hostilities. These two branches of the law applicable in armed conflict have become so closely interrelated that they are considered to have gradually formed one single complex system, known today as international humanitarian law.”⁶

The customary rules of IHL apply to all belligerent States, regardless of their justification for or their position on the legality of the armed conflict (jus ad bellum). Compliance with customary IHL is obligatory and is not dependent upon reciprocity or the compliance of the other party to the conflict with the IHL rules.

Customary IHL can be found in international provisions that codify it, such as the Hague Conventions of 1899 and 1907, the Geneva Conventions of 1949 (GC) and the two Additional Protocols to the Geneva Conventions of 1977 (AP); and in general customary international law. A treaty, a convention, or other similar documents may include provisions codifying (or that may become in time) customary IHL when there is “evidence of a general practice accepted as law”⁷ (looked for primarily in the actual practice and opinion juris of States). For example, not all the provisions of the Additional Protocols of 1977 reflect customary IHL, and as a result these specific provisions (that do not coincide with the general practice of States that is accepted as law) are not binding for States that are not parties to these protocols.

⁵ ICTY (Appeals Chamber), Tadić, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, § 70. See also ICC (Trial Chamber III), Bemba, Judgment, 21 March 2016, §§ 128, 141.
⁶ ICJ, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, § 75.
⁷ Statute of the International Court of Justice, art. 38(1)(b).
In addition to the principles of military necessity and humanity, IHL rules include other fundamental principles, such as the principle of distinction and the principle of proportionality.

**The principle of distinction**

The principle of distinction, a fundamental pillar of IHL, requires parties to the conflict to differentiate between combatants and civilians, and between military objectives and civilian objects.\(^8\)

A **combatant** is defined as either (i) a member of the armed forces of a party to the conflict (including members of militias or volunteer corps forming part of such armed forces); or (ii) a member of militias or other volunteer corps belonging to a party to the conflict that fulfill four cumulative conditions: (1) being commanded by a person responsible for his subordinates; (2) having a fixed distinctive sign recognizable at a distance; (3) carrying arms openly; and (4) conducting their operations in accordance with the laws and customs of war.\(^9\)

A **military target** is defined as an object that: (1) by its nature, location, purpose or use make and effective contribution to military action; and (2) its total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.\(^10\) As a result of this definition certain objects are considered to be ‘dual use’ objects (such as roads and bridges) and therefore, depending on the circumstances, could be considered as military targets.

**Civilians** and **civilian objects** are defined by the negative – as long as there is doubt about the status of a person or object, they are to be considered civilian.\(^11\)

However, a **civilian who takes an active part in the hostilities** (DPH) loses the immunity that is attached to every civilian and which prevents them from being targeted by the opposing party to the conflict “for such time as they take a direct part in hostilities”.\(^12\) To what extent and at which point the civilian loses such protection or potentially even the civilian status is a contentious issue.\(^13\)

In addition to requiring the parties to distinguish between military and civilian, the principle requires that, in an armed conflict, only combatants, DPH, and military objectives be directly

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\(^8\) AP I, art. 48. See, e.g., ICTY (Appeals Chamber), *Kordić and Čerkez, Judgement*, December 17, 2004, § 54.

\(^9\) GC III, art. 4(2). See also AP I, arts. 1., 43, 44, and infra fn. 13.

\(^10\) AP I, art. 52(2).

\(^11\) AP J, arts. 50(1), 52(1), 52(3).

\(^12\) AP J, arts. 51(3). See also ICC, *Rome Statute*, Art. 8(2)(b)(i).

targeted. Care should be taken to spare the civilian population, individual civilians and civilian objects. For example, in planning or deciding upon an attack the person must do “everything feasible” to verify that the objectives to be attacked are indeed military targets.\textsuperscript{14}

\textbf{The principle of proportionality}

The principle of proportionality is a specific example of the broader principle of humanity. According to the principle of proportionality an attack is to be considered as indiscriminate if it may be expected to cause incidental loss of civilian life, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.\textsuperscript{15}

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\textsuperscript{14} See, e.g., AP I, art. 57(2).

\textsuperscript{15} AP I, arts. 51(5)(b), 57(2)(a)(iii). See also ICC, Rome Statute, Art. 8(2)(b)(iv).
International Criminal Law

"Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."16

ICL is a branch of public international law that concerns the criminal responsibility of individuals for international crimes. It is premised on the idea that international legal prescriptions may impose obligations on individuals.

ICL is considered to be a relatively new branch of public international law and has developed from different sources. For example, war crimes originate in IHL, whereas genocide and crimes against humanity find their origins in international human rights law. Since many IHL violations are criminalized as a war crime, IHL serves as a point of reference in understanding the corresponding crime.

Like other branches of public international law, the sources of ICL may be found in treaties, customary international law and general principles of law. However, contrary to other fields of public international law, the rights that guarantee a fair trial, and in particular the principle of legality, require to ascertain that the crime was sufficiently defined and clear as to give a fair notice to the perpetrator that the conduct is criminal.

ICL can be enforced by national courts, hybrid courts or by international courts, but it was primarily enforced by the former. However, already in the Convention on the Prevention and Punishment of the Crime of Genocide, from 1948, the possibility that a perpetrator could be tried by “a competent tribunal of the State in the territory of which the acts was committed, or by such international penal tribunal”17 was envisaged.

International Crimes

There are no unanimously agreed upon characteristics for an international crime, and consequently, no clear list of international crimes, and even less is defined regarding their elements.18 However, it is generally agreed that international crimes consist of violations of customary rules that are considered so grievous that the international community as a whole has the interest, and the right, to repress such behavior and to bring the perpetrator...
to justice. As a result, the jurisdiction to try perpetrators for international crimes before national courts may be found in the legislation of most States, regardless of the perpetrators’ or the victims’ nationality or the territory in which the crime was committed (universal jurisdiction).

It is commonly stated that war crimes, crime of aggression, crimes against humanity, torture and genocide are international crimes. Other international crimes may also include slavery, piracy and, possibly, terrorism and some transnational crimes. However, the definition of each crime, its elements, the scope of the criminal act and criminal responsibility are not always perceived in a uniform manner. Scholars have even been arguing in regard to the crime of piracy, which is traditionally considered one of the most ancient of international crimes, claiming that it fails to fulfill the requirements necessary to be classified as an international crime.20

**International Criminal Tribunals**

International criminal tribunals are one of the enforcement branches of ICL (also considered to be the procedural aspect of ICL). In the previous century, ICL was enforced at the international level, for example, by the Nuremburg Tribunal, the International Military Tribunal for the Far East, the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda. All the above tribunals were created to deal with a specific conflict. The ICC is different in this regard, and will be discussed further below.

It should be noted that international criminal tribunals do not have, like national courts, a criminal code or penal laws, but rather statutes that include the crimes over which they have jurisdiction. The statutes do not purport to list all the international crimes. In line with the principle of nullum crimen sine lege, the General opined that the ICTY “should apply rules of international

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humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise”.

By bringing to justice those most responsible for the international crimes, international criminal tribunals have developed this corpus of law, while simultaneously contributing to the standardization of laws that safeguard the accused human rights.

“Four conditions must be fulfilled before an offence may be prosecuted under Article 3 of the Statute [violations of the laws or customs of war]: (i) the violation must constitute an infringement of a rule of international humanitarian law; (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met; (iii) the violation must be serious, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim; and (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.”

ICTY (Appeals Chamber), Kunarac, Kovać, and Vuković, Judgement, 12 June 2002, § 66.

- Recommended reading:


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International Criminal Court

The ICC is a treaty-based permanent institution with legal personality, created to put an end to impunity for the perpetrators of “the most serious crimes of concern to the international community as a whole”,\(^{22}\) namely, the crime of genocide, crimes against humanity, war crimes and the crime of aggression.

Since the definition of crimes was not tailored to a specific conflict but was formulated from a more general and relatively detail-oriented point of view, the Rome Statute is an important milestone in the codification of international crimes. While, ICL is a mixture of both public international law combined with terms and principles derived from national criminal laws, the establishment of the ICC “has given a stupendous impulse to the evolution of a corpus of international criminal rules proper”.\(^{23}\)

In addition to the subject-matter parameter, mentioned above, the ICC jurisdiction is qualified as follows:

- **‘Natural person’ jurisdiction** – the Court only has jurisdiction over natural persons over the age of 18 at the time of the alleged commission of the crime. (Arts. 1, 25-26).
- **Temporal jurisdiction** – the Court has jurisdiction over conduct that occurred after the Rome Statute entered into force, i.e., 1 July 2002 (Arts. 11, 24(1)). If the State became a Member State at a later date, the Court will only have jurisdiction for conduct committed following the entry into force of the Rome Statute for that State. However, every State (including Member States that joined after 1 July 2002) may accept the Court’s jurisdiction for prior events (Art. 12(3)). A different temporal jurisdiction exists for the crime of aggression (see Arts. 15 bis and 15 ter).
- **Territorial and personal jurisdiction** – the Court has jurisdiction for crimes committed in the territory of Member States (the territorial principle) or on board a vessel or aircraft registered in a Member State (the flag principle). In addition, the Court has jurisdiction over individuals who are nationals of a Member State (the active personality principle). The Court has similar jurisdiction with regard to States which are not members of the Rome Statute, but have accepted the Court’s jurisdiction on an ‘ad hoc’ basis (see Art. 12(3)).

Notwithstanding the above, if the case is referred to the ICC by the United Nations Security Council under Chapter VII, the Court has jurisdiction, according to the referral, regardless of the above ‘geographical’ limitations (the universality principle).

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\(^{22}\) *Rome Statute*, Preamble.

The exercise of the Court’s jurisdiction is bound by admissibility limitations:

- According to the **complementarity principle** (see Arts. 1 and 17), which forms the basis of the ICC’s existence, the Court can only exercise its jurisdiction where national jurisdictions are “unwilling or unable genuinely to carry out the investigation or prosecution” (Art. 17(1)(a)). It is a court of last resort.\(^{24}\) As a corollary to the complementarity principle, the Court is prevented from exercising its jurisdiction according to the **ne bis in idem** principle (see Arts. 20 and 17(1)(c)), except in cases where the relevant proceedings were conducted for the purpose of shielding the individual from the Court’s jurisdiction (Art. 17(2)(a)).

- The case must be of sufficient **gravity** to justify further action by the Court (Art. 17(1)(d)).\(^{25}\) In addition, taking into account the gravity of the crime and the interests of victims, the Prosecutor may consider that there are “substantial reasons to believe that an investigation would not serve the **interest of justice**” (Art. 53(1)(c)).\(^{26}\)

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\(^{25}\) ICC (Pre-Trial Chamber I), *Situation in Georgia*, Decision on the Prosecutor’s request for authorization of an investigation, 27 January 2016, § 51; ICC (Appeals Chamber), *Situation in DRC*, Judgment, 13 July 2006, §§ 69-79.