

International Criminal Law -- Exercises.

(MONDAY) EXERCISE #1: Where should crimes be prosecuted? Which State (national authority) has criminal jurisdiction? In your view, what should be the rule?

Consider the following circumstances:

1. The boundary between State A and State B is a river. A citizen of A, standing in A, shoots and kills a citizen of B, who is standing in B. It turns out that A was assisted in the attack by a citizen of C, who arranged for B to be at the location where A could shoot her.
2. In Heidelberg, a student from M is assaulted by an illegal migrant from P. The migrant escapes to Q, where (fearing persecution if she is returned to Heidelberg) she seeks (and gains) asylum in Q.
3. A citizen of X is murdered by agents of the Government of Y inside Y's embassy in Z.
4. A group of environmental activists takes control of a passenger (cruise) ship, filled with tourists, in the Pacific Ocean, demanding payment of a large ransom to support world-wide efforts to combat "global warming." The activists are from Australia; the ship flies the Liberian flag; the captain and crew are predominantly Spanish; most of the tourists are from Japan, Saudi Arabia, and Russia; the ship sailed from Manila and was scheduled to arrive in Guayaquil.
5. In (an imaginary country called) Confusia, the two predominate ethnic groups have gone to war with each other. They have each declared their intent to eradicate the other. The killing has spread across the country, and to date many hundreds of thousands of men, women and children have died. So far, no evidence exists of any "outside" involvement; the violence has not crossed any of Confusia's border with other countries; but knowledgeable observers predict that the killing will not stop until one side has "eliminated" the other.
6. Cybercriminals located in R have been stealing money from the bank accounts of elder citizens of E who live in G. The banks are chartered in G.
7. Sometime in the future, tourists will be able to travel to a space station. Assume that a tourist from one country assaults tourists from other countries, first on the trip to the space station and then while on board the space station.
8. In the State of Q, abuse of drugs (especially opioids and other narcotics) has reached epidemic proportions. Accordingly, the Government of Q has raised the price of these drugs significantly. In response, traffickers have increased their illegal importation (smuggling) activities, typically by aircraft and ship. Q has therefore declared that illegal importation of these substances is a "threat to its national security" and has begun to interdict aircraft and vessels

outside its jurisdiction (that is, on and over the high seas), regardless of nationality, arresting and prosecuting those it apprehends on the basis of “protective” jurisdiction. In your view, is that legitimate?

(TUESDAY) EXERCISE #2: What are the specific elements of the international crimes of (1) genocide, (2) crimes against humanity, (3) aggression? Focus, in particular, on Articles 6, 7 and 9 of the Rome Statute.

Article 6: Genocide

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;
- (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.

Article 7: Crimes against humanity

1. 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;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (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;
- (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.

2. For the purpose of paragraph 1:

- (a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;
- (b) "Extermination" includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;
- (c) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;
- (d) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;
- (e) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;
- (f) "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;
- (g) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;
- (h) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;
- (i) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above

Article 8 bis: Crime of aggression

1. For the purpose of this Statute, "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.

2. For the purpose of paragraph 1, "act of aggression" means 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. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:

- (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
- (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
- (c) The blockade of the ports or coasts of a State by the armed forces of another State;
- (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
- (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
- (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
- (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement.

Crimes Against Humanity: Here is the link for the draft articles for a convention on crimes against humanity, adopted by the International Law Commission on First Reading in 2017: A/CN.4/L.892 (226 may 2017): <http://legal.un.org/docs/index.asp?symbol=A/CN.4/L.892>. _How does it differ from the Rome Statute?

(WEDNESDAY) EXERCISE #3: How does a case get started in the ICC?

Article 13: Exercise of jurisdiction

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

- (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;
- (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or
- (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

(Wednesday) Exercise #4: Modes of Participation

In what circumstances can an individual be found guilty before the ICC if he/she did not actually “commit” the crime in question? When is there criminal liability for “aiding and abetting,” “assisting,” “facilitating,” “conspiring,” “inciting,” etc.? What is a “joint criminal enterprise”?

Article 25: Individual criminal responsibility

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.
2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.
3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
 - (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
 - (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
 - (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
 - (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
 - (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
 - (ii) Be made in the knowledge of the intention of the group to commit the crime;
 - (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;

(f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

3 *bis*. In respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State.

4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

Article 28: Responsibility of commanders and other superiors

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where: Rome Statute of the International Criminal Court

(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and

(iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(FRIDAY) EXERCISE #5: Defenses: Duress/Superior Orders/Immunity: Before the ICC, when can a defendant successfully argue that, while he or she was in fact involved in the crime, he or she should not be held responsible? What if a government official “orders” an individual to commit the crime? Cf. *Erdemović* (IT-96-22), <http://www.icty.org/case/erdemovic/4>.

Article 31: Grounds for excluding criminal responsibility

1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:

(a) The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law;

(b) The person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court;

(c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph;

(d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm

than the one sought to be avoided. Such a threat may either be:

- (i) Made by other persons; or
- (ii) Constituted by other circumstances beyond that person's control.

2. The Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it.

3. At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in article 21. The procedures relating to the consideration of such a ground shall be provided for in the Rules of Procedure and Evidence.

Article 32: Mistake of fact or mistake of law

1. A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.

2. A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in article 33.

Article 33: Superior orders and prescription of law

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility 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.

2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

(TUESDAY) EXERCISE #6: Presentations on Treaty Crimes

Choose **one** (1) of the following, find the text of the relevant international convention, and come prepared to make a short presentation about its central elements:

- Int'l Convention on the Suppression and Punishment of the Crime of Apartheid
- Int'l Convention for the Protection of All Persons from Enforced Disappearance
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- UN Convention against Transnational Organized Crime and the Protocols Thereto
- UN Convention against Corruption
- Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition

(WEDNESDAY) EXERCISE #7: Presentations on Terrorism Conventions

Choose **one** (1) of the following, find the text of the relevant convention, and come prepared to make a short presentation about its central elements:

- 1979 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation
- 1979 Convention Against the Taking of Hostages
- 1988 IMO Maritime Terrorism Convention
- 1999 International Convention for the Suppression of the Financing of Terrorism
- 1999 International Convention for the Suppression of Terrorist Bombings

- Comprehensive convention definition

Generally see <https://www.un.org/en/counterterrorism/legal-instruments.shtml>.

(WEDNESDAY) EXERCISE #8: Cyber Crime

Investigate the current status of international law regarding “cybercrime.” What treaties, conventions, or other international agreements currently exist? Are any being negotiated?

Assume you have been asked to participate in the negotiation of such an instrument, what do you think it should cover? Specifically, propose your draft of (i) a definition of the offence of cybercrime and (2) the jurisdictional basis on which states parties to such a convention would be obligated to prosecute those who commit that crime.

(THURSDAY) EXERCISE #9: Limitations on Extradition

Read the 2016 bilateral U.S.–Serbia extradition treaty. Pay particular attention to articles 2 (extraditable offenses), 3 (nationality), (4) political and military offenses), 5 (*non bis in idem*) and 7 (death penalty).