

# Ukraine, Russia, and International Criminal Law

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## I. Introduction

## II. What is International Criminal Law?

### A. Definition of International Criminal Law

A system of law concerned with the punishment of those who commit international crimes:

- 1) Wrongs committed under international law; and
- 2) Prosecutable by an international tribunal<sup>1</sup>

### B. International Criminal Law Antecedents

- 1) Just War Theory
- 2) Piracy
  - Grave challenge in the 18-19<sup>th</sup> centuries
  - Development of universal jurisdiction

Example: *UN Law of Sea Convention (1983)* – “on the high seas, or in any other place outside the jurisdiction of any state, every state may seize a pirate ship...and arrest the persons and seize the property on board...[and] may decide upon the penalties to be imposed.”<sup>2</sup>

- 3) Slavery
  - Post-Wilberforce efforts to eliminate the African slave trade

Example: Brussels Act (1890) “General Act for the Repression of the African Slave Trade” (calls on all nations to criminalize and prosecute offenders).<sup>3</sup>

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<sup>1</sup> DAVID J. LUBAN, ET AL., INTERNATIONAL AND TRANSNATIONAL CRIMINAL LAW 4 (3d. ed. 2019).

<sup>2</sup> Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.

<sup>3</sup> General Act for the Repression of the African Slave Trade, July 2, 1890, 173 C.T.S 293.

### III. Development of Modern International Criminal Law

#### A. Nuremberg Trials (1945-1946)

- 1) What led to Nuremberg?
- 2) Crimes punished<sup>4</sup>
  - Crimes against peace.
  - War crimes.
  - Crimes against humanity.
- 3) Challenges
  - Victor's "justice"?
  - Legality.
- 4) Results
  - 22 defendants: 19 convicted; 3 acquitted.
  - Court limits crimes against humanity to those committed as part of Germany's aggressive war (a war that was illegal under the Hague Convention of 1907 and the Kellogg-Briand Pact of 1928).

#### B. International Criminal Tribunal for the Former Yugoslavia (ICTY) (1994- )

- 1) Development of international criminal law post-Nuremberg:
  - a) Genocide Convention (1948).<sup>5</sup> Declares genocide to be an international crime; authorizes national courts and international tribunals to punish individuals for genocide.
  - b) Geneva Conventions (1949).<sup>6</sup> Further develops the law related to war crimes; identifies "grave breaches" and authorizes nations to try violators.
- 2) UN Security Council creates ICTY in 1993 to address atrocities committed during Serbian-Bosnian war.<sup>7</sup>
- 3) Key facts about the ICTY
  - Sits in The Hague, Netherlands.
  - Three trial chambers with three judges each; one appellate chamber with five judges.

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<sup>4</sup> International Military Tribunal Charter, Aug. 8, 1945,

[https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.2\\_Charter%20of%20IMT%201945.pdf](https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.2_Charter%20of%20IMT%201945.pdf).

<sup>5</sup> Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1945, 78 U.N.T.S. 277.

<sup>6</sup> Geneva Conventions (1949), <https://www.icrc.org/en/war-and-law/treaties-customary-law/geneva-conventions>.

<sup>7</sup> [https://www.icty.org/x/file/Legal%20Library/Statute/statute\\_sept09\\_en.pdf](https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf).

- Given concurrent jurisdiction with national courts and primacy over them.
- Crimes punished:
  - Grave breaches of Geneva Conventions.
  - War crimes.
  - Crimes against humanity.
  - Genocide.
- Penalties limited to life imprisonment.

#### 4) Results of tribunal

- 161 individuals charged; 91 convicted; 18 acquitted; others died, had indictments withdrawn, or were referred to national courts.
- Developed much caselaw on international criminal law.

### C. International Criminal Tribunal for Rwanda (ICTR) (1994- )

#### 1) UN Security Council creates ICTR in 1994 to address Rwandan Genocide.<sup>8</sup>

#### 2) Key facts about the ICTR

- Sits in Arusha, Tanzania.
- Three trial chambers with three judges each; one appellate chamber with seven judges.
- Given concurrent jurisdiction with national courts and primacy over them.
- Crimes punished:
  - Genocide.
  - Crimes against humanity.
  - War crimes.
- Penalties limited to life imprisonment.

#### 3) Results of Tribunal

- 93 individuals charged; 62 convicted; 14 acquitted; others had indictments withdrawn, died, or were referred to national courts.
- Jurisprudential advances:
  - Lots of advances in genocide law generally.
  - Rape can be genocide when one tries to impregnate a woman with sperm from another ethnic group or traumatizes her so she does not want to procreate.
  - Media figures can be complicit in genocide through broadcasts, publications.

### D. Hybrid Courts

#### 1) Combine national and international elements and resources.

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<sup>8</sup> [https://unictr.irmct.org/sites/unictr.org/files/legal-library/100131\\_Statute\\_en\\_fr\\_0.pdf](https://unictr.irmct.org/sites/unictr.org/files/legal-library/100131_Statute_en_fr_0.pdf)

- 2) Why hybrid courts?
  - a) Advantages of national involvement
    - National judges can use coercive powers of their states.
    - Closer to the facts.
    - Closer to victims; ensure victims get justice.
    - Maybe faster – international tribunals are typically slow.
    - Can affirm the national rule of law.
  - b) Advantages of international involvement
    - Resources.
    - Perhaps bring a broader perspective/antidote to bias.
    - International expertise.
- 3) Examples of hybrid courts
  - Bosnian War Crimes Chamber and Specialist Chambers of Kosovo
  - Special Court for Sierra Leone
  - Extraordinary Chambers in the Courts of Cambodia
  - Special Tribunal for Lebanon

#### **IV. International Criminal Court**

##### **A. ICC Basics**

- 1) Entered into force July 1, 2002, when 60 nations ratified the Rome Statute.<sup>9</sup>
- 2) Sits at The Hague, the Netherlands.
- 3) Overarching goals: End impunity for the most serious crimes of international concern and contribute to their prevention.
- 4) The ICC is an independent body; it is not under the authority of the United Nations, though the Security Council can require a deferral of an investigation under certain circumstances.
- 5) Operates on the complementarity principle; it acts only when national courts are unable or unwilling to act.
- 6) Key officers
  - 18 judges serve in their individual capacities. They are selected by a 2/3 vote of the Assembly of State Parties. They serve 9-year terms.

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<sup>9</sup> Rome Statute of the International Criminal Court, July 17, 1998 (last amended 2010), <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>

- A prosecutor is also elected for a non-renewable 9-year term by the Assembly of States Parties. The current prosecutor is Karim A. A. Khan of the United Kingdom.
- 7) The prosecutor may initiate an investigation in 3 ways:
    - Referral by a state party.
    - Referral by the United Nations Security Council.
    - On the prosecutor's own motion (and approved by a judge panel).
  - 8) Membership
    - 123 nations have ratified the Rome Statute.
    - Many of the most powerful and populous nations have not, including the United States, China, India, Indonesia, Russia, Pakistan, Iran, and Turkey.
  - 9) Current ICC activity: Investigations in 17 countries (including Ukraine); 31 active cases.<sup>10</sup>

## B. ICC Jurisdiction

- 1) Subject matter jurisdiction over 4 crimes:
  - Genocide.
  - Crimes against humanity.
  - War crimes.
  - Aggression.
- 2) Personal and Territorial Jurisdiction
  - a. Main bases of jurisdiction: nationality and territory.
  - b. Nationality: Jurisdiction over the:
    - National of state that is a party.
    - National of a non-state party wherever crimes occurred if the non-state party consents to ad hoc jurisdiction over the situation.
    - National of non-state party if the Security Council refers the matter.
  - c. Territory: Jurisdiction over crimes committed on:
    - The territory of a state party, even if the perpetrator is not the national of a state party.

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<sup>10</sup> <https://www.icc-cpi.int/cases>

- The territory of a non-state party where the territorial state accepts ICC jurisdiction on an ad hoc basis (even if perpetrator is not national of state-party).
- The territory (of any state) where the crimes were committed if the Security Council refers it.

## V. International Criminal Law and Ukraine

### A. Reported Criminal Acts

From the March 15, 2023 report of the United Nations Independent International Commission of Inquiry on Ukraine<sup>11</sup>:

#### 1. Attacks on civilian populations

- Some attacks specifically targeted civilians. Others targeted military personnel or assets but were carried out with a disregard for large concentrations of civilians. Examples: attacks on the Mariupol Drama Theater and the Kramatorsk train station.<sup>12</sup>

#### 2. Violations of personal integrity

- Alleged violations include willful killings, unlawful confinement, torture, and rape.<sup>13</sup>

#### 3. Forced transfer and deportation of children

- From February 2022 to February 2023, 16,221 children were deported to the Russian Federation. Some have been placed in foster families and given Russian citizenship.<sup>14</sup>
- According to Russia’s Presidential Commissioner for Children’s Rights, “now that the children have become Russian citizens, temporary guardianship can become permanent.”<sup>15</sup>

### B. Possible International Crimes Committed

#### 1. Aggression

- a. The United Nations Charter allows armed conflict only in rare circumstances:

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<sup>11</sup> [https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/coiukraine/A\\_HRC\\_52\\_62\\_AUV\\_EN.pdf](https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/coiukraine/A_HRC_52_62_AUV_EN.pdf)

<sup>12</sup> Id. at paragraphs 23-35.

<sup>13</sup> Id. at paragraph 48

<sup>14</sup> Id. at paragraph 95.

<sup>15</sup> Id. at paragraph 96.

- Article 2(4): “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”<sup>16</sup>
  - Article 51: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”<sup>17</sup>
- b. The Rome Statute of the International Criminal Court defines the crime of aggression as:
- 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. Article 8.<sup>18</sup>
- c. The International Commission has found that Russia’s invasion and attacks against Ukraine’s territory and armed forces constitute acts of aggression.<sup>19</sup>

## 2. War crimes

- a. 4 core principles:<sup>20</sup>
- Principle of distinction – The parties to a conflict must distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed at civilians.
  - Principle of proportionality – Collateral damage can’t be disproportionate to the military goals of the attack.
  - Principle of necessity – As long as they are not prohibited by the law of war, a party may use all measures needed to defeat the enemy as quickly and efficiently as possible.
  - Principle of Humanity – Parties are forbidden to inflict suffering, injury, or destruction unnecessary to accomplish a legitimate military purpose.

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<sup>16</sup> U.N. Charter art. 2(4).

<sup>17</sup> Id. at art. 51.

<sup>18</sup> Rome Statute of the International Criminal Court, July 17, 1998 (last amended 2010), art. 8, <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>

<sup>19</sup> [https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/coiukraine/A\\_HRC\\_52\\_62\\_AUV\\_EN.pdf](https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/coiukraine/A_HRC_52_62_AUV_EN.pdf), para. 3.

<sup>20</sup> DAVID J. LUBAN, ET AL., INTERNATIONAL AND TRANSNATIONAL CRIMINAL LAW 1031-33 (3d. ed. 2019).

b. Geneva Conventions (August 12, 1949)

- There are 4 conventions:
  - Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field.<sup>21</sup>
  - Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea.<sup>22</sup>
  - Convention (III) relative to the Treatment of Prisoners of War.<sup>23</sup>
  - Convention (IV) relative to the Protection of Civilian Persons in Time of War.<sup>24</sup>
  
- All “grave breaches” are considered war crimes. These include: Willful killing, torture or inhuman treatment, including biological experiments, and willfully causing great suffering.
  
- Once can’t intentionally target noncombatants, use indiscriminate methods of waging war, or attack legitimate military targets if it will cause excessive civilian harm.

c. Rome Statute of the International Criminal Court

- All grave breaches of the Geneva Conventions are war crimes.
  
- Article 8 also identifies a wide variety of other war crimes, including:
  - “Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities.”<sup>25</sup>
  - “Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives.”<sup>26</sup>
  - “Unlawful deportation or transfer or unlawful confinement.”<sup>27</sup>
  - “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.”<sup>28</sup>

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<sup>21</sup> <https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949>

<sup>22</sup> <https://ihl-databases.icrc.org/en/ihl-treaties/gcii-1949>

<sup>23</sup> <https://ihl-databases.icrc.org/en/ihl-treaties/gciii-1949>

<sup>24</sup> <https://ihl-databases.icrc.org/en/ihl-treaties/gciv-1949>

<sup>25</sup> Rome Statute of the International Criminal Court, July 17, 1998 (last amended 2010), art. 8(2)(b)(i), <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>

<sup>26</sup> Id. at art. 8(2)(b)(v)

<sup>27</sup> Id. at art. 8(2)(a)(vii)

<sup>28</sup> Id. at art. 8(2)(b)(viii)



- d. The International Commission has found many war crimes, including the attack on Mariupol; the detention, torture, rape, and execution of civilians; and the forced transfer and deportation of children.<sup>29</sup>
3. Crimes against humanity
    - a. Rome Statute of the International Criminal Court defines a crime against humanity as 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.<sup>30</sup>
    - b. The International Commission has found that several acts committed by Russian forces may constitute crimes against humanity, including acts of torture, the systematic attack on Ukraine's energy infrastructure (including nuclear power plants), and the attack against Mariupol.<sup>31</sup>
4. Genocide
    - a. Genocide is: any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

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<sup>29</sup> [https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/coiukraine/A\\_HRC\\_52\\_62\\_AUV\\_EN.pdf](https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/coiukraine/A_HRC_52_62_AUV_EN.pdf)

<sup>30</sup> Rome Statute of the International Criminal Court, July 17, 1998 (last amended 2010), art. 7, <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>

<sup>31</sup> [https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/coiukraine/A\\_HRC\\_52\\_62\\_AUV\\_EN.pdf](https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/coiukraine/A_HRC_52_62_AUV_EN.pdf), paras 35, 43, 109.

- (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.<sup>32</sup>
- b. Genocide is a specific intent crime: the defendant must have the intent to commit one of the acts listed above as well as the additional intent to destroy a group as such (because of who they are).
- c. Russian individuals have committed many of the necessary predicate acts for a genocide charge. The challenge will be proving the intent to destroy a group. While the International Criminal Court has issued an arrest warrant for Vladimir Putin related to the forced transfer of children (a predicate act for genocide), the warrant alleges a war crimes violation only.

### C. Options for Prosecution

#### 1. Ad hoc tribunal

Extremely unlikely. Russia would veto the creation of such a court in the United Nations Security Council.

#### 2. International Criminal Court

- Russia has never ratified the ICC's Rome Statute, and it "unsigned" the statute in 2016.
- Ukraine is not a member state, but it has accepted on an ad hoc basis the ICC's jurisdiction over crimes committed in its territory since Nov 2013.<sup>33</sup>
- Thirty-eight other states referred the matter to the ICC Prosecutor on March 2, 2022.<sup>34</sup>
- The ICC's jurisdiction is met for crimes against humanity and war crimes. But its jurisdiction doesn't extend to aggression. Aggression must be committed by a national of or on the territory of a state that has ratified the Rome Statute.

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<sup>32</sup> Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1945, art. 2, 78 U.N.T.S. 277.

<sup>33</sup> <https://www.icc-cpi.int/situations/ukraine>.

<sup>34</sup> Id.

- On March 17, 2023, a pre-trial chamber of the ICC issued arrest warrants for Vladimir Putin and Maria Lvova-Belova alleging that they had engaged in war crimes. The war crimes are the unlawful deportation of children and the unlawful transfer of children to the Russian Federation under Articles 8(2)(a)(vii) and 8(2)(b)(viii) of the Rome Statute.<sup>35</sup>
3. Ukrainian domestic prosecution
    - Ukraine has prosecuted at least one captured Russian soldier for war crimes. A Ukrainian court sentenced Russian tank commander Vadim Shishimarin to life in prison for shooting an unarmed civilian.<sup>36</sup>
  4. Prosecution by other nations claiming Universal Jurisdiction.
    - See as an example: *Case Concerning the Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium) 2002 I.C.J Rep. 3 (Feb. 14) (addresses Belgium's effort to prosecute in absentia the Congolese Minister of Foreign Affairs for war crimes and crimes against humanity).<sup>37</sup>

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<sup>35</sup> Id.

<sup>36</sup> <https://www.bbc.com/news/world-60690688>

<sup>37</sup> DAVID J. LUBAN, ET AL., INTERNATIONAL AND TRANSNATIONAL CRIMINAL LAW 216 (3d. ed. 2019).