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## ARTIKEL UTAMA



## ARTIKEL PENDUKUNG



## KOLOM



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# JURNAL HUKUM HUMANITER

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# EDITORIAL

Para pembaca yang kami hormati,

Puji syukur kami panjatkan ke hadirat *Allah Subhanahu Wata'ala* karena berkat rahmatNya jualah maka JURNAL HUKUM HUMANITER ini dapat hadir di tangan para pembaca semua. Jurnal ini merupakan jurnal yang pertama kali terbit di tanah air, secara khusus mengulas berbagai masalah hukum humaniter, dan akan terbit setiap enam bulan sekali.

Penerbitan jurnal ini dimaksudkan sebagai wahana bagi semua lapisan masyarakat, baik dari kalangan militer, aparat penegak hukum, birokrat, LSM, akademisi, mahasiswa, maupun kalangan lainnya yang ingin mengetahui secara lebih mendalam mengenai seluk-beluk hukum humaniter. Di samping itu, konflik-konflik yang terjadi di berbagai wilayah Republik Indonesia dalam dekade terakhir juga menjadi pertimbangan lain bagi diterbitkannya jurnal ini.

Pada edisi perdana ini, topik utama JURNAL HUKUM HUMANITER adalah tentang "kejahatan perang" (*war crimes*). Kejahatan perang merupakan salah satu tindak pidana yang belum sepenuhnya diakomodasikan ke dalam aturan hukum nasional Indonesia. Oleh karena itu, sejarah dan praktik-praktik negara serta beberapa substansi dasar dari peraturan-peraturan mengenai tindak pidana kejahatan perang akan dikemukakan dalam artikel-artikel utama dan pendukung. Tidak hanya itu, pemaparan hukum nasional serta upaya-upaya yang telah dilakukan khususnya dalam Rancangan Kitab Undang-undang Hukum Pidana Nasional juga akan ditampilkan guna melengkapi edisi kali ini.

Di samping materi pokok tersebut, disertakan pula "Kolom" yang pada edisi kali ini berisikan tentang Konvensi Den Haag IV (1907) yang mengatur mengenai hukum dan kebiasaan berperang di darat. Pemilihan materi ini sengaja dilakukan mengingat urgensi Konvensi ini yang sudah menjadi hukum kebiasaan internasional dan berlaku bagi semua negara serta merupakan aturan penting dalam hal pengaturan alat dan cara berperang yang masih relevan dan berlaku pada saat ini.

Atas diterbitkannya jurnal ini, kami mengucapkan terima kasih kepada *International Committee of the Red Cross* (ICRC) yang memiliki komitmen tinggi dalam upaya mengembangkan hukum humaniter di Indonesia dengan mendukung penerbitan jurnal ini.

Akhir kata, kami berharap semoga penerbitan jurrnal ini dapat memenuhi kebutuhan dan keingintahuan yang mendalam terhadap hukum humaniter. Untuk itu, kami dengan segala kerendahan hati akan menerima segala kritik maupun saran-saran yang konstruktif bagi penyempurnaan jurnal ini di masa datang.

***Redaksi***

# DAFTAR ISI

hlm.

## Artikel



## Kolom

# WAR CRIMES IN INTERNATIONAL LAW: AN INTRODUCTION[1]

**Michael Cottier**[2]


## Abstract

Under international humanitarian law (IHL), war crimes have been developed, particularly at great speed since the early 1990s and there have been many changes as, for example: the criminalization of violations of IHL. In this paper the author will examine, among others, the meaning of war crimes in international law, the concept of war crimes, list and definitions of the war crimes. The development of war crimes tribunal until the establishing of the International Criminal Court (ICC) can be found in this paper as well.


## A. Introduction

Where wars are fought, allegations of "war crimes" are frequently made. The term implies most serious and universally repudiated misbehavior related to situations of war. "War crimes" indeed evoke horrific images, such as concentration camps, rape or execution of prisoners and brutal attacks on civilians. But what exactly is the legal definition of a war crime? What conduct amounts to such an offense, and who can be made accountable and criminally responsible for its commission?

The present contribution strives to provide an introduction to the law of war crimes,[3] an area of international law that has evolved at particularly great speed since the early 1990s. First, we examine what "war crimes" means in international law, namely serious violations of international

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[1] The views expressed are those of the author alone and do not necessarily reflect the views of the Swiss Government.

[2] Michael Cottier holds *lic. iur.*, LL.M. degree form New York University Law School. Currently, he is Deputy Head, Section for Human Rights and Humanitarian Law, Directorate of International Law, Federal Department of Foreign Affairs, Switzerland.

[3] On the law of war crimes, *see generally* Otto Triffterer (ed.), COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE (1999) (2nd ed. forthcoming); Gerhard Werle, VÖLKERSTRAFRECHT (2003), at 293-425; Eric David, PRINCIPES DE DROIT DES CONFLITS ARMÉS (3rd ed. 2002), at 645-733; Knut Dörmann, ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: SOURCES AND COMMENTARY (2003); Michael Bothe, *War Crimes*, *in* Antonio Cassese *et al.* (eds.), I THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 379 (2002). Online resources include http://www.crimesofwar.org; http://www.mpil.de/en/vi/eAuf_Systematik_VR.cfm (see e.g. VR 18.2) (online bibliography of the Max Planck Institute for Comparative Public Law and International Law); http://www.eisil.org.

humanitarian law criminalized under international law (Chapter I). Hence, to understand the concept of war crimes, we need to examine what the content of that "international humanitarian law" is (Chapter II), and which violations of humanitarian law have been criminalized (as war crimes) under international law (Chapter III). After a short historic introduction, Chapter III examines particularly the list and definitions of the war crimes under the Rome Statute of the International Criminal Court (ICC), since that Statute contains the most comprehensive list of war crimes to date and has been ratified by more than half the globe's nations. Lastly, Chapter IV presents some of the judicial and non-judicial mechanisms to ensure accountability for the commission of war crimes, including the ICC.

**B. What is a "War Crime"?**

A war crime can be defined as a violation of international humanitarian law that is criminalized under international law. Hence, not every breach of international humanitarian law amounts to a war crime. War crime is thus such conduct that: 1. constitutes a violation of international humanitarian law (IHL); and 2. gives rise to individual criminal responsibility directly under international law.

This technical definition of war crimes under international law is used throughout this contribution.

To be sure, the term "war crimes" often is not used in this technical-legal sense under international law. Particularly media often use the term to refer to *all crimes committed in a particular war or armed conflict*, of whatever nature the particular crimes are.

Often, the term is used to designate *all "core crimes" under international law*, that is, war crimes in the above-described technical sense, crimes against humanity[4] and genocide[5] (and, more rarely, the crime of

[4] Crimes against humanity are, essentially, violations of human rights committed as part of a widespread or systematic attack directed against a civilian population. Art. 7 of the Rome Statute contains the first definition of crimes against humanity in a multilateral treaty. *See generally* M. Cherif Bassiouni, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW (1999).

[5] The customary law definition of genocide, contained in the Genocide Convention of 1948

aggression). Someone who perpetrated a war crime (in the technical sense), a crime against humanity and/or an act of genocide correspondingly would be called a "war criminal". Also, international criminal tribunals such as the International Criminal Tribunal for Rwanda (ICTR) or the International Criminal Tribunal for the former Yugoslavia (ICTY) are often referred to as "war crimes tribunals". The term "war crimes" in this sense is used as a convenient short form to connote particular egregious and internationally repudiated crimes. Since the commission of crimes against humanity or genocide does not, however, require any link to an armed conflict (or colloquially a "war"), the use of the notion of "war crimes" as encompassing crimes against humanity and genocide is somewhat misleading.

Thirdly, the term has sometimes been used to designate *all violations of international humanitarian law*, which – under international law – is incorrect.

Fourthly, the term "war crimes" can have a technical, legal *meaning under a given national legal system*. Several national military codes, manuals, regulations and other national criminal law instruments use the term "war crimes" to denote offenses against the prescriptions of the relevant legal instrument where committed in the context of an armed conflict. Such nationally defined "war crimes" thus refer to violations of humanitarian law and sometimes even are used in domestic setting to connote also acts like military disobedience, breaches of military discipline or offenses like "high treason".

### C. International Humanitarian Law

Since war crimes are criminalized violations of international humanitarian law, we need to examine that area of law[6] to understand and correctly interpret such offenses.

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and reflected in Art. 6 of the Rome Statute, defines genocide as any of a list of acts such as killing or causing serious bodily or mental harm "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such." *See generally* William A. Schabas, GENOCIDE IN INTERNATIONAL LAW (2000).

[6] On international humanitarian law, *see generally* Jean-Marie Henckaerts/Louise Doswald-Beck, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (3 vol., 2005); Eric David, PRINCIPES DE

IHL frequently is also called the (international) law of armed conflict[7] or *ius in bello*, more archaically also laws and customs of war or simply law(s) of war. It is a *set of rules under international law governing all situations of armed conflict* (or, as laymen would call it, "war"), be they international or non-international armed conflicts. IHL does not apply to situations or conducts without any *link* to an armed conflict.

*An international armed conflict* exists where a state uses armed force against another state, be it through its armed forces or other groups such as proxies and private military companies. IHL furthermore applies to situations of partial or total occupation of a territory.

*A non-international armed conflicts* exists in the event of armed confrontations that take place within the boundaries of a state or involve confrontations between the authorities of a state and armed groups or among armed groups. Internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature do not amount to a non-international armed conflict.[8] Non-international armed conflicts involve a relatively significant, intense and sustained use of armed force.

IHL applies to any armed conflict, irrespective of the reasons parties to the conflict allege to legitimate their use of force. It is irrelevant for purposes of applicability of IHL whether the armed force violates or not the customary prohibition of the use of force between states reflected in Art. 2(4) of the UN Charter, or whether the use of force is otherwise perceived or

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DROIT DES CONFLITS ARMÉS (3rd ed., 2002); Frits Kalshoven/Liesbeth Zegveld, CONSTRAINTS ON THE WAGING OF WAR: AN INTRODUCTION TO INTERNATIONAL HUMANITARIAN LAW (3rd ed., 2001); Dieter Fleck (ed.), THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS (1995); Anthony P.V. Rogers, LAW ON THE BATTLEFIELD (2nd ed., 2003); Ingrid Detter, THE LAW OF WAR (2nd ed., 2000); Hilaire McCoubrey, INTERNATIONAL HUMANITARIAN LAW (2nd ed., 1998); Hans-Peter Gasser, INTERNATIONAL HUMANITARIAN LAW: AN INTRODUCTION (1993); Marco Sassòli/Antoine A. Bouvier, HOW DOES LAW PROTECT IN WAR? CASES, DOCUMENTS AND TEACHING MATERIALS ON CONTEMPORARY PRACTICE IN INTERNATIONAL HUMANITARIAN LAW (1999); International Committee of the Red Cross (ICRC), UNDERSTANDING HUMANITARIAN LAW: BASIC RULES OF THE GENEVA CONVENTIONS AND THEIR ADDITIONAL PROTOCOLS (1988); Horst Fischer/Avril McDonald (eds.), YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW (since 1999); http://www.icrc.org; http://www.ihlresearch.org. Further references are available at http://www.eda.admin.ch/sub_expool/e/home/s.html.

[7] Occasionally, „law of armed conflict" is understood in a broader meaning to also cover aspects of *ius ad bellum.*

[8] See Art. 1(2) of Additional Protocol II of 1977.

presented as legitimate or illegitimate. The applicability of the *ius in bello* must thus be separated from issues relating to the *ius ad bellum* regulating under what circumstances a state may lawfully use force against another state.

IHL seeks to *moderate the negative effects of armed conflict*, first, by protecting persons who do not, such as civilians, or no longer, such as prisoners of war, participate in the armed hostilities ('Geneva Law'), and, second, by restricting the right of parties to the conflict to chose means, including weapons, and methods to conducting military operations ('Hague Law').

The *'Geneva law'* branch of IHL protects persons that find themselves in the hands of an adversary in a situation of armed conflict and belligerent occupation against abuse of power. Persons protected under the Geneva law include most particularly the wounded, sick, shipwrecked, prisoners of war and other detainees as well as internees, and the civilian population, particularly the population in occupied territory. *Persons in the hand of an adversary must be treated humanely*. Prohibited are, for instance, torture, rape, scientific experiments or other violations of a person's dignity or physical or mental integrity. In general, protected persons are entitled to a judicial examination of their status and, insofar they are prosecuted, to fair trial guarantees. The population of occupied territories and their property also enjoy particular protection. Deportations and, subject to certain exceptions such as imperative military reasons, transfers or expropriations are prohibited. The main sources of the Geneva Law branch are the four Geneva Conventions of 1949 as well as the two Additional Protocols of 1977,[9] while several other instruments and customary international law are also of great relevance, most particularly with regard to internal conflicts.

[9] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (12 August 1949) (Geneva Convention I); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (12 August 1949) (Geneva Convention II); Geneva Convention relative to the Treatment of Prisoners of War (12 August 1949) (Geneva Convention III); Geneva Convention relative to the Protection of Civilian Persons in Tie of War (12 August 1949); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (8 June 1977) (Additional Protocol I,

The *'Hague law'* branch of IHL sets *limits on how armed warfare and military operations* may be conducted in armed conflicts. The right of the parties to an armed conflict to adopt means or methods of injuring the enemy indeed is not unlimited. "[T]he *only legitimate object* which states should endeavor to accomplish during war *is to weaken the military forces of the enemy*."[10] From this general idea follows that killing persons or destroying objects would not be legitimate if it would offer no advantage with respect to the weakening of the adversary military power.

IHL thus establishes that, in the context of an armed conflict, only *adversary combatants* and other *military objectives* may be targeted with armed force.[11] Military objectives are objects "which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture, or neutralization, in the circumstances ruling at the time, offers a definite military advantage".[12]

In international armed conflicts, combatants such as members of the adversary armed forces may not be prosecuted for the mere fact of participating in the international armed conflict and have the right to prisoner of war status. This is different from the situation of non-international armed conflicts, where neither combatant nor prisoner of war status exist and where persons engaging in armed force against state forces of course can be prosecuted if the national law so provides.

Attacks against persons not taking part in hostilities or against objects the destruction of which offers no military advantage are prohibited. Hence, parties to the conflict must always distinguish between legitimate and prohibited targets, and must take *all feasible precautions*.[13] This *principle of distinction* is a cardinal principle of international humanitarian law. To allow distinction, IHL requires in principle that all persons engaging in armed

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AP I); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (8 June 1977) (Additional Protocol II, AP II).

[10] Declaration of St. Petersburg of 1868 to the Effect of Prohibiting the Use of Certain Projectiles in Wartime (emphasis added).

[11] *See* Art. 48 *et seq.* AP I.

[12] Art. 52(2) AP I

[13] Art. 57 AP I.

combat must distinguish themselves from the civilian population, e.g. by carrying arms openly and wearing distinctive emblems and uniforms.[14]

The general principle of *proportionality* requires that parties to the conflict should not cause damages or casualties that are militarily unnecessary or disproportionate in relation to the intended military goal. More particularly, *excessive incidental damage or casualties is prohibited.* Art. 57(2)(a)(iii) and (b) AP I provides that attacks must not be carried out insofar they "may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated".

Another concrete application of the basic principle of proportionality is the general prohibition to employ means or methods of warfare "of a nature to cause *superfluous injury* or *unnecessary suffering*" or "which are intended, or may be expected, to cause *widespread, long-term and severe damage to the natural environment*".[15] Customary international humanitarian law prohibits for instance to employ biological or chemical weapons including poison or also blinding laser weapons, and restricts the employment of mines, booby-traps or incendiary weapons. Particular treaties go further and prohibit some of these and other weapons, such as the Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on their Destruction of 1997.

*Methods of warfare* that are specifically prohibited include perfidy, ordering that there shall be no survivors, abusing recognized emblems such as the red cross or red crescent, starving civilians, utilizing protected persons as shields, using child soldiers, transferring civilians or using terror.

The most important 'Hague law' treaties are the 1899 and 1907 Hague Conventions (which is where the term 'Hague law' stems from), most

[14] *See more precisely* Jean-Marie Henckaerts/Louise Doswald-Beck, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (3 vol., 2005) (text following Rule 106).
[15] Art. 35(2) and (3) AP I, emphasis added

particularly the 1907 Hague Regulations[16], and the 1977 First Protocol Additional to the Geneva Conventions. A great number of specific treaties prohibit or restrict specific means or methods of warfare, while customary international law retains great importance.

The rules applicable to non-international armed conflicts are far less numerous than those applying in international armed conflicts. The primary treaty provisions applicable in non-international conflicts are Art. 3 common to the four Geneva Conventions and Additional Protocol II. However, there is a clear tendency in practice and evolving customary international law to apply rules initially intended for international conflicts also to non-international conflicts.[17]

## D. Definitions of War Crimes: Criminalized Violations of International Humanitarian Law

### *1. Evolution of International Criminal Law*

Writings of classical authors and historians of most diverse cultures confirm the old notion that there are some most fundamental values which under no circumstances must be violated. Even in times of brutal war there is a common denominator of (legitimate) behavior. Yet, international law including for instance the Hague Regulations of 1907 traditionally deal only with obligations of states. After World War II, however, international treaties began to focus also on obligations of individuals.

Up to the Second World War, the prosecution of violations of international humanitarian law was essentially exclusively effected by national courts, and restrained to the vanquished and, rather exceptionally, to isolated case of a rogue combatants in the victor's armed forces. These

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[16] Regulations concerning the Laws and Customs of War on Land, Annex to the Convention (IV) respecting the Laws and Customs of War on Land, The Hague, 18 October 1907.

[17] *See* Jean-Marie Henckaerts/Louise Doswald-Beck, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (3 vol., 2005). The has been confirmed by the recognition of war crimes committed in non-international armed conflicts, *see below*. On the law of non-international armed conflicts, *see* Moir, THE LAW OF INTERNAL ARMED CONFLICT (2002); Abi-Saab, DROIT HUMANITAIRE ET CONFLIT INTERNE (1986). A Manual on Non-International Armed Conflicts has been drafted by legal experts under the auspices of the Institute for International Humanitarian Law in San Remo and is hoped to be soon finalized.

prosecutions were not always balanced and impartial and generally ineffective when those responsible for the crimes were still in power. One of the founders of the Red Cross movement, Gustave Moynier, therefore proposed to create an international criminal court prosecuting breaches of the Geneva Conventions of 1864 and other humanitarian rules. Actual prosecution for war crimes by an international tribunal however had to wait until the trials by the International Military Tribunal at Nürnberg.

Then, in 1946, the Nürnberg Tribunal stated that "[c]rimes 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 aw be enforced". It thereby decided that an individual may be held *criminally responsible directly under international law.*[18]

The Geneva Conventions of 1949 provide for individual criminal responsibility of persons committing grave breaches of the Conventions and require States Parties to provide for domestic jurisdiction over these war crimes, regardless of where and by whom they were committed.[19] The Additional Protocol I of 1977 provides for an essentially identical obligation with regard to grave breaches of the Protocol.[20] Other crimes under international law are provided under the Genocide Convention of 1948, the Torture Convention and other conventions adopted after World War II.

Until the early 1990s, it was generally agreed that individuals cannot incur criminal responsibility under international law for war crimes committed in *non-international* armed conflicts. After a relatively small number of national precedents such as military manuals and court decisions,[21] the ICTY

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[18] On the evolution of international criminal law and more particularly international criminal tribunals, *see* Heiko Ahlbrecht, GESCHICHTE DER VÖLKERRECHTLICHEN STRAFGERICHTSBARKEIT IM 20. JAHRHUNDERT (1999). On international criminal law more generally, *see, e.g.*, Antonio Cassese, INTERNATIONAL CRIMINAL LAW (2003); Gerhard Werle, VÖLKERSTRAFRECHT (2003); M. Cherif Bassiouni, INTERNATIONAL CRIMINAL LAW (3 vol., 2nd ed., 1999); Jordan J. Paust *et al.*, INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS (1996).

[19] Art. 49-50/50-51/129-130/146-147 GC I-IV.

[20] Art. 85 AP I.

[21] *See, e.g.*, Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AJIL 559 (1995); Thomas Graditzky, *Individual Criminal Responsibility for Violations of International Humanitarian Law Committed in Non-international Armed Conflicts*, 322 IRRC 29 (1998); Cottier, Michael, *Völkerstrafrechtliche Verantwortlichkeit für Kriegsverbrechen in internen*

decided that its jurisdiction over "violations of the laws or customs of war" extended to war crimes committed in non-international conflicts.[22] Furthermore, Art. 4 of the ICTR Statute provides explicitly for jurisdiction over "[v]iolations of Article 3 common to the Geneva Conventions and of Additional Protocol II", which are provisions that apply only to non-international armed conflicts. Art. 8(2)(c) and (e) of the Rome Statute adopted in July 1998 contain war crimes committed in non-international armed conflicts. This confirmed the increasingly accepted and today, in 2005, only rarely disputed view that violations of the law of non-international armed conflict may give rise to individual criminal responsibility for war crimes.[23]

### *2. The List and Definitions of War Crimes under the Rome Statute*

The Rome Statute of the ICC, ratified by more than half of all nations, contains the most comprehensive and authoritative list of war crimes to date. Governments often take this list as a point of departure when considering to provide domestic jurisdiction over war crimes or drafting national military manuals or statutes of international or other war crimes tribunals. While it was early on agreed in the negotiations leading to the adoption of the Rome Statute that the ICC should have jurisdiction over war crimes, which war crimes and what definitions should be adopted was often the subject of intense negotiations. The general approach was not to engage in a legislative exercise, but rather to include only war crimes recognized under customary international law under Art. 8. In addition, the war crimes at issue needed to be sufficiently serious, since the ICC was intended to focus on the most serious international crimes. Two cumulative normative elements were

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*Konflikten*, *in* Ingo Erberich et al. (eds.), FRIEDEN UND RECHT (38. ASSISTENTENTAGUNG ÖFFENTLICHES RECHT, MÜNSTER) (1998).

[22] ICTY, *Pros. v. Dusko Tadić a/k/a "Dule"*, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995), para. 128-137. Art. 3 of the ICTY Statute provides for jurisdiction over "[v]iolations of the laws or customs of war", while Art. 2 provides for jurisdiction over "[g]rave breaches of the Geneva Conventions of 1949".

[23] On war crimes in non-international armed conflicts, *see* Claus Kress, *War Crimes Committed in Non-International Armed Conflict and the Emerging System of International Criminal Justice*, 30 ISRAEL YHR 103 (2001).

demanded to recognize the customary law status of a war crime: First, the rule of international humanitarian law violated by the conduct at issue must reflect customary international law. Second, international customary law must provide for individual criminal responsibility for the violation of that rule of humanitarian law.

The customary law status of some of the war crimes other than the grave breaches of the Geneva Conventions gave rise to extended debate. In order to prevent long discussions whether a formulation contained in more recent treaties such as Additional Protocol I reflected customary law, delegations frequently preferred the less disputed, albeit often archaic or less precise older language such as the formulations of the 1907 Hague Regulations. Nonetheless, several definitions under Art. 8 constitute a clear progress in international law.

Today, the list and definitions of war crimes under Art. 8 can presumably be considered to be reflective of customary law. Even though Art. 8 of course is only a treaty provision, states at the Rome Diplomatic Conference agreed, as above described, that the Conference should not create new war crimes, but only include customary offences.[24] 120 states adopted the Rome Statute in July 1998 and, as of May 2005, 99 states have ratified.[25] Several of the states opposing the Rome Statute did not primarily disagree over the definition of the war crimes. Also, the Elements of Crimes, which are based on Art. 8, were adopted by consensus in 2000, a consensus in which including by states such as the United States that oppose the Rome Statute. Also, as above mentioned, many states not parties to the Rome Statute have also "implemented" the list of war crimes under Art. 8 in national laws, regulations and manuals.

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[24] On the negotiating history of the war crimes under the Rome Statute, *see* Herman von Hebel, *Putting an End to Impunity: From The Hague to Rome*, *in* HAGUE YEARBOOK OF INTERNATIONAL LAW 83 (1998); Herman von Hebel/Darryl Robinson, *Crimes within the Jurisdiction of the Court*, *in* Roy S. Lee (ed.), THE INTERNATIONAL CRIMINAL COURT. THE MAKING OF THE ROME STATUTE: ISSUES – NEGOTIATIONS – RESULTS 79 (1999); Roy S. Lee (ed.), THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE (2001); Knut Dörmann, ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: SOURCES AND COMMENTARY (2003).

[25] An updated list of States Parties is available at http://www.icc-cpi.int.

The list of war crimes under Art. 8(2) *categorizes* the offenses mainly according to the *type of conflict* in which they were committed. War crimes committed in international armed conflicts are listed in paragraphs a) and b) and war crimes committed in non-international armed conflicts in paragraphs c) and d). Paragraph a) contains grave breaches of the Geneva Conventions. The war crimes under paragraph b) stem from different sources, including Additional Protocol I of 1977, the 1907 Hague Regulations and other particular treaties such as international treaties prohibiting certain weapons. The war crimes under paragraph c) represent violations of Art. 3 common to the Geneva Conventions. The war crimes under paragraph e) are primarily based on Additional Protocol II of 1977 and require the existence of a "protracted" non-international armed conflict between governmental authorities and organized armed groups or between such groups. This latter formulation reflects the conviction of the States Parties to the Rome Statute that the higher applicability threshold as provided under Additional Protocol II no longer needs to be met for the (customary) rules reflect under that Protocol to be applicable.

To gain an overview over what is prohibited, it is useful to categorize the ICC war crimes according to the *criminalized conduct*. First, there are the war crimes committed against persons in the power of the adversary ('Geneva law' war crimes). These war crimes include the war crime of killing and war crimes of mistreatment such as torturing, wounding, causing great suffering, mutilating, conducting experiments, sexual violence or other inhuman treatment or outrages upon personal dignity, as well as other war crimes against persons in the power of the adversary, such as deporting or transferring the population of an occupied territory, transferring the own population into occupied territory, unlawfully confining a person or denying a fair and regular trial, taking hostages. In addition, the Rome Statute criminalizes the war crimes of pillaging or of destroying or appropriating adversary property.

A second group of war crimes are war crimes criminalizing violations of the humanitarian law restrictions on the conduct of hostilities ('Hague law'

war crimes). Firstly, we can distinguish several war crimes of prohibited targeting. It constitutes a war crime to intentionally target civilians, civilian objects, hospitals or other buildings enjoying particular protection such as those dedicated to religion, education, art, science or charitable purposes, persons and objects using the distinctive emblems of the Geneva Conventions (in particular, the Red Cross and the Red Crescent), or persons *hors de combat*. It is also a war crime to cause *excessive* incidental civilian casualties or damage (excessive "collateral damage"), that is, to launch an attack against a military objective knowing that such attack will cause incidental civilian casualties or damage or environmental damage which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated. Furthermore, the use of certain prohibited methods of warfare also is criminalized as a war crime, in particular perfidious killing or wounding, improper use of distinctive signs, using protected persons as shields, using starvation as a method of warfare, or denying quarter. The last category of "Hague law" war crimes are the war crimes of employing prohibited weapons, namely poison, asphyxiating, poisonous or other gases, liquids materials or devices (which basically corresponds to chemical weapons), and bullets which expand or flatten easily in the human body.

Several of the war crimes under Art. 8(2) reflect a progressive development of the international law of war crimes by the Rome Statute. For instance, the explicit recognition of rape, enforced prostitution, forced pregnancy and other sexual offences as war crimes in their own right makes it unnecessary to subsume such violence under other, more generally worded war crimes, as was previously necessary. Other particular achievements of the Rome Conference are the international criminalization of using children under fifteen to participate actively in hostilities or conscripting or enlisting them into armed forces, of starvation including impeding relief supplies, or of using protected persons as human shields.

Also, various offences generally accepted to reflect customary war crimes have been progressively defined. The elements for the war crime of

torture for instance no longer require that torture be inflicted by or with the acquiescence of a person acting in official capacity. Arab countries had insisted that it be explicitly stated that the war crime of transferring parts of the Occupying Power's own population may be committed "directly or indirectly", which suggests that indirect transfer policies such as economic and financial incentives may amount to an internationally criminalized population transfer.

The brief short definitions of the 50 war crimes under Art. 8 are not self-explanatory. Rather, the individual war crimes definitions refer to the rule of humanitarian law the violation of which it criminalizes. To correctly interpret the offences and know what conduct is criminalized by a specific war crime and what particular exceptions based on humanitarian law might apply, one must consider the "established framework of the international law of armed conflict."[26] Therefore, we need to examine for each war crime on what (treaty or customary) humanitarian law rules it is based. Additional assistance is given by the (non-binding) Elements of Crimes adopted by the Assembly of States Parties to the Rome Statute,[27] that shall "assist the Court in the interpretation and application of articles 6, 7 and 8"[28].

To illustrate how to interpret the Rome Statute, let us for instance examine the war crime of the transfer of all or parts of the population of the occupied territory (Art. 8(2)(a)(vii) and (b)(viii). Art. 49 of the Fourth Geneva Convention describes what precisely is prohibited and under what circumstances exceptions are lawful. For instance, an Occupying Power may undertake total or particular evacuation of a given area if the security of the population or imperative military reasons so demand, subject to several conditions such as ensuring proper accommodation or in principle not displacing the population outside the bounds of the occupied territory. Furthermore, court decisions and other precedents may give further insight

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[26] Elements of Crimes, ICC-ASP/1/3 (part II-B) (9 September 2002), at 125 (introduction to the elements of war crimes).
[27] Elements of Crimes, ICC-ASP/1/3 (part II-B) (9 September 2002).
[28] Art. 9 Rome Statute.

as to the concrete content and prescriptions of the general prohibition against transfers.[29]

## E. Individual Criminal Responsibility and Other Mechanisms of Accountability

### 1. Legal Mechanisms of Accountability

#### a. Individual Criminal Responsibility

Under international criminal law as well as all modern criminal law systems, an individual can only be held criminally responsible if the physical elements of a criminal conduct can be attributed to him or her (*actus reus*, the physical, corporeal elements of a crime) and if he or she had the requisite criminal mindset (*mens rea*). First, it must thus be proven that the *behavior of the perpetrator caused a result*. The Rome Statute, containing the first multilaterally agreed general part of international criminal law inspired by national criminal law systems around the world, provides that a person can not only be held criminally responsible if he himself committed the crime, but also for ordering, soliciting or inducing the crime, or facilitating or attempting its commission.

However, the perpetrator in addition must have had a "guilty" *state of mind*, namely, according to Art. 30 of the Rome Statute, *intent and/or knowledge* with regard to the material (physical) elements of his conduct, the relevant circumstances, and the result, insofar a result is required for completion of the offence. According to Art. 28 of the Rome Statute, civilian or military superiors are held to a more strict standard with relation to the acts of their subordinates, since they have particular powers and responsibilities for them.

Immunities and official capacity are irrelevant before the ICC (Art. 27 Rome Statute). Prescriptions of national law or superior orders do not, in

[29] For an example of the analysis of the different precedents and relevant rules "outside" the Rome Statute, *see* Otto Triffterer (ed.), COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE (1999), *Art. 8*; Knut Dörmann, ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: SOURCES AND COMMENTARY (2003).

principle, relieve a person from criminal responsibility (Art. 33 Rome Statute).

**b. International Criminal Tribunals**

Up to now, there have been four *ad hoc international criminal tribunals*, namely the two tribunals set up by the Allies after World War II, the Nürnberg Tribunal and the International Military Tribunal for the Far East (generally known as the Tokyo Tribunal) and the two United Nations *ad hoc* Tribunals, the International Criminal Tribunal for the former Yugoslavia (1993) and the International Criminal Tribunal for Rwanda (1994).[30] The material, personal and temporal scope of jurisdiction, their organs and the way to function are all defined in their respective statute. All four *ad hoc* international criminal tribunals had jurisdiction over war crimes. Their case law significantly developed the international law of this category of crimes and international criminal law generally.

In recent years, **hybrid criminal tribunals** with both national and international aspects have arisen: the Special Court for Sierra Leone,[31] the special panels within the District Court in Dili, Timor-Leste,[32] the Extraordinary Chambers in the Courts of Cambodia,[33] international prosecutors, investigating judges and/or mixed international/national panels within the criminal justice system of Kosovo[34], and the War Crimes Chamber in the State Court of Bosnia and Herzegovina in Sarajevo[35]. The mixed international/national elements of these courts include international and

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[30] For documents on these ad hoc tribunals, see e g. http://www.yale.edu/ lawweb/ avalon/ imt/imt.htm; http://www.yale.edu/lawweb/avalon/imtfech.htm; http://www.icty.org; http://www.ictr.org; http://www.trial-ch.org/.

[31] *See* http://www.sc-sl.org.

[32] *See* UN Transitional Administration in East Timor (UNTAET) Regulation 2000/11, section 10 (available at http://www.un.org/peace/etimor/untaetR/Reg11.pdf).

[33] *See* Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes committed during the Period of Democratic Kampuchea, Law NS/RKM/0801/12 (11 July 2003, as amended on 27 October 2004); Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes committed during the Period of Democratic Kampuchea (19 October 2004); http://www.ruhr-uni-bochum.de/ifhv/publications/bofaxe/x287E.pdf. Documeents and information are available at http://www.cambodia.gov.kh/krt/.

[34] UN Interim Administration Mission in Kosovo (UNMIK) Regulation 2000/62 (15 Dec. 2000), available at http://www.unmikonline.org/regulations/2000/re2000_64.htm

[35] Inaugurated on 9 March 2005.

national judges and international assistance and influence in diverse forms. Also, they usually have an international or a mixed international/national legal basis, such as the UN regulations regarding the Timor-Leste and the Kosovo cases or the agreement between the UN and Sierra Leone. The international community has recently favored these mixed tribunals over exclusively international processes, particularly because they are easier to conduct close to where the crimes were committed, less costly and can deal with a greater number of war criminals. Also, it corresponds to the objectives of war crimes proceedings to conduct them close to where the crimes were committed, thereby permitting the local community, victims as well as past or potential future perpetrators to follow the proceedings and "learn" about accountability.

However, *ad hoc* tribunals, be they international or mixed, have serious drawbacks as compared to permanent institutions. They are established only once the crimes were committed. This means on the one hand that their functioning, organs, jurisdiction and all other details must be negotiated each time anew. On the other hand, their creation *ex post facto* may impact their perceived legitimacy. *Ad hoc* tribunals are only created insofar those having power deem it opportune, and therefore incur the danger of being selective or perceived as such. This is why nations and human rights had longed for a permanent international criminal jurisdiction, a vision that became reality with the adoption of the Statute of the International Criminal Court on 17 July 1998 in Rome (see below).

**c. Domestic Jurisdiction over International Crimes**

Yet, international criminal courts and tribunals will never be able to prosecute all war crimes. Therefore, the *primary responsibility is still on the states* to prosecute and punish such most serious crimes under international law. The Rome Statute indeed recalls that states have a duty to exercise their criminal jurisdiction over those responsible for international crimes. There is indeed even a customary international law obligation of all states to prosecute and punish grave breaches of the Geneva Conventions.

Today, many states have established explicit domestic criminal jurisdiction of their courts over war crimes. Since the adoption of the Rome Statute, many states included the definitions under the Rome Statute. Besides the general bases of jurisdiction (principles of territoriality, active personality and passive personality), states often also provide for universal jurisdiction over war crimes, that is, jurisdiction even where the crime has not been committed on the court state's territory or by or against one of its nationals.[36]

### d. Forms of Legal Responsibility other than Individual Criminal Responsibility

Individuals may also be held accountable for the material damage caused by committing a war crime and e.g. sentenced to pay the damage. Under the United States Alien Tort Claims Act (ATCA) for instance, individuals and even companies can be held liable for torts caused by war crimes on the basis of universal jurisdiction.

Another type of responsibility is the well-established *responsibility of the state* for the acts of its agents.[37] While the ICC does not have criminal jurisdiction over *corporations*, some national systems provide for liability for torts or even criminal responsibility of corporations, on the basis of which corporations such as multinationals or private military or security companies could be held liable.[38]

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[36] *See, e.g.*, the legal study by Amnesty International on universal jurisdiction, available at http://web.amnesty.org/pages/legal_memorandum.

[37] The International Law Commission adopted in 2001 the authoritative Draft Articles on Responsibility of States for Internationally Wrongful Acts, see *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), chap. V; James Crawford et al., *The ILC's Articles on Responsibility of States for Internationally Wrongful Acts*, EJIL 963 (2001).

[38] *See* Menno T. Kamminga/Saman Zia-Zarifi, *Liability of Multinational Corporations under International Law* (2000). Information on various suits filed against corporations in the United States are available at http://www.ccr-ny.org/v2/legal/corporate_accountability/corporate_accountability.asp.

**a. Alternative Non-Legal Mechanisms**

The prosecution and punishment of wrong-doers by the traditional criminal law system and other tribunals is only one way to ensure accountability, although a central one. Complementary to criminal prosecution, there are alternative non-judicial or quasi-judicial mechanisms to address past crimes may be particularly meaningful with regard to countries that undergo a transition from conflict to peace or from dictatorship or autocracy to a democratic society.

Transitional justice mechanisms and processes include measures that complement criminal prosecution such as truth and reconciliation commissions and processes, institutional vetting and reform, traditional justice, and compensation, restitution and rehabilitation. However, such mechanisms should not serve in order to shield the main perpetrators of crimes under international law. Many truth commissions to date have had many flaws and insufficiently ensured accountability for the past crimes, therefore also not preventing later national or international trials. Both the South African Truth and Reconciliation Commission[39] and the Commission for Reception, Truth and Reconciliation in East Timor[40] ensure a certain degree of accountability of wrongdoers and therefore appear to be interesting examples for study.[41]

**b. *Excursus: The International Criminal Court***

The adoption in 1998 of the Rome Statute of the ICC reflects the most important progress with regard to human rights and humanitarian law as well as their enforcement for decades, including with regard to the law of war crimes. Therefore, the ICC and its functioning shall be briefly examined.[42]

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[39] *See* http://www.doj.gov.za/trc/.

[40] *See* http://www.easttimor-reconciliation.org/.

[41] On truth commissions and lessons learned, *see* Priscilla B. Hayner, UNSPEAKABLE TRUTHS: FACING THE CHALLENGE OF TRUTH COMMISSIONS (2002); http://www.truthcommission.org. More generally on Transitional Justice, *see* Neil J. Kritz (ed.), TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES (3 Vols, 1995) (see excerpts and info at www.usip.org/ruleoflaw/activities.html); Cherif M. Bassiouni (ed.), POST-CONFLICT JUSTICE (2001). Further references on transitional Justice are available at http://www.eda.admin.ch/sub_expool/e/home/s.html.

[42] The official website of the ICC is http://ww.icc-cpi.int. The website of the International

The objective of the ICC is reflected in the Preamble of the Rome Statute: "Recognizing that such grave crimes threaten the peace, security and well-being of the world," the states adopting the Rome Statute affirmed "that the most serious crimes of concern to the international community must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation." Against this background, the ICC was established "to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,...for the sake of present and future generations."

The ICC is a *permanent* judicial body sitting in The Hague, although it may sit elsewhere if considered desirable. The Rome Statute, its legal basis, is a treaty binding only the states that ratified it. The Court's activities are overseen by the Assembly of States Parties. The Assembly meets at least once a year and may establish subsidiary bodies. Its functions include management oversight, adoption of the Court's budget, election of Judges and Prosecutors, as well as considering issues relating to the non-cooperation of states.[43]

The ICC has jurisdiction over the "*most serious crimes of concern to the international community as a whole*" listed in Arts. 5 to 8, that is, genocide, crimes against humanity and war crimes. In addition, the Court will have jurisdiction over the crime of aggression once States Parties to the Rome Statute can agree on its definition and the conditions under which the Court shall exercise jurisdiction over it (Art. 5(2)). So-called "treaty crimes" had not been included under the Statute since it was agreed that the ICC should, at least initially, focus on the "core crimes" and because the Rome Conference did not find agreement on some of these crimes. Nonetheless, Resolution E annexed to the Final Act of the Rome Conference recommends

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NGO Coalition for the ICC also provides much information: www.iccnow.org[tbc]. On the ICC, *see generally* Schabas, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT (2001); Otto Triffterer (ed.), COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE (1999); Cassese (ed.), COMMENTARY (3 vols., 2001); Shelton, THE ROLE OF THE ICC (2000).

[43] Arts. 112, 36(6), 42(2) and 87(5) and (7).

that the Review Conference, which probably will take place in 2009, consider the crimes of terrorism and drug crimes. Also, States Parties may, for a period of seven years after the Statute's entry into force for that state, exclude the ICC's jurisdiction over war crimes based on a territorial or nationality link to that state (Art. 124).

The ICC can only prosecute *individuals* (Arts. 25 and 26). The Court cannot prosecute states, transnational corporations or other entities. In contrast to national criminal systems in general, *immunities* and the official capacity of a person, for instance as a member of government or parliament, cannot stand in the way of prosecutions before the ICC (Art. 27).

In order for the ICC to have jurisdiction over a specific crime, one of the three following *preconditions* must be fulfilled:

1. The state on the territory of which the conduct occurred (*territoriality principle*), or the state of which the person responsible for the crime is a national (*nationality principle*), was a *State Party* a the moment of the crime's commission (Arts. 12(2) and 11(2)).
2. The *Security Council referred the situation* in which the crime has been committed to the ICC under Chapter VII of the UN Charter (Art. 13(b) in connection with chapeau of Art. 12(2)). In this case, no territorial or nationality link is necessary, and also crimes committed prior to the Security Council's referral may be covered.
3. A state makes an *ad hoc declaration* accepting the Court's jurisdiction with respect to a certain situation and the crime concerned is of relevance to that situation (Art. 12(3) in connection with rule 44 of the RPE).[44] Art. 12(3) seems to suggest implicitly that such declaration may also extend to acts committed prior to the declaration.

[44] Art. 12(3) refers only to an acceptance of the jurisdiction with respect to "the crime in question." In addition, Art. 12(3) in connection with Art. 12(3) requires that the crime occurred on the territory or that the accused is a national of the declaring state. The PrepCom° however made it clear that an *ad hoc* declaration under Art. 12(3) "has as a consequence the acceptance of jurisdiction with respect to the crimes referred to in article 5 *of relevance to the situation* ..." (emphasis added).

In any event, however, the ICC's *temporary jurisdiction* does not extend to acts of genocide, crimes against humanity or war crimes committed prior to the Statute's entry into force on 1 July 2002 (Arts. 11(1) and 126).

The Court's jurisdiction can be *triggered* by a State Party, the Security Council or the ICC Prosecutor. The Prosecutor's right to *proprio motu* initiate proceedings reflects an important success for the civil society. The Prosecutor may seek information from states, inter-governmental or non-governmental organizations or other sources he deems appropriate. Since he thereby has great power, many checks and balances have been inserted. For instance, the Prosecutor needs the Pre-Trial Chamber's authorization to proceed with formal investigations.

Also, and key to understanding the ICC, the Court must determine for each particular case whether it is admissible under the *principle of complementarity*. The ICC's jurisdiction indeed is (only) complementary to national criminal jurisdictions (Art. 1 and para. 10 of the Preamble). If a case is being or has been investigated, prosecuted or tried in a national criminal system, including on the basis of universal jurisdiction, the case is inadmissible before the ICC, unless the state concerned is or has been "unwilling or unable genuinely to carry out the investigation or prosecution" (Arts. 17 and 20). "Unwillingness" exists, for instance, where the national proceedings were or are being undertaken to shield the accused from criminal responsibility (Arts. 17(2) and 20). "Inability" may exist where, for instance, the national judicial system collapsed or where the accused or the necessary evidence or testimony cannot be obtained (Art. 17(3)). The Court must in addition determine whether a case formally under its jurisdiction is inadmissible because it is "not of *sufficient gravity* to justify further action by the Court" (Art. 17(1), emphasis added).

The Security Council can block investigations and prosecutions by the Court with a resolution adopted under Chapter VII of the UN Charter (Art. 16), that is, with a majority of nine of the 15 votes of the Council's members and with no permanent member vetoing the resolution.

The *procedural rules* under the Rome Statute and the Rules of Procedure and Evidence adopted in 2000 have been derived from different legal systems. The Statute guarantees for instance rights of the accused as well as measures to protect victims and witnesses and their participation in the proceedings (Art. 68). The Rome Statute also deals with victims' rights, providing for their participation in proceedings and giving the Court the possibility to decide on reparations to the victims in the form of restitutions, compensation or rehabilitation (Art. 75). In addition, a Trust Fund will be established for the benefit of victims of crimes under the jurisdiction of the Court and of the families of such victims (Art. 79).

Since the ICC does not have an own police force and has no general mandate to directly conduct investigations on the territory of States Parties, the *cooperation and judicial assistance of states* is absolutely central to the Court's effective functioning. Therefore, it is of great importance that States Parties implement their obligations under the Rome Statute to ensure that the Court can realize its objectives effectively.[45]

**F. Concluding Remarks**

The definitions of war crimes under international law and in particular under Art. 8 of the Rome Statute reflect the universal agreement that these offenses constitute most serious crimes that should never go unpunished. The investigation and prosecution and the ensuring of accountability for war crimes clearly remains the primary responsibility of states. This is the case even under the Rome Statute. Every state has an obligation under customary law to provide for effective domestic jurisdiction over grave breaches of the Geneva Conventions. The Rome Statute goes a step further and provides a detailed list of core crimes as well as a specific mechanism

[45] *See* Manual on the Ratification and Implementation of the Rome Statute of the International Criminal Court (available in different languages on http://www.dfait-maeci.gc.ca/foreign_policy/icc/icc_implement_manual-en.asp); Bruce Broomhall, *The International Criminal Court: A Checklist for National Implementation*, *in* Bassiouni (ed.), 13*quater* NOUVELLES ÉTUDES PÉNALES 113 (1999); Claus Kress/Flavia Lattanzi (eds.), I THE ROME STATUTE AND DOMESTIC LEGAL ORDERS: GENERAL ASPECTS AND CONSTITUTIONAL ISSUES (2000). For examples of national implementing legislation see www.legal.coe.int/criminal/icc or www.iccnow.org/resourcestools/ratimptoolkit.html.

of accountability to become active where a state does not or cannot itself genuinely prosecute the most serious crimes of genocide, crimes against humanity and war crimes. In order to effectively prevent the commission of war crimes in the future, effective and credible accountability mechanisms must be established.