
Chapter XV

INTERNATIONAL CRIMINAL LAW

A. GENERAL PRINCIPLES

Q. What is an international crime?

A. An international crime is such act universally recognized as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the State that would have control over it under ordinary circumstances. (*U.S. v. List, Trials of War Criminals Before the Nuremberg Military Tribunals, February 19, 1948*)

Q. May a person be punished for an act or conduct which did not constitute a crime at the time it was committed?

A. No, International Criminal Law applies the principle of *nulla poena sine culpa*. No person shall be punished for an act or conduct where there is no law punishing it as a crime at the time it was committed. This is expressed in Article 15 of the International Covenant on Civil and Political Rights which states that:

“No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.”

Article 11(2) of the Universal Declaration of Human Rights also provides that:

“No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.”

Q. What is the “*ne bis in idem*” rule?

A. “*Ne bis in idem*” (Latin for “not twice for the same”) is the equivalent of the constitutional prohibition against double jeopardy in municipal law. As applied in international criminal law, it consists of the following principles:

- a) No person shall be tried twice before an international court or tribunal with respect to the same offence for which he or she has already been convicted or acquitted by the said court or tribunal.
- b) No person shall be tried before a national court for offences for which he or she has already been tried by an international court or tribunal.
- c) No person who has been before a national court may be subsequently tried by an international court or tribunal, unless the proceedings before the national court were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted. (See *Rome Statute, Art. 20; ICTY Statute, Art. 10, ICTR Statute, Art. 9*)

Q. Is the principle of “*actus non facit reum, nisi mens sit rea*” applicable in international criminal law?

A. Yes, this principle which translates as “*the act is not culpable unless the mind is also guilty*” also applies in international criminal law. It embodies the fundamental principle that every crime there is an *actus reus*, or the physical act that constitutes the crime, and the

mens rea, or the mental element of varying standards that is held by the perpetrator.

Article 30 of the Rome Statute of the International Criminal Court embodies this principle. It states that “unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime only if the material elements are committed with intent and knowledge.”

Q. When does individual criminal responsibility attach?

- A.** Under Article 25 of the Rome Statute, individual criminal responsibility attaches if a person:
- a) Commits 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.
 - 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.

Q. What is the Command Responsibility?

A. Under Article 28(a) of the Rome Statute, command responsibility renders a military or person effectively acting as a military commander criminally responsible for crimes 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. It has three essential elements:

- a) the existence of a commander-subordinate relationship of effective command and control between the accused and the perpetrator of the crime;
- b) the knowledge, or constructive knowledge, of the accused that the crime was about to be, was being, or had been committed; and
- c) the failure of the accused to take the necessary and reasonable measures to prevent or stop the crime, or to punish the perpetrator. (*Prosecutor v. Bagilishema, ICTR-95-1A-T, June 7, 2001, par. 38*)

Q. What is Superior Responsibility? Distinguish it from Command Responsibility.

A. Under Article 28(b) of the Rome Statute, superior responsibility makes a civilian superior criminally responsible for crimes 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. It is distinguished from Command Responsibility as follows:

- a) Superior responsibility applies to civilian superiors, while command responsibility applies to military commanders;

- b) Superior responsibility requires authority and control over the subordinates, while command responsibility requires command and control;
- c) Superior responsibility requires that the civilian superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes, while command responsibility requires only that the military commander either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes.

Q. Are war crimes and crimes against humanity subject to a statute of limitations?

A. No. It is an established principle in international criminal law that no period of limitation shall apply to war crimes and crimes against humanity to secure their universal application. This principle has been codified in the following international conventions:

- a) Article 1 of the *1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity* that states that “no statutory limitation shall apply to the following crimes, irrespective of the date of their commission:
 1. War crimes as they are defined in the Charter of the International Military Tribunal, Nürnberg, of 8 August 1945, particularly the “grave breaches” enumerated in the Geneva Conventions of 12 August 1949 for the protection of war victims;
 2. Crimes against humanity whether committed in time of war or in time of peace as they are defined in the Charter of the International Military Tribunal, Nürnberg, of 8 August 1945, eviction by armed attack or occupation and inhuman acts resulting from the policy of apartheid, and the crime of genocide as defined in the 1948 Genocide Convention,

even if such acts do not constitute a violation of the domestic law of the country in which they were committed.

- b) Article 29 of the *Rome Statute* of the International Criminal Court that provides that “the crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.”

Q. May a person be convicted for different crimes charged in the indictment based on the same conduct?

- A. Yes, under the *Doctrine of Cumulative Convictions*, convictions for different crimes charged in the indictment based on the same conduct are permissible if each crime involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other. (*Delalic Appeal Judgment, ICTY-IT-96-21-A, 20 February 2001*)

To illustrate: Convictions for violations of the laws and customs of war (*war crimes*) and for crimes against humanity based on the same conduct are permissible, as each contains a materially distinct element. The materially distinct element required by war crimes is the requirement that there be a close link between the acts of the accused and the armed conflict. That required by crimes against humanity is that the offence be committed within the context of a widespread or systematic attack directed against a civilian population.

Q. What is the standard of sentencing in case of cumulative convictions?

- A. Whenever cumulative conviction is based on the same conduct, the Court must ensure that the final or aggregate sentence reflects the totality of the criminal conduct and overall culpability of the offender. The prejudice that an offender will or may suffer because of cumulative convictions based on the same conduct has to be taken into account when imposing the sentence. (*Kunarac Trial Judgment, ICTY-IT-96-23-T & ICTY-IT-96-23/1-T, 22 February 2001*)

Q. What are the courts or tribunals that have been established to enforce International Criminal Law?

A. Two international military tribunals (*IMT*) were established by the victors of World War II to punish international crimes committed during the war; two international criminal tribunals were established by the U.N. Security Council; and one International Criminal Court was established outside of the U.N. system.

In addition, several hybrid courts, which enforce a combination of domestic and international criminal law and comprise both local and international judges, prosecutors and administrative staff, operate in Kosovo, East Timor and Sierra Leone and were established under U.N. authority. The U.N. has agreed to participate in a hybrid court in Cambodia as well.

The major ones are the following:

- a) ***International Military Tribunal (IMT) at Nuremberg*** – established by the Allied Powers through the London Agreement (*August 8, 1945*) “for the Prosecution and Punishment of the Major War Criminals of the European Axis.”
- b) ***International Military Tribunal for the Far East*** – established through an Executive Order of Gen. Douglas MacArthur on April 26, 1946 for the punishment of war criminals of the Far East;
- c) ***International Criminal Tribunal for the Former Yugoslavia (ICTY)*** – established by the adoption of its Statute by U.N. Security Council Resolution 827 (*May 25, 1993*) “for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991;
- d) ***International Criminal Tribunal for Rwanda (ICTR)*** – established by the adoption of its Statute by U.N. Security Council Resolution 955 (*November 8, 1994*) “for the

Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States, between 1 January 1994 and 31 December 1994;

- e) *International Criminal Court (ICC)* – established by the States which participated in the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court.

B. THE NUREMBERG PRINCIPLES

Q. What are the Nuremberg Principles?

- A.** The Nuremberg Principles are a set of guidelines adopted by the U.N. International Law Commission in 1950. The basic premise of the principles is that no person, no matter what their office, stands above International Law.
- a) **Principle I** - Any person who commits an act which constitutes a crime under International Law is responsible therefore and liable to punishment.
 - b) **Principle II** - The fact that internal law does not impose a penalty for an act which constitutes a crime under International Law does not relieve the person who committed the act from responsibility under International Law.
 - c) **Principle III** - The fact that a person who committed an act which constitutes a crime under International Law acted as Head of State or responsible Government official does not relieve him from responsibility under International Law.
 - d) **Principle IV** - The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from

- Public International Law Bar Reviewer -

SAMPLE CHAPTER

www.attyralph.com / attyralph@gmail.com

responsibility under International Law, provided a moral choice was in fact possible to him.

- e) **Principle V** - Any person charged with a crime under International Law has the right to a fair trial on the facts and law.
- f) **Principle VI** - The crimes hereinafter set out are punishable as crimes under International Law:
 - 1. **Crimes against peace:** Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances or participation in a common plan or conspiracy for the accomplishment of any of the said acts.
 - 2. **War crimes:** Violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation to slave-labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war, of persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.
 - 3. **Crimes against humanity:** Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.
- g) **Principle VII** - Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principles VI is a crime under International Law.

C. THE INTERNATIONAL CRIMINAL COURT

Q. What is the International Criminal Court?

- A.** The International Criminal Court (*ICC*) is the first permanent, treaty based, international criminal court established to promote the rule of law and ensure that the gravest international crimes do not go unpunished. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in the Rome Statute, and shall be complementary to national criminal jurisdictions. (*Rome Statute, Art. 1*)

It was established by the Rome Statute of the International Criminal Court on 17 July 1998, when 120 States participating in the “United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court” adopted the Statute. The Statute entered into force on July 1, 2002 and anyone who commits any of the crimes under the Statute after this date will be liable for prosecution by the Court.

Q. What is the Rome Statute? Is the Philippines a party to it?

- A.** The Rome Statute established the International Criminal Court. The Statute was opened for signature by all states in Rome on July 17, 1998 and had remained open for signature until December 31, 2000 at the United Nations Headquarters in New York. The Statute entered into force on July 1, 2002.

The Philippines is not yet a party to the Statute. While the Philippine Mission to the United Nations, through *Charge d’ Affairs* Enrique Manalo, signed the Rome Statute on December 28, 2000, the same however was not signed by the President and submitted to the Senate for ratification. Without ratification, the Philippines cannot be a party to the Statute. In fact, Art. 125(2) of the Statute provides that it is subject to ratification, acceptance or approval by signatory States. (*Pimentel vs. Office of the Executive Secretary, G.R. No. 158088, July 6, 2005*)

Q. On December 28, 2000, the Philippines signed the Rome Statute of the International Criminal Court on December 28, 2000 through Charge d' Affairs Enrique A. Manalo of the Philippine Mission to the United Nations. However, it was not signed by the President of the Philippines.

May the Executive Secretary and the Department of Foreign Affairs be compelled by mandamus to transmit to the Senate the copy of the Rome Statute signed by a member of the Philippine Mission to the United Nations even without the signature of the President?

A. No, it is beyond the jurisdiction of the Courts to compel the executive branch of the government to transmit the signed text of Rome Statute to the Senate. Under our Constitution, the power to ratify is vested in the President, subject to the concurrence of the Senate. The role of the Senate is limited only to giving or withholding its consent, or concurrence, to the ratification. Hence, it is within the authority of the President to refuse to submit a treaty to the Senate or, having secured its consent for its ratification, refuse to ratify it. Although the refusal of a state to ratify a treaty which has been signed in its behalf is a serious step that should not be taken lightly, such decision is within the competence of the President alone, which cannot be encroached by the Courts via a writ of mandamus. (*Pimentel vs. Office of the Executive Secretary, G.R. No. 158088, July 6, 2005*)

Q. May the provisions of the Rome Statute be given retroactive effect?

A. No. the Rome Statute applies the principle of non-retroactivity *ratione personae*. Article 24 of the Statute states that "no person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute." The Rome Statute entered into force on July 1, 2002 and therefore crimes committed prior to that date will no be liable for prosecution by the International Criminal Court.

Q. Where is the seat of the ICC?

A. The seat of the Court is The Hague in The Netherlands. The Court will be temporarily housed at "de Arc" on the outskirts of The Hague before moving to its permanent premises at the Alexanderkazerne. (*Id.*, Art. 3)

Q. Does the ICC have international legal personality?

A. Yes, the Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes. (*Id.*, Art. 4)

Q. What are the crimes falling under the jurisdiction of the ICC?

A. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

- a) The crime of genocide;
- b) Crimes against humanity;
- c) War crimes;
- d) The crime of aggression.

Q. What are the jurisdictional rules applicable to the ICC?

A. The Rome Statute provides for the following rules on jurisdiction:

a) **Jurisdiction *ratione materiae* (subject matter)** – The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (i) Genocide; (ii) Crimes against humanity; (iii) War crimes; (iv) Crime of aggression. (*Art. 5*)

b) **Jurisdiction *ratione loci* (place of the commission of the crime)** – Once a State becomes a party to the Statute, it accepts

the Court's jurisdiction with respect to crimes under the Rome Statute. However, for the Court to exercise its jurisdiction, the “territorial state” (*the state on whose territory the situation which is being investigated has taken or is taking place*), or the “nationality state” (*the state whose nationality is possessed by the person who is being investigated*) must be a party to the Rome Statute. (*Art. 12*)

- c) **Jurisdiction *ratione personae*** (*over the person of the accused*) – The Court shall have jurisdiction over the person of an accused only if the crime was committed in the territory of a State that is a party to the Rome Statute or if the accused is a national of a State that is party to the Rome Statute. (*Art. 12*)

However, the Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime. (*Art. 26*)

The Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence. (*Art. 27*)

- d) **Jurisdiction *ratione temporis*** (*time of commission of the crime*) – A person shall not be criminally responsible under the Rome Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court. (*Art. 22*) The Court has jurisdiction only with respect to crimes committed after the entry into force of the Rome Statute, i.e., on July 1, 2002. (*Art. 11*)

Q. Would the ICC replace national or domestic criminal courts?

- A. No, the ICC will not replace national courts, but will be complementary to national criminal jurisdictions. The Court will only investigate and prosecute if a State is unwilling or unable to

genuinely prosecute. This will be determined by the judges. Unjustified delays in proceedings as well as proceedings which are merely intended to shield persons from criminal responsibility will not render a case inadmissible before the ICC. (*Id.*, Art. 17)

Q. Is mistake of fact a valid defense in a prosecution before the ICC?

A. Yes, a mistake of fact shall be a ground for excluding criminal responsibility but only if it negates the mental element required by the crime. (*Id.*, Art. 32[1])

Q. Is mistake of law a valid ground for excluding criminal responsibility in a prosecution before the ICC?

A. 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.

However, a mistake of law may be a ground for excluding criminal responsibility if it negates the mental element required by such a crime. (*Id.*, Art. 32[2])

Q. Is following orders of a superior a valid defense in a prosecution before the ICC?

A. 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.

For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful. (*Id.*, Art. 33)

Q. May the accused be tried *in absentia* before the ICC?

A. No. The Rome Statute applies the principle of presence. Article 63 of the Statute states that the accused shall be present during the trial.

However, if the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the accused and shall make provision for him or her to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology, if required. Such measures shall be taken only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required.

Q. Is the rule on presumption of innocence applicable to the ICC?

A. Yes. Article 66 of the Rome Statute affirms the rule on presumption of innocence until proved guilty before the Court in accordance with the applicable law. The *onus (burden)* is on the Prosecutor to prove the guilt of the accused and in order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.

Q. May the ICC impose the death penalty?

A. No. Article 77 of the Rome Statute only allows the imposition of the following penalties on a person convicted of a crime under the Rome Statute:

- a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or
- b) Life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.

In addition to imprisonment, the Court may impose a fine and order the forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of *bona fide* third parties.

- Q. Where will the penalty of imprisonment be served?**
- A.** Article 103 of the Rome Statute provides that a sentence of imprisonment shall be served in a State designated by the Court from a list of States which have volunteered to enforce the sentence in their territory. However, if no State is designated by the Court or if no State is willing to enforce the sentence, the sentence of imprisonment shall be served in a prison facility made available by the host State, i.e., The Netherlands.
- Q. Have victims the personality to participate in the proceedings before the ICC?**
- A.** Yes, for the first time in the history of international criminal justice, victims have won the right in the Rome Statute of the International Criminal Court to make representations to the Pre-Trial Chamber (*Art. 15*), to make submissions directly as well as through counsel (*Art. 19*), and to make applications for reparation and to appeal the same (*Art. 82*). This is because the victims before the two *ad hoc* tribunals for the former Yugoslavia and Rwanda were considered as mere witnesses who have no independent participation in the proceedings, but are only called on to give evidence by the parties to the proceedings.