



INTERNATIONAL CRIMINAL LAW TRAINING MANUAL 2016

A manual for use by legal actors in the application of International Criminal Law before the International Crimes Division of the High Court of Uganda.

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Abbreviation/ Acronym

ICTY	International Criminal Tribunal for Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
ICC	International Criminal Court
LRA	Lord's Resistance Army
ICD	International Criminal Division
UN	United Nations
ILC	International Law Commission
GA	General Assembly
UNGA	United Nations General Assembly
ICJ	International Court of Justice
IBA	Bilateral Immunity Agreements
UNSC	United Nations Security Council
RPF	Rwandan Patriotic Front
RTL	<i>Radio-Télévision Libre des Milles Collines</i>
CDR	Coalition for the Defence of the Republic
IMT	Charter of the International Military Tribunal
UPDF	Uganda Peoples Defence Forces
UHRC	Uganda Human Rights Commission
IAC	International Armed Conflicts
NIAC	Non International Armed Conflicts
ICRC	International Committee of Red Cross
ICCPR	International Covenant on Civil and Political Rights
JLOS	Justice Law and Order Sector
DDR	Disarmament, Demobilization and Re-integration
DRC	Democratic Republic of Congo
OTP	Office of the Prosecutor
ICD	International Crimes Division
CID	Criminal Investigations Department
DPP	Directorate of Public Prosecutions

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Foreword

Avocats Sans Frontières (ASF) is an International Non-Governmental Organization established in Brussels in Belgium in 1992. It has field offices Burundi, Central African Republic, Myanmar, Democratic Republic of Congo, Chad, Tunisia and Uganda. The Ugandan office was established in December 2007. The main mission of ASF is to serve the most vulnerable waiting for justice and to contribute to the establishment of institutions and mechanism that allow for access to independent and impartial justice capable of guaranteeing the protection of fundamental human rights.

In Uganda, ASF has been implementing a project with support from MacArthur Foundation aimed at promoting national accountability processes for mass atrocities in Uganda. Among the activities under this project is capacity building of legal actors. In order to implement this activity, ASF has developed a training manual as a result of the needs assessment that was carried out among the legal actors to establish the trends in knowledge, perceptions and attitudes towards international criminal justice system.

This training manual explains the general introduction to international criminal justice, the procedural and evidence aspects of international criminal law under the different tribunals and the International Criminal Court and finally it highlights how the International Crimes Division of Uganda operates.

The purpose of the training manual is to enhance the skills, expertise and disposition of the legal actors necessary when dealing with cases under the purview of international criminal justice. We believe that this training manual will benefit the legal fraternity in Uganda and other countries across the world to make some milestones towards the application of international criminal justice in the local courts.

Introduction

This training manual has been developed by Avocats Sans Frontières (ASF) as a basic guide on the standard of procedural international criminal law to be applied in Uganda's International Criminal Division (ICD) of the High Court of Uganda.

This manual arose from key findings generated from a needs assessment exercise carried out among legal actors in Uganda. In particular the assessment identified perceptions, knowledge gaps and lacunae, different attitudes and challenges that impact on the implementation of International Criminal Law (ICL) before the ICD. The manual is intended to serve as a training tool and resource for legal trainers in Uganda and Africa in general. Discussion questions, tips, and other useful notes for training have been included where appropriate. However, trainers are encouraged to adapt the materials to the needs of the participants and the particular circumstances of each training session. Trainers are also encouraged to update the materials as maybe necessary, especially with regards to new jurisprudence or changes to the criminal procedure code or the rules of the Court.

The materials make use of the most relevant and available jurisprudence. It should be noted that where a first instance judgment has been cited, special care has been taken to ensure that the part referred to was upheld on appeal. It may be useful for trainers to discuss additional cases that might also be relevant or illustrative for each topic, and to ask participants to discuss their own cases and experiences. Because our national courts have very little jurisprudence in this area, the bulk of the case law is taken from the International Criminal Tribunal for Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Court (ICC).

Manual Description and Structure

This manual is divided into three broad modules. The first module deals with contemporary international criminal law. It explores the crimes of genocide, crimes against humanity and war crimes and sets out their ingredients and elements. The second module provides a brief overview of the main issues of procedure and evidence before international and domestic courts. The third module looks at Uganda's existing legal structures established to implement international criminal law. It focuses on the current challenges being faced by the Court and the best practices to resolve these administrative and legal hurdles.

This manual is not a comprehensive guide to substantive international criminal law issues, as the focus of the training manual is on practical and evidentiary aspects, including jurisprudence. Significant areas of substantive international criminal law such as 'defenses' and 'modes of liability' have been omitted to reduce on the size of the manual. However participants should be provided with an analysis of the key concepts of criminal law so as to be able to understand how the substantive law is put into practice before international courts.

Objectives

The manual's objective is to bring participants into contact with the topics and enable them to understand how to implement international criminal law at the domestic level. Legal actors should be able to defend the rights of all people, as well as prosecute those that perpetrate these crimes, in times of peace as well as in times of armed conflict. It is hoped that this contact will inspire participants to further deepen their knowledge of the topics and other topics not included in the training. Another goal is for participants to take an interest in participating in the operations of International Criminal Court, in order to achieve the efficient functioning of a court able to judge and sanction those who commit international crimes and violate human rights when national courts cannot or will not prosecute them.

Specifically, this manual has been developed to:

- Familiarise legal professionals with the principles of International Criminal Law.
- Promote understanding of how those responsible for international crimes should be tried.
- Strengthen the application of international criminal law principles in domestic and international legal practice.
- Build the capacity of domestic institutions to fight impunity and ensure accountability for international crimes.

In order to achieve these objectives you will find “Notes to trainers” in boxes inserted at the beginning of important sections. These notes will highlight the main issues for trainers to address, identify questions which the trainers can use to direct the participants to focus on the important issues, and make references to the parts of the case study that are relevant and identify practical examples to apply the legal issues being taught.

MODULE I

CONTEMPORARY INTERNATIONAL CRIMINAL LAW

Note for trainers.

- This part of the manual covers substantive ICL with a strong bias towards the ICC and Uganda's referrals to that Court.
- It also looks at how the International Courts were able to use judicial activism to fill lacunae that existed in the new international criminal legal regime. This is explored for comparative purposes with our own ICD.
- The body of rules of international criminal law can therefore be divided into *substantive* and *procedural* criminal law.
- The rules on **substantive** international criminal law determine the following:
 - Material acts which amount to international crimes.
 - Subjective or mental elements of international crimes.
 - The circumstances which may excuse the accused from individual criminal liability.
 - The conditions under which the States may or must, under international rules, prosecute persons accused of international crimes.
- The rules on **procedural** international criminal law regulate various stages of international trials (investigation, prosecution, pre-trial, trial, appeal, sentencing, enforcement of judgments) and other related matters such as admission of evidence and the protection of victims and witnesses.
- Where necessary, cross reference with the ICC Act 2010 has been provided.

THE PROSECUTION OF INTERNATIONAL CRIMES

1.1 A Historical Development of International Criminal Law

For centuries, the right of the sovereign to defend itself against internal dissidents was unchallenged and usually uncompromising. The treatment of insurgents, rebels, guerrillas, or dissidents (whatever name was used to refer to internal opponents of a government) was a matter of domestic concern, something still vehemently argued by some scholars today.¹

Article 3 common to the 1949 Geneva Conventions and 28 articles of Additional Protocol II apply to Non International Armed Conflicts (NIAC)

The right of the sovereign to defend itself against internal dissidents was unchallenged and usually uncompromising

These strong beliefs expressed themselves in the international law principles of non-interference and sovereignty. An example of the legislative triviality attached to NIAC can be determined by juxtaposing the sheer magnitude of legal dispositions relating to international as opposed to NIAC conflicts. The 1949 Geneva Conventions and the 1977 Additional Protocols contain close to 600 articles, of which only Article 3 common to the 1949 Geneva Conventions and 28 articles of Additional Protocol II apply to internal conflicts.²

However this gap has over the years been gradually chipped away, if not by the legal decisions of our modern jurists, then by the international conscience that has developed as a result of globalization.

1.1.1. The Evolution of International Criminal Law

The first international prosecution of a war criminal was admittedly that of Peter von Hagenbach, who was tried in 1474 for atrocities committed during the occupation of Breisach. When the town was retaken, von Hagenbach was charged with war crimes, convicted and beheaded.³ Later, in the 1860s, Gustav Moynier, one of the founders of the International Red Cross, argued for an International Criminal Tribunal to try individuals accused of breaching the Geneva Convention of 1864 and proposed a draft statute for such a Court.⁴ His ambitions were however vehemently opposed by the international community and considered too radical for the times since such crimes were not universally recognised as attracting individual responsibility. It had to wait for the twentieth century and the horrors perpetrated in the course of the Second World War (1939-1945) to see individual criminal responsibility attached to the perpetration of international crimes. Following the Nuremberg and Tokyo trials, judicial activity in this domain remained scarce and it is only in the 1990s that, under the auspices of the United Nations, two international *ad hoc* tribunals were created to specifically and respectively address the 1994 genocide in Rwanda⁵ and the ethnic conflict in the Former Yugoslavia.⁶ Subsequently, different types of tribunals have been established for Sierra Leone⁷, East Timor⁸, Cambodia⁹ as well as Hissène Habré before the Extraordinary African Chambers in Senegal.

In the 1990s under the auspices of the United Nations, two international ad hoc tribunals were created to specifically and respectively address the 1994 genocide in Rwanda and the ethnic conflict in the Former Yugoslavia

¹ See e.g. Baty, T. and Morgan, J.H., *War: Its Conduct and Legal Results*, London. John Murray. 1915. P.289; Fiore P., *International Law Codified and its Legal Sanction* (trans. Borchard, E.M.). New York: Baker, Voorhis and Company, 1918, p.553; Walker, W.L., *Pitt Cobbett's Leading Cases on International Law (War and Neutrality)*, Vol.2, 5th edn, Sweet & Maxwell, London, 1937, p.6.

² Boelaert-Suominen, S., 'Grave Breaches, Universal Jurisdiction and Internal Armed Conflict: Is Customary Law Moving towards a Uniform Enforcement Mechanism for all Armed Conflicts?', (2000) 5: 63 *Journal of Conflict and Security Law*, p. 31.

³ Bassiouni, M.C., 'From Versailles to Rwanda in 75 Years: The Need to Establish a Permanent International Court', (1997) 10 *Harvard Human Rights Journal* p.11.

⁴ Hall, C.K., 'The First Proposal for the Permanent International Court', (1998) 322 *International Review of the Red Cross* p. 57.

⁵ See Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N.Doc. S/Res/955 (1994), as amended, found at <http://www.ict.org/ENGLISH/basicdocs/statute.htm>.

⁶ See Statute of the International Criminal Tribunal for the former Yugoslavia, S.C.Res. 827, U.N. Doc. S/Res/827 (1993), as amended, found at <http://www.un.org/icty/legaldoc/index.htm>.

⁷ See Security Council resolution 1315 (2000) [on establishment of a Special Court for Sierra Leone]. Statute of the Special Court for Sierra Leone, 16 January 2002.

⁸ Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences by the UNTAET on 6 June 2000.

⁹ In August of 2001, the first Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea ("ECCC Law I") entered into force.

1.2. Judicial Creativity and the International Criminal Tribunals

The creation of the *ad hoc* Tribunals for the territory of the former Yugoslavia (ICTY) and Rwanda (ICTR) were steps towards the creation of a permanent body for the purpose of pursuing justice for the victims of armed conflicts. The UN's first special international court, the ICTY heard cases of genocide, crimes against humanity, and war crimes from the conflicts that ravaged the former Yugoslavia during the 1990s. It has garnered special attention for prosecuting former Yugoslav President Slobodan Milosevic.¹⁰

Rwanda began trials of persons accused of participating in the 1994 genocide in December 1996. Over 120,000 people have been accused of various crimes during the genocide. Many of the persons who were senior government officials during the genocide and are allegedly high-level perpetrators were tried at the International Criminal Tribunal for Rwanda (ICTR)

Creation of the ad hoc tribunals for the territory of former Yugoslavia and Rwanda were steps towards creation of a permanent body for the purpose of pursuing justice for the victims of armed conflicts

in Arusha, Tanzania.¹¹

The ICTY and the ICTR have the mandate to prosecute those responsible for committing war crimes, crimes against humanity and genocide and have provided an ever expanding body of case law in relation to these international crimes.

The judges of these two tribunals have grappled with interpretation of norms of international humanitarian law in their relatively recent transformation and with their application to international crimes.¹² This process has produced a formidable and growing body of case law concerning a wide range of criminal acts and the numerous procedural and jurisdictional questions have arisen in this field of law.¹³

The judicial creativity and legal import of the case law of the international tribunals is perfectly illustrated by the decision reached by the Appeals Chamber in the *Tadić* case, when – disregarding the traditional distinction between norms applicable to international armed conflicts and those applicable to non-international armed conflicts – it held that Common Article 3 of the Geneva Conventions applied to both sorts of conflicts.¹⁴ This prompted legal commentators to qualify this decision as ‘one of the most important rulings on war crimes since the Nuremberg Judgment’¹⁵ and to consider that the ICTY here ‘explosively expanded the customary law applicable to non-international armed conflicts’.¹⁶

Tadić is not an isolated illustration of judicial creativity at the International Criminal Tribunals and it is undeniable that the definition of genocide has also been subjected to active judicial interpretation. For instance, Trial Chamber I of the ICTR in the case of Akayesu¹⁷ found that the scope of protection under the Genocide Convention¹⁸ applied to “permanent and stable” groups, even though no such statement exists in the convention. Indeed the Tutsis and Hutus were arguably the same ethnicity as they shared the same language and culture. Destexhe argues:

¹⁰*Prosecutor v. Slobodan Milosevic, IT-02-54-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 16 June 2004, available at: <http://www.unhcr.org/refworld/docid/47dfb590.html> [accessed 19 May 2010]*

¹¹*Prosecutor v. Akayesu, Case No. ICTR-96-4-T (Trial Chamber), September 2, 1998; Prosecutor v. Bagilishema, Case No. ICTR-95-1A-T (Trial Chamber), June 7, 2001; Prosecutor v. Kambanda, Case No. ICTR-97-23 (Trial Chamber), September 4, 1998; Prosecutor v. Kayishema and Ruzindana, Case No. ICTR-95-1-T (Trial Chamber), May 21, 2001; Prosecutor v. Musema, Case No. ICTR-96-13-A (Trial Chamber), January 27, 2000; Prosecutor v. Nahimana, Barayagwiza and Ngeze, Case No. ICTR-99-52-T (Trial Chamber), December 3, 2003; Prosecutor v. Niyitegeka, Case No. ICTR-96-14 (Trial Chamber), May 16, 2003; Prosecutor v. Ruggiu, Case No. ICTR-97-32-I (Trial Chamber), June 1, 2000; Prosecutor v. Rutaganda, Case No. ICTR-96-3 (Trial Chamber), December 6, 1999; Prosecutor v. Semanza, Case No. ICTR-97-20 (Trial Chamber), May 15, 2003; Prosecutor v. Serushago, Case No. ICTR-98-39 (Trial Chamber), February 5, 1999.*

¹²Hon. David Hunt (AO QC), ‘Foreword’ in Mettraux G. *International Crimes and the Ad Hoc Tribunals*, Oxford University Press, Oxford 2005. p.14.

¹³*Ibid.*

¹⁴*See Prosecutor v Tadić, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, para.91.*

¹⁵Orentlicher, Diane F., ‘Internationalizing Civil War’, in Cooper, Belinda (ed.), *War Crimes – The Legacy of Nuremberg*, TV Books, 1999, p. 154.

¹⁶*See Aldrich, George H., ‘The Laws of War on Land’, (2000) 94 AJIL 60-1.*

¹⁷*Supra note 210 para. 515.*

¹⁸*Convention on the Prevention and Punishment of the Crime of Genocide. Adopted by Resolution 260 (III) A of the U.N. General Assembly on 9 December 1948. Entry into force: 12 January 1951. Hereinafter referred to as the Genocide Convention.*

“The Hutu and Tutsi cannot even correctly be described as ethnic groups for they both speak the same language and respect the same tradition and taboos. It would be difficult to find any kind of cultural or folkloric custom that was specifically Hutu or Tutsi. There were certainly distinguishable social categories in existence before the arrival of the colonisers, but the differences between them were not based on ethnic or racial divisions.”¹⁹

The ICTR continued with this judicial activism in its *Nahimana et al.* judgment²⁰ where it controversially extended the tribunal’s temporal jurisdiction. It stipulates in the ICTR Statute preamble that the court has jurisdiction over international crimes committed between 1 January 1994 and 31 December 1994 and this is further restated in unequivocal terms in Article 7 of the ICTR Statute which states, “the temporal jurisdiction of the International Tribunal for Rwanda shall extend to the period beginning on 1 January 1994 and ending on the 31 December 1994”²¹

Despite these clear jurisdictional restrictions, the Trial Chamber admitted that many of the events referred to in the indictment preceded 1 January 1994 but argued that such events still “provide[d] a relevant background and basis for understanding the accused’s alleged conduct in relation to the Rwandan genocide of 1994”²² and that they “may have probative or evidentiary value.”²³

So just like the ICTY, the ICTR despite its jurisdictional limitations embodied in its Statute took into account events pre-dating 1994. According to Fournet:

“Both international criminal tribunals have learnt from the legacy of Nuremberg and thanks to their work and case law, international criminal law has undergone a fantastic evolution which has sometimes required forced interpretations of relevant norms. It is submitted that such forced interpretation has to be celebrated as a legal recognition of the Rwandan events as Genocide. By analogy, maybe the interpretation of the Trial Chamber 1 in the present case, even if questionable from a methodological standpoint, has to be welcomed as yet another step forward in the enforcement of international criminal law?”²⁴

There is however a risk that is posed by such judicial creativity to the principle of legality –*nullum crimen, nulla poena sine lege* - as a minimum. Mettraux states:

...because international criminal law is still a body of law in need of legal precision, international criminal tribunals from Nuremberg to The Hague and Arusha, have had to give it substance and precision and have eased many meta-legal standards into proper legal prohibitions. Without judicial input, such legal standards, in and of themselves, would rarely have attained the degree of precision and certainty required from a legal norm to warrant more than a vain hope of compliance. In the history of international criminal law, international tribunals have done more than merely give jural *imprimatur* to norms in waiting [...] so that international criminal law may owe more to judges than any other part of international law.²⁵

This judicial activism is what gave impetus to the formation of the International Criminal Court (ICC). The establishment of the ICC has marked a potential shift from the administration of international criminal law by means of transitory, short lived tribunals. Until the adoption of the Rome Statute, there was no single instrument containing a comprehensive and widely accepted definition of crimes under international law. Before the ICC, enforcement was left to national courts exercising territorial or universal jurisdiction or to *ad hoc* national or international tribunals.

ICC has marked a potential shift from the administration of international criminal law by means of transitory, short lived tribunals

¹⁹Destexhe. A. *Rwanda and Genocide in the Twentieth Century*, Pluto Press, London 1995, p.36

²⁰Supra note 211 para 101.

²¹See Supra note 204 Article 7.

²²ICTR Decision on the Prosecutor’s Request for Leave to File an Amended Indictment, *Prosecutor v. Ngeze*, Case No. ICTR-97-27-I, T.Ch. 1.5 November 1999. para.3.

²³*ibid.*, para. 28.

²⁴Fournet. C, ‘Commentary of Judgement and Sentence, *Prosecutor v. Nahimana, Barayagwiza and Ngeze*, Case No. ICTR-99-52-T, T. Ch. 1, 3 December 2003’, in Klip, A. and Sluiter, G. (eds), *Annotated Leading Cases of International Criminal Tribunals, Volume XVII: The International Criminal Tribunal for Rwanda 2003 – 2004*, Antwerp: Intersentia, 2008, pp. 518-530.

²⁵G Mettraux, *International Crimes and the ad hoc Tribunals* (OUP, Oxford 2005) 14.

1.3. The Creation of the International Criminal Court

Although the International Law Commission (ILC) carried out some preliminary work to determine the desirability of an international tribunal in the 1950s and again in the 1980s²⁶, it was not until July 1994 that a draft statute was adopted and recommended to the United Nations General Assembly (UNGA).

In December 1989, reacting to a letter by Trinidad and Tobago about curbing the spiraling international drug trafficking, the UNGA resurrected the idea of an international tribunal. Matters were even rendered more urgent by the conflict in Yugoslavia and the first reports of mass killings there. The UNGA instructed the ILC to resume work on a draft ICC statute as a matter of priority. This Commission finished its work in 1994 and submitted the draft of what would later be known as the Rome Statute.²⁷

The ILC draft was submitted at the 49th session of the UNGA, and because the draft raised several issues, the GA in 1996 set up the Preparatory Committee on the Establishment of an International Criminal Court (PrepCom).²⁸

The draft was submitted to the Diplomatic Conference sitting in Rome from 15 to 17 July 1998. To their credit, and especially that of the Chair, Canadian judge Philippe Kirsch (who later became president of the court), the Statute was adopted by 120 votes to 7 (USA, Libya, Israel, Iraq, China, Syria and Sudan) with 20 abstentions.

The ILC draft was submitted to the Diplomatic Conference sitting in Rome from 15 to 17 July 1998 and the statute adopted by 120 votes

The Statute set out the Court's jurisdiction, structure and functions and provided for its entry into force 60 days after its ratification or accession by 60 States. The 60th instrument of ratification was deposited with the Secretary General on 11 April 2002, when 10 countries simultaneously deposited their instruments of ratification. Accordingly, the Statute entered into force on 1 July 2002. By October 2005, 100 states had ratified the Statute, with Mexico being the 100th state to ratify.²⁹

Statute entered into force on 1 July 2002 and by October 2005, 100 states had ratified the Statute

1.3.1. Why the need for an International Criminal Court?

Without an international criminal court for dealing with individual responsibility as an enforcement mechanism, international crimes and egregious violations of human rights often go unpunished.³⁰ In the last 50 years, there have been many instances of crimes against humanity and war crimes for which no individuals have been held accountable in Uganda and other parts of Africa. In armed conflicts in Mozambique, Liberia, El Salvador and other countries, there has been tremendous loss of civilian life, including horrifying numbers of unarmed women and children. Massacres of civilians continue in Somalia and other parts of the Great Lakes region of Africa.³¹ The Judgments of the Nuremberg Tribunal stated that 'crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions

There have been many instances of crimes against humanity and war crimes for which no individuals have been held accountable in Uganda and other parts of Africa

of international law be enforced'.³² It thereby established the principle of individual criminal accountability for all who commit such acts as the cornerstone of international criminal law. According to the Draft Code of Crimes against the Peace and Security of Mankind, completed in 1996 by the International Law Commission at the request of the General Assembly, this principle applies equally and without exception to any individual

²⁶For an account on the ILC's earlier work on these issues, see Report of the International Law Commission on the Work of its forty-second session, 1 May-20 July 1990, Vol II, Part Two, p. 19-25, paras 93-157.

²⁷Cassese, A, Gaeta, P, and Jones, J (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Vol.1, Oxford: Oxford University Press, p.321.

²⁸Ibid.

²⁹Text of the Rome Statute circulated as document A/CONF.183/9 of 17 July 1998 and corrected by process-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002.

³⁰<http://www.un.org/icc/index.htm>, Retrieved on 14/04/16.

³¹Ibid.

³²Trial of the Major War Criminals before the International Military Tribunal, Nürnberg, 14 November 1945-1 October 1946, published at Nürnberg, Germany, 1947, p. 223.

throughout the governmental hierarchy or military chain of command.³³ The Convention on the Prevention and Punishment of the Crime of Genocide adopted by the United Nations in 1948 recognizes that the crime of genocide may be committed by constitutionally responsible rulers, public officials or private individuals.³⁴ According to Benjamin B. Ferencz, former prosecutor at Nuremberg: “There can be no peace without justice, no justice without law and no meaningful law without a Court to decide what is just and lawful under any given circumstance”.³⁵

In situations such as those involving in ethnic conflict, violence begets further violence; one slaughter is the parent of the next. The guarantee that at least some perpetrators of international crimes may be brought to justice acts as deterrence and enhances the possibility of bringing a conflict to an end. As mentioned earlier, the ICTY and the ICTR were created in this decade with the hope of hastening the end of the violence and preventing its recurrence.³⁶

- Yet, the establishment of such *ad hoc* tribunals immediately raises the question of selective justice. Reference has been made to ‘tribunal fatigue’.³⁷ The delays inherent in setting up an *ad hoc* tribunal can have several consequences: crucial evidence can deteriorate or be destroyed; perpetrators can escape or disappear; and witnesses can relocate or be intimidated. Investigation becomes increasingly expensive, and the tremendous expense of *ad hoc* tribunals may soften the political will required to mandate them.³⁸ In contrast, a permanent court could operate in a more consistent way

Delays inherent in setting up an ad hoc tribunal can have several consequences

- *Ad hoc* tribunals are subject to limits of time or place. In the last year, thousands of refugees from the ethnic conflict in Rwanda had been murdered, but the mandate of that tribunal was limited to events that occurred in 1994. Crimes committed since that time are not covered.³⁹

According to Cassese, “crimes under international law by their very nature often require the direct or indirect participation of a number of individuals at least some of whom are in positions of governmental authority or military command”.⁴⁰ Nations agree that criminals should normally be brought to justice by national institutions. In times of conflict however, whether internal or international, such national institutions are often either unwilling or unable to act, usually due to the fact that governments often lack the political will to prosecute their own citizens, or even high-level officials, as was the case in the former Yugoslavia or national institutions may have collapsed, as was the case in Rwanda.⁴¹

Nations agree that criminals should normally be brought to justice by national institutions but they are either unwilling or unable to act.

- Effective deterrence is a primary objective of the International Criminal Court. Once it is clear that the international community will no longer tolerate such monstrous acts without assigning responsibility and meeting out appropriate punishment to heads of State and commanding officers as well as to the lowliest soldiers in the field or militia recruits it is hoped that those who would incite a genocide; embark on a campaign of ethnic cleansing, murder, rape and brutalize civilians caught in an armed conflict or use children for barbarous medical experiments will no longer find willing helpers.⁴²

³³See *Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June-17 July 1998, vol. I, Final documents (United Nations publication, Sales No. 02.I.5), document A/CONF.183/9.*

³⁴Article IV of the Genocide Convention.

³⁵*Supra* note 239, p. 431.

³⁶See the respective preambles of the Statutes of the ICTY and ICTR.

³⁷See *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First Session, New York, 3-10 September 2002 (ICC-ASP/1/3, United Nations publication, Sales No. 03.V.2), paras. 16-23.*

³⁸*Ibid.*

³⁹Article 7 of the ICTR Statute limits the temporal jurisdiction of the Tribunal to the period beginning on 1 January 1994 and ending on 31 December 1994.

⁴⁰*Supra* note 229, p. 57.

⁴¹*Ibid.*

⁴²See Casese. A. *The Reaction of the International community to Atrocities. International Criminal Law. Oxford University Press. New York. 2003 p. 431*

Effective deterrence is a primary objective of the International Criminal Court

1.3.2. The jurisdiction and authority of the ICC⁴³

The International Criminal Court has authority to try crimes that are contained in the Rome Statute. These are the crime of genocide, crimes against humanity, war crimes and the crime of aggression. The jurisdiction of the court is non-retroactive and thus only covers cases occurring after 1 July 2002 the date of entry into force of the Statute.⁴⁴

ICC has the authority to try crimes that are contained in the Rome statute

- Under article 12 of the Statute, the court has jurisdiction over crimes committed by nationals of a State Party or committed on the territory of a State Party. In addition, under article 12(3), non-state parties may accept ICC jurisdiction for crimes committed by their nationals or on their territory in regards to specific situations by making a declaration to this effect.
- Article 12(2) gives the court jurisdiction over individuals from a non state party, if they commit atrocities within the jurisdiction of the court as laid out in articles 12 and 12 (a). This is the provision that was so vehemently opposed by the US and eventually led to Bilateral Immunity Agreements (IBA) which offer immunity from prosecution to US nationals accused of committing international crimes in the territory of state parties. Interestingly in the context of the present work, Uganda has signed an IBA with the US to protect US citizens in Uganda.⁴⁵

Article 12(2) gives the court jurisdiction over individuals from a non state party

- Lastly, under article 13 (b), the Court can acquire jurisdiction if a situation is referred to it by the United Nations Security Council. In such instances, the accused need not be nationals of a state party or the crime committed on the territory of a State Party. As an example, the situation in Darfur was referred to the ICC by the UNSC as Sudan is not a state party to the ICC.

Article 13 (b), the Court can acquire jurisdiction if a situation is referred to it by the United Nations Security Council

1.3.3 The Principle of Complementarity

The international tribunals worked on a principle of primacy. In other words, they took precedence over national courts by virtue of their establishment by the UN Charter. The ICC is different, it operates on a principle of complementarity.⁴⁶ The principle is based upon the concept that the onus for punishing those who commit international crimes as well as fighting impunity lies with the States. The States should have domestic mechanisms in place for ensuring the prosecution of individuals involved in the commission of these grievous crimes. Thus the Court will complement, not replace, national judicial systems. The principle of complementarity provides that the Court shall be complementary to national criminal jurisdictions.⁴⁷ This principle means that the ICC exercises jurisdiction when States are unwilling or unable to prosecute⁴⁸

⁴³See Part II of the ICC Statute covering Jurisdiction, Admissibility and Applicable Law. Articles 5-21 of the ICC Statute.

⁴⁴Article 11 of the ICC Statute

⁴⁵A copy of the Bilateral Immunity Agreement signed on the 12-June-2003 is available at http://www.amicc.org/usinfo/administration_policy_BIAs.html

⁴⁶Article 1 and 17 of the ICC Statute.

⁴⁷Article 1 of the ICC Statute.

⁴⁸Article 17. See also *Prosecutor v Muthaura et al, Judgment on Appeal of the Republic of Kenya ICC-01/09-02/11-274*.

ICC operates on a principle of complementarity and is based upon the concept that the onus for punishing those who commit international crimes as well as fighting impunity lies with the States.

The principle of complementarity stems from a series of concerns and not only from deference to state sovereignty. Indeed, in practical terms, the ICC's resources and infrastructure necessarily entail that the Court will be unable to prosecute more than a few individuals.⁴⁹ Furthermore, to a large extent, the Court will have to rely on state cooperation and on states to investigate, prosecute and sentence individuals accused of having committed international crimes.

It was consequently agreed that the Court would defer to States if: (i) 'the case is being investigated or prosecuted'⁵⁰, (ii) has been investigated and the State has decided not to prosecute⁵¹; (iii) the person concerned has already been tried⁵² (*ne bis in idem*); or (iv) 'the case is not of sufficient gravity to justify further action by the Court'.⁵³ In these circumstances, the principle of complementarity obligates the Court to declare the case inadmissible and, in so doing, to accept the primary role of States to prosecute.⁵⁴

Court will have to rely on state cooperation and on states to investigate, prosecute and sentence individuals accused of having committed international crimes

In some instances however, the Court will have primacy for prosecuting where the case is

of such a massive gravity to necessitate the intervention of an international tribunal. This is especially the case if for example the legal framework of the country has completely or substantially been destroyed i.e. as was the case in the eastern Democratic Republic of Congo.⁵⁵

Furthermore, under article 17, the court will prosecute if the state is 'unable or unwilling' to prosecute itself. However this will not bar the court from exercising its jurisdiction if it rules that the national trials are intended to shield the accused from genuine prosecution.⁵⁶

Under article 17, the court will prosecute if the state is 'unable or unwilling' to prosecute itself

The principle of complementarity is very important to Uganda as the International Crimes Division (ICD) is an expression of this principle. Uganda has shown a willingness and ability to try perpetrators of crimes in Uganda. In fact, the Ugandan government has argued that while it was 'unable' to try the LRA at the time of referral, it is now able to try the LRA under municipal law.⁵⁷

Uganda has shown a willingness and ability to try perpetrators of crimes in Uganda

According to paragraph 2 of Article 17 of the Statute, in order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

- (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;

⁴⁹Mohammed, Z.M., 'The Ugandan Government Triggers the First Test of the Complementarity Principle: An Assessment of the First State's Party Referral to the ICC', (2005) 5: 83 *International Criminal Law Review* 83–119.

⁵⁰Sub-para. 17 (1)(a).

⁵¹Sub-para. 17 (1)(b).

⁵²Sub-para. 17 (1)(c).

⁵³Sub-para. 17(1) (d).

⁵⁴Kress J., 'Self-Referrals' and 'Waivers of Complementarity': Some Considerations in Law and Policy' (2004) 2 *Journal of International Criminal Justice* 944-948.

⁵⁵Article 17 (3). See also the case of *G. Katanga and M. Ndjolo Chui* where the Court held that where the judiciary is so deficient, the State (in this case DRC) is considered as 'unable' to prosecute.

⁵⁶Article 17 (2)(a). See also *Supra* note 48

⁵⁷See Mohammed, Z.M., *op. cit.* note 244.

(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with the intent of bringing the person concerned to justice;

(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with the intent of bringing the person concerned to justice.⁵⁸

This provision thus envisages these three scenarios as clear evidence of the 'unwillingness' of the national proceedings. During the drafting negotiations of paragraph 1 of article 17, some delegations had criticized the use of the term 'unwilling' on the allegation that it was too subjective and inclined to be abused by political motivations.⁵⁹ Though it was passed as is, it was under the understanding that any interpretation of the meaning should be narrow and strict. Therefore, paragraph 2 of article 17 is exhaustive and should be of strict interpretation.

To determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law

1.3.4. Referring cases to the Court⁶⁰

There are three ways in which cases can be brought to the attention of the Court.

- First, A State can ask the Prosecutor of the Court to carry out an investigation of crimes that have been committed, and for which the ICC has authority.⁶¹ This was the method used when the Government of Uganda referred to the situation in northern Uganda to the Prosecutor in 2003. This method can be used by countries which are signatories to the Rome Statute.
- Second, the Security Council of the United Nations acting under chapter VII of the UN Charter can refer a case to the Prosecutor for investigation.⁶² This method is useful for pursuing people who commit these serious crimes in countries which have not signed the Rome Statute. This is the method which was used in March 2005, to refer the situation in Darfur to the ICC, even though Sudan has not signed the Rome Statute. It was also employed in the case of Libya.
- Third, the Prosecutor can start an investigation when he receives reasonable information that requires him to conduct an investigation also referred to as a *proprio motu* investigation.⁶³ In this case, the Prosecutor must obtain the permission of the pre-trial Judges before s/he can carry out an investigation. This is the case with the ICC investigations into the Kenyan post election violence.

For crimes other than those referred by the UN Security Council, the Court can only exercise its authority if the offender is a citizen of a member State or a State which has accepted the Court's authority in respect of the crime.⁶⁴ Similarly, the Court can exercise its authority if the crime was committed within the borders of a member State, or a State which has accepted the Court's authority in respect of that crime.⁶⁵

Court can only exercise its authority if the offender is a citizen of a member State or a State which has accepted the Court's authority in respect of the crime

Where the case is referred to the Court by the UN Security Council, the Court can exercise its authority without any limitation as to the citizenship of the offender, or where the crime was committed.⁶⁶

⁵⁸Article 17 (2) of the ICC Statute.

⁵⁹See John T. Holmes, 'The Principle of Complementarity', in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (Kluwer Law International, The Hague, 1999), p. 49.

⁶⁰Article 13.

⁶¹Articles 13(a) & 14.

⁶²Article 13(b).

⁶³Article 13 (c) & 15.

⁶⁴Article 12(2)(b).

⁶⁵Article 12(2)(a).

⁶⁶Article 13 (b).

1.3.5. Other Jurisdictional Issues ⁶⁷

- The Court can only try offences outlined in the Rome Statute if they were committed after 1 July 2002.⁶⁸ It cannot deal with crimes committed before this date, even if they are very serious. This posed a challenge to the Ugandan government as the LRA has been engaged in committing atrocities against the population since 1986. This ultimately led to the creation of the ICD which has a wider jurisdictional mandate under the laws of Uganda.

Court can only try offences outlined in the Rome Statute if they were committed after 1 July 2002

- Second, the Court can only try people who commit these crimes when they are above 18 years of age.⁶⁹ Those who were below 18 years of age at the time of committing these crimes cannot be tried in this Court because they are considered to have been children at the time.

Court can only try people who commit these crimes when they are above 18 years of age

- Third, the Court cannot exercise its authority in a case where the offender has already been tried by another court for the same conduct. This is the principle known as 'double jeopardy'.⁷⁰
- Fourth, the Court can only exercise its authority when the country responsible does not have the capacity to try the offender; or, is unwilling to arrest, investigate and prosecute the offender(s) for these crimes.⁷¹ Where the concerned country has started national proceedings in respect of crimes under the Rome Statute, the ICC must keep off. However, if these national proceedings are biased and aimed at protecting the offender from being held responsible for the crimes, the ICC can come in.

Court can only exercise its authority when the country responsible does not have the capacity to try the offender

Similarly, where the concerned country has investigated and decided not to prosecute the person concerned, the ICC cannot exercise its authority, except where the decision is aimed at protecting the offender(s) from being held responsible for the crimes.⁷²

- Another factor for the Court to consider before exercising its authority is the interests of justice. Under the Rome Statute, the prosecutor is required to evaluate information available in relation of a crime and then initiate an investigation, except in a case where the prosecutor determines that there is no reasonable basis to go on under the Rome Statute.⁷³ To decide whether or not to investigate, the prosecutor must consider whether the available information provides a basis to believe that a crime was committed. However, the prosecutor could also consider that despite the fact that the offence is of a grave nature, and that the interests of the victims should be considered, there are substantial reasons to believe that undertaking an investigation would not be in the interests of justice.⁷⁴ This may be based on the seriousness and circumstances of the crime, the role of the offender in the crime, and the interests of victims.

Prosecutor is required to evaluate information available in relation of a crime and then initiate an investigation

⁶⁷Articles 11, 12, 17, 20 & 26.

⁶⁸Article 11.

⁶⁹Article 26.

⁷⁰Article 20 & article 17 (c).

⁷¹Article 17 (a).

⁷²Article 17 (b).

⁷³Article 15(6).

⁷⁴Article 53.

THE CRIME OF GENOCIDE

Notes for trainers:

- Participants need to appreciate the drafting history of the Genocide Convention, which is the basis for interpreting and applying the elements of the crime of genocide.
- Despite the significance of charging the crime of genocide, regarded as the most serious crime against humanity, prosecutors should only proceed with the crime of genocide where there is sufficient evidence of each of the elements of the crime. Therefore, it is vital to convey the very specific nature of the legal elements of this offence.
- When prosecuting genocide, whether in an international or national setting, careful consideration must be given to whether the evidence establishes the unique requirements of this offence. Crimes against humanity can be charged where there is insufficient evidence of genocide, providing that the requirements for such crimes are met.

1.4 The Crime of Genocide

The word 'genocide' was coined by Polish lawyer Raphael Lemkin in 1944⁷⁵ who merged the Greek word 'genos', which refers to individuals sharing the same genetic features, and the Latin word 'cide' which literally means 'killing'. Lemkin coined this new term to describe the first internationally recognized genocide of the 20th Century, which is the extermination of the Jews by the Nazis.⁷⁶

'Genos' is Greek word, which refers to individuals sharing the same genetic features, and the 'cide' is Latin word which literally means 'killing'

The definition of genocide is found in Article 6 (Art 7 of the ICC Act 2010) of the Rome Statute which reproduces *verbatim* the wording of Article II of the Genocide Convention and accordingly reads:

Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.⁷⁷

Genocide means any acts committed with intent to destroy, in whole or in part, national, ethnical, racial, or religious group. Three elements must be present to constitute genocide.

⁷⁵Lemkin, R., *Axis Rule in Occupied Europe – Laws of Occupation, Analysis of Government, Proposals for Redress*, Washington: Carnegie Endowment for International Peace, Division of International Law, 1944.

⁷⁶Bergen, D., *War & Genocide: A Concise History of the Holocaust*, Lanham, MD: Rowman & Littlefield, 2003. p. 16.

⁷⁷Article 2 of the Genocide Convention and Article 6 of the Rome Statute.

This language highlights three important elements. First, the victims must constitute a national, ethnic, racial, or religious group. Second, the Statute dictates that certain enumerated acts of harm or willful neglect must have been inflicted upon members of such a group. Third, those acts of harm must have been undertaken with the intent to destroy or partially destroy the group. Each of these three elements must be present to constitute genocide.⁷⁸ This is what we refer to as the objective elements of the crime of genocide.

The subjective elements of the crime require one to distinguish between first, the mental element required for each of the underlying acts (murder, etc.) and, second, the specific mental element which is necessary to consider those acts as amounting to genocide.

All the prohibited acts must be accomplished *intentionally*, i.e. they require *intent* on the part of the perpetrator. This is also the case, as has been already pointed out above, for the killing of members of the group. Premeditation, i.e. the planning and preparation of the prohibited act, is not required, except – in the opinion of a distinguished commentator – in the case of the act listed under (c), because of the use of the word ‘deliberately’. It logically follows that other categories of mental element are excluded: recklessness (or *dolus eventualis*) and gross negligence.

Genocide is a typical crime based on the ‘depersonalization of the victim’; that is a crime where the victim is not targeted on account of his or her individual qualities or characteristics, but only because he or she is a member of a group. As the German Federal Court of Justice rightly held in *Jorgić* in 1999, the perpetrators of genocide do not target a person ‘in his capacity as an individual’; they ‘do not see the victim as a human being but only as a member of the persecuted group’. Therefore, to the general intent of the underlying act an additional specific mental element must be added, namely ‘the intent to destroy, in whole or in part’ one of the enumerated group ‘as such’, which is provided for in Article II(1) of the Convention on Genocide (and in the corresponding customary rule). This is the *dolus specialis* (specific intent) of genocide, also known as genocidal intent. It is an aggravated form of intent that does not demand realization through the material conduct, but that is nonetheless pursued by the perpetrator. In other words, it is not required that the perpetrator should actually manage to destroy a member of a protected group by carrying out one of the five acts prohibited under the Convention. It is only necessary that the perpetrator harbour the specific intent to destroy the group while carrying out one of the those acts, regardless of whether by accomplishing the act the intended ultimate objective is achieved. The requirement of the specific intent, therefore, has a preventative function, since it allows the criminalization of genocide before the perpetrator achieves the actual destruction of the group.

As previously mentioned, the first element of the crime of genocide is the group status of the victims.⁷⁹ Article 6 of the Statute requires that victims belong to a ‘national, ethnical, racial or religious group’. Neither the Statute; the Convention nor any other international document define these terms, but international tribunals have stated that the concepts ‘partially overlap’⁸⁰ and should be ‘assessed in the light of a particular political, social and cultural context.’⁸¹

Article 6 of the Statute requires that victims belong to a ‘national, ethnical, racial or religious group’

In the *Akayesu* case, the ICTR found racial groups to be ‘based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors.’⁸² The ICTR has also described an ethnic group to be ‘one whose members share a common language and culture.’⁸³

In a similar vein, in the *Jelisić* case, the ICTY argued that objective criteria alone were insufficient and believed it appropriate to evaluate group status ‘from the view of those persons who wish to single that group out from the rest of the community.’⁸⁴

⁷⁸See Schabas, W.A., *Genocide in International Law – The Crime of Crimes*, Second edition, Cambridge: Cambridge University Press, 2009.

⁷⁹*Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T, Judgment, Appeals Chamber, 7 June 2001, para. 65.

⁸⁰*Prosecutor v. Krstić*, op. cit. note 290, para. 555.

⁸¹*Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Judgment, Trial Chamber, 6 December 1999, para. 56.

⁸²*Prosecutor v. Akayesu*, op. cit. note 272, para. 514.

⁸³*Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T, 21 May 1999, para. 98.

⁸⁴*Prosecutor v. Jelisić*, Case No. IT-95-10, 14 December 1999, para. 70.

As an example the Tutsis and Hutus of Rwanda have been controversially classified as distinct ethnic groups by the ICTR.⁸⁵ Less controversial are the Fur, Zaghawa, and Masaalit tribes of the Darfur region. In the case of Darfur, all of the victims are black African as opposed to Arab Sudanese. In its September 2004 report 'Documenting Atrocities in Darfur', the State Department described the tribes as 'non-Arab'.⁸⁶ Each of the tribes in the Darfur region speaks a Nilo-Saharan language, distinct from that spoken by the Arab Sudanese.⁸⁷ These pronounced distinctions are not evident in northern Uganda. The perpetrators and victims belong to the same ethnic group, speak the same language and generally have a similar history and background.

Tutsis and Hutus of Rwanda have been controversially classified as distinct ethnic groups by the ICTR

This is not the case in northern Uganda. Members of the Acholi, Langi and Teso who have been the biggest victims of the LRA insurgency are all Ugandan in nationality, black African in race and Nilotic in ethnicity. Furthermore, there is no indication that the LRA are targeting a particular religious group as they seem to carry out atrocities irrespective of religion or religious background. Based on the above principles of identification of a protected group (i.e subjective and objective criteria), a group is determined by reference to the objective particulars of a given social or historical context and by subjective perceptions of the perpetrators.⁸⁸ As a result the ingredient of a group status which is an essential element of the crime of genocide is not fulfilled.

It is therefore not surprising that investigations by the ICC have led to indictments for crimes against humanity and war crimes but have found no evidence to suggest that the atrocities committed in northern Uganda amount to genocide.

Investigations by the ICC have led to indictments for crimes against humanity and war crimes

⁸⁵Fournet. C., *Op Cit* Note 224.

⁸⁶Documenting Atrocities in Darfur - US State Department report on Darfur Genocide, September 2004, State Publication 11182. p. 21.

⁸⁷The International Court of Justice discussed the terminology of a 'group' in its Reservations to the Convention on the Prevention and Punishment of Genocide, Advisory Opinion, ICJ Reports (1951), p. 23. For the State Department report, see United States Department of State Bureau of Democracy, Human Rights, and Labor and the Bureau of Intelligence and Research, 'Documenting Atrocities in Darfur', 9 September 2004, available at <http://www.state.gov/g/drl/rls/36028.htm> [hereinafter 2004 State Department Report].

⁸⁸Prosecutor v Nahimana, Barayagwiza and Ngeze Appeals Chamber Judgment, 28 November 2007 491-497

CHECKLIST ON THE CRIME OF GENOCIDE

Act:	Genocide by killing	Genocide by causing serious bodily or mental harm	Genocide by deliberately inflicting conditions of life calculated to bring about physical destruction	Genocide by imposing measures intended to prevent births	Genocide by forcibly transferring children
Conduct	1. The perpetrator killed one or more persons.	1. The perpetrator caused serious bodily or mental harm to one or more persons	1. The perpetrator inflicted certain conditions of life upon one or more persons.	1. The perpetrator imposed certain measures upon one or more persons.	1. The perpetrator forcibly transferred one or more persons.
Note	Note: The term "killed" is interchangeable with the term "caused death".	Note: This conduct may include, but is not necessarily restricted to, acts of torture, rape, sexual violence or inhuman or degrading treatment.	Note: The term "conditions of life" may include, but is not necessarily restricted to, deliberate deprivation of resources indispensable for survival, such as food or medical services, or systematic expulsion from homes.		Note: The term "forcibly" is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment.
Consequences and Circumstances			4. The conditions of life were calculated to bring about the physical destruction of that group, in whole or in part.	4. The measures imposed were intended to prevent births within that group.	4. The transfer was from that group to another group.
					5. The person or persons were under the age of 18 years.
					6. The perpetrator knew, or should have known, that the person or persons were under the age of 18 years.
	2. Such person or persons belonged to a particular national, ethnical, racial or religious group.	2. Such person or persons belonged to a particular national, ethnical, racial or religious group.	2. Such person or persons belonged to a particular national, ethnical, racial or religious group.	2. Such person or persons belonged to a particular national, ethnical, racial or religious group.	2. Such person or persons belonged to a particular national, ethnical, racial or religious group.
Intent	3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.	3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.	3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.	3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.	3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.
Context	4. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.	4. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.	5. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.	5. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.	7. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.
Note	The term "in the context of" would include the initial acts in an emerging pattern; - The term "manifest" is an objective qualification	The term "in the context of" would include the initial acts in an emerging pattern; - The term "manifest" is an objective qualification	The term "in the context of" would include the initial acts in an emerging pattern; - The term "manifest" is an objective qualification	The term "in the context of" would include the initial acts in an emerging pattern; - The term "manifest" is an objective qualification	The term "in the context of" would include the initial acts in an emerging pattern; - The term "manifest" is an objective qualification

CRIMES AGAINST HUMANITY

Notes for trainers:

- This Module deals with both the contextual elements for crimes against humanity and the specific prohibited underlying acts that constitute crimes against humanity. It is important for participants to understand what the general contextual requirements are for crimes against humanity, namely that these crimes are committed as part of a widespread or systematic attack on any civilian population. It is these features which distinguish crimes against humanity from war crimes and ordinary crimes. It must be emphasized that isolated acts are excluded from crimes against humanity. It is only when criminal conduct forms part of a widespread or systematic attack that it can be characterized as a crime against humanity.
- In addition to these contextual elements, participants must discuss and understand which particular prohibited acts, if committed as part of an attack against a civilian population, will constitute crimes against humanity.
- Questions to develop the participants' understanding of these matters are, for example:
 - What are the main features of a widespread or systematic attack?
 - What constitutes a civilian population? Does it make any difference if there are armed forces mixed in with the population?
 - What role does an accused need to play in relation to the widespread or systematic attack?
 - Do the underlying prohibited acts (*i.e.* murder, torture, rape, etc.) they have to be widespread or systematic? What relationship must there be between the underlying acts and the attack?

1.5. Crimes against humanity ⁸⁹

The phrase “crimes against humanity” as crimes for which individuals could be held responsible only emerged after the Second World War in the Nuremberg Charter. The 1868 St. Petersburg Declaration limited the use in times of war of certain explosive or incendiary projectiles, since they were declared to be contrary to the laws of humanity.

The expression ‘crimes against humanity’ was first used in the 1915 Declaration by the Governments of France, Great Britain and Russia denouncing the massacre of Armenians taking place in Turkey.⁹⁰

Nonetheless the concept of crimes against humanity remained vague, often overlapping with that of war crimes. Crimes against humanity were defined as accessory crimes due to the war nexus requirement.

In 1947, the International Law Commission (ILC) was given two tasks by the United Nations General Assembly: (a) to formulate the principles of international law recognized by the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal; and (b) to prepare a Code of offences against peace and security of mankind. As a result, there was a definition of crimes against humanity with a more exhaustive list of acts punishable under the offence.⁹¹ This definition continued to ‘expand’, culminating in the Rome Statute.

⁸⁹Article 7 of the Rome Statute.

⁹⁰Cited in Schwelb, E., ‘Crimes against humanity’, (1949) 23:8 *British Year Book of International Law*, p. 181.

⁹¹These are: ‘a) murder; b) extermination; c) torture; d) enslavement; e) persecutions on political, racial, religious or ethnic grounds; f) institutionalised discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population;

The list of the specific crimes contained within the meaning of crimes against humanity has been expanded since Article 6(c) of the IMT to include, in the ICTY and the ICTR, rape and torture. The statute of the ICC also expands the list of specific acts. In particular, the ICC statute adds the crimes of enforced disappearance of persons and apartheid. Further, the ICC statute contains clarifying language with respect to the specific crimes of extermination, enslavement, deportation or forcible transfer of population, torture, and forced pregnancy.

Crimes contained within crimes against humanity has been expanded since Article 6(c) of the IMT to include, in the ICTY and the ICTR, rape and torture and later before the ICC, enforced disappearance and apartheid.

There's undoubted consensus that crimes against humanity are crimes under international law committed in both times of peace and war.

Now encapsulated in the ICTY, ICTR and ICC Statutes, there is undoubted consensus that crimes against humanity are crimes under international law, recognized under the general principles of law, giving rise to universal jurisdiction. Crimes against humanity can be committed in times of peace or war. It is undeniable that the judicial decisions of both *ad hoc* Tribunals have proved instrumental in elaborating a definition of crimes against humanity. In particular, in the *Akayesu* case, the ICTR listed the elements of crimes against humanity, clearly stating that:

Crimes against humanity can be broken down into four essential elements, namely:

- “(i) the act must be inhumane in nature and character, causing great suffering, or serious injury to body or to mental or physical health;
- (ii) the *act* must be committed as part of a wide spread or systematic attack;
- (iii) the act must be committed against members of the civilian population;
- (iv) the *act* must be committed on one or more discriminatory grounds, namely, national, political, ethnic, racial or religious grounds.”⁹²

Yet, the exact parameters of such crimes remain unclear,⁹³ even if the Rome Statute has drawn from the previous judicial decisions and now contains a longer list of acts characterized as crimes against humanity in its definition:

any of the following acts when committed as part of a widespread and 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 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;

⁹²*Prosecutor v. Akayesu*, Case No. ICTR-96-4-T (Trial Chamber), 2 September 1998, para 578

⁹³Roberge, M.-C., 'Jurisdiction of the *ad hoc* Tribunals for the former Yugoslavia and Rwanda over crimes against humanity and genocide', (1997) 321 *International Review of the Red Cross*, pp.651-664.

- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.⁹⁴

1.5.2. The elements of crimes against humanity

In the *Akayesu* case,⁹⁵ the Trial Chamber of the ICTR observed that for an act to attain the threshold of a crime against humanity, it must satisfy four essential ingredients, also known as the elements of the crime. These are elements of crimes are also clearly enumerated by the ICC in its Elements of Crimes as adopted at the 2010 review conference. They include inter alia:

- (i) the act must be inhumane in nature and character, causing great suffering, or serious injury to body or to mental or physical health;
- (ii) the act must be committed as part of a widespread or systematic attack;
- (iii) the act must be committed against members of the civilian population;
- (iv) the act must be committed on one or more discriminatory grounds, namely, national, political, ethnic, racial or religious grounds.⁹⁶

1.5.2.1. Element 1: *The act must be within Art 7 of the Rome Statute.*

With crimes allegedly committed by the LRA, there is no doubt that they would squarely fall within the acts provided for under Art 7 of the ICC Statute. As enumerated earlier, the LRA has been brutal in its tactics, committing atrocities meant to shock the population into submission and observance. Crimes committed by the LRA such as widespread murder, rape, abductions, maiming and other extreme forms of torture would qualify as 'inhumane in nature and character'.⁹⁷

With crimes committed by the LRA, there is no doubt that they squarely fall within the 'inhumane' bracket

1.5.2.2. Element 2: *The 'widespread or systematic attack'*

In the *Semanza* case,⁹⁸ the Trial Chamber analyzed the meaning of 'widespread and systematic' and held:

A crime against humanity must have been committed as part of a widespread or systematic attack against any civilian population on discriminatory grounds. Although the act need not be committed at the same time and place as the attack or share all of the features of the attack, it must, by its characteristics, aims and nature or consequence objectively form part of the discriminatory attack.⁹⁹

The LRA has allegedly committed these crimes as part of their policy to shock the civilian population into submission and continue to commit these crimes as part of a widespread and systematic military tactic to achieve their aims, however misguided. In *Akayesu*, the Trial Chamber noted 'An attack is an unlawful act of the kind enumerated in Article 3(a) to (i) of the Statute. An attack may also be non violent in nature like imposing a system of apartheid or exerting pressure on the population to act in a particular manner'.¹⁰⁰ In *Kayishema and Ruzindana*¹⁰¹ the Tribunal went further to add that within a single attack, there may exist a combination of the enumerated crimes, for example murder, rape and deportation.

⁹⁴Article 7 of the Rome Statute.

⁹⁵*Prosecutor v Akayesu*, Case No ICTR-96-4-T (Trial Chamber), September 2, 1998. para. 578. See also ICC Elements of Crimes

⁹⁶*Ibid.* para 76.

⁹⁷*Supra* note 93.

⁹⁸*Prosecutor v Semanza*, Case No. ICTR-97-20 (Trial Chamber), May 15, 2003. para 326.

⁹⁹*Ibid* para. 439.

¹⁰⁰*Supra* note 93.

¹⁰¹*Prosecutor v Kayishema and Ruzindana*, Case No. ICTR-95-1-T (Trial Chamber), May 21 1999 para 124.

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Taking as an example the Barlonyo massacre, the LRA attacked the village and camp in Barlonyo and killed 380 civilians, raped and tortured 80 people, abducted 400 children (most of whom were rescued later that night) and forced dozens of young girls into sexual slavery.¹⁰²

In *Akayesu*¹⁰³ and again in *Kayishema and Ruzindana*¹⁰⁴, the Tribunal clarified the position on personal attacks by holding that 'the act must be committed as part of a widespread or systematic attack and not just a random act of violence'. It stated 'The elements of the crime effectively exclude... acts carried out for purely personal motives and those outside a broader policy or plan. Either of these conditions [widespread or systematic] will serve to exclude isolated or random inhumane acts committed for purely personal reasons.'

Widespread or systematic will serve to exclude isolated or random inhumane acts committed for purely personal reasons

In *Akayesu*, the Tribunal held that the attack must contain one of the alternate conditions of being widespread or systematic, not both, as in the French text of the Statute: 'customary international law requires only that the attack be either widespread or systematic.' The Tribunal went further to define widespread as 'massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims'.¹⁰⁵

Tribunal defines widespread as 'massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims

Systematic is defined as being thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources

The concept of 'systematic' has been defined as being thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources. In *Kayishema and Ruzindana*, the Trial Chamber held:

For an act of mass victimization to be a crime against humanity, it must include a policy element. The requirements of widespread or systematic are enough to exclude acts not committed as part of a broader policy or plan. Additionally the requirement that the attack must be committed against a civilian population demands some kind of plan, and the discriminatory element of the attack is... only possible as a consequence of a policy.¹⁰⁶

But in later decision, the ICTY clarified that the existence of a policy or plan may be evidentially relevant, in that it may be useful in establishing that the attack was directed against a civilian population and that it was widespread or systematic, but that the existence of such plan is not a separate legal element of the crime.¹⁰⁷ This position finally has been clarified by the ICC under Art 7(2) (a) where the court requires showing a plan or policy. In other words, it must be shown that the attack was in furtherance of a State or organizational policy to commit such attack.

1.5.2.3. Element 3: The attack must be committed against members of the civilian population.

Members of the civilian population are people who are not taking any active part in the hostilities, including members of the armed forces who have laid down their arms and those persons placed *hors de combat* by sickness, wounds, detention or any other cause. In the case of northern Uganda, the Uganda Human Rights Commission has discovered that 87% of the victims of the conflict have been civilians.¹⁰⁸

¹⁰²'The Barlonyo camp survivors', *The Weekly Observer*, 4th April 2001 p. 12.

¹⁰³*Supra* note 355 para. 578.

¹⁰⁴*Supra* note 361 para. 123.

¹⁰⁵*Supra* note 355 para. 579.

¹⁰⁶*Supra* note 361 para.581.

¹⁰⁷*Supra* note 358 para 329.

¹⁰⁸See Uganda Human Rights Commission Annual Report 1999 at p. 264 available at www.uhrc.or.ug

Members of the civilian population are people who are not taking any active part in the hostilities

In *Kayishema and Ruzindana*, the Tribunal held that because crimes against humanity may be committed inside or outside the context of an armed conflict, 'the term civilian must be understood within the context of war as well as relative peace. Thus, a wide definition of civilian is applicable and, in the context of the situation of Kibuye *prefecture* where there was no armed conflict, includes all persons except those who have the duty to maintain public order and have legitimate means to exercise force.'¹⁰⁹

The Tribunal went further to hold in *Bagilishema* that "the requirement that the prohibited acts must be directed against a civilian population does not mean that the entire population of a given State or territory must be victimized by these acts in order for the acts to constitute a crime against humanity".¹¹⁰ In the case of the LRA, the fact that LRA crimes have been limited to northern Uganda and not the whole country or the entire population does not absolve them of liability.

The 'population' element is intended to imply crimes of a collective nature and thus excludes single or isolated acts which, although possibly constituting crimes under national penal legislation, do not rise to the level of crimes against humanity.¹¹¹

In *Akayesu*, the Tribunal further clarified that "where there are certain individuals that within the civilian population who do not come within the definition of civilians, this does not deprive the population of its civilian character".¹¹² Now this is very important because in times of war, it's common for the side on the defensive to use civilians as human shields and for the offensive side to have informers. This has often been argued by the LRA as justification for their atrocities i.e. that they are 'weeding out' informers and UPDF collaborators.¹¹³ More recently this was played out to deadly consequences in May 2009 when the Tamil Tigers in Sri Lanka, in a last desperate attempt to stem off a government onslaught surrounded themselves with civilians.¹¹⁴

In times of war, it's common for the side on the defensive to use civilians as human shields and for the offensive side to have informers

Prior to the Rome Statute, the ICTR also attempted to narrow down the effect of 'discriminatory grounds' by holding in *Bagilishema*:

The qualifier 'on national, political, ethnic, racial or religious grounds,' which is peculiar to the ICTR Statute should, as a matter of construction, be read as a characterization of the nature of the 'attack' rather than the men's *rea* of the perpetrator. The perpetrator may well have committed an underlying offence on discriminatory grounds identical to those of the broader attack; but neither this, nor for that matter any discriminatory intent whatsoever, are prerequisites of the crime, so long as it was committed as part of the broader attack.¹¹⁵

The Appeals Chamber went ahead to clarify that the discriminatory intent under Article 3 was not required for acts other than persecution. It held in *Akayesu*, 'The Trial Chamber committed an error of law in finding that intent to discriminate on national, political, ethnic, racial or religious grounds was an essential element for crimes against humanity. Article 3 does not require that all crimes against humanity be committed with a discriminatory intent'.¹¹⁶ This element is therefore unnecessary for the case of the LRA as international criminal law has crystallized to eliminate it as a requirement for the crime against humanity.

¹⁰⁹Supra note 361 at para. 127-129.

¹¹⁰Prosecutor v Bagilishema, Case No. ICTR-95-1A-T (Trial Chamber), June 7, 2001. para. 80.

¹¹¹Ibid.

¹¹²Supra note 355. para. 582.

¹¹³Supra note 171 and 191.

¹¹⁴Tamil Tigers using human shields: France, UK, ABC News, 14th May 2009 available at <http://www.abc.net.au/news/stories/2009/04/16/2544191.htm>

¹¹⁵Supra note 366. para.81.

¹¹⁶Supra note 355. para 447-469.

WAR CRIMES

Notes for trainers:

- This Module is one of the most important for participants as the crimes discussed will be frequently prosecuted within national jurisdictions. It is critical for participants to grasp the unique elements of international crimes as compared with the ordinary national crimes. The participants should also examine the differences in the elements between war crimes, crimes against humanity and genocide.
- The elements of the offences must be thoroughly explored, and the use of practical examples from the international and domestic case law would greatly assist in illustrating how the elements are defined and implemented.
- It is imperative that participants appreciate the origins and development of IHL, as this will empower them both to understand the rationale behind the legal requirements of war crimes and to develop arguments in favour of interpretations they wish to advance in their cases.

1.6. War Crimes ¹¹⁷

War crimes include violations of established protections of the laws of war (*ius in bello*), and include failures to adhere to norms of procedure and rules of war. War crimes were until recently the domain of international humanitarian law since this is the primary law applicable in times of armed conflict.

War crimes include violations of established protections of the laws of war and failures to adhere to norms of procedure and rules of war

The ICTY Appeals chamber in *Tadić* held that “an armed conflict exists whenever there is protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until in the case of internal conflicts, a peaceful settlement is reached”.¹¹⁸ It went further to hold ‘An armed conflict is distinguished from internal disturbances by the level of intensity of the conflict and the degree of organization of the parties to the conflict’.¹¹⁹

An armed conflict is distinguished from internal disturbances by the level of intensity of the conflict and the degree of organization of the parties to the conflict

International humanitarian law originally established two regimes to govern armed conflict, whether international or non-international. That means that these two regimes have slightly different law applicable. While international armed conflicts (IAC) are covered by the four Geneva Conventions and Additional Protocol I thereto, non international armed conflicts (NIAC) are covered by a sole provision common to all the four conventions and hence called common article 3. In addition NIAC are covered by Additional Protocol II. This distinction is perhaps the single largest legal lacuna that has been addressed by contemporary international criminal law.

¹¹⁷Article 8 of the ICC Statute.

¹¹⁸*Prosecutor v Tadić, Case No. IT-94-1 (Appeals Chamber), Decision of the Defence Motion for Interlocutory Appeal on Jurisdiction, October 2, 1995, para. 70.*

¹¹⁹*ibid.*

Non-international armed conflicts (conflicts occurring in the territory of one State) while a conflict is classified an international armed conflict when war is being fought between two sovereign States or war is being fought in the territory of more than one sovereign State.

NIAC occur much more frequently today and entail more suffering than international armed conflicts. Prudence would, therefore, call for an understanding of the rules of international humanitarian law applicable in times of non-international armed conflict as being more important than those of international armed conflicts.¹²⁰

In this respect, as mentioned previously, the ICTY Appeals Chamber's decision in the *Tadić* case marked an unprecedented step forward in the harmonization of the legal regime applicable to both types of conflicts. Indeed, disregarding the traditional distinction between norms applicable to international armed conflicts and those applicable to non-international armed conflicts, the Chamber held that the leading principles of international humanitarian law apply to both sorts of conflicts.¹²¹

The conflict in northern Uganda was originally a non-international armed conflict, then it turned into an international armed conflict (with Sudan attacking Uganda and *vis a versa*), before becoming an internationalized armed conflict (by virtue of the LRA being primarily based in Sudan and the DRC)¹²². Consequently, it is sustainable that the whole regime of international humanitarian law is applicable to the LRA, even if it might differ depending on the period in question.

The offences of war crimes are sanctions to breaches of IHL and therefore ICL primarily exists to protect people who are not taking part in a war or those that are *hors de combat*,

For an offence to be classified as a war crime, it must be committed as part of the war, and there must therefore be a connection to the war, in terms of location or offender

from crimes committed in a war or conflict situation. For an offence to be classified as a war crime, it must be committed as part of the war, and there must therefore be a connection to the war, in terms of location or offender. In other words, the crime may be committed in the location where the armed conflict is taking place, or by a person who is actively taking part in the war situation, or both.¹²³ The war situation must have influenced the offender's decision to commit the crime, the manner in which he committed the crime, and even the purpose for which he committed it. The war situation may be an international or an internal armed conflict.

War Crimes in the Rome Statute relate to grave violations of the Geneva Conventions (principally for international conflicts);¹²⁴ serious violations of common article 3 of the Geneva Conventions in conflicts of a non-international nature;¹²⁵ and serious violations of the law of armed conflict in non-international armed conflicts.¹²⁶

1.6.1. Grave breaches of the 1949 Geneva Conventions as war crimes – article 8(2) (a) of the ICC Statute

The war crimes that constitute grave breaches of the Geneva Conventions are committed when four conditions exist: there must be an armed conflict; there must be a connection between this conflict and the crimes; the armed conflict must be international in scope; and the persons or property which fall victim to the grave breaches must be 'protected' in the Geneva Conventions.¹²⁷

¹²⁰Sassoli, M and Bouvier, A, *How Does the Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law*, vol. I, 2nd ed., ICRC, Geneva, (2006), at 250.

¹²¹See *Prosecutor v Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, para.91.

¹²²*Sudan attacks Uganda*, *The Observer Newspaper*, 18th February 2002.

¹²³*Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2 (Trial Chamber), February 26, 2001. para. 32.

¹²⁴Article 8(2)(a).

¹²⁵Article 8(2)(c).

¹²⁶Article 8(2)(e).

¹²⁷*Prosecutor v. Naletilic and Martinovic*, Case No. IT-98-34 (Trial Chamber), March 31, 2003 para 225

A conflict is classified an international armed conflict when the following circumstances exist:

1. When a war is being fought between two sovereign States (for example as in the case of Uganda and Sudan in mid 2001 and early 2002)
2. When war is being fought in the territory of more than one sovereign State.

A conflict is considered international there is participation of a 3rd State or some of the participants in the conflict act on behalf of another State. In determining this participation, the Courts have set up a 'OVERALL CONTROL' test. This means that the 3rd State must have a role in organizing, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group.¹²⁸.

1.6.2. Serious violations of common article 3 of the 1949 Geneva Conventions as war crimes – article 8(2) (c) of the ICC Statute

Whenever armed violence erupted in the international community, in traditional international law the legal response was based on a stark dichotomy: belligerency or insurgency. The former category applied to armed conflicts between sovereign States, while the latter applied to armed violence breaking out in the territory of a sovereign State.¹²⁹

Correspondingly, international law treated the two classes of conflict in a markedly different way.

Correspondingly, international law treated the two classes of conflict in a markedly different way: interstate wars were regulated by a whole body of international legal rules, governing both the conduct of hostilities and the protection of persons not participating (or no longer participating) in armed violence. By contrast, there were very few international rules governing internal conflict, for States preferred to regard internal strife as rebellion, mutiny and treason coming within the purview of national criminal law and, by the same token, to exclude any possible intrusion by other States into their own domestic jurisdiction. This dichotomy was clearly sovereignty-oriented and reflected the traditional configuration of the international community, based on the co-existence of sovereign States more inclined to look after their own interests than community concerns or humanitarian demands.¹³⁰

Since the 1940s, however, the aforementioned distinction has gradually become more and more blurred. The international community has realised that for the innocent victims of war, the artificial distinction between international and non-international conflicts is irrelevant.¹³¹ They suffer the same and die the same. Consequently, the protection offered to civilians in times of a non-international armed conflict has improved over the years to the level that the distinction remains only on the Statute books. In this regard the International Committee of the Red Cross has carried out a study on international customary law which looks at the ever increasing protection offered by the law during times of war.¹³²

International Committee of the Red Cross has carried out a study on international customary law which looks at the ever increasing protection offered by the law during times of war

Notwithstanding the precursor above, the four Geneva Conventions have only one provision amongst them to deal with conflicts of a non-international nature and in particular war crimes. Common Article 3 of the Geneva Conventions states:¹³³

¹²⁸Prosecutor v Bemba Judgment, 21 March 2016, ICC-01/05-01/08-3343

¹²⁹Cullen A., *The Definition of Non-International Armed Conflict in the Rome Statute of the International Criminal Court: An Analysis of the Threshold of Application* Contained in Article 8(2)(f), *Journal of Conflict & Security Law* (2008), Vol. 12 No. 3, 419–445.

¹³⁰see Prosecutor v Tadić, *Jurisdiction Case, Appeals Chamber, 1995, at paras 96 and 97 where the issue was discussed at length.*

¹³¹Supra note 387.

¹³²Henckaerts J-M and Doswald-Beck L., *Customary International Humanitarian Law*, Cambridge University Press, 3 vol., 2005. This study is available from the Cambridge University Press — www.cambridge.org — in English.

¹³³Geneva Conventions of 1949 which include: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, August 12, 1949; Convention (III) Relative to the Treatment of Prisoners of War; August 12, 1949 and the Convention (IV) Relative to the Protection of Civilian Persons in Time of War, August 12, 1949.

In cases of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

1) Persons taking no active part in the hostilities shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are prohibited with respect to the above-mentioned persons:

- a) Violence to life and person, in particular murder, mutilation, cruel treatment and torture;
- b) Taking of hostages;
- c) Outrages upon personal dignity through humiliating and degrading treatment;
- d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court.

2) The wounded and the sick shall be collected and cared for.¹³⁴

Article 8 (2) (c) of the Rome Statute of the International Criminal Court seeks to protect civilians and other protected persons from acts amounting to war crimes. Such persons include civilians, religious personnel, and members of the armed forces who have surrendered or laid down their arms and those who are sick, in detention, injured in battle, or who are no longer actively participating in war for any reason. Any person fitting such a description is a 'protected person' in this category of war crimes.

Article 8 (2) (c) of the Rome Statute of the International Criminal Court seeks to protect civilians and other protected persons from acts amounting to war crimes

For war crimes that result in serious violations of common Article 3 of the Geneva Conventions to apply, there must be an armed conflict within the borders of a State, and does not involve the participation of another sovereign State.¹³⁵ In other words, the conflict is not of an international character, but is between forces of a sovereign State and an organized armed group. Crimes under this part involve those committed against people who are not actively taking part in hostilities. These include members of armed forces who have laid down their arms and those who are unable to actively participate in combat due to sickness, wounds, detention or for any other reason.

The conflict in northern Uganda has been classified as a non-international armed conflict for purposes of International Humanitarian Law and the distinctions made under the Geneva Conventions.¹³⁶ The problem with the conflict in northern Uganda is that it has involved different players at different times with Sudan and the DRC becoming involved in the conflict. This inevitably leads to a blurring of the nature of the conflict and consequently the law applicable.

¹³⁴ Geneva Conventions of 1949 which include: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, August 12, 1949; Convention (III) Relative to the Treatment of Prisoners of War; August 12, 1949 and the Convention (IV) Relative to the Protection of Civilian Persons in Time of War, August 12, 1949.

¹³⁵ This has of course been the case in northern Uganda although the conflict has now spilled over to neighbouring States.

¹³⁶ ICRC Country Report 1998, p.32.

MODULE II

PROCEDURE AND EVIDENCE BEFORE INTERNATIONAL TRIBUNALS

Notes for trainers:

- The procedural and evidentiary system before international courts comprises a mixture of the common law “adversarial” system and the civil law “inquisitorial” system.
- The particular system in place at the domestic level should be compared and contrasted with the system applied before the international courts.
- It is important for participants to understand the manner in which the procedural and evidentiary systems before international courts have been designed and have evolved to meet the challenges of proving international crimes, and in particular, guaranteeing the rights of the accused in such proceedings.
- It is not necessary for participants to delve into the details of how these systems work. They should develop an understanding of the way in which the systems work in practice so that they are able to apply the international standards where appropriate within their domestic systems.
- It is imperative that participants appreciate that the international systems have been fashioned to most effectively facilitate the prosecution of international crimes which are very often widespread and complex, and which involve the admission of large quantities of oral and written evidence.

2.0 International Criminal Law And Jurisprudence

2.1. Introduction

The predecessors of the ICC, the ICTY and ICTR have established *locus classicus* in various areas of international criminal law procedure and practice. While the ICC is still developing its jurisprudence, and in several cases still undergoing the appeal process, the principles laid down by the tribunals are trite law. This module looks at the jurisprudence of the tribunals and the ICC in areas of procedural and evidentiary international criminal law.

2.1.1. Overview of Procedural Issues

International criminal courts have adopted a mixed system of procedure for the prosecution of international crimes. A major difference between the “adversarial” and inquisitorial” system is the role played by the different parties in the proceedings.¹³⁷

In the adversarial system:

- The prosecution and the defence each bring their case to court, to be heard by the judge(s);
- The parties do their own investigations;
- The judges neutrally manage the proceedings and decide on procedural and evidentiary issues as they arise at trial; and
- In adversarial systems where juries are assigned to cases, the jury will be the finder of fact, and in all other cases, the judge will be the finder of fact.

In an inquisitorial system:

- A state agency undertakes an objective investigation into the case as a whole;
- In general, a judge may supervise the investigation and together with the prosecutor and investigators, create a case file;
- The trial judge plays an active role during the trial in an effort to “seek the truth”; and
- The judge is the finder of fact.

The differences in these systems have led to the development of distinct procedures and rules for the international tribunals.

The international system has sought to blend the two systems. Different courts have adopted procedures from the two systems to varying degrees. The ICTY and ICTR Statutes include very few procedural rules, but the judges created rules of procedure and evidence to reflect “concepts that are generally recognized as being fair and just in the international arena”.¹³⁸ A trend in the Statutes and Rules of the ICTY and ICTR is that they are more adversarial than inquisitorial.

However, the rules do provide judges with the ability to intervene more frequently in the proceedings than in typical adversarial system. For example, in the ICTY and ICTR, judges are permitted to call their own witnesses. This is not permitted in traditional common law systems such as in our courts in Uganda.

With regard to the ICC, State parties to the Rome Statute adopted Rules of Procedure and Evidence. The ICC Rules provide for a Pre-Trial Chamber to authorize the prosecutor’s investigations, and charges can only be confirmed following a contested hearing between the prosecution and defence.

For all international courts, the prosecutor is appointed as an independent party responsible for the investigation and prosecution of international crimes. It is the prosecutor who brings and prosecutes the cases.

¹³⁷For a Discussion of the two Systems, See Robert Cryer, *Etal.*, *An Introduction to International Criminal Law and Procedure* 425–430(2010).

¹³⁸Annual Report of the ICTY, UNDoc.A/49/342-S/1994/1007,p53

Key components of procedure include:

- For all international courts, the prosecutor is appointed as an independent party responsible for the investigation and prosecution of international crimes. Unlike the inquisitorial system, for all international courts, it is the prosecutor who brings and prosecutes the cases. The prosecutor bears the burden of proof, and must prove all crimes beyond reasonable doubt.
- The defence does not have to prove its case and the accused has the right to remain silent. The onus lies on the prosecution throughout the proceedings to establish its case. The defence is entitled to investigate the allegations made against the accused and call its own evidence if it so wishes. The accused can testify in his case, but there is no requirement to do so.
- Each party, as well as the judges, can call witnesses to testify. Witnesses, often victims, play an important role at the international tribunals. Some witnesses testify as “experts” on areas of specialization that can assist the court understand a particular issue. Witnesses may apply to be granted security measures for their testimony, such as closed sessions, voice and facial distortion, or pseudonyms. If the circumstances necessitate, witnesses may also apply to be part of relocation protection programmes.¹³⁹
- Under the ICC Statute, victims can directly participate in the proceedings as a party to the proceedings when they fulfill the requirements under the Rome Statute.¹⁴⁰ They are entitled to be represented separately in the proceedings, and can apply for reparations at the conclusion of proceedings. This is a characteristic of the international court that stakeholders have been very interested in reciprocating at the ICD.

Notes for trainers:

- One of the most important issues in this module for participants to discuss is the way in which fair trial guarantees are recognized and implemented before international and domestic courts.
- In the domestic section that follows, participants will receive an overview of how these guarantees are applied in their own domestic systems.
- In order to stimulate discussion about these issues, participants could be asked to consider how each of the guarantees that are recognized before international courts are implemented in their national systems. Participants should be actively encouraged to consider whether all necessary fair trial guarantees are recognized both before international and national courts, and what improvements could be made.
- Another way of ensuring that participants engage with the issues would be to ask them whether they believe that the accused in the case study could get a fair trial in their national courts, and what steps would need to be taken to ensure that his rights were protected. Is this a case that should rather be referred to the ICC?

¹³⁹ See rule 36 of *The Judicature (High Court) (International Crimes Division) Rules, 2015*.
¹⁴⁰ The ICD Rules under rule 35 and 36 provide for Victim's Counsel.

2.1.2 Fair Trial Rights

Fair trial rights are core principles of international criminal law. International courts follow the fair trial provisions contained in treaties, and have used the provisions on fair trial rights contained in the ICCPR¹⁴¹ as a model in their proceedings.¹⁴²

The basic fair trial standards applied by the international courts are:

- The Presumption of innocence;
- Right to trial before an independent and impartial tribunal;
- Right to be informed promptly and in detail in a language they understand of the nature of the charge(s) against them;
- Right to adequate time and facilities to prepare a defence;
- Right to communicate with counsel of one's own choosing;
- Right to self-representation;
- Right to be tried without undue delay;
- Right to a public trial;
- Right to be tried in his or her own presence;
- Right to legal assistance;
- Right to examine evidence against them and obtain the presentation and examination of evidence on their behalf under the same conditions as evidence against them; and
- Right not to be compelled to testify against him/herself or to confess guilt.

In particular, these rights are reflected by Articles: 21 of the ICTY Statute, 20 of the ICTR Statute and 67 of the Rome Statute. These rights are also provided for in the Constitution of Uganda under Articles 28 and 44 (which makes them non-derogable rights).

These rights can be grouped *inter alia* into the following categories of fair trial issues, which are considered below:

- Equality of arms;
- Self-representation; and
- Public trials and trial without undue delay.

The 1995 Constitution of Uganda and the Rules of the ICD also provide for many of these fair trial rights for suspects and accused persons, although the ICD is still to fully be tested in its application of these rights. The general courts in Uganda have shown that though these rights are guaranteed in the Constitution, in reality their application is limited especially to the affluent and where the case has gathered public attention.

2.1.3 Equality of Arms

Equality of arms encompasses several rights that ensure that the defence has the same opportunity to prepare and present its case as the prosecution¹⁴³. In some cases, defence counsel have argued that it is unfair that they do not have the same resources as the prosecution, which has a large staff and significant financial and human resources to prepare its case over a number of years¹⁴⁴.

Equality of arms refers to procedural equality, and not equal resources.

¹⁴¹International Covenant on Civil and Political Rights ("ICCPR"), G.A.Res.2200A(XXI),21U.N.GAORSupp. (No.16) at 52, U.N.Doc.A/6316 (1966), 999U.N.T.S.171, (Mar.23,1976).

¹⁴²The ICTR has also recognized that customary international law is reflected in the ICCPR. See, Juvénal Kajelijeli, Case No. ICTR-98-44A, Appeal Judgement, May23, 2005, 209.

¹⁴³See, e.g. Bosnia and Herzegovina CPC, Arts. 14 (equality of arms) (2003), 7 (defence), 39-40 (defence counsel). Komentari Zakonaokrivicom/kaznempostupkuu Bosnii Hercegovini Zajednickiprojektat Vijeda Evropei Evropskekomisije, Sarajevo 2005. p 43 (Commentary on the Criminal Procedure Code in Bosnia and Herzegovina, Joint project of the Council of Europe and the European Commission, Sarajevo, 2005, p. 43; available in BCs only.

¹⁴⁴See, e.g. Official Gazette of Croatia,, Narodne Novine "No.110/97, Art.4(2)

The ICTY and ICTR have held that equality of arms refers to procedural equality, and not equal resources.¹⁴⁵ The judges are required to provide everything they practically can when a party asks for assistance in presenting its case.¹⁴⁶ The court must ensure that the defence is not at a significant disadvantage.¹⁴⁷

The defence is always free to raise any violation of this right before the Trial Chamber on the facts of the case.

A common complaint from the accused is a violation of the right to sufficient time or facilities to prepare a defence. The judges will evaluate claims of insufficient time or insufficient facilities on a case-by-case basis, considering whether the defence as a whole, and not just individual counsel, was deprived of time or facilities.¹⁴⁸

The concept of adequate time and facilities is abstract and must be evaluated by looking at the circumstances of each case.¹⁴⁹

Other rights that fall under this category include the rights;

- To defence counsel;
- To be informed promptly and in detail about the charges against them;
- To disclosure of exculpatory evidence by the prosecution; and
- To examine and call witnesses.¹⁵⁰

2.1.4 Self- Representation

The right to self-representation is not absolute. For complicated trials, such as those before the international tribunals, an accused may lack the ability to conduct their own case—which may obstruct the accused's right to a trial without undue delay. Moreover, at times, accused have taken the opportunity of self-representation to engage in disruptive behavior or otherwise obstruct the trial. In such situations, a trial chamber can assign legal counsel or legal assistance to an accused.¹⁵¹

The right to self- representation is not absolute.

2.1.5. Public Trial and Trial without Undue Delay

The right to a public trial and a trial without undue delay is widely recognized, but is sometimes difficult for the tribunals to guarantee in light of the types of cases they hear. The right to a public trial, in which the public can follow and analyse the trial, helps protect against unfair or arbitrary decisions by the judges. The international tribunals allow for public trials, but also recognize exceptions to this right.

The international tribunals allow for public trials, but also recognize exceptions to this right

Closed or private sessions are allowed at the ICTY and ICTR for reasons of public order, morality, safety and security, non-disclosure of the identity of a protected witness or victim or protection of the interests of justice.¹⁵²

At the ICC, closed or private sessions are allowed to protect the accused, victims, witnesses or confidential or sensitive evidence. The judges must balance the interests of a public hearing against the interests listed above. As a result, there are frequent closed or private sessions, usually because of witness protection issues.

¹⁴⁵Ferdinand Nahimana, Case No. ICTR-96-11A, Appeal Judgement, 28 Nov. 2007, ¶1220; Dario Kordid et al., Case No. IT-95-14/2-A, Appeal Judgement, 17 Dec. 2004, p69.

¹⁴⁶Nahimana, AJP 220; Duško Tadić, Case No. IT-94-1-A, Appeal Judgment, 26 Jan. 2000, p52.

¹⁴⁷Clément Kayishema et al., Case No. ICTR-95-I-A, Appeal Judgement, 1 June 2001, p67–69.

¹⁴⁸Nahimana, AJ 220; Aloys Ntabakuze, Case No. ICTR-98-41-AR72(C), Decision (Appeal of the Trial Chamber) “Decision on Motions by Ntabakuze for Severance and to Establish a Reasonable Schedule for the Presentation of Prosecution Witnesses” of 9 Sept. 2003, 28 Oct. 2004, p.4.

¹⁴⁹See also Paul Kelly v. Jamaica Communication No. 253/1987 (10 April 1991), UN Doc. CCPR/C/41/D253/1987, ¶ 5, 9

¹⁵⁰See e.g., Statute of the International Tribunal for the Former Yugoslavia, Art. 21(4) (1993); Statute of the International Criminal Tribunal for Rwanda, Art. 20(4); Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9; 37 ILM 1002 (1998); 2187 UNTS 90, Art. 67 (1).

¹⁵¹See, e.g., Radovan Karadžić, Case No. IT-95-5/18-AR73.2, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on Adequate Facilities, 7 May 2009, 13–14;

¹⁵²ICTY Rules of Procedure and Evidence (“ICTRRPE”), Rule 79; ICTRPE, Rule 79; ICCPR Art. 14 (1); Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”), 4 Nov. 1950, ETS5

Notes for trainers:

This section will consider the basic procedural steps that apply in prosecutions before the ICTY and ICTR. These procedures are similar before both tribunals; however, there are certain differences with the procedures that apply before the ICC.

- In the next section, basic procedural steps applied before the ICC will be considered.
- In both of these sections, the participants should be encouraged to consider the differences between the procedures of the international courts and those that apply before our own national courts.
- The case study can also be used to consider how the indictment should be drafted and confirmed before an international court, and whether the same procedure would need to be followed in our domestic system.
- Participants could be asked to discuss the advantages and disadvantages of the different procedural steps that are followed from their own experience. A useful way of stimulating discussion is to ask participants what changes they think should be made to their national procedure, drawing on the experiences of the international courts.

2.2. Best Practices of the ICTY and ICTR

The processes and procedures at the ICTY, ICTR and SCSL are very similar. Below is a very brief summary of procedural issues dealt with at trial. For a more in-depth look at practice and procedural issues, refer to the ICTY Manual on Developed Practices.

2.2.1. Investigations

The first step in any trial is the prosecutor initiating an investigation within the limits of the court's jurisdiction. The prosecutor can start an investigation based on information received from sources or *ex officio*.¹⁵³

Key issues include:

- The prosecutor does not need to get permission from a judge to proceed with an investigation or investigate crimes within the jurisdiction of the court.
- The prosecutor is not required to investigate or collect evidence that is favorable to the suspect or defence. However, if such information emerges, the prosecutor must disclose it.
- During the investigation, the prosecution team interviews suspects, witnesses, victims, experts and others, and collects and reviews documentary evidence. Sometimes there will be forensic evidence taken as well, for example, in the case of mass graves or being present at the sites of killings.

2.2.2 The Indictment

Key issues regarding the initial indictment include:

- Once the investigation is complete, only the prosecutor can decide whether to apply for an indictment to be issued.
- The prosecutor is responsible for the content of the indictment.
- Once the prosecutor has determined "that a *prima facie* case exists"¹⁵⁴, the indictment will be sent to a judge.
- The judge will determine whether there are reasonable grounds for the issuance of an indictment.¹⁵⁵

¹⁵³ICTY Statute, Art.18 (1); ICTR Statute, Art.17 (1).

¹⁵⁴ICTY Statute, Art.18 (4); ICTR Statute, Art.17 (4).

¹⁵⁵ICTY RPE, Rule 29 (A).

The indictment is the document upon which the entire case will be based. It must be precise and inclusive, since the trial chamber cannot convict a defendant for a crime he or she has not been charged with (unless they convict for a lesser and included crime to one charged).

The indictment must be precise and inclusive. The trial chamber cannot convict a defendant for a crime he or she has not been charged with (unless they convict for a lesser crime to the one charged).

The indictment is critical to informing the accused of the charges he or she faces. Important considerations include:

- The accused will use the indictment to prepare a defence. An accused cannot mount a proper defence if the indictment does not adequately inform him or her of the charges.
- An indictment must not violate the rights of the accused to be informed in detail of the nature and cause of the charges and to adequate time and facilities to prepare a defence.
- The “nature” of the charge is its legal characterization, or the specific alleged offence and the alleged mode of liability.
- The “cause” of a charge includes the facts it is based on.

There are certain basic requirements for indictments, including:

- The material facts of the prosecution’s case must be set out with “enough detail to inform a defendant clearly of the charges against him so that he may prepare his defence”.¹⁵⁶
- The prosecutor does not have to include the evidence intended to prove the material facts.
- Which facts are “material” is determined on a case-by- case basis according to the nature of the charges. For example, a charge of directly perpetrating a crime requires more specific material facts in the indictment than a charge of aiding and abetting.

The material facts of the prosecution’s case must be set out with “enough detail to inform a defendant clearly of the charges against him so that he may prepare his defence

Fundamental defects in the indictment can lead to the Trial Chamber throwing out a charge or the Appeals Chamber reversing a conviction.¹⁵⁷ At the ICTY, the focus of the indictment is on the offence, as opposed to the conduct of the accused. Therefore, how an offence is characterized in an indictment is binding on the Trial Chamber and they cannot convict for a crime not charged, even if they find one was committed.

There is a set process for how the indictment is issued. Important steps in this procedure include:

- The indictment must be issued by a single judge before the proceedings can begin. This is usually done before the suspect is arrested or surrenders.
- The prosecutor must provide a summary of evidence, either documentary or oral, which will be called during trial, to support the charges in the indictment.
- This evidence must establish *prima facie* that the suspect committed the crimes.
- The court must determine that the prosecutor has met the evidentiary requirements for bringing the case to trial.
- Each charge must be confirmed.

¹⁵⁶*Thomir Blaškić, Case No. IT-95-14-A, Appeal Judgement, 29 July 2004, 209.*

¹⁵⁷*Milorad Krnojelac, Case No. IT-97-25-A, Appeal Judgement, 17 Sept. 2003 38–42; Mikaeli Muhimana, Case No. ictr-95-1-a, Appeal Judgement, 21 May 2007, 217-18, 224-6 (J.Schomburg, dissenting).*

As long as it does not unfairly prejudice the accused, an indictment can be amended at anytime, even during the trial proceedings, but only with the approval of the court.

2.2.3. Cumulative Charges and Convictions

The ICTY and ICTR also accept cumulative charges, which are quite common. These arise because, in the context of genocide, crimes against humanity and war crimes, the same act can qualify as several different crimes. For example, a rape could be considered a crime under any of those characterizations, and could be charged as three different crimes.

Cumulative charges arise because, in the context of genocide, crimes against humanity and war crimes, the same act can qualify as several different crimes.

Important considerations regarding cumulative charges include:

- Cumulative charges can lead to cumulative convictions.
- A cumulative conviction must be entered if both statutory provisions charged have a “materially distinct” element not included in the other.
- A materially distinct element requires proof of a fact that is not required by another element.¹⁵⁸ If this test is not met, a single conviction must be entered, with the more specific crime taking precedence.
- The court will also take into consideration the contextual elements of the crimes when deciding on a cumulative conviction.

Cumulative charges can lead to cumulative convictions if both statutory provisions charged have a “materially distinct” element not included in the other.

A number of examples are discussed below.

- A single act can be charged as two different crimes against humanity. For example, an accused that has killed a person can be convicted of persecution as a crime against humanity and with murder as a crime against humanity—even though the underlying act, killing a person, was the same.

A single act can be charged as two different crimes against humanity.

These types of convictions are allowed as long as each offence has a materially distinct element not contained in the other.¹⁵⁹ The ICTY has found that this test is met for persecution and murder and other inhumane acts, or imprisonment as crimes against humanity.¹⁶⁰

There are also alternative charges for various forms of criminal liability. For example, an accused might be charged with direct perpetration, or in the alternative, aiding and abetting, planning, or superior responsibility.

An accused might be charged with direct perpetration, or in the alternative, aiding and abetting, planning, or superior responsibility.

Even if convicted of cumulative charges, an accused will not be sentenced cumulatively for these charges. In other words, an accused convicted of both killing as a war crime and killing as a crime against humanity would only be sentenced once for the same underlying act of killing. The accused would not have to serve two terms of imprisonment for the same unlawful act.

¹⁵⁸Kordidetal.,AJ 1033.

¹⁵⁹Ibid. at 1040.

¹⁶⁰Ibid. at 1041-1043

The accused would not have to serve two terms of imprisonment for the same unlawful act.

2.2.4. Pre-Trial Proceedings

After an indictment is issued, the accused will be transferred to the court either under arrest or voluntarily. As soon as an accused is brought before the court, there is a formal first hearing. The judge will ensure that the accused's rights have been respected, and will formally read out the charges to the accused and allow the accused to enter a plea (the plea can also take place at a later hearing). If the accused pleads not guilty to the charges, a date for trial will be set.

Challenges to jurisdiction, evidentiary issues and protective measures will usually be dealt with before trial.

2.2.5. Joinder

The court may allow for the trials of several defendants to be joined into one when the crimes were all committed within the "same transaction".

The court may, at its discretion, decide to join the trials of several defendants into one trial, provided that there is no prejudice to the accused. This is allowed when the crimes were all committed within the "same transaction". The "same transaction" means that the factual allegations in the indictment support a finding that the alleged acts or omissions form part of a common scheme, strategy or plan.

The acts or omissions charged against the various accused could have taken place at different times or different places. Joining similar trials promotes more efficient trials, avoids duplicating evidence and means that witnesses will not have to testify multiple times.

2.2.6. Disclosure

There are rules relating to what each party must disclose to the other.

Prosecution rules include *inter alia*:

- The prosecution must disclose to the defence evidence that is favorable to the accused.¹⁶¹ The prosecution's obligation to disclose this material is continuous, lasting throughout the trial.

The prosecution must disclose to the defence evidence that is favourable to the accused.

- During the pre-trial phase, the prosecution must disclose material that supports the indictment, statements from witnesses the prosecution intends to call to testify, and statements that are entered into evidence instead of oral testimony.¹⁶²
- Some material is exempt from disclosure, and in some circumstances the trial chamber can allow some information to remain undisclosed.¹⁶³

Defence rules include:

- The defence has to provide an outline of its defence before the commencement of the trial, but does not have to provide the evidence that it will rely upon until the commencement of its case.
- The defence must disclose information if it will rely on an alibi or other special defence (such as lack of mental capacity) before the commencement of the trial. However, if the defence fails to disclose this information, it will not be prohibited from raising the defence or evidence.¹⁶⁴

¹⁶¹ICTY RPE and ICTR RPE, Rule 68.

¹⁶²See ICTY RPE and ICTR RPE, Rules 66, 92 bis, and 94 bis.

¹⁶³ICTY RPE and ICTR RPE, Rule 70; see also CRYER, *supra* at p.463.

¹⁶⁴CRYER, *supra* at p.463.

2.2.7. Pleas, Admissions of Guilt, and Plea Bargaining

Guilty pleas and plea bargaining are critical issues for both international and national courts. Key considerations regarding this practice are described below.

The ICTY and ICTR apply simplified proceedings when an accused pleads guilty.¹⁶⁵ These proceedings include the following steps:

- The judges must first review a guilty plea and be satisfied that the plea is voluntary, informed and unequivocal.
- If the plea is accepted by the judges, they will enter a finding of guilt and schedule a sentencing hearing.¹⁶⁶
- There must be a sufficient factual basis indicating that the crime occurred and that the accused participated in its commission.¹⁶⁷ Usually, the parties will negotiate a set of agreed facts underlying the charges to which the accused will plead guilty. The parties can also submit other relevant information that may assist the Trial Chamber determine a sentence.
- The judges will review the accepted facts and determine whether they conform to the crimes admitted.¹⁶⁸
- On the basis of the facts and additional information, the chamber will use its discretion to determine a sentence. The chamber does not need to make specific findings on the facts - if the chamber references the facts; it indicates that it accepts the facts are true.¹⁶⁹

The parties may also come to an agreement regarding the recommended sentence for the accused. Thus “plea bargaining” may be attractive to defendants because they could obtain a reduced sentence.¹⁷⁰

However, the Trial Chambers are not bound to any agreements by the parties and they are not obligated to accept sentencing recommendations.¹⁷¹ The Trial Chamber is required to take a plea agreement into consideration and give it due consideration when determining a sentence.¹⁷² In many cases such recommendations have been followed by the trial chamber. If the recommendation is not followed, the chamber must provide reasons.¹⁷³

Trial chambers are not bound to any agreements by the parties and are not obligated to accept sentencing recommendations.

Plea bargains are also possible in Uganda (see rule 28 of the ICD Rules).

2.2.8. Trial and Judgment

International criminal trials are usually very long and complicated. Both the prosecution and the defence have the opportunity to present a case and control the evidence they each present. Judges control the proceedings to ensure fair and efficient trials. Trials are in principle to be open to the public, unless there is a need for closed or private sessions due to security or other reasons.

The trials follow a basic format:

- Opening statements;
- Presentation of evidence;
- Closing arguments;
- Deliberations; and
- Judgment.

¹⁶⁵*Ibid.* at p.467.

¹⁶⁶37 ICTY RPE, Rules 62 bis and 63 ter; ICTR RPE, Rules 62 and 62 bis.

¹⁶⁷*Milan Babid, Case No. IT-03-72-A, Appeal Judgment, 18 July 2005, 18; CRYER, supra at p.467.*

¹⁶⁸*Babid, AJ 8 –10; 18.*

¹⁶⁹*Ibid.* at 18.

¹⁷⁰CRYER, *supra* at p.468.

¹⁷¹ICTY Rules, Rule 62 ter(B).

¹⁷²*Babid, AJ 30, citing Dragan Nikolid, CaseNo.IT-94-2, Judgement on Sentencing Appeal, 89.*

¹⁷³*Babid, AJ 30.*

Usually the prosecution presents its evidence first and then the defence presents its evidence.¹⁷⁴ The prosecution may present additional evidence in rebuttal, and the defence can adduce additional evidence in rejoinder. The Trial Chamber can also call evidence, and can hear evidence to determine a sentence.¹⁷⁵

For each witness called, the following procedure is followed:

- The witness is first examined by the party calling it; then
- Cross-examined by the other party; and finally
- Re-examined by the calling party. The judges may ask questions at any time.
- Cross-examination is limited to the subject matter of the evidence-in-chief, matters affecting the credibility of the witness, and the subject matter of the case of the cross-examining party.¹⁷⁶

The Trial Chamber has ultimate control over the presentation of evidence and calling witnesses, and is required to ensure that the presentation of testimonies is both efficient and effective for finding the truth.¹⁷⁷

At the close of the Prosecutor's case, the Trial Chamber shall, by oral decision and after hearing the oral submissions of the parties, enter a judgment of acquittal on any count if there is no evidence capable of supporting a conviction.¹⁷⁸ The defence can request such a judgment or the Trial Chamber can make the judgment of its own accord. The test for an acquittal at this stage is "whether there is evidence (if accepted) upon which a reasonable tribunal of fact *could* be satisfied beyond a reasonable doubt of the guilt of the accused on the particular charge in question".¹⁷⁹

An accused may appear as a witness in his or her own case. At the ICTY and ICC, a defendant can make unsworn statements at trial.¹⁸⁰

Judgments must be reasoned to allow a later review of the legal and factual findings of the Trial Chamber. A judgment by the majority is allowed, and minority opinions can be included.¹⁸¹

2.2.9 Trials in Absentia

No trials *in absentia* are allowed before the ICTY, ICTR, or the ICC.

Article 28(5) of the Constitution of Uganda provides that an accused shall not be tried *in absentia* except with his or her consent. This is particularly important for Uganda as perpetrators of international crimes have proved hard to apprehend.

In Croatia, however, an accused may be tried in his absence if he has fled or is otherwise not amenable to justice, provided that particularly important reasons exist to try him although he is absent.¹⁸² There have been many trials *in absentia*,¹⁸³ which often lead to obligatory re-trial in cases where the defendant later appears before the Croatian judiciary and requests a re-trial.

Serbia also allows for trials *in absentia*.¹⁸⁴ Trials *in absentia* will be re-tried if the convicted person and his defence counsel so request within six months of when it becomes possible to try him in his presence or if his extradition is approved by a foreign state on the condition that the trial be renewed.¹⁸⁵

¹⁷⁴See CRYER, *supra* at p.469, for a discussion of how the ICC could depart from this model.

¹⁷⁵ICTY RPE, Rules 84–7; ICTR RPE, Rules 84–8; Rome Statute, Art. 64(8); ICC RPE, Rules 140–2.

¹⁷⁶ICTY RPE, Rule 90 (H)(i).

¹⁷⁷ICTY RPE, Rule 90 (F).

¹⁷⁸ICTY RPE, rule 90 bis

¹⁷⁹See, e.g., Zejnil Delalidetal. (Celebidi), CaseNo.IT-96-21-A, Appeal Judgement, 20 Feb, 2001,434.

¹⁸⁰ICTY RPE, Rule 84 bis; ICC RPE, Rule 140.

¹⁸¹ICTY Statute, Art. 23; ICTY RPE, Rule 98 ter; ICTR Statute, Art.22; ICTR RPE, Rule 88; Rome Statute, Art. 74; ICC RPE, Rule 144.

¹⁸²CPA 1998, Art.332(5); Official Gazette of Croatia, Narodne Novine" No.110/97.

¹⁸³Amnesty International is concerned that the vast majority of these cases are those in which the proceedings have taken place in absentia ;see Organization for Security and Co-Operation In Europe Mission to Croatia, background Report, Developments in War Crimes Proceedings Jan.–OCT.2007,3 (2007).

¹⁸⁴CPC, Art. 304

¹⁸⁵*Ibid.* at Art. 413.

2.2.10 Appeals

All of the current international tribunals allow appeals. Key considerations about appeals include:

- Appeals extend to convictions, sentences and acquittals.
- Either party can appeal.
- The Appeals Chamber may affirm, reverse or revise a Trial Chamber's decision. It may also dismiss the entire judgment and order a re-trial before a different Trial Chamber.¹⁸⁶

At the ICTY and ICTR, appeals are meant to correct errors made by the trial chamber; they are not new trials. The errors can be errors of law, or errors of fact that result in a "miscarriage of justice". The following are important issues relating to appeals:

- To change a finding of law, the Appeals Chamber must find that "no reasonable trial of fact"¹⁸⁷ could have reached the factual conclusion, and the conclusion led to a "grossly unfair outcome in judicial proceedings, as when the defendant is convicted despite a lack of evidence on an essential element of the crime".¹⁸⁸
- The appeals chamber can also correct an error of law on its own accord, if the interests of justice so require.¹⁸⁹
- A sentence can be revised if the Trial Chamber has committed a "discernable error" or has failed to follow the law correctly.¹⁹⁰
- In appealing the Trial Chamber judgment, the parties must identify the alleged error, present arguments, and explain how the error invalidates the decision.¹⁹¹

If the interests of justice so require, the Appeals Chamber may correct an error of law on its own accord.

Interlocutory appeals (appeals of Trial Chamber decisions made during the course of trial proceedings) are also allowed at the ICTY, ICTR and ICC. Interlocutory appeals are subject to the following considerations:

- Jurisdiction, and at the ICC, admissibility, are always subject to appeal.¹⁹²
- In order to appeal any other decision made by the Trial Chamber, the party seeking appeal must get permission from the Trial Chamber.
- Leave to appeal will be granted if the party shows that the decision "involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial" and for which "an immediate resolution by the Appeals Chamber may materially advance the proceedings".¹⁹³

The Appeals Chamber is fairly restrictive when evaluating matters that the Trial Chamber has the discretion to decide. It limits its review to whether the Trial Chamber correctly exercised its discretion, and not to whether it agrees with the substantive decision.¹⁹⁴

¹⁸⁶ICTY Statute, Art. 25(2); ICTR Statute, Art. 24(2); Rome Statute, Art.81(2).

¹⁸⁷Tadić, AJ 64; Akayesu, AJ 178.

¹⁸⁸Anto Furundžija, Case No. IT-95-17/1-A, Appeal Judgment, 21 July 2000, 37.

¹⁸⁹See, e.g., Čelebidi, AJ 16.

¹⁹⁰Tadić, AJ 22.

¹⁹¹Krnjelac, AJ 10.

¹⁹²The ICC also allows appeals for provisional release and some Pre-Trial Chamber orders during investigation. See CRYER, *supra* at p.473.

¹⁹³ICTY RPE and ICTR RPE, Rule 72(B)(ii); ICC Statute, Art. 82(1) (d).

¹⁹⁴See, e.g., Slobodan Milošević, Case No.IT-02-54-D, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, 1 Nov. 2004, 9-10

2.3 Best Practices at the ICC

The ICC has some different pre-trial and trial procedures than the ICTY and ICTR. This part discusses the areas where there are significant differences between the ICC and the ICTY and ICTR.

2.3.1. Investigations

There are several steps involved in an investigation. These include the following:

- First, the Prosecutor will make a preliminary examination of a situation based on: her own initiative, a referral from either a State Party or the United Nations Security Council, or a declaration of a State that is not a party to the Rome Statute under rule 12(3).¹⁹⁵ Once the Prosecutor has identified the situation, a preliminary examination must establish that: there is a reasonable suspicion of a crime within the court's jurisdiction, the case would be admissible and the case would be in the interests of justice.¹⁹⁶ Preliminary examinations are currently taking place in Burundi.
- Next, after these factors have been determined, the Prosecutor can decide to open an investigation. If a situation is referred to the ICC, the Prosecutor's decision to open an investigation is not subject to judicial review. With no referral, the Prosecutor must get approval from the Pre-Trial Chamber before starting an investigation. The Pre-Trial Chamber will approve an investigation after an initial analysis of jurisdiction, and when there is a "reasonable basis to proceed".¹⁹⁷
- After an investigation has commenced, the Pre-Trial judge may make such orders as may be required for the purposes of an investigation and for the protection of victims and witnesses.¹⁹⁸ The ICC Prosecutor is obligated to investigate "exonerating circumstances" to the same extent as incriminating circumstances.¹⁹⁹ Where the Prosecutor has decided to proceed, she must notify the States involved so as to prevent destruction and adulteration of evidence.²⁰⁰ In the event that a State receiving such notification has already commenced investigations in respect to the criminal acts in question, it may inform the Court which shall then defer the case so as to allow the trial at the national level, unless the Pre-Trial Chamber decides otherwise.²⁰¹

The ICC Prosecutor may investigate "situations" which cover either entire countries or parts of them. Within situations, particular cases against individuals are then identified by the Prosecutor. Thus, the investigations are quite broad. For example, the ICC is currently investigating the situation in the Democratic Republic of Congo, but has opened four cases within that situation.

2.3.2. Arrest Warrants/Summons

After the Prosecutor has investigated a situation and determined that a specific case should be prosecuted, she may make an application to the Pre-Trial Chamber to issue an arrest warrant or a summons to appear. Key considerations regarding this process include:

- If the Pre-Trial Chamber is satisfied that there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the court, it will issue the arrest warrant or summons on application of the Prosecutor.
- An arrest warrant may be issued at any time after the initiation of the investigation. However, charges in the arrest warrant must be confirmed by the Pre-Trial judge.
- This is scheduled to take place after a suspect has been brought to Court, but if the suspect cannot be apprehended or does not surrender, a confirmation hearing can take place *in absentia*. If the confirmation of charges takes place *in absentia*, the Pre-Trial Chamber may decide to assign counsel to represent the interests of the accused.²⁰²

¹⁹⁵Rome Statute, Art. 12 (3).

¹⁹⁶*Ibid.*, Art. 53 (1); ICC RPE, Rule 48.

¹⁹⁷Rome Statute, Art. 15 (3) (4) and the Rules of Procedure and Evidence, rule 50 (5)

¹⁹⁸*Ibid.* Arts. 56 and 57 (3)

¹⁹⁹*Ibid.* Art. 54 (1) (a).

²⁰⁰Rome Statute Art. 18 (1)

²⁰¹*Ibid.* Art. 18 (2)

²⁰²*Ibid.* Art. 61 (2) and ICC RPE Rules 123–6.

2.3.2.1. Confirmation of Charges

At the ICC, the confirmation of charges is an adversarial process and the defence and prosecution have an opportunity to present arguments about the charges. Witnesses can be called and the confirmation hearing can last several days. As at the other international courts, the Prosecutor must support each charge with evidence. The test is that there are “substantial grounds to believe” that the suspect committed the crimes charged.²⁰³ Once charges have been confirmed; the trial is transferred to a Trial Chamber.

At the ICC, the confirmation of charges is an adversarial process. The defence and prosecution both have an opportunity to present arguments about the charges, but the Prosecutor has the additional obligation of supporting each charge with evidence.

2.3.3. Pre-Trial and Preparing for Trial

During the first hearing, it is not necessary to enter formal charges against the suspect. The focus is on setting a date for the confirmation of charges hearing.

In addition to challenges to jurisdiction, evidentiary issues and protective measures, the ICC will also deal with admissibility issues that have been raised before trial.

2.3.4. Joinder

Trials of several accused may also be joined at the ICC.²⁰⁴ Important issues include:

- If persons are accused jointly, they will be tried together unless the Trial Chamber decides otherwise.
- The joinder can be decided by the Pre-Trial Chamber during the confirmation of charges hearing.²⁰⁵
- In deciding on the joinder of charges, the Pre-Trial Chamber can consider whether the crimes allegedly committed arose out of the same facts, whether the supporting documentation provided by the prosecution relates to both alleged perpetrators, and whether the prosecution has requested the joinder.²⁰⁶

2.3.5. Disclosure

Rules relating to prosecutorial and defence disclosure are not very different at the ICC from the ICTY. The following are pertinent to consider:

Prosecution rules:

- The Prosecutor is required to disclose any material that is exculpatory, mitigating, or which affects the credibility of the prosecution’s evidence.²⁰⁷
- Before the trial begins; the prosecution must also disclose a list of witnesses it intends to call to testify and copies of witness statements.²⁰⁸

The Prosecutor is required to disclose any material that is exculpatory, mitigating, or which affects the credibility of the prosecution’s evidence.

Defence rules:

- The defence must disclose information if it intends to raise the defence of an alibi or other defences.
- However, the failure to disclose this information will not prohibit the defence from raising the intended defence or presenting evidence.²⁰⁹

²⁰³Rome Statute, Art. 61 (6)-(7).

²⁰⁴Ibid., Art. 64 (5); ICC RPE, Rule 136.

²⁰⁵Germain Katanga et al., Case No. ICC-01/04-01/07-573, Judgment on the Appeal against the Decision on Joinder rendered on 10 March 2008 by the Pre-Trial Chamber in the Germain Katanga and Mathieu Ngudjolo Chui Cases, AC, 9 June 2008, 5-9.

²⁰⁶Katanga et al., Case No. ICC-01/04-01/07-307

²⁰⁷Rome Statute, Art. 67 (2).

²⁰⁸ICC RPE, Rule 76.

²⁰⁹ICC RPE, Rule 79.

Both parties have the right to inspect materials in control of the other party, both before the confirmation of hearings and during trial.²¹⁰

There are some exceptions to disclosure rules; including confidential information or information that if disclosed could create a risk to witnesses, victims, and their families.²¹¹

The Chambers have considerable power in ordering disclosure both during the confirmation hearings and during trial.²¹²

2.3.6. Pleas, Admissions of Guilt, and Plea Bargaining

The ICC also allows for expedited proceedings if an accused admits his guilt.²¹³ The judges can also decide, in the interests of justice, to order the prosecution to provide more information or to hold a normal trial.²¹⁴ The ICC Statute does not prohibit plea bargaining, but this practice as of yet, has not been relied upon at the ICC²¹⁵.

Notes for trainers:

- Participants should receive an overview of the essential rules of evidence that apply before the international courts.
- They should not be expected to discuss the detailed application of these rules, but should be able to discuss the key principles and the way in which they are either incorporated or not followed within their domestic systems.
- Trainers should explore with participants the particular rules of evidence related to cases involving sexual violence. It is important to understand the rationale behind these rules and whether participants believe that they are put into practice in their courtrooms.
- Participants should also be reminded that specific practice issues relating to evidence for particular crimes or modes of liability should be considered.
- The case study can be used as a means of stimulating discussion on this topic by considering whether any of the statements made by the accused to the national police and the ICC could be admitted before both international and national courts.
- Another example from the case study which could be considered is whether the telephone intercept would be admissible before national and international courts, as well as the weapons that were discovered during the search of the accused's premises.

International courts have established flexible rules of evidence which are discussed below.

2.4 Evidentiary Issues

2.4.1. Essential Rules of Evidence

- The courts must apply evidentiary rules that “will best favour a fair determination of the matter” and “are consonant with the spirit of the Statute and the general principles of law”.²¹⁶
- The primary standard of evidence is relevance.
- Any evidence that is relevant and has a probative value can be admitted. The evidence must be relevant to an issue in trial or an allegation. It must also go to the proof of an issue. Evidence must also be *prima facie* reliable in order to determine its relevance and probative value.²¹⁷

The primary standard of evidence is relevance. Any evidence that is relevant and has a probative value can be admitted.

²¹⁰ICC RPE, Rules 77–8.

²¹¹See, e.g., ICC RPE, Rules 81–2.

²¹²Rome Statute, Arts. 61 (3) (Pre-Trial Chamber) and 64(3)(c) (Trial Chamber).

²¹³Rome Statute Art. 65; ICC RPE Rule 139.

²¹⁴Rome Statute Art. 65 (4) (a)

²¹⁵This may be employed in the recent case of Prosecutor v Ahmed Al Faqi Al Mahdi

²¹⁶ICTY and ICTR RPE, Rule 89(B).

²¹⁷Jadranko Prlidetal., Case No. IT-04-74, AC, Reconsideration of Appeal Decision, 3 Nov. 2009, 33.

- The Trial Chamber can exclude evidence “if its probative value is substantially outweighed by the need to ensure a fair trial”.²¹⁸ Evidence can also be excluded based on the means by which it was obtained.²¹⁹

The Trial Chamber can exclude evidence “if its probative value is substantially outweighed by the need to ensure a fair trial”.

- Hearsay evidence may be admitted.²²⁰
- The international courts have also created rules to allow for more efficient trials. One of these rules allows for written witness statements in lieu of oral testimony, as long as it does not go to proof of the acts and conduct of the accused as charged in the indictment.²²¹ The Trial Chamber can decide to call the witness for cross-examination if a written statement is entered into evidence.²²² Rule 92 *quarter* allows for the introduction of written witness statements where the witness is unable to appear in court because he or she is deceased or because of a physical or mental impairment.²²³
- Evidence of witnesses who have been intimidated can be introduced if the requirements of Rule 92 *quinquies* are met, even if such evidence goes to the acts and conduct of the accused.²²⁴

2.4.2. Evidence in Cases Involving Sexual Violence

In cases involving sexual assault or sexual violence, special rules of evidence apply:

In cases involving sexual assault or sexual violence, special rules of evidence apply

- No corroboration of the victim's testimony shall be required;
- Consent shall not be allowed as a defence if the victim has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression, or reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear;
- Before evidence of the victim's consent is admitted, the accused shall satisfy the Trial Chamber in camera that the evidence is relevant and credible; and
- Prior sexual conduct of the victim shall not be admitted in evidence.²²⁵

The ICC RPE gives further instruction to judges dealing with cases of sexual violence:

- Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent;
- Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent;
- Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence; and
- Credibility, character or predisposition to sexual availability of a victim or witness cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim or witness.²²⁶

Moreover, prior or subsequent sexual conduct of a victim or witness is not allowed, but the prohibition is subject to the Trial Chamber's authority under Article 69(4) of the ICC Statute.²²⁷

²¹⁸ICTY RPE, Rule 89 (C)-(D).

²¹⁹ICTY and ICTR RPE, Rule 95; Rome Statute, Art. 69(7).

²²⁰Nahimana, AJ 509, citing *Sylvestre Gacumbitsi*, Case No. ICTR-01-64-A, Appeal Judgement, 7 July 2006.

²²¹ICTY and ICTR RPE, Rule 92 bis.

²²²ICTY RPE Rule 92 bis(E).

²²³ICTY RPE, Rule 92 *quinquies*

²²⁴ICTY RPE, Rule 92 *quinquies*

²²⁵*ibid.*

²²⁶ICC RPE, Rule 70.

²²⁷ICC RPE, Rule 71; ICC Statute, Art. 69(4).

MODULE III

DOMESTIC APPLICATION OF INTERNATIONAL CRIMINAL LAW: THE INTERNATIONAL CRIMES DIVISION OF THE HIGH COURT

Notes for trainers:

- This module focuses on Ugandan law and procedure as well as the available jurisprudence. It will be useful for participants to compare the rules and jurisprudence of Ugandan courts with that of the ICC, especially given that Uganda has ratified the Rome Statute and domesticated it into the ICC Act 2010.
- Participants should be encouraged to discuss the strengths and weaknesses of the procedural and evidentiary approaches that have been adopted by the ICD for the prosecution of international crimes. In particular, the following topics could be addressed:
 - What measures should be adopted by prosecutors and the courts to ensure that fair trial rights are respected in the prosecution of international crimes?
 - An evaluation of the use of plea agreements and plea bargaining, and in particular whether the procedures ensure that the conduct as charged is adequately reflected in the final findings of the court.
 - An assessment of the discretion of the ICD to admit evidence which would not be accepted in ordinary courts e.g. newspaper reports or NGO reports. What factors should be taken into account in the exercise of this discretion? Should evidence be admitted that goes to the acts and conduct of the accused, and if so, in what circumstances should it be admitted?
 - How best can experts be relied upon in the prosecution of international crimes? Discuss the extent to which expert opinion can assist in the determination of questions of fact such as political and military command structures.

3.1. Introduction

The northern Ugandan conflict, which raged for more than two decades, has been characterized by serious violations of human rights and humanitarian law by the Lord's Resistance Army (LRA) and the Uganda Peoples Defence Forces (UPDF).

Following a request by the Ugandan government to the Office of the Prosecutor (OTP) of the International Criminal Court (ICC), the OTP opened an investigation into the northern Uganda situation in 2004. The ICC issued arrest warrants for five LRA leaders: Joseph Kony, Vincent Otti, Okot Odhiambo, Raska Lukwiya, and Dominic Ongwen. Lukwiya and Otti have since died while D. Ongwen is facing trial at the ICC.

The Ugandan government sent a request to the ICC Office of the Prosecutor, the OTP opened an investigation into northern Uganda in 2004 and ICC issued arrest warrants for five LRA leaders.

Some Ugandan scholars have insisted that the principle of sovereignty implies that the Rome Statute of the ICC cannot be superior to the national laws of any member State, hence the principle of complementarity, enshrined in paragraph 10 of the preamble and Article 1 of that Statute which emphasizes that the jurisdiction of the ICC is aimed at complementing and not replacing the domestic criminal justice system of any state. International law recognises the rights of any nation to set up special courts to administer law according to its municipal law.²²⁸

International law recognises the rights of any nation to set up special courts to administer law according to its municipal law and doesn't prohibit a State from exercising jurisdiction in its own territory

International law also does not prohibit a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts that have been committed either on its territory or even on the territory of another state by its nationals²²⁹.

In a still fragmented and split world community, it is both logical and consistent to assign first of all to States' own national courts the power (and the duty) to bring to trial and punish persons alleged to be responsible for intolerable breaches of internationally agreed values. In carrying out this role, national courts should act as organs of the world community.

In a still fragmented and split world community, it is both logical and consistent to assign first of all to States' own national courts the power (and the duty) to bring to trial and punish persons alleged to be responsible for intolerable breaches of internationally agreed values.

The idea for a domestic mechanism to try international crimes came about during peace talks to end the conflict in northern Uganda. These talks occurred in Juba, southern Sudan, from 2006 to 2008 between representatives of the LRA and the Ugandan government. The talks produced agreements which provided that Uganda's government would establish a "special division" to hold national trials for serious crimes. While the LRA leadership never signed the talks' final agreement, the Ugandan government committed to unilaterally implementing the agreements to the fullest extent possible.

In particular, the Accountability and Reconciliation Agreement made on 29th June, 2007 (Juba Agreement) stipulated for the establishment of a special court to try those who have committed serious crimes and human rights violations.²³⁰

Pursuant to Article 133 of the Constitution²³¹, Hon. Benjamin Odoki (the then Chief Justice of Uganda) established an International Crimes Division of the High Court (the ICD), as a way of fulfilling the Government of Uganda's commitment to the actualization of the Juba Agreement. The ICD is a court intended to fulfill the principle of complementarity as stipulated under the International Criminal Court Statute and is mandated to prosecute international crimes.

²²⁸Zachary Lomo, 'Can Ugandan Courts Try Kony?' - Paper Presented at a HURIPPEC seminar, Makerere University, Sept 2008.

²²⁹Ibid

²³⁰Clause 4 of the Juba Agreement on Accountability and the relevant parts of the Annexure 3 thereto.

²³¹The 1995 Uganda Constitution

3.2 The International Crimes Division of the High Court of Uganda: Establishment and Jurisdiction.

The legal basis of the ICD was established by a Legal Notice issued by Uganda's former Chief Justice, Benjamin Odoki JSC, in May 2011, which formally sets up the ICD and defines its operations.²³²

The legal basis of the ICD was established by a Legal Notice issued by Uganda's former Chief Justice, Benjamin Odoki

Pursuant to the Legal Notice, the ICD is mandated to try genocide, crimes against humanity, and war crimes, as well as terrorism, human trafficking, piracy, and any other international crimes defined in Uganda's 2010 International Criminal Court Act, the 1964 Geneva Conventions Act, the Penal Code Act, or any other criminal law.²³³

The ICD is not an *ad hoc* tribunal. It operates pursuant to domestic legislation similar to any other division of the High Court. Therefore it is bound by Ugandan laws such as the Judicature Act, The Trial on Indictments Act, the Evidence Act and the Penal Code Act *inter alia*.

The ICD is a division of the High Court of Uganda. It is not an ad hoc tribunal.

The ICC Act also incorporates modes of liability into Ugandan law that can be important to trials for serious crimes, notably command responsibility.²³⁴ Penalties for the crimes under the ICD's jurisdiction range from a 10 years imprisonment to the death penalty.²³⁵ ICD decisions can be appealed to Uganda's Court of Appeal, and after that, to Uganda's Supreme Court.²³⁶

The ICC Act also incorporates modes of liability into Ugandan law that can be important to trials for serious crimes, notably command responsibility

Therefore the normal procedural and evidentiary issues of court in Uganda apply at the ICD. Where these rules do not meet the international standards we enumerated above, then this is a matter for legal reform through legislative measures. There is currently no legal relationship between the ICD and any of the international tribunals, although there have been proposals for a partnership agreement between the ICD and the ICC.²³⁷

3.3. The Structure and Composition of the International Crimes Division

The ICD bench is composed of three judges appointed by Uganda's Principal Judge in consultation with Uganda's Chief Justice.²³⁸ The judges appointed to date bring a degree of experience in international criminal law and conducting trials, along with knowledge of the northern Uganda conflict.²³⁹

At least three judges sit on the ICD, appointed by Uganda's Principal Judge, in consultation with Uganda's Chief Justice

Like regular High Court judges, these judges also work on non-ICD cases, including some outside Kampala so as to help reduce Uganda's serious backlog of High Court cases. Currently the judges are handling criminal sessions in Kampala, Jinja and Fort Portal. The judges have one paid and three unpaid staff to support their work (referred to as legal assistants), who conduct legal research and writing. The assistants are not assigned to a particular judge, but assist all ICD judges as the need arises.²⁴⁰

²³²The High Court (International Crimes Division) Practice Directions ("ICD Practice Directions"), Legal Notice no. 10 of 2011, Legal Notices Supplement, Uganda Gazette, no. 38, vol. CIV, May 31, 2011.

²³³ICD Practice Directions, para. 6(1).

²³⁴Command responsibility allows for liability of those who were not involved in the direct commission of crimes, but were responsible for them due to their leadership positions. ICC Act, art. 19.

²³⁵See Geneva Conventions Act (Ch 363), art. 2; ICC Act, arts. 7-9; Penal Code (Ch 120), June 15, 1950.

²³⁶JLOS, "Frequently Asked Questions on the International Crimes Division of the High Court of Uganda," p. 5.

²³⁷Interviews with ICD Registry personnel.

²³⁸ICD Practice Directions, paras. 4-5.

²³⁹One of the judges previously worked as a Commonwealth judge, another worked at the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone, and a third is from northern Uganda and trained in international law.

²⁴⁰Researcher's group interviews with four individuals who work with the ICD, Kampala, April 20 and 23, 2012.

Currently the judges are handling criminal sessions in Kampala, Jinja and Fort Portal

One of the judges serves as a Head of Division, who, with the Registrar's support, is responsible for the ICD's overall administration.²⁴¹ The Registrar handles the ICD's daily administration.

Currently, there is no ICD program responsible for such functions as: witness protection and support, outreach and public information. The registrar is often consulted on these areas but she has admitted that the ICD is not equipped to handle witnesses or public outreach.²⁴²

The ICD's prosecution function is entrusted to a unit of Uganda's Directorate of Public Prosecutions (DPP). Between five and six prosecutors are appointed to this unit, although the number of those actively working on ICD cases fluctuates depending on workload. The unit's prosecutors are also responsible for cases not heard by the ICD. For instance, following the *Kwoyelo* appeal, three of the prosecutors were handling the *Kyadondo terrorism* case while the rest have been reassigned to other cases by the DPP.²⁴³ Now that the *Kwoyelo* case has been set for trial, three prosecutors have been assigned to it.

The ICD's prosecution function is entrusted to a unit of Uganda's Directorate of Public Prosecutions (DPP).

The Criminal Investigations Department (CID) of the Ugandan Police Force is responsible for investigating all crimes including those that may be tried before the ICD. An ICD official indicated that senior police investigators based in Kampala and in focal points around the country are assigned ICD investigations on a temporary basis as need may require.²⁴⁴

Both the DPP and CID indicated that prosecutors work far more closely with investigators in ICD investigations than in investigations involving other crimes, including travelling around the country with them.²⁴⁵

CID of the Ugandan Police Force is responsible for investigating all crimes including those that may be tried before the ICD

3.4. Rights of the Accused

In Uganda, an accused has the right to retain private counsel or receive state appointed counsel at no cost (which is known as the "state brief" system). Only prisoners charged with capital offenses punishable by death or life in prison may use the system.²⁴⁶

In Uganda, an accused has the right to retain private counsel or receive state appointed counsel at no cost (which is known as the "state brief" system).

However Uganda is a party to the International Covenant on Civil and Political Rights (ICCPR), which guarantees that anyone facing a criminal charge has the right to be assigned legal assistance in any case where the interests of justice so require, if they cannot afford to pay.²⁴⁷ It would appear that Uganda's limited scope of the state brief (only for capital offences) directly undermines that right and renders us in breach of our obligations under the ICCPR.

A Justice Law and Order Sector (JLOS)-commissioned needs assessment of the ICD found that the state brief is flawed in many other respects including the fact that: judges select which advocates will represent the

²⁴¹The current head of the division is Justice Moses Mukiibi

²⁴²Supra note 187

²⁴³Researcher's interviews with three individuals working with the ICD, Kampala, April 21 and 23, 2012.

²⁴⁴Ibid

²⁴⁵Ibid

²⁴⁶Constitution of the Republic of Uganda (1995), Art. 28(3)(e). The Ugandan Constitution, in article 28, provides that an accused is entitled to a fair, speedy and public hearing before an independent and impartial court established by law. It also protects other due-process rights ordinarily enumerated in international human-rights law. These constitutional protections include the right to be given adequate time and facilities to prepare for his or her defence, and to choose a lawyer. In case of the possibility of a death sentence or imprisonment for life upon conviction, an accused is entitled to legal representation at the states expense. A conviction on the basis of the Geneva Conventions Act – the law upon which the *Kwoyelo* indictment is based – carries a maximum penalty of life imprisonment.

²⁴⁷International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, ratified by Uganda on June 21, 1995, art. 14(3)(d).

accused in particular cases, the relatively inexperienced counsel involved, and advocates are appointed very late in the process.²⁴⁸

A needs assessment of the ICD commissioned by JLOS found that the state brief is flawed in many other respects including: judges selecting which advocates will represent accused in particular cases, and the very late appointment of advocates are in the process

Other rights of the accused are protected under Art. 28 of the Constitution of Uganda. Art 28 guarantees the right to a fair trial; that the individual shall be entitled to a fair speedy and public hearing before an independent and impartial court. Therefore there should be no unreasonable delay in the trial.

The trial must be in public so as to ensure fairness, although there are circumstances in which the public may be excluded from the Courts for reasons of morality, public order or national security. In addition, Art 28 also provides:

- The right to a presumption of innocence;
- The right to be informed in the language that the individual understands of the offence for which he/she is being tried;
- The right to legal representation;
- The right to equality of arms;
- The right to be tried in his/her presence, (however, this right is not absolute and pursuant rule 16 (1) of the ICD Rules, an accused may be removed in cases where he/she becomes disruptive);
- The right of the accused to a copy of the proceedings;
- Protection from retrospective criminalization of acts;
- No double jeopardy;
- The right against self incrimination. This extends to the spouse who is a competent but non compellable witness.

In addition the ICD Rules²⁴⁹ set out principles to protect victims, witnesses and in particular children, elderly persons, persons with disabilities and victims of sexual or gender violence. These measures include; hearings in camera, redaction, use of pseudonyms, distortion of voices and faces etc.

However three domestic laws and legal interpretation matters create major challenges for the ICD and the pursuance of justice in general: Uganda's Amnesty Act, Uganda's ICC Act, and the Trial on Indictments Act.

3.5 Challenges to the Administration of Justice at the ICD

3.5. The Amnesty Act²⁵⁰

Uganda has an Amnesty Act²⁵¹. However as of May 2015 the Act shall be subjected to a periodic review. In the past, the Minister of Internal Affairs has by Statutory Instrument No. 34/2012 declared the lapse of Part II of the Amnesty Act. This effectively suspended the issuance of amnesty for a period of 12 months. He also extended Part I, Part III and Part IV for a further 12 months meaning that the Amnesty Commission could continue its Disarmament, Demobilization and Re-integration (DDR), sensitization and education work. We shall wait to see what route the government will take in 2016 considering that the applications for amnesty have significantly reduced.

Uganda has an Amnesty Act but however as of May 2015 the Act shall be subjected to a periodic review

²⁴⁸Supra note 29 para 57.

²⁴⁹The Judicature (High Court) (International Crimes Division) Rules 2015

²⁵⁰The Amnesty Act, Cap 294 of 2000

²⁵¹Ibid

There continues to be a strong lobby group in support of a general amnesty, including the elders and religious leaders from northern Uganda who have in the past even petitioned parliament seeking a re-establishment of Part II of the Act.

The Supreme Court of Uganda has pronounced itself on Amnesty and held that amnesty covers political offences and not international crimes which are offences against humanity²⁵². However, Ugandans argue that the peculiar nature of the Ugandan conflict - especially since most of the perpetrators are former abducted children, necessitates a functional amnesty and less prosecution. In a few months the issue of amnesty will need to be re-visited, does Uganda really need an Amnesty Law?

3.6. The ICC Act²⁵³

Uganda's ICC Act-which makes serious crimes and modes of liability as defined by the ICC's Rome Statute offenses under Ugandan legislation-was adopted in 2010, while the majority of crimes committed in northern Uganda were committed prior to this date.²⁵⁴

There is no reason under international law why the Act cannot be used to prosecute crimes that predate its enactment. The principle of non-retroactivity is not violated where the conduct to be prosecuted was already a crime under international law, and the national law is not creating a new offense, but is establishing jurisdiction to try the offense. This is the case for genocide, war crimes, and crimes against humanity.²⁵⁵

Nevertheless, there is uncertainty as to whether the Ugandan courts would follow this interpretation or would instead apply the principle of non-retroactivity as enshrined in Article 28 of the Constitution and thereby prohibit the use of the ICC Act to prosecute any crimes that occurred prior to 2010.²⁵⁶ However the prosecution team in *Kwoyelo's case* was hesitant to test this principle of customary international law Vs the Constitution (especially in their first case). This is a matter where our courts, like the ICTR and ICTY have a chance to demonstrate some positive judicial activism.

In the end, *Thomas Kwoyelo*, was indicted for war crimes pursuant to Uganda's Geneva Conventions Act, but there is also a pending legal issue as to whether the Act applies in his case. War crimes under the Geneva Conventions Act relate to international armed conflicts, and the judges are yet to rule on a preliminary objection raised by defence counsel as to whether the northern Uganda conflict was an international or non-international armed conflict.

With this in mind, the prosecution had added alternative counts in *Kwoyelo's* indictment for ordinary crimes under Uganda's domestic penal code, such as murder, kidnap and rape.

3.7. The Trial on Indictments Act²⁵⁷ and the Death Penalty

The ICD may impose the death penalty as a sanction, although an execution has not been carried out in Uganda in several years and courts have recently limited its application.²⁵⁸ In line with the preference in international law for abolition of the death penalty, the death penalty has not been a punishment available to international and hybrid war crimes courts.²⁵⁹ Consequently whether the Court will follow domestic precedent and ignore crystallizing international practice, only time will tell.

The ICD may impose the death penalty as a sanction, although an execution has not been carried out in Uganda in several years and courts have recently limited its application

²⁵²Supra note 202

²⁵³International Criminal Court Act ("ICC Act"), Acts Supplement No. 6, Uganda Gazette, no. 39, vol. CIII, June 25, 2010

²⁵⁴International Criminal Court Act Cap No 11 of 2010

²⁵⁵Supra note 202 p.32

²⁵⁶Article 28 (12) of the Ugandan Constitution states, 'Except for contempt of court, no person shall be convicted of a criminal offence unless the offence is defined and the penalty for it prescribed by law'. In my discussions with the prosecution team prior to the commencement of the *Kwoyelo* trial, the team was reluctant to test this principle of retrospectivity for international crimes especially in its first case. As a result, it seems unlikely that crimes against humanity committed during the conflict will ever be charged as such and it is unclear if anyone could be pursued on the basis of command responsibility.

²⁵⁷Trial on Indictments Act Cap No 23 of 2008

²⁵⁸See *Attorney General v. Susan Kigula and 417 Others*, Supreme Court of Uganda, Constitutional Appeal No. 03 of 2006, January 21, 2009 (unreported).

²⁵⁹The International Criminal Court and all current international and hybrid tribunals have a maximum sentence of life imprisonment.

3.8. Witness Protection and Support

Witnesses who testify in trials involving serious crimes, some of whom are likely to be direct victims - may face serious risks to their security and stability before, during, and after giving testimony. These may include threats to the safety of their families. In addition they may need ongoing psychosocial support in the aftermath of testifying about deeply traumatic events.

Witness protection and support is a significant issue for the ICD. While witness protection has not been completely absent in Uganda, measures are *ad hoc*, informal, and limited. Moreover, there is neither a comprehensive nor specific legal regime for witness protection (although some relevant provisions do exist, such as sanctions for attacks on witnesses).²⁶⁰

Witness protection and support is a significant issue for the ICD and those who testify in trials involving serious crimes need protection and support and this has not been completely absent in Uganda

Uganda has taken some important steps to promote witness protection and support that will benefit the ICD and the justice system more widely. For instance, as mentioned earlier the ICD Rules have incorporated protective measures for victims and witnesses and Uganda's Law Reform Commission is currently developing a witness protection law.²⁶¹

Witness protection and support are areas where accumulated expertise exists among international and hybrid international courts especially the ICC, from which the ICD should consider drawing.

The timing and implementation of these efforts is crucial given that some 113 witnesses are already selected to testify on behalf of the prosecution in the *Kwoyelo* case which begins in May 2016. For these witnesses, a Witness Protection Policy cannot come soon enough. In addition, protection of defence witnesses who were preliminarily identified can be expected to pose particular challenges due to the likely distrust of many of these witnesses of the Ugandan police (on which informal measures traditionally rely).

Witness protection and support are areas where accumulated expertise exists among international and hybrid international courts, especially the ICC, from which the ICD should consider drawing.

3.9. Conclusion

Uganda domesticated and established a domestic international crimes procedure in just a few years and while under pressure to implement reforms to handle a post conflict situation. This hurried work neglected to take care of a lack of professionally well-trained judges on the bench, investigators, prosecutors as well as the technical support staff working in the ICD – most of whom are mostly on-and-off as stated earlier.

The Needs Assessment Report that recommended this manual supports the common view that the integration of international crimes into the domestic legal scene in Uganda through the ICD and the ICC Act was hastily done without concrete understanding and appreciation (proper and adequate knowledge) of what International Criminal Law (ICL) actually entails in practice. It is also suggestive of the fact that the ICD commenced business before the professional and the allied staff could receive adequate preparatory training on international crimes, International Criminal Law and International Criminal Justice in general.

On the capacity building, it revealed that a number of trainings on the Rome Statute and the ICC have mainly focused on the judges at the higher level. To a great extent, the lower ranking judicial officials such as the magistrates, prosecutors, registrars, and court clerks have been left out. Such officials should be systematically trained not just on the general and theoretical aspects of the ICC, but also on more specific and practical issues prior to being posted to the ICD. The research noted the absence of an adequate witness protection and support scheme and the need to provide sufficient support and time for the accused to adequately prepare his or her defence. These are all areas addressed in this training manual with the hope that it will be used.

²⁶⁰See "Uganda Context on Victim and Witness Protection," Frank N. Othembi, Secretary, Uganda Law Reform Commission, presentation at the Judicial Colloquium on Victim and Witness Protection and the Administration of Justice, Bomah Hotel, Gulu, Uganda, August 1, 2011.

²⁶¹*Ibid*

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