



International Criminal Law (Master Exam, Spring Semester 2022)
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Note: The document outlines the answers to the exam questions in key words. The potential solutions presented here do not claim to be comprehensive or to be the only possible solution.

Question 1

What were the main contributions to today's International Criminal Law

- a) of the Treaty of Versailles?
- b) of the Nuremburg and Tokyo Tribunals?
- c) of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda?
- d) of the International Criminal Court (ICC)?

<i>Disclaimer: Following examples are a selection. Not all had to be mentioned to receive all points. And: further aspects were also rewarded points.</i>	
<p>Treaty of Versailles:</p> <p>By blaming Germany for starting the war (<i>Kriegsschuld</i>), the idea of aggression was introduced in ICL.</p> <p>Introducing the idea of individual criminal responsibility for the first time.</p> <p>No more immunity for the head of state.</p> <p>First time that moral outrage about atrocities and legal possibility to prosecute overlapped.</p>	12
<p>Nuremburg and Tokyo Tribunals:</p> <p>Triumph of rule of law over vengeance.</p> <p>Cases not left to domestic courts in order to avoid sham proceedings.</p> <p>New offences are introduced: crimes against humanity and aggression. Genocide mentioned in indictment. (War crimes were already known because of Hague law.)</p> <p>Individual criminal responsibility for those most responsible for the most serious crimes.</p> <p>Trial of crimes with no particular geographical location.</p> <p>Trial of military and political leaders, especially for joint conspiracy to wage war.</p> <p>Confirmed the crimes as customary international law.</p>	



<p>ICTR and ICTY: ICL for internal armed conflicts. Proof that international tribunals can be successful in securing arrests and fulfilling their mandate.</p> <p>Provided the impetus for creating a permanent International Criminal Court.</p> <p>Courts providing a multitude of jurisprudence, confirming but mostly further clarifying the elements of the crimes (sexual violence for genocide, crimes against Humanity, etc.) and defining key concepts for a "general part" of ICL.</p>	
<p>ICC: No impunity for perpetrators for most serious crimes of concern to the international community as a whole, and consequently prevention of such crimes.</p> <p>No ad hoc tribunals but permanent and independent permanent International Criminal Court.</p> <p>Involvement of UNSC not required.</p> <p>The ICC now knows a proprio motu investigation of the OTP, thus banning the dependency of the international community for an UNSC referral when state parties do not cooperate.</p> <p>Complementarity System: ICC has no primary jurisdiction. It is primarily the domestic courts' duty to exercise their criminal jurisdiction over those responsible for international crimes. ICC can step in as a court of last resort though.</p> <p>Further development of rule of law in ICL: first complete statute with a general and specific part.</p> <p>First international tribunal based on a treaty (agreement).</p> <p>(Almost) universal jurisdiction.</p> <p>Introduction of crime of aggression into a statute.</p>	

Question 2

A war has broken out between State A and State B. Neither of those states is a State Party to the Rome Statute of the ICC.

After several war crimes happened, State A fears that the forces of State B will commit further war crimes in its territory and therefore wants the ICC to investigate them.

A) How can State A react?

<p>State A cannot refer a case to the ICC on its own if it has not ratified the Rome Statute.</p>	<p>9</p>
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But it can legally accept the Court's jurisdiction over alleged crimes under the Rome Statute occurring on its territory (even retrospectively!), should the Court choose to exercise it. This is provided for in Art. 12 para 3 Rome Statute.	
Other countries can then refer the case to the ICC: Art. 13 lit. a, Art. 14 Rome Statute.	
Or the Prosecutor can initiate a proprio motu investigation (Art. 13 lit. c, Art. 15 Rome Statute). In that case, the prosecutor needs authorization by the Pre-Trial chamber (Art. 15 para 3 Rome Statute).	
Another possibility is a referral by the UNSC (Art. 13 lit. b Rome Statute), however State A must rely on the UNSC to take action.	
Furthermore, State A could sign and ratify the Rome Statute. That, however, would be a lengthy process and only crimes occurring after the date of ratification would fall under the jurisdiction of the ICC.	

State B does not want the ICC to investigate international crimes in its territory. However, the international community is very concerned about the events taking place in State B.

B) Is there a possibility for the ICC to exercise jurisdiction over war crimes, crimes against humanity or genocide that possibly occurred in the territory of State B?

Yes: Crimes referred to ICC Prosecutor by the UNSC (Art. 13 lit. b Rome Statute).	1
<i>(Note: A proprio motu investigation is not possible for lack of jurisdiction without acceptance. Alternatives to the ICC proceedings were partially accepted [especially asking a national court with universal jurisdiction for help, referring the case to the ICJ for state responsibility or establishing a new ad-hoc or a mixed tribunal].)</i>	

Question 3

The ICC has developed its own procedural system, incorporating elements from common law and civil law traditions.

Provide two examples where a common law approach was followed as well as two examples where a continental law approach was followed. Also provide a short (one or two sentences) explanation for each example.

<i>Various examples are possible. The solution only mentions some.</i>	
Civil law	2.5
Judicial fact finding is allowed: Judges are allowed to question witnesses, and they are even allowed to order the gathering of further evidence during the trial.	
Duty to establish substantial rather than procedural truth.	
Principle of immutability. Once charges are confirmed by the Pre-Trial Chamber, they can, as a rule, not be amended.	



<p>Free assessment of evidence.</p> <p>Prosecution has to investigate both incriminating and exculpatory evidence.</p> <p>The decision is rendered by judges, not a jury.</p>	
<p>Common law</p> <p>Principle of immediacy: all evidence must be presented in court. It is not a trial based on documents.</p> <p>Separate trial phases for determining guilt on the one hand and sentencing on the other hand. This allows defendants to withhold statements that would imply their guilt during the first phase and present them during the sentencing phase should they be found guilty.</p> <p>Cross-examination.</p> <p>Importance of case law.</p>	<p>2.5</p>

Question 4

During the war between the countries H and G, C seizes the opportunity of the chaos of war and shoots his wife W because she has cheated on him. W is a member of an ethnical minority. Thousands of members of this ethnical minority have already become victims of sniper attacks committed by enemy soldiers against the civilian population, targeting them because of their ethnicity.

Did C commit a crime covered by the Rome Statute? Explain.

<p>C incurs criminal liability for homicide or murder according to the domestic national criminal law.</p>	<p>10</p>
<p>The crimes covered by the Rome Statute (Art. 5 Rome Statute) are: The crime of genocide (Art. 6 Rome Statute); Crimes against humanity (Art. 7 Rome Statute); War crimes (Art. 8 Rome Statute); (The crime of aggression, Art. 8bis Rome Statute).</p>	
<p>Genocide (Art. 6 Rome Statute) Actus Reus: Protected group: W is a member of an ethnic minority and thus belongs to a protected group. Individual act: C kills a member of the group (Art. 6 lit. a Rome Statute). Context requirement according to Elements of Crime (conduct took place in the context of a manifest pattern or a similar conduct directed against that group): no, C killed W as an act of personal revenge. <i>[context requirement did not need to be examined as part of the Actus Reus as it is debated]</i></p>	



<p><i>whether it is required. If it was not examined, Mens Rea needed to be discussed.]</i></p> <p>[Mens Rea Intent and knowledge (Art. 30 Rome Statute): C meant to kill W and wanted to cause her death by his conduct. Since he used to be married to her, he also must have known that she belonged to an ethnic minority and therefore to a protected group. Special intent to destroy a group in whole or in part: W did not act with an intent to destroy the religious minority. He "merely" intended to kill his wife.]</p> <p>C did not commit genocide.</p>	
<p>Crimes against Humanity (Art. 7 Rome Statute) Actus Reus Context element (systematic or widespread attack against the civilian population): Thousands of the members of this religious minority have already become victims of various sniper attacks against the civilian population, there thus is a widespread attack. They were targeted because of their religion. Therefore, this constitutes a policy, and the attack is systematic.</p> <p>Individual act: C commits a murder (Art. 7 para. 1 lit. a Rome Statute).</p> <p>Functional nexus between context and act: missing nexus to widespread and systematic attacks. C killed his wife as an act of revenge in an isolated attack.</p> <p>C did not commit a crime against humanity.</p>	
<p>War crimes (Art. 8 Rome Statute) require Actus Reus Contextual element: there is an international armed conflict between countries H and G.</p> <p>Individual act: willful killing in an international armed conflict (Art. 8 para. 2 lit. a Rome Statute).</p> <p>Nexus (functional connection between context and act) is missing between the killing of the wife and the armed conflict. C killed his wife as an act of revenge. It had nothing to do with the ongoing war.</p> <p>C did not commit a war crime.</p>	

Question 5

In Sweden, a mother recently got convicted of having committed a war crime for failing to prevent her 12-year-old son from becoming a child soldier in Syria, where he was then killed in the civil war.



Assess whether the mother might also be held criminally responsible for war crimes under the Rome Statute if she had sent her son to a non-governmental paramilitary organization active in an international armed conflict today. Note that all warring parties ratified the Rome Statute in 2002.

<p>Jurisdiction of the ICC poses no problem regarding the <i>ratione temporis</i> (Art. 11 Rome Statute), and the State on whose territory the conduct in question occurred is a party to the Rome Statute (Art. 12 para 2 lit. a Rome Statute). Furthermore, the mother is a natural person (Art. 25 para. 1 Rome Statute).</p>	4
<p>As elaborated regarding Question 3, War crimes (Art. 8 Rome Statute) require Actus Reus Contextual element: there is an international armed conflict.</p>	
<p>Possible individual act committed: Conscripting or enlisting children under the age of fifteen into the national armed forces or using them to actively participate in hostilities (Art. 8 para. 2 lit. b) xxvi) Rome Statute).</p> <p>In an international armed conflict, the child needs to be enlisted into the <i>national armed forces</i>. In casu, the child is enlisted into a <i>non-governmental paramilitary organization</i>, not into <i>national armed forces</i>. The mother may therefore not be held criminally responsible for war crimes under the Rome Statute.</p> <p>This is a criminal liability loophole. In non-international conflicts, this loophole is closed because Art. 8 para. 2 lit. e) vii) Rome Statute criminalizes conscripting or enlisting children under the age of fifteen into armed forces or groups or using them to actively participate in hostilities. The armed forces do not need to be national armed forces.</p>	

Question 6

After State Y is invaded by enemy soldiers of State X, civilians, including civilian C, fill bottles with flammable liquid using rags as fuses. They then throw those bottle bombs at enemy soldiers, some of which die. The next day, before a bottle bomb is thrown, C is killed by a sniper of the enemy army.

Do the civilians and / or the sniper incur criminal liability for committing war crimes covered by the Rome Statute? Please provide your assessment.

<p>Civilians The civilians might have committed a war crime. As elaborated regarding Question 3, war crimes (Art. 8 Rome Statute) require Actus Reus Contextual element: State Y and X are in an international armed conflict.</p>	2
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<p>Individual act: willful killing in an international armed conflict (Art. 8 para. 2 lit. a Rome Statute).</p> <p>The soldiers do not belong to the persons protected under Art. 8 para. 2 lit. a Rome Statute because they are combatants.</p> <p>The civilians therefore do not incur criminal liability for committing a war crime covered by the Rome Statute.</p>	
<p>Sniper</p> <p>The sniper might have committed a war crime.</p> <p>As elaborated regarding Question 3, war crimes (Art. 8 Rome Statute) require Actus Reus</p> <p>Contextual element: State Y and X are in an international armed conflict.</p> <p>Individual act: willful killing in an international armed conflict (Art. 8 para. 2 lit. a Rome Statute).</p> <p>It is questionable whether C is a person protected under Art. 8 para. 2 lit. a Rome Statute or whether C has lost his immunity.</p> <p>In order for immunity to be lost, direct participation in the armed conflict is required.</p> <p>In casu, C makes bottle bombs and kills enemy soldiers using such bottle bombs. C thus directly participates in hostilities and therefore becomes, temporarily, a legitimate target.</p> <p>S kills C the next day. Thus the question arises whether C's immunity is reinstated. "Before a bottle bomb is thrown" indicates that further bottle bombs are to be thrown at enemy soldiers. C can thus still be considered a direct participant and does not get protection from Art. 8 para. 2 lit. a Rome Statute.</p> <p>S, therefore, did not commit a war crime covered by the Rome Statute.</p>	<p>3</p>



Question 7

There is an ongoing war between the states O and L. Both are Party States to the Rome Statute. A was deployed by the occupying State O as the local commander in the City C of the occupied State L. During his time as local commander, A ordered 20'000 Catholic civilian men to be killed in order to "liberate C from Catholics" and to "secure the city's territory for our own men". Another 9'000 Catholic civilian men were murdered by A's military forces without A's order. Once he was made aware of these additional killings, he congratulated the soldiers who committed the killings. Traditionally, Catholic women in State L will convert to the religion of their husbands if these are not also Catholics, which is why A did not order the killing of women. The male Catholic civilian population of the city decreased from around 30'000 to 300.

A) Assess the criminal liability of the soldiers under the Rome Statute

B) Assess the criminal liability of A under the Rome Statute

For the events during his time as the local commander in the City C, a court in State O sentenced A to a fine.

C) Can A still be tried by the ICC?

A) Criminal liability of the soldiers	
All warring parties are parties to the Rome Statute of the ICC. The ICC therefore has territorial jurisdiction over what happened in this case (Art. 12 para. 2 lit. a Rome Statute). The soldiers also are natural persons. Therefore, the ICC has personal jurisdiction (Art. 25 para. 1 Rome Statute). Mode of liability: The soldiers act as direct perpetrators.	14
Genocide (Art. 6 Rome Statute) Actus Reus: Protected group: Catholics are protected as a religious group. Individual act: The soldiers killed members of the group (Art. 6 lit. a Rome Statute).	
(Context requirement according to Elements of Crime [the conduct took place in the context of a manifest pattern or a similar conduct directed against that group]: the soldiers did the killings because they were ordered to kill Catholics. Thus, the killings took place in a manifest pattern directed against that group.)	
Mens Rea: Intent and knowledge (Art. 30 Rome Statute): Soldiers meant to kill the Catholic men and wanted to cause their death. They knew they were killing Catholic men as the order was to free the city from Catholics.	
Special intent to destroy a group in whole or in part: It may be assessed by looking at quantitative or qualitative criteria. Quantitative criteria refer to the absolute or relative number of targeted persons, however, no one can say what the threshold number would be. To assess the quantitative threshold, the group must first be identified. The	



<p>group could be all Catholics in the world, all Catholics in State L or all Catholics in City C.</p> <p>If the group is defined as all Catholics in City C, the quantitative threshold is probably met because two thirds of all Catholic men were killed by the soldiers. However, ethnic cleansing in order to secure the territory for one's own group usually does not satisfy the intent to destroy a protected group.</p> <p>If the group is defined as all Catholics in State L: Catholics of City C would be part of that group. Male Catholics would, however, only be part of a subset of that group. It is questionable whether this satisfies the quantitative threshold.</p> <p>Qualitative criteria refer to the prominence of the targeted individuals within the group. Qualitative criteria can be met if the perpetrator's aim is to make the continuing existence of the group impossible. One could argue that the existence of the Catholics is threatened if one third of all male Catholics is killed as the Catholic women convert to the religion of their non-Catholic husbands when they get married to nationals of the occupying State.</p> <p><i>[Possible to argue for or against special intent.]</i></p> <p><i>[If argued for special intent, Grounds for Excluding Criminal Responsibility must be looked at. See below, Crimes against Humanity.]</i></p>	
<p>Conclusion: The soldiers did/did not commit genocide.</p>	
<p>Crimes against Humanity (Art. 7 Rome Statute)</p> <p>Actus Reus</p> <p>Context element (systematic or widespread attacks against the civilian population): 29'000 Catholic men are killed with approval of their superior commander or because the soldiers were ordered to do so, thus there is a widespread attack. The victims were targeted because of their religion. Therefore, this constitutes a policy and the attack is systematic.</p>	
<p>Individual acts: Soldiers commit murders (Art. 7 para. 1 lit. a Rome Statute)</p>	
<p>Functional nexus between context and act poses no problems:</p> <p>Regarding the ordered killings:</p> <p>Soldiers participated in and did have knowledge of the widespread and systematic attacks against the civilian population as they were specifically ordered to free the City from Catholics. They did the killings because they were ordered to do so. Thus, there is a functional link between individual acts and contextual element.</p> <p>Regarding the killings on their own initiative:</p> <p>The individual acts fit into the pattern of the attacks regarding the purpose of freeing the city from Catholics. There is, thus, also a functional link between the individual acts and the contextual element.</p>	
<p>Mens Rea:</p>	



<p>Soldiers meant to kill the Catholic men and wanted to cause their death. They were, furthermore, aware of the context of the widespread or systematic attacks against the civilian population.</p>	
<p>Grounds for Excluding Criminal Responsibility: Superior orders (Art. 33 Rome Statute): Orders to commit genocide or crimes against humanity are manifestly unlawful (Art. 33 para. 2 Rome Statute). Criminal responsibility can therefore not be excluded (Art. 33 para. 1 lit. c Rome Statute).</p>	
<p>Conclusion: the soldiers did commit crimes against humanity.</p>	
<p>War crimes (Art. 8 Rome Statute) Actus Reus Contextual element: there is an international armed conflict between countries O and L. Individual act: willful killing in an international armed conflict (Art. 8 para. 2 lit. a Rome Statute). Soldiers kill Catholic civilian men. Nexus (functional connection between context and act): the soldiers killed the civilians in the context of the armed conflict. Mens Rea Intent and knowledge (Art. 30 Rome Statute) fulfilled.</p>	
<p>Superior orders (Art. 33 Rome Statute): Orders to commit war crimes do not fall within the absolute liability scope of Art. 33 para. 2 Rome Statute. Following superior orders is not recognized as standalone ground for excluding responsibility, however, there can be a privileged treatment of recipients of orders within hierarchies, if firstly, the person was under a legal obligation to obey duties (Art. 33 para. 1 lit. a Rome Statute). The Soldiers were A's subordinates and therefore under the obligation to obey orders. Secondly, it is required that the soldiers did not know that the order was unlawful (Art. 33 para. 1 lit. b Rome Statute). Nothing in the case indicates that the soldiers were not aware of the unlawfulness of the order. Thus, no privileges apply to them. Furthermore, an order to kill thousands of civilians is also manifestly unlawful (Art. 33 para. 1 lit. c Rome Statute).</p> <p>Conclusion: The soldiers committed war crimes.</p>	
<p>B) Criminal liability of A</p>	
<p><u>Ordered killings:</u> For jurisdiction of ICC and possibly committed crimes covered by the Rome Statute, see above A).</p>	8
<p>Regarding A, the mode of liability must be examined. A orders the killing of 20'000 Catholic men.</p>	



<p>(Co-Perpetration [Art. 25 para. 3 lit. a Rome Statute]: There is no indication that A made an individual contribution other than ordering the killings.)</p>	
<p>Encouragement (Art. 25 para. 3 lit. b Rome Statute): Ordering commission (Art. 1): requires (<i>de facto</i>) superior-subordinate relationship between the giver and the recipient of the order. The giver of the order uses his authority and special position to encourage the receiver to commit the crime. In casu, A is the local commander, and the soldiers are his military subordinates. A thus uses his position to order the killings.</p>	
<p>Mens Rea Intent and knowledge (Art. 30 Rome Statute): A knows of the existence of the armed conflict, is aware of the target of the offence, which are persons protected by international humanitarian law (civilians). A also acted with intent.</p>	
<p>There are no grounds for excluding criminal responsibility.</p>	
<p>Conclusion: regarding the ordered killing, A incurs criminal responsibility for ordering a war crime (the killing of civilians) (Art. 8 para. 2 lit. a and Art. 25 para. 3 lit. b Rome Statute).</p>	
<p><u>Not ordered killings:</u> For jurisdiction of ICC and possibly committed crimes covered by the Rome Statute, see above A). Regarding A, the mode of liability must be examined.</p>	
<p>A did not order the killings. Therefore, no individual criminal responsibility. (Art. 25 Rome Statute). Command responsibility, Art. 28 Rome Statute: Actus Reus: Existence of a superior-subordinate relationship: A was the military commander. The soldiers were his subordinates. Commission of international crimes by subordinates: The subordinates committed crimes against humanity, war crimes and maybe genocide. Both types of responsibility are fulfilled: A failed to take all necessary and reasonable measures to prevent or repress commission. A also failed to submit the matter to competent authorities for investigation and prosecution (<i>ex post facto</i>). Instead, he congratulated the soldiers for their wrongdoing.</p> <p>Mens Rea:</p>	



<p>Regarding the first type: It is unclear whether A, owing to the circumstance at the time, should have known that his soldiers were committing or about to commit war crimes that he did not order them to do.</p> <p>Regarding the second type A's intent and knowledge are, however, clear. He congratulated the soldiers and thus made it clear that he had no intention to submit the matter to the competent authorities for investigation and prosecution.</p>	
<p>There are no grounds for excluding criminal responsibility.</p>	
<p>Conclusion: regarding the not ordered killing, A incurs criminal command responsibility.</p>	
<p>C)</p>	
<p>According to Art. 20 para. 3 Rome Statute, as a rule, no person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the ICC with respect to the same conduct.</p> <p>There are, however, exceptions to that rule:</p> <p>One exception is when the proceedings in the other court serve the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court.</p> <p>A was merely sentenced to a fine for his conduct as the local commander in City C. From that it can be derived that the court in country O wanted to shield A from criminal responsibility for international crimes.</p>	<p>2</p>