



International Criminal Law Solution

Question 1

- a) How is the principle of legality defined in international law?
- b) Give examples where the principle of legality in ICL has been challenged.
- c) How were such challenges addressed by courts/tribunals? Were they addressed in a convincing manner?
- d) How is the issue of legality dealt with in the Rome Statute of the ICC?
- e) Are historical concerns about the legality of ICL relevant today?

<p>a) A definition of the principle of legality can be found in Article 15(1) ICCPR and Article 7(1) ECHR: “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.”</p>	2
<p>b) The principle of legality was challenged, for example, at the Nuremburg and Tokyo Tribunals. While war crimes (Hague and Geneva Conventions) already existed before WWII, crimes against peace and crimes against humanity were included in Art. 6 of the Nuremburg Charter after WWII. Those crimes were not part of any legal act before they happened.</p> <p>See also, Tadic, where the lawful establishment of the ICTY was challenged. The Tadic defence argued that the ICTY should have been created by treaty, the consensual act of nations, or by amendment of the Charter of the United Nations, not by resolution of the Security Council.</p>	2
<p>c) At Nuremburg, a solution was to refer to broader principles of justice. The argument was that in such circumstances the perpetrators must have known that their behaviour was wrong. Essentially, their actions contradicted the commands of basic laws so drastically that it must have been clear to every perpetrator that such conduct was punishable. It would have been unjust to allow for those wrongs to go unpunished. Thus, the argument of justice might be understood to outweigh the legality principle and allow for the punishment of such offences and the creation of tribunals ex post factum. This is something distinct to ICL and unknown to (most) domestic criminal laws.</p>	4



<p>Students might also note that the solution is today implemented in Articles 15(2) ICCPR and 7(2) ECHR: <i>If an act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations, the principle of legality is satisfied if a perpetrator is punished for such an act or omission.</i></p>	
<p>d) Article 22 Rome Statute is a strong restatement of the legality principle. Article 22(1) prevents the ICC from engaging in expansions of criminal liability not mandated by the state parties.</p>	2
<p>e) The question is in essence asking whether the 'original sin' of Nuremberg serves to de-legitimise the discipline as a whole – and thus the ICC? Though of course this is only of relevance if the one believes Nuremberg did not adequately address the legality issue.</p>	2



Question 2

A is accused of committing several crimes against humanity. An ICC Prosecutor conducts several interviews with him in his home state, where A is detained in a facility that is infamous for human rights abuses. Later, at the trial stage, A's defence claims that A was tortured in detention by officials of his home state, who gave him instructions on how to answer to the questions of the ICC prosecutor.

a) Under what circumstances and conditions can the interviews conducted by the ICC Prosecutor be excluded as evidence?

b) What rationale, if any, prohibits the use of evidence that results from torture?

<p>a) According to Article 69(7) Rome Statute: <i>Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if:</i> <i>(a) The violation casts substantial doubt on the reliability of the evidence; or</i> <i>(b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.</i> Torture constitutes a violation of Article 55(1)(b) Rome Statute and of internationally recognized human rights</p>	2
<p>The defence has burden of proof: It must show that the criteria for exclusion of evidence have been met (<i>The Prosecutor v. Al Hassan</i>, para. 37 with further references).</p>	2
<p>The defence must show that there is a real risk, that the answers given were the result of torture (<i>The Prosecutor v. Al Hassan</i>, para. 38 with further references).</p>	2

<p>b) Using evidence that was obtained from torture undermines the system of criminal justice. The prohibition on the use of the evidence might be considered to act as a deterrence. If the use of such evidence were to be permitted, the prosecution authorities would not have an incentive to abstain from torture.</p>	2
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Question 3

While a war was going on between State A and B in 2015, two soldiers of State B were captured and brought to a City in State A. There, the Military Commander M placed the two prisoners of war under the escort of soldier S and ordered S to walk with the two prisoners to an office in town for interrogation. While soldier S and the three prisoners started walking, M shouted to S: "Do not interfere, if civilians molest the prisoners or try to kill them! They ought to be dead anyway." The gathered civilians, among them X, Y and Z, heard this order (as was intended by M).

When the prisoners were walked through one of the city's main streets, X,Y, Z and other civilians started to hit the prisoners. Some even started to shoot. Soldier S nevertheless followed his order and did not intervene. Even though he knew that soldiers are duty bound to protect Prisoners of War when escorting them. The two prisoners eventually were shot dead on the street (but not by X, Y or Z).

State A and B are both parties to the Rome Statute.

- a) Assess the criminal liability of Soldier S under the Rome Statute**
- b) Assess the criminal liability of Commander M under the Rome Statute**
- c) Assess the criminal liability of the three civilians X, Y, Z under the Rome Statute**

Answer

a) Criminal liability of Soldier S	
States A and B are parties to the Rome Statute. The ICC thus has jurisdiction.	1
War crime: Article 8(2)(a)(i) Rome Statute	1
S could have committed the war crime of killing prisoners of war (PoW), i.e. persons protected by the Geneva Conventions.	
Actus Reus	3
Contextual element: there is an international armed conflict between States A and B.	
Individual act: wilful killing in an international armed conflict.	
Two PoW were killed.	
Nexus (functional connection between context and act): the PoW were killed in the context of the armed conflict as they were escorted to an office to be interrogated there.	
Mode of liability	4
The soldier did not kill the PoW. The question thus arises, whether and if the killings may be attributed to him.	
Natural person: the Soldier is a natural person as required by Article 25(1) Rome Statute.	



<p>The Soldier may have participated in the killings by facilitating the commission of the crime by aiding, abetting, or otherwise assisting in its commission according to Article 25(3)(c) Rome Statute.</p> <p>S must have acted in a manner which facilitated the commission of the crime. While he neither shot nor hit the PoWs, he aided the civilians in killing the foreign soldiers by not fulfilling his duty to protect them.</p> <p>The Soldier may have participated in the killings by contributing to a group crime according to Article 25(3)(d) Rome Statute.</p> <p>Participation:</p> <p>S must have acted "in any other way". That could be the case if he did not carry out essential tasks.</p> <p>The Soldier did not intervene, thus he neither hit nor shot the PoW. However, he failed to protect the PoW even though he as a soldier who escorted PoW was duty bound to do.</p> <p>Group crime: the gathered civilians in the street started hitting the PoW.</p> <p>Significant contribution: Not intervening despite being duty bound to do so is a significant contribution.</p>	4
<p>Mens Rea</p> <p>Intent and knowledge regarding own contribution</p> <p>S did not intervene because he was ordered not to, and he knew that he in that way contributed to the lynching.</p> <p>Knowledge of common purpose of group.</p> <p>He also knew about the common purpose of the group (lynching the PoW) because he heard what M shouted and saw how civilians started to hit the PoW and witnessed how some started shooting.</p> <p>Intention to contribute to criminal activity or purpose of group (aim of furthering) <i>or</i></p> <p>Knowledge of intention of group to commit crime.</p> <p>S knew of the intention of the group to commit the crime because he witnessed how the PoW were hit and how gunshots were fired.</p>	2
<p>Grounds for Excluding Criminal Responsibility:</p> <p>S followed the order of Commander M. Thus, the question arises, whether this excludes his criminal liability.</p> <p>According to Article 33 Rome Statute following superior orders is not a ground for excluding criminal responsibility, unless</p> <p>The person was under a legal obligation to obey orders of the Government or the superior in question;</p>	2



<p>The person did not know that the order was unlawful; and The order was not manifestly unlawful.</p> <p>S knew that the order was unlawful. Criminal responsibility is therefore not excluded (Article 33(1)(b) Rome Statute).</p>	
<p>Conclusion: Soldier S committed a war crime</p>	-

<p>b) Criminal liability of Commander M</p>	
<p>See a) regarding jurisdiction and Actus reus of the war crime</p>	
<p>Mode of liability</p> <p>Commander M did not kill the PoW. Thus, the question arises, whether and if yes, how, the killings may be attributed to him.</p>	-
<p>Natural person: M is a natural person as required by Article 25(1) Rome Statute.</p>	-
<p><i>Attributing the acts of S to M:</i></p> <p>M might have acted as a direct perpetrator by committing the killings through others, namely through soldier S according to Article 25(3)(a) Rome Statute.</p> <p>That requires the existence of a hierarchical structure, and that the perpetrator is situated at the upper levels of this structure. This holds true for M as he is the Military Commander.</p> <p>He furthermore must exercise sufficient control over the primary perpetrator via the hierarchical structure.</p> <p>In casu sufficient control questionable. No further clues in the case.</p>	2
<p>M, however, might have ordered the commission of the crime according to Article 25(3)(b) Rome Statute by ordering S not to intervene.</p> <p>That requires a superior-subordinate relationship between direct actor and accomplice. M is the commander of S.</p> <p>The crime must occur or be attempted:</p> <p>In casu the PoW was killed.</p> <p>Causal connection:</p> <p>Because S did not intervene and protect the PoW, the PoW was killed.</p>	2
<p>Mens Rea</p> <p>M needs to possess intent and knowledge regarding the encouragement and the crime.</p> <p>M clearly intended S not to intervene as he ordered him not to and he knew that with his order he was encouraging S not to intervene. By ordering S not to intervene and doing so in a way that the gathered</p>	2



civilians could hear him, indicates that M intended the PoW to be killed by the civilians or rather because of them not being protected by S.	
There are no grounds for excluding criminal responsibility.	-
Conclusion 1: Military Commander M committed a war crime by ordering S not to intervene.	-
<p><i>Attributing the acts of the civilians who shot the PoW dead to M:</i></p> <p>M might have induced the commission of the crime according to Article 25(3)(b) by shouting that the PoW shall not be protected which led to their killing by civilians.</p> <p>M induced the civilians to kill the PoW by letting them know, that no one will intervene.</p> <p>The crime must occur or be attempted:</p> <p>In casu the PoW got killed.</p> <p>Causal connection:</p> <p>Had M not made clear to the civilians that the PoW will not be protected they would probably not have shot them.</p>	1
Mens rea: M intended the civilians to hear him and to kill the PoW and he knew, they would do so. He also wanted the PoW to be dead. He even said that they ought to be killed.	1
There are no grounds for excluding criminal responsibility.	-
Conclusion 2: Military Commander M committed a war crime by inducing the civilians to kill the PoW.	-

c) Criminal liability of the three civilians X, Y, Z	
See a) regarding jurisdiction and Actus reus of the war crime	
<p>Mode of liability</p> <p>X, Y and Z did not kill the PoW. Thus, the question arises, whether and if yes, how, the killings may be attributed to them.</p> <p>Natural person: X, Y and Z are natural persons as required by Article 25(1) Rome Statute.</p> <p>X, Y and Z may have participated in the killings by contributing to a group crime according to Article 25(3)(d) Rome Statute.</p> <p>Participation:</p> <p>X, Y and Z must have acted "in any other way".</p> <p>X, Y and Z hit the PoW. They did, however, not shoot them and they were not duty bound to protect the prisoners of war since they were civilians and not military staff.</p>	1.5



Hitting the PoW is not a significant contribution to their killing. (Note: JCE III is not covered by the Rome Statute)	
Assessment of criminal liability for war crimes other than wilful killing (e.g. Causing of great suffering or serious injury according to Art. 8(2)(a)(iii) and others)	1.5
Conclusion: X, Y and Z did not commit a war crime	-



Question 4

A journalist approaches you for a comment on whether Mr. Vladimir Putin could be tried for committing war crimes and aggression. Write a response.

Your response should address:

- a) Under what circumstances ICC jurisdiction could be triggered.**
- b) What the obstacles to prosecution before the ICC are.**
- c) Whether other courts could try Mr. Putin for those crimes.**

a) ICC Jurisdiction	
The ICC's jurisdiction depends on the trigger mechanism that is activated. Article 15bis(5) Rome Statute: State referrals and proprio motu investigations regarding the crime of aggression are not possible in respect of a State that is not a party to the Rome Statute, when committed by that State's nationals or on its territory.	2
Article 15ter(1) Rome Statute: A Security Council (SC) referral would trigger the ICC's jurisdiction.	1
War Crimes (+) because Ukraine accepted ICC Jurisdiction and crimes were committed on the territory of Ukraine.	2

b) Possible obstacles	
Since Russia is one of the five permanent members of the SC, Russia has a veto right and a SC referral is therefore unlikely.	2
Personal immunity for heads of state: Article 27 v. Article 98(1) Rome Statute (see eg <i>Al Bashir case</i>).	2
Link of crimes to Putin (see e.g. <i>Bemba et al case</i>): Command responsibility even for remote acts?	1
No trial in absentia: If Putin does not travel to a party state of the Rome Statute, he will not be arrested and handed over. The ICC does not try individuals unless they are present in the courtroom.	2

c) Other Courts	
National courts rather not as personal immunity will probably hinder their jurisdiction over Mr. Putin.	1
Special Tribunal A special tribunal could perhaps be established via the Security Council as was the case with the Special Court for Sierra Leone. There is, though, again the problem that Russia has a veto power in the Security council. Thus, the special tribunal would need to be	4



<p>established by the General Assembly as was the case for the extraordinary chambers in the courts of Cambodia (Khmer Rouge Tribunal). It could be in Ukraine by way of international treaty. However, this would circumvent the compromises found at the Kampala conference regarding jurisdiction over the crime of aggression.</p>	
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