

International Criminal Justice

War Crimes during IACs and NIACs

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War Crime

- The first attempt to define the concept of a "war crime" emerged during the American Civil War in the mid-19th century with the codification of the international customary laws of war, which was achieved at a national level with the publication of the **Lieber Code** in the United States of America
- Art. 2 **London Charter** 1945: violations of the laws and customs of war, such as the killing of civilians or hostages, the mistreatment of the population, prisoners or shipwrecked, the plunder of public or private property, the wanton destruction of cities, towns, villages, the desolation unjustified by military reasons.

War Crime (II)

- Article 8: War crimes
- para 1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.
- para 2. For the purpose of this Statute, “war crimes” means: (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention: (i) **Wilful killing**; (ii) **Torture or inhuman treatment**, including biological experiments; (iii) **Wilfully causing great suffering**, or serious injury to body or health; (iv) **Extensive destruction and appropriation of property**, not justified by military necessity and carried out unlawfully and wantonly; (v) **Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power**; (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial; (vii) **Unlawful deportation or transfer or unlawful confinement**; (viii) **Taking of hostages**.

War Crime (III)

- Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:
- (x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons; (xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;
- **Para 3: In the case of an armed conflict not of an international character**, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause

War Crime (IV)

- The term was created as part of International Criminal Justice, constitutive to it, and it was established by the Treaty of Versailles in 1919
- It was applied immediately after the end of WWII
- It includes all forms of morally wrong actions during a war that cause serious harm to their victims
- *See also* Art. 124 ICC: opt-out system – a state party may not accept its jurisdiction over war crimes for a period of 7 years from the entry into force of the statute
- Temporary self-exclusion clause

Lubanga Judgement ICC

- The ICC's first war crimes ruling was the prosecution of Thomas Lubanga Dyilo
- Founder & former leader of the paramilitary group "Union of Congolese Patriots" (UPC)
- The group was formed in 2000 in Congo with the participation of people from the Hema tribe mainly
- The group was accused in 2002 of massacres of civilians in Ituri province
- Following a request from the Democratic Republic of the Congo in 2004, the ICC Prosecutor began investigating crimes that took place in the Ituri region and fell under its jurisdiction (Art. 14)
- The Pre-Trial Chamber issued a secret arrest warrant in 2006 due to reasonable grounds for the commission of the war crime of recruiting and enlisting children under the age of 15

Lubanga Judgment ICC (II)

- Decision to detain Lubanga in The Hague
- Raised doubts: principle of complementarity
- Indictment: charged under national jurisdiction with crimes against humanity and genocide (but not for recruiting children)
- Trial postponed twice (difference between prosecution and judges)
- 2012: conviction – victims' hearing for reparation
- Initial stay of proceedings considered very critical for the credibility of the ICC
- Question on the application of the principle of fair trial

ICTY – Jean-Paul Akayesu case (1998)

- In the case of *Prosecutor v Akayesu* the Court set out the criteria for distinguishing between domestic armed conflicts and other internal conflicts, which do not meet the criteria to be classified as armed conflicts.
- Criteria: a) the intensity of the conflict and b) the degree of organization of the opposing parties
- Caution in the case of internationalization

ICTY – Tadic case

- Serious violations of humanitarian law on the territory of Yugoslavia since 1991 prompted the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY)
- First case in court Duško Tadić
- Bosniak Serb politician and former leader of the Serbian Democratic Party (SDS) in Kozarac
- Result of a thorough and meticulous investigation of testimonies and written evidence
- Reference: reflects a detailed investigation of legal issues raised for the first time before a Court
- Timeline of the events of the Tadić Case: Bosnia and Herzegovina, 1991.
- Until then: a regime of joint governance, a result of the mixed ethnic composition (population predominance of Bosnian Muslims (43%), Bosnian Serbs (33%) and Bosnian Croats (17%).

ICTY – Tadic case (II)

- In February 1994, Tadić was arrested in Munich and transferred to The Hague
- The indictment was filed on 14 December 1995The trial began on 7 May 1996
- He faced twelve counts of crimes against humanity, twelve counts of grave breaches of the Geneva Conventions and ten counts of violations of the customs of war
- In his initial plea to the Court on 26 April 1995, he pleaded not guilty
- On 14 July 1997, the Court, in its judgment, found Tadić guilty of crimes against humanity, persecutions and inhumane acts and violations of the laws or customs of war, imposing a sentence of 20 years imprisonment

ICTY – Tadic case (III)

- The defendant and the Prosecutor appealed the Court's decision
- A significant period of time was allocated for the resumption of procedures for finding additional evidence
- Following a request by the defendant, an extension of the time limit was granted
- In 1999, Tadić's appeal was rejected
- One of the grounds for appeal was the question of the legality of the court's exercise of jurisdiction
- Tadić argued that the latter was created illegally through the United Nations Security Council, basing his argument on the separation of powers
- He essentially argued that the Security Council was the executive branch of governments and therefore did not have the jurisdiction to create a judicial body

Individual criminal responsibility and war crimes

- Article 25 para. 3 ICC Statute: conditions for establishing individual criminal responsibility for the commission of war crimes and for any crime within the jurisdiction of the Court
- Individuals are criminally responsible for the intentional and malicious commission of a war crime, whether the crime is committed by an individual himself/herself or in the form of participation
- Burden of proof: the individual's conduct contributed decisively to the commission of the unlawful act, while with regard to participation, it is necessary to assess the form and degree of their participation
- The act can also be committed through a perpetrator, who will be guided and motivated to do so under the guidance of someone else
- A perpetrator who obeyed / followed the orders of a hierarchical superior is also considered individually responsible

Individual criminal responsibility and NIACs

- War crimes can also be committed during a non-international armed conflicts
- The Court that first supported this view was the International Criminal Tribunal for Rwanda (ICTR)
- Article 4 ICTR Statute states that the Court shall have jurisdiction to try persons who commit or order the commission of grave breaches of common Article 3 of the Geneva Conventions (1949) and Additional Protocol II (1977)