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Core crimes in the name of “mercy”

ἀλλ' εἰρκτέον τάδ' ἐστὶν ὃν γὰρ οἱ πλατεῖς
ὄνδ' ἐνρύνωτοι φῶτες ἀσφαλέστατοι,
ἀλλ' οἱ φρονούντες ἐν κρατοῦσι πανταχόν.²

SUMMARY

In the present article is analyzed the prevention of serious violations of international humanitarian law, particularly in view of the gravity of certain acts, qualified as core crimes (the crime of genocide, war crimes, crimes against humanity and aggression). In order to achieve the aforementioned, the paper provides scientific examination of the norms that regulate these international crimes in the Rome Statute of the International Criminal Court, Convention on the Prevention and Punishment of the Crime of Genocide, Geneva Conventions and other important treaty-based sources of the international criminal law.

Therefore, the starting point is that the core crimes are deemed to be the most serious crimes of concern to the international community as a whole. The aim of the article is also to analyze the absence of a treaty that prohibits nuclear and depleted uranium weapons, especially considering court practice. It is confirmed that international humanitarian law prohibits

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² “It is not by thews and bulk,
or shoulder’s breath,
the perfect man is known,
but wisdom gives chief power in all the world”.

[Sophocles, *Ajax*, William Blackwood and sons, Edinburgh – London, 1876, 42].

engagement in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury. The results of the research show that the rule prohibiting the use of weapons causing superfluous injury is a customary norm applicable to all parties to any armed conflict. The author also presents the development, challenges and perspectives of the international criminal law, in the widely accepted historical narrative.

Keywords: core crimes, international criminal law, convention, aggression, genocide.

Introduction

International criminal law has developed as a part of a broader system of public international law, which has been based on state sovereignty, including each state's jurisdiction over its own territory and citizens. It has adapted through a long and slow historical process, drawing upon multiple sources. The purpose of international criminal law is to establish the criminal responsibility of individuals for international crime.³ According to Article 21 of the Rome Statute of the International Criminal Court (ICC Statute), the Court shall apply: (a) In the first place, this Statute, elements of crimes and its rules of procedure and evidence; (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict.⁴

Treaty-based sources of international criminal law, either directly or as an aid to interpretation, include the 1907 Hague Regulations, the 1949 Geneva Conventions (and their additional protocols) and the 1948 Genocide Convention.⁵ Treaties are agreements between sovereign nations, governed by international law and binding only upon parties to each particular agreement.

As regards the International Criminal Court, it is to apply general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.⁶ The ICC may also apply

³ Bartram S. Brown, *Research Handbook on International Criminal Law*, Edward Elgar Publishing Limited, Cheltenham, 2011, 3.

⁴ Rome Statute – the International Criminal Court – ICC Statute, available at: <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf>, 27. 9. 2022.

⁵ Robert Cryer *et al.*, *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, Cambridge, 2010, 9.

⁶ Art. 21(1)(c) of the ICC Statute. This and all other sources of law available to the ICC are qualified by Article 21(3) which requires application and interpretation of the law to be consistent with internationally recognized human rights, and without adverse discrimination.

"principles and rules of law as interpreted in its previous decisions". This court is not, however, bound by its previous decisions; it has no equivalent to the common law principle of *stare decisis*.⁷

As international criminal law is a subset of international law, its sources are those of international law. These are usually considered to be those enumerated in Article 38(1) (a)–(d) of the Statute of the International Court of Justice, in other words, treaty law, customary law, general principles of law. A subsidiary means of determining the law are judicial decisions and the writings of the most qualified publicists. They are available for use by national courts in so far as the relevant national system concerned will allow.⁸

Customary law is composed of two elements, an objective and a subjective. The objective element is made up of the uniform and continuous practice of States with regard to a specific issue and, depending on its adherents, this may take the form of a universal or a local custom. The subjective element comprises a State's conviction that its practice on a particular issue emanates from a legal obligation, which it feels bound to respect. International customary rules bind all States, except for those States that have consistently and openly objected to the formation of a rule from its inception. No derogation is allowed from *jus cogens* norms, which generally comprise fundamental human rights and rules of international humanitarian law, as well as the prohibition of the use of armed force.⁹ Customary international law derives from the practice of States accompanied by *opinion iuris* (the belief that what is done is required by or in accordance with the law).¹⁰

The primary sources of international criminal law are independent and capable of producing binding rules. The secondary sources serve to ascertain, and perhaps interpret, the primary sources.¹¹

Core crimes regulated by international criminal law

The core crimes enumerated in the Rome Statute are deemed to be the most important international crimes. The label 'core' is without question used to refer to the perceived elevated status of these crimes, and it designates special standing regarding international jurisdiction.¹² At the time of World

⁷ Art. 21(2) of the ICC Statute.

⁸ R. Cryer *et al.*, 6.

⁹ Ilias Bantekas, Susan Nash, *International Criminal Law*, Routledge-Cavendish, London, 2009, 2–4.

¹⁰ R. Cryer *et al.*, 9.

¹¹ I. Bantekas, S. Nash, 2.

¹² Christine Schwöbel-Patel, "The core crimes of international criminal law", *The Oxford Handbook of International Criminal Law* (eds. Kevin Heller *et al.*), Oxford University Press, Oxford, 2020, 769.

War II, the international laws that applied to wars were the Hague Conventions of 1899 and 1907. These regulations set forth rules regarding attacks on civilian populations. The Conventions did not anticipate air warfare and, therefore, did not contain any specific provisions on air attacks. Instead, the Conventions prohibited targeting undefended towns and cities by naval and field artillery. Additionally, the Conventions prohibited using “arms, projectiles, or material calculated to cause unnecessary suffering.”¹³

Genocide

Perhaps one of the most significant developments in the law of armed conflict since 1907 was the adoption on 12 August 1949 of four Conventions replacing the two Geneva Conventions of 1929: I-Wounded and Sick in the Field; II-Wounded, Sick and Ship wrecked at Sea; III-Prisoners of War; IV-Civilians.¹⁴ Of these, the Civilians Convention is completely new and is the consequence of the treatment suffered by civilian populations of occupied territories during World War II and represents the first attempt to protect the civilian population during the conflict, although it is essentially concerned only with the protection of civilians in occupied territory and not the treatment of civilians in a belligerent’s own territory, unless such civilians possess enemy nationality.¹⁵

The Convention on the Prevention and Punishment of the Crime of Genocide¹⁶ was adopted by the United Nations General Assembly on December 9, 1948, and entered into force on January 12, 1951. Article II declares genocide as acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group as such. On the one hand, certain acts must be committed against a protected group (material elements), but on the other hand, the perpetrator needs to act with the intent to destroy the group on the basis of their member’s religion, ethnicity, nationality etc. (mental elements).¹⁷

¹³ Christopher Vail, “The Legality of Nuclear Weapons for Use and Deterrence”, *Georgetown Journal of International Law*, Vol. 48, Nr. 3/2017, 845–846.

¹⁴ Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Geneva Convention III Relative to the Treatment of Prisoners of War; Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War.

¹⁵ Leslie C. Green, *The contemporary law of armed conflict*, Manchester University Press, Manchester, 2000, 43.

¹⁶ Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948.

¹⁷ Rosa Duarte-Herrera, Clara Ifsits, “Genocide against Yazidis – Austria’s obligation to prosecute and punish returning ISIS fighters under international and national law”, *University of Vienna Law Review*, Vol. 1, 2017, 3.

Article II of the Genocide Convention making, the commission of genocide a crime, has been incorporated in the 1998 Rome Statute of the International Criminal Court. The Genocide Convention was the first legal instrument to formally define genocide. According to the convention, genocidal acts are not limited to murder but pertain to any attempt to cause serious bodily or mental harm to members of a group, or “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.” Genocide is not only a crime against a particular group of people but also a crime whose intent is the obliteration of their history, culture, and future existence as well.¹⁸

The Fourth Geneva Convention employed a similar definition in Article II, which describes genocide as “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.” These acts are banned under international law regardless of whether they are committed in war or in peacetime. All signatories are obliged to prevent and punish any acts of genocide that take place under their jurisdiction. Signatories agree to enact appropriate legislation to make these acts illegal under national law and provide appropriate penalties for violators. The convention also declares it illegal to conspire to commit genocide, incite others to commit genocide, attempt to commit genocide, or become complicit in the commission of genocide.¹⁹

The Stockholm Declaration on Genocide, announced on January 28, 2004, emerged from a three-day intergovernmental conference sponsored by the United Nations that was entitled “Preventing Genocide: Threats and Responsibilities.” Attended by delegates from 58 nations, it was the first major international conference on genocide since the United Nations adopted the Genocide Convention in 1948. The declaration called for collective efforts of the international community to prevent genocide, ethnic cleansing, and mass killings. The declaration also obliged state members to identify and report possible threats of genocide and take effective measures to stop it.²⁰

¹⁸ Leslie Alan Horvitz, Christopher Catherwood, *Encyclopedia of War Crimes and Genocide*, Facts on File, New York, 2006, 168.

¹⁹ Vukan Slavković, *Le commencement d'exécution*, Pravni fakultet Univerziteta u Beogradu, Beograd, 2022, 28.

²⁰ L. A. Horvitz, C. Catherwood, 407.

War crimes

The Charter of the Nuremberg International Military Tribunal of 1945 stated that the court had the authority to try individuals or members of organizations for one of three crimes (crimes against peace, war crimes, and crimes against humanity). Article 6 (c) defines war crimes as violations of the laws or customs of war, which shall include, but not be limited to, murder, ill-treatment, or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder of or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.²¹

War crimes, as listed in Art. 8(2)(a) of the ICC Statute cover grave breaches of the Geneva Conventions of 12 August 1949 (Article 50), 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) Willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;²²

Grave breaches of the Geneva Conventions concern acts committed in the context of an international armed conflict against persons or property protected under the relevant provisions of the four 1949 Geneva Conventions.²³

The commission of a war crime requires that the relevant prohibited conduct has a close connection with an armed conflict. Crimes against humanity must be committed as part of a widespread or systematic attack against a civilian population. The distinguishing feature of genocide under the Genocide Convention is the requirement that the prohibited conduct be carried out with the intent to destroy a racial, ethnic, national, or religious group in whole or in part as such (special intent or *dolus specialis*).²⁴

²¹ David M. Crowe, *War Crimes, Genocide, and Justice*, Palgrave Macmillan, New York, 2014, 164.

²² Rome Statute – the International Criminal Court.

²³ Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court*, Cambridge University Press, Cambridge, 2004, 17.

²⁴ Douglas Guilfoyle, “Transnational Crimes”, *The Oxford Handbook of International Criminal Law* (eds. Kevin Heller *et al.*), Oxford University Press, Oxford, 2020, 809.

Crimes against humanity

Genocide was, in essence, an aggravated form of crime against humanity. Whereas genocide involved the physical annihilation of the group, crimes against humanity covered a larger range of acts, subsumed under such terms as persecution. Genocide only covered groups defined by race, nationality, ethnicity, or religion, whereas crimes against humanity extended to include political and all other groups as well. But at the time they were devised in the mid-1940s, probably the most important difference was the fact that genocide could be committed in time of peace as well as during war. According to D. L. Shelton, crimes against humanity, though broader in scope in some respects, were also more limited, because they could only be carried out in a time of armed conflict.²⁵

After 1945 the link between crimes against humanity and war was gradually dropped. This is evidenced by Article 11(1)(c) of such 'multinational' legislation as Control Council Law no. 10 passed by the four victorious Powers four months after the London Agreement, that is on 20 December 1945, by national legislation (such as the Canadian and the French criminal codes), case law, as well as international treaties such as the 1948 Genocide Convention, the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, and the 1973 Convention on Apartheid. This evolution gradually led to the abandonment of the nexus between crimes against humanity and war: at present, customary international law bans crimes against humanity whether they are committed in time of war or peace. The same holds true for the Rome Statute for an ICC, which confirms the rupture of the link between crimes against humanity and armed conflict.²⁶

The concept of crimes against humanity was first articulated as an international offence in Article 6(c) of The Nuremberg IMT Charter. This read as follows: "Crimes against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of, or in connection with, any other crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated."

Prior to the Nuremberg Charter, reference to the laws of humanity and the dictates of public conscience was expressly made in the preamble to the 1907 Hague Convention IV –otherwise known as the Martens clause –the aim of which was to extend additional protection to both combatants and

²⁵ Dinah L. Shelton, *Encyclopedia of genocide and crimes against humanity*, Macmillan Library Reference, New York, 2004, XIV.

²⁶ Antonio Cassese, *Cassese's International Criminal Law*, Oxford University Press, Oxford, 2013, 90.

civilian populations where the law was in development, until such time as more comprehensive rules were adopted.²⁷

According to Article 7. of the 1998 Rome Statute of the International Criminal Court “For the purpose of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or 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 3, 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; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health”.²⁸

Aggression (crime against peace)

General Assembly Resolution 3314 (XXIX) of December 14, 1974, constitutes the most detailed statement of the United Nations on aggression. The resolution defines aggression in its first articles. Article 1 provides: Aggression is the use of armed force by a State against the sovereignty, territorial integrity, or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.

Article 3 lists a series of acts which, regardless of a declaration of war, would constitute aggression, including the invasion or attack by the armed forces of a state of the territory of another state, bombardment by the armed forces of a state against the territory of another state, the blockade of the ports or coasts of a state, and the sending of armed bands, groups, irregulars, or mercenaries, which carry out acts of armed force against another state.²⁹

According to Article 6(c) of the Charter of the Nuremberg Tribunal in 1945, the following acts are crimes against peace coming within the jurisdiction of the Tribunal for which there shall be individual responsibility: planning, preparation, initiation or waging of a war of aggression, or a war

²⁷ I. Bantekas, S. Nash, 123.

²⁸ Rome Statute – the International Criminal Court.

²⁹ D. L. Shelton, 13.

in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.³⁰

In 2010, the Assembly of States Parties (ASP) to the Rome Statute of the International Criminal Court agreed on a definition for the crime of aggression after years of deliberations. The ASP adopted the Rome Statute in 1998, but the crime of aggression proved too contentious. The ASP failed to reach a consensus on its definition or jurisdictional regime.³¹ In September 2002, the Assembly of States Parties appointed a Special Working Group on the Crime of Aggression. Participation in the Group was open to any member states of the United Nations and any member states of the UN agencies, as well as member states of the International Atomic Energy Agency.

After years of work, at the last formal session of the group, in February 2009, the final version of the provisions on the crime of aggression was adopted. The group agreed that Article 8 *bis* should be worded as follows: 1. For the purpose of this Statute, crime of aggression means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations. 2. For the purpose of paragraph 1, "act of aggression" means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.³²

The definition of aggression in this Article 8 *bis* is based largely on the Definition of Aggression annexed to United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974. Any of the following acts, regardless of a declaration of war, shall, qualify as an act of aggression: (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof; (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State; (c) The blockade of the ports or coasts of a State by the armed forces of another State; (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State; (e) The use of armed forces of one State which are within

³⁰ Драган Јовашевић, „Систем међународних кривичних дела“, *Политичка ревија*, бр. 2/2010, 126–127.

³¹ Julie Veroff, "Reconciling the Crime of Aggression and Complementarity: Unaddressed Tensions and a Way Forward", *The Yale Law Journal*, Vol. 125, Nr. 3/2016, 733.

³² Patrycja Grzebyk, *Criminal Responsibility for the Crime of Aggression*, Routledge, New York, 2013, 118–119.

the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement; (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State; (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.³³

Absence of a treaty that prohibits nuclear and depleted uranium weapons – court practice

Ryuichi Shimoda et al. v. The State

Until 2017, there was no comprehensive or universal ban on nuclear weapons in international law, which is why some scholars argued that nuclear weapons are not *per se* illegal under the laws of war and customary international law. Theoretically, the use of nuclear weapons would be a violation of IHL due to the restrictions (proportionality and distinction) of international law on the types of weapons that states can use.

The health and physical effects of nuclear weapons make their use incompatible with, and illegal under, the humanitarian principles of customary international law. The military advantage can never outweigh the vast humanitarian concerns because radiation will spread indiscriminately and uncontrollably. This indiscriminate aspect, by itself, precludes nuclear weapons from ever being used.³⁴

A 1963 ruling from the Tokyo District Court supports these assertions. In *Shimoda v. State*, the Tokyo court found that the United States' use of nuclear weapons during World War II violated the Hague Conventions and customary international law³⁵ by causing unnecessary suffering. The court noted that the nuclear bomb was a "really cruel weapon" that caused

³³ Mark Klamburg, *Commentary on the Law of the International Criminal Court*, Torkel Opsahl Academic Publisher, Brussels, 2017, 156–159.

³⁴ C. Vail, 842, 843–844.

³⁵ Specific legal rules and provisions: Article 25 of the regulations of the Law and Customs of War on Land of 1899 (indiscriminate nature of attack); Article 23(a) of the regulations of the Law and Customs of War on Land annexed to the Hague Convention IV on 18 October 1907; Geneva Protocol of 17 June 1925, (prohibition on 'the use in war of asphyxiating, poisonous or other gases); Articles 22 and 24 of the Draft Rules of Air Warfare of 1923 (prohibition on indiscriminate aerial bombing of non-combatants). *International Crimes Database*, available at: <https://www.internationalcrimesdatabase.org/Case/53/Shimoda-et-al/>, 24. 4. 2022.

massive destruction and mass casualties. Any weapon the use of which is contrary to the customs of civilized countries and to the principles of international law should *ipso facto* be deemed to be prohibited even if there is no express provision in the law; the new weapon may be used as a legal means of hostilities only if is not contrary to the principles of international law. Atomic bomb must necessarily be prohibited because it has characteristics different from other conventional weapons in the inhumanity of its effects.³⁶

In the *Shimoda case* in 1963, the plaintiffs, residents of Hiroshima and Nagasaki in 1945, brought proceedings against the Japanese Government on the ground that, by signing the 1951 Peace Treaty with the Allies, it had waived their right to seek compensation from the United States for its use of atomic bombs in violation of the laws of war. The plaintiffs argued, *inter alia*, that the government's waiver of their claims obliged the government to pay them compensation itself. The Tokyo District Court ruled that, even though the aerial bombardment was an illegal act of war, individuals could be considered the subjects of rights under international law only in so far as they had been recognized as such in specific instances, such as, for example, in cases of mixed arbitral tribunals. In light of this determination, the Court concluded: "There is, in general, no way open to an individual who suffers injuries from an act of hostilities contrary to international law to claim damages on the level of international law, except for the cases mentioned above." The Court went on to consider the question of whether the plaintiffs could seek redress before the municipal courts of either of the belligerent parties and concluded that considerations of sovereign immunity precluded proceedings against the United States either before Japanese or US courts.³⁷

According to Article 19. Paragraph (a) of the Treaty of Peace with Japan, signed at San Francisco on 8 September 1951, "Japan waives all claims of Japan and its nationals against the Allied Powers and their nationals arising out of the war or out of actions taken because of the existence of a state of war, and waives all claims arising from the presence, operations or actions of forces or authorities of any of the Allied Powers in Japanese territory prior to the coming into force of the present Treaty". Paragraph (b) prescribes that "The foregoing waiver includes any claims arising out of actions taken by any of the Allied Powers with respect to Japanese ships between September 1, 1939, and the coming into force of the present Treaty, as well as any claims and debts arising in respect to Japanese prisoners of war and civilian internees in the hands of the Allied Powers, but does not include Japanese

³⁶ *Ryuichi Shimoda et al. v. The State*, available at: <https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/0/aa559087dbcf1af5c1256a1c0029f14d>, 19. 4. 2022.

³⁷ *Practice Relating to Rule 150. Reparation*, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v2_rul_rule150_sectionb, 24. 4. 2022.

claims specifically recognized in the laws of any Allied Power enacted since September 2, 1945".³⁸

According to the Hague Conventions of 1899 and 1907, because Hiroshima and Nagasaki were undefended cities, it seems likely that the nuclear weapons' destruction would be classified as "unnecessary suffering". Not only did the bombings violate international law at the time, but the nuclear attacks on Japan also violate modern international law. Today, the Geneva Conventions along with its Additional Protocols – which further added to IHL – comprise the law of armed conflicts. Additional Protocol I came into action in 1977. Many Protocol I provisions are recognized rules of customary international law. Protocol I requires parties in armed conflict to abide by the principles of proportionality and distinction.³⁹

Based on Protocol I, which has done away with the distinctions of defended and undefended cities, the bombings would have been disproportionate and indiscriminate. Additionally, the Geneva Conventions are directly inspired by the principle of humanity, which prohibits causing suffering, injury, or destruction that is not required to realize a lawful military objective. Thus, humanity is incorporated into the concepts of proportionality and distinction. The goal of IHL is to minimize combatant and civilian suffering by placing limits on the type of destruction a state may inflict.⁴⁰

The UN Treaty on the Prohibition of Nuclear Weapons (TPNW), or the Nuclear Weapon Ban Treaty, is the first legally binding international agreement to comprehensively prohibit nuclear weapons with the ultimate goal being their total elimination. It was adopted on 7 July 2017, opened for signature on 20 September 2017, and entered into force on 22 January 2021. The concept of security under the treaty is different from the traditional one. In traditional thinking, security refers to the national and military security of each state. However, the security under the TPNW is comprehensive security for all humanity, which means it includes not only military but also human, humanitarian, environmental, and other types of security. The treaty, if compared with the contents of the obligations of the NPT⁴¹, prohibits the use or the threat of using nuclear weapons or the stationing of nuclear weapons on one's territory. It prohibits the testing of nuclear weapons, which is a much wider mandate than the CTBT⁴², which prohibits only nuclear weapons test explosions.

³⁸ *Treaty of Peace with Japan (with two declarations)*. Signed at San Francisco on 8 September 1951, available at: <https://treaties.un.org/doc/publication/unts/volume%20136/volume-136-i-1832-english.pdf>, 7. 4. 2022.

³⁹ Additional Protocol I, *supra* note 8, arts. 51–52.

⁴⁰ C. Vail, 847–848.

⁴¹ The Treaty on the Non-Proliferation of Nuclear Weapons (NPT) was opened for signature in July 1, 1968 and entered into force on March 5, 1970.

⁴² Comprehensive Nuclear-Test-Ban (CTBT) was signed in September 1996 following the decision at the 1995 NPT Review and Extension Conference.

The principal obligation of the treaty is the “prohibition” of certain activities concerning nuclear weapons, but it does not provide for the “destruction” or “elimination” of nuclear weapons directly. The purpose of the TPNW is to stigmatize and delegitimize nuclear weapons in the long term. Although it entered into force, its supporters need to keep trying to increase the number of treaty parties and sway public opinion to change government attitudes.⁴³

In the Joint Statement of the Leaders of the Five Nuclear-Weapon States on Preventing Nuclear War and Avoiding Arms Races of January 03, 2022, it was stated that they reaffirm the importance of addressing nuclear threats and emphasize the importance of preserving and complying with their bilateral and multilateral non-proliferation, disarmament, and arms control agreements and commitments. They remain committed to their Nuclear Non-Proliferation Treaty (NPT) obligations, including Article VI obligation “to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.” They underline their desire to work with all states to create a security environment more conducive to progress on disarmament with the ultimate goal of a world without nuclear weapons with undiminished security for all.⁴⁴

The practice of the International Court of Justice

It is widely agreed that international law forbids states to use force unilaterally even for the purpose of the so-called “humanitarian intervention”. The chief treaty regulating the use of force, the Charter of the United Nations, does not name “humanitarian interventions” among lawful exceptions to Article 2(4). Relevant UN General Assembly resolutions and the International Court of Justice confirm this overarching rule. It was also recognized in leading treatises that “humanitarian intervention” was prohibited under both the relevant treaty law and customary international law. In recent times, the issue became particularly important in connection with NATO aggression on the Federal Republic of Yugoslavia called *Angel of Mercy* (1999).⁴⁵

⁴³ Mitsuru Kurosawa, “Progress in Nuclear Disarmament during the 50 Years of the NPT”, *Osaka University Law Review*, Vol. 68, 2021, 12–15.

⁴⁴ “Joint Statement of the Leaders of the Five Nuclear-Weapon States on Preventing Nuclear War and Avoiding Arms Races”, available at: <https://www.whitehouse.gov/briefing-room/statements-releases/2022/01/03/p5-statement-on-preventing-nuclear-war-and-avoiding-arms-races/>, 4. 3. 2022.

⁴⁵ Сергей. В. Саяпин, *The Crime of Aggression in International Criminal Law*, Asser press, The Hague, 2014, 131.

With regard to the term “humanitarian”, it is necessary to provide an explication of what moral norms and principles constitute. One of the key Confucian moral norms is the concept of *ren*, which is often translated as benevolence or humaneness. In terms of how to concretely practice or make manifest *ren*, Confucius gave different explanations, including loving your fellow human beings, being tolerant, sincere and respectful, helping others overcome challenges and difficulties, helping others reach the aspirations you yourself wish to reach, avoiding placing impositions on others that you would not want imposed on yourself, and diligently observing ritual propriety.⁴⁶

On April 29, 1999, Yugoslavia filed an Application instituting proceedings against the United States of America “for violation of the obligation not to use force”, accusing that State of bombing Yugoslav territory “together with other Member States of NATO”. On the same day, it submitted a request for the indication of provisional measures, asking the International Court of Justice to order the United States of America to “cease immediately its acts of use of force” and to “refrain from any act of threat or use of force” against the FRY.

As a basis for the jurisdiction of the Court, Yugoslavia invoked Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the United Nations General Assembly on 9 December 1948, as well as Article 38, paragraph 5, of the Rules of Court. Article IX of the Genocide Convention provides that disputes between the contracting parties relating to the interpretation, application or fulfilment of the Convention shall be submitted to the International Court of Justice.

In an Order issued in the case concerning *Legality of Use of force (Yugoslavia v. United States of America)*, the Court rejected the request for the indication of provisional measures submitted by the Federal Republic of Yugoslavia. In its Order, the Court, having found that it manifestly lacked jurisdiction to entertain the case, decided to dismiss it.⁴⁷

Some scholars considered that the intervention of NATO was an implementation of its new „Strategic Concept“. However, the use of armed force against the FRY was clearly illegal due to the lack of authorization by the United Nations Security Council.⁴⁸ After the end of the aggression, the District Public Prosecutor’s Office in Belgrade filed an indictment against the leaders of the NATO alliance. They were tried *in absentia* and the District

⁴⁶ Norman P. HO, “Legal Realism and Chinese Law: Are Confucian Legal Realists, Too”?, *Tsinghua China Law Review*, Vol. 13, Nr. 127/2020,135.

⁴⁷ *Case concerning legality of use of force (Yugoslavia v. United States of America)*, available at: <https://www.icj-cij.org/public/files/case-related/114/14129.pdf>, 5. 4. 2022.

⁴⁸ Lyal S. Sunga, “The Role of Humanitarian Intervention in International Peace and Security: Guarantee or Threat?”, *The Use of Force in International Relations: Challenges to Collective Security* (ed. Hans Köchler), International Progress Organization, Vienna, 2006, 40.

Court in Belgrade, by its judgment K. 381/2000, convicted them on September 21, 2000, because of co-perpetration in criminal offences: Instigating an aggressive war (Article 152 of the Criminal code); Violation of territorial sovereignty (Article 135); War crime against the civilian population (Article 142); Employment of prohibited means of warfare (Article 148).⁴⁹

At that time, criminal offences against humanity and international law in FR Yugoslavia were regulated by Federal criminal code.⁵⁰ According to Article 148. (Employment of prohibited means of warfare) Section 1., “whoever during time of war or armed conflict orders employment of means or methods of warfare that are banned under rules of international law or who uses such means or methods, shall be punished by imprisonment up to one year. Section 2. prescribes that if the offence specified in Section 1 of this Article results in killing of a number of persons, the offender shall be punished by imprisonment up to five years or by imprisonment of twenty years.”⁵¹

To this date, there is no treaty regulating depleted uranium weapons. Yet, International Humanitarian Law prohibits weapons that cause unnecessary suffering, have indiscriminate effects or cause long-term damage to the natural environment and therefore theoretically should apply fully to this. The usage of depleted uranium munitions was only indirectly forbidden (by General convention which is against environmental pollution).

According to Article 35. Section 1. of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), “It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering”. Section 2. prescribes that “it is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment”.⁵²

This is a confirmation of the 1977 *Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques* (Article I): “Each State Party to this Convention undertake not to engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction,

⁴⁹ Decision of the District court in Belgrade K. 381/2000.

⁵⁰ Criminal code of FR Yugoslavia, *Official Gazette of SFR Yugoslavia*, nr. 44/76 – 1329, 36/77 – 1478, 34/84 – 895, 37/84 – 933, 74/87 – 1743, 57/89 – 1441, 3/90 – 63, 38/90 – 1217, 45/90 – 1340, 54/90 – 1773 and *Official Gazette of FR Yugoslavia*, nr. 35/92 – 651, 37/93 – 816, 24/94 – 273, 61/01.

⁵¹ Вид. Љубиша Лазаревић, *Кривично право Југославије: Посебни део*, Савремена администрација, Београд, 1995.

⁵² The Geneva Conventions of 1949 and their Additional Protocols, available at: http://www.oas.org/dil/introductory_course_on_international_humanitarian_2007_ihl_instruments.pdf, 12. 3. 2022.

damage or injury to any other State Party”.⁵³ All the restrictions upon the means and methods of warfare and the weapons that may be used during conflict are directed to protect both combatants and noncombatants from unnecessary suffering.⁵⁴ According to Article 55., Section 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, “Care shall be taken in warfare to protect the natural environment against widespread, longterm and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population”.⁵⁵

The rule prohibiting the use of weapons causing superfluous injury is a customary norm applicable to all parties to any armed conflict. The United States has not “accepted” the provisions on environmental protection set out in the 1977 Additional Protocol I and has repeatedly expressed the view that these provisions are “overly broad and ambiguous” and “not a part of customary law”.⁵⁶

Conclusion

Umberto Eco considers that “It is an intellectual duty to proclaim the inconceivability of war”. He rejects the question of humanity and inhumanity, morality, and immorality of war and gives an order to the intellect to perceive the outcome of war beyond ethics and ideology, to see it in its practical senselessness.

The core crimes enumerated in the Rome Statute are deemed to be the most important international crimes. The label ‘core’ is without question used to refer to the perceived elevated status of these crimes, and it designates special standing regarding international jurisdiction. The 1945 Statute of the International Court of Justice recognizes two types of sources: primary and secondary. The primary sources of international criminal law are treaties, international custom, and general principles of law, all being independent and capable of producing binding rules. The secondary sources, namely the writings of renowned publicists and the decisions of international courts, serve to ascertain, and perhaps interpret, the primary sources.

⁵³ Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD), available at: https://treaties.un.org/doc/Treaties/1978/10/19781005%2000-39%20AM/Ch_XXVI_01p.pdf, 16. 4. 2022.

⁵⁴ L. C. Green, 127–128.

⁵⁵ The Geneva Conventions of 1949 and their Additional Protocols.

⁵⁶ Stuart Casey-Maslen, *The Treaty on the Prohibition of Nuclear Weapons: A Commentary*, Oxford University Press, Oxford, 2019, 98–99.

According to the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, genocidal acts are not limited to murder but pertain to any attempt to cause serious bodily or mental harm to members of a group, or “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.” The Fourth Geneva Convention of 1949 employed a similar definition in Article II, since genocide implies “any of the enumerated acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group.

The Charter of the Nuremberg International Military Tribunal of 1945 (IMT) defines war crimes as violations of the laws or customs of war, which shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder of or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity. War crimes as listed in the Art. 8(2)(a) of the Rome Statute of the International Criminal Court (ICC Statute) cover grave breaches of the 1949 Geneva Conventions.

According to the 1998 Rome Statute of the International Criminal Court, crime against humanity implies any of the enumerated acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. On the other hand, for the purpose of this Statute, “crime of aggression” means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

Absence of a treaty that prohibits depleted uranium weapons attracted special scholars’ attention. According to the 1949 Protocol Additional to the Geneva Conventions, “It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering”. Convention also forbids employing of methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.

Prohibition of using “arms, projectiles, or material calculated to cause unnecessary suffering” firstly was prescribed in the Hague Conventions of 1899 and 1907. Apart from Protocol Additional to the Geneva Conventions of 1949, the severe damage of the natural environment is also forbidden by the Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques of 1977. The International Humanitarian Law bans weapons that cause unnecessary suffering, have indiscriminate effects or cause long-term damage to the natural environment, but the usage of depleted uranium munitions is only indirectly forbidden.

„God doesn't want a loathsome crime to remain undetected. That's the way a scrupulous judge should reason. At times the Devil will try to trick us with the help of tears. All we have to do is learn how to perceive his temptations and his tricks. And not to forget that no one is safe“.⁵⁷

Bibliography

- Alan Horvitz Leslie, Catherwood Christopher, *Encyclopedia of War Crimes and Genocide*, Facts on File, New York, 2006.
- Bantekas Ilias, Nash Susan, *International Criminal Law*, Routledge-Cavendish, London, 2009.
- Brown Bartram S., *Research Handbook on International Criminal Law*, Edward Elgar Publishing Limited, Cheltenham, 2011.
- Casey-Maslen Stuart, *The Treaty on the Prohibition of Nuclear Weapons: A Commentary*, Oxford University Press, Oxford, 2019.
- Cassese Antonio, *Cassese's International Criminal Law*, Oxford University Press, Oxford, 2013.
- Crowe David M., *War Crimes, Genocide, and Justice*, Palgrave Macmillan, New York, 2014.
- Cryer Robert et al., *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, Cambridge, 2010.
- Dörmann Knut, *Elements of War Crimes under the Rome Statute of the International Criminal Court*, Cambridge University Press, Cambridge, 2004.
- Duarte-Herrera Rosa, Ifsits Clara, „Genocide against Yazidis – Austria's obligation to prosecute and punish returning ISIS fighters under international and national law“, *University of Vienna Law Review*, Vol. 1, 2017.
- Green Leslie C., *The contemporary law of armed conflict*, Manchester University Press, Manchester, 2000.
- Grzebyk Patrycja, *Criminal Responsibility for the Crime of Aggression*, Routledge, New York, 2013.
- Guilfoyle Douglas, „Transnational Crimes“, *The Oxford Handbook of International Criminal Law* (eds. Kevin Heller et al.), Oxford University Press, Oxford, 2020.
- HO Norman P., „Legal Realism and Chinese Law: Are Confucian Legal Realists, Too?“, *Tsinghua China Law Review*, Vol. 13, Nr. 127/2020.
- Johnson Eyvind, *Dreams of Roses and Fire*, Hippocrene Books, New York, 1984.
- Klamberg Mark, *Commentary on the Law of the International Criminal Court*, Torkel Opsahl Academic Publisher, Brussels, 2017.

- Kurosawa Mitsuru, "Progress in Nuclear Disarmament during the 50 Years of the NPT", *Osaka University Law Review*, Vol. 68, 2021.
- Schwöbel-Patel Christine, "The core crimes of international criminal law", *The Oxford Handbook of International Criminal Law* (eds. Kevin Heller et al.), Oxford University Press, Oxford, 2020.
- Shelton Dinah L., *Encyclopedia of genocide and crimes against humanity*, Macmillan Library Reference, New York, 2004.
- Slavković Vukan, *Le commencement d'exécution*, Pravni fakultet Univerziteta u Beogradu, Beograd, 2022.
- Sunga Lyal S., "The Role of Humanitarian Intervention in International Peace and Security: Guarantee or Threat?", *The Use of Force in International Relations: Challenges to Collective Security* (ed. Hans Köchler), International Progress Organization, Vienna, 2006.
- Vail Christopher, "The Legality of Nuclear Weapons for Use and Deterrence", *Georgetown Journal of International Law*, Vol. 48, Nr. 3/2017.
- Veroff Julie, "Reconciling the Crime of Aggression and Complementarity: Unaddressed Tensions and a Way Forward", *The Yale Law Journal*, Vol. 125, Nr. 3/2016.
- Јовашевић Драган, „Систем међународних кривичних дела“, *Политичка ревија*, бр. 2/2010.
- Лазаревић Љубиша, *Кривично право Југославије: Посебни део*, Савремена администрација, Београд, 1995.
- Саяпин Сергей. В., *The Crime of Aggression in International Criminal Law*, Asser press, The Hague, 2014.

Вукан СЛАВКОВИЋ

“CORE CRIMES” ИЗВРШЕНИ У ИМЕ “МИЛОСРЂА”

САЖЕТАК

У раду се анализира превенција озбиљног нарушавања међународног хуманитарног права, нарочито имајући у виду тежину појединих дела која се квалификују као „цоре цримес“ (злочин геноцида, ратни злочини, злочини против човечности и агресија). Како би се постигао наведени циљ, спроведено је научно истраживање норми које регулишу ове међународне злочине у Римском статуту Међународног кривичног суда, Конвенцији о спречавању и кажњавању злочина геноцида, Женевским конвенцијама и другим важним изворима међународног кривичног права, заснованих на уговорима.

При томе се полази од чињенице да се “core crimes” сматрају најтежим злочинима који се тичу међународне заједнице у целини. Циљ

научног чланка је и проучавање узрока непостојања конвенција које забрањују нуклеарно оружје и оружје са осиромашеним уранијумом, посебно имајући у виду судску праксу. Утврђено је да међународно хуманитарно право забрањује војну или било коју другу непријатељску употребу техника које мењају животну средину и имају широко распрострањене, дуготрајне или тешке последице, као средства уништења, оштећења или повреде. Резултати спроведеног истраживања показују да је правило о забрани употребе оружја које узрокује наношење сувишних повреда обичајно-правна норма која се примењује на све стране у било ком оружаном сукобу. Аутор такође приказује развој, изазове и перспективе међународног кривичног права, у широко прихваћеном историјском наративу.

Кључне речи: “core crimes”, међународно кривично право, конвенција, агресија, геноцид.