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PEACE THROUGH LAW: THE ROME STATUTTE OF INTERNACIONAL CRIMINAL COURT AND CONTEXTUAL ELEMENTS WITH REFERENCETO ARMED CONFLICT

The relationship between peace and international criminal law reflects also in definitions of international crimes (genocide, war crimes, crimes against humanity and aggression). Their contextual elements have been namely closely connected with armed conflict. The paper discusses contextual elements of international crimes, related to armed conflict as a part of material elements of international crimesfrom the viewpoint of their present regulation in the Rome Statute of the International Criminal Court and historical comparison. It is centred on the issue, whether a connection between a certain international crime and armed conflict is required or not, and what is the essential element of this connection. Also, since the material elements alone do not suffice for criminal responsibility, the second prerequisite for criminal responsibility - perpetrator's guilt regarding the contextual elements of international crimes - is analysed as well.

The contextual elements of core crimes in international criminal law (aggression, genocide, crimes against humanity, war crimes) show certain legal or factual link to armed conflict.

Aggression itself represents incrimination of unlawful warfare, war crimes must be committed in the context and are associated with an international or non international armed conflict, crimes against have lost connection with armed conflict since the ICTY Tadi? decision and genocide has never had it, but the most notorious and well-known cases of genocide from history have occurred in the framework of armed conflict and wars. Demands regarding guilt towards the existing contextual elements of core crimes, which connect the latter to armed conflict, are moderated. According to the Rome Statute with aggression, as well as with war crimes factual awareness of transgression of United Nations' Charter, existence and nature of armed conflict suffices, which alleviates the prosecution and conviction of perpetrators of these core crimes. In this manner the contextual elements in question in a manner, in which they are defined, facilitate the conviction. Contextual elements serve also as arguments for multiple conviction for one natural executing act of core crimes. Namely, core crimes differ mostly in contextual elements and share many of the executing acts. Therefore, it is common practice to prosecute and convict a perpetrator of an act for all core crimes, for which contextual elements could be proved.

1. Introduction

Peace and international criminal law have always been intertwined, which has reflected also in definitions of international crimes (genocide, war crimes, crimes against humanity and aggression). Their contextual elements have been closely connected with armed conflict. Aggression essentially represents incrimination of use of armed force against the sovereignty, territorial integrity or political independence of another state or any force, inconsistent with the Charter of the United Nations,[1] whereas the definitions of war crimes reflect the prohibition of illegal means and ways of conducting armed conflict from the Hague and Geneva conventions. Also, according to the Rome Statute's[2] definition of crimes against humanity the perpetrator must commit his act as part of a widespread or systematic attack directed against any civilian population, with the knowledge of the perpetrator the attack. No direct connec-

1 Available at: http://www.un.org/en/charter-united-nations/.

2 Available at: https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf.

tion to armed conflict is accordingly necessary; however the definitions of crimes against humanity from the previous statutes have required it. Last, but not least, the commonly accepted definition of genocide again lacks any such connection, but the most notorious cases of genocide in history have occurred in international or non – international armed conflict.

The paper therefore discusses contextual elements of international crimes, related to armed conflict as a part of material elements of international crimes. It is centred on the issue, whether a connection between a certain international crime and armed conflict is required or not, and what is the essential element of this connection. Also, since the material elements alone do not suffice for criminal responsibility, the second prerequisite for criminal responsibility - perpetrator's guilt regarding the contextual elements of international crimes - is analysed as well.

These issues are analysed from the viewpoint of their present regulation in the Rome Statute of the International Criminal Court (hereinafter the ICC) with special emphasis on the case law of the International Criminal Court. A historical glimpse is included as well, due to its relevance for the development of elements.

The paper concludes with the synthesis of previous parts on criminal responsibility for international crimes from the point of view of their contextual elements in connection to armed conflict.

General Definition of a Criminal Act in International Criminal Law

International criminal law deals with two types of international crimes; core crimes and treaty crimes. The main difference between the two is that core crimes are defined in international treaties and statutes of international(ised) tribunals and prosecuted, at both, international and national level, whereas the treaty crimes are defined by an international treaty and prosecuted by state signatories, since this is their duty according to the treaty.[3] This paper deals with core crimes only.

There have been four core crimes: aggression, genocide, crimes against humanity and war crimes.[4] In order to establish criminal responsibility for each core crime, not only the elements of the definition of a core crime, but also elements of a general definition of a criminal act must be fulfilled.[5]

Article 30 of the Rome statute of the ICC is the central article for the general part of substantive international criminal law. It namely determines the

3 Matjaž Ambrož et al., Mednarodno kazensko pravo (Ljubljana: Uradni list, 2012), 149.

4 bidem, 149, Paola Gaeta, "The History and Evolution of International Crimes," Roberto Belleli (ed.) International Criminal Justice – Law and Practice from the Rome Statute to Its Review (Surrey: Ashgate, 2010): 175.

5 Antonio Cassese et al., The Rome Statute of the International Criminal Court: a Commentary (Oxford: Oxford University Press, 2002), 767.

general definition of a criminal act *(*German *die allgemeine Vebrechenslehre)*, as it is understoodin Rome Statute. The criminal act in Rome Statute consists of two types of elements: material elements and mental elements. Namely, unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the ICC only if the material elements are committed with intent and knowledge.[6]

Moreover, for the purposes of this article, a person has intent where in relation to conduct, that person means to engage in the conduct and in relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events. Knowledge means awareness that a circumstance exists or a consequence will occur in the ordinary course of events.[7]

Contrary to continental criminal law under the influence of German criminal law,[8] where the general definition of a criminal act usually consists of three elements (definition of a criminal act, illegality and guilt[9]), is the general definition of a criminal act in Rome Statute simpler and consists only of two elements; material, objective element and subjective element or *mens rea* (also the guilt).

One of the most important part of the objective elements is also the fulfilment of the definition of a criminal act. Typical core crime consists of two-part objective definition; abstractly defined executingact *(actus reus*), usually defined in alternative manner in numerous paragraphs, and contextual elements, which connect this execution act to armed conflict or gives the core crime a systematic and/or large scale nature. Killing persons, for example, can be sumbsumed either under genocide (killing members of protected groups with *dolus coloratus*), crimes against humanity (murder of civillians as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack) or war crime (killing of protected persons under Geneva Conventions[10]).[11]

Contextual elements open many interesting issues in regard to the substantive international criminal law, such as their connectivity to armed conflict

6 Ibidem, 890.

7 Rome Statute, Article 30.

8 See for example Hans H. Jescheck and Thomas Weigend, Lehrbuch des Strafrechts, Allgemeiner Teil (Berlin: Dunckler & Humblot, 1996), 196.

9 Handlung, Tatbestandmßigkeit, Rechtswidrigkeit and Schuld in German.

10 The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, The Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, The Geneva Convention on relative to the Treatment of Prisoners of War, the Geneva Convention relative to the Protection of Civilian Persons in Time of War and three additional protocols (relating to the Protection of Victims of International Armed Conflicts, to the Protection of Victims of Non-International Armed Conflicts and to the Adoption of an Additional Distinctive Emblem).

11 Rome Statute, Articles 6, 7, 8.

or war during the history of international criminal courts, the guilt that has to be proven in connection to them and merger of offences.

Contextual Elements of a Core Crimes in Relation to Armed Conflict

Aggression was defined with any statute as core crime, which established criminal responsibility in international criminal law only recently with the Kampala revision conference in 2010. Even the Kampala amendment is not in force yet.[12]

Previously, act of aggression was recognised as a breach of international law, which invokes state responsibility,[13] but not criminal responsibility by General Assembly Resolution 3314 on definition of aggression. According to this resolution, act of aggression is a crime against international peace and gives rise to international responsibility.[14]

Although this resolution only introduced state responsibility,[15] it is still relevant also for later criminal responsibility. Namely, the definition of aggression as a core crime according to the amendment to Rome Statute[16] is based upon the definition of the aggression from the aforementioned resolution.

Aggression does also not differ from other core crimes in its structure; its definition consists of alternative executing acts (such as 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 or 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 for example[17]), which have to represent use of armed force by a State against the sovereignty, territorial integrity or political independence of another

12 The Court will not be able to exercise its jurisdiction over the crime of aggression until: at least 30 States Parties have ratified or accepted the amendments; and after a decision is taken by two–thirds of States Parties to activate the jurisdiction at any time after 1 January 2017. Resolution RC/Res.6, adopted at the 13th plenary meeting, on 11 June 2010, by consensus: The crime of aggression, Articles 3 and 4.

13 See Draft articles on
Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, from http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (last visited August 8 2013).

14 Definition of Aggression, United Nations General Assembly Resolution 3314 (XXIX), Article 5/II.

15 AmbroŹ et al., Mednarodno kazensko pravo, 177, case Nicaragua v. United States of America, International Court of Justice, from
http://www.icj-cij.org/docket/index.php?sum=367&p1=3&p2=3&case=70&p3=5 (last visited August 8 2013).

16 Rome Statute, Article 8bis.

17 Rome Statute, Article 8bis/II(a) and (b).

State, or in any other manner inconsistent with the Charter of the United Nations, which is also by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.[18] Not only the contextual elements, but the whole definition of aggression itself represents incrimination of unlawful armed conflict or unlawful use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or any other inconsistent threat or use of force according to the Charter of the United Nations.

Not every person could be prosecuted for this crime. Only a person in a position effectively to exercise control over or to direct the political or military action of a State could be.[19] This core crime is therefore considered *delictum proprium,* a crime, which can only be committed by individuals with certain characteristics.[20]

The theory of international criminal law is united in its opinion that aggression or at least some acts of aggression constitute an international crime under customary international criminal law.[21] Unfortunately not even one of these authors has tried to deliberate this thesis by presenting the definition of aggression. As for the tribunals, the only ones, which have in their case law dealt with this crime, were International Military Tribunal in Nuremberg[22] and International Military Tribunal for the Far East after the Second World War. According to their statutes they had jurisdiction for crimes against peace.[23] The Nuremberg statute defined crimes against peace as planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

According to the Control Council Law 10 the law from Nuremberg statute became internal German law that could be used by the military courts in the military zones in post Second World War Germany. All military courts in all military zones had jurisdiction for crimes against peace, but mostly the

18 Rome Statute, Articles 8bis/I and 8bis/II. The same structure could be found in the mentioned resolution.

19 Rome Statute, Article 8bis/I.

20 Ljubo Bavcon et al., Kazensko pravo, splošni del (Ljubljana: Uradni list, 2013), 199.

21 Cassese, Antonio, International Criminal Law (New York: Oxford University Press, 2003), 113, Werle, Gerhard, Principles of International Criminal Law (The Hague: Aser Press, 2005), p. 391. Cassese, Antonio, "On Some Problematical Aspects of the Crime of Aggression," Leiden Journal of International Law 20 (2007): 841 – 849.

22 Statute of the International Military Tribunal (also Nuremberg Tribunal), Article 6/II(1).

23 Statute of the International Military Tribunal for the Far East (also Tokyo Tribunal), Article 5.

Americans made good use of this power.[24] Consequently the case law of the Nuremberg and Tokyo tribunals and the case law of the American military court in Germany more specifically defined crimes against peace.

But even though this case law made the definition of aggression clearer, the Nuremberg tribunal first had to address a bigger and even more controversial legal issue. The main objection of the defence was that the conviction of defendants for the crime of aggression contradicts the basic principle of legality. According to their argument the aggression had not been an international crime at the time of the trial. There had been conventions which banned aggression, but they refer to state responsibility and not to individual criminal responsibility. Basically, what they argued was that the leap from mere prohibition as a basis for state responsibility to international crime, for which an individual is criminally responsible, was not made. The court however decisively rejected the defence arguments. It stated that the statute itself makes the planning or waging of a war of aggression or a war in violation of international treaties a crime, so it is not necessary up to the tribunal to consider whether and to what extent aggressive war was a crime before the execution of the statute. The court basically says that it does not matter what happened and what was the state of law before the statute, because the incriminations in the statute correct any irregularities that supposedly existed before. I cannot agree with this statement, because from the viewpoint of the principle of legality the act needs to be defined as a crime at the time it was committed and not solely at the time of the trial. The court should focus more on elaborating that aggression was the crime at the time of commission of those acts.

Even the tribunal felt that it cannot leave this question unanswered because of the great importance of the question, so it expressed its view, in contradiction to its previous statement. It said that the ones, who "in defiance of treaties and assurances attacked neighbouring states without warning, must know that they are doing wrong" and it would be unjust if their wrong were allowed to go unpunished.[25] The tribunal referred to the positions the defendants occupied in the Government of Germany; according to these positions at least some of the defendants must have known of the treaties signed by Germany, which were outlawing recourse to war for the settlement of international disputes; they must have known that they were acting in defiance of all international law when in complete deliberation they carried out the designs of invasion

24 Control Council Law 10, Article 2.

25 Judgment of the International Military Tribunal, from http://www.yale.edu/lawweb/avalon/imt/proc/judlawch.htm (last visited August 13 2013).

and aggression. The tribunal put also much of the emphasis on the Kellog-Briand Pact, signed in 1928 by sixty-three nations, including Germany, Italy and Japan. The legal effect of this treaty according to the Tribunal was that the nations who signed the treaty or adhered to it condemned recourse to war for the future as an instrument of policy, and expressly renounced it. After the signing of the treaty, any nation resorting to war as an instrument of national policy automatically breaks the pact. In the opinion of the Tribunal, the solemn renunciation of war as an instrument of national policy automatically makes war illegal in international law and, what is even more important, automatically makes perpetrators of war individually criminally responsible.[26] The tribunal substantiated this statement with referring to Hague Conventions, the Versailles Treaty and also to the League of Nations statute, but I do not think that the tribunal has done a really good job with additional explaining, why the conviction for crimes against peace does not violate the basic principle of legality. Especially the Tribunal still has not reason well the leap from prohibition of war in international law (which is clear) to the crime against peace (which was certainly unclear at the time). Just because something is prohibited in international criminal law, it does not mean it necessarily bring along also the individual criminal responsibility. However, even though the Nuremberg tribunal had difficulties with defending its jurisdiction for crimes against peace, it has done a better job with defining the crime itself.

As the other international or internationalised tribunals is concerned, the *ad hoc* tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR) and the mixed tribunals, which emerged in the last few years (Cambodia, Sierra Leone, East Timor) have had no jurisdiction over the crime of aggression. The only exception is the Statute of Iraqi Special Tribunal, but this is an internal and not an international tribunal. Nevertheless, it encompasses also the threat of war or the use of the armed forces of Iraq against an Arab country, defined as the abuse of position and the pursuit of policies that were about to lead to the threat of war or the use of the armed forces of Iraq against an Arab country, in accordance with Article 1 of Law Number 7 of 1958.[27] This criminal act is however not based on international law, but on the violation of Iraqi laws.[28]

Next core crime, the genocide, has no definitional or substantive connection to armed conflict,[29] although the worst *de facto*[30]cases of genocide in

26 Ibidem.

27 This incrimination is discriminatory, because it does not encompass also the aggression against non-arab state.

28 Statute of Iraqi Special Tribunal, Article 14. It should be mentioned again that this tribunal is not a mixed or an international one, but an internal tribunal.

29 Cassese et al., Commentary, 338.

history occurred in the framework of armed conflict, such as the killings of the Jews during the Second World War or Cathars in France in 13th century.[31]

Namely, according to the Rome Statute, genocide means any of the prescribed acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such; killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group or forcibly transferring children of the group to another group.[32]

The only case in ICC, that has dealt with genocide up until now, is *The Prosecutor v. Al Bashir.*[33] As known, Prosecutor's proposal to issue a warrant for the arrest also contained genocide, but the Pre-Trial Chamber failed to comply with this request and issued only a warrant for the arrest of war crimes and crimes against humanity.[34] Based on Prosecutor's appeal the Appeal Chamber then decided that the Pre-Trial Chamber made extensive demands regarding the evidentiary standard and that it needs to re-decide on genocide.[35]

On this basis, the Pre-Trial Chamber issued a new arrest warrant, among other things, for genocide (killing members of a protected group, causing serious bodily or mental harm to its members and intentional exposure to conditions of life calculated to bring about its total or partial physical destruction),[36] with which no connection with armed conflict was required either.

The Nuremberg Statute did not yet include genocide, the Convention on the Prevention and Punishment of the Crime of Genocide introduces genocide as treaty crime, which has to be implemented and prosecuted by state signatories, but without any connectivity to armed conflict;[37] still more; the convention explicitly demands that the contracting parties confirm that genocide, *whether committed in time of peace or in time of war*, is a crime under international law which they undertake to prevent and to punish.[38]

3030 Even though not de iure cases of genocide, since there was no definition of genocide until 1948.

31 AmbroŹet al., Mednarodno kazensko pravo, 157.

32 Rome Statute, Article 6.

33 ICC-02/05-01/09, The Prosecutor v. Omar Hassan Ahmad Al Bashir.

34 ICC-02/05-01/09, The Prosecutor v. Omar Hassan Ahmad Al Bashir, First Warrant of arrest, 6, 7.

35 ICC-02/05-01/09, The Prosecutor v. Omar Hassan Ahmad Al Bashir, Appeal's Chamber Decision on Warrant of arrest, para 33, 34 and 42.

36 Rome Statute, Articles 8/a, b, c.

37 Ambrož et al., Mednarodno kazensko pravo, 164. With potential jurisdiction of international court, if ever established. It, however, was not.

38 Convention on the Prevention and Punishment of the Crime of Genocide, para. 1.

Also the definition of genocide from the Statute of the ICTY includes definition of genocide, but without any connection to armed conflict, although the case law of this tribunal has dealt with genocide in connection to the armed conflict in Bosnia and Herzegovina, especially in Srebrenica.[39]

On the other side the definition of crimes against humanity has been amending tremendously through years. According to the Rome Statute crime against humanity means any of the defined executive acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack, for example murder, etc.[40] Furthermore, attack directed against any civilian population is interpreted as a course of conduct involving the multiple commission of acts referred to against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.[41] The attack therefore must be systematic or widespread in connection to organizational policy, but there is no requirement for connection with armed conflict.[42] This is clarified further by general introductory remarks of Elements of crimes to crimes against humanity, according to which Attack directed against a civilian population in these context elements is understood to mean a course of conduct involving the multiple commission of acts referred to in article 7, paragraph 1, of the Statute against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack. *The acts need not constitute a military attack.*"

Such regulation has been confirmed also by case law, which has not demanded link with armed conflict.[43]

The definition of crimes against humanity is therefore currently completely independent of existence of armed conflict. Their definition has not however always been as wide. The Nuremberg Statute defined crimes against humanity as 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 crime within the jurisdiction of the Tribunal*,

39 See for example ICTY cases Karadžić, Krstić and Jelišić.

40 Rome Statute, Article 7/I.

41 Rome Statute, Article7/II(a).

42 Ambrož et al., Mednarodno kazensko pravo, 194, William Schabas, The International Criminal Court (Oxford: Oxford University Press, 2010), 144.

43 ICC-01/04-02/12, The Prosecutor v. Mathieu Ngudjolo Chui, Decision on Confirmation of Charges, para 26, ICC-01/09-01/11, The Prosecutor v. William Samoei Ruto and Joshua Arap Sang, Decision on Confirmation of Charges, para 58, ICC-01/09-02/11, The Prosecutor v. Uhuru Muigai Kenyatta, Decision on Confirmation of Charges, para 46.

whether or not in violation of the domestic law of the country where perpetrated.[44] Two requirements were therefore made; the act must have been committed before or during the war and in connection with any other crime from the statute.[45]

According to the Statute of the ICTYthe International Tribunal shall have the power to prosecute persons responsible for the defined executing acts when committed *in armed conflict*, *whether international or internal in character*, and directed against any civilian population.[46] The limitation according to the statute was however not confirmed in the case law of the tribunal. According to the case law, in customary international criminal law no connection is required, as in the Rome Statute.[47]

Last, but not least war crimes are closely linked to armed conflict. According to the Rome Statute ICC 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,[48] war crimes are listed in four groups; as 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 and 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, 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 and Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts. Already their definition refers to (non-)international armed conflict,[49] which is substantiated further by Elements of Crimes, according to which The elements for war crimes under article 8,

44 Charter of International Military Tribunal, Article 6/II(c), Cassese et al., Commentary, 354.

45 Ambrož, Mednarodno kazensko pravo, 192, 193, Otto Triffterer et al., Commentary on the Rome statute of the International Criminal Law: Observers' Notes, Article by Article (Munich: C H Beck, 2008), 175.

46 Ibidem, 175, AmbroŹ, Mednarodno kazensko pravo, 195, Cassese et al., Commentary, 365.

47 Triffterer et al., Commentary, 175, IT-94-1 The Prosecutor v. Duško Tadi?, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para 141, Cassese et al., Commentary, 366, Schabas, The International Criminal Court, 155 156.

48 Rome Statute, Article 8/I.

49 Ambrož, Mednarodno kazensko pravo, 188, Cassese et al., Commentary, 381, Schabas, The International Criminal Court, 199, Triffterer et al., Commentary, 283.

paragraph 2, of the Statute shall be interpreted within the established framework of the international law of armed conflict including, as appropriate, the international law of armed conflict applicable to armed conflict at sea.[50] Also, with each war crime the requirement is made that the conduct took place in the context of and was associated with an international or non-international armed conflict, the former including military occupation.

Such position has been confirmed by the case law of ICC[51] and was also defined in the Statute of ICTY and Nuremberg Tribunal. The latter namely defined war crimes as namely, violations of the laws or customs of war.[52] The former as Grave breaches of the Geneva Conventions of 1949 and Violations of the laws or customs of war.

Guilt in Regard to Contextual Elements

After establishing that aggression represents incrimination of unlawful warfare, that crimes against humanity and genocide no longer require link to armed conflict, but at least crimes against humanity used to and that war crimes still require such link, it necessary to ascertain the content of guilt or *mens rea* that has to be proved to the perpetrator in relation to the relevant contextual element.

In regard to aggression, according to the general rules of article 30 intent towards the material elements (executing act) of this core crimes should be proven, since neither the definition of aggression, nor its elements do not include additional standard of mental element. Lower standard is however defined in Elements of crimes for the elements of inconsistency of the executing act of aggression with the United Nation's charter and of manifest violation of the same Charter. Namely, there is no requirement to prove that the perpetrator has made a legal evaluation as to whether the use of armed force was inconsistent with the Charter of the United Nations. Also, there is no requirement to prove that the perpetrator has made a legal evaluation as to the "manifest" nature of the violation of the Charter of the United Nations.[53] Instead, it suffices that the act of aggression – 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 – was committed, that the perpetrator was aware of the factual circumstances that established that such a use of armed force was inconsistent with the Charter of the United

50 Elements of Crimes, introduction to war crimes.

51 ICC-01/01-01/06, The Prosecutor v. Thomas Dyllo Lubanga, Judgment pursuant to Article 74 of the Statute, para 503, ICC-01/04-01/07, The Prosecutor v. Germain Katanga, Decision on Confirmation of Charges, para 233.

52 Statute of International Criminal Tribunal for Former Yugoslavia, Article 6/II(b).

53 Elements of Crimes, introduction to 8bis.

Nations and that the act of aggression, by its character, gravity and scale, constituted a manifest violation of the Charter of the United Nations and the perpetrator was aware of the factual circumstances that established such a manifest violation of the Charter of the United Nations.[54]

Since the amendment on aggression is not enforced yet, there has not been any case law on this topic yet. The Nuremberg Tribunal[55], however, discussed responsibility for aggression and made very simple requirements regarding guilt. The tribunal simply referred to the positions the defendants occupied in the Government of Germany; according to these positions at least some of the defendants must have known of the treaties signed by Germany, which were outlawing recourse to war for the settlement of international disputes; they must have known that they were acting in defiance of all international law when in complete deliberation they carried out the designs of invasion and aggression. The tribunal put also much of the emphasis on the Kellog-Briand Pact, signed in 1928 by sixty-three nations, including Germany, Italy and Japan. The legal effect of this treaty according to the Tribunal was that the nations who signed the treaty or adhered to it condemned recourse to war for the future as an instrument of policy, and expressly renounced it. After the signing of the treaty, any nation resorting to war as an instrument of national policy automatically breaks the pact. In the opinion of the Tribunal, the solemn renunciation of war as an instrument of national policy automatically makes war illegal in international law and, what is even more important, automatically makes perpetrators of war individually criminally responsible.[56]

Similar demand could be noticed in connection to the war crimes in Rome Statute. Here, again factual awareness suffices. The conduct took place in the context of and was associated with an international/non-international armed conflict and the perpetrator must have been aware of factual circumstances that established the existence of an armed conflict.[57] There is no requirement for a legal evaluation by the perpetrator as to the existence of an armed conflict or its character as international or noninternational; no requirement for awareness by the perpetrator of the facts that established the character of the conflict as international or noninternational, only a requirement for the awareness of the factual circumstances that established the existence of an armed conflict that is implicit in the terms "took place in the context of and was associated with".[58]

54 Elements of crimes, Article 8bis.

55 This analysis is limited to the Main Judgment of International Military Tribunal.

56 Main Judgment of International Military Tribunal.

57 Elements of Crimes, war crimes paragraphs.

58 Elements of Crimes, introduction to war crimes.

This position has also been confirmed also by the case law of ICC.[59]

Table 1: Content of Contextual Elements of Core Crimes in Relation to Armed Conflict and Required Mental Element

	Aggression	Genocide	Crimes against humanity	War crimes
Nuremberg Statute	Essence of incrimination For guilt the positions the defendants occupied in the Government of Germany sufficed; at least some of the defendants must have known of the treaties signed by Germany, which were outlawing recourse to war for the settlement of international disputes; they must have known that they were acting in defiance of all international law when in complete deliberation they carried out the designs of invasion and aggression	No criminal act	Act, before or during the war; in connection with any crime within the jurisdiction of the Tribunal	Link (violations of the laws or customs of war)
Statute of International Tribunal for former Yugoslavia	x	No link	acts committed in armed conflict, whether international or internal in character (according to the case law no link)	Link (Grave breaches of the Geneva Conventions of 1949, Violations of the laws or customs of war)
Rome Statute and ICC case law	Essence of incrimination	No link	No link	The conduct took place in the context and was associated with an international/non international armed conflict (interpreted within the established framework of the international law of armed conflict including as appropriate the international law of armed conflict applicable to the armed conflict at sea)
Mental elementin the Rome Statuteand ICC case law	The perpetrator was aware of the factual circumstances that established that such ause of armed force was inconsistent with the Charter of the United Nations. The perpetrator was aware of the factual circumstances that established such amanifest violation of the Charter of the United Nations. There is no requirement to prove that the perpetrator has made a legal evaluation asto whether the use of armed force was inconsistent with the Charter of the United Nations. There is no requirement to prove that the perpetrator has made a legal evaluation asto the "manifest" nature of the violation of the Charter of the United Nations. No case law yet	x	x	The perpetrator must have been aware of factual circumstances that established the existence of an armed conflict. There is no requirement for a legal evaluation by the perpetrator as to the existence of an armed conflict or its character as international or noninternational; no requirement for awareness by the perpetrator of the facts that established the character of the conflict as international or noninternational, only a requirement for the awareness of the factual circumstances that established the existence of an armed conflict that is implicit in the terms "took place in the context of and was associated with". Confirmed in case law of ICC.

59 ICC-01/01-01/06, The Prosecutor v. Thomas Dyllo Lubanga, Judgment pursuant to Article 74 of the Statute, para 1349, ICC-01/04-01/07, The Prosecutor v. Germain Katanga, Decision on Confirmation of Charges, para 385, ICC-01/05 -01/08, The Prosecutor v. Jean-Pierre Bemba Gombo, Decision on Confirmation of Charges, para 238.

Contextual Elements in Regard with Merger of Offences

The executing acts of core crimes are substantially the same or at least similar[60] in all core crimes. The only difference between these executing acts in most cases is only the contextual element; the fact that executing act was committed within or in connection with an internal or international armed conflict,[61] that the act was committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group (genocide) or as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack (crimes against humanity).[62]

The contextual element has therefore become essential for the resolving the issue of merger of offences. The essential question in the mergers of criminal acts is for how many criminal acts the perpetrator is liable, or whether it is possible to ignore any criminal act, the definition of which the perpetrator fulfilled. The most important distinction is the one between the fictious and real merger. We are talking about a *fictious* merger, when despite the fact that the perpetrator fulfilled the elements of definition of several criminal acts, we are dealing with only one criminal act, because all the remaining acts have lost their autonomy on the basis of certain argumenst. A *real* merger is given when no criminal act loses its independence and we are dealing with all criminal acts, which definitions have been fulfilled with the perpetrator's act.[63]

The ICC Statute is governing the determination of the sentence in case of a real merger, while the criteria for assessing, whether we are dealing with a real or a fictious merger are left to the case law and theory.[64] There is particular an issue of three general questions: the relationship between the same executing acts of war crimes in internal and international armed conflicts; the relationship between the executing act of war crimes and crimes against humanity and the relationship between the executing act of crimes against humanity and genocide.

The current case law of the ICC, as regards the raised issues of mergers, follows the established case law of ICTY and ICTR, and does not derive from it. It places (too much) emphasis solely on contextual elements of core crimes and applies the *Blockburger* test. Accordingly, when a perpetrator fulfilled definitions of more than one criminal acts, he should be convicted for all, if each

60 Ambrož et al., Mednarodno kazensko pravo, 186.

61 See ICC-01/04-01/06, The Prosecutor v. Thomas Lubanga Dylo, Judgment pursuant to Article 74 of the Statute, para 1349.

62 The only core crime that stands aside a bit and differentiates itself with the executing act, is aggression.

63 Bavcon et al., Kazensko pravo splošni del, 201.

64 Rome Statute, Article 78/III.

of the criminal acts in question includes additional elements, which cannot be found in other relevant criminal acts.[65] Since genocide includes *dolus coloratus,* which could not be found with crimes against humanity or war crimes, crimes against humanity includes the unique element of systematic or widespread attack against civilian population and war crimes link to (non) international armed conflict, every core crimes includes one element, the others do not.[66]

This way, ICC allows for alternative prosecution for war crimes in international and non-international armed conflict,[67] real merger between the same executing act of crimes against humanity and war crimes[68] and a real merger between the same executing act of crimes against humanity and genocide,[69] even if it is based on the same factual basis.

In my opinion, the question of whether it is non-international or international armed conflict, should crystallize in the process as soon as possible, and the extreme point to determine the legal qualification on which the court should decide on at the trial, should be the confirmation of the charges.

As for the relationships of war crimes and crimes against humanity with the same (natural) executing act and against the same group of victims, based on the same factual basis, the ICC should terminate the improper practice violating the *ne bis in idem* prohibition, use the fictitious merger instead and in such case prosecute only for crimes against humanity on the basis of consumption and the principle of specialty of contextual elements.

In addition to the strictly formal *Blockburger* test the opinion of judge Dolenc of the International Criminal Tribunal for Rwanda (ICTR) in the case of *Semanza* shall also be taken into account, in which the judge expressed the view that in analysing the distinction of international crimes the substantive test needs to be assessed also, especially what is the significance of contextual circumstances and the court should not insist on a strict formal interpretation.[70]

65 Blockburger v. United States, 284 U.S. 299 (1932), 284. Cassese et al, Commentary, 482, Werle, Principles, 214.

66 See ICTY case Kupreški□, Cassese, International Criminal Law, 213-214.

67 ICC-01/04-01/06, The Prosecutor v. Thomas Lubanga Dylo, Warrant of arrest, para 2, ICC-01/04-01/10, The Prosecutor v. Callixte Mbarushimana, Warrant of arrest, ICC-01/04-02/06, The Prosecutor v. Bosco Ntaganda, Warrant of arrest, 2, 4.

68 ICC-01/04-01/07, The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Warrant of arrest, 4, Decision on confirmation of charges, para 285.

69 ICC-02/05-01/09, The Prosecutor v. Omar Hassan Al Bashir, Second Decision on the Prosecution's Application for a Warrant of Arrest, para 20.

70 ICTR-97-20, The Prosecutor v. Laurent Semanza, Judgment of Trial Chamber, Separate and dissenting opinion of Judge Pavel Dolenc, para 22-26.

It is also necessary to examine the content and purposes of international crimes. A war crime can be a single violation of the rules and customs of armed conflicts and humanitarian law,[71] which are strictly related to the armed conflict. In the case of crimes against humanity, in my opinion, we are dealing with a broader and more serious international crime, which has some of its executing acts the same as war crime, but we are indeed dealing with a part of a systemic or widespread attack against the civilian population, with the knowledge of the attacker that it is about such attack. It should therefore be necessary to consider the content and the value aspect as well as the fact that crime against humanity constitutes greater criminal quantity and a more serious crime as a war crime. Therefore, in the case when dealing with the same content related executing act committed against the civilian population, it would be necessary to always make a fictitious merger due the relationship of consumption, because in my opinion systematic crime against humanity consumes individual war crime. War crime should therefore in this case lose autonomy and what should be left is only the responsibility for crimes against humanity.

The same applies to the relationship between genocide and crimes against humanity, based on the same natural executing act. Genocide and crimes against humanity can have the same or similar legal executing acts, under which one could subsume the same natural executing practices, but may differ in certain elements: contextual elements, characteristics of the victim and the contents of guilt.

Given the contextual circumstances it is true that for the crimes against humanity it is usually required for the executing practice to be an integral part of a widespread or systematic attack against civilian population, and with genocide, there must be a specific intent to destroy specific protected group either in whole or in part, but there is not demand for systematic act. However, Elements of crimes define that the prosecution must prove that the conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.[72] This condition indicates the element of organization and sytematism, and constitutes a specialty of the genocide definition within the ICC Statute. In my opinion, both crimes (genocide and crimes against humanity) relate to discriminatory policy of the state, except that in the contextual circumstance of genocide we are talking about qualified and because of that also special (*lex specialis*) contextual ele-

71 Ambrož et al.,Mednarodno kazensko pravo, 186.

72 See Elements of Crimes, introduction to genocide, ICC-02/05-01/09, The Prosecutor v. Omar Hassan Al Bashir, Second Decision on the Prosecution's Application for a Warrant of Arrest, para8; Cassese, et al., Commentary, 347-350, Schabas, The International Criminal Court, 124-125, Triffterer et. al., Commentary, 147-149.

ment in relation to systematic or widespread attack against the civilian population, pursuant to which the intent to destruct specific group (within the civilian population) is not required. The special contextual element of genocide should therefore consume the widespread and systematic attack with crimes against humanity.

Crimes against humanity must be committed against any civilian population, while the genocide is directed at ethnic, racial, ethnic or religious group. Since groups in the case of genocide are defined more specifically, this again refers to a special provision, despite the fact that the provision of genocide protects not only the civilian members of protected groups. In the case of civilian members of protected groups we are therefore talking about broader criminalization, while the genocide one is narrower and thus special also in this manner.

The difference can also be found in the contents of guilt. In the crimes against humanity it is necessary to prove that the perpetrator is aware that the act is part of a systematic and widespread attack against the civilian population and guilt, which is required in regard to a particular executing act.[73] While in the case of genocide the prosecution must prove that the perpetrator has the intent *(dolus coloratus)* to destroy, in whole or in part, a particular protected group and the guilt in regard the executing acts in accordance with Articles 30 and 6 of the ICC Statute. If we substract the guilt to the individual executing act (to which the same general rules apply) the fundamental difference between the guilt in genocide and crime against humanity lies in the culpable relation of the perpetrator to contextual circumstances. Again, the criminalization of genocide regarding this is worse and special, since it demands *dolus coloratus,* whereas the crimes against humanity only the awareness.

If a protected group of genocide in actual case matches the civilian population of crimes against humanity and the same natural executing act, which is in compliance with the same type of legal executing act under the ICC Statute, was committed, then the principles of specialty and consumption in my opinion do not allow for a real merger. Contrary, it is necessary to make a fictitious merger, under which only genocide would keep its independence.[74]

Conclusion

The contextual elements of core crimes in international criminal law (aggression, genocide, crimes against humanity, war crimes) have shown certain legal or factual link to armed conflict. Aggression itself represents incrimination

73 Rome Statute, Article 7/I. See also Elements of Crimes, Article 7.

74 In the same manner Schabas, The International Criminal Court, 124-125, 135.

of unlawful warfare, war crimes must be committed in the context and are associated with an international or non international armed conflict, crimes against have lost connection with armed conflict since the ICTY *Tadi?* decision and genocide has never had it, but the most notorious and well-known cases of genocide from history have occurred in the framework of armed conflict and wars.

The analysis shows that demands regarding guilt towards the existing contextual elements of core crimes, which connect the latter to armed conflict, are moderated. According to the Rome Statute with aggression, as well as with war crimes factual awareness of transgression of United Nations' Charter, existence and nature of armed conflict suffices, which alleviates the prosecution and conviction of perpetrators of these core crimes. In this manner the contextual elements in question in a manner, in which they are defined, facilitate the conviction.

On the other side, these contextual elements serve also as arguments for multiple conviction for one natural executing act of core crimes. Namely, core crimes differ mostly in contextual elements and share many of the executing acts. Therefore, it is common practice to prosecute and convict a perpetrator of an act for all core crimes, for which contextual elements could be proved. For example murder could be considered genocide, as well as war crime and crime against humanity, if *dolus coloratus,* link to armed conflict, protected status of the victim and systematic and widespread attack on civilian population could be proved. In my opinion such practice is improper and violates the prohibition of *ne bis in idem.* In regard to the relationships of war crimes and crimes against humanity with the same (natural) executing act and against the same group of victims the court should use the fictitious merger instead and prosecute only for crimes against humanity on the basis of consumption and the principle of specialty. The same applies to the relationship between genocide and crimes against humanity, based on the same natural executing act.

Sabina ZGAGA

MIR POSREDSTOM ZAKONA: RIMSKI STATUT MEĐUNARODNOG KRIVIČNOG SUDA I KONTEKSTUALNI ELEMENTI SA REFERENCAMA NA ORUŽANI SUKOB

Odnos između mira i međunarodnog krivičnog zakona očitava se takođe u definicijama međunarodnih zločina (genocid, ratni zločini, zločini protiv čovečnosti i agresija). Njihovi kontekstualni elementi su usko povezani sa oružanim sukobima. Ovaj rad razmatra kontekstuane elemente međunarodnih zločina koji su povezani sa oružanim sukobima kao deo mateijalnih elementa međunarodnih zločina sa tačke gledišta regulative Rimskog statuta Međunarodnog krivičnog suda i istorijskog poređenja. Rad je fokusiran na ovu temu, bilo da je veza između konkretnog međunarodnog zločina i oružanog konflikta potrebna ili ne, a takođe se bavi i pitanjem koji je ključni element ove veze. Štaviše, kako su materijalni elementi sami po sebi nedovoljni za krivičnu odgovornost, drugi preduslov za krivičnu odgovornost - poinioeva savest u vezi sa kontekstualnim elementima međunarodnih zločina takođe se analizira u ovom radu.

Kontekstualni elementi ključnih zločina definisanih međunarodnim krivičnim pravom (agresija, genocid, zločini protiv čovečnosti i ratni zločini) pokazuju određenu pravnu ili činjeničku vezu sa oružanim sukobom. Agresija sama po sebi predstavlja inkriminisanje nezakonitog ratovanja, pa tako ratni zločini moraju biti počinjeni u kontekstu i povezani su sa međunarodnim ili unutrašnjim oružanim sukobima, a zločini protiv čovečnosti su izgubili vezu sa oružanim sukobima uprkos tome što su se najpoznatiji slučajevi genocida u istoriji odigrali u okviru oružanih sukoba i ratova.

Zahtevi vezani za krivicu prema postojećim kontekstualnim elementima ključnih zločina koji te elemente povezuju sa oružanim sukobima ograničeni su.

Na ovaj način kontekstualni elementi na način na koji su definisani ublažavaju osudu. Kontekstualni elementi takođe služe kao argumenti za višestruke osude za gnusne zločine. Naime gnusni zločini najviše se razlikuju po kontekstualnim elementima i dele mnoga izvršenja dela. Na taj način uobičajena je praksa da se krivično gone i osude počinioci gnusnih zločina za koji se kontekstualni elementi mogu obezbediti.