



Individual Liability for International Crime

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How to cite this paper: Simon Parsons. (2023) Individual Liability for International Crime. *Journal of Humanities, Arts and Social Science*, 7(8), 1494-1500. DOI: 10.26855/jhass.2023.08.002

Received: July 6, 2023

Accepted: August 3, 2023

Published: September 1, 2023

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Abstract

This article explores the lack of individual liability for international crime before 1945 and notes that the Nuremberg war crime trial of the leading Nazis officials laid the groundwork for personal international criminal liability for a criminal war and for the international criminal justice process in which those responsible for such a war are held responsible. Since 1945, there has been the International Criminal Tribunal for Rwanda which prosecuted persons for serious violations of international criminal law committed in Rwanda, the International Criminal Tribunal for the former Yugoslavia which dealt with international crimes that took place in the Balkans and the International Criminal Court which investigates and, where warranted, tries individuals charged with international crimes. All these courts have their origins in Nuremberg trial. It is hoped that one day, this international criminal law will be applied against the major war criminal Russian president Vladimir Putin and his subordinates.

Keywords

International criminal law, individual liability, legal status, *ex post facto* law, superior orders, core crimes

1. International Criminal Law Pre-1945

The evidence for individual criminal liability for international crime in this period is limited. However, the trial of Sir Peter von Hagenbach in 1474 for war crimes is seen as a milestone case because it was a precursor for the International Military Tribunals of 1945. Hagenbach allowed his soldiers to kill, rape and destroy properties of innocent civilians including women and children. These atrocities were committed when Hagenbach was governor of the Duke of Burgundy's Alsatian territories from 1469 to 1474. Hagenbach was tried before an ad hoc tribunal of 28 judges from various regional city states. His first exclusionary argument is familiar, in that he argued that as he was a subject of Burgundy the court had no jurisdiction to try him but rather, he should be tried by a Burgundian court. His second exclusionary argument was superior orders, he was simply carrying out orders. Hagenbach wanted to call the duke as a witness to confirm this, but this was denied. Both exclusionary arguments failed with the court ruling that Hagenbach knew or ought to have known that his soldiers' actions were unlawful. The court convicted Hagenbach and he was executed.

The chief reason for the lack of individual liability for international crime was the Peace of Westphalia of 1648 which laid down the principle state sovereignty meaning that the states could not interfere with other states' affairs. Therefore, each state had to police its own affairs, including prosecuting violators of the law of nations through national courts (Rhea, 2019). The Congress of Vienna 1814-1815 issued a declaration charging Napoleon Bonaparte with violating international law after he escaped from the island of Elba and re-entered France with an army. But after his defeat at the Battle of Waterloo he was not put on trial but rather exiled to the island of Saint Helena (Woetzel, 1960). At a meeting of the international committee of the Red Cross in 1872 Gustav Moynier proposed that there should be an international criminal tribunal to try and punish individuals who breached the 1864 Geneva Convention for the amelioration of the condition of the wounded in war. No state supported his proposal. In 1899

the first international peace conference took place, and four multilateral treaties were agreed which establish the rules of war but there was no mention that violations of the rules were war crimes and should result in the prosecution of individuals (Rhea, 2019).

After the signature of the armistice with Germany on November 11th, 1918, marking the end of the Great War, the victorious Allied powers at the Paris Peace Conference considered post war policies that would be the Treaty of Versailles. During negotiations, the Allied powers faced a predicament of whether to create an international criminal court to prosecute German war criminals, in particular Germany's former Kaiser Wilhelm II. On January 18, 1919, state delegates at the Paris Peace Conference were invited to submit submissions on the responsibilities of the authors of the war and punishment of war criminals. A special Tribunal was founded to arraign the Kaiser for immoral offences rather than war crimes demonstrate that international criminal law was still an underdeveloped aspect of international law. However, the 'Special Tribunal' referred to in Article 227 of the Treaty of Versailles was never convened as the Kaiser fled to the Netherlands, which refused to extradite him for prosecution (Rhea, 2019).

The Kellogg- Briand Pact was a multilateral treaty of 1928 which had the aim of eliminating war as a political instrument. The Pact stated that the 'signatories shall renounce war as a national policy' and 'signatories shall settle disputes by peaceful means'. The Pact was unsuccessful as in 1931 Japan invaded China. It was evident that the Pact proved unsuccessful in the prevention of war because there was no mechanism of enforcement (Bunck & Fowler, 2019). The Pact also failed to prevent the Second World War but was one the bases for trial of Nazi leaders in 1945-46 (National Museum of American Diplomacy, 2021).

2. The International Military Trial of 1945-46 (the Nuremberg Trial) Laid the foundations of modern international criminal law

Thus, except for war crimes, prior to 1945 there was little evidence that crimes against peace and crimes against humanity had crystallised as international crimes as part of customary international law.

The most well-known war crimes trial after World War II was the trial by the International Military Tribunal (IMT) of 24 of the most notorious military and political leaders of the Third Reich and it heard evidence against 21 of the defendants. It opened in Nuremberg on November 20, 1945, six and a half months after Germany had surrendered. A judge and a prosecution team were provided by each of the four major Allied nations: the United States, the United Kingdom, the Soviet Union, and France. Each of these states had their own laws and legal systems and therefore, on 8th August 1945 the London Agreement was signed which gave a common platform for trial. The IMT's Charter was annexed to the Agreement and article 6 defined the three crimes the leaders of Third Reich were to be tried for: crimes against humanity, war crimes, crimes against peace and conspiracy to commit these crimes. Thus, the indictment deposited with the leaders as individuals contained four counts: (1) Conspiracy to commit crimes against peace, war crimes and crimes against humanity. (2) Crimes against peace - the planning, initiating, and waging of wars of aggression in violation of international law (3) War crimes- violation of the laws of war. (4) Crimes against humanity – exterminations, deportations, and genocide (Rajakovich, 2015). The prosecution of the high-ranking military and political leaders of the Third Reich is the turning point for the imposition of personal criminal liability for war crimes through an international criminal jurisdiction. The IMT was required under article 16 of the London Charter to provide the defendants with certain rights so they had a fair trial including the right to speak and present evidence and witnesses in their own defence. It also included the right to cross-examine witnesses for the prosecution.

3. The exculpatory arguments put forward at Nuremberg

There were three principal challenges against the jurisdiction of the IMT. The first was that the defendants could not be blamed for the three crimes as the blame fell on to Germany as a state. The defence maintained that the defendants had no legal status in international law and their criminal culpability could only be assessed under German law. Although this was consistent with the lack of international individual criminal culpability before the Second World War it was morally intolerable. In view of the racist Nuremberg laws and others enacted during the Third Reich which allowed for barbaric atrocities against vulnerable groups, the liability of the defendants would have been far from certain. The IMT took the position that, despite the limited express treaty references to individual criminal liability, the crimes included in its Charter imposed such liability in customary international law and in

any case the defendants were fully aware of their gross criminality (Ray, 2023).

The defendant's second argument was that they were being tried under laws that did not exist when their crimes were allegedly committed. They argued that there is a fundamental principle of international and municipal law, that a crime cannot be punished by retrospective law applying the maximum of '*nullum crimen sine lege, nulla poena sine lege*' or the prohibition on *ex post facto* law (the principle of legality). However, the charge of war crimes, could not be objected based on *nullum crimen sine lege* as international law had already prescribed criminal sanctions for this offence prior to the second world war. Out of three crimes which were charged in the indictment at the Nuremberg trials it is the charge of crimes against peace that has been the main target of criticism. Critics have called this *ex post facto law*, as it did not constitute a criminal offence at the time it was committed there was the application of international law retroactively.

However, the IMT reminded the defence that the *nullum* principle was just a principle and Germany had violated her multilateral and bilateral guarantees by waging war. The IMT ruled that Hitler and his immediate subordinates ought to have known that there were serious violations of Germany's treaty obligations under international law and committing acts of aggression was certainly a violation. Thus, the *nullum* principle was inapplicable at the trial (Burchard, 2006). However, there were discrepancies between the judgment of the IMT in different languages. The English version states that '*the maxim nullum crimen sine lege is not a limitation of sovereignty but is in general a principle of justice on this it would appear that the maxim has no application to the present facts*'. However, in the French version the conclusion differs, the principle of *nullum crimen sine lege* seems to be a fully developed rule, binding the IMT (Acquaviva, 2011). Under article 22 of the Rome Statute of 1998, to be criminally liable under the Statute, the commission of the offence must take place at the time the Statute was entered into force on 2nd July 2002. The crime must also be written and clearly defined. Article 24 of the Rome Statute makes it clear that the law is non-retrospective or in other words the law cannot apply *ex post facto*.

The defendants' third argument was superior orders. "Superior orders" refers to a defence in international criminal law. The basis of this defence is that a subordinate is not criminally liable for the crimes he or she committed in when obeying to the orders of a superior. To have a separate defence available to subordinates may be justified because military discipline and hierarchy are principal features of any military organisation. Furthermore, a subordinate will face a tough dilemma if there is doubt about the lawfulness of the superior's order. The subordinate can be disciplined or even be prosecuted for disobeying a lawful order, but when an unlawful order is obeyed that subordinate may be held criminally responsible for any war crimes committed. When a superior order prompts war crimes that are so serious that the subordinate ought to know the order is unlawful, then the subordinate should not be able to invoke the defence of superior orders.

Three different approaches have been formulated: the respondeat superior doctrine, the absolute liability doctrine, and the conditional liability doctrine. According to the respondeat superior doctrine, only the superior is accountable for the international crime and not the subordinate who can effectively argue a defence of superior orders because of the duty to obey the orders of superiors. In the second approach, the absolute liability doctrine, superior orders amount to no defence; superior orders can only be pleaded in mitigation of punishment. The basis of this doctrine is that the duty to obey superior orders is limited to orders that are lawful. With the conditional liability doctrine, obeying superior orders does relieve the subordinate of criminal culpability but only where he or she did not know and could not reasonably have known that the order was unlawful. The IMT rejected the respondeat superior doctrine and conditional liability doctrine since they could have led to the consequence that the only Hitler could have been held criminally liable for the international crimes committed by the Nazi regime. Instead, the absolute liability doctrine was applied as provided for in article 8 of the London Charter.

The absolute liability doctrine is also applied in the Statutes of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda. Article 33(1) of the Rome Statute of the International Criminal Court applies the conditional liability doctrine. It clearly states that acting on superior orders does not relieve a defendant from criminal culpability unless there was a legal obligation to obey and it was not known that the order was unlawful, with the order not being obviously unlawful. However, the defence of superior orders cannot be pleaded in respect of genocide or crimes against humanity as the rule of absolute liability applies (Rome Statute article 33 (2)).

It was evident that there are limitations to the issue of legitimacy in the Nuremberg trial. The legitimacy, legacy, and legality of the Nuremberg Trial have been the subject of much debate for more than seventy years. The telling concerns raised include: were the representatives of victor nations legitimate judges over their defeated enemies?

Under International law at the time, how could there be individual criminal responsibility for crimes against peace and crimes against humanity? Did the defendants receive a fair trial? Was regard given to the principle of legality? Was it right to deny defendants the defence of superior orders (Jadhav, 2014)?

There was also break down of the separation of powers. The jurists from the Allied Nations were not only involved in drafting the IMT statute but were also appeared as prosecutors, such as Justice Robert H. Jackson, the US chief prosecutor. A joint defence motion was filed on 19 November 1945 which disapproved this conflict. Justice was applied solely by the victorious powers. There were no judges from neutral states such as Switzerland or Portugal included in the IMT. The IMT did not deal with the Nazi crimes against the German people, concentrating exclusively on crimes committed against non-Germans and, crimes against German Jews were only considered when they were linked to war crimes or crimes of against peace that were committed after 1939. In addition, the murder of mentally and physically deficient children was hardly got a mention in the judgment (Burchard, 2006). There was unilateral application of law as the IMT refused to consider evidence that the Allies had committed war crimes, only vanquished Germans were held to account for the WWII atrocities. Apart from war crimes the IMT had enforced ‘special law for the vanquished’. Despite being expressly protected in the Charter, defendants were denied the right to act as their own counsel during the trial, when Rudolph Hess stated he wanted to act as his own counsel, but this was denied.

However, the Nuremberg trial, is widely considered as the most significant international criminal law trial of the twentieth century as it laid the foundation of modern International criminal law based on individual criminal responsibility. The validity of the above criticisms may never be settled, but the fact is that nineteen defendants were found guilty at Nuremberg and twelve of them were executed because of the IMT’s judgment and sentence. In contrast, whilst there were international crimes committed by Allies which lead in some instances to a court-martial, most international crimes were not investigated by the Allied powers during and or after the war, or if they were investigated, a decision was taken not to prosecute. Following the London Charter and the Nuremberg judgment, the UN General Assembly confirmed these international crimes in a resolution (Rosen, 2021).

4. How international criminal law is enforced today and its application against Putin and other Russian war criminals

Thus, the principle of individual liability for war crimes was established after World War II with the Nuremberg trial, which prosecuted and convicted Nazis war criminals culpable for a criminal war. International criminal law places culpability on human beings and not on organisations or states. This law prescribes and punishes acts that amount to international crimes. International criminal law is part of public international law, and it holds war criminals to account for serious violations of international criminal law. Most states have universal jurisdiction which means they can prosecute and punish war criminals present in their jurisdiction, even though the war crime was not committed in that jurisdiction.

So international criminal law is imposed through national processes (ordinary courts and military tribunals) but also by international *ad hoc* tribunals such as the International Criminal Tribunal for the former Yugoslavia and now by the International Criminal Court. The Rome Statute 1998 set up the International Criminal Court (ICC), coming into force on 1st July 2002.

5. The Core Crimes

Article 5 of the Statute of Rome accords the ICC with jurisdiction over four core crimes: Genocide Article 6. Crimes against humanity Article 7. War crimes Article 8. Aggression Article 8 bis. Although the court’s jurisdiction over genocide, crimes against humanity, and war crimes is well entrenched, the crime of aggression was only included within the jurisdiction of the ICC after a 2010 review conference. The ICC’s jurisdiction over the crime of aggression commenced in July 2018. President Putin and his immediate and other subordinates have committed these crimes during the war in the Ukraine.

The International Criminal Court Act 2001 (ICCA) gives effect to the Rome Statute in English domestic law and allowed the UK government to ratify the Statute. Its purpose is to incorporate into English law the crimes over which the ICC has jurisdiction. Thus section 51 creates in English law the offences of genocide, crimes against humanity and war crimes (but not yet the crime of aggression). The section confers jurisdiction on English courts over such crimes when a committed in the UK and when committed outside the UK by a UK national, UK resident

or person subject to UK service jurisdiction. This means that whilst Vladimir Putin and his subordinates may have committed the international crimes of genocide, crimes against humanity and wars crimes during the unlawful war in the Ukraine they could not be prosecuted in England because the ICCA does not give English domestic courts' universal jurisdiction over these crimes when committed outside the UK because Putin and his subordinates do not have UK nationality. This is a serious gap in the law which is intolerable. The ICCA needs to be amended retrospectively to give English domestic courts universal jurisdiction over these crimes such as the jurisdiction over the crime of torture given to the courts by the Criminal Justice Act 1988. A person who commits torture anywhere in the world since 29 September 1988 can be prosecuted in England and Wales. There is no UK nationality requirement thus a visitor can be prosecuted.

First, genocide amounts to acts committed with an intention to destroy, in whole or in part, a national, ethnical, racial or religious group by murdering members of the group; causing grievous mental or bodily harm to representatives of the group; deliberately imposing on the group conditions of life with the intention to bring about its physical destruction in whole or in part; imposing measures intended to stop births within the group. (At the start of the Ukrainian war Putin made several allegations of genocide by Ukraine as justification for the invasion and this enabled the Ukrainian government to lodge a case against the Russian Federation with the International Court of Justice alleging false allegations of genocide under the Genocide Convention of 1948 and requesting the court order that there be immediate suspension of Russian military operations and the court so ordered on the 16th of March 2022).

Second, crimes against humanity covers murder, extermination, enslavement, deportation, and other inhumane acts committed on a civilian population, before the war starts or during the war, or crimes carried out on political, racial, or religious grounds whether or not that is a breach of domestic law of the state where the crimes are perpetrated.

Third, war crimes: breaches of the laws or customs of war. Such breaches include, inter alia, murder, ill-treatment, and deportation for slave labour of the civilian population of territory occupied during the war, ill-treatment, or murder of prisoners of war, murder of hostages, plunder of public or private property, purposefully destroying of cities, towns, or villages, or destruction not justified by military necessity and forcibly moving children of a group to another group. The ICC announced the issue arrest warrants for two individuals with relation to the conflict in Ukraine. These were issued on the 17 March 2023 against Vladimir Putin and Maria Alekseyevna Lvova-Belova, the commissioner for children's rights, under articles 8(2)(a)(vii) and 8(2)(b)(vii) of the Rome Statute (Hofmańsk, 2023). The arrest warrants are for alleged responsibility for the war crime of the unlawful transfer of children from occupied areas of Ukraine to the Russian Federation. Whilst an arrest and trial of Putin very unlikely at present Sir Geoffrey Nice KC, who was the lead prosecutor when former Serbian president Slobodan Milosevic was tried, has said the warrant against Putin will influence how world leaders view him. 'He will remain an alleged criminal until and unless he submits himself for trial or is handed over for trial and acquitted. That seems extremely unlikely, so he will remain an alleged criminal until the end of his life' (BBC news, 2023).

Fourth, crime of aggression amounts to the use of armed force by a state against the sovereignty, territorial integrity, or political independence of a different state, or in any other manner that conflicts with the Charter of the United Nations. The following acts, inter alia, even without of a declaration of war, are listed in UN General Assembly resolution 3314 (XXIX) of 14 December 1974, as acts of aggression: (a) The invasion by the armed services of a state onto the territory of another state, and a military occupation, even if temporary, following the invasion or attack, or the annexation by force of the territory of another state; (b) Bombing by the armed services of a state against the territory of another state or the use of weapons of war by a state against the territory of another state; (c) An attack by the armed services of a state by land, sea or air, on the marine and air forces of another state.

The crime of aggression is a violation of international criminal law's prohibition of the use of force. Article 2(4) of the UN Charter forbids the use of force, subject to limited exceptions. The crime of aggression seeks to give this prohibition force by imposing criminal culpability on individuals responsible for this crime.

The parties to the Rome Statute amended it to include the crime of aggression in 2010 and this amendment came into effect in 2018. The amendment to the Rome Statute included a major lacuna, as, in respect states who are not parties to the Rome Statute, 'the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory' (Article 15bis para 5). This clause means that the ICC is expressly precluded from charging citizens of the U.S., China, and Russia (the Russian Federation withdrew from the Rome Statute in 2016 after the ICC published a report classifying the Russian annexation of Crimea as an occupa-

tion), as well as India, Israel, Saudi Arabia, and Turkey with the crime of aggression, because these states are not parties to the Statute. Thus, even though acts of aggression have been committed by Russian nationals in the Ukraine the ICC has no jurisdiction because Russia is not a party to the 1998 Statute. The ICC's jurisdiction is limited to crimes, included in the Rome Statute prior to 2018. The only exception is that the UN Security Council can refer a non-party to the ICC for the crime of aggression, but the Russian Federation as a permanent member of the council holds a veto so this will not happen. This is a serious problem as the crime of aggression is the crime most likely to catch Russia's top table. There have been calls for the creation of a special tribunal for the punishment of the crime of aggression against the Ukraine (Brown, 2022).

6. Conclusion

The development of Individual liability for international crime means that Putin and other war criminals can be put on trial for their crimes. Individual criminal liability for international crimes allows for individuals to be held criminally liable for genocide, crimes against humanity, war crimes, or acts of aggression (these crimes overlap), but also for conspiring and even inciting the commission of these crimes. Individuals can also be held criminally culpable for aiding and abetting or attempting the commission of these crimes. This could include President Putin and his immediate subordinates. Breaches of international criminal law can also be the outcome of an omission to act. Armed forces or groups are usually put under commanding officers who are responsible for the conduct of their subordinates. To make international criminal law is effective, superior officers should be held accountable if they omit to take adequate measures to stop their subordinates from committing serious breaches of international criminal law. Thus, they might be held to be criminally culpable for criminal actions in respect of which they have no personal participation. This could also include President Putin and his immediate subordinates. The former Bosnian Serb military commander Ratko Mladic was convicted of war crimes on this basis and sentenced to life imprisonment.

Putting Putin and his supporters on trial for international crimes will serve two principal purposes. First, those guilty of such crimes will be punished. Second, a trial will be a deterrent to others. A trial of the Russian leadership would be relatively straight forward because there is overwhelming evidence that Putin and his subordinates are guilty of international crimes especially the crime of aggression. Most states can prosecute and punish for international crimes by using universal jurisdiction, which allows any state to prosecute alleged criminals present in its jurisdiction, even though the crime was not committed in the state exercising jurisdiction.

It will probably be necessary to try Putin and his subordinates in an ad-hoc tribunal constituted for that purpose and using the ICC court building in Hague so they can be indicted, *inter alia*, for the crime of aggression. To accomplish this, Putin needs to be removed from office and then extradited by a new Russian government that has better relations with the international community. There is also the issue of sovereign immunity in that under customary international law heads of state, heads of government and foreign ministers have personal immunity from prosecution for their actions while in office. When they leave office that immunity supposedly continues for international crimes committed in their official capacity. However, this does not apply if they are brought before an international tribunal. Slobodan Milosevic the former president of Yugoslavia and Radovan Karadzic the former president of the Bosnian Serb Republic both stood trial for genocide, war crimes and crimes against humanity before the International Criminal Tribunal for the former Yugoslavia. Milosevic died of heart failure before the conclusion of his trial, but Karadzic was convicted and is serving a life sentence in a British prison (Rozenberg, 2022, 2023). That said another major war criminal in the world Bashar al-Assad of Syria has been accepted back into the fold of the Arab League. This suggests that time may be on Putin's side and the West may lose interest in prosecuting him for reasons of political expediency.

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