

*Jacek Izydorczyk*¹

University of Łódź

WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

DOI: <http://dx.doi.org/10.12775/TSP-W.2023.013>

Date of receipt: 22.02.2023

Date of acceptance: 22.11.2023

(Summary)

It is important to know the great scientific achievements of Polish medieval science on what a war is and in what civilized manner can be fought – i.e., the so-called Polish school of *ius gentium* (law of nations). However, as there have been wars, there have also been war crimes. The beginnings of the modern war regulations date back to the end of the 19th century or even the beginning of the 20th century. For civilized rules of warfare very important is the Hague Convention of October 18, 1907 on the laws and customs of war on land with an annex – the Regulations concerning the laws and customs of war on land (replacing the Convention of July 29, 1899). Very important, achievements of international law in the field of armed conflict law, including war crimes are, of course, regulations of the Rome Statute of the International Criminal Court (done at Rome on July 17, 1998 – in force on July 1, 2002). The Rome Statute distinguishes (in six groups of regulations on such crimes) four categories of war crimes: first – grave breaches of the Geneva Conventions of 12 August 1949, second – other serious violations of the laws and customs applicable in international armed conflicts, third – serious violations of Article 3. common to the Geneva Conventions which applies to non-international armed conflicts, and the last fourth category – other serious violations of the laws and customs applicable in armed conflicts not of an international character.

Key-words: war crimes, so-called Polish school of *ius gentium* (law of nations), the Hague Convention of October 18, 1907 on the laws and customs of war on land, the Rome Statute of the International Criminal Court of 1998.

Zbrodnie wojenne w świetle Rzymskiego Statutu Międzynarodowego Trybunału Karnego (Streszczenie)

Artykuł przedstawia regulacje zbrodni wojennych w Statucie Rzymskim z 1998 roku, który ustanowił Międzynarodowy Trybunał Karny. Autor przypomina znakomity dorobek polskiej nauki w zakresie tzw. prawa narodów (*ius gentium*) oraz poprzez wyjaśnienie pojęcia „strony wojującej” regulowanej w Konwencji Haskiej wraz z aneksem z 1907 roku prezentuje szeroki zakres jurysdykcji w ww. zakresie Trybunału w Hadze. Konkluzja autora jest realistyczna, choć może wydawać się krytyczna wobec dwudziestoletniej już ponad działalności Międzynarodowego Trybunału Karnego.

Słowa kluczowe: zbrodnie wojenne, polska szkoła *ius gentium* (prawa narodów), Konwencja Haska z 18 października 1907 roku dot. praw i zwyczajów wojny lądowej, aneks do tej Konwencji (tzw. Regulamin), Statut Rzymski z 1998 roku.

¹ Jacek Izydorczyk – Professor, Faculty of Law, University of Lodz, Poland, jizydorczyk@wpia.uni.lodz.pl, ORCID: 0000-0001-7275-8150.

There have always been wars. At least as long as there have been nations and states. There has also been a law since then and as the ancient Romans used to say: “*sunt et belli sicut pacis iura*” (i.e., the same laws hold for peace as for war)². It is important to know the great scientific achievements of Polish medieval science on what a war is and in what civilized manner can be fought – i.e., the so-called Polish school of *ius gentium* (law of nations)³.

More than six hundred years ago Stanislaw of Skarbimierz (1365-1431), Pavel Vlodkowitz (1370-1435) and Benedict Hesse (1389-1456) defined in a modern way the concept of a just war, specifying the conditions it must meet and the rules of a civilized war. They regarded war as a necessary evil, which was only perpetrated when all other means of justifying justice or repelling unjust aggression failed. These great thinkers of Kingdom of Poland emphasized that in international relations regulated by the so-called *ius gentium*, the basis must be the good faith of the parties, honest attitudes, goodwill and pure intentions. And what is important here – they forbade waging a war “in a wicked and scoundrel way”⁴.

Therefore, war is not and cannot be indifferent to the law. International law has already regulated and now clarifies the rules of war (i.e., “*ius ad bellum*” – “right to war”), that is, formerly the so-called the right to wage a war; and currently – it regulates the rules of just conduct during a war (i.e., “*ius in bello*” – “the law in waging war”)⁵. However, as there have been wars, there have also been war crimes. The beginnings of the modern war regulations date back to the end of the 19th century or even the beginning of the 20th century. Such rules of just conduct during a war were introduced by the Hague Conventions of 1907 and the Geneva Conventions of 1949, supplemented by two additional protocols of 1977. In addition, these rules are also supplemented by the Hague Conventions of 1954 on protection of cultural property, of 1972 on prohibition of the production and stockpiling of biological and toxic weapons, of 1977 on prohibition of using technical means of

² K. Burczak, A. Dębiński, M. Jońca: Łacińskie sentencje i powiedzenia prawnicze, Warszawa 2007, p. 211.

³ St. Wielgus: Polska średniowieczna doktryna *ius gentium*, Lublin 2001, pp. 66-71.

⁴ St. Wielgus: Polska średniowieczna doktryna *ius gentium*, Lublin 2001, pp. 66-68.

⁵ T. M. Gelewski: Zbrodnie wojenne na morzu w drugiej wojnie światowej, Gdańsk 1976, p. 12; J. Nowakowska-Małusecka: Odpowiedzialność karna jednostek za zbrodnie popełnione w byłej Jugosławii i Rwandzie, Katowice 2000, pp. 23-29.

environmental impact for military purposes and of 1980 on restriction and prohibition of the use of certain (conventional) weapons⁶.

For civilized rules of warfare very important is the Hague Convention of October 18, 1907 on the laws and customs of war on land with an annex – the Regulations concerning the laws and customs of war on land (replacing the Convention of July 29, 1899)⁷.

First of all, it defines who is a “militant”, that is, a soldier who is subject to the rules and protection of international law e.g., when he/she becomes a prisoner of war (or becomes just a terrorist [!]). Pursuant to Article 1. of the Regulations concerning the laws and customs of war on land: the laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions: first – to be commanded by a person responsible for his subordinates; second – to have a fixed distinctive emblem recognizable at a distance; third – to carry arms openly; and fourth – to conduct their operations in accordance with the laws and customs of war. In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination “army”⁸. In addition, Article 2. of the Regulations concerning the laws and customs of war on land says the inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with Article 1., shall be regarded as belligerents if they carry arms openly and if they respect the laws and customs of war. As we can see, the most important is observance of the laws of war⁹. Moreover, Articles 22.-23. of the Regulations concerning the laws and customs of war on land constitute that: the right of belligerents to adopt means of injuring the enemy is not unlimited and in addition to the prohibitions provided by special Conventions, it is especially forbidden: (a) to employ poison or poisoned weapons; (b) to kill or wound treacherously individuals belonging to the hostile nation or army; (c) to kill or wound an enemy who, having laid down his arms, or having no longer means of defense, has surrendered at discretion; (d) to declare that no quarter will be given; (e) to employ arms,

⁶ J. Izydorzycy, P. Wiliński: *International Criminal Court – Międzynarodowy Trybunał Karny*, Kraków 2004, p. 56; M. Królikowski, P. Wiliński, J. Izydorzycy: *Podstawy prawa karnego międzynarodowego*, Warszawa 2008, p. 128.

⁷ M. Królikowski, P. Wiliński, J. Izydorzycy: *Podstawy prawa karnego międzynarodowego*, Warszawa 2008, pp. 128-129; M. Królikowski, P. Wiliński, J. Izydorzycy, M. Znojek: *Prawo karne międzynarodowe – wybór źródeł*, Warszawa 2010, pp. 25-32; St. M. Przyjemski: *Prawo karne wojskowe*, Gdańsk 1999, pp. 209-219.

⁸ International Committee of the Red Cross - <https://ihl-databases.icrc.org>.

⁹ International Committee of the Red Cross - <https://ihl-databases.icrc.org>.

projectiles, or material calculated to cause unnecessary suffering; (f) to make improper use of a flag of truce, of the national flag or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention; (g) to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war; and (h) to declare abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party. A belligerent is likewise forbidden to compel the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war¹⁰.

International humanitarian law limits the effects of armed conflicts and protects persons who are not or no longer participating in hostilities and restricts the means and methods of warfare. But the latest, very important, achievements of international law in the field of armed conflict law (especially after the International Criminal Tribunal for the former Yugoslavia – ICTY), including war crimes are, of course, regulations of the Rome Statute of the International Criminal Court (done at Rome on July 17, 1998 – in force on July 1, 2002). Pursuant to Article 5. of the Rome Statute the jurisdiction of the Court is limited to the most serious crimes of concern to the international community as a whole. The International Criminal Court cover the following crimes: first – the crime of genocide, second – crimes against humanity, third – war crimes, and fourth – the crime of aggression¹¹.

The Article 8 (1-2) of the Rome Statute of the International Criminal Court defines and penalizes war crimes. First of all the International Criminal Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes. Then, there are six groups of regulations on such crimes (points: a-f): 1/ grave breaches of the Geneva Conventions of August 12, 1949, 2/ other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, 3/ in the case of an armed conflict not of an international character, serious violations of Article 3 common to the four Geneva Conventions of August 12, 1949, 4/ paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar

¹⁰ International Committee of the Red Cross - <https://ihl-databases.icrc.org>.

¹¹ International Committee of the Red Cross - <https://www.icrc.org>; International Criminal Court - <https://www.icc-cpi.int>.

nature, 5/ other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, and 6/ paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature; it applies to armed conflicts that take place in the territory of a state when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups¹².

As we can see, Article 8 (2, c-f) of the Rome Statute of the International Criminal Court defines and penalizes crimes in the case of an armed conflict not of an international character. The war crimes in the case of an armed conflict of an international character are as follows:

First: grave breaches of the Geneva Conventions of August 12, 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention: 1/ willful killing; 2/ torture or inhuman treatment, including biological experiments; 3/ willfully causing great suffering, or serious injury to body or health; 4/ extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; 5/ compelling a prisoner of war or other protected person to serve in the forces of a hostile power; 6/ willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial; 7/ unlawful deportation or transfer or unlawful confinement; and 8/ taking of hostages¹³.

Second: 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 (up to 26 points): 1/ intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities; 2/ intentionally directing attacks against civilian objects, that is, objects which are not military objectives; 3/ intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict; 4/ intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe

¹² J. Izydoreczyk, P. Wiliński: International Criminal Court – Międzynarodowy Trybunał Karny, Kraków 2004; International Criminal Court - <https://www.icc-cpi.int>.

¹³ International Criminal Court - <https://www.icc-cpi.int>.

damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated; 5/ attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives; 6/ killing or wounding a combatant who, having laid down his arms or having no longer means of defense, has surrendered at discretion; 7/ making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury; 8/ the transfer, directly or indirectly, by the occupying power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory; 9/ intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives; 10/ subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons; 11/ killing or wounding treacherously individuals belonging to the hostile nation or army; 12/ declaring that no quarter will be given; 13/ destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war; 14/ declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party; 15/ compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war; 16/ pillaging a town or place, even when taken by assault; 17/ employing poison or poisoned weapons; 18/ employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices; 19/ employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions; 20/ employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in Articles 121 and 123; 21/ committing

outrages upon personal dignity, in particular humiliating and degrading treatment; 22/ committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in Article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions; 23/ utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations; 24/ intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law; 25/ intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies as provided for under the Geneva Conventions; and finally 26/ conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities¹⁴.

Thus, the Rome Statute distinguishes (in six groups of regulations on such crimes) four categories of war crimes: first – grave breaches of the Geneva Conventions of 12 August 1949, second – other serious violations of the laws and customs applicable in international armed conflicts, third – serious violations of Article 3. common to the Geneva Conventions which applies to non-international armed conflicts, and the last fourth category – covers other serious violations of the laws and customs applicable in armed conflicts not of an international character¹⁵.

As we can see, it is not difficult to interpret the rules governing war crimes under the Rome Statute of the International Criminal Court. Besides there are so-called elements of crimes (Article 9. of the Rome Statute). Elements of crimes shall assist the Court in the interpretation of Article 6. (genocide), of Article 7. (crimes against humanity) and Article 8. (war crimes). Moreover – and unfortunately – war crimes have long history, that is why it is not difficult for lawyers to interpret such crimes. At least (unfortunately again) among them, the most common ones. Most criminal codes in the World define and penalize such crimes as international crimes and/or even as common crimes. For example, willful killing as a war crime or/and as a homicide, torture or inhuman treatment as a war crime or/and as

¹⁴ International Criminal Court - <https://www.icc-cpi.int>.

¹⁵ K. Doermann: War crimes under the Rome Statute of the International Criminal Court, with a special focus on the negotiations on the elements of crime (A. von Bogdandy and R. Wolfrum, eds.), Max Planck Yearbook of the United Nations Law, Volume 7, 2003, pp. 341-407.

a crime, the same other crimes as: biological experiments, serious injury to body or health; destruction and appropriation of property, etc.¹⁶

Of course, the International Criminal Court has a very important role in the modern World. Unfortunately, twenty years have passed since the Rome Statute of the International Criminal Court is in force (on July 1, 2022) – before the International Criminal Court there have thus been 31 cases, with some having more than one suspect. The Court (ICC judges) issued 38 arrest warrants, 21 people have been detained in the International Criminal Court detention center and have appeared before the Court. 14 people remain at large. Charges have been dropped against 5 people due to their deaths. The International Criminal Court (ICC judges) issued 10 convictions and 4 acquittals. Among above mentioned 31 cases – war crimes are on the top list (22 cases)¹⁷.

It should be stated here that the international law and the international humanitarian law shall rule globally only if there is such a real political will supported by real force. And, of course, it would be better for all mankind if it works always, because every armed conflict should be under specific laws and civilized rules. Otherwise, the war ceases to be an “extension” of international politics (as von Clausewitz once wrote) and just becomes a crime on behalf of a state. The International Criminal Court was established to prevent such paradox i.e., not only to prevent such crimes of states (war crimes) but also to prevent such “ways” of international politics. Let me not be pessimistic but realistic – if the International Criminal Court fails let’s forbid at least waging war “in a wicked and scoundrel way” – as great Polish medieval thinkers emphasized more than 600 years ago.

BIBLIOGRAPHY:

BURCZAK K., DĘBIŃSKI A., JOŃCA M., *Łacińskie sentencje i powiedzenia prawnicze*, Warszawa 2007.

DOERMANN K., *War crimes under the Rome Statute of the International Criminal Court, with a special focus on the negotiations on the elements of crime* (A. von Bogdandy and R. Wolfrum, eds.), Max Planck Yearbook of the United Nations Law, Volume 7, 2003.

GELEWSKI T. M., *Zbrodnie wojenne na morzu w drugiej wojnie światowej*, Gdańsk 1976.

International Committee of the Red Cross - <https://ihl-databases.icrc.org>

International Committee of the Red Cross - <https://www.icrc.org>

International Criminal Court - <https://www.icc-cpi.int>

¹⁶ J. Izydorczyk, P. Wiliński: *International Criminal Court – Międzynarodowy Trybunał Karny*, Kraków 2004.

¹⁷ International Criminal Court - <https://www.icc-cpi.int>.

IZYDORCZYK J., WILIŃSKI P., *International Criminal Court – Międzynarodowy Trybunał Karny*, Kraków 2004.

KRÓLIKOWSKI M., WILIŃSKI P., IZYDORCZYK J., *Podstawy prawa karnego międzynarodowego*, Warszawa 2008.

KRÓLIKOWSKI M., WILIŃSKI P., IZYDORCZYK J., ZNOJEK M., *Prawo karne międzynarodowe – wybór źródeł*, Warszawa 2010.

NOWAKOWSKA-MAŁUSECKA J., *Odpowiedzialność karna jednostek za zbrodnie popełnione w byłej Jugosławii i Rwandzie*, Katowice 2000.

PRZYJEMSKI St. M., *Prawo karne wojskowe*, Gdańsk 1999.

WIELGUS St., *Polska średniowieczna doktryna ius gentium*, Lublin 2001.