Auslegungsregeln des Völkerstrafrechts

1. allgemeine Regeln der Auslegung völkerrechtlicher Verträge (vgl. WVÜ)
   a) Wortlaut
   b) Kontext (Systematik)
   c) Ziel und Zweck des Vertrages ("rule of effectiveness")
   d) hilfsweise: Entstehungsgeschichte, travaux préparatoires

2. ggf. gewohnheitsrechtskonforme Auslegung

3. ggf. verbotskonforme Auslegung

4. ggf. menschenrechtskonforme Auslegung

5. spezifisch strafrechtliche Auslegungsregeln:
   a) Nullum crimen sine lege praevia
   b) Poenalia non sunt extendenda, Analogieverbot

Wiener Übereinkommen über das Recht der Verträge vom 23. 5. 1969

Section 3. INTERPRETATION OF TREATIES

Article 31
General rule of interpretation
1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
   (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
   (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
   (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
   (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
   (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32
Supplementary means of interpretation
Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable.

Article 33
Interpretation of treaties authenticated in two or more languages
1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.
3. The terms of the treaty are presumed to have the same meaning in each authentic text.
4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.
Auslegungsregeln des Rom-Statuts

1. Die Auslegung des Rom-Statuts richtet sich nach dem Wiener Übereinkommen über das Recht der Verträge sowie

2. nach den im Statut enthaltenen speziellen Auslegungsregeln:

   a) Art. 9(1) Rom-Statut: Berücksichtigung der “Elements of Crimes”

   1. Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8. They shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.

   b) Art. 10 Rom-Statut: keine Beeinträchtigung existierender oder sich entwickelnder Normen des Völkerrechts

   Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.

   c) Art. 21(2) Rom-Statut: kein *stare decisis*

   2. The Court may apply principles and rules of law as interpreted in its previous decisions.

   d) Art. 21(3) Rom-Statut: menschenrechtskonforme Auslegung

   3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status

   e) Art. 22–24 Rom-Statut: strafrechtspezifische Auslegungsregeln

   *Article 22*  
   *Nullum crimen sine lege*  
   1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.  
   2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.  
   3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.  

   *Article 23*  
   *Nulla poena sine lege*  
   A person convicted by the Court may be punished only in accordance with this Statute.  

   *Article 24*  
   *Non-retroactivity ratione personae*  
   1. No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.  
   2. In the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply.

3. Beilegung von Auslegungsstreitigkeiten, Art. 119(2) Rom-Statut:

   2. Any other dispute between two or more States Parties relating to the interpretation or application of this Statute which is not settled through negotiations within three months of their commencement shall be referred to the Assembly of States Parties. The Assembly may itself seek to settle the dispute or may make recommendations on further means of settlement of the dispute, including referral to the International Court of Justice in conformity with the Statute of that Court.
Auslegung im Völkerstrafrecht: Beispiel

Problem: Anwendbarkeit des ICTY-Statuts auf nicht-internationale (= interne) Konflikte?

<table>
<thead>
<tr>
<th>ICTY Statute</th>
<th>Geneva Convention I</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Article 2</strong></td>
<td><strong>Article 2</strong></td>
</tr>
<tr>
<td>Grave breaches of the Geneva Conventions of 1949</td>
<td>In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.</td>
</tr>
<tr>
<td>The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:</td>
<td>The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.</td>
</tr>
<tr>
<td>(a) wilful killing;</td>
<td>Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.</td>
</tr>
<tr>
<td>(b) torture or inhuman treatment, including biological experiments;</td>
<td></td>
</tr>
<tr>
<td>(c) wilfully causing great suffering or serious injury to body or health;</td>
<td></td>
</tr>
<tr>
<td>(d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;</td>
<td></td>
</tr>
<tr>
<td>(e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;</td>
<td></td>
</tr>
<tr>
<td>(f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;</td>
<td></td>
</tr>
<tr>
<td>(g) unlawful deportation or transfer or unlawful confinement of a civilian;</td>
<td></td>
</tr>
<tr>
<td>(h) taking civilians as hostages.</td>
<td></td>
</tr>
</tbody>
</table>

**Article 3**

Violations of the laws or customs of war

The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

| (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering; | |
| (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity; | |
| (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings; | |
| (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science; | |
| (e) plunder of public or private property. | |

(= "common Article 3")

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

| (1) 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, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. | |
| To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: | |
| (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; | |
| (b) taking of hostages; | |
| (c) outrages upon personal dignity, in particular humiliating and degrading treatment; | |
| (d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples. | |

| (2) The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. | |
| The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict. | |
B. Does The Statute Refer Only To International Armed Conflicts?

1. Literal Interpretation Of The Statute

71. On the face of it, some provisions of the Statute are unclear as to whether they apply to offences occurring in international armed conflicts only, or to those perpetrated in internal armed conflicts as well. Article 2 refers to “grave breaches” of the Geneva Conventions of 1949, which are widely understood to be committed only in international armed conflicts, so the reference in Article 2 would seem to suggest that the Article is limited to international armed conflicts. Article 3 also lacks any express reference to the nature of the underlying conflict required. A literal reading of this proviso standing alone may lead one to believe that it applies to both kinds of conflict. By contrast, Article 3 explicitly confers jurisdiction over crimes committed in either internal or international armed conflicts. An argument a contrario based on the absence of a similar provision in Article 3 might suggest that Article 3 applies only to one class of conflict rather than to both of them. In order better to ascertain the meaning and scope of these provisions, the Appeals Chamber will therefore consider the object and purpose behind the enactment of the Statute.

2. Teleological Interpretation Of The Statute

72. In adopting resolution 827, the Security Council established the International Tribunal with the stated purpose of bringing to justice persons responsible for serious violations of international humanitarian law in the former Yugoslavia, thereby deterring future violations and contributing to the re-establishment of peace and security in the region. The context in which the Security Council acted indicates that it intended to achieve this purpose without reference to whether the conflicts in the former Yugoslavia were internal or international.

As the members of the Security Council well knew, in 1993, when the Statute was drafted, the conflicts in the former Yugoslavia could have been characterized as both internal and international, or alternatively, as an internal conflict alongside an international one, or as an internal conflict that had become internationalized because of external support, or as an international conflict that had subsequently been replaced by one or more internal conflicts, or some combination thereof. The conflict in the former Yugoslavia had been rendered international by the involvement of the Croatian Army in Bosnia-Herzegovina and by the involvement of the Yugoslav National Army (“JNA”) in hostilities in Croatia, as well as in Bosnia-Herzegovina at least until its formal withdrawal on 19 May 1992. To the extent that the conflicts had been limited to clashes between Bosnian Government forces and Bosnian Serb rebel forces in Bosnia-Herzegovina, as well as between the Croatian Government and Croatian Serb rebel forces in Krajina (Croatia), they had been internal (unless direct involvement of the Federal Republic of Yugoslavia (Serbia-Montenegro) could be proven). It is notalbe that the parties to this case also agree that the conflicts in the former Yugoslavia since 1991 have had both internal and international aspects. (…) 73. The varying nature of the conflicts is evidenced by the agreements reached by various parties to abide by certain rules of humanitarian law. Reflecting the international aspects of the conflicts, on 27 November 1991 representatives of the Federal Republic of Yugoslavia, the Yugoslavia Peoples’ Army, the Republic of Croatia, and the Republic of Serbia entered into an agreement on the implementation of the Geneva Conventions of 1949 and the 1977 Additional Protocol I to those Conventions. (See Memorandum of Understanding, 27 November 1991.) Significantly, the parties refrained from making any mention of common Article 3 of the Geneva Conventions, concerning non-international armed conflicts.

By contrast, an agreement reached on 22 May 1992 between the various factions of the conflict within the Republic of Bosnia and Herzegovina reflects the internal aspects of the conflicts. The agreement was based on common Article 3 of the Geneva Conventions which, in addition to setting forth rules governing internal conflicts, provides in paragraph 3 that the parties to such conflicts may agree to bring into force provisions of the Geneva Conventions that are generally applicable only in international armed conflicts. In the Agreement, the representatives of Mr. Alija Izetbegovic (President of the Republic of Bosnia and Herzegovina and the Party of Democratic Action), Mr. Radovan Karadzic (President of the Serbian Democratic Party), and Mr. Milenko Beksic (President of the Croatian Democratic Community) committed the parties to abide by the substantive rules of internal armed conflict contained in common Article 3 and in addition agreed, on the strength of common Article 3, paragraph 3, to apply certain provisions of the Geneva Conventions concerning international conflicts. (Agreement No. 1, 22 May 1992, art. 2, paras. 1–6 after Agreement No. 1). Clearly, this Agreement shows that the parties concerned regarded the armed conflicts in which they were involved as internal but, in view of their magnitude, they agreed to extend to them the application of some provisions of the Geneva Conventions that are normally applicable in international armed conflicts only. The same position was implicitly taken by the International Committee of the Red Cross (“ICRC”) at whose invitation and under whose auspices the agreement was reached. In this connection it should be noted that, had the ICRC not believed that the conflicts governed by the agreement at issue were internal, it would have acted bluntly contrary to a common provision of the four Geneva Conventions (Article 6/6/6/7). This is a provision formally banning any agreement designed to restrict the application of the Geneva Conventions in case of international armed conflicts. (“No special agreement shall adversely affect the situation of [the protected persons] as defined by the present Convention, nor restrict the rights which it confers upon them.” (Geneva Convention I, art. 6; Geneva Convention II, art. 6; Geneva Convention III, art. 6; Geneva Convention IV, art. 7.) If the conflicts were, in fact, viewed as international, for the ICRC to accept that they would be governed only by common Article 3, plus the provisions contained in Article 2, paragraphs 1 to 6, of Agreement No. 1, would have constituted clear disregard of the aforementioned Geneva provisions. On account of the unanimously recognized authority, competence and impartiality of the ICRC, as well as its statutory mission to promote and supervise respect for international humanitarian law, it is inconceivable that, even if there were some doubt as to the nature of the conflict, the ICRC would promote and endorse an agreement contrary to a basic provision of the Geneva Conventions. The conclusion is therefore warranted that the ICRC regarded the conflicts governed by the agreement in question as internal.

Taken together, the agreements reached between the various parties to the conflict(s) in the former Yugoslavia bear out the proposition that, when the Security Council adopted the Statute of the International Tribunal in 1993, it did so with reference to situations that the parties themselves considered at different times and places as either internal or international armed conflicts, or as a mixed international-internal conflict. […] 76. That the Security Council purposely refrained from classifying the armed conflicts in the former Yugoslavia as either international or internal and, in particular, did not intend to bind the International Tribunal by a classification of the conflicts as international, is borne out by a reductio ad absurdum argument. If the Security Council had categorized the conflict as exclusively international and, in addition, had decided to bind the International Tribunal thereby, it would follow that the International Tribunal would have to consider the conflict between Bosnian Serbs and the central authorities of Bosnia-Herzegovina as international. Since it cannot be contended that the Bosnian Serbs constitute a State, arguably the classification just referred to would be based on the implicit assumption that the Bosnian Serbs are acting not as a rebellious entity but as organs or agents of another State, the Federal Republic of Yugoslavia (Serbia-Montenegro). As a consequence, serious infringements of international humanitarian law committed by the government army of Bosnia-Herzegovina against Bosnian Serbian civilians in their power would not be regarded as “grave breaches”, because such civilians, having the nationality of Bosnia-Herzegovina, would not be regarded as “protected persons” under Article 4, paragraph 1 of Geneva Convention IV. By contrast, atrocities committed by Bosnian Serbs against Bosnian civilians in their ICTY (Appeals Chamber), Prosecutor v. Tadić, Case No. IT-94-01, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, §§ 71 ff.
hands would be regarded as “grave breaches”, because such civil-
ians would be “protected persons” under the Convention, in that
the Bosnian Serbs would be acting as organs or agents of another
State, the Federal Republic of Yugoslavia (Serbia-Montenegro) of
which the Bosnians would not possess the nationality. This would
be, of course, an absurd outcome, in that it would place the Bos-
nian Serbs at a substantial legal disadvantage vis-à-vis the central
authorities of Bosnia-Herzegovina. This absurdity bears out the
fallacy of the argument advanced by the Prosecutor before the Ap-
peals Chamber.

77. On the basis of the foregoing, we conclude that the conflicts
in the former Yugoslavia have both internal and international as-
pects, that the members of the Security Council clearly had both
aspects of the conflicts in mind when they adopted the Statute of the
International Tribunal, and that they intended to empower the
International Tribunal to adjudicate violations of humanitarian
law that occurred in either context. To the extent possible under
existing international law, the Statute should therefore be con-
strued to give effect to that purpose.

78. […] Thus, the Security Council’s object in enacting the Stat-
ute – to prosecute and punish persons responsible for certain con-
demned acts being committed in a conflict understood to contain
both internal and international aspects – suggests that the Security
Council intended that, to the extent possible, the subject-matter
jurisdiction of the International Tribunal should extend to both
internal and international armed conflicts.

In light of this understanding of the Security Council’s purpose
in creating the International Tribunal, we turn below to discus-
sion of the Appellant’s specific arguments regarding the scope of the
jurisdiction of the International Tribunal under Articles 2, 3 and
5 of the Statute.

3. Logical And Systematic Interpretation Of The Statute
(a) Article 2

79. Article 2 of the Statute of the International Tribunal provides:
[…] By its explicit terms, and as confirmed in the Report of the Sec-
retary-General, this Article of the Statute is based on the Geneva
Conventions of 1949 and, more specifically, the provisions of those
Conventions relating to “grave breaches” of the Conventions. Each
of the four Geneva Conventions of 1949 contains a “grave breach-
es” provision, specifying particular breaches of the Convention for
which the High Contracting Parties have a duty to prosecute those
responsible. In other words, for these specific acts, the Conventions
create universal mandatory criminal jurisdiction among contract-
ing States. Although the language of the Conventions might appear
to be ambiguous and the question is open to some debate (…), it is
widely contended that the grave breaches provisions establish uni-
versal mandatory jurisdiction only with respect to those breaches of the
Conventions committed in international armed conflicts. Appellant argues that, as the grave breaches enforcement system
only applies to international armed conflicts, reference in Article 2 of
the Statute to the grave breaches provisions of the Geneva Con-
ventions limits the International Tribunal’s jurisdiction under that
Article to acts committed in the context of an international armed
conflict. The Trial Chamber has held that Article 2:

“[H]as been so drafted as to be self-contained rather than ref-
rential, save for the identification of the victims of enumer-
ated acts; that identification and that alone involves going to
the Conventions themselves for the definition of “persons or
property protected”. […]”

[T]he requirement of international conflict does not appear on
the face of Article 2. Certainly, nothing in the words of the
Article expressly require its existence; once one of the specified
acts is allegedly committed upon a protected person the power
of the International Tribunal to prosecute arises if the spatial
and temporal requirements of Article 1 are met. […]”

There is no ground for treating Article 2 as in effect importing into
the Statute the whole of the terms of the Conventions, including
the reference in common Article 2 of the Geneva Convention
[sic] to international conflicts. As stated, Article 2 of the Stat-
ute is on its face, self-contained, save in relation to the defi-
nition of protected persons and things.” (Decision at Trial, at paras. 49–51.)

80. With all due respect, the Trial Chamber’s reasoning is based on
a misconception of the grave breaches provisions and the extent of
their incorporation into the Statute of the International Tribunal.
The grave breaches system of the Geneva Conventions establishes a
twofold system: there is on the one hand an enumeration of offenc-
es that are regarded so serious as to constitute “grave breaches”; closely bound up with this enumeration a mandatory enforcement
mechanism is set up, based on the concept of a duty and a right of
all Contracting States to search for and try or extradite persons al-
legedly responsible for “grave breaches.” The international armed
conflict element generally attributed to the grave breaches provi-
sions of the Geneva Conventions is merely a function of the system
of universal mandatory jurisdiction that those provisions create.
The international armed conflict requirement was a necessary
limitation on the grave breaches system in light of the intrusion on
State sovereignty that such mandatory universal jurisdiction rep-
resents. State parties to the 1949 Geneva Conventions did not want
to give other States jurisdiction over serious violations of interna-
tional humanitarian law committed in their internal armed con-
licts – at least not the mandatory universal jurisdiction involved
in the grave breaches system.

82. The above interpretation is borne out by what could be con-
sidered as part of the preparatory works of the Statute of the In-
ternational Tribunal, namely the Report of the Secretary-General.
There, in introducing and explaining the meaning and purport of
Article 2 and having regard to the “grave breaches” system of the
Geneva Conventions, reference is made to “international armed
conflicts” (Report of the Secretary-General at para. 37).

83. We find that our interpretation of Article 2 is the only one war-
anted by the text of the Statute and the relevant provisions of the
Geneva Conventions, as well as by a logical construction of their
interplay as dictated by Article 2. However, we are aware that this
conclusion may appear not to be consonant with recent trends
of both State practice and the whole doctrine of human rights –
which, as pointed out below (see paras. 97–127), tend to blur in
many respects the traditional dichotomy between international
wars and civil strife. In this connection the Chamber notes with
satisfaction the statement in the amicus curiae brief submitted by
the Government of the United States, where it is contended that:

“the ‘grave breaches’ provisions of Article 2 of the Internation-
al Tribunal Statute apply to armed conflicts of a non-interna-
tional character as well as those of an international character.”
(U.S. Amicus Curiae Brief, at 35.)

This statement, unsupported by any authority, does not seem to
be warranted as to the interpretation of Article 2 of the Statute.
Nevertheless, seen from another viewpoint, there is no gainsaying
its significance: that statement articulates the legal views of one
of the permanent members of the Security Council on a delicate
legal issue; on this score it provides the first indication of a possi-
ble change in opinio juris of States. Were other States and interna-
tional bodies to come to share this view, a change in customary
law concerning the scope of the “grave breaches” system might gradu-
ally materialize. […]

84. Notwithstanding the foregoing, the Appeals Chamber must
conclude that, in the present state of development of the law, Arti-
cle 2 of the Statute only applies to offenses committed within the
context of international armed conflicts.

[…] 
(b) Article 3

 […]

(v) Conclusion

137. In the light of the intent of the Security Council and the logi-
cal and systematic interpretation of Article 3 as well as custom-
ary international law, the Appeals Chamber concludes that, under
Article 3, the International Tribunal has jurisdiction over the acts
alleged in the indictment, regardless of whether they occurred
within an internal or an international armed conflict. Thus, to
the extent that Appellant’s challenge to jurisdiction under Article 3 is
based on the nature of the underlying conflict, the motion must
be denied.