

LAW 561

INTERNATIONAL
CRIMINAL LAW
(Cassese) BOOK
SUMMARY

GOLTZ

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CHAPTER 1

UN Security Council is mandated **by Chapter VII of the UN Charter** to deal with threats to or breaches of, international peace and security.

States generally respond to breaches of reciprocal obligations more than breaches of community obligations.

Specific Responses

Normal response to atrocities: bring perpetrators to justice in court of the state of nationality of the alleged perpetrator.

The assumption by national courts of the task of dealing with atrocities perpetrated abroad.

Courts sometimes substitute themselves for national and territorial courts when these have failed to take proceedings against persons accused of serious international crimes.

Eichman, 1962

Supreme Court of Israel: The State of Israel can try Eichman under

-Principle of Universal Jurisdiction

-In the Capacity of a Guardian of International Law and an Agent for its enforcement

-Doesn't matter that Israel did not exist when the offenses were committed.

-The crimes were international in character

-Harmful effects so embracing and widespread as to shake the International Community to its foundations.

Now states have asserted jurisdiction to try crimes committed by foreigners against other foreigners.

Civil Suites have also been brought

United States have done this the most.

Making international treaties imposing upon contracting States the obligation to exercise jurisdiction

Treaties impose an obligation to exercise criminal jurisdiction

-Geneva Conventions of 1949 (Updates in 1977)

-1984 UN Convention against Torture

These provide that a state **MUST** exercise jurisdiction over crimes perpetrated anywhere when offender is in their territory. If they chose not to prosecute, hand offender off to any state concerned.

The UN Torture Convention – Used in Pinochet: House of Lords decides they have jurisdiction over torture committed elsewhere and can extradite him to Spain.

The Establishment of Truth and Reconciliation Commissions

-Usually follow the collapse of some oppressive regime. (Argentina, Bolivia, Chile, etc.)

- i) Gather evidence about gross violations
- ii) Investigate general causes of violations
- iii) Compile public reports

Example: South African commission of 1995-98. This also had quasi-judicial powers, could grant amnesty to perpetrators and recommend persecution, had power of sub-poena and to question witnesses.

Theoretically these commissions are supposed to bring about reconciliation and whiskers on kitten, but this doesn't work in reality.

Establishment of International Criminal Tribunals

1993: ICTY (Yugoslavia)

1994: ICTR (Rwanda)

1998: ICC statute adopted in Rome

2002: UN and Sierra Leone enter into agreement to establish a special court

The Promotion of Extraterritorial Jurisdiction

States tend to view human rights obligations as applying strictly within their own territory. International bodies tend to interpret these obligations as extraterritorial. States that are bound by international obligations concerning human rights are obliged to respect those obligations not only when State officials act on the State's own territory, but also when they take actions abroad.

Lozidou vs. Turkey: A State can be held responsible for actions committed by its officials abroad. The main question was whether Turkey had effective control of armed forces stationed outside its national territory.

CHAPTER 2 – FUNDAMENTALS OF INTERNATIONAL CRIMINAL LAW

2.1 THE NOTION OF INTERNATIONAL CRIMINAL LAW

Two limbs of international criminal law:

1. Substantive international law –

- Set of rules indicating WHAT ACTS AMOUNT TO INTERNATIONAL CRIMES.
- The subjective elements required for such acts to be considered prohibited.
- Possible circumstances under which persons accused may not be held criminally liable, and
- On what conditions States MAY or MUST, under international rules, prosecute or bring to trial persons accused of one of those crimes.

2. Procedural criminal law –

- The set of rules regulating international PROCEEDINGS.

2.2. GENERAL FEATURES OF INTERNATIONAL CRIMINAL LAW

Unique features of ICL:

1. It is a relatively new branch of international law.
2. ICL is still a very rudimentary branch of law. Three main features of its formation stand out:
 - a) For a long time, treaties and customary rules were confined to PROHIBITING certain acts, without adding punishment.

- b) When IL criminalized some acts (war crimes, crimes against humanity, etc.), NATIONAL COURTS had the task to prosecute and punish.
 - c) When international criminal courts were created, the crimes were not enumerated as in a criminal code, therefore, do not have a general reach, only germane to court's jurisdiction.
3. International criminal law is a hybrid branch of law: "it is a public international law impregnated with notions, principles, and legal constructs derived from national criminal law and human rights law" (unique to ICL).
 4. ICL has twofold relationship with general body of public international law:
 - a) Mutual subsidiarity or support – when a crime is committed by individual not acting in a private category, dual responsibility may follow: criminal liability of individual & State responsibility
 - b) Conflicting philosophies underline each area of law:
 - i. ICL aims to protect society against "most harmful transgressions of legal standards/behaviour perpetrated by individuals".
 - ii. Public international law pursues the purpose of reconciling the conflicting interests and concerns of sovereign states.
- The need for detailed, clear and unambiguous legal regulation is stronger in the ICL, where fundamental rights of suspects/accused persons are at stake.

2.3 THE NOTION OF INTERNATIONAL CRIMES

International crimes are breaches of international rules that entail the personal criminal liability of the INDIVIDUALS concerned (as opposed to responsibility of the state).

International crimes may be held cumulatively to embrace:

1. Violations of international **customary** rules.
2. Rules intended to protect **values** considered important by the whole international community, thus, bind all States and individuals (these values are laid down in international instruments, e.g. 1948 Universal Declaration of Human Rights).
3. There is a universal interest in repressing these crimes, States may in principle both prosecute and punish.
4. If perp has acted in official capacity, the State on whose behalf he has done act is barred from claiming immunity (unless State official belongs to specific category – head of State, etc.)

International crimes include:

1. War crimes
2. Crimes against humanity
3. Genocide
4. Torture

Does **NOT** include

- Piracy
- Illicit drug trafficking (not customary law, however, provided for in international treaties)

- Apartheid (has not reached status of customary law crime).

2.4 SOURCES OF INTERNATIONAL CRIMINAL LAW

- Each national legal system has its own mechanism for implementing international rules. The way they apply this law varies. Treaty rules may trump, or be trumped by national laws.
- Since ICL is a branch of public international law, the sources of law from which the relevant rules are derived:
 1. Are those proper to international law
 2. Must be resorted to in the hierarchical order dictated by international law.
 1. Hierarchical order is as follows (codified in Article 21 of ICC Statute):
 - i) Treaty rules laid down in such international instruments as **binding resolutions of the UN Security Council**.
 - ii) However, when these rules do not contain provisions giving court/tribunal jurisdiction, you must resort to **customary law or treaties explicitly or implicitly referred to in the rule**.
 - iii) When (ii) contains gaps, apply **general principles of ICL**.
 - iv) When (iii) fails, resort to **general principles of criminal law common to most nations**.

Let's consider these four sources in detail!

2.4.1. Statutes of Courts and Tribunals

Chief among texts deriving from the Statutes of courts and tribunals are:

- 1945 London Agreement - out substantive and procedural law of the IMT of Nuremberg
- 1998 Statute of the ICC – lays down both crimes subject to jurisdiction of the Court and some general principles of ICL, and sets forth main elements of the proceedings before the court.

Others:

- 1993 UN Security Council adoption of ICTY Statute
- 1994 UN SC ICTR Statute

2.4.2 Other Treaties

- Often some provisions of the Statutes of courts and tribunes refer, if only implicitly, to international treaties.
 - Example: Article 2 of the ICTY Statute confers on the Tribunal jurisdiction over grave breaches of the Geneva Conventions of 1949.
- International treaties, by definition, are only binding upon the contracting States. However, they may be evidence of the crystallization of customary rules.
- **Nullum crimen** – an international court only has jurisdiction over categories of crimes conferred upon it.
- The rules for *interpreting* treaties are laid down in Article 31-3 of the 1969 Vienna Convention on the Law of Treaties, which is declaratory of customary international rules on the construction of both treaties, and, arguably, other written rules.

2.4.3 Customary Law

- Written rules on ICL are not in abundance, therefore, often have to rely upon customary rules or general principles to clarify the content of treaty provisions or to fill gaps.
- Customary law, like *nullum crimen* principle, a court/tribunal can not apply a customary rule criminalizing conduct for which it has no jurisdiction.
- Both customary rules and principles can be drawn/inferred from case law, which emanates mostly from national courts.
- Examples where case law considered to established whether a customary rule had evolved on a specific matter:
 - Furundzija (ICTY)
 - Kupreskic and others (ICTY)
 - Tadic (ICTY)
- In some cases, courts do not consider case law to determine whether something has crystallized into international customary rule. Instead, they use case law as a set of precedents that could be of assistance in establishing the applicable law.

2.4.4 General Principles of International Criminal Law and General Principles of International Law

General principles of ILC: principles specific to criminal law (eg principles of legality and specificity, presumption of innocence, etc.).

- Application of these principles results from their gradual over time shift from national legal systems on to the international order. They are now firmly embedded in the international legal system.

General principles of international law: principles inherent in the international legal system.

- Their identification is not an in-depth study of all major legal systems worldwide, instead, require a generalization and induction from the main features of the international legal order.

2.4.5 General Principles of Criminal Law Recognized By the Community of Nations

- Only go to this source if all other sources (treaties, custom, general principles of international law, rules produced through secondary source) are exhausted. It is here that the search for general principles shared by the major legal systems of the community of nations is initiated.
- A principle of law exists under this class if it is shared by common law, civil law, the Islamic world, and some Asian countries.
- In Furundzija (ICTY), it is noted that where all else fails, reliance upon national legislation is justified, subject to the following conditions:
 - i) Must refer to more than one national legal system (unless indicated differently by an international rule). Must draw upon all major legal systems of world.
 - ii) Account must be taken to differences of international criminal proceedings when utilizing national law notions.
- In some cases the ICTY found that there existed general principles common to the major legal systems of the world, and applied them! (Erdemovic – however, here, Court failed to refer to the national laws it used so does not carry as much weight as it could).
- However, the ICTY has more often than not ruled out the existence of a general principle of

law recognized by all nations.

2.4.6 Regulations and Other Rules of International Law

- International proceedings are normally governed by “Rules of procedure and evidence” that may be adopted by the international Court itself. The adoption of such Rules is thus provided for in the Court’s Statute. Passing these rules of procedure amounts to “tertiary legislation”.
- This set of rules must not conflict either with the primary (or secondary) legislation governing the same matter (Statute of the ICTY, ICTR and ICC) or with rules and principles in customary law.
- Principles of interpretation: should be upheld in international law and codified in the Convention on the Law of Treaties.

2.4.7 The Role of Judicial Decisions and the Opinion of Scholars

- Judicial decisions, per se, do not constitute a source of international criminal law.
- However, given characteristics of ICL, they may prove of crucial importance for (a) ascertaining whether a customary rule has evolved, and (b) a means for establishing the most appropriate interpretation to be placed on a treaty rule.
- Aleksovski (Appeal) the ICTY Appeals Chamber held it could depart from a previous decision by same court if it had “cogent reasons for so doing”. This seems that a decision is merely *persuasive authority* for another Appeals Chamber. HOWEVER, a decision by the Appeals Chamber *in the very same case* is binding on the Trial Chamber (not matter of precedent, but of the hierarchy of power)
- Legal literature, although carries less weight than case law, may significantly contribute to international rules.

2.5. THE HISTORICAL EVOLUTION OF INTERNATIONAL CRIMES

Pre-World War II

- Traditionally, individuals subject to the exclusive jurisdiction of the State where they live. Thus, international rule violations were prosecuted and punished by the State where ACT WAS PERFORMED (doctrine of territorial jurisdiction).
- If the state where act performed did not prosecute, the State of which the victim had nationality could punish.
- State officials held immunity abroad.
- Exceptions:
 - Piracy
 - War crimes (through (i) codification of customary law of warfare through the Lieber Code in 1863 (private level) and the Hague codification in 1899-1907 (state level; and (ii) there were important trials held at the end of the American civil war)
- War crimes entailed that:
 - (i) Individuals acting as State officials (chiefly low-ranking servicemen) could be brought to trial for violations of the laws of warfare; and
 - (ii) They could be punished by either their own state or the enemy.

- For many years it was primarily the adversary who carried out the prosecution and punishment on basis of the principle of “passive nationality”.
- Since WWI, prosecution was also effected by allies on basis of either principle of territoriality or of passive nationality. For obvious reasons, while possible through the principle of ‘active nationality’, States rarely prosecuted their own nationals.

Nuremberg

- The creation of the IMT at Nuremberg marked a crucial turning point:
 - (i) Two new crimes were created: crimes against peace and crimes against humanity
 - (ii) Senior State officials, until 1945, had never been held personally responsible for their wrongdoings.
- For the first time the basic principle was proclaimed that, faced with the alternative of complying with either national legal commands or international standards, State officials and individuals must opt for the later.
- Convention on Genocide, 1948
- 1949 Geneva Conventions – laid down principle of universality of jurisdiction
 - Two additional Protocols, 1977
 - Convention against Torture, 1984

ICTY

- ICTY Appeals Chamber held in Tadic, the notion of war crimes was gradually extended to serious violations of international humanitarian rules governing *internal* armed conflict.

CHAPTER 3 WAR CRIMES

Serious violations of customary or treaty rules belonging to the corpus of the international humanitarian law of armed conflict.

ICC Article 8(2): War crimes may be committed in the course of either international or internal armed conflict.

War crimes violate the law of the Hague or the Law of Geneva.

Hague Convention of 1899 and 1907 on International Warfare:

Law of Geneva: Four Conventions of 1949 and the

Additional Protocols of 1977: updates Hague rules on means and methods of conflict

*War crimes can be perpetrated by members of the military or civilians against enemy civilians or military members. **Crimes committed by members of the military against other members of the same army are not covered.***

Offenses committed by civilians against other civilians are only war crimes if there is a link between the offense and the conflict.

For a serious violation of international humanitarian law to become a war crime, it must be criminalized

Offense and Conflict Link

A link needs to exist between the offense and a conflict.

- ICTY and ICTR restate the proposition
- Applies to crimes committed by civilians

Establishing Violation

- Violation must be criminalized

IMT at Nuremberg:

- Does not matter if the rules of conflict fail to provide for courts
- Military Courts or Criminal Courts have adjudicated breaches of International Humanitarian Law.

Not all breaches of international law are war crimes

- Violation may be a war crime by international or national courts
- A Breach is termed a war crime by the statute of an international tribunal

When case law and tribunals are silent, examine:

- military manuals
- national legislation of states belonging to major legal systems of the world
- general principles of criminal justice common to nations of the world
- legislation of the state to which accused belongs, or territory where crime was committed.

ICTY Tadic: War Crimes can happen in internal conflicts, from the point of view of substantive justice and equity, and violations of laws of the states involved.

Objective Elements of a Crime

ICC Article 8 lists some crimes, but it is not intended to codify

Nullum Crimen Sine Lege is upheld only in a limited way

Classes of War Crimes

- i) Committed in international armed conflicts
- ii) Committed in internal armed conflicts

Both Include:

- i) Crimes committed against persons not taking part or no longer taking part in armed hostilities (Wounded, civilians, etc are protected by the 1949 Geneva Conventions, the First Additional Protocol) Grave Breaches are covered by universal jurisdiction and defined in Article 50, 51, 130, 147 of first, second, third and fourth protocol and Article 85 of the Additional Protocol
Internal Conflicts: ICTR Article 4
- ii) Crimes against enemy combatants or civilians committed by resorting to prohibited methods of warfare.
- iii) Crimes against enemy combatants or civilians committed by resorting to prohibited means of warfare. **Convention of Prohibition or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to be Excessively Injurious or Have Indiscriminate Effects – Protocol IV**
- iv) Crimes against specially protected persons or objects (Red Cross, Gay and Lesbian Alliance, etc.)
- v) Crimes consisting of improperly using protected signs and emblems

Subjective Element of the Crime

Mens Rea

Third Geneva Convention of 1949 Article 130: “willfully”

Fourth Geneva Convention of 1949 Article 147: “intentionally”

Provisions require intent or at least recklessness

Knowledge: predictability of the likely consequence of action

Culpable negligence is sufficient

Commanders are responsible by war crimes he should have known are being committed by his subordinates.

ICC

ICC Article 8(2): “Within the established framework of international law”

This means that for things not directly set out by the ICC Statute, it will be necessary to establish whether:

- i) they considered as breaches of international humanitarian law under general international law
- ii) they are considered war crimes under customary international law

This gives States greater freedom. Possibly allows transfer of population.

Weapons that are:

- i) cause superfluous injury or unnecessary suffering
- ii) inherently indiscriminate

These weapons are not banned per se and therefore are not criminal under ICC

ICC Article 8 makes a distinction between international and internal conflict. This is a somewhat retrograde notion. Internal conflicts in the statute must be protracted.

Use of prohibited weapons in internal conflicts is not regarded as a crime

ICTY said bans on weapons apply to internal conflicts as well

ICC problems:

- Allowance has been made for superior orders to relieve subordinates of responsibility
- Article 124 allows signatories to declare the Court's jurisdiction over war crimes committed by their nationals or on their territory will not become operative for 7 years.

CHAPTER 4 – CRIMES AGAINST HUMANITY

4.1 THE NOTION

Crimes against humanity is a category of crimes under general IL that covers actions that share the following set of common features:

1. They are particularly odious offences (constitute serious attack on human dignity or grave humiliation/degradation).
2. They are not isolated or sporadic events (either part of a governmental policy or of a widespread or systematic practice).
3. Prohibited both in times of war and times of peace.
4. The victims of the crime are civilians under the Statute of the ICTY, ICTR, ICC.
However, in customary IL (but not statute) they can be enemy combatants.

Potpourri of Information:

- Systematic nature of the crimes (2)→ case law has shown this is must be major feature of the crimes against humanity (*Albrecht* – page 65).
- When the atrocities are part of a government policy, the perpetrators do not have to identify themselves with that policy (*Enigster* – a Jew imprisoned in concentration camp held liable for his crimes against his fellow criminals).
- Must be part of a practice in order for crime to be considered crime against humanity – either one person doing many things, or many people doing one thing!

4.2 THE ORIGIN OF THE NOTION

- 1915 - Notion of CAH first seen, regarding the mass killings of Armenians in the Ottoman Empire.
- 1945 – The London Agreement embodying the Charter of the IMT included provision defining “crimes against humanity” (page 69). Article 6(c) required, for CAH to come under jurisdiction of the IMP that they be perpetrated “in execution of or in connection with” war crimes or crimes against peace.
 - The IMT set out view that “the maxim *nullum crimen sine lege*... is in general a principle of justice” – one can be punished for act occurring BEFORE the creation of the law, when it would be “unjust” for such wrongs to be “allowed to go unpunished”.

4.3 THE OBJECTIVE ELEMENT OF THE CRIME

Current offences under crimes against humanity:

1. Murder
2. Extermination
 - *Rutaganda* – ICTR held the requisite offences as follows: (i) accused or his subordinate participated in the killing of certain named or described people; (ii) the act or omission was unlawful and intentional; (iii) must be part of widespread or systematic attack; and (iv) attack must be against the civilian population. However, this is unsatisfactory definition.
 - *Krstic* – the ICTY offered a better definition: “for the crime of extermination to be established, in addition to the general requirements for a CAH, there must be evidence that a particular pop. was targeted and that its members were killed or otherwise subjected to conditions of life calculated to bring about the destruction of a numerically significant part of the pop.”
 - Some argue that extermination for the purpose of spreading terror should be included in this class of crimes.
3. Enslavement
 - *Milch, Pohl and others, Kunarak*
 - ICC Statute – Art. 7(2)(c) defines enslavement as ‘the exercise of any or all powers attaching to the right of ownership over a person and includes the exercise of such power in course of trafficking in persons, in particular women and children’.
 - *Kunarac and others* lays out elements that clarify this definition (page 75)
4. Deportation or forcible transfer of population
 - ICC Statute – Art. 7(2)(d)
 - *Krstic*
5. Imprisonment
 - Defined by the ICTY in *Kordic and Cerkez*: “arbitrary imprisonment, the deprivation of liberty of the individual w/o due process of law, as part of a widespread or systematic attack directed against a civilian population”.
6. Torture
 - ICC Statute – Art. 7(2)(e)
 - ICTY *Furundzija* – crime committed in an armed conflict must include the following

- elements: (i) inflicting of severe pain/suffering, (ii) must be intentional, (iii) aim at recovering information, etc., (iv) must be linked to an armed conflict, (v) at least one person must be public official.
- ICTY *Kunarac and others* – broadened this definition, saying the presence of a state official not necessary (shared in view in *Kvočka and others*)
7. Sexual violence
 - Includes: rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and any other form of sexual violence of comparable gravity. Art. 7(2)(f) of the ICC Statute.
 8. Persecution
 - ICC Statute – Art. 7(2)(g)
 9. Enforced disappearance of persons
 1. IC Statute - Art. 7(2)(i)
 10. Other inhumane acts of a similar character or gravity.
 - ICC Statute – Art. 7(1)(k) (restated here from Article 6(c) of the Nuremberg Statute and *Ternek*, 1951)

4.4 THE SUBJECTIVE ELEMENT OF THE CRIME

Courts have insisted on three points:

1. Intent is normally required.
2. Not necessary for accused to anticipate specific consequences of his misconduct; sufficient for him to be aware of the risk
3. Agent must understand the link between his misconduct and a policy or systematic practice. At least needs to be aware of the risk that his act is part of the attack (*Blaskic*). However, does not need to know the details of the attack (*Kunarac and others*)
 - Courts do not require, as part of the *mens rea*, that the perp should have a racist or inhuman frame of mind. EXCEPTION: Persecution – a third mental element required: a persecutory or discriminatory animus (“special criminal intent”). However, requisite *mens rea* is not (i) only criminal intent, but also (ii) knowledge that the offences are part of a systematic policy.
 - Subjective element, in some cases, was culpable negligence. In some cases mere negligence not sufficient.

4.5 THE POSSIBLE AUTHORS OF THE CRIME

Authors: State organs OR individuals acting in unison with a general state policy.

NOT authors: State officials acting in private capacity NOT in unison with general state policy.

- Normally, state organs perpetrate crimes against humanity.
- Case law indicates that CAH may be committing by individuals acting in their private capacity, provided they are acting in unison with a general state policy.
- PROBLEM: Whether CAH may be committed by State officials acting in a private capacity – appears that for them to be considered CAH, require explicit or implicit approval by State or authorities (*Weller* – a member of the SS beat Jews when not working, not considered CAH)

4.6 THE POSSIBLE VICTIMS OF THE CRIME

Article 6(c) of the London Agreement clearly prohibits against:

- (i) inhumane acts such as murder, etc. of any group of civilians, regardless of their nationality, and
- (ii) persecution on political, racial or religious grounds.

- Customary international law of CAH is based largely on Article 6(c)
- *Actus Reus* is different for these two classes of crimes.
- Below, will discuss separately each of the two classes of CAH

4.6.1 ‘Murder-Type’ Crimes Against Humanity

- Embrace crimes perpetrated against any civilian population.
- After WWII, courts placed liberal interpretation on term ‘civilians’ (sometimes encompassed military personnel). Continued in the ICTY – Art. 5 (*Mrksic and others* – CAH could be committed even when victims once bore arms; *Kunarac and others* – in case of doubt as to whether person was civilian, they shall be considered a civilian).

4.6.2 ‘Persecution-Type’ Crimes Against Humanity

- Can include military, as is apparent from Article 6(c) (*Pilz*)

4.6.3 The Gradual Broadening of the Category of Victims

The emphasis on civilians as the exclusive class of victims of CAH has dwindled. Reasons:

- Recall: CAH may be committed in times of war AND in times of peace. Therefore, it does not make sense to require that such crimes be committed against civilians alone! When there is no war, military forces are not protected by international humanitarian law, and, therefore would be protection-less.
- Further, broadening the category shows a trend towards expanding scope of protection of the basic values of human dignity
- Some categories of combatants, if not included, would find themselves “in twilight zone”, therefore, unprotected.

4.7 CUSTOMARY INTERNATIONAL LAW AND ARTICLE 7 OF THE ICC STATUTE

Does Article 7 of the ICC statute depart from or restate customary international law?

- Answer: Article 7 elaborates on and clarifies CIL. In some respects, it is narrow. In some, broader. (page 91)

CHAPTER 5 GENOCIDE

The Intentional killing, destruction of extermination of groups or members of a group.

At first was a subcategory of crimes against humanity.

IMT Article 6 (c) did not set it out as a separate crime, but the crimes clearly encompassed genocide.

IMT and Tokyo don't explicitly mention genocide, refer to crimes of persecution.

UN Genocide Convention 1948

- i) sets out definition of the crime
- ii) punishes other acts connected (conspiracy, complicity)
- iii) prohibits genocide in both times war and peace
- iv) criminal responsibility of the perpetrator and responsibility of the state

Flaws of the Convention:

- i) Does not cover cultural genocide
- ii) Four classes of protected groups are not defined and no criteria provided
- iii) Ineffective enforcement mechanism-courts of the state where it occurs

Enforcement level generally a failure. Only one occasion pronounced as genocide by the UN.

National Courts also pursue genocide: **Eichmann**.

Substantive parts of the provisions of the Convention have gradually turned into customary international law. This has been explicitly stated by the **ICTR** and the **ICTY**.

Objective Element of the Crime

Article 4 of the UN Genocide Convention

- i) Killing members of a national, ethnical, racial or a religious group
- ii) Causing serious bodily or mental harm to members of the group
- iii) Deliberately inflicting on the group conditions designed to bring about its destruction in whole or in part
- iv) Imposing measures intended to prevent birth within the group
- v) Forcibly transferring children of the group to another group

-Does not appear to cover ethnic cleansing. Courts are divided.

German Court in Jorgic: systematic expulsion can be a method of destruction and is therefore an indication though not the sole substantiation of an intent to destroy.
ICTY agrees.

Killing five or ten members of a group with the intention of destroying whole or a part of it is genocide, even if it's an isolated act.

Difficult to identify groups. **ICTY** and **ICTY** case law helps to clarify this.

ICTR Akayesu

- genocide is the gravest of international crimes
- group refers to stable groups, not challengeable by its members who belong automatically, by birth in a continuous and often irremediable manner.

Hutus vs. Tutsis

Court had to establish whether

- those persons were in fact treated as belonging to one of those protected groups
- they considered themselves as belonging to one of such groups.

Self-Identification + Identification by Others

ICTY shares the approach

ICTR Akayesu:

- Genocide may happen even if only one member of group is harmed.
- Confirms rules in UN Genocide Convention

Subjective Element of the Crime

UN Genocide Convention Article II Paragraph 1: Intent to destroy, whole or in part, a national, ethnical, racial or religious group.

German Federal Court in Jorgic: “Do not see the victim as a human being but only as a member of the persecuted group”

Intent is aggravated criminal intention, in addition to criminal intent accompanying the offense (killing someone) Recklessness and Gross Negligence as excluded.

ICTR Akayesu: Special intention: specific intention, required as a constitutive element of the crime which demands that the perpetrator clearly seeks to produce the act charged.

Intent can be inferred from presumptions of fact.

ICTY Krstic: 7,000 Muslim Bosnian men killed. Constitutes an intent to destroy in part the Bosnian Muslim group within the meaning of Article 4 of the Genocide Convention and therefore is genocide.

An enterprise to attach only the cultural or sociological characteristic of human group is not genocide. So blow up statues all you like.

Genocide and Crimes against Humanity

After the **UN Genocide Convention of 1948** Genocide has become a category of crimes per se.

Both categories share the following elements

- i) encompass very serious offenses
- ii) do not constitute isolated events, but usually a part of a larger context
- iii) need not be perpetrated by the state, but usually done so, or with complicity of the state

Subjective and Objective Elements differ

-May overlap objectively somewhat, but crimes against humanity cover things like imprisonment or torture.

MR does not overlap at all

Crimes Against Humanity: intent to commit underlying offense plus knowledge of the widespread or systematic practice constituting the general context the offense

Genocide: special intent to destroy, whole or in part a particular group, in addition to the intent to commit the underlying offense.

ICC Statute Article 6

Reproduces Article II of the **UN Genocide Convention** word for word.

Article III on responsibility other than perpetration (conspiracy, complicity, incitement, attempt) have not been taken up.

Conspiracy did not get support of civil law countries.

Some were in other sections:

Incitement: **Article 25(3)(e)**

Attempt: **Article 25(3)(f)**

Complicity: **Article 25(3) (c) and (d)**

Customary international law criminalizes conspiracy to commit genocide, Article 6 does not.

Customary International Rule, as codified in Article 6 does not require that victims of genocide are numerous. But it can be clearly inferred that genocide cannot be held to occur when there is only one victim.

ICC Article 28: Command responsibility – May contemplate a lower level of MR for genocide. Commanders may be liable for genocide committed by subordinates even without knowledge of the crime.

Possible objection: only applies when the superior known genocide is about to happen or is

happening and does nothing to prevent it. May be a co-perpetrator or aider and abettor. Could also be guilty of intentional, reckless or negligent breach of his supervisory duties. Therefore not responsible for genocide with a lower MR threshold.

CHAPTER 6 – OTHER INTERNATIONAL CRIMES (AGGRESSION, TORTURE, AND TERRORISM)

6.1 INTRODUCTION

- Two main features of aggression, torture, and terrorism:
 1. Are not normally regarded as being included in the so-called ‘core crimes’ (war crimes, CAH, genocide).
 2. They do not fall under the jurisdiction of any international criminal tribunal/court (no international jurisdiction).
 - i. Aggression: excluded because issue is too politically charged to be defined in sufficiently clear criminal provisions.
 - ii. Torture: has been considered more in need of attention
 - iii. Terrorism: imprecisely defined at international level, must be prosecuted at national level.

6.2 AGGRESSION: THE NOTION

- First regarded as an international crime in 1945 by the IMT – Article 6(a). War of aggression merely one of the subcategories of broad category of “crimes against peace” (111)
- Since 1946, there have been no national or international trials for alleged crimes of aggression.
- In negotiations on the Statute of the ICC, no agreement was reached re: definition of aggression. Main bone of contention: the role to be reserved by the UN SC.
- This is an area where States want to retain a broad margin of discretion.

6.3 OBJECTIVE AND SUBJECTIVE ELEMENTS OF AGGRESSION

- Customary international law appears to consider as international crimes: the planning, organizing, preparing, or participating in the first use of armed force by a state in contravention of the UN Charter, provided the acts of aggression have large-scale and serious consequences.
- NOT international crime (although may constitute international wrongful acts):
 - Engaging in armed conflict in violation of international treaties proscribing resort to armed violence
 - Participating in a conspiracy to wage aggressive war.
- 1974 London Agreement definition of aggression (see page 114)
 - Everything in above definition refer to *traditional* forms of aggression.
 - There is still no agreement on possible new forms of aggression.

What does the crime of aggression require?

- **Criminal intent (dolus)** – perpetrator must have INTENDED to participate and was AWARE of the scope, significance, and consequences of the action, or AT LEAST KNOWINGLY took the risk of bringing about those consequences (recklessness) (Krauch v. Others – 115)

6.4 THE POSSIBLE IMPACT ON JUDICIAL FINDINGS OF THE APPRAISAL OF AGGRESSION BY INTERNATIONAL POLITICAL BODIES (117 – read if you want)

6.5 TORTURE: GENERAL

- Torture is **prohibited** when: part of a widespread or systematic practice, thus amounting to a crime against humanity and is **proscribed** when: it is done as a single act perpetrated in time of armed conflict, thus amounting to a war crime.
- In time of war, a serviceman can be held criminally liable for a war crime if he engages in torture against enemy military/civilian.
- A private individual can be liable for a war crime if they commit torture against (i) a member of the enemy army, or (ii) a protected person who has the nationality of the enemy or in control of the adversary. Further, torture must be linked to the armed classes. State official does not have to be involved (as stated incorrectly in *Sokolovic*).

Three categories of torture:

To amount to a **crime against humanity**, torture must:

- Be part of a widespread or systematic practice
- Accused must know his acts are part of this widespread practice.

Torture as a **war crime**:

- Have “passive involvement” of the authorities.

Torture as a **discreet crime** (not a discrete crime or war crime):

- May be perpetrated either in time of war or peace (*Kunarac and others*)
- Article 1.1 of the UN Torture Convention, 1984 – “pain or suffering” is necessary ingredient, must be inflicted “by or with consent or acquiescence of public official acting in official capacity”.

- The three categories of torture share one fundamental element: it is not required that the purpose of torture used to extract confession. Instead, aim could be (*Furundzija*):

1. To obtain information or confession;
2. To punish, intimate, or humiliate a person;
3. To coerce the victim or third party do do/omit something; or
4. to discriminate against the victim or third party.

6.6 THE EMERGENCE OF A CUSTOMARY RULE ON TORTURE

A *general rule* has evolved in the international community,

- i. Prohibiting individuals from perpetrating torture, regardless of whether it is committed on a large scale, and
- ii. Authorizing all states to prosecute and punish the alleged perpetrators, regardless of where acts took place and nationality of the perpetrator

or victim.

6.7 OBJECTIVE AND SUBJECTIVE ELEMENTS OF TORTURE

- ICTY held in *Delalic and others, Furundzija, and Kunarac and others* that “there is now general acceptance of main elements contained in the definition:
- Objective elements:
 1. Any act by which severe pain or suffering, whether physical or mental, is inflicted on a person.
 2. Such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.
 3. Such pain or suffering does not arise ‘only from’ nor is it ‘inherent in or incidental to lawful sanctions’

Requirements for *mens rea*:

- Noted in Article 1 of the 1984 Convention, and has now become part of customary law, provides that the inflicting must be ‘intentional’. Thus, criminal *intent* is always required. Less stringent subjective criteria (recklessness, culpable negligence) not sufficient.

6.8 TERRORISM

6.8.1 A Current Misconception: The Alleged Lack of a Generally Agreed Definition of Terrorism

- States have never agreed on a definition.
- Resolution passed by UN GA in 1994 stated that: “criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them”

Three main elements that seem to be required for crime of international terrorism:

1. Act must constitute a criminal offence under most national legal systems
 2. Must be aimed at spreading terror
 3. Must be politically, religiously, or ideologically motivated (not motivated by private ends)
- ICC Statute did not include terrorism, mainly due to lack of agreed definition.

6.9 THE DIVERSE FORMS OF TERRORISM

6.9.1 The Main Features of Terrorism

- Terrorism has a ‘chameleon-like’ character – may fall under various categories of crime.
- Of these categories, they share general features:
 - ‘depersonalization of the victim’
 - must show nexus with an international or international armed conflict, or must acquire such a magnitude as to exhibit hallmarks of a crime against humanity, or must involve State authorities and exhibit trans-national dimension.

- Criminal, whether perpetrated by private individuals or state officials.

6.9.2 Terrorism as a War Crime

- Article 33(1) of Geneva Convention 1949 – prohibits acts of terrorism against civilians. Thus, under international humanitarian law, terrorism prohibited and criminalized so long as directed against civilians.
- **Actus Reus** – attack or threat of attack on civilians, or adoption of other measures designed to spread fear.
- **Subjective Element** – must be intent to carry out unlawful acts or threats or violence against civilians. However, this **general intent** must always be accompanied by a **special criminal intent** to bring about terror – the spreading of threat or fear among civilians must be the ‘primary purpose’ of the act.

6.9.3 Terrorism as a Crime Against Humanity

Amounts to CAH when they meet special requirements:

1. part of a widespread or systematic attack against civilians
2. perpetrators are aware their acts are part of a systematic pattern of conduct.

Note: customary international law has a broader scope than ICTY, ICTR and ICC (in which CAH can only be committed against civilians), and encompasses acts targeting military people or military installations.

6.9.4 Terrorism as a Discrete International Crime

- For terrorist acts to amount to international crimes they must (i) not be limited in their effects on one state solely; (ii) must transcend national boundaries; and (iii) must be promoted or tolerated by the State.
- UN SC resolution 1368(2001) stated that there is a fourth element: are very serious or large scale.
- States’ repulsion to the acts of September 11 (above resolution) demonstrate that by now, international terrorism is a crime PROSCRIBED by customary international law.

Actus Reus and Mens Rea:

- **Actus Rea:**
 - (i) Terrorist acts must constitute a criminal offence under most national legal systems
 - (ii) Must be aimed at spreading terror
 - (iii) Must be politically, ideologically, or religiously motivated (not motivated by private ends)

*victims can be either civilians and military personnel.
- **Mens Rea:**
 - In addition to the subjective element required for the underlying offence (serious bodily harm, murder, kidnapping, etc.) there must be **special intent**, to spread terror among the population.

6.9.5 Treaty-Based Prohibited Classes of Terrorism

- The primary purpose of treaties prohibiting classes of terrorism is to achieve the prompt and effective punishment of terrorism by **national** authorities.
- No international body is entrusted with the task of prosecuting and punishing those criminal

offences.

6.9.6 Concluding Remarks

- International *substantive* rules on international crimes of terrorism are satisfactory.
- However, international law fails at the *enforcement* level.
- In spite of the apparent trend emerging in the UN towards universal and unqualified condemnation of terrorism, many developing states still cling to the old political doctrine where “freedom fighters” are entitled to avoid the stigma of terrorism on account of the political ends they pursue.

CHAPTER 7 GENERAL PRINCIPLES

International criminal law is not nearly as developed as national criminal law systems.

Some of the principles of International Criminal Law are not unique and can be found in most State systems.

Individual Criminal Responsibility

ICTY Tadic: fundamental principle

- i) nobody may be held accountable for acts committed by another person
- ii) a person may only be held criminally responsible if he is somehow culpable for any breach of criminal rules – *objective criminal responsibility is ruled out*

Exception: Statute of the IMT at Nuremberg, Articles 9 and 10

-Tribunal may declare any group or organization criminal and bring individuals to trial for membership. Whether or not participation in the organization was voluntary.

The rationale was to punish as many Nazis as possible. Gestapo, Leadership of the Nazi party, SS, SD among others.

-Labeling of a group as criminal should be based on well-settled legal principles.

-Criminal organization is the same as criminal conspiracy – members must know of the criminal purpose or acts of the organization to be held liable.

Nullum Crimen Sine Lege

Substantive Justice: the legal order aims primarily at prohibiting and punishing conduct that is socially harmful or causes danger to society, whether or not it was criminalized at the time the offense was committed. Favours society over individual.

Strict Liability: a person may only be held responsible for conduct that was regarded as a criminal offense at the time it was performed. Favours individual over society. Present today in most democratic countries.

International law has applied the substantive justice doctrine for a long time and has only recently begun to replace it with strict liability, though with some qualifications.

-Only rudimentary customary rules prohibiting and punishing war crimes existed.

-IMT Goring and others: Tribunal declared that the crimes were already prohibited when they were committed, a questionable finding.

-Dissenting Opinion in the Tokyo Trials: *nullum crimen* principle is not a principle of justice, but a rule of policy.

Post World War II strict legality gradually replaced substantive justice:

-States ratified a number of important human rights treaties which laid down the *nullum crimen* principle to be strictly followed by national courts. It was framed as a human rights issue (Third and Fourth Geneva Conventions of 1949)

-International Criminal Law network expanded through treaties (1948 Convention on Genocide, 1949 Geneva Conventions, 1984 Convention on Torture) and by case law.

ICTY and ICTR lay out strict legality implicitly

ICC Article 22 sets out the principle of strict legality explicitly

Articulations of the Principle of Legality

Specificity: criminal rules must be as specific and detailed as possible, so as to clearly indicate prohibited conduct, both its objective elements and the MR.

-Not fully applied in International Criminal Law. Example: **ICTY and ICTR** Statutes outlining Crimes Against Humanity include "*other inhumane acts.*" Rape and torture are not legislatively defined. Most international laws do not specify the subjective element of a crime.

The clarification system is decentralized, because there is no central court with the powers to clarify things for all.

ICC Statute tries to define various crimes as precisely as possible. (But it is not intended to codify customary law)

Some principles play a greater role than they do in national law systems.

-*Defense of Mistake of Law*

-*Principle of Strict Interpretation*

-*Principle of Favor Rei* (in case of doubt, rule interpreted to favour accused)

These are supposed to compensate the flaws in International Criminal Law

Non- Retroactivity: criminal rules may not cover acts or conduct undertaken prior to the adoption of such rules.

London Agreement of 1945 provided for two categories of crimes that were new:
Crimes Against Peace

Crimes Against Humanity

The IMT acted on both of this and applied the law retroactively at Nuremberg. Tribunal justified only the retroactive application of Crimes Against Peace. Justified poorly by stating that the Charter was an expression of international law existing at the time of its creation.

Non-retroactivity has gradually evolved as a principle of international law. **1949 Geneva Conventions**
ICTY and ICTR both implicitly enshrine it.

ICC Article 22(1) is explicit.

Courts can still refine and elaborate existing rules.

Expansive Adaptation of some Legal Ingredients of Criminal Rules to New Social Conditions

International Criminal Law consists of judge made law to a large extent.

Main Example: Man rapes his wife, claims marital status as a defense. This is disallowed and it is declared that the removal of the defense is not a retroactive application of the law. The essential element of a crime is still there. It was foreseeably wrong.

Interpretation and Clarification of Existing Rules is bound by stringent requirements.

- -must keep with the essence of the offense
- -conform with fundamental principles of international criminal law or at least general principles of law
- -reasonably foreseeable

Courts can not create a new criminal offense with new legal ingredients (AR and MR)

ICTY Tadic: customary rules of international law criminalized some conduct in internal conflict. Until then many states held that violation of humanitarian law of internal armed conflict did not amount to war crimes.

The Ban on Analogy

-Can't extend the scope and purport of criminal rule to a matter than is unregulated by law.

International law: a treaty between two states can not be applied by analogy to a third state.

ICC Article 22(2): Crimes shall be strictly construed and not extended by analogy.

Three qualifications on the analogy bad

- 1) Can regulate a matter by resorting to general principles of international criminal law
- 2) Some international rules request analogy themselves. Example: “Other inhumane acts” in **Geneva Conventions of 1949**.

ICC Article 7(1) (k): other inhumane acts of a similar characters intentionally causing great suffering.

- 3) One can use the Logical Approach. Example: a new weapon that is not banned. Inquire whether the new weapon is at variance with the general principle about causing unnecessary harm. For this purpose one can compare with already proscribed weapons.

The Principle of Favouring the Accused

In case of conflicting interpretations of a rule, the construction that favours the accused prevails.

ICC Statute Article 22(2)

ICTR upheld this in Akayesu

US Military Tribunal at Nuremberg: if from credible evidence two reasonable inferences may be drawn, one of guilt and one of innocence, the latter must be taken.

Legality of Penalties

States have not agreed on scale of penalties on international crimes due to widely diverging opinions. This results in great judicial discretion.

Some tribunals set limitations.

ICTY Statute Article 24(1): Penalties will be limited to imprisonment (rules out death sentence). “In determining the terms of imprisonment, the Trial Chamber shall have recourse to the general practice regarding prison sentences in Former Yugoslavia.

ICTR Statute Article 23: Identical in relation to Rwanda

ICC Statute Article 23: only punished in accordance with the statute.

ICC Statute Article 77: envisions imprisonment for 30years. Life imprisonment is possible. *Implicitly rules out the death penalty but does **NOT** establish a scale of sentences and does **NOT** suggest court should take into account penalties of the relevant state.*

CHAPTER 8: MENS REA

8.1 THE METHODOLOGICAL PROBLEM

- It is difficult to identify the various forms of *mens rea* in ICL for two reasons:
 1. Substantive rules concerning crimes often do not specify the subjective element required.
 - How to overcome: (i) identify the international *substantive* provisions which lay down subjective element required for violated to be considered an international crime. Also look to *case law* (ICTY/R) to see who they have pronounced on the matter.
 2. There is no customary rule setting out a *general definition* of the various categories of *mens rea* (e.g. intent, recklessness, negligence) ← exception, **Art. 30 of ICC Statute on ‘mental element’**.
 - How to overcome: Identify the general rules existing in IL, or principles common to major legal systems of world: (i) case law (particularly ICTY/R); and (ii) existence of some *basic notions* common to all major legal systems of the world.

8.1.1 Substantive Rules Setting Out the Mental Element Required For the Crime

Important Treaty Provisions:

- **Article 2 – 1948 Geneva Convention** (now international customary rule) where genocide as IC requires that there be ‘the intent to destroy a national... group as such’.
- **Article 1 – 1984 Convention on Torture** – prohibits torture when it is ‘intentionally inflicted’.
 - While international human rights law, has been incorporated in humanitarian law – ICTY Delalic and others, Furundzija, and Kunarac and others.
- **Article 85 of the First Additional Protocol of 1977** – makes punishable many violations so long as committed ‘wilfully’.
- All the above provisions require intentional conduct, thus automatically excluding any other subjective frame of mind (recklessness, etc.).

8.2 GENERAL CATEGORIES OF MENS REA: INTENT

- **Intent**: the will to bring about a certain result
 - Does not matter that your conduct does not kill them, will be guilty of murder if (i) intended them to die; and (ii) they died as a result of your acts.
 - International rules require intent for most international crimes, although sometimes other forms of mens rea are admissible.

8.2.1 The Role of Knowledge Within Intent

- **Article 85(3)(e) of the First Additional Protocol of 1977** – ‘making a person the object of attack in the knowledge that he is *hors de combat*’
- **Article 7(1) of the ICC Statute** – provides that CAH comprise various acts enumerated there, ‘when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack’.
 - Here, knowledge means awareness of the requisite circumstances.
- **Article 30(2) of the ICC Statute** – knowledge means ‘awareness that a circumstance exists or a consequence will occur in the ordinary course of events’.
- Knowledge is also required in **aiding and abetting an international crime**. Criminal

responsibility arises if the aider **knows** his action will assist the commission of specific crime (Furundzija, ICTY Trial Chamber)

- Knowledge is also required in most cases of **command responsibility** (Medina)
- Thus, in most cases, knowledge should not be considered as an autonomous criminal state of mind, but only as a means of entertaining criminal intent or recklessness.
- However, knowledge cannot be reduced in some categories:
 - CAH – accused must know of the widespread or systematic attack..

8.2.2 Special Intent (*Dolus Specialis*)

- Some international crimes require that the agent pursue a *specific goal* that goes beyond the result of his conduct.
 - In some CAH (namely, persecution) – A discriminatory intent is required, the will to discriminate against members of a particular group. (Kupreskic and others, Kordic and Cerkez, Blaskic)
 - Genocide – Agent must possess ‘intent to destroy an ethical... group’. (Jorgic)
 - Terrorism – require special intent of spreading terror in the population.

8.3 RECKLESSNESS

- Recklessness (*dolus eventualis*) is a state of mind where the *person foresees that his action is likely to produce its prohibited consequences, and nevertheless takes the risk of so acting*.
- When crimes perpetrated by multiple people, what is required is (Tadic): (i) it was foreseeable that the crime might be perpetrated by one or more members of the group; and (ii) the accused willingly took the risk.

8.4 CULPABLE NEGLIGENCE

- Negligence entails the person:
 - (i) acts in *disregard of certain elementary standards* of the reasonable man
 - (ii) either does not *advert at all to the risk of harm* to another person involved in his conduct (simple negligence), or is *aware of that risk*, but is sure that it will not occur (gross negligence)
- To be considered international crime, to be liable under negligence, it must reach threshold of gross or culpable negligence. Occurs when (i) it is expected to abide by certain standards of conduct; and (ii) is aware of the harm and takes it, for they believe the risk will not materialize owing to the steps taken.
- Gross negligence clearly required by the customary rules on **superiors’ responsibility**.
- CAH may result from negligence, so long as it is gross. Further, there are cases where culpable negligence borders on recklessness (Medina)

8.5 THE ICC STATUTE

- **Article 30** – states intent and knowledge are the only mental elements of those crimes as set forth in **Articles 6-8**
 - **Art. 30(1)** – ‘unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge’. **Paragraph 2** defines

these two notions.

- Art. 30 is the only international provision setting out a general definition of the subjective element of international crimes

8.6 JUDICIAL DETERMINATION OF THE SUBJECTIVE ELEMENT

- Can deduce from factual circumstances whether the action was accompanied by a mental attitude showing some degree of fault (Tepez, Delilac and Others, ICTY).

CHAPTER 9 PERPETRATION AND OTHER MODALITIES OF CRIMINAL CONDUCT

Criminal responsibility arises not only when a person materially commits a crime but also when he engages in other forms of criminal conduct.

National Legal Systems:

- When a crime involves more than one person, all performing the same act, all are equally liable as co-perpetrators.
- Many systems do not provide for different categories of participants and don't attach different penalties to principals or accessories.
- Distinctions are usually drawn for the purposes of sentencing by judges.

International Law:

- Neither treaties nor case law (as indicative of customary rules) make any legal distinction between various categories as far as penalties are concerned.
 - i) absence of agreed scale of penalties in international criminal law
 - ii) general body of law still rudimentary and lacks formalism

Descriptive and classificatory purposes only. Judges decide each case on the degree of culpability of the participant, whatever the modality.

Perpetration: the physical carrying out of the prohibited conduct accompanied by the requisite psychological element. (AR+MR)

Co-Perpetration: All participants have the AR and MR.

Participation in a Common Purpose or Design

-When a crime results from the actions of many, it may be that not all participants perform the same act. Example: Torture-One interrogates, one actually tortures, a doctor makes sure the torture does not lead to death.

All participants in a common criminal action are equally responsible if they:

- i) participate in the action whatever their position and the extent of their contribution
- ii) intend to engage in the common criminal activity

ICTY: Tadic (Appeal)

-No need for the common plan or purpose to be formally set, may materialize suddenly

AR: Active participation in the system of repression

MR: knowledge of the nature of the system, intent to further common design.

Intent can be inferred from position of authority. The higher the easier.

Another case: Prisoners killed in a hospital, involved administrator, doctor, nurses

"...Every single one of the accused has overtly and affirmatively participated in this entire network that brought about the illegal result."

British and US courts: Common Design

Dutch, German and Italian courts: Concurrence of persons in crime

Knowledge is necessary on the parts of the accused as to the intended purpose of the enterprise.

Participation Entailing Responsibility for the Foreseeable Crimes of Other Participants

All participants agree to do one thing, but then one or more does something not agreed upon.

Example: Agree to beat up POWs, one kills.

ICTY: Tadic

Responsible for crime not agreed upon if

- i) it was foreseeable that such a crime might be perpetrated by one or other members of the group
- ii) the accused willingly took the risk

Aiding and Abetting

A person may participate in a crime without sharing the criminal intent of the principal, by assisting him in the commission of the crime.

Objective Element: practical assistance, encouragement, or moral support

Subjective Element: accessory has knowledge that his actions assist the perpetrator

Assistance must have a substantial effect on the perpetration of the crime

ICTY: Tadic

Principal need not know about the contributions of the accomplice

ICTR: Akaysu

Tacit encouragement possible, here encouraged rape by presence, attitude and utterances.

Incitement or Instigation

- Does not presuppose an hierarchical position
- Requires intent to have the crime perpetrated

Blaskic: Incitement is a crime under the following conditions

- i) Direct and Explicit
- ii) Commission of the crime must follow it (Genocide is the exception)

It is not necessary to prove crime would not have happened without the involvement of the accused.

Subjective Element:

- i) intent to induce commission of crime by another person
- ii) awareness of the likelihood that crime would be committed as a result
- iii) possession of MR regarding the crime he is instigating

Inchoate Offenses

Preliminary, or “Just Begun” criminal wrong doings.

- i) Preparatory to prohibited offenses
- ii) Have not been completed and therefore have not caused any harm
- iii) Are punished on their own, despite not leading to a completed offense

Planning

ICTR: Akayesu “One or several persons contemplate designing the commission of a crime at both preparatory and executory phases.”

Subjective element: Intent to carry out criminal conduct

ICTR: Planning only punishable if it leads to actual crime. **ICTR Statute Article 6(1)** Page 4

ICTY: An accused may be held criminally responsible for planning alone. **ICTY Statute Article 7(1)**

If planning does not result in carrying out, can be persecuted as conspiracy (though planning can be done by one person and conspiracy requires at least two) ICTY and ICTR allow conspiracy for genocide but not for Crimes against Humanity or War Crimes.

If planning is followed by execution, it will not be punished as a distinct offense.

MR: Intent that crime be committed or awareness of risk that it will be committed.

Ordering

Whoever issues the order is either the *de facto* or *de jure* superior

No formal relationship is required, as long as authority to order is demonstrated.

No need for order to be given in writing or in a particular form.

Not necessary for order to be executed.

If the order is executed, person issuing is also liable as co-perpetrator.

MR: Intent to have the crime committed. If order is generic, recklessness or gross negligence are sufficient.

Attempt

Two possibilities:

- i) The perpetrator takes initial steps but is stopped by others
- ii) Because of circumstances independent of his will, action not produce the intended results.

ICC Statute Article 25 (3) (f)

Required:

- i) conduct consisting of a significant commencement of criminal action
- ii) clear intention to commit a crime
- iii) failure of that intention to take effect owing to external circumstances

Cessation of attempter's criminal intention is taken into account and initial steps are not punished in that case. (Example: Ordered someone shot, changed mind and reversed order)

Conspiracy to Commit Genocide

An agreement of two or more persons to commit a crime. Punishable even if the crime is not perpetrated. If it is carried out, perpetrators are held liable for both conspiracy AND the crime.

MR:

- i) Knowledge of facts or circumstances making up crime group intended to commit
- ii) Intent to carry out conspiracy perpetrate the substantive offense

International Rules: London Agreement of 1945, Article 6 – conspiracy punishable only to the extent that it had been carried out. IMT at Nuremberg took similar restrictive view.

1948 Genocide Convention: Article 3(b) makes conspiracy to commit genocide punishable.

This has probably become customary international law. *Followed by both ICTR and ICTY but NOT ICC.*

ICTR: Musema – MR: concerted intent to commit genocide. Conspiracy punishable even if it genocide is not perpetrated.

Incitement to Genocide

Must be Direct and Public and is punished even if it is not followed.

ICTR Article 2 (3) (c)

ICTR Akayesu: Subjective Element – desire to create by his actions a particular state of mind necessary to commit such a crime in the mind of person or persons he is so engaging.

CHAPTER 10 – CRIMINAL LIABILITY FOR OMISSION

10.1 GENERAL

- *First Additional Protocol to the Geneva Conventions* – Article 86(1): “shall repress grave breaches, and take measures necessary to suppress all other breaches... which result from a *failure to act under a duty to do so.*”
 - Formally, this provision only addresses states, but may hold that it is also a general principle on criminal liability for omission.
 - Note: **superiors’ responsibility** has taken on distinct features and evolved as a discrete and important form in this category.

10.2 RULES IMPOSING THE POSITIVE OBLIGATION TO ACT

- Some provisions of the Geneva Conventions lay down unconditional positive obligations:
 - Article 16(4) of the First Geneva Convention – on the wounded and sick armed forces in the field
 - Article 17 – provides for burial or cremation of the dead.
- Other provisions lay down positive obligations that are so sweeping they leave States a *broad margin of appreciation*:
 - Article 14(2) of the Third Geneva Convention – duty to protect POWs against acts of violence
 - Article 15 – maintenance free of charge for POWs
 - Article 29 – cleanliness and hygiene of detention camps
 - Article 36 of the First Additional Protocol – legality of new weapons
 - Article 76 and 77 – protect women and children
 - Articles 82 and 83
- Provisions containing *qualified* obligations:

- Article 12(5) of First Geneva Convention
 - Article 12(2) of the Second Geneva Convention
 - Article 60 of the Third Geneva Convention
 - Article 55 and 56 of the Fourth Geneva Convention
 - Article 69(1) of the First Additional Protocol
 - Article 70
- Note: serious violations of many of the above positive obligations amount to a war crime (Tadic – determines which violations may be regarded as war crimes). However, sometimes a serious violation may amount to a ‘grave breach’, as specified in the relevant provisions.

10.3 MENS REA

- The mental element varies, depending on the requirements of international rules.
- Normally, intent is required. However, some cases may require a less demanding subjective element, recklessness or culpable negligence, for criminal liability to arise.

10.4 THE RESPONSIBILITY OF SUPERIORS

10.4.1 The Historical Emergence of the Notion

- The issue of superior responsibility as gradually acquired enormous importance in ICL. Formulated into customary international law through various cases (e.g. Delalic and Others). Is firmly embedded in international humanitarian law, and the Statutes of the ICTY/R and ICC. Covers superior responsibility for any international crime (not only war crimes).
- Most cases are related to military commanders, however, is extended to civilian and political authorities.
- Responsibility by omission: responsible for the breach of an international obligation incumbent upon any commander or superior authority, to prevent or suppress crimes by subordinates (Delalic)

10.4.2 CRIMINAL CATEGORIES INTO WHICH THE GENERAL NOTION MAY BE SUBDIVIDED

- Superior responsibility generally lumped together without drawing distinction:
 - ICTY - Article 7(3)
 - ICTR – Article 6(3)
 - ICC Statute – Article 28
- Only when the superior knows of the crime and willingly fails to prevent its commission, may he be deemed to participate in the crime as a co-perpetrator or accomplice.

10.4.3 General Conditions of Superior Responsibility

- Generally can distinguish between 3 major categories of responsibility:
 1. They exercise *effective command, control, or authority over the perpetrators*
 - ICTY in Delalic: can be within civilian or military structures, and de facto or *de jure* position.
 2. The superior *knew, or had information which should have enabled him to conclude in*

- the circumstances at the time that crimes were being committed, or should have known and consciously disregarded information indicating that these international crimes were going to be committed.*
3. He *failed to take the action necessary* to prevent or repress the crimes, thereby breaching his duty to prevent or suppress crimes by his subordinates.

10.4.4 The Subjective Element of the crime and the Various Classes of Omission

- Intent is not required for the subjective element.
- Should distinguish various situations:
 1. The superior knows that crimes are about to be or are being committed by his subordinates and does nothing.
 - This requires (i) knowledge; and (ii) intent, or at least recklessness
 2. Superior has information which should lead him to conclude that crimes are being or will be committed, and fails to act, in breach of his supervisory duties.
 - Here, either recklessness or gross culpable negligence may be enough.
 - Culpable negligence: (i) the commander is required to abide by certain standard of conduct and (ii) he is aware of the risk and takes it anyhow.
 3. The superior should have known that crimes were being or had been committed.
 - Gross or culpable negligence sufficient.
 4. Superior knows crimes have been committed and does not punish culprits.
 - Knowledge and intent or culpable negligence seem to be required.
- The threshold for holding superiors liable is to a less culpable mental element (e.g. recklessness, negligence often enough) is justified by his hierarchical position, the obligation he has to control subordinates, and the consequent need to make him accountable for the conduct of his subordinates.

CHAPTER 11 MULTIPLICITY OF OFFENSES

Real Concurrence of Offenses: a person may breach the same rule against various persons or breach multiple rules against one person. Charged different crimes in the first case or with one crime against several people.

Ideal Concurrence of Offenses: a person violates several rules by one offense. Usually charged with two different crimes, but the sentences should run concurrently.

Two offenses, one lesser than the other:

Civil Law: Principle of consumption

Common Law: Lesser included offense

The More serious offense prevails over and absorbs the other.

One Act may breach several rules covering the same subject matter. Example: Rape may be a war crime, a crime against humanity and an act of genocide. How to decide which one?

Blockburger Test AKA Principle of Reciprocal Speciality

It must be established if each of the two or more provisions that appear at first sight to be breached requires an element that the other does not. Three things may happen:

- i) Offense meets requirements of one, but not the other. Charge under one rule and under another alternatively, just in case.
- ii) Offense meets requirements of both. Offense under both rules. Charge cumulatively. Sentences should run concurrently
- iii) Two rules cover the same crime, one requires an additional element not provided in the other rule. Apply principle of Specialty: Rule providing for the special requirement prevails. (Example: Killing a civilian is both a murder and, if the conditions are met, a Crime Against Humanity)

Test Based on Protected Values

ICTY: if an act is in breach of two criminal provisions, protecting different values, it may be held that an act or transaction infringes both criminal provisions.

ICTY Appeals said implicitly it's not necessary

Grounded on the notion that the International Community establishes an hierarchy among various values it intends to protect by its criminal prosecutions.

Multiple Crimes and Sentencing

ICTY Delalic: Can impose one sentence for all offenses or several sentences to run concurrently.

ICC Article 78(3): Must pronounce sentence for each crime and a joint sentence specifying total period of imprisonment. Court can not impose a single term for several offenses.

CHAPTER 12: CIRCUMSTANCES EXCLUDING CRIMINAL LIABILITY: JUSTIFICATIONS AND EXCUSES

12.1 THE DISTINCTION BETWEEN JUSTIFICATIONS AND EXCUSES

- Justification: an action that would normally be considered criminal is regarded instead as lawful.
- Excuses: an action contrary to a norm is regarded as *unlawful*, but the wrongdoer is not *punished*.
 - The *actus reus* cannot be called into doubt, whereas *mens rea* is lacking.
 - In international law, must look to both international customary law and treaty rules to appropriately characterize each defence.

12.2 CUSTOMARY INTERNATIONAL LAW: GENERAL

- Classified as justification:
 - Lawful punishment
 - Lawful belligerent reprisals
 - Self-defence

- Classified as excuses:
 - Mental disease
 - Intoxication
 - Mistake of fact
 - Mistake of law
 - Duress
 - Physical compulsion

*Note: under CIL, neither superior order nor immunity for acting as a State official may EVER amount to an excuse.

12.3 SELF-DEFENCE

- Must fulfill following requirements:
 - (i) Action is taken in response to an imminent or actual unlawful attack;
 - (ii) There is no other way of preventing the offence;
 - (iii) Unlawful action of other person not caused by them acting in self-defence;
 - (iv) Conduct is proportionate to the offence to which the person reacts.
- Kordic (ICTY) held that self-defence is one of the defenses that “form part of the general principles of criminal law which the IT must take into account in deciding the cases before it”.
- Self-defence is not an excuse that can be used by States or State-like entities (Kordic – “military operations in self-defence do not provide a justification for serious violations of international humanitarian law”).

12.4 EXCUSES: TWO MAIN CATEGORIES

1. Lacks *mens rea* (person is ‘criminally not imputable’)
2. Lacks a criminal frame of mind. May be because:
 - He intends to bring about conduct different from what actually occurs because is under a *non-culpable misapprehension* about the facts or about the applicable rules. Or,
 - Although he is *aware* of the consequences of his conduct, he was *obliged by another person* to carry out prohibited act through an unavoidable and serious threat to his life or limb.

12.5 EXCUSES BASED ON LACK OF INDIVIDUAL AUTONOMY

12.5.1. Insanity or Mental Disorder

- The accused lacks the requisite *mens rea* and may not be held responsible for his behaviour (**Article 31(1)(a) of ICC Statute**)
- Delalic and others, appeal: Defendant bears onus of establishing diminished mental responsibility on BOP.

12.5.2 Intoxication

- Intoxication may amount to an excuse only under very strict conditions:
 - (iii) The intoxication is so serious as to negate *mens rea*
 - (iv) In the case of voluntary intoxication, person has not become voluntarily intoxicated knowing the risk that, as a result, was likely to engage in criminal action (**Article 31(1)(b) of ICC Statute**)
- Kvocko – intoxication rejected as mitigating factor, instead found to be aggravating factor.

12.5.3 Minors

- In IL, no customary rule has emerged on this matter. Found in **Article 26 of the ICC Statute** – no jurisdiction over under 18s.

12.6 THE ICC STATUTE

- Article 31(1)(c) of the ICC states self-defence as a ground excluding responsibility, in the following terms (page 230). In essence, Article 31 codifies a rule of customary international law, as ICTY emphasized in Kordic. Can also apply to defending property (this is definitely not codified in customary international law!).
- Article 31(1)(a) and (b) deals with mental disease and intoxication in terms that may be held to restate or codify customary international law.

CHAPTER 13 OTHER EXCUSES

Excuses where the absence of the subjective element derives from external circumstances

Superior Orders

Respondeat Superior – Only the superior should be held accountable

Moral Demand – Anyone who deviates from fundamental standards of conduct should be punished, even at risk of jeopardizing military discipline.

Customary Rule of International Law: an international crime by a subordinate may not be excused by the plea that he acted on a superior order.

Following orders may mitigate the punishment

Principle applies to both military and civilian authority provided

- i) the subordinate had a legal obligation to obey
- ii) the authority issuing the order wields formal or substantial control over that subordinate

The Pleas of Superior Order

National Courts and international tribunals have dismissed the plea in numerous cases, especially when dealing with obvious cases, such as shipwrecked sailors, prisoners of war, civilians, etc.

Case Law Upholding the Plea

The accused lacked the requisite MR due to

- i) absence of freedom of judgment – dubious reasoning, reversed in other courts
- ii) mental disorder
- iii) mistake of law-where law is unclear. Can raise the mistake of law defense as well

Can unlawful orders relieve responsibility if given on the battlefield? National courts hold no, but it is a possible extenuating circumstance.

ICC

ICC Article 33(3) –Orders to commit genocide or crimes against humanity are manifestly unlawful.

-Contrary to Customary International Law because it does not include War Crimes

Necessity and Duress

Necessity may be urged as a defence when a person, acting under a threat of severe and irreparable harm to his life or limb or to life and limb of a third person perpetrated an international crime.

Necessity:

- Threat to life and limb from objective circumstances
- Criminal intent present

Duress:

- Threat from subjective circumstance
- Negates subjective element to a large extent

Four Conditions for necessity and duress to be upheld as a defence

- 1) Immediate threat if severe and irreparable harm
- 2) No adequate means of averting the evil
- 3) Crime must not be disproportionate to evil threatened.
- 4) Did not enter situation voluntarily

International law seems to admit necessity

Defence of necessity is unavailable to members of special units bent on disregarding the law.

-When a person has freely and knowingly become a member of a unity institutionally intent upon actions contrary to international humanitarian law.

Duress and Superior Order

Superior order may be issued without any threats to life or limb. If this order is manifestly illegal under international law, the subordinate is under a duty to refuse to obey that order.

Duress may be independent of superior orders, where threat comes from fellow serviceman, or even a subordinate.

ICTY Erdemovic: Duress can not be a defence when killing innocents. But may mitigate punishment.

Customary rule on International Law of duress does not exclude the defence to war crimes and crimes against humanity, even if underlying offence is murder or unlawful killing.

-Hard to meet requirements of duress.

-Relevant whether a crime would have been committed in any case by a person other than the one under duress

ICC Article 31(1)(d): necessity and duress together. Killing is not excluded, in principal.

Mistake of Fact

AR is present but MR is missing, because the perpetrator honestly and reasonably believed in some factual circumstance that made conduct lawful.

ICC Article 32(1)

Mistake must not result from negligence

Mistake of fact and superior order: accused may prove he was not aware order was unlawful in point of fact

Mistake of Law

ICC Article 32(1): Mistake of law will not be ground for excluding criminal responsibility. This codified customary law

ICC Article 32(2): Only grounds for excluding criminal responsibility if it negates mental elements required.

Mistake of Law may be pleaded as an excuse when

- i) had no knowledge of an essential element of law
- ii) lack of knowledge did not result from negligence
- iii) did not possess requisite MR

In those areas of international humanitarian law or criminal law where the rules are clear, incontrovertible, and universally recognized, one is barred from invoking the plea.

Because the status of international criminal law is not fully settled, it attaches a somewhat higher weight to mistake of law than national systems.

Courts should take into account:

- i) Whether rule breached is universally admitted and recognized or obscure and controversial
- ii) Intellectual status, education, training of person relying on defence
- iii) Position within military hierarchy
- iv) Importance of value protected (life and dignity are big)

Mistake of Law and Superior Order

Mistake of Law may negate MR, when the law is confused.

Because the law on matter is not straightforward and universally recognized, and subordinate is not required to settle controversial legal issues when deciding whether or not to execute an order.

Mistake of Law may be admitted as a defence to the execution of an illegal superior order when the subordinate acted under the honest and reasonable belief that the law allowed execution of that superior order. Only admissible when the law on the matter is not clear or should be known to any serviceman in armed conflict (or to a person of average intelligence.)

CHAPTER 14 – IMMUNITIES

14.1 GENERAL: VARIOUS CLASSES OF IMMUNITIES

- The following immunities may in principle be relied upon:
 1. Those accruing under **customary international law** (e.g. Act of State doctrine)
 2. Those granted by **international customary or treaty rules** (e.g. personal immunities that end when position of individual ends)
 3. Those provided for in **national legislation** (end when functions come to end)

14.2 FUNCTIONAL AND PERSONAL IMMUNITIES PROVIDED FOR IN INTERNATIONAL CUSTOMARY LAW

- Functional immunities vs. personal immunities
 - Functional immunities:
 - No State agent accountable to other States for acts taken when in official capacity, thus attributed to the State.
 - Relates to substantive law
 - Covers official acts of any de jure or de facto state agent
 - Does not cease at the end of official functions by State agent.

- Is *erga omnes* (may be invoked towards any other State)
- Personal immunities:
 - Idea is that any activity of Head of State, etc. must be immune from foreign jurisdiction (to protect sovereignty!)
 - Relates to procedural law
 - Covers official/private acts carried out while in office and private acts performed prior to taking office;
 - Intended to protect only some categories of State officials
 - Comes to an end after they leave office
 - May not be *erga omnes*
- These two classes of immunity coexist and somewhat overlap.

14.3 THE CUSTOMARY RULE LIFTING FUNCTIONAL IMMUNITIES IN THE CASE OF INTERNATIONAL CRIMES

- After WWII, 'shield' protecting senior State officials lifted regarding war crimes, crimes against peace, and CAH. More recently, has extended to torture and other international crimes.
 - London Agreement 1945 – Article 7 (State position does not free you from responsibility or mitigate punishment) now has status of customary international rule
 - How do we know customary international rule? Eichmann, and ICTY Trial Chambers.
 - ICTY Appeals Chamber in Blaskic
 - ICJ implicitly admitted that under customary law official status does not relieve responsibility. (Also, ICTR in Akayesu and ICTY in Krystic)
- The rationale behind forfeiting right to immunity by State officials is that respect for human rights overrides traditional principle of respect for State sovereignty.

14.4 INTERNATIONAL PERSONAL IMMUNITIES

- Question: can State officials accused of international crimes when abroad be arrested and brought to trial?
 - **Customary rules** - ICJ in its judgment in the *Case Concerning the Arrest Warrant of 11 April 2000* bars any possible interference with the official activity of such officials. Even when accused of international crimes, the State agent entitled to personal immunities is inviolable and immune from prosecution (Pinochet, Castro).
 - Some **international treaties** on specific international crimes may prescribe that personal immunities do NOT relieve officials:
 - Implicitly expressed, which could be interpreted to proscribe that personal immunities do not relieve officials:
 - Genocide Convention of 1948 – Article IV
 - 1984 Convention on Torture – Article 4
 - ICTY Statute – Article 7(2)
 - ICTR Statute – Article 6(2)
 - ***The only treaty that explicitly excludes the right to invoke or rely upon personal immunities is the Statute of the ICC – Article 27(2).**

Further, may say same about 1984 Convention on Torture, Articles 1-4

- However, there is a resistance to the trend of excluding the right to invoke personal immunities.
- Remember, once these officials leave office, they no longer enjoy personal immunities and can be prosecuted for any international crime (as per the earlier discussed customary international rule)

14.5 NATIONAL PERSONAL IMMUNITIES

- Customary international law does not have any rule forcing a State to disregard national legislation on immunities.
- National law may contain general rules granting immunity for any crime, including international crimes.
- However, after entry into force of the ICC Statute, States cannot rely upon any possible national legislation on immunities.

CHAPTER 15 LEGAL GROUNDS OF JURISDICTION

Territoriality

Permanent Court of International Justice – Lotus Case:

“In all systems of law the principle of territorial character of criminal law is fundamental”

Territoriality applies even when a crime is committed outside a state’s territory, as long as its effects are felt there. Example: forging money.

Advantages:

- Evidence is there
- Rights of accused are best safeguarded
- Cathartic process most likely, since the effects were felt there

Problem with territoriality in international crimes:

- State officials may have been complicit, making prosecution unlikely or ineffective

International Treaties providing grounds of jurisdiction over international crimes:

UN Genocide Convention 1948 Article VI: person accused of genocide must be brought to trial before the courts of the State where act has been performed.

- This has only been applied in Rwanda, along with the ICTR

Active Nationality

State jurisdiction over crimes committed by nationals abroad.

UK Criminal Court Act 2001 implements ICC, Courts have jurisdiction over all crimes envisioned in Statute committed by British nationals at home or abroad.

Convention Against Torture 1984 Article 5(1): Lays down active nationality principle.

When does nationality matter, when the crime was perpetrated or at the time proceedings begin?
Most states say both.

States tend to include residents as well as citizens.

Passive Nationality

State jurisdiction over crimes committed against their nationals.

Normally this needs “double incrimination”, the act being a crime both in the nation and in the place it’s committed.

Crimes Against Humanity do not require a link between the prosecuting state and the offense.

Passive nationality is only to be relied upon when no other state is willing to persecute

UN Convention Against Torture Article 5(1)(c): states are authorized, but NOT required to prosecute.

The Universality Principle

Some crimes can be persecuted by states regardless of place of commission, nationality of victim or perpetrator.

-Piracy

Universal Jurisdiction is based on the assertion that some things are The Joint Concern of All States.

UN Convention on Torture, Conventions on Terrorism

Eichman: Crimes over which this jurisdiction may be exercised are of such gravity and magnitude that they warrant universal persecution.

Narrow Universality: only the state where the accused is in custody may persecute

Customary International Law: Piracy

Treaty Law: Grave breaches of:

-1949 Geneva Conventions

-Torture Convention Article 7

States are obliged to persecute or extradite where others will persecute

Broad Universality: may persecute regardless of nationality, and without custody

- May encourage forum shopping by victims
- Judges end up investigating things they can't do anything about
- Trials in absentia are open to criticism on the grounds of rights of accused
- Exercise may lead to international disputes

Broad universality is useful for minor offenders, those not protected by position but whom the home state won't persecute

Objections to Universality:

State courts interfere in affairs of another state

National courts hinder diplomatic relations (when accused is a State Agent)

Universality and Customary Law:

-No State protested against Eichman being tried by Israel

-US Courts approved universal jurisdiction over torture

-**Pinochet**: crimes prohibited by international law are under universal jurisdiction if:

i) contrary to the peremptory (absolute) norm of international law

ii) serious and on such a scale as can be justly regarded as an attack on the international order

Trends of Universal Jurisdiction

Individual Criminality: crimes committed by one individual. Example: one soldier commits rape. Usually persecuted by own state, armies have interest in maintaining discipline

System Criminality: crimes on a large scale. Example: rape encouraged or allowed on a large scale in an invading army, for ideological reasons.

1949 Geneva Conventions about Universal Jurisdiction over any breach of convention has remained unapplied, until the **ICTY** and the **ICTR**

Many states still claim exclusive jurisdiction when their national commit War Crimes. USA is one of these.

Eichman can be justified on the grounds of passive nationality.

CHAPTER 16 – THE IMPACT OF INTERNATIONAL LAW ON NATIONAL LEGISLATION

16.1 ARE THERE INTERNATIONAL CUSTOMARY RULES OBLIGING STATES TO PROSECUTE INTERNATIONAL CRIMES?

- Question: are international customary rules empowering or mandating States to exercise jurisdiction over war crimes, CAH, genocide, aggression, torture and terrorism?
- Answer: State practice shows there are no international customary rules endowed with a

general scope (concerning all crimes) that oblige States to exercise jurisdiction. Nor are there international rules imposing on States the obligation to act upon a specific ground of jurisdiction when they bring to justice alleged perpetrators of international crimes.

The choice of such grounds is left to each state

- (In other words: States do not have to exercise jurisdiction, nor do they have to use specific jurisdiction when trying alleged perpetrators of ICs).
- Qadafi – cited in preamble of ICC Statute, whereby ‘it is a duty of every State to exercise its criminal jurisdiction over those responsible for international crimes’. Thus, where **treaties provide for such an obligation**, a customary rule may be evolving!
- Appears to exist a customary obligation concerning grave breaches (ICJ – Nicaragua)

16.2 ARE THERE CUSTOMARY RULES AUTHORIZING STATES TO PROSECUTE INTERNATIONAL CRIMES?

- Under the general principle in Lotus (1927 OCUH), States are free to exercise their criminal jurisdiction over acts performed outside their territory, whenever no specific international limitations (either treaties or customary rules) restrict such freedom.
- No customary or treaty limitation exists on the power of States to try and punish CAH and other crimes perpetrated at home or abroad either by nationals or by foreigners, except for the limitations on personal immunities.

16.3 THE LIMITED IMPACT OF INTERNATIONAL LAW ON NATIONAL COURTS

16.3.1 The Relevance of International Customary Law

16.3.2 The Implementation of International Treaties

- Treaties designed to oblige States to prosecute and punish authors of some categories of international crimes have had considerable bearing on State legislation and national Courts. HOWEVER, States have found many ways to evade international obligations:
 1. Many States have failed to pass legislation to implement duly ratified international treaties
 2. Some States have entered reservations upon ratification of some treaties
 3. Some States have passed legislation that restricts the scope of signed international treaties.
 - E.g.: While the Geneva Conventions lay down the universality principle, it has been replaced in the US by the traditional principles of active and passive personality (in blatant breach of the Convention)!
 4. National courts have developed in their judicial practice a restrictive tendency to limit the impact of international rules on the exercise of jurisdiction by national courts over international crimes.
- However, must be noted, some States the courts have adopted an **expansive approach** in interpreting international treaties, thus broadening their jurisdiction over international crimes (e.g. Netherlands in Bouterse)

16.4 INTERNATIONAL RULES IMPOSING RESPECT FOR FUNDAMENTAL SAFEGUARDS IN NATIONAL TRIALS

- There exist many international customary and treaty rules which impose the obligation

on States to respect a core of procedural standards.

CHAPTER 17 LEGAL IMPEDIMENTS TO EXERCISE OF NATIONAL JURISDICTION

Amnesty

- Prosecutors can't start proceedings
- Any sentence passed is obliterated

Supposed to heal social wounds, the effectiveness is doubtful

International Rules disallow states to grant amnesty for international crimes

UN Convention on Genocide 1948 and the Geneva Conventions impose obligations to persecute crimes set out in these treaties. To amnesty the authors would run counter to those obligations.

States sometimes make agreements to amnesty. France and Algeria in 1962 after Algerian independence. Lots of crimes committed in Algerian independence war by both sides.

France revised constitution in 2000 to implement **ICC Statute**. Crimes covered by the statute may not receive amnesty.

Practice still not widespread enough to say that a Customary Rule exists.

Still, a court in Country A can persecute a person for International Crimes amnesty by Country B without acting contrary to International Law.

ICTY: Whenever general rules prohibiting specific international crimes come to acquire nature of absolute norms (jus cogens), they may be construed as imposing an obligation not to cancel by legislative or executive fiat the crimes they proscribe.

Statutes of Limitation

UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity 1968

European Convention 1974 on the same subject

Few states have ratified.

ICC Statute Article 29: Crimes within jurisdiction of the court are not subject to limitations.

Some national and international courts ruled that Statutes of Limitations don't apply to international crimes.

ICTY Furundzija: torture is of peremptory nature, limitations may not apply.
Unclear if a customary rule has evolved. In some States only some categories of international crimes are subject to statutory limitations.

France: crimes against humanity have no limitations, war crimes still do.

Specific customary rules render statutes of limitation inapplicable with regard to some crimes: genocide, crimes against humanity, torture.

ICC Statute Article 29: No Statutes of limitations in proceedings before the Court.

The Prohibition of Double Jeopardy

Principle: court can't start proceedings against a person if the crime has already been tried by a national or international court and for which the person has been convicted or acquitted.

Unclear whether the principle has turned into customary international law

The rule is evolving. International Courts refrain from sitting in judgment on an offense already tried if the court that already tried it:

- i) Court conformed to some fundamental principle of fair trial and acted independently
- ii) With due diligence

This is borne out by treaties between states (Horizontal treaties)

ICTY Article 10 and ICTR Article 9 and ICC Article 20 agree.

First two endorsed by the UN Security Council, ICC Adopted by 120 States.

Principle does not apply when

- i) person was persecuted for same conduct and it was characterized as an ordinary crime
- ii) court did not comply with standards of fair trial
- iii) it was a sham trial

Immunities

Heads of State, Diplomats, High ranking cabinet members enjoy immunity from other states usually.

International Crimes? National courts have to respect diplomatic immunity, but not

FUNCTIONAL IMMUNITY

