

LAW 561

INTERNATIONAL CRIMINAL
LAW

Goltz

International Criminal Law – CAN

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International Criminal Law – CAN

- International law: rules which regulate the conduct of states and international organizations
 - Also regulates the conduct of states towards their citizens and the conduct of individuals

Sources

- 2 general sources: treaty and customary law
- **Treaty law**: international conventions either signed by only 2 states (**bilateral treaties**) or by many states (**multilateral treaties**)
 - Treaties bind only those or organizations who are signatory to the treaty
 - Can be used to establish new laws by creating new norms
 - More significant the greater the number of signatory states
- **Customary law**: international customs evidence by general practice
 - 2 elements:
 - State practice
 - Essentially, what states do – the conduct of government organs and its agents
 - Evidence by the duration of the practice and the number of states engaged in the practice
 - *Opinio juris*
 - Essentially, why states do what they do
 - States do what they do because the State believes that there is the existence of some rule which says that they have to do what they do
 - States believe they are required to do what they do
 - Not any rule or law can become a customary law – those that do become customary laws are fundamentally norm-creating laws
 - Ex: genocide – most countries agree that genocide is unacceptable conduction; it is fundamental
 - Binding on all states
 - Assessing customary law:
 - *SS Lotus Case*: the effects, not just the location of a crime, help determine jurisdiction
 - *Columbia v. Peru*: *opinion juris* is achieved when there are a large number of states engaged in the practice (not achieved in this case)
 - *North Sea Continental Shelf Case*: for a law to become a customary international law there must be enough uniformity and enough states practicing the law for it to be considered a general state practice (in this case, it lacked *opinio juris*)
- 2 secondary sources of international criminal law
 - General principles of law
 - Common law of individual countries

Customary International Law

- UN GA resolutions are considered to be statements of customary international law, though they

are not binding

- If a state violates a customary international law, and other states respond, depending on the response, may either reinforce the existence of the customary international law, or suggest a change is needed
- Evidence of customary international law
 - UN Charter
 - UN GA and UN SC (i.e. the resolutions)
 - International tribunals
 - State pronouncements on other states' actions
- **Baxter paradox:** the more states that are signatory to a treaty, the less likely the treaty is customary international law

Hierarchy of International Law (Rough)

Jus Cogens

- A preemptory norm of international law
- Recognized by the international community of states; cannot be derogated and can only be modified by another norm of the same character
- Trumps all other rules of international law
- Only a rule of *jus cogens* can override another rule of *jus cogens*
- If a treaty calls for some violation of a *jus cogens* rule, that treaty provision is void (treaty provisions cannot override rules that have achieved the status of *jus cogens*)
- Ex: prohibitions on aggression, slavery, genocide
- *Jus cogens* rules are *erga omnes* obligations
 - Due to the importance of the rights being protected by a rule of *jus cogens*, all states have a legal interest in the protection of the rights
 - They are obligations imposed on all states and directed towards the international community as a whole

Customary and Treaty Laws

(reviewed above)

Municipal Law

- Law of each state; its national or domestic laws
- Municipal laws only apply in the jurisdiction that is controlled by the state (i.e. the territory)
 - International crimes usually give rise to universal criminal jurisdiction – a state may or must (depending on circumstances) take jurisdiction if found in the state's territory
 - Treaty law imposes mandatory jurisdiction
 - Customary law imposes a permissive jurisdiction

Horizontal Versus Vertical International Criminal Law

- **Horizontal:** involves the interrelations between states of the application of one state's municipal law in another state
 - Ex: honouring a foreign judgment
- **Vertical:** involves the relationship between international criminal law and municipal law
- Generally speaking, once a country signs a treaty, the state incorporates the provisions of the treaty into their municipal laws

- Treaty may impose such an obligation
- *US v. UK*: cannot use the argument that insufficiencies in municipal laws resulted in non-fulfillment of international obligations
 - International law supersede municipal laws

International Crimes

- **International crime**: a legal prohibition universally recognized as criminal
 - Considered a grave matter, ripe for international concern
 - Cannot be left to the sole jurisdiction of one state
 - Arises under international law, either by way of custom or treaty
 - Results in a penalty
 - Individual responsibility versus state responsibility
 - State is responsible to other states (or individuals) through reparations, compensation, compliance etc ...
 - Triable by an international criminal tribunal
 - Depending on how the crime came to be an international crime (i.e. through treaty or custom), it will decide the jurisdiction
 - Customary international law gives rise to permissive jurisdiction – a state can choose to take jurisdiction
 - Treaty international crimes may impose a mandatory jurisdiction – a state either tries the individual themselves, or extradites the individual to a country who will try the person

Other Aspects of International Law

Laws of War

- Not international crimes because the laws are imposed on the warring states
- Can result in individual responsibility
- Governs how states (and individuals) behave during war time

International Human Rights

- Imposes obligations on the state wrt the rights of their citizens and how the states are to treat their citizens
- Some breaches of international human rights law will give rise to international crimes (ex: crime of torture)
- Has to do with state responsibility, so it is not a crime *per se*

Sovereignty

- **Sovereignty**: one state may not exercise its power, in any form, in another state's territory (*SS Lotus Case*)
- State sovereignty has 3 aspects
 - A state and its rule has sole and exclusive right and authority over his/her own territory
 - States are to be treated equally wrt rights, obligations, and autonomy
 - States are not subject to laws to which they have not consented, either through treaties,

customs or general principles of law

Legality Principle

- **Legality principle:** not being held responsible for a crime which when committed, was not a crime
 - Also applicable to the type of penalty available at the time of the commission of the offence
- Requirements for an individual to be punished by an international court applying international law:
 - International recognition that the individual (not the state) could be subject to criminal punishment
 - The conduct in issue has been prescribed as an international crime, subject to international sanction (which have been clearly identified)
 - Difficult to achieve when there isn't an international criminal code
- Issue first arose after WWI – a commission proposed that the peace treaty conferred jurisdiction over criminal conduct; attempted to expand the jurisdiction of war crimes
 - Americans opposed on the basis of the legality principle
- CAH never used to be recognized independent of war crimes
 - Accused would be found guilty of a war crime principally, and a CAH would get tacked-on
 - CAH have been independently recognized since Nuremberg

International Tribunals

- General rule: sovereign states are bound only by those international laws they have consented to (*SS Lotus Case*)
- Establishment of an ICT requires a degree of consent among sovereign states as to their establishment and operation
 - Precisely the reason why the establishment of ICTs is so difficult – it treads on the concept of state sovereignty

Universal Jurisdiction

- International crimes give rise to permissive universal criminal jurisdiction on the part of state parties
- *Congo v. Belgium*
 - There is a difference in the jurisdiction to prescribe a law and the jurisdiction to enforce a law
- Part of sovereignty is the ability to create any laws the state wants to but sovereignty does not allow the state to enforce a law outside of its territory
 - There is a universal jurisdiction to prescribe, not to enforce
 - International Court of Justice missed this *Congo v. Belgium* because the court held that Belgium should not have issued the warrant for arrest
- Generally, there exists a permissive universal jurisdiction for customary international crimes

Individual vs. State Responsibility

- Historically, it was the state that was held responsible for breaches of international laws
- Its main purpose was the regulation of relationships between states
- When individuals are held responsible, they are prosecuted and punished according to international criminal laws by an international criminal tribunal
- When states are held responsible, other states may request cease and desist, monetary compensation, to restore the situation as best as possible
- Not all 'bad' acts of a state are considered criminal – it may just be state delictual responsibility
 - I.e. an international wrong
 - Ex: breaches of investment treaties
 - Such breaches are separate and apart from individual responsibility of criminal acts of the state
- International Law Commission Draft Articles on State Responsibility (1976)
 - It was thought that a state could be held responsible for criminal acts
 - Idea ultimately not accepted – how would you prosecute and punish a state?
 - Articles incorporated in the 2001 International Law Commission Draft Articles on Responsibility of States for International Wrongful Acts
 - Art. 29 – confirmed duty of performance of obligations breached
 - Art. 30 – duty to cease wrongful act
 - Art. 31 – obligation to pay reparations
 - Art. 49 – countermeasures must be proportionate

Individual Criminal Responsibility

- Historically, individuals had immunity in regards of international crimes if they held prominent positions within their state
 - This constituted the main problem – international crimes were being committed by those who had immunity
 - Recently, there has been an international shift to individual criminal responsibility taking precedent over immunity
- *Pinochet* (UK, House of Lords)
 - Former heads of state have narrower immunity than current heads of state
 - Current heads of state are immune as long as they remain heads of state
 - There is no immunity for former heads of states wrt charges of torture or hostage taking because such acts could never constitute an official act
 - Immunity for former heads of states extend only to official acts
- Under the ICC, there is no immunity

Jurisdiction Over International Crimes

- Jurisdiction permits a court to deal with the subject matter
 - Requires control over the subject matter and the parties
- Jurisdiction defines the power of the court
 - Inquire into facts
 - Application of the law
 - Make decisions; render judgments
- International law pertains to a state's authority, under international law, to regulate the conduct

of persons

National Jurisdiction

- In respect of international law, refers to a state's ability to deal with the subject matter
- 2 aspects of jurisdiction
 - Jurisdiction to prescribe – the authority to create and assert the applicability of laws
 - Jurisdiction to enforce – the authority to apply the prescribed law
- A state always has exclusive jurisdiction to prescribe and enforce its own municipal laws within its own territory
 - A state can choose to enforce the laws of another state within its own territory
 - Ex: Canada recognizing a marriage from Los Vegas as a valid marriage
 - A state can choose to extradite
- Bases for asserting prescriptive jurisdiction [classical understanding]
 - Territorial – a state controls all forms of conduct committed within its borders
 - Protective principle – allows a state to take jurisdiction over an offence when it has (or could have) an adverse effect on the state's security interests
 - No element need actually occur within the state's territory; the offender need not be a national
 - Key is the nature of the interest affected, not where the harm occurs
 - Ex: breach of trade secret; counterfeiting
 - **Effect Doctrine**: assertion of extraterritorial jurisdiction over conduct because the conduct will allegedly have an effect within the jurisdiction
 - Nationality – the nationality of the offender is a valid reason to exercise extraterritorial jurisdiction
 - All states are allowed to prescribe and enforce laws wrt the conduct of its nationals, regardless of where the offence occurred
 - Passive personality – a state may assert the application of its own crimes if the victim of the act is a national
 - Controversial
 - *SS Lotus Case, Pinochet*
 - International treaties provide for this
 - Universal jurisdiction – customary international law provides that, for certain offences, any nation may exercise its jurisdiction if the accused is in the territory of the nation
 - Allowed to exercise the jurisdiction, not required to do so (treaty law may mandate it though)
 - Meeting the mandated treaty obligation entails either trying the accused or extraditing the accused to a state that would try the accused
 - Universal jurisdiction is limited to specified offences
 - Piracy, slavery, war crimes, CAH, genocide, apartheid

Specific International Tribunals

Nuremberg

- Concerns crimes committed in Europe
- Arises out of the London Charter
 - The principles of the Charter were endorsed after-the-fact by the UN

- Prosecution of 24 former Nazi leaders, by a joint military tribunal
- Indictment consisted of 4 counts
 - Conspiracy
 - Crimes against peace
 - Crimes of war
 - CAH
- Charter
 - Art. 7 – official position not considered
 - Art. 8 – defence of superior orders
 - Art. 26 – decision is final and binding
 - Art. 27 – death sentence may be imposed
- Legitimacy of the process is still in doubt
 - Arts. 16 & 18 provided for fair trial procedures
- Concurrent jurisdiction with national courts

Tokyo

- Established by the US Supreme Commander in Japan
- Tokyo Charter was modeled after the London Charter
 - Concurrent jurisdiction with national courts
 - Art. 6 – defence of superior orders
 - Art. 5 – jurisdiction over the following offences
 - Crimes against peace
 - War crimes
 - CAH
 - Art. 16 – death sentence
- Probably less impartial than Nuremberg because Japan was not allowed to accuse the US of nuclear warfare

ICTY

- Established on May 25, 1993 (Resolutions 808 & 827, UN SC)
- Why could the UN set up such a tribunal
 - Art. 39 of the UN Charter provides that such action can be taken if there are ‘threats to international peace and security’
 - It was held that the practice of ethnic cleansing that was occurring in the former republic of Yugoslavia amounted to such a threat
- Statute
 - Art. 9 – jurisdiction is concurrent, but the Tribunal has primacy
 - Art. 10 – *non bis in dem*: if tried by the Tribunal, cannot be tried by a national tribunal; vice versa
 - Arts. 11-14 – composition of the court
 - Provides for an appeal process
 - Art. 27
- *Tadic* decision consisted of a challenge to the UN SC as to their ability and authority to establish the ICTY
 - Trial Chamber held that they couldn’t even question its creator
 - Appeal Chamber disagreed with the Trial Chamber but upheld the validity
 - The UN SC was acting within their mandate when it created the Tribunal because

they were acting in pursuant of s. 39 and according to s. 41, which is sufficiently broad in wording, to permit the establishment of a criminal court

- Court was consistent with the Rule of Law

ICTR

- Established by Resolution 955, Nov. 8, 1994 (UN SC)
- Statute
 - Arts. 5 & 6 – superior orders can be a mitigating factor in sentencing
 - Art. 8 – concurrent jurisdiction with primacy
 - Art. 9 – *non bis in dem*
- *Kanyabashi* decision also challenged the ability and authority of the UN SC to establish the Tribunal
 - Similar reasoning to *Tadi*
 - As Rwanda had asked for the establishment of the Tribunal, it could not be argued that the Tribunal violated state sovereignty
 - The seriousness of the situation provided the rationale
 - The adequate guarantees wrt the rules of procedures provided valid constitution

ICC

- The notion arose from the *Genocide Convention* (Art. 6)
- Idea was kicked around, conservatively, until it was resurrected when Latin America asked for the creation of an international court for drug trafficking offences
 - The International Law Commission was asked by the UN GA to draft a statute

Draft Statute (1994)

- The ILC opted to create a mechanism that relates to existing international law (as opposed to creating an entirely international criminal justice system)
- Simply a matter of establishing a new tier in a criminal justice system
- Except for the crime of genocide, consent would be required between the states of where the acts occurred and the state of the accused
- Advantages
 - Based on existing treaty obligations
 - Gives the custodial state the right to try the accused themselves (except for genocide)
 - Based on existing international criminal law
- Disadvantages
 - No accepted definition of CAH
 - Differences between international criminal acts and war crimes
 - No definition of terrorism; no provisions going to terrorism

Rome Statute (1998)

- Art. 5 – crimes within jurisdiction
 - Does not include a definition of crime of aggression
- Art. 12 – jurisdiction can be exercised either where the crime occurred, or the state of the accused (Statute must be ratified by one of those states)
- Art. 26 – minors
- Complimentarity principle – a way to ensure that state sovereignty is not replaced by the ICC's jurisdiction

- No express veto for any state
- Provisions seem to imply the concept of 'ownership' in a crime

Specific International Crimes

- Acts become criminal acts either through treaty law or customary law
 - Customary law: sources if from the practice and *opinio juris* of the state
 - Binds all states
 - Treaty law
 - The definition of each crime is found in the text of the treaty
 - Only binding on those states who have signed the treaty

Genocide

- Customary law
 - Term first used in the Nuremberg prosecutions of 1944
 - Tried as a subset of CAH
 - UN GA resolutions have affirmed that genocide is a CAH
 - States enjoy universal jurisdiction under customary international laws (*Eichmann*)
 - In the *Jeliscic* case, it was held that genocide has reached the status of *jus cogens*
 - States have an obligation to the entire international community, not just towards other individual states, to prevent and punish the crime of genocide (*erga omnes* obligations)
- Treaty law
 - Genocide has its own convention: *The Convention on the Prevention and Punishment of the Crime of Genocide* (1948)
 - Affirms that genocide is condemned by the civilized world
 - 133 nationals have ratified it; at 50 haven't including, Japan, Nigeria, Indonesia, Thailand
 - Provisions of the *Convention*
 - Art. 1 – signatories agree to prevent and punish
 - Art. 2 – definition
 - Genocide differs from other CAH in that genocide requires a specific intent
 - Exhaustive list of the acts comprising genocide
 - Art. 3 – list of means by which a person could be found guilty (the *actus reus*)
 - Art. 4 – immunity is not a defence
 - Art. 5 – signatories are required to criminalize genocide in national law
 - Art. 6 – jurisdiction
 - Art. 7 – genocide is not a political crime
- *Akeyasu*, ICTR
 - First time an individual was convicted for the specific crime of genocide
 - As there is no death penalty provision of the ICTR, received life sentences
 - 'Membership in the groups protected by the *Genocide Convention* seems to arise by birth, in a continuous, and often irremediable measure'
- The victim of genocide is not the individual, but rather the group
 - It is the group that is targeted specifically
- ICC Elements of Crimes
 - Used to assist the court in interpreting the ICC Statute

- Commonalities
 - Intent to destroy, in whole or in part, a national, ethnic, racial or religious group
 - Conduct must take place in a context of manifest similar conduct or the conduct was such that the conduct itself could effect such destruction
 - The act need only affect at least one person
- *Actus Reus*
 - Can arise by both acts or omissions (*Kambanda*)
 - Genocide is committed once any one of the acts enumerated is committed with the requisite intent
- *Mens Rea*
 - To be convicted, it must be proved that the person had the specific intent to destroy, in whole or in part, a national, ethnic, racial or religious group
 - Intent must be proved beyond a reasonable doubt
 - *Jelisić*: ‘destroying in whole or in part’ means to destroy an important part of the group, either from a qualitative or quantitative perspective; the potential impact of the group
- *Mens rea* must be formed prior to the commission of the genocidal act – the things you are doing are furthering your intention to destroy the group
- Intent may be inferred
 - Words, deeds
 - Extent of bodily injury
 - Systematic nature of the killings
 - Types of weapons used

Crimes Against Humanity

- Definition: a crime which is so severe and shocking that its magnitude or savagery exceeds the limits tolerated by modern societies
- Historically, laws of war only protected civilians in territory of another state; meaning, a state could do whatever they wanted to their own civilians
- 1907 Hague Convention
 - ‘Desire to serve the interests of humanity’
 - Provides overall general protection ... you can’t commit despicable acts against your own citizens
- Nuremberg Charter, Art. 6(c)
 - First time individual responsibility was attached to a CAH, but tried in connection with a war crime
- Tokyo, Art. 5(c)
 - Did not consider religious groups; religion was not much of consideration in the Far East
- WWII prosecutions were subsequently endorsed by the UN GA
- ICTY, Art. 5
 - Does not require an international conflict; can arise in a civil conflict but needs an armed conflict, of some quality
 - Need only be committed against a civilian population; need not be a specific group
 - Expanded the list of acts to include imprisonment, rape and torture
- ICTR, Art. 3
 - Does not require an armed conflict
 - Requires a widespread or systematic attack on a civilian population
 - Grounds: national, political, ethnic, racial religious

- ILC Draft, Art. 18
 - Does not require an armed conflict
 - Requires that the act occur in a systematic manner, or on a large scale
 - More of a separation between war crimes and CAH
- ICC Statute, Art. 7
 - Widespread or systematic attack against any civilian population
 - Requires knowledge of the attack
- Main elements of CAH, as customary law
 - Civilian population
 - Part of a widespread or systematic attack
 - *Blaskic*
 - Large scale against civilians (in this case, political)
 - Repeated and continuous commission of inhumane acts linked to one another
 - Preparation and establishment of a methodical plan
 - Plan doesn't need to be expressed, or even stated clearly and precisely
 - Can be inferred
 - *Akeyasu*
 - **Widespread:** massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims
 - **Systematic:** thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources although not necessarily adopted formally as part of the policy of the state
 - [Likely that it no longer needs to be part of an armed conflict
 - Attack may be non-violent in nature (ex: apartheid)]
- Perpetrator likely needs to exercise some sort of *de facto* power, but needn't be a government or military official or agent (*Blaskic*)
- There needs to be some sort of express or implied approval by the state (*Kupreskic*)
 - Can be an issue if it is rebels who are committing the CAH
- *Actus Reus*
 - Attack: widespread or systematic
 - Inhuman in nature and character
 - Against members of a civilian population
 - [Could qualify if the effect of the act is felt in a widespread scope]
- *Mens Rea*
 - Does not require a specific intent to destroy a particular group, as is required with genocide
 - It must be proved that the perpetrator knowingly committed the crime and understood the broader context in which the commission occurred
 - Actual or construction knowledge that the act committed forms part of a widespread or systematic attack on a civilian population pursuant to some sort of state endorsed policy or plan
 - Knowledge is examined objectively and can be inferred
 - *Blaskic*: knowledge can be imputed to the one who is reckless, who knowingly takes the risk

- Need only be aware of a policy/plan, need not have intimate knowledge of the extent of the policy/plan

War Crimes

- Two main sources of war crimes
 - Violations of the Laws and Customs of War
 - Grave Breaches of the *Geneva Convention*
- History
 - Westphalian paradigm states that one state cannot govern the conduct of another state
 - Greeks and Romans customarily observed certain humanitarian principles which have become fundamental to contemporary laws of war
 - Over the course of many years, the practice of states have led to the emergence of customary principles and rules regarding the conduct of hostilities
 - Fundamental principle: there are limits to what one state can do during time of war
 - Development
 - 1864 – first Convention
 - Red Cross founded
 - St. Petersburg Declaration – banned certain types of ammunition because of the great suffering it inflicted (principle: limit suffering)
 - Treaties prior to WWI
 - Protection for POWs, wounded and sick
 - Geneva Gas Protocol – prohibited the use of certain asphyxiating gases

4 Key Principles of the Laws of War

- **Necessity** – only the degree and kind of force required (and permitted by the laws of armed conflict) for the partial or complete submission of the enemy with a minimum expenditure of time, life and physical resources
- **Humanitarian concerns** – at all times, armed forces must treat the wounded, sick, POWs, and civilians humanely
- **Proportionality** – the use of force must not be disproportionate to the intended objective (ex: nuclear weapons during WWII)
- **Distinction** – in all cases, civilians should be distinguished from military personnel and objectives
 - Civilians should not be the specified targets of an attack

The Laws and Customs of War

- Historically, taken from the 1907 Hague Convention
- Specific war crimes have been adopted into the charters of specific international military tribunals
- 1993, UN SC identified the laws and customs of war as coming from
 - The 4 1949 *Geneva Conventions*
 - The 1907 Hague Convention
 - The 1948 Geneva Convention
 - The Nuremberg Charter
- Each of the 4 1949 *Geneva Conventions* have the same Art. 3
- The ICC Statute provides an exhaustive list of the laws of customs of war that are within the jurisdiction of the ICC

Grave Breaches of the Geneva Convention

- Expressly gives rise to individual criminal responsibility under international law
- 1977, 2 Additional Protocols were adopted to supplement the grave breaches
- Under the *Conventions*, Grave Breaches are serious war crimes that are subject to the universal jurisdiction of all states
 - If the state does not prosecute, they must extradite (Art. 49, GC-I)
- Grave Breaches provisions
 - GC-I, 49-50
 - GC-II: 50-51
 - GC-III : 129-130
 - GC-IV: 146-47
 - AP-I: 85
- Grave Breaches are international crimes pursuant to treaty law (uncertainty still remains wrt customary international law)
 - NB: Baxter paradox
 - *Nicaragua* has held that Art. 3, common to all the conventions, amounts to a customary international law
 - *Tadic* went further and held that some specific war crimes were crimes under customary international law (did not identify them)
- Wrt customary international law, it is likely that the common Art. 3, the grave breaches and the APs have reached the status of crime of customary international law
- *Actus reus* and *mens rea* will vary according to the specific war crime
- Can a civilian, or non-state actor, be held responsible for a war crimes?
 - AP-I, Art. 1(4)
 - ICC, Arts. 8(2)(c) & (e)
 - *Tadic*: requires some sort of *de facto* power
 - *Akeyasu*: individuals who were legitimately mandated could be held responsible
- MEANING: requires some sort of *de facto* control by a public authority

Aggression

- Formerly known as a crime against peace
- Currently, the crime of aggression has no clear definition and no constituent elements comprising the crime
- Individual criminal responsibility
 - 2 debates
 - It is the state that wages wars
 - It is the individual who put the plans into effect
 - Nuremberg; crimes against international laws are committed by men, not by abstract entities
- Statutory provisions
 - Nuremberg, Art. 6(a)
 - Tokyo, Art. 5(a)
 - ICC, Arts. 5(1)(d) & 5(2)
 - UN Charter
 - Does not provide a definition
 - Every state has an inherent right of self-defence (Art. 51)

- Pursuant to Art. 39, it is up to the SC to determine when there has been a threat to peace
 - Arts. 40-42 identifies what the SC can do about it
 - Difficulty arises because the 5 permanent members of the UN SC have a veto (Art. 27)
- *Nicaragua* tried to clarify the definition of aggression
 - All acts of aggression include the use of armed forces, but not vice versa
 - Funding, in and of itself, does not amount to a use of armed forces
- Impossible to define the *actus reus* or the *mens rea*; likely to include a high-ranking state official

Modes of Participation

- All of the current international criminal tribunals allow for individual criminal responsibility
 - ICTY – Art. 7
 - ICTR – Art. 6
 - ICC – Art. 25
- The ICC Statute identifies the 4 main ways in which an accused can be found individually responsible
 - Direct commission
 - Indirect commission
 - Inchoate offences
 - Command responsibility
- In comparison to the ICTY/ICTR, ICC is part progressive and part conservative wrt modes of participation
 - ICTY/ICTR only attaches criminal responsibility if the offence is completed (with the exception of genocide)
 - ICC allows for attempts
 - ICTY/ICTR includes conspiracy to commit
 - ICC does not
 - ICTY/ICTR includes planning
 - ICC does not
- *Kristic*
 - **‘Planning’** means that one or more persons design the commission of a crime at both the preparatory and execution phases
 - **‘Instigating’** means prompting another to commit an offence
 - **‘Ordering’** entails a person in a position of authority using that position to convince another to commit an offence
 - **‘Committing’** covers physically perpetrating a crime or engendering a culpable omission
 - **‘Aiding and abetting’** means rendering substantial contribution to the commission of a crime
 - **‘Joint criminal enterprise’** entails individual responsibility for participation

Direct Commission

- Individuals are principals in the first degree
- Liability for both acts and omission

Ordering

- Implies a superior – subordinate relationship (*Akeyasu*)
- Using a position of authority to convince, command another to commit a crime
- On order need not be in a particular form; can be explicit or implicit; can be inferred from circumstantial evidence (*Blaskic*)
- Need not be given directly by the superior (*Blaskic*)

Omissions

- Where an individual has a duty to act and does not (*Rutaganda*)
- Judge objectively; is deliberate and not accidental (*Delalic and Delic*)

Indirect Commission

- While the offence is not directly committed by the individual, the individual must directly assist in the commission of the illegal act
- Principles in the second degree
- ‘Deliberate acts contributed directly and substantially to the commission of the crime’ (*Kordic and Cerkez*)

Complicity

- An accomplice to an offence; an individual who associates him/herself with the principal offence committed by another perpetrator
- *Actus reus*
 - Plurality of persons
 - Existence of a common design or plan which, when committed, amounts to a criminal act
 - Participation of the accused in the common design
- *Mens rea*
 - The intent to commit a crime is a shared intent among all the perpetrators
 - Each individual must intend the result of the actions taken
 - It must be proved that the accused had the knowledge of the intended purpose of the criminal enterprise
 - Can have the intent imparted
 - When the acts fall outside the common design, it must have been foreseeable that the secondary crime would be committed
 - The accused willingly took the risk
 - Advertent recklessness
- Genocide
 - Requires knowledge of the genocidal plan
 - Requires the *actus reus* of participation in the execution of the plan
 - The accused must act or fail to act knowing that such actions contributes to the partial or destruction of a particular group without sharing the goal (*Jelesic*)

Aiding or Abetting

- **Aiding:** giving assistance to someone
- **Abetting:** facilitating the commission of an act by being sympathetic thereto
- Always an accessory to the principle

- Aider or abettor carries out acts directed to assist, encourage, or lend moral support to a specific crime which has a substantial effect on the perpetration of the crime
 - Differs from complicity – being complicit means that the individual acts somehow furthers the plan or purpose
- *Actus reus*
 - Practical assistance, encouragement, or moral support which has a substantial effect on the completion of the criminal act
 - Can be acts or omissions (ex: silent presence)
 - If an individual has the authority to intervene and stop the current commission of a crime, and does not do so, they could be liable
- *Mens rea*
 - Knowledge that the act assists the principal in the commission of the crime
 - Does not require the same *mens rea* as the principal
 - Need not know of the precise crime that is intended to be committed by the principal
 - *Blaskic*
 - Knowledge that the act/omission assists in the commission of the crime
 - Aider or abettor needs to have intended to provide assistance, encouragement, or moral support, or that such assistance would be foreseeable

Planning

- *Akeyasu*: one or more persons contemplate designing the commission of a crime at both the preparatory and execution phases
- An accused must directly or indirectly intend that the crime be committed (*Blaskic*)

Inchoate Offences

- Does not require that the substantive crime to be completed, or actual harm felt
- Method alone is punishable

Instigation and Incitement

- **Incitement**: a person seeks to persuade another to commit a criminal offence
 - Only indictable as an international crime in the case of genocide; must be direct and public
- Committing an act intended to directly provoke another to commit a crime
- Requires a causal connection between the incitement and the material commission of the crime
- You can be convicted even if it fails (*Akeyasu*)
- *Actus Reus*
 - Direct provocation
- *Mens Rea*
 - Intent to directly provoke
 - For incitement of genocide, the incitor must also have the specific intent to destroy (*Akeyasu*)

Conspiracy

- Agreement by two or more people to carry out a criminal act
- Limited to the crime of genocide
- No distinction between direct and indirect perpetrators

- *Mens Rea*: requires the same intent to destroy

Attempts

- Not recognized by the ICTY or ICTR (other than for genocide)
- Recognized for all crimes within the ICC's jurisdiction

Command Responsibility

- Superior held criminally responsible for the criminal acts of a subordinate if the superior knew or ought to have known of the act, was in a position to stop the act and failed to do so
 - Either prevent or punish the subordinate
- The ICTY/ICTR only recognizes a superior-subordinate relationship; ICC recognizes both a military and non-military relationship (military relationship is held to a higher standard)
- Wrt military commanders, command responsibility has reached the level of a customary international law (*Delalic and Delic*)
- The key is the level of control the superior possesses (*Delalic and Delic*)
- *Actus reus* – 3 requirements for command control
 - There must be a superior-subordinate relationship
 - The superior knew or had reasons to know that the subordinate committed or was about to commit a crime
 - Superior failed to take the reasonable and necessary steps to prevent or punish the perpetrator thereof
- *Mens rea*
 - 'Serious negligence which is tantamount to acquiescence or even malicious intent' (*Akeyasu*)
 - Exists when
 - Superior has actual knowledge established through direct or circumstantial info
 - The superior possessed info which would put the superior on notice of the risk, indicating the need for additional investigation
- ICC, Art. 28
 - Military commanders are required to keep a more active awareness of the activities of their subordinates
 - Other superiors are held to a lower standard

Defences

- Defences aim to exclude punishment
- Includes both justifications and excuses
- Defences can be used to 1) exclude punishment; 2) result in a lesser charge; or 3) mitigation of sentence
- Possibility of exculpation is a general principal of criminal law
- Burden of proof: accused has to prove the defence on a balance of probabilities (*Delalic and Delic*)
- Statutory provisions
 - Not recognized in the Nuremburg Charter
 - ICTY

- Art. 7(4) – superior orders are a mitigating factor
- Art. 7(2) – ‘official position’ not a defence or a mitigating factor
- Art. 24(2) – wrt sentencing, consider circumstances, individual culpability and mitigating factors
- Rules – listed defences (alibi, insanity, special defences)
- ICTR
 - Art. 6(4) – superior orders are a mitigating factor
 - Art. 6(2) – ‘official position’ not a defence or a mitigating factor
 - Art. 23(2) – wrt sentencing, consider circumstances, individual culpability and mitigating factors
 - Rules – listed defences (alibi, insanity, special defences)
- ICC
 - Art. 31 – permitted defences

Age

- No provisions in the ICTY or ICTR
- ICC – Art. 26
 - Court has no jurisdiction over persons under the age 18
- Determined at the time the offence was committed
- Rationale is to treat children as victims of international crimes, not perpetrators

Insanity or Diminished Responsibility

- Insanity: an individual, who at the time the offence was committed, is unaware of what he/she is doing; is incapable of forming a rational judgment that what he/she is doing is right or wrong
- Diminished responsibility: the accused knew that his/her conduct was wrong, but was unable to control his/her actions because of his/her mental condition
 - A mental abnormality substantially impairs the ability to exercise self-control
- This defence likely encompasses mental incompetence (*Delalic and Delic*)
 - It removes the capacity to formulate the requisite *mens rea*
- The ICTY Rules provide that diminished responsibility is not an absolute defence
 - Destruction of mental capacity would constitute an absolute defence
 - Could be considered for a postponement or stay in proceedings
- Assessed at the time the offence was committed
- Presumption of sanity (*Delalic and Delic*)

Intoxication

- A permissible ICC defence only if it was not done voluntarily
- Intoxication removes the mental element; must be to an extent as to destroy the capacity to appreciate lawfulness

Self-Defence

- Extends to self, third persons and property
- Practicality of the defence
 - Actions in response must be reasonable
 - There must be an imminent threat of unlawful force
 - The response must be proportionate to the initial threat
- Defence of property only applicable wrt certain war crimes

- The defence of self-defence cannot be equated with action in a defensive military operation

Duress

- It is an admission that the accused had both the *actus reus* and *mens rea*, but can be excused because the accused was overcome by threats from another
- AKA defence of necessity
- You are committing the offence because of some harm that would come to you if you did not commit the offence
- Not commonly accepted in ICTY and ICTR
 - ICTY accepted the defence as a mitigation factor going to punishment
- ICC, Art. 31
 - There must exist a threat of imminent death or serious bodily harm
 - The conduct of the accused must be necessary and reasonable
- Accused must not intend to cause greater harm than he/she intends to avoid
- *Erdemovic*
 - Trial Chamber held it could be a complete defence
 - Appeals Chamber held the duress cannot be a complete defence, only a mitigating factor

Mistake of Fact or Law

- Most legal systems allow for mistake of fact, but not mistake of law
- ICC, Art. 32
 - Mistake of fact can amount to a complete defence
 - Must be honestly and reasonably held
 - Limits mistake of law defence in that there is no defence going to whether or not a crime is a crime within the jurisdiction of the ICC

Superior Orders

- General proposition: conduct of the accused should be tolerated/excused because it was required by his/her military or civilian superior
- National tribunals did not allow the defence
- Nuremberg, Art. 8 – only available as a mitigating factor
- Tokyo, Art. 6 – allows it to be considered as a mitigating factor
- ICTY, Art. 7(4) – mitigating factor
- ICTR, Art. 6(4) – mitigating factor
- ICC, Art. 33 – would only be relieved of criminal responsibility if
 - The person was under a legal obligation
 - The person did not know the order was unlawful
 - The order wasn't manifestly unlawful
- It is understood by the international tribunals that soldiers are under 2 sets of laws

Rejected Defences

- Statute of Limitations
 - Not an accepted defence under international law
 - ICC, Art. 29
- Military Necessity
 - State defences are not available to individual perpetrators
 - ICC, Arts. 8(2)(a)(iv) and 8(2)(b)(xiii)

- Reciprocity
 - *Kupreskic: tu quoque* ('you also') argument is flawed; international laws are based on obligations owed to the international community, not to individual states
- Immunity/Official Capacity
 - All international criminal tribunals have expressly rejected this defence
 - The defence does exist in national courts because of the principle of sovereignty
 - Nuremberg, Art. 7
 - Tokyo, Art. 6
 - ICC, Art. 27 (although this section is in conflict with Art. 98, where some sort of waiver is required)

International Criminal Procedure

- International criminal law also established the procedures
- 2 main aspects
 - Rights afforded to the accused, and other parties
 - Relationship between international tribunals and national courts

Initiating Proceedings

- ICTY/ICTR
 - Prosecutor has the primary responsibility of initiating the proceedings
 - Can be initiated based on information from any source
 - Acts like a screen to weed out those cases which *prima facie* do not contain sufficient particulars
 - If the prosecutor decides to proceed, an indictment is forwarded to the trial judge
 - Art. 16(2)/Art. 15(2)
 - The sitting judge decides whether there is a *prima facie* case against the accused; either confirms or dismisses the indictment
 - *Delalic and Delic* confirmed that it is up to the prosecutor along to decide who to indict
- ICC
 - 3 means by which the ICC's jurisdiction is triggered
 - State referral
 - SC referral
 - Prosecutor's own initiative

Rights of the Parties

- Both the Nuremberg (Art. 16) and the Tokyo (Art. 9) Charters seemed to protect the rights of the accused
- Principles regarding the rights of the accused are pulled from the Universal Declaration of Human Rights and UN International Covenant on Civil and Political Rights
- *Tadic*: challenged to whether the tribunal was 'established by law'
 - Issue only applies in a national or municipal court
 - As the tribunal is 'rooted in law', it can be seen as being established by law

Suspects and Accused

- ICTY/ICTR
 - **Accused:** a person against whom one or more counts in an indictment have been confirmed
 - **Suspect:** a person about whom the prosecutor possesses reliable information which tends to show that he/she may have committed a crime within the tribunal's jurisdiction
- ICC: refers to 'person' in relation to all people who are not accused

Rights of Suspects

- Right to be informed promptly of the reasons for the arrest and the charges against
- Right to be brought to trial without undue delay
- Right to be an independent judicial officer for review
- Right to not be unreasonably held pre-trial
- ICC, art. 85 – enforceable right to compensation for unlawful arrest or detention

Rights of Accused

Ne bis in idem

- Right not be tried twice for the same offence
- ICTY, Art. 10/ICTR, Art. 9
 - An individual cannot be tried by a national court after having been tried by an international tribunal
 - Can only try an accused again after a national trial if
 - The charge was classified as a national crime
 - Proceedings were not impartial or independent
 - Case was not prosecuted diligently; proceedings were meant to shield the accused from international criminal responsibility
- ICC, Art. 20
 - Forbids a national trial after an international one
 - Can only try after a national trial if
 - Proceedings were designed to shield the accused from criminal responsibility
 - Proceedings were not impartial or independent

Public Hearing

- ICTY, Art. 21(2)/ICTR, Art. 20(2)
 - Certain exceptions going to measures of privacy and protection of witnesses
- Main purpose of such provisions
 - Prevent intimidation of and retribution on witnesses
 - Protect the dignity of sexual assault victims
- *Tadi* highlights the fact that you need to balance the interests of the accused and the interest of the witnesses
- You can infringe on the public nature of the trial, but you can't infringe on the fairness of the trial

No Trial in Absentia

- Nuremberg, Art. 12
- ICTY, Art. 21(4)(d)/ICTR, Art. 20(4)(d)
- ICC, Art. 63 – does allow for the accused to be removed if he disrupts the proceedings

- ICTY – Rule 61 allows for a sort-of preliminary inquiry where witnesses give evidence to establish the reasonable and probable grounds of the offence
 - If committed to trial, allows for the issuance of international warrants
 - Reasons for
 - Get custody of the accused
 - Witness gets their testimony out in open court
 - Creates a historical record
 - Upheld in *Rajic* as not offending trial fairness

Legal Representation

- Nuremberg, Art. 16(d)
- Tokyo, Art. 9(c)
- ICTY, Arts. 18(3), 21(4), Rule 45
- An associated right is the right to not have legal counsel
 - *Milosevic* refused to enter a defence on the grounds that the court did not have jurisdiction
 - Not entering a defence or having legal representation can affect the fairness of the trial – extra measures would need to be taken

Specificity in the Indictment

- There must be certainty in the indictment so a meaningful defence can be filed and presented
- Nuremberg, Art. 16(a)
- Tokyo, Art. 9(a)
- ICTY, Art. 18(4)/ICTR, Art. 17(4)

Impartiality of Judges

- Nuremberg, Art. 3, would not allow a challenge wrt a judge's bias
- No judge can sit on the appeal of a trial they heard
- Judges can make orders and sit on the same trial (*Blaskic*)
- Judges can sit on different and separate trials arising from the same offence (*Kordic*)
- *Furundzija*
 - A judge is not impartial if actual bias is shown
 - Unacceptable appearance of bias:
 - A judge is party to case, or has an interest in the outcome of the case
 - Circumstances would lead a reasonable person, properly informed, to reasonably apprehend bias

Appeals

- Nuremberg, Art. 26 – decision is final; no appeal
- Tokyo, Art. 17 – no appellate procedure; could only request a sentence reduction from the Supreme Commander
- ICTY, Art. 25/ICTR, Art. 24 – allows for appeals on errors of law (invalidating the decision) and errors of fact (involves a miscarriage of justice)
- *Furundzija* – showing an error of fact
 - Show that the trial chamber did in fact commit the error
 - Error resulted in a miscarriage of justice – a grossly unfair outcome
- *Tadic* – leading additional evidence on appeal

- Evidence must be relevant and material to an issue
- Evidence must be credible on its facts
- Reasonable explanation for why it was not available at trial
 - Lack of availability must not be due to a lack of diligence on the party wishing to adduce the evidence
- ICC, Arts. 81, 83

Rights of the Victim

- Defined in the ICC statute – natural person who has suffered because of the commission of a crime within the jurisdiction of the court
 - Could include legal entities who have suffered direct harm
- ICTY, Art. 22/ICTR, Art. 21
- ICC, Art. 68
- *Tadic* – test for balancing the right of the accused to a fair trial and the right of the witnesses to be protected
 - There must be real fear for the safety of the witness and their family
 - Evidence to be provided must be sufficiently relevant and important
 - Lack of prima facie evidence that the witness is untrustworthy
 - Lack of a witness protection employment
 - Any measures taken must be strictly necessary

National Enforcement

- International laws are not automatically in effect within the national laws of a country; they must be adopted into the national law
- If there is a conflict, international law prevails – cannot plead the country’s constitution to defeat the application of international law
- Penalty for a state failing to enact treaty obligations:
 - Required compliance
 - Possible compensation
 - Delictual responsibility
- Treaty laws – some are self-executing and others require adoption by the legislative body

Territoriality

- A state’s national jurisdiction over international crimes is two-fold
 - Jurisdiction to prescribe
 - Jurisdiction to enforce
- A state is not permitted to enforce that which it is not permitted to prescribe
- Exceptions
 - By treaty – ex: Schengen Convention, Lockerbie case, SOFAs, Dayton Agreement
 - By consent; international agreements
 - By custom – certain military tactics

Extradition

- **Extradition:** surrender by one country, at the request of another country, of a fugitive who is either accused or convicted of a crime by the requesting country
 - Differs from deportation, which is an immigration matter
- Common provisions in bilateral extradition treaties
 - **Conditions of double criminality:** the conduct must be a crime in both the territorial and requesting states
 - **Political offence exception:** extradition will not be granted if the offence is regarded as a political offence
 - **Rule of speciality:** the person extradited shall not be prosecuted, sentenced, detained for any other crime than those for which he/she was extradited

Extradition in Canada

- *Extradition Act*
- *Kindler*
 - SCC held that not having sought assurances did not offend the Charter
 - For it to offend the Charter, the decision of the Minister would have had to ‘shock the conscience of Canadians’
- *Burns and Rafay*
 - 5 reasons why the SCC held that the failure to seek assurances violated the Charter
 - Death penalty has been rejected in Canada
 - Death penalty has been rejected by other countries
 - Treat personal characteristics as mitigating factors to the death penalty
 - Concern about potentially wrongful convictions
 - Death row phenomenon
- 4 requirements for an offence to qualify for extradition
 - The requesting country must have jurisdiction over the offence charged (i.e. a real and substantial link between the criminal conduct and requesting country)
 - The offence must constitute a crime in the requesting country
 - The offence must constitute a crime if it had been committed in Canada
 - The crime must be listed in the list in the extradition treaty between Canada and the requesting country
 - The treaty prevails over the *Extradition Act*
- Process
 - Arrest under the *Extradition Act*
 - Committed by an extradition judge
 - Same threshold as a preliminary inquiry – prosecution has the burden of showing a *prima facie* case which would suffice for committal to trial
 - Surrendered to the federal Minister of Justice
 - Allows for appeals on grounds of law; appeals on grounds of fact or mixed fact and law require leave from the court

INTERPOL

- Mission: prevention and combat international crime
- Works with national forces; communication system that links police around the globe

- Important task – to place member countries on alert about people who are being sought by police forces worldwide
- Members have access to international databases of criminal information as well as a global view of specific crimes, patterns, and trends

Belgium Example

- An example of a nation implementing international laws
- Belgian passed a law (Act of 10 February 1999 Concerning the Punishment of Grave Breaches of International Humanitarian Law) in which criminal courts are given universal jurisdiction over ‘grave breaches’ causing injury or damage to persons or objects protected by the 1977 Additional Protocol II (applicable to non-international armed conflicts)
 - Problems
 - Additional Protocol II doesn’t actually contain any grave breaches provisions – Belgium is essentially attempting to equate grave breaches to the status of customary international law
 - The issue arises wrt the fact that it is uncertain as to whether the grave breaches has reached the status of customary international law
 - ICTY held in *Tadic* that many of the provisions of AP-II have reached the status of customary international law
 - If it has reached the status of customary int’l laws, there is no issue wrt prescribe the crime; the issue arises wrt enforcement
 - Eliminates any and all diplomatic immunities (diplomatic and head of state immunities) under national law
 - This wouldn’t be an issue if it were an international court
 - Because of issues of sovereignty, heads of states should be able to claim immunity before national courts
- Practically, a number of complaints have been filed in Belgium pursuant to this act
 - Complaints have been filed against PM of Israel, Sharon; President Castro