

Law 561
Int'l Criminal law
Harrington

INTRODUCTION:	6
i) Source of ICL (Art 38(1) ICJ Statute)	6
ii) Goal of International Criminal Law:	6
JURISDICTION:	8
i) Forms of jurisdiction:	8
ii) Conceptual Matters:	9
iii) Traditional Heads of Jurisdiction:	9
1. Territorial:.....	9
2. Nationality.....	10
3. Passive Personality:	10
4. Protective Principle:	10
5. Universal	10
NATIONAL PROSECUTIONS OF INTERNATIONAL CRIME:	12
i) National prosecutions are preferred, but problematic:	12
ii) Does the State have an obligation to prosecute?:	12
1. Treaty Obligations:.....	12
2. Customary Obligations:.....	13
3. Statutory limitations:	13
4. Double Jeopardy:	13
iii) Canada: Crimes Against Humanity and War Crimes Act, etc.:	13
STATE COOPERATION WITH RESPECT TO NATIONAL PROCEEDINGS	15
i) Introduction:	15
ii) Interaction with human rights:	15
iii) Extradition:	15
iv) Case Law (Kindler v. Canada, Soreing, Burns)	16
v) Mutual Legal Assistance:	17
Transfer of proceedings:.....	17
Enforcement of penalties:	17
HISTORY OF INTERNATIONAL PROSECUTIONS: FROM IMT (NURENBERG/FAR EAST)	17
i) Early History of the International Tribunals:	18
1. WW1:	18
2. The Interwar Period:	19
3. WW2/IMT Nurembeg/Tokyo:.....	19
Final Assessment of the Early Tribunals:.....	22
ii) ICTY and ICTR and their contributions:	22
1. ICTY:	22
2. ICTR.....	25
3. Final comments on AD HOC tribunals:.....	26
THE INTERNATIONAL CRIMINAL COURT:	26
i) Origins:	26
The Rome Conference	26
ii) Rome Statute	27
Aims:	27
iii) Crimes in Rome Statute:	27
Genocide (art. 6)	27
Crimes Against Humanity (art. 7)	28

War Crimes (art 8).....	28
Elements of crime (art. 9):.....	28
iii) How do crimes get before ICC?.....	28
Exercise of Jurisdiction (art. 13).....	28
Subject Matter of Jurisdiction (art. 5).....	29
Temporal Jurisdiction (art. 11).....	29
Geographic:.....	29
Other jurisdictional matters:.....	29
Principle of Complementarity:.....	29
Other provisions:.....	30
iv) United States and the ICC:.....	30
v) Arguments in favour of ICC:.....	31
vi) Principles of Legality of ICC.....	31
vii) Sentencing:.....	31
viii) Four Situations Before the ICC.....	31
1. Lubanga – on trial for crimes in DRC – State referral.....	31
2. Uganda – referral by state of Uganda.....	32
3. Darfur – SC referral (2005).....	32
4. Central African Republic – State referral.....	32
ix) Truth Reconciliation Commissions, Amnesties and ICC:.....	32
HYBRID OR INTERNATIONALIZED CRIMINAL TRIBUNALS:.....	33
i) Overview:.....	33
ii) Sierra Leone:.....	33
The conflict:.....	33
The Resolution:.....	33
Jurisdiction:.....	33
The Cases:.....	34
iii) Cambodia: Extraordinary Chambers.....	34
The Conflict.....	34
The Court:.....	34
Jurisdiction:.....	34
Other Matters:.....	35
iv) Lebanon: Special Tribunal.....	35
The conflict:.....	35
The Court:.....	35
v) Relationship b/n international tribunals and the ICC.....	35
THE ROLE FOR INTERNATIONAL HUMAN RIGHTS LAW.....	36
i) Origins of HR Treaties.....	36
ii) Treaties (ICCPR ICESCR):.....	37
ICCPR:.....	37
The Human Rights Committee:.....	37
iii) Human Rights at Regional Level:.....	38
European Court of Human Rights.....	38
iv) Human Rights and International Tribunals (<i>Tadic</i>):.....	38
Fair Trial Requirements:.....	39
INTERNATIONAL CRIMES: GENOCIDE:.....	39
i) Overview:.....	39
The Genocide Convention:.....	40

ii) Relationship to CAH:	40
iii) The Protected Groups:	40
iv) Intent To Destroy	41
v) The Rome Statute:	41
vi) Canadian Implementation:.....	41
vii) Examples of genocide?:	41
1. Prosecutor v. Krstic (ICTY, Appeal 2004):	41
2. Darfur	42
3. Ukraine:	42
INTERNATIONAL CRIMES: CRIMES AGAINST HUMANITY:.....	42
i) Historical development:.....	42
Armenians:.....	42
WWI/WW2:.....	43
ICTY/ICTR (<i>Tadic</i>)	43
ii) What is CAH:	44
iii) CAH and the Rome Statute:	44
Mental Element.....	44
Residual Clause:	44
INTERNATIONAL CRIMES: WAR CRIMES:.....	45
i) overview:	45
ii) Historical Development:.....	45
Long Standing Historical Practice:	45
18 th and 19 th Century Developments:.....	45
The Hague Conventions:.....	46
The Geneva Conventions:.....	46
Other Weapons Codification:	46
Nuclear Weapons:	47
Chemical and Bio Weapons.....	48
More mass destruction weapons	48
iii) Definition of War Crimes:.....	48
Tadic:	48
Underlying Principles:	48
iv) War Crimes, Armed Conflict, and Civil War:.....	49
v) Victims:	49
vi) Jurisdiction of the ICC	50
INTERNATIONAL CRIMES: CRIME OF AGRESSION.....	50
i) Aggression and the ICC – the caveat:.....	50
It is a crime recognized against CIL	51
WW2:	51
The UN.....	51
Creating the Rome Statute.....	52
iii) Definition:.....	52
iv) Jurisdiction:	52
v) Summary on Aggression:	53
OTHER CRIMES: INTERNATIONAL TERRORISM	53
i) What is terrorism?.....	53
ii) Historical Overview:	54
Attempts at International Prohibitions:.....	54

Terrorism Agreements:.....	54
iii) The Security Counsel:	55
iv) Obstacles to reaching a definition:	56
OTHER CRIMES: OFFENCES AGAINST THE PERSON.....	57
i) What are Offences against the person.....	57
ii) Slavery and Slave trade:	57
Historical perspective:.....	57
Modern Slave Trade:.....	57
Summary:	58
iii) Apartheid.....	58
iv) Forced Disappearances:	58
v) Torture.....	59
vi) Transnational Organized Crime:	59
vii) Drug Trafficking.....	60
Historical Perspective	60
Drug Trafficking and The Rome Statute:.....	60
viii) Corruption.....	60
GENERAL PRINCIPLES OF LIABILITY:.....	61
i) Heads of Liability (art 25).....	61
ii) Mens Rea (art. 30)	62
iii) Command Responsibility (art 28).....	63
 GROUNDS FOR EXCLUDING CRIMINAL LIABILITY	63
i) Overview:	63
ii) Mental Disease (art 31(1)(a))	63
iii) Intoxication (art 31(1)(B)).....	64
iv) Self defence, defence of others, defence of property (Art 31(1)(c)).....	64
v) Duress and Necessity (art 31(1)(d)).....	64
vi) Mistake of Fact/Law.....	64
vii) Defence of Superior Orders (art 33).	65
Historical Overview.....	65
Art. 33.....	65
vii) Statutory Limitations (art 29).....	65
viii) Guilty Pleas (art 64, 65).....	65
Article 64(8).....	66
Article 65	66
IMMUNITIES	66
i) Overview:	66
ii) Functional:.....	66
iii) Personal:	66
iv) Immunities and Crimes of Serious International Concern.....	67
v) Surrender provision (art 98)	67
vi) Hybrids and Immunities	68
SENTENCING:	69
i) ICC penalties (RS art 77)	69
iv) Role of Victims:.....	70
v) Enforcement:.....	70
vi) Review of Sentence (art 110).....	71

INTRODUCTION:

- Domestic courts and international courts are complementary

i) Source of ICL (Art 38(1) ICJ Statute)

- **1. ICJ Statute, Article 38(1)**
 - o "The court...*shall* apply:"
 - (a) international conventions (i.e. treaties)
 - (b) customs *as accepted as law* – based on habits, practices of states over time in their interactions with each other – must be customs that state do b/c they think they have to (i.e. Customs related to ICL – prohibitions of genocide and torture are CIL)
 - (c) general principles of law recognized by civilized nations – note: bit dodgy b/c it says "civilized". They are not necessarily written out somewhere, but filter into this category (i.e. right to a hearing, notice).
 - (d) academic writings (highly qualified writers), judicial decisions – do not have to be from ICJ, but could be from domestic court, international tribunal, etc. Academic writings are to be from the most highly qualified publicists. It is highly respected, so it is persuasive, but not binding. European Court on Human Rights – not binding, but it is a persuasive source. Who are the highly qualified writers? This is still debated. In terms of papers you can see this reflected – look at the writer/publisher, etc.
- This is not an exhaustive provision.
 - o Might also include diplomatic correspondence – letters from one state to another could be important.
- There is no hierarchy b/n sources a, b, c. Also remember that a custom could be a treaty – these provisions interact.
 - o Ex. There is a treaty against torture, however for those not part of the treaty they can still breach the law by violating the custom.
- 2. Overlapping Sources:
 - o Many of the rules reflect what is humanitarian law.
 - o Borrow from criminal law – the sources of law are international, but the consequences are penal. As it is criminal law also need the substantive provisions.
 - Principles of legality (i.e. non-retroactive application of criminal law)
 - Penalties must be defined clearly prior to the event, but obviously some judicial discretion.

ii) Goal of International Criminal Law:

- Two approaches to justify punishment – forward looking and looking at the crime itself
- Deterrence:

- Derived from Bentham's theory – problematic for retributionists b/c the individual is a means to an end – this is b/c you are punishing them beyond the act (with the added element).
- Criticism – if Nuremburg was a deterrent, note that we have had the worst atrocities after that; also the criminal process is slow; The ICTY did not stop crimes from being committed in former Y b/n '93 and '95 (though in fairness the ICTY was in early stages – not respected yet).
- Stronger argument for ICC than ad hocs – ICC statute has excepted role for deterrence.
- Retribution:
 - Based on Kant's theory: To refuse to focus on the autonomous actions of the perpetrator by holding them responsible for those actions is to treat them as lesser beings
 - Punishment, irrespective of future goals.
 - Distinguish from vengeance; better understood as the expressions of condemnation and outrage of the IC.
 - Should be proportionate to wrong doing.
 - Accountability
 - ICTY examples:
 - *Aleksovki* case: not revenge, but expressing outrage and acknowledging harm to the victims, *Nokolic* case: retribution is understood as the expression of condemnation and outrage, *Todorovic* case: focus on proportionality
- Others?
 - Incapacitation:
 - Taking out the influence of the leader – again a forward looking principle.
 - Denunciation/Communication:
 - Communicating to the perp and wider society that not okay.
 - Effective in Cambodian case; ineffective in Milosevic case (Δ was defiant of court that people were rallying behind him – he was almost less of a war criminal).
 - ICTY has asserted the relevance of this function in the *Kordic and Cerkez* case – aims at conveying the message that rules of educational international humanitarian law have to be obeyed under all circumstances. The sentence seeks to internalise these rules and the moral demands they are based on in the minds of the public.
- Broader goals:
 - Justice for victims:
 - But do not prosecute everyone involved; often just leaders; is that justice.
 - History on Record;
 - Eichman trial – denial/revisionists – people on stand cross examined, admissions, etc.
 - Peace:

- International Tribunal Rationale:
 - Judges international' they are not part of the conflict; distant from it; not as open to political manipulation; suggested that they might be more familiar with int'l law than domestic judges. However, that was the critique of Cambodia – said that they did not know the country enough..
- Alternatives:
 - Amnesty: There should not be amnesty for HR crimes, but have seen it in places like SA; Reconciliation commission.
 - Distinction between blanket amnesties those that require certain conduct (such as confession) or a particular motivation for the crimes.
 - Reconciliation – some w/o trials – victims telling story, etc.
 - Problem: the quality of the report depends on the information available to the commission.
 - Reparations:
 - There are some reparation provisions, but often cannot afford to pay; how to decide who gets them, etc.
 - Lustration
 - Purging of public servants who are thought to be responsible for international crimes
 - Main purpose is punishment
 - Problematic in that it is almost always done on a mass basis, without individual hearings to determine what precise responsibility a lustrated person bears
- Critiques of Criminal Accountability:
 - Cost
 - Geography – distant; inaccessible to victims; affected populations do not see day to day of tribunals.
 - Adequate mechanism? Many commit measures that a prep cannot possibly 'repay' in his or her life time.

JURISDICTION:

- Involves asserting sovereignty.
- Required to prosecute
- *note: jurisdiction issue can be determined by agreement: i.e. SOFA – Status of Forces agreement – will often tell you who has jurisdiction.

i) Forms of jurisdiction:

- Legislative (prescriptive), executive (enforcement), adjudicative
- Legislative:
 - Right of a state to pass laws that have a bearing on conduct.
- Adjudicative

- The extent to which courts are able to pass judgment on matters brought before them. May not be a third category – many argue part of executive.
- Executive (enforcement)
 - “failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State.”

ii) Conceptual Matters:

- Proof
 - State practice is to assert a positive ground for the exercise of jurisdiction, rather than rely on the absence of a prohibition (*Lotus* stated that absent a prohibition, there was jurisdiction, but this was with respect to territoriality)
- Treaties and Jurisdiction
 - States are entitled to pass jurisdiction to one another
 - A matter of concessions between parties
 - Example: New York Convention Against the Taking of Hostages

iii) Traditional Heads of Jurisdiction:

1. Territorial:

- Least controversial
- Right to exercise jurisdiction over all events on their territory
- As long as least one of the elements of crime took place in state territory then jurisdiction.
- Objective = where the crime took place/completed. Subjective = if it originated elsewhere.
- Criminal law is usually territorial:
 - No state disputes this as basis.
 - Common law countries have seen objective jurisdiction as taking precedence over subjective (*Libman* – Canada has determined the essence of t. jurisdiction as the real and substantial link to the state – subjective is permissible – not limited to objective).
 - There are other basis of jurisdiction, besides territoriality that can be relied on (*Lotus*).

Lotus (PCIJ, 1927)

- Facts:
 - Action b/n Turkey and France; collision and sea – Turkish nationals die.
 - Turkey wants to prosecute French capt. for manslaughter.
- Decision/Reasoning:
 - International law does not prohibit a state from “exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law”

- “The territoriality of criminal law, therefore, is not an absolute principle of international law and by no means coincides with territorial sovereignty.”

2. Nationality

- Nationality of the perp.
- Many state accept that they can prescribe laws for their nationals in other states.
- State determines criteria for nationality.
- State is responsible for protection of nationals.
- Accepted at international law that this principle can be extended to permanent residents

3. Passive Personality:

- Nationality of victim.
- More contentious ground for jurisdiction.
- It is not filling a gap – have territoriality/nationality of perp.
- Not CIL (seen in *Lotus*)
- Concerns that could lead to people being subjected simultaneously to the laws of many different states; including prohibitions of which they were unaware (where law differs b/n states – would not affect ICL).
- Eichman example – Israel could not rely on p.p. b/c Israel was not state at time of offences.

4. Protective Principle:

- Protecting jurisdiction/interests.
- i.e. if a country was producing counterfeit Canadian currency.
- Again, Eichman example – cannot apply b/c Israel was not state at time of Holocaust.

5. Universal

- Generally two types: a) when crime is beyond the jurisdiction of any one state (i.e. pirates), b) nature of crime (so heinous that any state can prosecute).

AG Israel v. Eichmann (1961, Dist Ct. Jerusalem)

- Facts:
 - Eichmann escaped to Argentina after the war and actually spends part of his life living and working there.
 - Removed to Israel by persons likely agents of state, w/o consent of the Argentine government.
- Decision/Reasoning:
 - Israel violated Argentina’s sovereignty, but not Δs.
 - Israel lack many basis of jurisdiction – victims not I, Δ not I, crime did not happen in I.

- UJ was left; relied on both grounds – “grave offences against law of nations itself”; “in the absence of an international court, in need of judicial and legislative organs of every country to give effect to its criminal interdictions and bring the criminals to trial...”

- Pure UJ:
 - Jurisdiction even when Δ is not in state.
- Conditional UJ
 - UJ with presence of Δ in territory.
 - Once the presence connection can arguably justify the use of your law.
- Examples of Jurisdiction:
 - Since Eichmann, do not have many UJ arguments:
 - Pinochet
 - Crime in Chile; Chilean and Spanish victims
 - UK for doctor, Spanish judge issues warrant.
 - Torture considered UJ; but becomes fair trial issue – UK gets medical opinion and refuse the extradition request.
 - It is clear immunity did not save him.
- Canada – conditional UJ – *War Crimes Act* – perpetrator has to be later present in country
- Problems: UJ does not give rise to obligations on behalf of the state to assist, investigate or provide evidence. Also forum shopping; might allow powerful countries to selectively apply UJ.

Case Concerning the Arrest Warrant of 11 April 2000 (Congo v. Belgium) (ICJ, 2002).

- Facts:
 - Warrant was issued by B for the foreign minister of Congo for crimes against humanity.
 - Significant b/c ministers have immunity.
 - B had no connection to alleged offences other than willingness to prosecute.
 - C argued in closing that B violated sovereign immunity, but originally claimed that B exceed the scope of its jurisdiction at international law – following decision deals with that.
- Decision/Reasoning:
 - **Arguments for and against UJ in pure form (in obiter – missed opportunity to rule on UJ)**
 - **Arguments against:**
 - Classic territorial nature of criminal law. Reasons for this – this is where the WIs are, etc. Domestic judges are not supposed to be avengers of crimes occurring all over the world.
 - Comity Principle - Limits exist so that states can get along.
 - Not really state practice of UJ - States typically want stronger

connection. Some states want other elements (i.e. nationality, location, etc).

- Means no CIL and obviously no treaty conferring this power.
- **Arguments for:**
 - There may not be state practice, but not state practice precluding it either.
 - It is good that Belgium is willing to take on this role; someone has to do it. Etc.
 - Int'l law is changing – becoming more global, universally linked, etc.

NATIONAL PROSECUTIONS OF INTERNATIONAL CRIME:

i) National prosecutions are preferred, but problematic:

- International crimes primarily intended to be prosecuted at the domestic level.
- National prosecutions are preferred.
- Many WW2 crimes were prosecuted elsewhere; i.e. Finta in Canada (strict mental and material requirements introduced for CAH and war crimes).
- Conflicts after WW2 have not produced many proceedings.
- 1990s = renewed focus on ICL; ICTY, ICTR, but also national prosecutions in Germany, Sweden, etc.
- Other countries (i.e. Canada and the USA) have preferred deportation, loss of citizenship, etc. to criminal prosecutions.
- National prosecutions have been highly selective and generally states have been unwilling to prosecute own nationals.
 - Might end up putting state on trial – i.e. Barbie Trial – question as to states' collaboration with Nazis and crimes.
- Uneasiness with IL:
 - “national courts frequently refer to ‘CIL’, but without an accompanying attempt to demonstrate the existence of such norms. Also the legal reasoning in some of the judgments has been criticized as ‘lightweight and generally superficial.’

ii) Does the State have an obligation to prosecute?:

1. Treaty Obligations:

- Some treaties contain an obligation to extradite or submit to prosecution
- Examples:
 - 1984 torture convention.
 - Geneva conventions
 - Genocide convention (obligation only if the State is the ‘state in the territory of which the act was committed’)

- The “domestic prosecution of CAH is not treaty-regulated expect for torture (as a separate crime) and apartheid”

2. Customary Obligations:

- State practice does not support the position that State have a general duty to prosecute international crimes.
- Nevertheless, suggestion that exists at CIL>
- Expressions in support of this:
 - o ICTY in *Blaskic* “there is a customary obligation to prosecute or extradite those who have allegedly committed grave breaches of int’l humanitarian law, but w/o developing the argument further.”
- Suggested that the nature of the crimes gives rise to obligation (*egra omnes*)
 - o This argument has won support at ICJ with regard to genocide.
 - o You still need domestic law to give jurisdiction even if there is an obligation to prosecute; problem sometimes b/c national legislation designed for selective application.
- With ICC and complementarily principle, states want to meet the test (though not obliged to under RS), some states are just making RS offences in their domestic law.

3. Statutory limitations:

- Have been obstacles in national prosecutions.
- ICC statute explicitly provides that they do not apply (art. 29).
- “It has been claimed that the non-applicability of statutory limitations to war crimes as developed into a norm of CIL. Others restrict the claim of a customary riles to genocide, crimes against humanity and torture...fact remains that many States still apply such limitations tin international crimes.”

4. Double Jeopardy:

- Principle applies in the context of international cooperation in criminal matters
- States not bound by the rulings of other states.
- ICTY/R – “no one may be tried for the same conduct after he or she has been prosecuted at the Tribunal, but the Tribunals are not hindered by domestic proceedings in certain circumstances.” – finalized proceedings ca bar the Tribunal.
- ICC – ICC precludes the person from being tried for a crime listed in art. 5, but it appears that the national court could prosecute on the basis of same conduct, but for an ordinary/domestic crime (i.e. murder). National prosecutions hinder prospective ICC trials, with the exception of “sham trials”. If the matter was dealt with as an “ordinary crime” still cannot do anything – it is the facts not the legal characterization that matters.
- Signatories will rarely see cases before ICC as they will attempt to prosecute first.

iii) Canada: Crimes Against Humanity and War Crimes Act, etc.:

- Commission of Inquiry on War Criminals:

- Following WWII, large immigration and in 1985, the government established the Commission of Inquiry on War Criminals (Justice Jules Deschênes, resulted in list of names.
- Principal recommendation Deschênes mandated investigations of these persons.
- 1987 gov't announcing that those alleged with commission of war crimes or crimes against humanity would be subject to criminal prosecution or revocation of citizenship and deportation.
- Government initially decided to focus on the prosecutions, than all three suggestions (extradition and immigration).
- War Crimes Act 1987.
- With failed prosecutions and case like *Finta* it was clear that not likely successful.
- 1995,= change in its approach to dealing with war criminals.
- Shift from prosecution of these individuals to revocation of citizenship. Focus was not on proving that Δs were "war criminals" but focus on proof that Δ entered Canada and/or obtained citizenship through misrepresentation, fraud, or the concealment of material facts.
- Canada again shifting focus to on criminal prosecutions – funding, etc.

Finta (1994, SCC)

- Facts:
 - Δ part of paramilitary force controlled by Himmler (Hungarian).
 - Δ = commander of this unit.
 - Alleged to have confined Hungarian Jews and sending them to Auschwitz; arg. made that Δ knew where going.
 - Indicted for ordinary crimes and war crimes and CAH (in 1988).
 - Decision/Reasoning:
 - Big point = mens rea – majority says that mens rea must be proven for CAH, not just regular crime,
 - Defence of superior orders still exists – unless manifestly unlawful or patently wrong – must prove obligation to obey order and no knowledge of illegality.
 - Minority judgment saw distinction for CAH as being required for distinction not mens rea.
- Australia has also tried to prosecute – three failed trials for war crimes and unit disbanded in 1991.
 - *Polyukhovich* – crown could not prove BRD – acquitted b/c lack of evidence.

STATE COOPERATION WITH RESPECT TO NATIONAL PROCEEDINGS

i) Introduction:

- State not obliged to cooperate with other states in criminal matters unless it has consented to such an obligation.
- ICTY, ICTR, ICC – different rules to be outlined later. This is just about state to state.
- Traditional forms of legal cooperation: extradition, MLA, transfer of criminal proceedings, and enforcement of foreign penalties.
- Extradition = first form of legal cooperation to be regulated by international agreements,
 - o UN has developed a model treaty– meant to be a practice example for bilateral treaties.
 - o “May treaties specifically provide that the relevant crime shall be an extraditable offence and that the treaty may satisfy domestic conditions that a treaty obligation for extradition exists.”
- States still have power to refuse requests for other states. Some grounds:
 - o Double criminality – it has to be a crime in both states – asserts that sometimes obstacle to effective co-operation. Some states require identical crimes, but others satisfied with similar facts or gravity. Also seems to be temporal aspect – must be crime in both states at relevant time (*Pinochet* case). EU seeking to abolish – has EU arrest warrant - co-operation among states not required
 - o Rule of Specialty – restricts state to bringing proceedings only with respect to crimes for which suspect was extradited.
 - o Statutory limitations – may bar cooperation – ground for refusal.
 - o Double jeopardy – when requested state has already passed final judgment.

ii) Interaction with human rights:

- Tension.
- Rule of Non-inquiry – moving away from this rule – rule to grant deference to the requesting state not to inquire into the other states practices.
- HR violations can be a bar to co-operation
 - o i.e. non-refoulement principle – refugee should not be returned to a country where he or she is likely to be persecuted .

iii) Extradition:

- The surrender of a person from one state to another for the purposes of prosecution or to serve the remainder of time in prison.
- Technically done state to state, although can be a surrender to a tribunal.
- Process of extradition:
 - o Requesting state requests the arrest and extradition of the Δ or convicted person.

- Countries generally require that the prosecution evidence against the fugitives justifies the trial for which extradition is sought . It requires a *prima facie* case.
- Conditions for extradition:
 - Mandatory and optional grounds (m= pol. offences, offence of military nature; O= death penalty, nationality [though often triggers duty to prosecute])
 - The treaties generally start with the obligation to extradite, but illustrate the surrender is upon request. Moreover, it must be an extraditable offence.
 - Certain classes of offences are typically excluded: political offences (though ill defined).]
 - Non-extradition of nationals - many will prohibit the extradition of own nationals.
 - Death penalty/life imprisonment:
 - Unless assurance many states will refuse based on death penalty.
 - Life imprisonment is considered worse for some states – i.e. Portugal – will not extradite.
 - Assurances used – but difficult to follow up on and normally w/o sanctions if breached (cannot get Δ back, etc).
- Re-extradition
 - The requesting state is **not** generally allowed to re-extradite the Δ to a third state w/o the permission of the requested state.
 - Idea is to ensure that the third state meets the conditions of the requested state.
- Abduction, rendition:
 - These can, but do not always violate international law. Courts often do not care how the person gets before them (*Eichmann*); however in some states are changing view on this. At ICTY it was seen that this is an abuse of process.

iv) Case Law (Kindler v. Canada, Soreing, Burns)

Kindler v. Canada (Human Rights Committee, 1993)

- Facts:
 - Escaped to Canada after being convicted in State of manslaughter and kidnapping.
 - Captured in Canada and USA requested extradition back – even though facing death penalty.
 - Canada does so w/o seeking assurances.
 - Δ argues that this violates Canada’s obligations under international law.
- HRC views:
 - No violation on part of Canada. Number of arguments, but basically the decision to do so w/o assurances was well thought out and

considered – did not want to provide safe haven, etc.

Burns

- Δ killed parents for \$ in the USA
- Fled to Canada.
- SCC implicitly over turns its decision in Kindler
- Canada has to ask for assurances before extradition.

Soering v. UK (1989)

- Facts:
 - Killed gf's parents in US.
 - He is a German national caught in the UK.
- Decision
 - Despite the surrender to the US based on the UK's human rights obligations.
 - The argument was not that he would be sentenced to death in the US, but the death row phenomenon (back logged and poor conditions; quite often the person is just waiting for their death; tantamount to torture). Δ argued that this meant UK had obligation not to return him to the US.

v) Mutual Legal Assistance:

- mainly treaty based – covers wide range of measures.
- Similar grounds of refusal as noted above.

Transfer of proceedings:

- “From one state to another, both of which have jurisdiction over the offence; a double-criminality requirement always applies and, due to the nature of cooperation, is often far-reaching.”
- “Transfer of proceedings is not primarily a device for giving priority to particular jurisdictional grounds; the motive is rather that the Δ has ties to the requesting state or that the proceedings there would be more convenient.”

Enforcement of penalties:

- “an otherwise reluctant state may accept extradition on condition that the fugitive is returned to serve any sentence imposed.”
- Obvious humanitarian issue.

**HISTORY OF INTERNATIONAL PROSECUTIONS: FROM IMT
(NURENBERG/FAR EAST)**

i) Early History of the International Tribunals:

- Are examples from ancient Greece/Rome and moments in middle ages, etc.
- There is some build up of sense of limitations and rules in war.

1. WW1:

- The early idea for this sort of prosecution was at Versailles; The Versailles Peace treaty did promise the prosecution of the Kaiser.
- There had been calls from trials for atrocities committed from the very beginning of WW1.
- Commission established:
 - A fifteen member commission was est. to determine who started the war and what violations of laws of war/humanity were committed. It was also to determine what tribunal is necessary.
 - Focus on leadership; commission recommends going after the Kaiser and other high officials.
 - Suggests setting up an ad hoc tribunal; made of the allied members.
 - The majority of allied nations are content with this. Two states concerned about this tribunal. Japan and US had reservations about the report – what they were concerned about:
 - Were these crimes at time committed, but more importantly for the US is that is this a body that could try the crimes (it is a new body established after the fact).
 - To create a new tribunal will breach the rule of retrospectivity, says US.
 - The tribunal never came into place b/c the Kaiser was in the Netherlands and they would not surrender him on the basis that the offence is political.
- Although the tribunal did not materialize, we see the first draftings of an international tribunal of this sort with the Treaty of Versailles:
- Article 227:
 - The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties.
 - A special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defence. It will be composed of five judges, one appointed by each of the following Powers: namely, the United States of America, Great Britain, France, Italy and Japan.
 - In its decision the tribunal will be guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality. It will be its duty to fix the punishment which it considers should be imposed.

- The Allied and Associated Powers will address a request to the Government of the Netherlands for the surrender to them of the ex- Emperor in order that he may be put on trial.
- **Article 228**
 - The German Government recognises the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. Such persons shall, if found guilty, be sentenced to punishments laid down by law. This provision will apply notwithstanding any proceedings or prosecution before a tribunal in Germany or in the territory of her allies.
 - The German Government shall hand over to the Allied and Associated Powers, or to such one of them as shall so request, all persons accused of having committed an act in violation of the laws and customs of war, who are specified either by name or by the rank, office or employment which they held under the German authorities.
- **Article 229**
 - Persons guilty of criminal acts against the nationals of one of the Allied and Associated Powers will be brought before the military tribunals of that Power.
 - Persons guilty of criminal acts against the nationals of more than one of the Allied and Associated Powers will be brought before military tribunals composed of members of the military tribunals of the Powers concerned.
 - In every case the accused will be entitled to name his own counsel.
- There were some national prosecutions following WW1:
 - The Leipzig – there are two cases (Dover Castle and Llandoverly Castle) – the issue was that they shot on two different hospital ships - the military commander was held accountable.

2. The Interwar Period:

- In the interwar period you do get discussions of having international courts. In particular, when the King of Yugoslavia was assassinated there was a convention to determine if they can have a terrorism court.
- By 1937 we get a treaty to create a criminal court to try terrorists was negotiated, but only one state ever ratified it (India).

3. WW2/IMT Nurembeg/Tokyo:

- This is crucial starting point. The allies were determined to prosecute the Nazis for war crimes.
- 1943 Moscow Declaration – the axis war criminals will be punished – commitment was made.
- The “London Conference” at end of war
 - Here the four major parties are hammering out the details: UK, France, US, USSR – they draft it and others come on board.

- The London Agreement (which forms the basis of IMT – Nuremberg) is created and signed in 1945. (19 other states join later).
- The thrust is the main powers, which is why the four judges are from those four states (four principle judges and four alternates; same states).
- The agreement is followed with the charter of the tribunal.
 - There is the treaty saying that “we the parties agree to do”; then there is the charter with the details.
- The Nuremberg charter is the starting point for “what is a crime against a humanity”.

Charter of the IMT (Nuremberg)

- Art 1 “or the just and prompt trial and punishment of the major war criminals of the European Axis”
- Art 2 – How it will be set up/composed.
- Jurisdiction (art. 6)
 - Three particular categories of crimes: against peace, war crimes, and crimes against humanity.
 - Detailed what each of them are.
 - Emphasizes that the leaders are being targeted: “Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.”
- This is an early recognition of international crime, but it is missing genocide.
- No State Immunity:
 - Art 7 –The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.
- No Superior Orders Defence:
 - Art 8 – It does not free someone of responsibility b/c they were acting under orders, but although it is not a defence for the crime it can be considered in the mitigation of sentencing.
 - The Rome Statute does not pick up on this precedent. You cannot use this defence for genocide, or crimes against humanity, but you can use it for war crimes.
- Mechanics of the tribunal
 - Each of the four places was allowed to have a judge, and each allowed to have a prosecutor.
 - Once the indictment was made – the four prosecutors divided up the charges:
 - US = overall conspiracy
 - UK = crimes against peace
 - French and Soviet = split war crime and crimes against humanity.
- 24 defendants; the judgment in Nuremberg does remain a source of international criminal law.

- The ILC studied the Charter and the Judgment and came up with some key principles.
 - 1. Individual responsibility: This comes right out of Nuremburg (no longer just state to state). International recognition that individuals can be help responsible for certain crimes at international tribunals. It recognizes that states act through individuals.
 - Right to fair trial in this setting.
- One of the issues that people complain about
 - Victor's justice
 - Trial was not perfect, there was a heavy reliance on affidavit evidence; however must evaluate it by the standards of the day, not today's standard; given that they were basically run fairly.
 - Suggested that a judge from Germany would have made more legitimate.
 - Another complaint is that it did not put the Holocaust on trial – the focus of the IMT was aggression. Eichmann dealt more with the Holocaust than IMT.
 - Also critiqued that Allies not prosecuted.

The Tokyo IMT (IMT FE)

- "Stern justice" was promised in the Potsdam declaration – Japan has accepted this.
- 11 judges, headed by an Australian judge; some criticism that he was not the best judge, but. . .
- The US appointed the chief prosecutor.
- The indictment was much lengthier (55 counts) and it took longer (about two and a half years).
 - All that made it through the trial were found guilty; some given death, some given prison.

Constitution of the IMTFE Charter

- Jurisdiction (Art. 5):
 - Geographic – Far Eastern; Offences – crimes against peace, conventional war crimes, crimes against humanity.
 - This one was concerned with the treatment of POWs.
 - Issue that was not dealt with by the tribunal was the issue of "comfort women".
- Selectivity was issue.
 - The Emperor was not put on trial – that was the agreement with the Japanese – some said he was divine from God, others said he was not that aware of what was going on
 - The argument for this was that there is no way to make the peace stick without making this concession.
- There are in addition to the two IMT, there are also allied trials. Those were promised in Versailles in article 228.

- It is sometimes overlooked that there are trials of war criminals – these were taken under the authority of Control Council Law No. 10 (provided for domestic prosecutions of war crimes, CAH and crimes against peace)
- National Prosecutions:
 - These were being held in the four zones of Germany (controlled by the four powers)
 - There were 12 major trials held by the US
 - One of which is the doctor's trial (eugenics, etc) and the other trial was the justice trial (dealt with the courts of the third Reich that authorized the deportation, etc).
 - Justice Trial – US military court held at Nuremburg.
 - The idea of holding lawyers responsible for the advice they give. Why is this important now? Think about the effect of lawyers authorizing torture in Gitmo.
 - There is an argument in the Nuremburg cases that the lawyers giving the “advice” were not giving advice, but these senior lawyers were not giving advice, but orders.
 - It is different when the lawyer is in the classic role; when the lawyer is advising on options and the president of the PM is making the decision.
 - There were also military tribunals in the Far East as well.

Final Assessment of the Early Tribunals:

- Individuals can be held responsible at international law, this has been firmly established now at law. However, also clear that states must draft this.
- After WW2 however, you get the cold war and blocks and you cannot really make drafts at this time. However, right after WW2 there was a push for that.
- No state immunity/head of state immunity for crimes like this is a principle established.
- Also emphasizes need for fair trial in the ad hoc trial situation.
- Now you can also see why there was the need for the permanent court – it is not ad hoc, it is not retrospective; the judges can have tenure/independence with the permanent courts, etc.

ii) ICTY and ICTR and their contributions:

- There has been a lull in international criminal law because of the Cold War:
- These are not treaty based courts like the IMT, these are instead created by the UN SC (authority comes from SC resolutions).

1. ICTY:

The Creation of the ICTY:

- There were clearly incidents of a horrific nature occurring and this was realized even before the war ended; large scale violations of international criminal law.
- This led to demands to hold these people accountable.

- Idea of using a treaty to est. tribunal was dismissed b/c thought it would take so long and there was question if Yugoslavia would ratify it.
- SC commission was created to investigate allegations of international crimes
- Suggest that the SC could create resolution to create a tribunal. Experts were in support.
- While the commission starts investigation, the UN secretary general office takes over and starts talking about the possibility of making a SC organ tribunal.
 - o This would mean binding on the member states (i.e. co-operating with the tribunal)
 - o UN funded, under UN control, etc.
- The Secretary General thought that there was enough support to draft a statute (built on Nuremburg)
- Tribunal created in 1993 (war was ongoing) with resolution 827.
- Purpose (art 1) To prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.

Jurisdiction of ICTY

- War crimes (art 3)
- Genocide (art 4)
- Crimes AH (art 5)
- Jurisdiction (art 8) - "The territorial jurisdiction of the International Tribunal shall extend to the territory of the former Socialist Federal Republic of Yugoslavia, including its land surface, airspace and territorial waters. The temporal jurisdiction of the International Tribunal shall extend to a period beginning on 1 January 1991.
 - o Temporal: 1991 on – this will allow for prosecution of actions in Kosovo later.
 - Note: This is an expensive tribunal – they developed a completion strategy to wrap up and get out. SC told them in 2003 that they needed to get out. So even though the court can technically go for years, likely, as a practical matter, it won't.
 - o Territorial jurisdiction as well.
 - o The jurisdiction is over natural persons – not corporations, associations, organizations, etc. Nuremburg was different, but just natural persons – there was not crime for just being part of an organization.
 - No prosecutions just for being a member – it was individual liability. It is a higher standard than just proving that they were part of an organization.
 - o There is also concurrent jurisdiction – the ICTY is intended to act concurrently with the domestic courts (art 9). The only thing is that ICTY had primacy in the ICTY – If the domestic courts have the big fish the ICTY can demand the Δ be given to them.

Structure of the ICTY

- Registry
 - Administrative management of tribunal (i.e. victim witness program)
- Office of the Prosecutor
 - Body to investigate, order indictment, etc.
 - Hire former RCMP, etc. for the investigations.
 - Once the prosecutor gets information from an NGO or what not, the prosecutor decides if enough for indictment.
- Chambers
 - The third, but main, branch.
 - It is divided into trial and appeals chambers.
 - The trial branch is divided into smaller branches to get the trials completed faster.
 - They are sometimes ad litem judges – they are temporary judges that sit in for one state – it is part of the completion strategy – speed things up.
 - The regular judges are appointed by the GA, they are from various nationalities.
 - Some criticism is that there was not a defence counsel office/support service at the ICTY.
- The Δ must be physically present for a trial at ICTY; that is why there is no decision for Milosevic trial – b/c he died.
- The trial procedure is a combination of civil/criminal proceedings – there are Rules of Procedures and Evidence.
 - At first appearance the Δ must plead not guilty or guilty.
- Statute outlines rights of Δ (art 21)
 - All the rights of fair trial that one would expect is given to the Δ - BRD standard is still used.
- Defences
 - No defence of state immunity.
 - No defence of superior orders.
- Contributions of ICTY (jurisprudence, etc).
 - Served as a model for ICTR and less directly the ICC.
 - Demonstrated that international prosecutions were possible.
 - Criticisms:
 - Too quick to say CIL
 - Too ready to expand own authority
 - Too expensive.
 - Too far removed geographically (outreaches, but ...)
 - Violate rights of defendants
 - Not enough attention to victims.
 - Issues of selectivity
- Sentencing at ICTY
 - International community is divided on the death penalty – so that is off the table.

- There are a variety of imprisonment sentencing – including life. However, know that the convict cannot be put into the jail at Yugoslavia or Rwanda. They go to a jail in another jurisdiction.
- Also note that we do not extradite to this court; the Δ can be surrendered.
- Retention problem with Staff:
 - This issue of retention is developing b/c the lawyers know that the tribunal is closing and some are already looking for other jobs.

The legitimacy of the ICTY (*Tadic*)

- Tadic was low level Bosnian Serb. At trial he made challenge about the very establishment of the court.
- The trial Chamber denied that it had the authority to rule on own creation and was limited to decisions about crimes in Y.
- Appeal Chamber provided a decision.
- The majority in Tadic held:
 - The SC was allowed to invoke its powers under Chapter VII b/c armed conflict at time.
 - Although art. 41 of UN charter did not list setting up a court as one of its measures it was okay b/c the list was not exhaustive.
 - Refused to ex post facto evaluate the SC reasoning that the court could est. peace and security.

2. ICTR

- There was a bit of a revenge issue in this tribunal.

Jurisdiction:

- Genocide, war crimes, crimes against humanity
- Temporal limit – Jan 1 994 – December 1994 – year of jurisdiction.
- Has jurisdiction over war crimes is limited to where the crime happened or if committed by Rwandans in the neighboring states.
- Also has primacy over national courts.

Sentencing:

- Prison, no death penalty, etc.

Assessment of ICTR :

- Early days were about financial mismanagement – to be fair to them they also would suggest that they were under financed at the time.
- Early case law that really helped them – Judicial finding that genocide that it did occur in Rwanda.
- Also confirms that rape was an international crime it is part of crimes against humanity.
- Criticisms:
 - Long time, many delays; difficulties with translations
 - Geographically distant from Rwanda.

Famous Acquittals in the ICTR

- Now many do not feel like that they are not guilty. So where do they go? Some feel like now they cannot go back to Rwanda.

- At UN safe house – no other that will take them.

3. Final comments on AD HOC tribunals:

- Arguments that they can be discriminatory, selective, etc
- Worries that they will be inconsistent or unfair.
- Also argument that SC is narrow – only 15 states – need more input from other states (i.e. maybe other states would have pushed harder for other aspects).

THE INTERNATIONAL CRIMINAL COURT:

i) Origins:

- Nuremburg as Tokyo as precedent.
- In 1947 the UN GA asked the ILC to look into what we can learn from N and T.
- The UN also suggested that the ILC was to draft a statute.
- Then the cold war set in the 1950s and the poor ILC did work, but was stuck.
- The ILC did two things.
 - o 1. Draft codification of the crimes – trying to get some consensus on what everyone thought were crimes.
 - o 2. Draft of the document creating the court.
- In addition to the Cold War, more and more states had soldiers abroad (peace keepers, etc) and some states were concerned with their soldiers being tried elsewhere. This was a big fear that stalled the process.
- There was also a philosophical side – there was a concern that criminal law was a domestic/territorial issue.
- Following the creation of the ICTY-R in the 1990s, it was seen that it might be the right time for this court.

The Rome Conference

- Held 1998. 128 states were involved.
- All the states wanting to participate in this court coming together to discuss, (there were some NGOs, some trial associations, etc.).
 - o Canada had a big role – it was ensuring that these negotiations were going to go through (also chaired the committee).
- Some things are not as clear in the Rome Statute as one might like. For international negotiations they try to use broad language to get all states to agree.
 - o First look at the ordinary meaning, however, if there is ambiguity we can look at the tp (a short form from some French phrase that means preparatory documents).
 - o However, Rome statute does not have a strong tp – a lot of it was done on the fly and b/c of the informal setting there are not a lot of written records – often rely on recollections of negotiators.

ii) Rome Statute

- 7 states voted against it, 21 abstained.
 - o China, India, Israel, USA voted against.
 - Israel voted against it b/c of the occupation of territory offence.
- Limited it to four crimes, but on one of the crimes they could not get agreement (aggression)
- After signing the next step was ratification.
- 108 states, when we got the 50 ratifications, then it was July 2002 – there is no retroactive application.
 - o Once the treaty comes into force the court is established (art 1)
- At Rome the crimes and court documents are combined (not like the separate ILC drafts).
- It is a treaty based court. The states pay for it proportionally by GDP (Unlike the UN based ICTY/R that get UN funding)
 - o If the US joined it would be helpful, practically, for everyone.
- It is based in the Hague – the treaty says this (art 3).
 - o The Hague has now become the world center of international justice. The ICC, the ICTY is there, etc. Likely will face same critiques about distance from affected areas.
- There is sometimes need for UN involvement – sometimes the ICC needs to meet at the UN in NY – that building has space for a group that size and capacity for translations, etc. There is some cooperation.

Aims:

- To be a permanent court
 - o Deterrent for those who commit these sorts of crimes.
- To prosecute those of “most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution” (Preamble).

iii) Crimes in Rome Statute:

- The jurisdiction of the court is limited to the “most serious crimes of the international community as a whole”
- Genocide, crimes against humanity, war crimes, aggression. (art 5).
- The compromise was that the court has jurisdiction over aggression, however they will have it only when the parties agree on what aggression is (at the time they could not agree on what it was). (art. 5(2)).
- Also recall, that to have jurisdiction, it must have been a state party to the treaty.
 - o The crime must occur in the territory of a state party or the nationality of the perpetrator must be that of one of the state parties. Although the treaty will generally only be applied against state parties, there is an exception that we will talk about later: SC referrals.

Genocide (art. 6)

- Was not in Nuremburg, but it was in the Treaty on Genocide in 1947.

- So they took the definition from this treaty:
 - o Genocide is: For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
 - (a) Killing members of the group;
 - (b) Causing serious bodily or mental harm to members of the group;
 - (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
 - (d) Imposing measures intended to prevent births within the group;
 - (e) Forcibly transferring children of the group to another group.

Crimes Against Humanity (art. 7)

- This is a long list, see text.
- Note that there does not need a link to war – it can happen before, after, or during.

War Crimes (art 8)

- Very detailed.

Elements of crime (art. 9):

- The ICC works on this principle of complementarity - the idea is that it is a court that should complement national prosecutions.
- The ICC is the last resort, not the first (unlike ICTY and ICTR who have primacy). The ICC will step in if another state is either incapable or unwilling.

iii) How do crimes get before ICC?

Exercise of Jurisdiction (art. 13)

- Be careful saying “court” gets the case. “court” includes the prosecutor. Instead say “judges” or “chambers”.
- 1. Prosecutor Initiated:
 - o States and NGO reports to the Prosecutor’s office – then the prosecutor decides if there is enough to prosecute.
 - o The judges have to confirm some details. This limits the prosecutorial discretion.
- 2. State Party Initiated:
 - o Inviting the ICC in.
- 3. Security Council:
 - o The SC can refer a group to the ICC.
 - o The USA voted in favour of the referral to the ICC of the Sudan – this surprised many.
 - o What are the problems with this? Who has one of the veto powers in the P5? China (who has a lot of oil interests in Sudan).
 - o The only time there is a referral from SC is if there is a threat to international peace and security. That is the only mandate that the SC has to act.

- In the Sudan the problem was that it was “spilling over” the boarder and even w/n the Sudan the red cross workers were being shot at, etc.
- 4. The other trigger in art. 12
 - Has to be read with 13 – but is a fourth way.
- Then the prosecutor puts out arrest warrants.
- If you become a state party the state is also under obligation to cooperate. The state also is required to cooperate with extradition, mutual assistance.

Subject Matter of Jurisdiction (art. 5)

- Subject matter of four crimes: genocide, aggression, war crimes, crimes against humanity.
 - Some arguments that genocide need to be redefined, but it was the 1948 decision was just accepted b/c it was already agreed upon – it is not a numbers game with genocide it is a specific definition.
 - The elements are defined in their respective sections (noted above). There is a list of war crimes – at the next meeting there is a state that plans to run an amendment – the proposed war crime is nuclear weapon use.

Temporal Jurisdiction (art. 11)

- Temporal – after July 1, 2002 (that was the date that got the 60 ratifications that were required to bring the treaty into force).
 - This would obviously make it hard to get Mugabe (most of his actions were pre 2002).
- If another state joins – they can only be brought after the date they joined (only the 60 states come from 2002), recall it is treaty based.

Geographic:

- Theoretically this could be WW.
- It is, however, the territory or the national of a state party. So this can really apply to a non-state party.
- There is a little wiggle room – you can opt of war crimes jurisdiction w/n your territory for seven years (art 124 – only two states of first 104 parties used it to opt out. Review conference might be able to remove this provision.

Other jurisdictional matters:

- Has to be a natural person over 18 years. Not corporations/organizations.

Principle of Complementarity:

- Only if the state is genuinely unable or unwilling can the ICC can take it.
- Mentioned in art. 1
- Outlined more specifically in art. 17 (“Issues of admissibility”)
- Unwillingness (art. 17(2)) – sham proceedings, unjustified delay, not being conducted independently or impartially (inconsistent with intent to bring person to justice).

- Inability (art. 17(3)) – substantial collapse or unavailability of national judicial system.

Other provisions:

- Art. 15 goes over job of prosecutor
 - o The chambers/judges still oversee the prosecutor (still say if they can issue warrants, take to courts, etc).
- SC RED LIGHT PROVISION: Art 16 – compromise – some of the HR NGOs really see this as a defeat, others see it as a political interference with the court – allows for SC to defer/temporarily suspend the investigative powers of ICC - can put a 12 months suspension.
 - o This can last for 12 months. “No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.” Art 12
 - o This is referred to the SC red light provision.
 - o The text book has an example of art 16 – early use is the Americans – regarding American peace keepers serving on UN peacekeeping missions – they did not want their nationals at ICC – it was the early uses of art 16, but the court is new, so not much to go on.
- RPE – Rules of Procedure and Evidence – the ICTY, etc. each have the RPE for that court – an additional document.

iv) United States and the ICC:

- They were very much a part of the RS negotiations. They were very good in those negotiations. At the very last minute the Clinton administration did sign.
- They were worried about the prosecutor role.
- The administration then changed – Bush administration made a statement that basically said that they were “unsigning” – said that they were never ratifying.
- What are the negatives from the US perspective:
 - o Loss of sovereignty – do not like the independent prosecutor.
 - o Treaty based court, but could have impact on non-state party and for some this is contrary to IL – IL is about consent – what is the rebuttal? Territory and nationality are both recognized jurisdiction at IL.
 - o Some, not the US, have a worry about the role of SC. The rebuttal for this is that the crimes this court deals with are already in the SC mandate.
 - There is still a big debate about the role of the SC; some thing that we needed more of an SC role and less of an independent prosecutor; others think SC needed a larger role.
 - o No juries – no provisions for this.
 - o US is very worried about servicemen being brought before this court.

v) Arguments in favour of ICC:

- Limited subject matter jurisdiction – not all crimes.
- Complementarity – it does not have primacy AND the types of crimes that people should never get away with – holocaust type deal.
- Significant step in international justice: permanent court, rid of ad hoc, not victor's justice, etc.
- Others say that these crimes are not new – see the jurisprudence at Nuremburg IMT, Tokyo IMT, etc.
- Argue that any vagueness can be taken care of by judges.
- Better to solve disputes by court, not war.
- It is about holding individuals, not state responsible.
- Some say that it could serve as a deterrent for future crimes – Harrington said that this principle.
- The concern that the US servicemen will be pulled before the ICC is misguided – in fact the ICC helps them – it has codified certain principles of war – cannot bomb hospitals, etc.

vi) Principles of Legality of ICC

- Non-retroactivity
- Applies equally to all persons – no immunities to some one b/c an official/head of state (art 27 or 28)
- No statute of limitation (art 29)
- Not a crime unless codified.
- You have to have intent and knowledge (art 30)
- There are defences codified (art 31).
- Presumptions of innocence (art 66).
- Standard proof BRD.
- There are clearly fair trial rights – not a kangaroo court.

vii) Sentencing:

- Will be outlined in detail below, but are in the RS
- Max life/30 years
- Provisions for reparations for victims using criminal proceeds, etc.

viii) Four Situations Before the ICC

- Three of these are state referrals and one is a SC referral.
- First trial has started.

1. Lubanga – on trial for crimes in DRC – State referral

- Started in last week of January, but brought to court in 2004, he was arrested in March in 2006.
- He is the first person the ICC got custody of.
- The alleged crime is child soldier recruiting (children under 15) and used in combat.
- For the DRC there are three that are ready to go – three other individuals and a fourth at large.

2. Uganda – referral by state of Uganda.

- State could not deal with LRA (Lords Resistance Army)
- 5 arrest warrants by the ICC issued in 2005(?) – refers to Joseph Coyne.
- Rumors that Coyne is dead (and rumors about another one is dead).
- So there are 5 arrest warrants – all at large.
- This crime is child soldiers, but also girl children being used for sex, etc.
- What could be set up in the peace process for “willing and able” – there would need to be enough serious justice in Uganda to allow ICC to give it back to the state – also do not refer unless you really want to – cannot take it back – it is up to the judges.

3. Darfur – SC referral (2005)

- Prosecutor has been upset even though SC referral, Sudan is not cooperating. SC has power to force Sudan to cooperate.
- China watches Sudan in SC – so a vote to force Sudan to give up minister is unlikely.
- It now, in addition to the other crimes, it also looks like they are killing humanitarian/red cross workers.
- Was seeking a warrant for the arrest for President of Sudan for Genocide in July 2008 – the judges have confirmed this – now all states party to the ICC will have to surrender the pres if he is in their state – they have an obligation to cooperate – this is not best for peace/reconciliation to put president on trial, but that is where we are.

4. Central African Republic – State referral

- referred in 2005, investigation in 2007.
- Going to be a lot of horrific evidence. Will be a lot of rape evidence, etc.
- Found one CAR in Belgium.

ix) Truth Reconciliation Commissions, Amnesties and ICC:

- Statue does not address the relationship b/n the jurisdiction of the ICC and non-judicial approaches.
- If a state grants amnesties, does it preclude the court from acting? Should they? It has been suggested that as long as the amnesties are accompanied by some form of inquiry/investigation (i.e South Africa) then it should render the case inadmissible before the ICC.
- However, given the language or art 17 that outlines that the investigation must be for the purposes of bringing the concerned person to justice. One might think justice has non-judicial meanings, but given TCP approach, unlikely.

HYBRID OR INTERNATIONALIZED CRIMINAL TRIBUNALS:

i) Overview:

- The international tribunals tend to be large and expensive, not always appropriate.
- Each model is different; political backgrounds and reasons for establishing them.
- Common: "all designed to deal with international crimes, exclusively or at least in part: the Lebanese court and the Lockerbie court being the exceptions..."
- Most will sit in the country in question.
- Problem: access to financial and other resources - mostly voluntary contributions by States (includes \$, people, equipment).

ii) Sierra Leone:

The conflict:

- Freetown was two for freed slaves. Eventually became a British Colony.
- 1991 we see the Revolutionary United Front – entered SL from Liberia and wanted to over throw the leaders.
- This group was known for mass rapes and amputations. There was also rereuitment of child soldiers on both sides. Fights over diamond trade, A third of the country is displaced – thousands die.
- Cease fire in 1999 – The Lome agreement fails and civil war resumes. Rebel forces take Freetown and British forces invade.

The Resolution:

- Reconciliation commission suggested.
- Instead SL and UN entered into a treaty to est. this SCSL; Agreement concluded January 2002. SL had adopted enough implementing legislation.
 - o Was at request of SL government.
- Judges: international judges appointed are the majority, minority are judges from SL.
- Neither Int'l or domestic – it applies its own statute and RPE.
- It has concurrent jurisdiction with domestic courts BUT SCSL has primacy.

Jurisdiction:

- "Jurisdiction to prosecute persons 'who bear the greatest responsibility for serious violations on international humanitarian law and Sierra Leonean law'.
- Subject matter: CAH, war crimes committee in non-international armed conflict. Also some specified SL crimes. Not genocide and international war crimes.
 - o Recruitment of child soldiers now a war crime – argued it has been CIL since 1996.

- Territorial: SL
- Temporal: Since November 30, 1996.
- Determined that the court is competent “to determine its own jurisdiction”.
- Declared that it is an international court and as such “state immunity does not bar prosecution of a head of state.”
- Challenges are heard by appeal branch as first and last instance.

The Cases:

- March 2003 – 1st indictments
- 13 indicted, 2 rescinded.
- Charles Taylor caught at Nigerian boarder – surrendered to Liberia – turned over to court.
- 4 groups to be tried:
 - o 1. Civil Defence Forces: appeal March 2008 – sentences for pillaging increased, but child soldier charges dropped.
 - o 2. RUF – trial concluded in June 2008 – judgment pending.
 - o 3. Armed Forces Revolutionary Council – 3 convicted, one at large. First judgment by any court that child soldier recruitment is a crime. Huge precedent in IL.
 - o 4. Charles Taylor – trial held at Hague – started in 2007 – on going.

iii) Cambodia: Extraordinary Chambers

The Conflict

- Atrocities committed by the Khmer Rouge – leader Pol Pot – occurred b/n 1975 and 1979.
- “During these years more than a million people are believed to have died by execution, starvation and forced labour.”
- 25% of population killed – cleansing to put state back to agrarian nature.
- Educated and bourgeoisie were targeted.

The Court:

- Request from Cambodia to UN for assistance bringing the KR to justice – the remaining leaders anyway.
- Cambodia wanted domestic solution – lengthy negotiations with UN.
- Cambodia “unilaterally adopted legislation for Extraordinary Chambers, which raised concerns regarding judicial independence from domestic political interference and shortcomings in the criminal procedures.”
- UN and C reached an bi-lateral agreement in 2005.
- Funding = voluntary contributions – Japan = large donor.

Jurisdiction:

- Part of domestic system – applies domestic law.
- Focus: “senior leaders of Democratic Kampuchea and those most responsible for the crimes and serious violations of C penal law....”

- Subject matter: Genocide (1048 Genocide Convention def.) and CAH as defined in the RS, certain Cambodian crimes.
- Temporal: exclusively retroactive: April 17, 1975 – January 6, 1979.

Other Matters:

- Rules Committee codified rules in 2007 – court could proceed after that.
- Amnesties – agreement with UN – not to request amnesties
- Must operate under C law with regard to MLA and extraditions.
- Chambers – C. judges are majority – int'l minority – all int'l could convict and still have acquittal.
- Everything in duplicate – even website – b/c Cambodia insists on independence (so one for C and one for UN).
 - o Two prosecutors – one C, one international lawyer.
- Civil parties: victims can be parties to the actual case – victims have a lawyer and the issue is how much delay there will be here – cannot have representations from each – suspects may die before trial concludes.

iv) Lebanon: Special Tribunal

The conflict:

- Terrorism trial.
- In 2005 truck bomb in Beirut that killed the former PM Rafiq Hariri and 22 others. Believed to have Syrian intelligence involved.

The Court:

- Treaty based court – b/n L and UN. It was brought into force by SC res. due to deadlocked parties.
- Like SCSL, will not be a domestic court or part of UN. It will be located outside L. The majority of judges will be international judges (same with prosecutor).
- Primacy over national courts.
- Governing law = Lebanese. Exception: b/c voluntary contributions death penalty has to be off table (even though allowed in L.).
- Judges selected, but not announced.

v) Relationship b/n international tribunals and the ICC

- Currently there is not really a conflict b/n the ICC and these courts, “even where the territorial, personal and subject-matter jurisdictions overlap...”
- The ICC cannot be applied pre- 2002 and many of these courts deal with older conflicts.
- Moreover, many of the international courts so far are part of the domestic system. As such, it would seem that the complementary principle would apply.

- Also, if a court like the SCSL that is not part of a national system has a conflict, ICC might just give complementarity anyway.
- Lastly, it is also likely that if a court was proposed in the future that had same jurisdiction of the ICC, there would be opposition to the creation of such a court.

THE ROLE FOR INTERNATIONAL HUMAN RIGHTS LAW

i) Origins of HR Treaties

- There are UN HR treaties and regional sources as well. They share a similar origin.
- WW2 marks extreme efforts of codification of HR standards. There were examples prior to this, but it was about HR in the broader standards. It is often seen as a reaction to the Holocaust.
- Traditionally international law is about states – and they have an obligation of non-interference with sovereign states.
- This changes following WW2. We see first efforts of the UN drafting a codified statement of rights.
- The UN Charter includes the purpose of promoting HR, etc. It is part and parcel of what the UN does.
 - Outlines powers and function. The preamble of the treaty includes “and the equal rights of men and women...”
 - Art. 1 – encourage co-operation in encouragement of human rights.
- The main organ for HR is ECOSOC – 54 states – a three-year term – on rotation – main body that coordinates down.
 - The first commission that ECOSOC created was the UNHR.
 - The commission gets going in 1947 and w/n a year we get The Universal Declaration on Human Rights in 1948 (December 10).
 - Minimum standards toward work, right to life and rights against torture.
 - Opens up treaty negotiations.
 - It was adopted by the GA in 1948 – recall that it is a non-binding resolution.
 - Some of the rights of the resolution are clearly customary international law and the declaration is merely codifying state practice. However, not all are – there is a right to leisure in there, but that is not CIL.
 - It is a statement of principles, some become CIL, but not b/c in the declaration.
 - It took almost 20 years to get the consensus after this draft to get a treaty.

ii) Treaties (ICCPR ICESCR):

- Two treaties resulted out of the draft created by the UNHR b/c not enough agreement.
 - o ICCPR, ICESCR

ICCPR:

- Has immediate effect.
- Has 164 ratified this treaty (Canada since 1976) out of 192 countries, this is pretty good.
- General standard with quite a high ratification record.
- It was intended to be universal – open to all states to become a party.
- Does not bind the tribunals, but the high degree of support for the treaty makes it a valuable resource.
- ICCPR – has rights of the Δ etc.
- Comes into force in 1976.
- Becoming a party – the state is obligated to comply.
- Art 14 – fair trial provisions – goes through general rights – it is more specific than the UNHR declaration.
- Art 15 – codified provision of non-retroactivity of criminal law (the substance and sentencing). That is also codified in the Rome Statute.
- Equality provisions in the ICCPR – also will find it in the supplemental treaties (i.e. children's rights and rights of women treaties).
- The other thing that these treaties do is est. a treaty monitoring body. They est. a committee to monitor state performance under the treaty – obligation to perform treaty requirements.

The Human Rights Committee:

- They did not est. a court, just this monitoring body. It is a committee (called the HR committee, outlined in art. 23).
- The primary mechanism is the use of the state report – that is a good place to get state practice.
 - o Committee examines the report along with information from the UN and other sources (i.e. NGOs), then sends state written questions and then there is an oral hearing.
 - o Reports are then published – “naming and shaming” idea. Since courts are less effective in this area we enforce rights with stigma.
- The body is aware that they are a non-binding committee – there is not a judicial power.
- The other mechanism is individual complaint.
 - o The individual complaint system was est. by OP.
 - o Two stages: admissibility and merits – often applicants lose at first stage.
 - Admissibility – criteria (BOP on applicant)
 - No anonymous submissions

- Must be in writing and involve facts after this mechanism was agreed to by state (non-retrospectivity)
- Must not have been previously examined by the treaty body
- Not a matter being considered by another IO
- Must not be manifestly ill-founded
- Sufficient domestic remedies must be exhausted – BOP on applicant to prove or show why not possible.
- Merits
 - Will review complaint in private
 - Will forward the complaint to state and permit three to six months to respond.
 - Conclusions of the body are then sent to the state party, the applicant and then the UNGA.
- Unless domestic law provides otherwise, the views of treaty bodies are not enforceable as judgments before domestic courts, not are they binding in international law.
- Treaty bodies have no power to order specific remedies for violations, just make findings and recommendations.
- SO the committee has the state reporting job and then for the OP states there is also the individual mechanisms.

iii) Human Rights at Regional Level:

- Recall that there is also a regional side to this.

European Court of Human Rights

- This is binding court was est. in 1950 within the Council of Europe (not EU). It applies to 48 states.
- It is a good persuasive source
- International court for one region.
- It is successful, but facing a huge back log.
- The decisions are not on Westlaw or QL, but free on the internet.
- In terms of its provisions:
 - Art 1 is the obligation provisions – must secure the rights and freedoms w/n the jurisdiction.
 - The tribunals cannot become a party to these tribunals, but it is a good course of comparative jurisprudence.
 - Art 3 – absolute prohibition on torture.
 - Art 6 – most litigated right there is – fair trial provision.
 - Art 7 – same as art 15 of the ICCPR – the non-retroactivity.

iv) Human Rights and International Tribunals (*Tadic*):

- Although not binding on these tribunals, the tribunals look to that jurisprudence to est. general principles.

Prosecutor v. Tadic “DECISION ON THE DEFENCE MOTION FOR INTERLOCUTORY APPEAL ON JURISDICTION” (ICTY, 2005)

- Facts:
 - Δ challenged the est. of the ICTY by claiming that it was not “est. by law” as required in HR treaties (cites ICCPR, European Convention of HR and American Convention on HR).
- Decision/Reasoning:
 - These treaties do not bind the court, but the court accepts that these treaties are general principles.
 - The ICTY looks at the treaties, the case law under these treaties and the views of the HR committee of the ICCPR.
 - Concludes that being est. by the SC is enough to satisfy the “est. by law” requirement.
 - “It does not follow from the fact that the United Nations has no legislature that the Security Council is not empowered to set up this International Tribunal if it is acting pursuant to an authority found within its constitution, the United Nations Charter.”
 - It just means it must be est. by the rule of law – inconformity with international standards of fairness, etc.
 - It does not mean “pre-est. by law”.
 - Tadic loses.

Fair Trial Requirements:

- Sui generis nature of international tribunals.
- For a fair tribunal there is a principle/provision that there must be equality of arms.
 - It is an ability to have the same information – for example, disclosure.
 - It comes up internationally. Prosecution has all resources available to him, so should defendant.

INTERNATIONAL CRIMES: GENOCIDE:

i) Overview:

- Defined in GA resolution 96(1) as “a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings.”
- Many atrocities (i.e. Khmer Rouge or Yugoslavian ethnic cleansing) are not genocide, but still are CAH.
- There is special intent with genocide – to kill or destroy a group – that distinguishes this crime.
- Term not coined until the 1940s.
- First g. conviction by an international court was at ICTR in 1998.
- The standard def. of genocide that has been adopted verbatim at the ICTY/R and ICC is the one found in the Genocide Convention.

The Genocide Convention:

- Adopted in 1948 – allows for accession. This is now a widely ratified treaty. It is arguably a codification of CIL (art. 13 did not come into force until 1950)
- Key Provisions:
- Art. 1: Genocide is crime in a time of peace or war
- Art. 2: CRUCIAL PROVISION! Defines genocide.
"genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
 - (a) Killing members of the group;**
 - (b) Causing serious bodily or mental harm to members of the group;**
 - (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;**
 - (d) Imposing measures intended to prevent births within the group;**
 - (e) Forcibly transferring children of the group to another group.**
- Art. 3: includes actual genocide, conspiracy to commit genocide, public incitement, attempts and complicity.
- Art. 4: "shall be punished" – Crime applies to everyone – no one is exempt.
- Art. 5: Obligation on parties to prosecute and make sure it is implemented in internal law.
- Art 6: Shall be tried in competent tribunal where the act was committed or another competent court that has jurisdiction.
- Art. 7 – not a political offence for the purposes of extradition.
- Art. 8: Any contracting party can call upon international organs to take appropriate actions against genocide. [Counter argument here is that it has since become obligatory].
- Art. 9: Disputes b/n contracting parties over the convention will go to the ICJ.

ii) Relationship to CAH:

- Obvious similarities
- The critical difference is the mental element – "the special intent to destroy the whole or part of a group that is a necessary element of genocide."
- Unlike CAH, there is not a requirement of scale – CAH has to be widespread, systemic attack. Not G.
- War crime must be in a time of armed conflict. Not G – can be time of peace.

iii) The Protected Groups:

- Lists only "national, ethnical, racial and religious groups" – closed list.
- ICTR Trial Chamber in *Akayesu* tried deviate – argues that the t.p suggested that it was meant "to protect any stable and permanent group, rather than simply the groups specifically mentioned."
- The Commission of Inquiry est. by SC in Dafur came to same conclusion – argued that the broader def. was part of CIL.
- However, text pts. out that no other case law suggests this (other tribunals have maintained the narrow def.) and state practice suggests restrictive.

iv) Intent To Destroy

- Is biological or physical.
- May fall short of causing death BUT NOT actions like social assimilation of a group into another or attacks on cultural characteristics.
- Some domestic legislation has changed this, but ICTY confirms that on international scale, still just these.
- Provided intent, it can apply to followers as well as leaders.
- The 'normal intent' is in art 30 of RS – must mean to engage in the conduct and must mean to, or is aware that consequence will occur in ordinary course of events. For genocide – need to also have the intent to destroy the group in whole or in part.

v) The Rome Statute:

- Adopts def. from Genocide Convention
- No defence of superior orders (art. 33)
- Nothing in the RS precludes the development of CIL (art. 10)

vi) Canadian Implementation:

- Crime Against Humanity and War Crimes Act – amends the Criminal Code – applies to genocide occurring w/n Canada's territory, or when the perpetrator is in Canada.
- Canadian def. is the same as Genocide Convention, but allows for the development of CIL.
- Relevant sections:
 - 4. (1) Every person is guilty of an indictable offence who commits (a) genocide; (b) a crime against humanity; or (c) a war crime.
 - 6. (1) Every person who, either before or after the coming into force of this section, commits outside Canada (a) genocide, (b) a crime against humanity, or (c) a war crime, is guilty of an indictable offence and may be prosecuted for that offence in accordance with section 8.
 - 14. (1) In proceedings for an offence under any of sections 4 to 7, **it is not a defence that the accused was ordered by a government or a superior** — whether military or civilian — to perform the act or omission that forms the subject-matter of the offence, unless (a) the accused was under a legal obligation to obey orders of the government or superior; (b) the accused did not know that the order was unlawful; and (c) the order was not manifestly unlawful
 - 14.(2) For the purpose of paragraph (1)(c), orders to commit genocide or crimes against humanity are manifestly unlawful.

vii) Examples of genocide?:

1. Prosecutor v. Krstic (ICTY, Appeal 2004):

- Facts:
 - o Planned attack on UN safe area; army came and deliberately killed 8,000 Bosnians.

- Focus on eliminating a large part of Bosnian Muslims.
- Decision/Reason:
 - Court said that when targeting part of a group it must be a substantial part of that group.
 - Substantial part meant more than size:
 - “The capture and ethnic purification of Srebrenica would therefore severely undermine the military efforts of the Bosnian Muslim state to ensure its viability, a consequence the Muslim leadership fully realized and strove to prevent. Control over the Srebrenica region was consequently essential to the goal of some Bosnian Serb leaders of forming a viable political entity in Bosnia, as well as to the continued survival of the Bosnian Muslim people. Because most of the Muslim inhabitants of the region had, by 1995, sought refuge within the Srebrenica enclave, the elimination of that enclave would have accomplished the goal of purifying the entire region of its Muslim population. In addition, Srebrenica was important due to its prominence in the eyes of both the Bosnian Muslims and the international community...”
 - Appeal Chamber asserted duty to punish this crime.
- ICJ confirmed the ICTY's finding that genocide occurred.

2. Darfur

- The USA argued genocide. Others said, no – it is CAH, but just as terrible.
- Commission of Inquiry in Darfur.
- See discussion above.

3. Ukraine:

- Deliberate intention to starve out Ukrainians under Stalin's rule.
- Canada developed An Act to Est. a Ukrainian Famine and Genocide Memorial Day.
- It was parliament's position that it was genocide. However, is that correct from a legal standpoint?
 - Retroactive in its application.
 - It is also unclear where the special intent is.

INTERNATIONAL CRIMES: CRIMES AGAINST HUMANITY:

i) Historical development:

Armenians:

- First reference to crimes against humanity was in 1915 in response a massacre of Armenians in Turkey. Was a joint declaration by France, GB and Russia.

- There was a state expression that their view was a crime – the legal concept is at least existing for these three states (rather big states). This is the early example of state practice (before Nuremburg).

WWI/WW2:

- There was some discussion following WW1 – but concern about creating a crime that did not exist; not precise enough for international law, etc.
- Then there was Nuremburg – recall that there were three crimes then: crimes against peace, war crimes, CAH.
 - War crimes are generally about how you treat the enemy – what are the appropriate targets, rules of war, etc.
 - The Germans were also killing their own (the Jews, etc.) – CAH is ANY civilian population – so it includes killing their own people.
 - Some argued that it was a new crime at the time, others said it was a newly emerging crime. The argument was that Nuremburg codified something that was a recently emerged crime. For others it was a codification of an old crime (and they go back to the Armenians case).
 - It was also there because they had not codified genocide – it is ANY civilian population (not just foreign nationals).
 - At Nuremburg there is a required connection to a war – there needed to be a nexus – read “before or during the war” – now it does not need that nexus (see *Tadic* below)
 - We also see in Nuremburg the scale required “population” – not just a person – there needs to be a group.
- Tokyo Charter brought in rape (recognizing what happened with comfort women) – T charter had imprisonment, torture, and rape).
- Following Nuremburg there was no CAH treaty.
- The next historical development ICTY ICTR

ICTY/ICTR (*Tadic*)

- It does have the nexus to war that was found in Nuremburg (*Tadic*)
 - In *Tadic* the ICTY draws attention to article 5 of ICTY – article 5 removes nexus to war, but replaces with armed conflict.
 - Court held that a civil war was sufficient.
 - Defence argued that it was a change of the law – retroactive application of law argument – the court said no – ICTY said that there was evolution and it does include international and internal law.
- They called it an armed conflict – substance over form – not just declarations of war, but use of force.
- It is good b/c it includes both civil and international wars
- The good thing is that a year later the ICTR dropped the nexus to the armed conflict/war.
- The ICTY is treated as an aberration basically – most look to the Rome Statute and ICTR and the lack of nexus to war.

ii) What is CAH:

- No treaty on CAH, but in RS
- Nuremburg started the codification of crimes against humanity, but again there is the weakness that it was a definition particular to that tribunal.
- 108 states that are implementing it for RS, but can argue that because they are starting to transform it into their domestic law that it is state practice.
- Art. 7 of the RS defines CAH as:
 - o Murder, extermination, enslavement, deportation, imprisonment (deprivation of physical liberties), torture, rape, enforced prostitution (other forms of sexual violence), persecution on an identifiable group, enforced disappearance, apartheid, other inhumane acts.
- What makes is CAH is a directed, widespread or systematic attack against any civilian population.

iii) CAH and the Rome Statute:

- No longer need the discriminatory element for all CAH (you do not need to just target Jews, etc). I.e. in twin towers it did not just hit USA citizens.
- The widespread aspect is still required.
- The CAH might arguably be more than just RS b/c we are seeing state practice in the form of domestic legislation.
- Art 7 – CAH – “when committed as widespread attack....with knowledge of the attack” – it then lists some grounds (i.e. rape, imprisonment, etc) but also says “any other grounds accepted by ?”
- “Enforced disappearance” – it has been recognized as a CAH.
- “Other inhumane acts” – argument to rebut the legality argument (i.e. that it is other acts, it leaves room for creation of new crimes not in existence at time of act) is that it does not say “other acts” – but it is focused on the interpretation w/n the act – so it is within the context of that – it needs to leave the door open to new ways of committing CAH – people can come up with new ways – we need this other/residual clause.
- Art 33. Of the RS – this is the exemption clause for genocide of CAH – gets rid of defence that you did so under the orders of a superior.

Mental Element

- Combines two aspects:
 - o 1. The mental element for the ordinary offence committed (which appears to be lower, art. 30) AND
 - o 2. Must be aware of the broader context in which the actions occur – must be aware of the directed attack against a civilian population.
- Willful blindness that your crime is part of that context.
- The perp does NOT need to share “in the purpose or goals of the overall attack” – knowledge not motive.

Residual Clause:

- Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

- This definition concerns defence lawyers b/c of the principle of legality.
 - o However, it is argued that there is sufficient precision. "be of a similar character to other prohibited acts and...that they cause great suffering or serious injury to body or mental or physical health."
- Necessary b/c how else would one keep up with the various forms of infliction as they develop.
- Have included mutilation, severe bodily harm, degrading treatment falling short of torture, forced nudity.

INTERNATIONAL CRIMES: WAR CRIMES:

i) overview:

- There are rules both concerning the resort to war and then the conduct of war. War crimes concern the conduct of war.
- Jus ad bellum – this is the rule about the resort to war.
- Jus in bello – these are the rules about the engagement of armed conflict.
- Unlike CAH, it does not have to be widespread or systemic. It can be a single attack. i.e. just have one attack on a hospital.
- There are some rules as to the kinds of weapons you can use and the things you can target.

ii) Historical Development:

Long Standing Historical Practice:

- The practice of prohibiting types of warfare (i.e. rules as to the kinds of weapons or places to target) is a long standing practice. The prohibitions have evolved over time, but many of these are crimes committed under CIL.
- When it was codified in the London agreement (Nuremburg) the argument was made that it was retroactive, but that was not the case. It is accepted that it was codification of CIL.
- Rome Statute codifies what the basic rules of war crimes are. Many would argue that those are customs. Some would argue that there are other practices that have not be included.
- The international committee of red cross (ICRC) – would go further – some states says that ICRC go too far in terms of custom.

18th and 19th Century Developments:

- In 18/19 C saw the development of codes of conduct for how to engage in battle. The more recent term used in rules of engagement (ROE)
- War conducted in 1700 an 1800 are different than 20th C – it is armies against armies in the time not whole national efforts.
- Now with our new enemy the rules are more difficult to apply because not everyone follows same ones.

- The goal is to avoid unnecessary suffering. There is suffering where there is no military gain and others that are “worth” it. There must be proportionality.
 - o i.e. dum dum bullet rules came out around 1850.
- The principle against suffering was pretty well respected in 18th C.

The Hague Conventions:

- Seeing more codification.
- Hague conventions began in 1899 – this is when they banned the dum dum bullets – they dealt with how you conduct war at land at sea.
- 1925 we get a treaty prohibiting the use of poison gas. In addition to suffering stuff it also does not go with principle of distinction – the gas cannot tell civilian vs. militia.
 - o Still used in WW2 – was a means to try to stop it, but obviously not enough to deter – but shows for Nuremburg that it was not a retro active application.
- Hague had focused on means of committing war. The focus was on weapons.

The Geneva Conventions:

- After WW2 rules addressing civilians and those outside of combat (i.e. POW) develop.
- These are known as the laws of Geneva. They add to the laws of the Hague.
- There are four Geneva conventions. There are different focus points for each (not just the “Geneva Convention”):
- Geneva I (wounded and sick armed forces in field)
- Geneva II (wounded and sick armed forces at sea)
- Geneva III (POW)
- Geneva IV (Civilians).
- The Geneva developments came about in 1949.
- There are then some additionally protocol to add more details to Geneva.
 - o Protocol I (victims of international armed conflict)
 - o Protocol II (expansion to non-international armed conflict)
 - This one is controversial – some states that are not party to this one are very concerned - it would mean it would apply to civil/internal war.
 - *Tadic* at ICTY held that CIL rules apply to internal conflict.

Other Weapons Codification:

- There has since been movements to prohibit other methods – i.e. landmines have been prohibited – but the focus is really the ones that are not controlled – the ones that are left in the field. This does not outright ban all – can still use the controlled ones (the ones that must be set off with a remote, and the person setting it off can distinguish who the target).
- There is also development about environmental concerns with arms – like the Agent Orange used in Vietnam. If there is a concern for the long lasting

affects of a weapon we will be dealing with it. There is not just the concern with the lasting effects on the population (i.e. being born w/o limbs) but affect on environment.

- Then there also cultural heritage rules – do not want to destroy
- Also rules on use of indiscriminate weapons:
 - o i.e. carpet bombs, lasers, boob traps.
- Make sure soldiers are trained about what the militia can and cannot do. Prosecutions are to occur nationally.

Nuclear Weapons:

- In 1961 – 55 states in the GA voted to accept that they are illegal, all western states said no. Latin states obtained. This would not be the best argument for CIL.
- Eventually what happens is that an argument is made that they should not be allowed – analogy is made b/n prohibition of gas – the initial impact does not kill everyone, but the nuclear fallout.
- There is a longer lasting impact – the argument was if poison/gas is prohibited then surely this should be banned too.
- There is obviously a problem with state practice and then there is an argument against opinio juris – argument made that the gas treaty just points to specific poison/gas – this is fallout and fallout is not the weapon, but the aftermath. SO not CIL. This is clearly a weak argument.
 - o Also argue that there is a deterrence principle.
 - o Carpet bombing – prohibited – lacking distinction – is a nuclear bomb not just a big carpet bomb.
- There was an advisory opinion at ICJ in 1995 – left open the issue of nuclear
 - o 21 states and WHO opposed these weapons.
 - o July 1996 – the opinion was given. It is not that easy to read. One judge died and then we ended up with a 7-7 split.
 - o There were different majorities on different issues. It essentially left it open – not clear that it is illegal to use the weapon.
 - o It is argued that it would generally be contrary, but the court found that it could not conclude definitively on the prohibition on the use.
 - o It is left open that there might be a circumstance, for survival of the state, that a weapon could be used. They are weighing the proportionality.
- India was so strong at Rome Statute and wanted to make international law develop to say that it is a war crime to use a nuclear weapon.
- In the end our strategy is to regulate rather than prohibit. (i.e. limit the numbers of them – limit who has them).
 - o States get very worried when another state enters the group.
 - o There are rules w/n targeting the nuclear power stations – if they are nuclear generating electrical power can argue that military, but need to remember proportionality – think civilians and suffering.

Chemical and Bio Weapons

- OPCW (org for prevention of chemical weapons).
- There could be breaches from principled perspective.

More mass destruction weapons

- 2000 secretary general of GA raised issue of small arms – guns – trafficking small arms – availability of weapons by thugs (links to child soldiers – the weapons got smaller and easier to carry).
- SG has focused on WMD in small arms.
- Have not seen this developed further.

iii) Definition of War Crimes:

- Defined at length in the RS, but:
- Crimes committed in violation of international humanitarian law, but does have to be in a period of armed conflict.
 - o i.e. use of blinding lasers, or dum dum bullets.
- “War crimes law is, in effect, a set of secondary rules that criminalize a subset of the primary rules found in IHL”.
- IHL focuses on states, war crime law focuses on individuals.
- Not all violations of IHL will be war crimes, but have seen treaties codifying some of the essential provisions.
- This question was also addressed in *Tadic*.

Tadic:

- “The decision confirmed that not every IHL violation amounts to a war crime.”
- Appeal Chamber outlined the following requirements for a war crime at the tribunal
 - o 1. “the violation must infringe a rule of IHL”
 - o 2. “that rule must be found in customary law or applicable treaty law:
 - o 3. “the violation must be ‘serious’ in that the rule protects important values and the breach involves grave consequences for the victim”
 - o 4. “the violation must entail individual criminal responsibility”
- This definition helped determine which crimes would be included in the lengthy ICC list.

Underlying Principles:

- 1. Principles of distinction – the military must distinguish b/n military and civilian (and therefore inappropriate) targets.
 - o Strong held principle in international law – it is a principle motivating many of these rules, but it is hard to apply.
 - o Another principle distinction is when militia becomes outside of combat/comparable to civilian (i.e. injured, ship wrecked).
- 2. Principle of Necessity
 - o Proportionality comes in.

- Notion that cannot use sledge hammer to crack nut. What military objective is being achieved? Is it proportional to the collateral damage.
- Both of these principles are CIL but still see them codified later.
- 3. Principles of Humanity/chivalry or fairness:
 - Sense in this area of law that there is some line that humanity says that we have gone over.
 - That is just not how we do war.
 - CIL principle.

iv) War Crimes, Armed Conflict, and Civil War:

- This notion of expanding some of the prohibitions into internal conflict.
- Still debate here. Rome Statute is making contribution and other states some saying they are not there yet.
- The gap b/n coverage b/c more problematic in the 1990s
 - Increase in internal conflicts
 - Increase in size and length of internal conflicts
 - Increasing consequences in surrounding area
 - State more willing to intervene with greater focus on HR
- ICTR was significant step b/c Rwanda was internal conflict.
- ICTY in *Tadic* found less of a dichotomy b/n internal and external – did not break down barrier all together, but thought some principles should apply internally also. Those norms that applied:
 - “were clear and unequivocal recognition of the norm, state practice indicating an intention to criminalize the norm, the gravity of the acts, and the interest of the int’l community in their prohibition.”
- ICC statute also includes some crimes that are applicable in an internal conflict (art 8(2)(e)). It is an incomplete list and art 10 allows for further development of ICL.
 - Criticized for not abolishing the distinction, but state practice/CIL not there yet. Indeed some of the provisions wouldn’t even locally apply.

Outstanding Points

- Current issue is Gaza – has war crimes been committed there.
- Israel’s priority is to save self/protect.
- Israel is not a state party so cannot get to ICC – other way to get there is security council – US will veto that.
- What is the argument for Palestine? Has to be a state party, but Gaza arguably not a state?

v) Victims:

- Applying Geneva Conventions – sometimes require that victim “be in the hands of or in the power of an adverse party”.
 - Bosnia international, but divided on ethnic lines not national.

- ICTY recognized in *Tadic* that the “crucial test is allegiance and that ethnicity rather than nationality may become the ground of allegiance.”

vi) Jurisdiction of the ICC

- Although art 8(1) includes threshold requirements they go to jurisdiction not the elements of crime.
- Moreover, they are a lower standard than CAH and are simply guidelines.
-

INTERNATIONAL CRIMES: CRIME OF AGGRESSION

i) Aggression and the ICC – the caveat:

- The drafters at the Rome Conference agreed that aggression was one of the four serious international crimes.
- Art. 5 of the Rome statute included in the jurisdiction of the court, but there is a caveat. The court cannot exercise this jurisdiction until it is defined and set out the conditions on which the court will exercise jurisdiction (art 5(2)).
- Two aspects to the crime – there is the definitions and the conditions for exercising jurisdiction. Harrington says the second part is more difficult.
- Principle of legality – cannot put someone on trial for crime that has not been assigned – it buttresses the caveat in article 5.
- The definition will not come into play instantaneously; it will have to give time to give notice. It will come into effect in future.
- Art 123 of Statute that it provides for the convening of a review conference after 7 years of the treaty coming into force.
- The review conference is going to be held in Uganda. It is a situation country, but there is a strong political reason to have it there. The four situation countries are in Africa. Uganda volunteered to do this. Uganda thinks it will be a good, education experience.
- Harrington says we are on our way to getting the definition, but is not sure that we will get conditions
- Art 121 – suggests amendments can be done with 2/3, but if you look further it suggests it just depends on the crime.
- When the treaty is amended it will require ratification of a certain number to bring it into force and certain states can opt out.
- Art 125 – individual state consent for adding a crime. Do not want a definition that never comes into force for most countries – do not want a definition that the western world does not support b/c they are often the ones with the waging of aggressive wars.
-

ii) Historical developments:

It is a crime recognized against CIL.

- Even though the Rome Statute could not agree on the various facets of definition, it is a crime recognized as CIL – just maybe not each facet.
- R. v. Jones (HL 2006) – used as persuasive source – it says aggression is CIL crime – the act of waging an aggressive war.
 - o Jones – involves 20 individuals. The acts all take place at same time in March 2003. They were trying to destroy US equipment on the base, chain selves to tanks, etc. – so they are protesting US in Iraq – argued that they were justified b/c they were trying to prevent a crime – the crime of aggression.
 - CA said no, we do not have a definition, the HL said we may not have the definition exactly (like the specifics), but it is CIL. .
- Also note that it is a leadership crime.

WW2:

- Nuremburg is the starting point. It started with the crimes against peace as was outlined in the London Charter.
 - o CAP was “the planning, preparation, initiation, or waging or a war of aggression, or a war in violation of international treaties...or a conspiracy to for the accomplishment of any of the foregoing”
- Dismissed the claim that it was a new crime by stating that it has been a crime since the 1928 Kellogg-Briand Pact.
- “Planning, preparation, initiation...” at this time – it is a leadership crime. It can be more than one – it can be a conspiracy.
 - o However, it focuses on the leaders – that is the what came out of Nuremburg.

The UN

- After WW2 we get the creation of the UN.
- The UN confirms the Nuremburg legacy – the GA affirms what happens at Nuremburg.
- They eventually get agreement in the GA resolution pact in 1974 – that was obviously a long time for a group to be working on it.
- The resolution said that having debated it for 20 years, we have a text – there is a state responsibility to it.
- The resolution also gives guidance to the SC.
 - o The definition to assist the SC, but not the only ones out there, say GA.
 - o What is the rebuttal to the fact that there are other ways to commit the crime – remember that with crimes against humanity there is the residual clause. Harrington’s argument – I do not have to list every way that one to commit murder for murder to be a crime. Argument is the residual clause does not breach the principle of legality.
 - Rebuttal – art 3 outlines the crimes - art 4 – the acts enumerated above are not exhaustive – SC can determine if it is crime. So people might say, yes, it is not exhaustive, but recall

the SC must be the one who decides – it is not for an over zealous prosecutor to decide.

Creating the Rome Statute

- We then come to drafting of the RS they are going to be looking at 1974 and 1945.
- We are going to build on past practice. If the SC has the ability to declare it was an act of aggression, when did they do so? Korea – authorizing the UN troops – one of few times the UN said it was crime.
- Nature of the crime – remember that it is a leadership crime.
- Severity – can be seen in ICC preamble. If you look at the 1974 definition you see the mental element “planning, preparation...” etc.

iii) Definition:

- The definitional side is the ACTS, THRESHOLD, WHO.
- Details outlined above.

iv) Jurisdiction:

- This is not something that will really occur often by allows SC to be in charge of determining when the ICC has jurisdiction.
 - o There is only a few actions taken in the whole existence of the UN.
- The alternative is that the ICC prosecutor is not waiting for the SC green light. However, the SC has the red light provision. Recall that the SC can defer an ICC prosecution, so some like this –
 - o Some dislike that it could be used to defer the prosecution of an aggressive war.
- Alternatives? Go outside of the SC for determining when the ICC has jurisdiction.
 - o Some suggest that maybe the ICJ should be the one in charge of determining if there was act of aggression and if there was, then the ICC can take over the individual prosecution of the individual responsible.
 - Argument against this is that the institutions should be kept separate/independent.
 - o Others have said that maybe the GA should be responsible for declaring that there was an act of aggression and if so, then the ICC prosecutor can proceed.
- Harrington said that she thinks that the problems of conditions might not be resolved by the review conference, whereas the definitional aspect seems to be resolved.
 - o SWGCA – special working group on crime of aggression was started in 2002 and is still going, Most recently the head of the group said that we have reached an agreement on the definition.
 - o Appears that the review conference will have a definition to be adopted (likely the 1974 one) and there will be a proposal for the conditions for exercise.

- We have started to think about amending the definition and later amending the conditions. Others say that we are not getting anywhere and we need to do something.

v) Summary on Aggression:

- You need state aspect and individual aspect
 - o You need the action (state sanctions, embargos, blockade, etc) and then you need the individual accountability. The idea is that an individual not the state that is responsible. However, there cannot be individual responsibility w/o the state action.
- Individual responsibility: Actus Reus, Mens Rea – it is a leadership crime, say most state
- Act of Aggression:
 - o It is not for the ICC to decide what the act of aggression is – there are specifics listed. ???
- Knowledge and intent – the perp must be knowingly in a position of leadership and have to had known that the acts were an act of aggression and a violation of UN charter.

OTHER CRIMES: INTERNATIONAL TERRORISM

- “Other crimes” – these are crimes that have international concern because they cross boundaries.
- The prosecution for these crimes will largely be domestic.

i) What is terrorism?

- “No definition has been agreed on for the purposes of a global prohibition of terrorist acts in a legally binding instrument.” Not even really a def. in the 11 global agreements. This supports the position that terrorism might be able to be prosecuted w/o a specific definition.
- The freedom fighter vs. terrorist distinction is no longer relevant – it is very 1970s.
- Courts will look at the individual act – the underlying act is murder.
- “Terrorism may be regarded as simply the commission of ‘ordinary’ though serious criminal acts with a particular purpose.”
- There was an attempt at the Rome Conference to add terrorism to the ICC list of crimes. There was a problem with principle of legality – the problem being it lacked the definitional content.
- The idea of a comprehensive terrorism agreement is back on the UN agenda. We still do not have it, but it is on the agenda. Others are saying give up, we do not need it.

ii) Historical Overview:

Attempts at International Prohibitions:

- Early attempt to get agreement on international prohibition of terrorism was at 1937 Convention for the Prevention and Punishment of Terrorism.
 - o This was done by the LON after the assassinations of King Alexander I of Yugoslavia.
 - o Only one state ratified this convention that was created and consequently never entered into force.
- The issue began to fade out and people start to focus on it domestically. In domestic law they do not define it, but they make sure their criminal code has murder, grievous bodily harm, etc. – do not worry about motive side.
- The 1970s again sees idea for international efforts for a convention. There was an emergence of terrorist activities at this time (IRA, Red Hand, etc.)
- A committee on terrorism was created by GA – 1972 – they were looking to define and prohibit terrorism. They gave up in 1979.
 - o “There was disagreement as to whether acts committed by a national liberation movement for causes such as decolonization should be excluded from any definition of terrorism...”

Terrorism Agreements:

- Following this was a shift to a case-by-case basis. Adding the co-operation element – that the crime would be dealt with domestically, but the treaty deals with co-operation.
 - o They start with the series of treaties (see footnote 28 on pg 285). Essentially the focus is suppressing terrorist acts.
 - o You can see that when you add up all of these treaties that are on a case-by-case and act by act basis, that we are dealing with terrorism.
 - o There was a case where a Italian cruise ship was hijacked and they threw a Jewish American in a wheel chair overboard. You are in the middle of the Mediterranean. You have a PLO terrorist and at some point and took over. This is not piracy because there are not two ships – they were on board at port.
 - This was committed for political means and means of terrorism. There is jurisdiction for the registered state of the cruise ship, but Americans want it – so they are trying to argue piracy. Others are saying that this is a gap in the legislation.
- We do appear to have an international legal framework in place to deal with terrorism. We do not have the definition, but we do have acts that together deal with terrorism.
- The SCC supports this position, as seen in *Suresh*.
 - o Δ is the alleged Tamil Tiger fundraiser. The SCC dealt with whether the word “terrorism” too vague. The SCC address what is terrorism. Our domestic court had no problem finding a definition for terrorism. The term is open to political conjecture. They also acknowledge that

there is some disagreement. They are not convinced that it is so unsettled “that is cannot set the proper boundaries of legal adjudication”.

- The SCC concludes that terrorism means: “act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act”. This definition catches the essence of what the world understands by “terrorism”.
- Defined it for the purposes of this case.
- Interesting though b/c Canada had not yet ratified the treaty that the SCC relied on. However, this is a post 9-11 case, so probably a little bit motivated.
- Mid 1990s there is a renewed impetus. There is the first GA resolution and additional treaties being negotiated.
- GA resolution – 1994 is adopted and 1995 is when it is printed, but should be date adopted. It is the Measures to Eliminate International Terrorism. In the annex there is a declaration on the measures to eliminate international terrorism. Again, they do not define it, but say that there is a framework – list some agreements – they realize act by act they cover various aspects of the problem.
 - Others say do we need a definition. What would it add? We seem to have agreement on at least acts committed indiscriminately.

iii) The Security Counsel:

- The Security Council is the UN powerhouse and does have, under chapter 7, the power to make binding resolution.
 - Lockerbie – the bomb that was on the flight going to NY – it blew up over Lockerbie.
 - Lybia was the one whose state agents put it on there. It was a question of whether state or private acts. It is now understood that the bomb that went on the plane when it was in Malta. It was in the days when they did not necessarily match the suitcase to the person.
 - The SC got involved (partly because UK and US part of SC – both very affected by this). The SC forced Lybia to turn over the individuals turned over. It is resolved to have a Scottish court, a Scottish trial in the Netherlands at a former US military base. So it was still Scottish, but in a neutral place. Scottish law still applied. Convicted two individuals (but not as a state crime). One of the individuals is appealing the decision b/c cancer and six months to live.
- Since then, we have 9-11. The SC takes action in the form of 1373 resolution. Overlying this is a huge motivation to deal with what happened in 9-11. This is quick as it was done September 28, 2001. Nevertheless, they set out the resolution and said that they were using the full powers under chapter 7.

Some states were objecting b/c appeared to be SC “legislating”. There were no vetoes. It is law.

- Call upon states to provide information and to ratify the separate treaties, etc. They cannot force states to do that, so they call upon them to do so.
- Est. a Counter-Terrorism Committee to monitor the implementation.
- The states are ordered to report to this committee on what they are doing to stop terrorism, etc.
- This condition has become quite interesting. Canada has made 5 reports. Cannot dodge this because it is SC.
- In Canada we have domestic legislation, and then we had our first case and now he is being sentenced – we will be able to report on the sentencing soon.
- In Canada there are limits on freedom of association – we are checking to ensure that we are not giving charity status to terrorists, not funding them, etc. Also not permitting membership in terror organization.
- We have been having an issue of names – we have a listing of names
- This was a bit of an issue because the argument was when did we allow the SC become our legislature – this has the effect of them making our banking laws, our charity laws, etc.
- This all again suggest that we have at least a working definition of terrorism.
- SC also have Res. 1566 – states are very aware of this – it builds on Res. 1373 – maintains counterterrorism committee – also have sanctions.
 - They are not quite into a serious international crime, but clearly getting close.
 - See them getting close to a definition in para 3. “with the purpose to promote state of terror” Seems to be repeating that sort of language – underlying ordinary criminal acts with the purpose to terrorism, intimidate or compel a state.

iv) Obstacles to reaching a definition:

- The textbook at 288 goes into the obstacles. Two obstacles:
 - 1. Any causes out there that justify an act of terrorism? Excuses? Some people are still thinking of the Nelson Mandela’s .
 - 2. State Terrorism – argument is that we are dealing with individual criminal responsibility and state terrorism should be excluded
- Another issue is whether we need the definition at all. Can we just deal with act by act as we have now and rely on the domestic system?
- It is suggested in the text that a definition is needed “if there is to be a comprehensive international prohibition on terrorism with a requirement for multilateral cooperation including extradition provisions...” or for terrorism to be added to the ICC jurisdiction.

OTHER CRIMES: OFFENCES AGAINST THE PERSON

i) What are Offences against the person.

- Will see references to HR law. We have some HR treaties related to the international aspect. HR civil side and the criminal side are different.
- Offences against person include:
 - o Slavery, apartheid, enforced disappearances, torture.
 - o They are all CAH, but also separate and it is the state's responsibility.
- Transnational Crime
 - o Organized crime, money laundering, drug trafficking (all at the transnational level).

ii) Slavery and Slave trade:

- CIL = abolished slavery/slave trade.
- Various human rights instruments outline that person have the right to be free from slavery or servitude.
- Erga omnes obligation - It is also an obligation to the whole wide world. All states should be looking to ensure it is wiped out.

Historical perspective:

- Various states were abolishing it, but then acting on the high seas or something, when they saw slave ships, they deferred to the domestic law of the flag state.
- This led to a series of bi-lateral slave suppression treaties.
- The real problem with these was the lack of domestic enforcement – you cannot board another state's ship, etc. unless that treaty grants you that power.
- There were international treaties – 1885. There were states building an international norm.
- Eventually built upon in 1927 with the slavery convention. The goal was to abolish and prohibit the slave trade.
- After WW2 there were still issues of modern forms of slavery – poverty, sexual exploitation, etc.
- 1949 – UN est. a AD HOC committee on slavery – that work still continues.
- 1956 – Supplementary slavery Convention expanded the focus to include: slavery, slave trade, debt bondage (many people never pay this debt off), etc.
 - o Serfdom – forever will work on land that is not theirs.
 - o Bride Price – looks like dowry.
 - o Child labour – selling child for labour.

Modern Slave Trade:

- There is now a special protocol on trafficking of persons – that is a 2000 and forward.
 - o 2000 (more specific) is the UN protocol to prevent, suppress and punish trafficking in Persons, esp. women and children.

- That was the title, but it is more specific. It is aimed at trafficking, not prostitution.
- It is saying that members of the treaty have to have it in their domestic law. They are also supposed to cooperate internationally to ensure investigation and prosecution.
- ILO - Actually banned Myanmar (Δ in 1998 of grave and persistence violations of labour). Then boycotted all goods from Myanmar. This then brought up a trade law issue. ILO tried to show its teeth.
 - ILO also has special programs for international child labour.

Summary:

- It does have some international treaties, but enforcement is very much domestic.
 - i.e. the Law of the Sea provisions in the Law of the Sea Provisions to board, visit, etc. However, you do not have the power to arrest, etc. To do that they need to get the flag state's jurisdiction to do that.

iii) Apartheid

- A racial superiority regime where the minority regime against the majority.
- 70s – saw criminal law addressing apartheid specifically. It is not just a breach of HR – but a crime.
- 1974 – UN sponsored a convention on the crime of apartheid.
 - The feature of this convention not only called it a crime, but made things that were used to enforce apartheid a crime (well forced domestic parties to) – i.e. arresting b/c part of a monitory group. Etc.

iv) Forced Disappearances:

- It requires a state actor and the unlawful detention or non-disclosure of information (i.e. location).
- Specific treaties in existence.
- Prevalent in South America.
- By the 1980s there was an increase of it around other places.
- The OAS has been particularly active about this – there was a famous decision of inter-American court that said it is already a violation of existing HR treaties, but suggested regional treaty.
- 1994 Inter-American Convention on Forced Disappearance of Persons.
- At the UN level, there was a working group and then a declaration in 1992. In 2006, we now have a UN convention. UN Convention on Forced disappearances.
- This convention is not yet in force. By def, a state that engages in enforced disappearance is already a CAH. The serious systematic attack of a civilian population,
 - Art 7(1)(i) – is a CAH.
 - CAH can be by non-state actors, but note that enforced disappearance must be state actor. This is by very nature of the crime.
 - Enforced disappearance could also been seen as torture.

v) Torture

- Prevented in ICCPR, ECHR
- UN Convention Against Torture
 - This is ensuring that the states will take measure to end torture.
 - The state must try to ensure that there is no torture.
 - Primarily aimed at ensuring that states take action to criminalize torture and ensure it does not take place in their system. THE CRIMINAL FOCUS IS DOMESTIC.
 - It had been prohibited before, but a big deal that happened just before the CAT 1894 was the declaration to come up with a def that was used in the convention. The GA developed it.
 - **Torture, in the convention is when there is a severe pain or suffering, whether physical or moral, intentionally induced, inflicted by a s public official or other persons acting in a official capacity.** Acquiescence counts.
 - Needs to be done for certain purposes – intimidating, obtaining a confession, discrimination, etc.
- Geneva Convention
 - Lack of need for a state actor; can be committed by a state or non-state actor in armed conflict.
- Depending on the regional agreement there will be differing scope of torture.
- We cannot give a list of things that are torture – just know the def and how the act would fit into that.

vi) Transnational Organized Crime:

- Crimes that affect persons, rather than crimes against the person. These are our transnational organized crimes.
- Really post 1990 era that we are getting this expanding.
 - It is seen by the international community as a crime deserving attention.
 - Series of meeting in 1999 – Transnational Convention of Organized Crime est at UN.
 - Money laundering, corruption, obstruction of justice, and participation in organized criminal groups.
 - These are the four offences of the convention.
 - It is to encourage cooperation – and support domestic prosecution.
 - Applies only to transnational crimes.
 - In addition to the 2000 convention there are two protocols; the trafficking one mentioned above (about the trafficking people), and there is also a fire arms protocol (it also dealt with the marking on firearms).
 - It seems to be more successful when they focus on the specific issues/crimes.

vii) Drug Trafficking

- This has broader and bigger issues.
- It also has links to bribery, corruption, and links to terrorism.
- It dates back to 1909 with Teddy Roosevelt and the Opium convention that passed in 1912.

Historical Perspective

- For a while the focus was on specific drugs.
- After WW2 it was clear that a different legal framework was needed.
- In 1946 the UN commission on Narcotic Drugs was created.
 - o They have long been interested and focused on effective measures to control the trade.
- 1961 – the single convention on narcotic drugs is born.
 - o The idea, as per the name, was to make one agreement – not just based on one drug at a time.
 - o International cooperation with domestic action.
 - There were also provisions on prescription drugs being properly labeled, etc.
- The 1960s also saw the development of new drugs.
 - o This convention did not deal the psychotropic drugs (not plant derived).
- 1971 – Introduction of the Convention on Psychotropic Drugs.
 - o It was eventually strengthened in 1988
- 1988 – UN convention Against Illicit Trafficking in Narcotic Drugs and Psychotropic Substances
 - o Again it is a treaty regime for cooperation.
 - o Requires parties to criminalize the production and implement and enforce the crimes domestically, etc.
 - o It also has provisions for controlling the trade of the substances that are used for making the drugs.

Drug Trafficking and The Rome Statute:

- Drug trafficking did come up at the proposal of the RS
 - o Trinidad and T suggested having it included.
 - o A number of places and then the Holy Sea said it should be in the RS
 - o However, there was less of an agreement, so not at the point where we were ready to put it in the RS.
 - o In the final act at the Rome Conference it, like Terrorism, was acknowledge that it might come back up at a later date.

viii) Corruption

- 1977 – a US domestic law was created making it an offence to deal with extraterritorial authorities by bribery of a US national company or company controlled by a US national.
 - o US companies complained that they were a disadvantage in the global scene.

- As a result the US felt that they should lead international efforts to get an international consensus that bribing foreign officials is bad.
- 1975 UN resolution condemning it.
- Another UN based agency (OACD) code of conduct
 - 1997 – OACD convention on combating bribery of foreign public officials in international business transactions.
- There are regional conventions as well.
 - 1997 EU has one dealing with corruption of EU officials
 - 1999 – Council of Europe made one
 - So there is a growing network of enhanced provisions.
- Again, encouraging states to take action domestically.

GENERAL PRINCIPLES OF LIABILITY:

i) Heads of Liability (art 25)

- Art 25 of Rome Statute – highlights that its focus is individual criminal responsibility. Cannot have corporate responsibility.
 - There was debate at conference – no agreements.
- Art 25(4) – This does not affect or oust state responsibility.

Art 25(3) is the heart of the modes of participation.

- 25(3)(a) is the commission of the offence
 - The perpetration is well est. in ICL.
 - Δ commits such a crime whether as an individual or through another person, regardless of their criminal liability. JCE= joint criminal enterprise.
 - The only point of contention here is really if it includes omissions. Some argue that the only place for omission is really the command responsibility (if they fail to discipline or tell their men not to). However, others disagree and argue that the word conduct includes acts and omission – it is a highly debated topic.
- (b) If you order, solicit, or induce the commission of such a crime – you can still be held liable.
 - Must be a superior/subordinate relationship.
- (c) Aiding and abetting
 - For a common law lawyers this would also cover b, so redundant. However, as an international lawyer, they know it is needed to accommodate all domestic systems.
 - The policy concern about this is how far it will go and what it will cover.
 - The underlying pt. of concern goes to sentencing – concern that a lower sentence than the aider and abettor.
- (d) This is the JCE, the common plan.

- Again we have difference b/n common law and civil law systems. There is an either or in this provision – it is conspiracy type stuff.
- The ICTY does not have this provision, but developed detailed jurisprudence on the meaning of the term in *Tadic*.
- JCE or through a person. There seems to be a difficulty to distinguish a joint perp and an accomplice. Different tribunals take different views. By the time it gets to ICC the debate is up. However, they say in 25(3)(a) that it can be indiv, joint or trough.
- ICTY has taken a different view (p. 304) than the ICC. The difficulty is that there is three forms of common plan. Basic joint criminal enterprise, and 2) systemic JCE (the example in the book is concentration camps – but do not call it systemic specifically; 3) Foreseeable that offences that could occur. Harrington warns that the text is more detailed than we need to know.
- ICTY development of JCE has been controversial. They tried to tie it up a bit in the RS and drafting. They borrowed a definition of 1997 International Convention on suppression of terrorist bombings in the 1998 draft of ICC (b/c they had already agreed). The underlying difficulty is again the common law vs. civil law problem. A CL lawyer needs at least two persons to agree to commit crime, even if crime does not happen. Civil law system need crime to happen also.
- (e) Incitement to commit genocide – it is an inchoate crime. The key to this provision is that it needs to be direct and public. Wanted it tailor like this.
 - Remember complementarity
- (f) Attempts – “by means of a substantive steps”.
 - Other tribunals have been silent on attempts.
 - It is covered in the ICC statute – many did not include it because it really does not seem to fit in the mandate – the most serious crimes; since did not happen, it is arguably not the serious.
 - Others say it should be there for the deterrence factor. It is to say that we care even if you are attempting it – we want to deter the planning, etc.

ii) Mens Rea (art. 30)

- Art 30 of the ICC statute is the MENTAL ELEMENT
- It makes it clear that a person must have some form of mental element.
- 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**.
- 30(2) 2. For the purposes of this article, a person has intent where: (a) In relation to conduct, that **person means to engage in the conduct**; (b) In relation to a consequence, **that person means to cause that consequence or is aware that it will occur in the ordinary course of events**.
- 30(3). For the purposes of this article, "knowledge" means awareness that a **circumstance exists or a consequence will occur in the ordinary course of events**. "Know" and "knowingly" shall be construed accordingly.

- Mistake of Law/Mistake of fact (art 32)
 - o Mistake of fact is ground for excluding criminal responsibility if it negates the MR.
 - o Mistake of law can be also if it negates the MR only.

iii) Command Responsibility (art 28)

- Art 28 confirms past practice. It was at Nuremburg and in HR instruments.
- Art 28(a) and (b) sections
 - o Military and non-military
 - o The difference is the mental elements – the military is known or ought to have known; the non-military is knew or consciously disregarded.
 - o For some, the fact that there was non-military people included.
- A lot of people writing about command responsibility. The ICTY dealt with this a lot. However, not a lot of cases have turned on this.
- Note, however, that you cannot convict on this AND 25(3)(a). One or the other – either prep or commander.

GROUNDINGS FOR EXCLUDING CRIMINAL LIABILITY

i) Overview:

- Defence precludes responsibility – the material elements of the offence have been proven in many cases, but reason not to be responsible.
- Art 31 – this is a partial codification – the RS is a *partial* codification – there could be other offences out there.
 - o Art 31(3) “...other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in article 21”
 - o Art 67 – rights of the Δ - also says that nothing precludes a Δ from raising a defence.
- What defences are left out?
 - o Alibi
 - o Abuse of process
 - o Consent
 - o Military necessity
- There are some defences that are not permissible:
 - o Official capacity
 - o Superior orders – has some limitation (will discuss today)
 - o Tu Kowk (reprisals) – cannot say “I did it b/c you did it to me”.

ii) Mental Disease (art 31(1)(a))

- You have to suffer from a mental disease of defect that that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity.
 - o ICTY has had this at their court. Instead of BRD, they have gone on the preponderance of evidence standard.

- This has been raised.
- Julius Striker in the Nuremberg trials – perhaps the famous one b/c lowest IQ of all of the Nuremberg clients. An insanity defence was not shown, but he was boarder line. So the issue has been raised, but never really upheld.
- Must satisfy one of three locus:
 - Unable to understand the nature of his conduct
 - Incapable of understanding the unlawfulness
 - “irresistible impulse” – unable to control self despite knowing its wrong.

iii) Intoxication (art 31(1)(B))

- Has been subject to criticism. Given the nature of crimes at ICC it does not really make sense. The planner and organizers are often focus. They would have to be intoxicated the entire time of genocide. Intoxicated an planned the whole thing? There is a disconnect here.
- “that destroys that persons capacity...unless voluntarily intoxicated...”
- If anything it will likely be raised at a war crime situation – not likely CAH or genocide.
 - It is certainly a very small liklihood.

iv) Self defence, defence of others, defence of property (Art 31(1)(c))

- Defence of property is controversial. For war crimes ONLY it includes defence of property.
- SD and def of others – specific heads it has to meet.
 - The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the **survival of the person or another person or property** which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. *The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility*

v) Duress and Necessity (art 31(1)(d))

- Duress is not the same as superior orders - each has different requirements.
- Duress is someone that is compelled to commit the crimes by threat of imminent death of serious BH to person or other person.
- Necessity is natural circumstances not a result of other persons.
- The two have been combined in this provision.

vi) Mistake of Fact/Law

- Mistake of fact okay
- Mistake of law was more controversial – we know that ignorance of law is no excuse. However, it has been recognized that war crimes more complex.
- Example:

- Lubanga tried to argue mistake of law – argued at the time it was not as clear that 16-17 year old recruiting was wrong. Failed defence.

vii) Defence of Superior Orders (art 33).

Historical Overview

- Tribunals:
 - Following WW1: if soldier believed that he was following orders and the order was not so manifestly illegal than it is a defence.
 - In Nuremberg and Tokyo there was no superior order defence.
 - They reject the defence of superior orders, but can be a consideration in the mitigation of sentencing.
 - ICTR, ICTY
 - Not a defence. But a sentencing consideration.
- Treaties:
 - Genocide convention 1948 – do not see a provision referring to the defence of superior orders.

Art. 33

- “The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless: (a) The person was under a legal obligation to obey orders of the Government or the superior in question; (b) The person did not know that the order was unlawful; and (c) The order was not manifestly unlawful.
- For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.”
 - We are back to our manifest illegality test again here.
 - Harrington said that it is unlikely that we would ever have this defence for aggression b/c it is a leader/planners crime.
- There are three conditions for invoking it:
 - 1. A person under the legal obligation to obey the order.
 - 2. That person must not know that the order was unlawful (bit of a link to mistake of law).
 - 3. The order must not be manifestly unlawful.

vii) Statutory Limitations (art 29)

- There are some crimes that you reach the bar for.
- RS says, in art. 29: The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.
- Was some debate about the bars from other jurisdictions – so art 29 in.

viii) Guilty Pleas (art 64, 65)

- ICTY did have some plea bargaining - some objects to this (reasons discussed in essay research, etc).

- GP at ICTY in Rules and procedures – ICC it is codified in RS.

Article 64(8)

- “At the commencement of the trial, the Trial Chamber shall have read to the accused the charges previously confirmed by the Pre-Trial Chamber. The Trial Chamber shall satisfy itself that the accused understands the nature of the charges. It shall afford him or her the opportunity to make an admission of guilt in accordance with article 65 or to plead not guilty. “
- Functions and powers of the trial chamber include the ability to hear a guilty plea. Must understand the nature of the charges – allow for the admission of guilt.
- There is then codification of safeguards for the pleas – nature and full consequences.

Article 65

- Includes the details of how a plea is entered. For example, any discussion b/n lawyers and accused – there is no guarantee that the court will agree.
- There is a complete presentation of facts and the courts can say that their statement is not enough – they can demand a complete presentation of the facts.

IMMUNITIES

i) Overview:

- There are exceptions to domestic jurisdiction, including diplomatic and state immunities.
- However, our focus is the criminal side.
- Two types: functional and personal.
 - o Functional relates to conduct.
 - o Personal relates to the person.

ii) Functional:

- To protect conduct taken on behalf of the state.
- The state has to act through someone and the state is immune.
- This is not private **conduct, but on behalf of the state.**
- It works for a **wide variety of officials.**
- Exception: Some actions cannot be justified on behalf of state.

iii) Personal:

- Rationale: to facilitate communication (i.e. messenger to king). This is a long standing CIL, codified in 1960s by convention.
- This is a smaller group of officials.
- It is not limited to a particular type of conduct (does not have to be ‘on duty’).
- They have it b/c of the type of person they are.

- i.e. diplomats, the head of state
- What if a state wants to prosecute these people?
 - Personal immunity ends when you are no longer in the job.
 - So prosecute diplomat when no longer in that job.
 - The immunity belongs to the state – state can waive it.
 - The receiving state can also make a diplomat PNG (persona non grata) – we can expel their diplomats.
 - Illustration on p435 – it is an absolute immunity, so have to get state to waive it.

iv) Immunities and Crimes of Serious International Concern

- There is an argument that says there are some crimes that are so grave that we think that there should not be personal immunity – grave breaches of humanitarian law.
- Cases for those with this position:
 - *Eichmann*.
 - Milosevic at the ICTY.
 - ICTR – was a head of state pulled in there too.
- The RS has made it express that position will not bar someone from being pulled before the ICC (art 27):
- (1) This Statute shall apply equally to all persons **without any distinction based on official capacity**. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, **nor shall it, in and of itself, constitute a ground for reduction of sentence**. (2). Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.
 - What this means is that the immunities still exist in national courts. However, idea of complementarily – have to make sure the treaty they are signing are consistent with domestic law.
- It is the nature of the crimes that no one should be exempt b/c of jurisdiction in this way.
- The genocide convention also has the exemption in it.
- Art was uncontested – the fact that official capacity was not a bar was not an issue.

v) Surrender provision (art 98)

- Under art 98 you have to respect other international law. The court cannot proceed with surrenders that would put the requested state in violation with international law, including their treaty obligations.
- American s have entered into bilateral agreements b/c they are worried that b/c there soldiers on state party land – these agreements that the USA wanted to be sure that the Americans will not be surrendered to the ICC

vi) Hybrids and Immunities

Special Court for Sierra Leone (*Charles Taylor*)

- Charles Taylor
 - He was the head of state for Liberia.
 - Indictment laid in 2003. Lawyers challenging it on grounds of immunity.
 - There was an application to oust the warrant.
 - This case went all the way up to the appeals chamber.
 - The lawyers said that this is not a SC tribunal and they begin by distinguishing it this way. Argued that it was a domestic court.
 - The appeals court disagreed.
 - 2004 – Appeals chamber ruled that the SCSL was an international criminal court and therefore the immunity argument does not fly. They said that it is a bilateral treaty b/n SL and SC and it is not part of the domestic court system.
 - Para. 43 really the analysis.
 - The argument to the contrary is that the SCSL was not the same as the ICTY. The ICTY created by the SC; the SCSL was by bilateral agreement with the UN as an org, not like the ICTY made by SC.
 - So we do have an immunity decision.
- Peace Accord:
 - In SLSC in 1999 there was a peace accord where parties agreed to including a blanket amnesty to members of the RUF.
 - Later when you have the statute from SLSC, art 10 outlines that they shall not be a bar to prosecution.
 - The RUF challenged the constitutionality of the provision.
 - Goes straight to appeals chamber – Called the Lomea Amnesty decision
 - Court says that it was not intended to be a treaty, but also looked at legality of amnesties at IL.
 - Court says it is all answered by the doctrine of universal jurisdiction.
 - Where is it is UV, the state cannot give amnesty for this sort of crime.
 - The decision has been subject to some criticism b/c the decision latched on to UV, but there is no state practice (in fact we have seen that they do often have amnesties).

ICTY (Radovan Karadžić)

- First indicted in 1995, arrested July 2008.
- This case is complicated by the fact that the Δ said that he has a written agreement with the states that says if X then will not get pulled being the others.
- The question is, did Holbrick (?) offer immunity to this accused.
- Have a december decision on procedural objection.
 - If there was a deal, would it bind the ICTY.
 - It has been raised that Holbirck cannot raise ICTY.
 - The other side of this:

- Having immunities in certain areas would be inconsistent with the
- The prosecutor at ICTY says that even if an agreement it would not bind on the tribunal.
- ICTY chamber agrees with prosecutor. The court said the prosecutor must act independently from the state. However the court did say that if the agreement could be proven, then might be able to use the agreement in the sentencing.

SENTENCING:

- Limited jurisprudence in international law on sentencing.
 - Does draw on principles like non-retroactivity of sentencing.

i) ICC penalties (RS art 77)

- Death Penalty:
 - Appropriate sentencing varies domestically.
 - IMTN, IMTT = the greatest penalty is death.
 - Not at ICTY, ICC, etc.
 - When we get to the ICTY and the ICTR – there is a leading human rights development to abolish the death penalty as a punishment. It was not that there was a consensus on this, but there was a lack of consensus on the death penalty (i.e. Europe says no; China is for it).
 - This left problem in Rwanda – R had a death penalty – this meant that little fish could face death penalty, while the big fish would not (b/c before ICTR).
 - There are limits on death penalty at international law, but it is not abolished (i.e. no death penalty for pregnant women). However there are some treaties that do abolish it, but recall that this only applies to state parties.
- Life Sentences (art 77):
 - Will also find life sentences and fixed term sentences.
 - RS allows for life imprisonment.
 - This also raises humanitarian concerns – Portugal argues that it is equally cruel to lock someone up for life when “life sentence” actually means until death. If you mean life, a lengthy sentence with prospect of review then Portugal is okay.
 - The RS, in article 77, says 30 year is the maximum (30 years or when justified when extreme gravity necessitates it, a life sentence).
- Complementarity of Sentencing (art 80):
 - There is a very specific provision that says whatever we decide at RS does not affect domestic law. The states are not bound domestically by what the ICC does.
- Alternative Penalties:

- There can be fines and forfeiture as additional penalties.
 - We actually have a similar approach with the domestic implementation in Canada. In our CAH War Crimes Act – we have our own domestic crimes against humanity fund.
 - UN CAT also has a victims fund.

ii) Purposes of Sentencing at IL?

- There is not much in international law on this – there are not clearly established guidelines.
- There is also a debate about the need for rehabilitation and others for restorative, others for just retribution.

iii) Discretion

- Sentencing is discretionary, it is up to our judges.
 - The ICTY and ICTR are not super helpful – it is not as practical to marshal cases – it will be discretionary.
 - The one that we do have some jurisprudence for is genocide. There is something about the mens rea for this that makes it the most serious for sentencing. It has been receiving the harshest punishment
 - Other than that there is not really a hierarchy of sentencing (i.e. CAH is not worst than war crimes).
 - Mitigating and aggravating factors will also be considered.
- Time spent awaiting trial can count towards sentencing.
- On procedural aspects for sentencing:
 - See art 76.

iv) Role of Victims:

- Our victims, for the most part, are witnesses.
- In some, but not all, civil law countries, allow the victims to be a party. They are entitled to representation and part of the proceedings.
- ICC has granted rights to participation.
- ICC expanded on art 106 of ICTY with art 75 and allows for reparations.
- Art 75 can include restitution, compensation and rehabilitation.
- It is left for the judges to determine on a case by case basis.
- It could go directly to victims, but it could go through Trust Fund.
- Canada has a similar provision in the code, but does not really get used b/c criminals do not have \$.

v) Enforcement:

- Where are sentences enforced?
- There are a series of countries that will enter into bilateral agreements with the tribunal for taking over enforcement of sentencing.
- They are typically called sentencing enforcement agreements.
 - Usually will say how many prisoners they will take, etc. – not just a blanket permission.
- Canada is a bit reluctant. ICC pays to and fro, but the country pays for that prisoner during the sentence.

- There is a famous one, Sierra Leone.
 - The Dutch agreed to hold it in the Netherlands, but the Dutch did not want to handle or enforce sentencing. The UK has conceded that they will take Charles Taylor.
 - It was worried that an African state would not be safe, so the UK said that their reasoning is to support the international justice – put money where mouth is so to speak. The UK even have parliamentary approval to ensure that they could do so.
 - The UK has also been very clear that once the sentence is over, Charles Taylor will not be permitted to stay there. After he will be asked or forced to leave.
- With sentence enforcement, the party must agree to minimum treatments (Harrington's toilet story).
- Some of the agreements include monitoring systems.
- The international tribunal decides on what the sentence is.

vi) Review of Sentence (art 110)

- RS under art 110 provides for a review of sentence. It provides for an automatic review after 2/3 of the sentence.
- A fair trial includes the right of appeal, but it also includes the right to review the sentence. Cannot just lock up and throw away key. This is reflected in the tribunal. Criminologists also say that it is safer for prison to have review – need to have the carrot and stick – need to have idea that their good behaviour might get you out.