

INTRODUCTION TO THE FOUNDATIONS OF INTERNATIONAL CRIMINAL LAW

International Criminal Law demonstrates a tension between its two component parts: the rights of the states and the need to prohibit certain actions undertaken by individuals, punishable by the state. **It works by imposing responsibilities directly onto individuals, but through international judicial mechanisms.**

SOURCES

- **Treaties.** 1907 Hague Regulations, 1949 Geneva Conventions, 1948 Genocide Convention form the basis for many of the crimes within the jurisdiction of the ad hoc tribunals and the ICC.

The Statute of the International Criminal Court. This is a treaty. Sets out the definitions of crimes and the jurisdiction of the ICC.

Security Council Resolutions 827 (1993) and 955 (1994) set up the ICTY and the International Criminal Tribunal for Rwanda (ICTR) were adopted by the security council, and therefore find their binding force in Article 25 of the UN Charter.

Do treaties suffice in creating individual liability? Only the provisions that are intended to apply directly to an individual can give rise to criminal responsibility.

- **Customary International Law.** ICTY has accepted that when a treaty does not regulate over a matter, you ought to refer to customary international law.

Customary international law is a body of law which derives from the practice of states accompanied by opinion juris (the belief that what is done is required by law).

Sometimes has written authority- a General Assembly resolution, accepted as reflecting custom, reflected in the courts.

Criticised as too vague to found criminal liability.

- **General Principles of Law and Subsidiary Means of Determining the Law.** Wary of taking criminals of domestic law and applying them to international trials. ICTY and ICTR have both resorted to using such in determining which international laws should be relevant.

Furundzija: care must be taken when using such legislation, not to look simply to one of the major legal systems of the world, as they must draw on concepts and principles common to all the major legal systems of the world'

Could be too general to apply to a specific case, or there could be no authority that could be applied (**Erdemovic**).

- Applied by ICC where the former two sources do not provide an answer.
- ICC may also apply principles and rules of law interpreted in its previous decisions. It is not bound to follow them, there is no stare decisis principle, just using them as a source of reference.

- ICTY and ICTR make reference to domestic as well as international case law. Domestic is used for material evidence (mainly).
- **Academic Commentary.**

How does ICL relate to other areas of law?

- Human Rights Law

Development of crimes against humanity and human rights law were a response to prevent the atrocities of Nazi Germany from happening again. The modern law of human rights shares a common base with ICL.

The creation of the two ad hoc tribunals were a response to a mass abuses of human rights by states.

States impose their own human rights standards, where they transgress them, ICL are a useful alternative to state responsibility.

ICL procedure draws on human rights law.

- International Humanitarian Law

Violations of international law are now criminalised as war crimes.

- State Responsibility

Concerns the criminal responsibility of individuals, not states. However, if an agent of the state is convicted of such, it may be in certain circumstances that the state is also internationally responsible.

Question of state responsibility is dealt with in the Bosnian Genocide case, having decided that genocide occurred in Srebrenica, the ICJ decided that Serbia was not itself responsible for the perpetrators' actions. **The standard of attributability** is not always the same for ICL and international law more generally. Instead, the ICJ ruled that Serbia was separately responsible under Art 1 of the Genocide Convention for its own failure to prevent and punish that crime.

Difficult to apply the concept of a mens rea to states.
Problem of punishment.

The Criminal Law Aspect

International courts and tribunals require methods and procedures proper to a criminal court.

Fundamentals of national criminal law have become entrenched into international law, especially in human rights law. These principles are listed below.

- **Nullum Crimen Sine Lege.** Has two aspects

Non-Retroactivity: fundamental principle of criminal law is that criminal responsibility can only be based on a pre-existing prohibition of conduct. This is listed in **Art 15 of the International Covenant of Civil and Political Rights (ICCPR)**.

Clarity of the Law: human rights courts tend to have a generous approach towards states who prosecute for international crimes. Jorgic: the ECtHR was willing to accept convictions in Germany for genocide on a broader interpretation of that crime than the later ICL tribunals adopted.

Played an important **role in the creation of the ICC Statute**. The definitions and elements of the crimes are set out. itself includes a strong assertion of the nullum crimen principle, in art 22.

- **Nulla Poena Sine Lege.** There is a requirement of defining penalties attached to criminal prohibitions. The **Roman Statute contains Art 23**, entitled, 'nulla poena' stating, 'A person convicted by the court may be punished only in accordance with this statute.'

Aims, Objectives, Justifications of ICL

Note that different aspects of ICL may have different objectives.

There are two approaches to justifying punishment: forward looking (**teleological or consequentialist**) which focuses on the consequences of a punishment, and backward-looking (**deontological**) which focuses on the crime itself.

The primary place where international courts and tribunals discuss such aims are in their sentences. These two main aims being **retribution** and **deterrence**.

- **Retribution.**

Associated with Immanuel **Kant**. Focuses on the necessity of punishing those who have violated societal norms, irrespective of the possible future benefits. Focuses on deontological justification for punishment. Modern retributive theories distinguish themselves from this, asserting that the punishment must be proportionate to the wrongdoing.

- **Deterrence**

Championed by utilitarian political theorists such as **Bentham**, who focuses on the future-related benefits of prosecution.

There is nothing in utilitarianism which justifies an exceedingly heavy punishment, punishing a family member for another's misdeeds, prosecuting the innocent.

Retributionist theorists point out that deterrence policies are simply a means to an end, which fails to recognise individuals' moral worth.

Deterrence based approaches treat people like moral calculators, carefully weighting the costs and benefits of their actions, which doesn't reflect the reality of such crimes.

Would the Hague, with limited jurisdiction, deter a despot from committing such crimes.

Only has a deterrent effect on those parties who have consented to and ratified the treaties- therefore being part of their own domestic law. However the real perpetrators have not done this.

Changes how civilians behave and the culture of decision making.

- **Incapacitation**

Utilitarian justification of punishment. Rely of the prediction of who will reoffend and who will not and seek to punish based on people's potential to act wrongly in the future.

- **Rehabilitation**

Criminal sanctions work as a reformation of the offender (18th century roots). Big amongst human rights supporters and lovers of restorative justice.

Does this work for those convicted of genocide? Is its possibility context-specific.

- **De-Nunciation/Education.**

Modern theory of justifying punishment. See punishment as an opportunity for communicating with the perpetrator, victim and wider society the nature of the wrong done. Reaffirms faith in the rule of law.

BROADER GOALS

- Vindicating the rights of victims. Trials have a cathartic effect.
- **Recording history.** A method of truth-telling. Depending on who prosecutes, a very specific narrative will come out of these trials. Rules on disclosure of evidence, judges aren't interested in writing a comprehensive history. Selective facts brought to the trial, prosecution constructs narrative against the accused. However, receive limited narrative from defendant, challenging the prosecution with rational argument.

Still get denial of actual events. Do court judgements actually change public perception? Countries involved still have their own narratives.

- Contribution to peace and security. ICTR and ICTY created by UN. Art 41, can take measures to enforce peace and security. Art 42, power to authorise military intervention. Yugoslavia conflict, art 41 triggered to set up tribunal to investigate those who have committed international crimes, with the hopes of deterring others from doing so. This narrative, that if ICL gets involved, this will lead to the restoration of international peace and security.

International criminal courts are a good way of doing nothing, makes the west feel as though they are persecuting and investigating, but whilst violence is still going on, it means that they do not send out troops to the areas of conflict.

- Post-conflict reconciliation.
- Promotion of the rule of law.
- Transitional justice. How a society overcomes a period of turmoil. Deposing of a despot. After a civil war etc. How do you live with your neighbour?

CRITICISMS

- Expensive
- Located far away from where the crime took place.
- Focus on the individuals most responsible, rare that victims will see the individual perpetrator punished.
- Courts or tribunal perhaps don't understand the nature of the crime that well. The event was atrocious, the perpetrators were of mixed background, where individual liability is only part of the answer.
- Western construct imposed on other societies.

THE NUREMBURG AN TOYKO WAR CRIMES TRIALS 1945-1948

Following World War II, the victorious Allied governments established the first international criminal tribunals to prosecute high-level political officials and military authorities for war crimes and other wartime atrocities.

The four major Allied powers—France, the Soviet Union, the United Kingdom, and the United States—set up the **International Military Tribunal (IMT) in Nuremberg, Germany**, to prosecute and punish “the major war criminals of the European Axis.” The IMT presided over a combined trial of senior Nazi political and military leaders, as well as several Nazi organizations.

The lesser-known International Military Tribunal for the Far East (IMTFE) was created in Tokyo, Japan, pursuant to a 1946 proclamation by U.S. Army General Douglas MacArthur, Supreme Commander for the Allied Powers in occupied Japan. The IMTFE presided over a series of trials of senior Japanese political and military leaders pursuant to its authority “to try and punish Far Eastern war criminals.”

- **1942 St James' Declaration:** plans to prosecute German political and military leaders announced. US, Australia, Canada, China, India, New Zealand, Union of South Africa, SU and 9 exiled governments of German-occupied countries to condemn Germany's 'policy of aggression.'
- **1945 London Agreement.** Established **IMT**. Other countries from across the globe 'adhered' to the agreement in support.

The Charter of the International Military Tribunal (The Nuremberg Charter) was annexed to the 1945 London Agreement. It outlined the **tribunals constitution, function and jurisdiction, and supplied a prosecution team.**

Gave authority to the IMT to punish people who had committed (material jurisdiction) :

(a) Crimes Against Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a Common Plan or Conspiracy for the accomplishment of any of the foregoing;

(b) War Crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity;

(c) Crimes Against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of domestic law of the country where perpetrated.

- IMT prosecuted 22 German political and military leaders.
- **The Nuremburg Trial Nov 1945 – Oct 1946.** It found 19 guilty. It concluded that 3/7 of the Nazi Organisations were criminal organisations under the terms of the Nuremburg Charter, the Leadership Corps of the Nazi Party, the SS Unit, the Nazi Security and Nazi Secret Police. (SD and Gestapo).

Mainly Crimes Against Humanity, war crimes and aggression. Genocide did not exist at this point. Genocide Convention was shortly after.

Jurisdiction covered 1943-1945. How destructive is the victor's justice to the legitimacy of the trial?

Principles of crimes against humanity is deeply contentious. Under ROL aren't all people bound by the same rules?

- **The IMTFE was not created by an international agreement.** This makes it different to the IMT. It emerged from such international agreements to try Japanese war criminals.
- **1945 Postdam Declaration.** UK, US and China signed, demanded Japan's unconditional surrendered and stated that justice should be brought to them.
- **Moscow Conference 1945.** US, UK and SU agreed to occupation of Japan. January 1946, Supreme Commander of Allied Powers (General McArthur) established IMTFE. It was similar to the IMT, laid out constitution, jurisdiction and functions.
- **The Tokyo War Crimes Trials May 1946- Nov 1948.** Additional trials held for 'minor' war criminals. These were held by domestic courts.

Models for a new series of international criminal tribunals established in the 1990s, the Nuremburg's charter's reference to 'crimes against peace' and 'war crimes' represented the foundations of such crimes, which were later adopted in the Charter of the IMTFE and later international instruments.

Achievements and Criticisms of the Nuremburg and Tokyo Crimes

- × 'victor's justice'. (Simpson) Whilst the Allied forces were setting up such authorities such as the IMT and IMTFE, the US was still at war with Japan, and dropped the hydrogen bombs on Hiroshima and Nagasaki without any legal repercussions. This was a novel weapon of mass destruction with debilitating effects massacring thousands of innocents without any legal effect on the US. International law at this stage is little more than a game of chess, with the winning team deciding who is legally and morally more culpable. **Partiality.**
- × Due to post-war instability, no unified or global approach.
- × Led to racial stereotyping in a climate where peace needed to be generated. Simpson" Nazi Germany still the epitome of evil.
- × Nullum Crimen- definitions of crimes varied between tribunals/trials. Defences available were not clear either.
- × Conflict between conforming to military commands and reporting them. Distinguished between reasonable and abberant commands, rank and file members should choose to not follow the latter and endure the military punishment as opposed to the tribunal punishment.
- × No public system of sanction in order to enforce such laws. Criminal law requires an Austinian sovereignty to be enforced.
- × The international system is normatively and morally pluralistic, how to we invoke crimes? Could be the west imposing norms on the east. Or the crimes in question are very vague in their nature.
- × Commission of a crime requires intent or a mens rea- hard to infer from a state.

SEMINAR 1

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Black earth rising- Rwandan genocide.

Engage with course as a whole, not seminar by seminar. Assessment title last week Nov. submitted January.

Nuremburg becomes the frame of reference for future tribunals/trials. Appears problematic as its used as a method of comparison to the Nazis and atrocities committed during the second world war.

Tribunals create awareness amongst the public.

Now an expectation of accountability for places where war crime takes place, criticising the government for continuing arms deals with places where war crimes occur.

What is international criminal law?

- **War crimes**– violations of international humanitarian war. Wars of armed conflict.
- **Genocide**- targeting members of a specific group, with the aim of eradicating the group as a whole. Dependent on intention. Intention to destroy a population because of their identity. National ethnic religious or racial. Social or class is not genocide. Contentious issue on what is included.
- **Crimes against humanity**. Political violence sort of crimes. Grave breaches of human rights law. Created as a response to the inadequacies of genocide and war crimes. Can be committed by a state against its own people. Widespread, systematic, pursuant to a policy- normally committed by a state as they have the apparatus to commit such crimes on such a scale.
- **Crimes against peace**. 'Crime of Aggression'. A state acts aggressively without legitimate means, the violation of the waging of an international war. Whole regime of when a state may or may not use force. Iraq war. Does the status of the war, what happens during it, affect whether it is legal or not? Irrespective of whether the law is legal in the first place, the endurance of the war still needs to be in keeping of the laws of war.
Aggression is a leadership crime. A soldier can commit a war crime. Only the head of state or person responsible for authorising the action can be prosecuted for aggression.
Only has jurisdiction over ICC member states who have ratified the treaty in 2010. The UK didn't want to be bound by it. the crime is active so far as individual states have chosen to be bound by this crime.

Modes of Liability

Legal mechanisms by which you attach criminal liability to the person/body who perpetrated the crime.

Link between the individual and the crime.

Procedural law.

- 'crimes against international law are committed by men and not abstract entities.' Not looking in to whether a state committed war crimes, but whether individuals committed them.
- Who enforces ICL? Primary enforcers are states, within their own statutory regimes, the legal onus is on states. The ICC will only step in where states are unable or unwilling to do so.