Four types of law available to an international court (ICJ Art. 38):

- **International conventions/agreements/treaties**
  - Technically binding on only the signatories to an agreement.
  - May reflect customary international law, in whole or part
    - **Treaties** → two steps (1) signature (2) ratification by 2/3 of Senate
      - National legal systems in charge of enforcement
      - “Aut dedere, aut judicare” → prosecute or extradite

- **International customary law**
  - General practice accepted as law. Two elements:
    1. General patterns of practice or behavior (what people do) **and**
    2. General acceptance as law (what people think) or general patterns of legal expectation (**opinio juris**)
  - Universally obligatory → example, 1907 Hague Convention. Germany was not a signatory to this Convention, but by 1939 the duties reflected in this Convention had become customary international law – and as such, the laws were held as binding on Germany at the IMT at Nuremberg in 1946.
  - **Persistant Objector** → nation consistently acts contrary to the general customary law (example – U.S. with land mines)

- **General principals of law recognized by civilized nations**
  - “Gap Fillers” → int’l law details adapted during the application of law (example – rules of evidence used during int’l prosecution). Filled in by surveying national legal systems.

- **Judicial decisions and the teachings of the most highly qualified publicists of the various nations**
  - Judicial decisions not binding law on int’l level (no **stare decisis**), but persuasive.
  - Int’l Court of Justice advisory opinions → given considerable weight.

**Obligatio erga omnes** → obligations owing not merely to certain states and their nations, but to all mankind.

**Opinio Juris** → belief that there exists a duty to prosecute something in international law.

**Jus cogens** → customary peremptory norms that preempt any other inconsistent international law.
  - Examples: genocide, torture, cruel and inhumane treatment of persons.
  - Any agreement to commit a **jus cogens** crime would be void **ab initio** (as a matter of law).

**International Crime** → created by international law; genocide, war crimes, crimes against humanity, aggression, piracy, slavery, terrorism

**Transnational Crime** → domestic statute that is breached that has an international aspect. Left to National States to define the crime.

### Jurisdiction

Classic International Jurisdiction (S.S. **Lotis**) → Everything is permitted in Int’l law unless it is expressly prohibited. (positivist theory)

**Basis for Jurisdiction for extraterritorial crimes (U.S. v. Yunis)**

**Universality Principal** → provides any State jurisdiction, under international law, to provide criminal or civil sanctions for violations of international law. This jurisdiction is granted whenever an alleged offender is found within the state’s territory or equivalent bases for enforcement of law.
  - Does not matter where crime occurred, victim identity, or whether forum state has ever had any contact with the individual.
  - Enforcement is thought to be on behalf of the int’l community. **Erga Omnes** – an obligation to everyone.
  - Example: **Demjanjuk v. Petrovsky** (Israel prosecuting ex-Nazi)
  - **Jurisdiction established two ways**
    - Treaty → all party States to a treaty agree to extradite an accused person in their territory regardless of the person’s nationality (**consensual jurisdiction**).
      - **PROBLEM** → if not all states have ratified the treaty, it leaves “safe havens” for an accused.
    - Customary International Law → “crimes so heinous that they shock the conscious of human kind” (ex. Slave trade, piracy, attacks on aircraft, genocide – **jus cogens crimes**)

**Territorial Jurisdiction** → jurisdiction granted where accused is in State’s territory or where some aspect of the crime occurred in State’s territory.
  - Strongest possible jurisdiction
• **Prescriptive Jurisdiction →** Jurisdiction is allowed with merely showing of an *intent* to produce effects in the State’s territory. No proof of an overt act or actual effect. (*U.S. v. Noriega* – imported cocaine)
  o Inchoate crimes are being charged under this theory. Terrorism cases.

**Protective →** Overriding national interest at stake (highly controversial)

**Passive Personal →** nationality of the *victim* grants jurisdiction
  - U.S. opposed because if a U.S. citizen kills a foreigner, it grants jurisdiction to foreign nation.
  - U.S. likes this in terrorism cases, however.
  - **PROBLEM →** all evidence & witnesses are in another country.

**Criminal Nationality →** jurisdiction based on nationality of the criminal.

**JURISDICTION OF TRIBUNALS**
  - ICTY & ICTR have primacy over national courts to overcome the danger of international crimes being categorized as ‘ordinary crimes’

<table>
<thead>
<tr>
<th>Tribunal</th>
<th>Art</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>IMT at Nuremberg</td>
<td>6</td>
<td>Persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes: (a) Crimes against peace (b) War crimes (c) Crimes against humanity <em>Article 12 →</em> doesn’t matter whether individual is present</td>
</tr>
<tr>
<td>ICTY (Hague)</td>
<td>1</td>
<td>Power to prosecute persons responsible for serious violations of int’l humanitarian law committed in the territory of the former Yugoslavia since 1991. - Grave breaches of the Geneva Conventions of 1949 - Violations of the laws or customs of war - Genocide - Crimes against humanity</td>
</tr>
<tr>
<td>ICTR (Tanzania)</td>
<td>1</td>
<td>Power to prosecute (I) persons responsible for serious violations of int’l humanitarian law committed in the territory of Rwanda and (2) Rwandan citizens responsible for such violations committed in the territory of neighboring States between Jan 1, 1994 and Dec. 31, 1994. - Genocide - Crimes against humanity - Violations of Common Art. 3 of Geneva conventions and Additional Protocol II</td>
</tr>
<tr>
<td>International Court of</td>
<td>34 &amp; 36</td>
<td>Only states may be parties in cases before the Court Jurisdiction of the Court comprises (1) all cases which the parties refer to it and (2) all matters specially provided for in the Charter of the U.N. or in treaties and conventions in force</td>
</tr>
<tr>
<td>Justice (ICJ)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>International Criminal</td>
<td>5</td>
<td>Jurisdiction limited to the most serious crimes of concern to the international community as a whole. (a) Genocide (b) Crimes against humanity (c) War crimes (i.e. Grave breaches of the Geneva Convention of 1949 as well as other serious violations of the law of war recognized as customary law) (d) Crime of aggression (court is not exercising this jurisdiction until a proper definition is universally accepted) Court only has jurisdiction with respect to crimes committed after entry into force of the Rome statute (July 2002)</td>
</tr>
<tr>
<td>Court (ICC)</td>
<td></td>
<td></td>
</tr>
<tr>
<td><em>Complimentary Juris</em>:</td>
<td>11</td>
<td></td>
</tr>
</tbody>
</table>
### Individual Responsibility

- Crimes are committed by men, not abstract entities (*Nuremberg*).
- *Treaty of Versailles* → authors of acts cannot shelter themselves behind their official position to be freed from punishment.

<table>
<thead>
<tr>
<th>ICC</th>
<th>Art. 25</th>
<th>Person is individually criminally liable if he:</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>(a) Commits a crime or is jointly criminally responsible</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(b) Orders a crime to be committed</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(c) Aids, abets, or assists the commission of a crime</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(d) Contributes to a person or group with the aim of furthering their criminal activity or has knowledge that the group intends to commit the crime</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(e) Incites others to commit genocide</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(f) Attempts to commit a crime by taking a substantial, despite whether or not the crime actually occurs. If the person abandons/Attempts to stop crime, they are not liable</td>
</tr>
</tbody>
</table>

| ICTY      | Art. 7  | Person who planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation or execution of a crime shall be individually responsible for the crime |

| ICTR      | Art. 6  | Person who planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation or execution of a crime shall be individually responsible for the crime |

### Command Responsibility

- **Position of Superior:**
  - De Facto Command → not formal title of commander, but individual possessed *actual* possession of powers of control. Determined by ability as demonstrated by duties and competence to exercise control. (*Toyoda* case)
  - Actual Command → title and had *actual* control of power.

- Two types (*Delalic*):
  - Criminal Liability → Commander held individually responsible for giving an unlawful order
  - Criminal Responsibility → Commander responsible for failure to *prevent* a crime, through a failure to deter the unlawful behavior of his subordinates.
    - Includes *omissions only* where there is a legal duty to act.

- “*Had Reason To Know*” → superiors are only criminally liable if “some specific information was in fact available to him which would provide notice of offences committed by his subordinates."
- **Mens Rea required** → at least negligence that is so serious as to be tantamount to acquiescence (*Musema* case)

<table>
<thead>
<tr>
<th>ICC</th>
<th>Art. 28</th>
<th>(1) Commander (<em>or de facto commander</em>) is criminally responsible for crimes committed under his command, as a result of his or her failure to exercise control properly over such forces where:</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>(a) Commander should have known that forces were committing or about to commit crime</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(b) Commander failed to take all necessary and reasonable measures within power to prevent crime or submit the matter to competent authorities for investigation/prosecution</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(2) Superior/Subordinate relationship – failure to exercise control properly</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(a) Superior either knew or consciously disregarded info about crime</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(b) Crimes concerned activities within effective responsibility and control of superior</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(c) Superior failed to take all necessary/reasonable measures to prevent crime</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>ICTY</th>
<th>Art. 7</th>
<th>(2) Position as Head of State does not relieve criminal responsibility</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>(3) If crimes committed by subordinates, commander is responsible if he knew or had reason to know about crimes and failed to take the necessary and reasonable measures to prevent the acts</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(4) Fact that accused acted pursuant to Gov’t order or of a superior does not relieve crim responsibility</td>
</tr>
</tbody>
</table>

| ICTR      | Art. 6  | Exactly the same as ICTY |

| Geneva Protocol I | Art 87 | Imposes on military commanders an *affirmative* duty to prevent persons under their control from committing violations of Int’l humanitarian law. |
Inappropriate General Defenses:

- Following Orders → does not relieve commander of individual criminal responsibility (Von Leeb, In re Eck)
- Duress → not a complete defense, but may be used to mitigate sentence (Erdemovic). Lower level of culpability when Δ is under duress. Crimes against humanity are too heinous to allow duress to be a complete defense.
  - Test for duress: whether a moral choice was in fact possible (Einsatzgruppen Trial):
    - Moral Choice → must have, otherwise Δ did not have the requisite mens rea
    - Duress Factors: (1) proportionality (2) imminent peril

Military Necessity → no.

Willful Blindness → no.

Conspiracy → accused need not have participated in all aspects of alleged criminal conduct. Joint criminal enterprise is defined by 3 objective elements (Blagojevic & Jokic)
  - Plurality of persons
  - Common plan involving commission of crime provided for in statute
  - Accused must have participated in common design

Appropriate General Defenses:

- ICC Art. 31:
  - Mental disease – person can’t appreciate the unlawfulness/nature of his conduct or control his conduct
  - Involuntary intoxication – not proper mens rea, unless person knew or disregarded the risk that as a result of the intoxication he or she was likely to commit such a crime
  - Self-defense of others, or property essential for the survival of the person, or property essential for accomplishing a military mission.
  - Duress – resulting from threat of imminent death or serious bodily harm provided that action does not create greater harm than that which caused the duress.
- Under ICC Art. 31(3) the Court may look to national laws and legal systems of the world in determining what law to apply as per Art. 21(c) only after the Court has first looked to the Statute, Elements of the Crimes, Treaties, and Established Principals of International Law.
- ICC Art. 32:
  - Mistake of fact → appropriate defense only if it negates the requisite mens rea
  - Mistake of law → only if negates requisite mens rea
- ICC Art. 33:
  - Crime committed pursuant to a superior order will relieve person of criminal responsibility where:
    - Person under legal obligation to obey order
    - Person did not know order was unlawful
    - Order was not manifestly unlawful (orders to commit genocide, or crimes against humanity are manifestly unlawful)

Immunities

- Ratione Materiae (Act of State Doctrine) → Head of state afforded same immunity as the state itself.
- Heads of State typically have ratione personae while in office (protects from nearly everything), but merely ratione materiae once leaving office (protects only his official acts while in office). Mostly in NATIONAL COURTS.
- Two Exceptions to Ratione Personae
  - Criminal acts committed for personal gain under the color of his authority as the head of State.
  - Commission of a jus cogens crime → ICC Art. 27 – no immunity or reduced sentence for heads of State.
- Immunity ≠ Impunity (Congo v. Belgium) → Jurisdictional immunity = procedural. Criminal responsibility is a question of substantive law.
Presence of the Accused

Extradition
- Official method to gain control over an individual who resides in a foreign territory.
- Uses diplomatic channels to persuade the other State to extradite the accused – called Rendering
  - Rendition – surrendering of the suspect by a foreign territory
- Bilateral Treaty → typical method for requesting extradition.
  - Nations not under obligation to surrender fugitive, only to process the extradition request.
  - Extradition may not be feasible where no treaty with foreign state.
- Specialty Rule → The Δ may only be tried for offenses listed in the extradition request.
  - EXCEPTIONS:
    - Political Crime – example, IRA members
    - Death Penalty – foreign states may refuse to extradite to the U.S. due to the possibility of the death penalty
    - Double Criminality – individuals may only be extradited to States where the Δ could have been charged with a crime in both countries – has the requesting nation established probable cause?
- Habeas Request → if Δ found extraditable, he may pose a habeas request to the U.S. Gov’t.

Luring
- ICTY → no rule on luring, follows the rule of *male captos bene detentos* – Bad Capture, Proper Detention (*Dokmanovic* - Δ crossed into another state where he was promised safe harbor, but was subsequently arrested).

Abduction
- Self-help method of obtaining a suspect. Illegally extracting an individual from another country where that other state has been unwilling or unable to extradite the individual.
  - However, where a suspect is apprehended by a foreign state’s enforcement officers, it is considered a violation of sovereignty principals.
  - Uncontested arrests violate the principal of territorial integrity.
- Exceptions (General Non-U.S. View)
  - Reasonably necessary abduction of criminals – where after a balancing test, it is not considered cruel, arbitrary, unjust, or unlawful
  - Capture of a dictator
  - Self-Defense under U.N. Charter Art. 51 – rescuing nationals
  - Permissible actions under Chapter VII and VIII of the U.N. Charter
- U.S. views abductions as legal under domestic laws, vital to nat’l security (especially terrorism)
  - Doesn’t give any defense in court for Δ
  - Executive branch may depart from international law, under Constitution, to follow domestic law
  - U.S. views abduction as justified when:
    - Actual or threatened Terrorist attack
    - Large scale drug traffickers
    - Self-Defense under U.N. Charter Art. 51
  - Potential Negative Implications:
    - No POW status to captured agents
    - Extradition requests for the agents upon their return to the U.S.
    - Cessation of extradition treaties with that or other nations
    - Lawsuits in other nation (ex. ICJ lawsuit)
    - Adverse political situation
    - Fear that other nations may act similarly on U.S. soil
- U.S. Armed Forces cannot be used to execute laws except for acts authorized by the Constitution or Congress.

Adjudication in Abduction Cases
- General U.S. view → criminal should stand trial, no matter how he came to be in that jurisdiction (the so-called “Tough Luck Rule” → *mala captus bene detenus*)
- Toscanino Exception – where fugitive was apprehended by Gov’t conduct that was completely outrageous.
  - Extinguished the *Ker-Frisbie Rule* → due process is limited to the guarantee of a constitutionally fair trial, not applied to how the suspect was apprehended. *Toscanino* Court held that the *K-F Rule* could not be reconciled with the Sup. Ct’s expansion of due process.
- *Ker* → extradition treaty existed with Peru, nevertheless Court found no problem with jurisdiction
- Sup Ct. had expanded due process requirement following *Frisbie*
  - *Frisbie* → suspect “abducted” from Chicago to Michigan (no international aspect) → implies that Sup. Ct. expansion of “due process” limited to U.S. cases.
• *Alvarez-Machain* case – overrules *Toscanino*. Brings back *K-F Rule* despite existing extradition treaty with Mexico. Court looks to the overall purpose underlying the extradition treaty, to end crime.

• *Matta-Ballesteros* case erodes last of *Toscanino* → right to due process doesn’t apply extraterritorially

### International Prosecutions

**Early Experiences and the Development of International Tribunals**

- **Law of Arms** → medieval law – leader must not administer trust territory improperly. In 1474 Von Hagenbach was tried on the basis of the law of arms, found guilty, and executed.
  - By the time of the Holy Roman Emperor, law had virtually no effect.
- **Civil War** → *Lieber Code* (1863). Code of conduct for military officers during times of war.
- **WWI** → Most trials conducted in domestic courts.
  - 1907 *Hague Peace Convention* – largely about methods of warfare (i.e. no poisoned arrows).
    - *Marten’s Principal* – squares with *Lotus Principal*. Based on customary international law that lies outside the scope of the Hague Rules. Provides a hierarchy of Constitution/Natural Law, then Treaties, then Custom.
  - Following war, Allies attempt extradition of German soldiers. Didn’t happen. Allies compromised by prosecuting only 12 Germans in local German courts. Only 6 of the 12 were found guilty. Light sentences.
- **Kellog-Briand Pact** (1928) – required States to forgo war as an instrument of national policy. Treaty still enforced.
- **WWII and Nuremberg**
  - *International Military Tribunal at Nuremberg* established.
    - Charter made by countries to which Germany surrendered. Was the expression of international law that existed at the time of its creation.
    - Jurisdiction defined by agreement and charter.
    - Sought to prosecute: (1) Crimes Against Peace (2) War Crimes (3) Crimes Against Humanity
    - Crimes against humanity prosecution allowed the IMT to prosecute Germans for persecuting their own population despite the legality of this persecution under German domestic law.
    - No right to appeal, death penalty allowed
    - Right to counsel
  - *Jus ad bellum* → regarding the legality of the war itself (and the decision to engage in war)
  - *Jus ad bello* → regarding the conduct of the parties during the war

### International Criminal Tribunal for Former Yugoslavia [ICTY]

- Established by Security Council resolution 808 in 1993 under Chapter VII of the U.N. Charter. Security Council felt the situation in Yugoslavia was a threat to int’l peace and security, thus establishing the ICTY to bring justice and restore and maintain peace.
  - Right to appeal, right to counsel, no death penalty
  - Primacy over national jurisdiction → if a State refuses to turn over criminals to the ICTY, they are in violation of the U.N. Security Counsel and could be reprimanded by the counsel.

### International Criminal Tribunal for Rwanda [ICTR]

  - Right to appeal, right to counsel, no death penalty

### International Criminal Court [ICC]

- Created by the Rome Statute in 1998
- Can only prosecute crimes that occur after ICC came into effect - July 2002.
- Freestanding treaty court, NOT a U.N. organ
  - Allowed for the ICC’s creation without amending the U.N. Charter
  - Downside → deprives the ICC of a level of universality
- Complimentary to national criminal jurisdictions
- States can consent to the ICC’s jurisdiction by becoming signatories to the treaty
- ICC only has jurisdiction where a State is unable or unwilling to investigate and prosecute the accused.
  - Downside → ICC may be divested of jurisdiction merely by a State opening up an investigation into the situation, however, ICC has the power to look into whether the investigation is valid.
- **Case referred to ICC (Art. 12 & 13)**
  - U.N. Security Council → no jurisdictional problems
  - ICC Prosecutor → jurisdiction extends to a non-party State only if that State Consents to ICC jurisdiction and (1) the acts were committed in that State (i.e. effects test) or (2) accused is a national of that State (nationality).
- State Party to the Treaty → preconditions same as for ICC Prosecutor

- **Appealing an ICC Decision**
  - Prosecutor (decision, sentence, other)
  - Convicted person (decision, sentence, other, reparations)
  - Victim’s legal representative (reparations)
  - Owner of property who has been adversely affected (reparations)

**Special Court for Sierra Leone**
- Hybrid court. Developed by treaty between U.N. and Sierra Leone.

**Special Court for East Timor**
- Hybrid court.

### War Crimes

**Geneva Law**
- Four conventions, two additional protocols – limit military necessity as part of the professionalism of war.
  - I. Wounded and Sick (1864)
  - II. Wounded and Sick at Sea (1906)
  - III. Prisoners of War (1929)
  - IV. Protection of Civilians (1949)
  - V. (Protocol I) → Protection of Victims of Int’l Armed Conflicts (1977)
  - VI. (Protocol II) → Protection of Victims of non-int’l armed conflicts (1977)
- Interpreted by the ICRC (International Committee of the Red Cross)
  - Everyone is either a civilian or a POW under Geneva where int’l armed conflict. And everyone is in Common Art. 3
  - U.S. position cuts against this, guerillas don’t fit civilian or POW position, not civilian b/c combatants, not POWs because unlawful combatants (i.e. terrorists). No human rights protection because applied extraterritorially.
- Applies:
  - Common Art. 2 → armed conflict of an international character
  - Common Art. 3 → armed conflict not of an international character
    - Insurgency would fit under this category
    - Gov’s can put down small rebellions – protracted nature of violence to be considered an insurgency.

<table>
<thead>
<tr>
<th>Art 2: Armed Conflict, Int’l Character</th>
<th>Who is Protected?</th>
<th>From What Are They Protected?</th>
</tr>
</thead>
</table>
| Those protected under Common Art. 3 (minimum protections) and those in Art. 4 → Those who at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals. | Minimum protections reflected in common Art 3 and in Art 75 of Protocol I:  
**Art. 3** Protected from (a) violence to life and person, murder, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, humiliating and degrading treatment; (d) passing of sentences and executions without true court judgment and wounded/sick should be collected and cared for.  
**Art. 75** adds protection from mental well-being, corporal punishment, enforced prostitution and any form of indecent assault including taking of hostages, collective punishments, and threats to do any of the foregoing acts.  
**Art. 16** adds expectant mothers should be shown particular protection and respect.  
**Art. 17** provides protection for ministers of all religions, medical personnel and medical equipment to besieged areas.  
**Art. 18** protects Civilian hospitals organized to give care to the wounded and sick, the infirm and maternity cases. |

<p>| Art. 3: Armed Conflict, NO Int’l Character | Persons taking no active part in the hostilities, including surrendered armed forces, and those placed hors de combat by sickness, wounds, detention, or any other case. | Protected from (a) violence to life and person, murder, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, humiliating and degrading treatment; (d) passing of sentences and executions without true court judgment and wounded/sick should be collected and cared for. |</p>
<table>
<thead>
<tr>
<th>Article</th>
<th>War Crimes</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>ICC</strong></td>
<td>Art. 8(2)(a) Grave Breaches of Geneva Convention: (1) Willful Killing (2) Torture/Inhumane treatment, including biological experiments (3) Willfully causing great suffering, or serious injury to body or health (4) Extensive destruction with no military necessity and carried out unlawfully (5) Compelling POW to serve in forces of hostile power (6) Depriving POW of fair &amp; regular trial (7) Unlawful deportation, transfer, or confinement (8) Taking hostages Customary Int’l Law: 26 acts that are considered war crimes</td>
</tr>
<tr>
<td></td>
<td>Art. 8(2)(b) Grave Breaches of Geneva Convention – slight difference with hostages. ICTY notes that it is illegal to take civilians as hostages, whereas the ICC merely says taking hostages is against Geneva. Violations of laws/custums of war: (1) using poisoned weapons to cause unnecessary suffering (2) wanton destruction of cities, towns, or villages not justified by military necessity (3) attack of undefended towns (4) willful destruction of institutions dedicated to cultural purposes (5) plunder of public or private property</td>
</tr>
<tr>
<td><strong>ICTY</strong></td>
<td>Art. 2 Grave Breaches of Geneva Convention + Protocol II → (1) violence to life, health, and physical/mental well-being of persons, in particular murder, torture, mutilation, or corporal punishment (2) collective punishments (3) taking of hostages (4) acts of terrorism (5) outrages on personal dignity, rape, prostitution, indecent assault (6) pillage (7) passing sentences without proper court judgment (8) threats to commit these acts.</td>
</tr>
<tr>
<td></td>
<td>Art. 3 Nuclear weapons not <em>per se</em> illegal – threatening to use them is generally against laws of war. Use illegal - disproportionate use of force (ICJ not binding). Requires specific intent, kill population.</td>
</tr>
<tr>
<td><strong>ICTR</strong></td>
<td>Art. 4 Geneva Convention + Protocol II → (1) violence to life, health, and physical/mental well-being of persons, in particular murder, torture, mutilation, or corporal punishment (2) collective punishments (3) taking of hostages (4) acts of terrorism (5) outrages on personal dignity, rape, prostitution, indecent assault (6) pillage (7) passing sentences without proper court judgment (8) threats to commit these acts.</td>
</tr>
<tr>
<td></td>
<td>Art. 3 Any of the following crimes when committed as part of a widespread or systematic attack against any civilian population, with knowledge of the attack.</td>
</tr>
<tr>
<td><strong>ICJ</strong></td>
<td>Art. 7(2)a Attack must be in furtherance of a State or organizational policy to commit such acts.</td>
</tr>
<tr>
<td></td>
<td>Art. 7 (a) Murder (b) Extermination (c) Enslavement (d) Deportation or forcible transfer of population (e) imprisonment in violation of fundamental rules of int’l law (f) torture (g) rape, sexual slavery, enforced prostitution, sexual violence (h) persecution against any identifiable group on political, racial, national, ethnic, cultural, religious, gender, or other grounds recognized as impermissible under int’l law (i) enforced disappearance (j) apartheid (k) other inhumane acts causing great suffering or serious injury to body, mental, or physical health.</td>
</tr>
<tr>
<td></td>
<td>Art. 5 Any of the following crimes when committed in an armed conflict whether international or internal in nature, and directed against any civilian population.</td>
</tr>
<tr>
<td></td>
<td>Art. 5 (a) Murder (b) Extermination (c) Enslavement (d) Deportation (e) Imprisonment (f) Torture (g) Rape (h) Persecutions on political, racial and religious grounds (i) Other inhumane acts.</td>
</tr>
</tbody>
</table>

**Differences**

- ICC includes “gender” as a ground by which one cannot be persecuted
- ICC Crimes Against Humanity also seems to swallow up portions of Genocide (i.e. persecutions).
- ICTR *chapeau* indicates a discriminatory intent requirement.
- ICTY requires acts be committed during an *armed conflict.*
Torture, War on Terrorism, September 11, 2001, Etc.

- Convention Against Torture – has it risen to the level of custom?
- AUMF → Authorization for Use of Military Force – empowered President to “use all necessary and appropriate force” against “nations, organizations, or persons” that he determines “planned, authorized, committed, or aided” in the 9/11 attacks.
  o Hamdi = U.S. citizen, captured by U.S. forces in enemy territory, accused of being an enemy combatant.
  o Mobbs Declaration = only evidence that Hamdi was an enemy combatant.
  o 4th Circuit held that the language of the AUMF (“necessary and appropriate force”) justified detention and that the Hobbs declaration was enough to continue the detention.
  o U.S. Sup Ct Holding:
    - AUMF authorizes President to detain citizens because it is an Act of Congress – no citizen may be detained except pursuant to an act of congress → must first prove that individual is in fact an enemy combatant.
    - Congress never authorized “indefinite detention” through the AUMF – given the unconventional nature of the war on terrorism, there is a possibility of the conflict may continue for generations to come, leading to a life detention. Indefinite detention not authorized.
    - Citizen-detrainee seeking to challenge his classification as an enemy combatant must (1) receive fair notice of the factual basis for his classification and (2) fair opportunity to rebut the Gov’t’s factual assertions before a neutral decision-maker.
    - Yet, the enemy combatant proceedings may be tailored to alleviate their burden on the Executive.
      - Hearsay is accepted
      - Presumption in Gov’t’s favor, so long as presumption is a rebuttable one and ∆ has chance
      - Once Gov’t puts forth credible evidence → burden shifts to ∆ to rebut
      - Process is due only when the determination is made to continue to hold ∆
    - Citizens are always allowed the writ of habeas corpus – unless Congress suspends the writ.
- Detainee Treatment Act of 2005 → reaction to Abu Graibe – outlawed any sort of inhumane treatment, torture, etc., in civil cases DTA stripped court actions based on law and habeas in criminal cases
- Hamdan v. Rumsfeld (Sup Ct 2006)
  o Hamdan = non-citizen, captured during hostilities, sent to Guantanamo, over a year passed before President deemed him eligible for trial by Military Commission for then-unspecified crimes. Another year passed before he was informed of the charges.
  o Hamdan filed for habeas corpus → challenged authority of the military commission to try him and claimed that Geneva Convention could be relied upon in these proceedings.
  o DTA of 2005 stripped Guantanamo inmates the right to have their habeas petition heard by a court, justice, or judge of the U.S. – made all of these heard by Military Commissions.
  o Sup Ct. Holds:
    - Military Commissions are illegal → not in a time where martial laws applies. Military commissions are emergency conditions. Starts to look more like the Milligan case – civil war case.
    - Writ of Habeas Corpus →in constitution says that writ can’t be suspended unless invasion or rebellion. Congress wouldn’t be able to strip writ → Hamdan’s argument. Sup Ct doesn’t reach this constitutional argument. If Congress takes away jurisdiction in cases that were pending and already filed, it is a violation of Art 3 – separation of powers.
- Military Commissions Act of 2006 → Reaction to Hamdan. Congress gives express power to the President and the Secretary of Defense to create Military Commissions to determine whether Guantanamo inmates are enemy combatants.
  o Most of what the act does applies only to aliens, because the military commissions deal with aliens, but according to the definition of an unlawful enemy combatant – any citizen can also become one.
- Boumediene v. Bush (2006 SupCt) → Sup Ct is supposed to determine the legality of the Combatant Status Review Tribunals (CSRT) that were established to handle prisoners’ cases.
  o Gov’t argues that each prisoner is given a “personal representative to assist him”
    - Yet – Rep is chosen by Military, and is required to pass along any useful intelligence obtained from the detainee (According to Souter this is not the definition of “counsel”).
  o In the NY Times on December 5, 2007.
  o Does Sup Court have jurisdiction under the MCA to hear the case?
### Genocide

| Genocide Convention (1948) | Art. 1 | Genocide may be committed in times of *peace* or *war*. Following acts committed *with intent to destroy*, in whole or 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 part (d) imposing measure intended to prevent births within the group (e) forcibly transferring children of the group to another group Punishes (a) Genocide (b) Conspiracy to commit genocide (c) Incitement to commit genocide (d) Attempt to commit genocide (e) Complicity in genocide |
| ICC | Art. 2 | |
| ICTY & ICTY | Art. 6 | Genocide → following acts committed *with intent to destroy*, in whole or part National, Ethnical, Racial, or Religious Group (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 group (e) Forcibly transferring children of the group to another group Punishes → (a) committing crime, individually, jointly or with another or through another person, regardless of whether they are criminally responsible (b) orders commission of genocide (c) aiding/abetting (d) contributes to commission or attempted commission of crime (e) inciting genocide publicly (f) attempted commission |
| ICTY & ICTY | Art. 25 |Taken directly from Genocide Convention ICTR → serious bodily injury = torture, rape, sexual violence (*Rutaganda*) → Conspiracy to commit genocide = punishable even if fails (*Musena*) ICTY → small group can be of such an importance/essential to the survival of the whole that it is considered genocide (*Krstic*).  
- Aider & Abetter → awareness of the plan, implicit in this is that a commander has a duty to *prevent* the genocide, (includes complicity)  
- State has duty to prevent genocide only where know that genocide is taking place (ICJ) |