

Individual Criminal Responsibility/Command Responsibility

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General introduction

General Characteristics of International Criminal Law

ICL provides for:

- definition of crimes under international law
- criminal responsibility of individuals directly under international law
- forms of criminal responsibility: individual criminal responsibility, command (superior) responsibility
- grounds for excluding criminal responsibility (Arguments serving as **Defenses**: 1. Necessity and Duress, 2. Self-Defense, 3. Mistakes; **Defenses not Admitted** 1. *Tu quoque* 2. Superior Orders 3. Official Capacity/Immunity.

Dimensions of Enforcement of ICL

- International (or ‘hybrid’) v. Domestic Courts
- During Armed Conflict v. In Peacetime
- Civil v. Criminal Processes
- Civilian Courts v. Military Justice
- Domestic v. Extraterritorial Jurisdiction
(Universal Jurisdiction)

Nuremberg Tribunal: “Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”



Crimes under International Law

War crimes:

- serious violation of international humanitarian law committed in the course of an international or internal armed conflict (whether against enemy civilians or combatants) which entails the individual criminal responsibility of the person breaching that law (see the ICTY, *Tadić case (Interlocutory Appeal)*, at para. 94).
- War crimes comprise, for instance, indiscriminate attacks against civilians, ill-treatment or torture of prisoners of war or of detained enemy combatants, rape of civilians, use of unlawful methods or means of warfare, etc.

The ICC Statute

Article 8 of the ICC Statute consolidates much of Hague & Geneva law:

- Grave and other Breaches of the Geneva Conventions
- violations of Common Article 3 & parts of AP I and II
- ‘Means & Methods’ Violations
- Much overlap, but IAC provisions are more extensive (Weapons crimes such as poison weapons, dum dum bullets, etc.)

Grave breaches of GCs:

- GCs I & II Art. 50, 51: “Grave breaches ... shall be those involving any of the following acts, if committed against persons or property protected by the Convention:
 - willful killing,
 - torture or inhumane treatment, including biological experiments,
 - willfully causing great suffering or serious injury to body or health, and
 - extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly.”
- GC III Adds:
 - “compelling a prisoner of war to serve in the forces of the hostile party, or
 - willfully depriving a prisoner of war of the rights of fair and regular trial prescribed by this Convention.”
- GC IV Adds:
 - “unlawful deportation or transfer or unlawful confinement of a protecting person,
 - compelling a protected person to serve in the forces of a hostile Power, or
 - willfully depriving a protected person of fair and regular trial, [and]
 - taking of hostages...”
- Victim must be a “protected person” and impacted property must be “protected.”

Protected persons

- Art. 13, 24, 25, 26 GC I: Wounded and sick members of the armed forces and medical personnel.
- Art. 13, 36, 37 GC II: Wounded, sick and shipwrecked members of the armed forces and medical, religious, etc. personnel.
- Art. 4, GC III: Prisoners of war “who have fallen into the power of the enemy.”
- Art. 4, 20 GC IV: “[T]hose 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**. ... Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.”
 - Catch all: applies where one of the other three Conventions does not apply.

Prosecutor v. Tadic

- Were Bosnian Muslim civilians “**in the hands of a Party to the conflict or Occupying Power of which they are not nationals**” when they were detained and abused by Bosnian Serb forces?
- “While previous wars were primarily between well-established States, in modern inter-ethnic armed conflicts such as that in the former Yugoslavia, new States are often created during the conflict and **ethnicity**, rather than **nationality** may become the grounds for allegiance. ... Under these conditions, the requirement of nationality is even less adequate to define protected persons.” Appeals Judgement, para. 166 (15 July 1999).
- “[T]he Bosnian Serbs ... arguably had **the same nationality as the victims**.... However, ... the Bosnian Serb forces acted as **de facto organs** of another state, namely, the [Federal Republic of Yugoslavia].” *Id.* at para. 167.

Non-International Armed Conflict

- CA 3 and AP II are silent as to individual criminal responsibility. Implications?
- Jurisprudence has extended individual criminal responsibility to non-international armed conflicts.
- Violation of *nullum crimen sine lege*?
 - “customary international law imposes criminal liability for serious violations of common Article 3 ... and for breaching certain fundamental principles and rules regarding means and methods of combat in **civil strife**.” (*Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 134 (2 Oct. 1995)).

Nexus to Armed Conflict

- **Conduct must have a nexus to the armed conflict to constitute a war crime:**
 - *Tadić*: closely related to the armed conflict as a whole.
 - *Kayishima*: “a direct link between crimes committed against these victims and the hostilities.”
 - *Kunarac*: the conflict “played a substantial part in the perpetrator’s ability to commit [the charged crime], his decision to commit it, the manner in which it was committed or the purpose for which it was committed.”
 - *Kunarac*: it is enough if “the perpetrator acted in furtherance of or under the guise of the armed conflict.”
 - ICC: the conduct “took place in the context of and was associated with” an armed conflict.
- **If no nexus:**
 - The act may be another international crime (e.g., a crime against humanity, genocide) .
 - The act may be a domestic crime (e.g., murder, rape).

- **War Crimes = serious violations of international humanitarian law (IHL), which were criminalized**
- not all violations of IHL are war crimes
- Disagreement about how IHL may apply to peacekeepers, few definite answers – implications?
- Need to look to a wide range of sources- including international criminal law, human rights law, SOFAs, Secretary-General's Bulletin (for UN peacekeeping) etc.
(Ryszard Piotrowicz, Application of IHL to UN peacekeepers)

Crimes against humanity (CAH):

- particularly odious offences constituting a serious attack on human dignity or a grave humiliation or degradation of one or more human beings (for instance, murder, forcible transfer of population, torture, rape and other forms of sexual violence, persecution, enforced disappearance of persons).
- CAH versus war crimes: CAH not concerned with **isolated** or **sporadic** breaches. CAH:
 - (i) may occur either in time of peace or of armed conflict, and
 - (ii) constitute part of a **widespread or systematic** practice of atrocities (or attacks) committed against the **civilian population**.(Report of the Commission of Inquiry for Darfur)

Genocide:

- “crime of crimes” versus “no hierarchical gradation of crimes”?
- all of the crimes specified in the ICTR Statute are “serious violations of international humanitarian law”, capable of attracting the same sentence.” (the ICTR, *Kayishema and Ruyindana*, at para. 367.)
- intent \equiv motive OR not?

Intersection of HR and IHL (ICL)

Who owes HR obligations?

HR “are designed to reconcile the effectiveness of state power with the protection against that same state power.” (Tomuschat)

Torture as a violation of human rights:

- See e.g. UDHR, ICCPR, ECHR, American Convention on Human Rights, etc.

Torture as a crime under international law:

- See e.g. Statutes of ICTY, ICC

Compare with e.g. Trafficking in Human Beings (THB) – HR violations, crime or both? Challenge not to confuse what might seem desirable, with what actually is.

The ICTY Treatment of Torture

- *Delalic et al* and *Furundzija* cases: “the definition of torture in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 reflects a consensus that is representative of customary international law.”
- Article 1(1) of the Torture Convention reads as follows: “For the purposes of this Convention, the terms ‘torture’ means any act by which severe pain and suffering ...is intentionally inflicted upon a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third party has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discriminations of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity...”.
- Compare with the following judgment

The ICTY treatment of Torture

- *Kunarac et al case*: the definition of torture under international humanitarian law does not comprise the same elements as the definition used in human rights law. In particular, “the presence of a State official or of any other authority-wielding person in the torture process is not necessary for the offence to be regarded as torture under international humanitarian law”. (*Prosecutor v. Kunarac et al*, at para. 496.)

Intersection of HR and IHL (ICL)

- No superseding of definitions – rather coexistence “inasmuch as they operate in different contexts and purposes, providing protection to the individuals in different circumstances.”

(UN Economic and Social Council)

Criminal liability

- **Direct liability:** committing, ordering, instigating
- **Joint Criminal Enterprise:** interpreted as implicitly present in 'committing' : an individual who knowingly and voluntarily joins a criminal enterprise can be held liable for all crimes committed by the enterprise.
- **Command (Superior) responsibility**
- **Accomplice liability:** aiding and abetting
- **Conspiracy:** to commit genocide

Joint Criminal Enterprise (JCE)

JCE= ‘Just Convict Everyone’?

JCE= ‘discounted convictions’?

JCE= viable model for addressing collective criminality?

Over **64%** of the indictments submitted in the ICTY between 2001-2004 relied on JCE.

- Origins and development of the concept
- Three categories of JCE:
 - I. the basic category: common purpose and common intention
 - II. systemic category: so-called concentration camp cases or detention camps (members of military or administrative units)
 - III. extended category: acts beyond the common plan but still constitute a natural and foreseeable consequence, of the realization of JCE

General requirements of *actus reus* (physical elements):

- plurality of persons were involved in the commission of a crime;
- there was a common plan, design or purpose which amounts to or involves the commission of a crime; no need for a formal agreement among participants (implied ag. suffices);
- the accused participated in the common design involving the perpetration of the crime.

Mens rea (mental elements):

- JCE I: accused and the physical perpetrator shared the **intent** to commit the crime that is the object of the JCE; accused's participation is **voluntary**, for crimes for which a **specific intent** is required, the accused must possess that intent, e.g. for crimes of persecution the accused must share the common discriminatory intent of JCE;
- JCE II: the intent to further the criminal purpose of the system of ill-treatment; personal **knowledge of the criminal nature of the system of ill-treatment**; specific intent for specific-intent crimes (e.g. genocide, persecution); a **position of authority** may be relevant evidence for establishing the accused's awareness of the system.

- JCE III: the intent to participate in the JCE; intent to further the criminal purpose of the JCE; crimes which fall beyond the JCE: natural and foreseeable and the accused nevertheless willingly took a risk.
- Practical examples and analysis



- As a member of the Bosnian Serb leader, Stakić participated in the joint criminal enterprise consisting of a discriminatory campaign to ethnically cleanse the Municipality of Prijedor by deporting and persecuting Bosnian Muslims and Bosnian Croats in order to establish Serbian control.[1]

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[1] *Prosecutor v. Stakić*, Case No.:IT-97-24, , Judgement, Appeals Chamber, 22 March 2006.



- In most situations of camp cases, the participant in JCE would not be someone readily replaceable, such that any “body” could fill his place. He would typically hold a higher position in the hierarchy or have special training, skills, or talents.
- However, the ICTY noted that much of the post World War II case-law did attribute criminal liability to mere drivers or ordinary soldiers made to stand guard while others performed an execution.

- In *Krstić* case[1] the murders, rapes, beatings and abuses committed against the refugees at Potocari, although not an agreed upon objective among the members of the JCE, were found to be natural and foreseeable consequences of the JCE to forcibly remove the Muslim population out of Srebrenica, especially given the lack of shelter, the density of the crowds, the vulnerable condition of the refugees, the presence of many regular and irregular military and paramilitary units in the area and the sheer lack of sufficient numbers of UN soldiers to provide protection.

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[1] *Prosecutor v Krstić*, Case No.: IT-98-33, Judgement, ICTY Appeals Chamber, 19 April 2004.

Use of JCE – different contexts

- ICTY, ICTR, SCSL, ICC (S. Milosevic, Ch. Taylor)
- Supreme Iraqi Criminal Tribunal (S. Hussein in ‘Dujail case’)
- Special Panels for Serious Crimes in East Timor
- Extraordinary Chambers in the Courts of Cambodia
- War Crimes Chamber of Court of Bosnia and Herzegovina (transfer of cases from the ICTY but also initiation of own investigations and prosecutions)
- See also similarity of terminology in some Guantanamo Indictments (the US jurisdiction)

Command Responsibility

- **500 BC Sun Tzu**
- **1439 Ordinance of Orleans by Charles VII of France**
(captains and lieutenants held “responsible for the abuses, ills, and offenses committed by members of his company”; “as soon as he receives any complaint concerning any such misdeed or abuse, he bring the offender to justice”)
- **1474 Peter Hagenbach brought to trial by the Archduke of Austria**
(duty to prevent a murder due to his position as a knight)
- **European military codes and articles of war**
- **US General Order No. 100 (“1863 Lieber Code”)**

Art. 44. All wanton violence committed against persons in the invaded country, all destruction of property not commanded by the authorized officer, all robbery, all pillage or sacking, even after taking a place by main force, all rape, wounding, maiming, or killing of such inhabitants, are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offense. A soldier, officer or private, in the act of committing such violence, and disobeying a superior ordering him to abstain from it, may be lawfully killed on the spot by such superior.

Art. 71. Whoever intentionally inflicts additional wounds on an enemy already wholly disabled, or kills such an enemy, or who orders or encourages soldiers to do so, shall suffer death, if duly convicted, whether he belongs to the Army of the United States, or is an enemy captured after having committed his misdeed.

- **1907 Hague Conventions (No. IV)**

Art. 1. The Contracting Powers shall issue instructions to their armed land forces which shall be in conformity with the Regulations respecting the laws and customs of war on land, annexed to the present Convention.

Art. 3. A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. **It shall be responsible for all acts committed by persons forming part of its armed forces.**



- **In Re Yamashita** (US Supreme Court upheld Philippine SC's denial of General Yamashita's petition for *habeas corpus*):

“These provisions plainly imposed on petitioner, who at the time specified was military governor of the Philippines, as well as commander of the Japanese forces, **an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population.** This duty of a commanding officer has heretofore been recognized, and its breach penalized by our own military tribunals.”

- Originally uncodified in the GCs.
- **AP I: Reaffirms duty of responsible command & codifies command responsibility**
- **Arts. 86-87, AP I to 1949 Geneva Conventions**

Art. 86: Superior's "Failure to act"

a) **fails to repress grave breaches** of Geneva Conventions, take necessary measures to suppress all other breaches

b) **knew, or had information** which should have enabled him to conclude that the subordinate was committing, or about to commit such breach

Art. 87: Duty of commanders with respect to “forces under their command” AND “other persons under their control”

a) **prevent, suppress, report** to competent authorities breaches of the Geneva Conventions and AP I

b) commensurate with their level of responsibility, **ensure** that their subordinates are **aware of their obligations** under the Conventions and AP I

c) if the superior is aware that a breach of the Conventions is or will be committed, he must initiate steps **to prevent violations** and initiate **disciplinary or penal action** against subordinate

- **STATUTES of ICTY and ICTR**

- Art. 7(3), ICTY: “The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if **he knew or had reason to know** that the subordinate was about to commit such acts or had done so and the superior **failed to take the necessary and reasonable measures to prevent** such acts or **to punish** the perpetrators thereof.”
- Art. 6(3), ICTR: “The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.”

- ‘[A] position of command is indeed a necessary precondition for the imposition of command responsibility. However, this statement must be qualified by the recognition that the existence of such a position cannot be determined by reference to **formal status alone**. Instead, the factor that determines liability for this type of criminal responsibility is the **actual possession**, or non-possession, of powers of control over the actions of subordinates’ (ICTY Trial Chamber, *Delalic and others* 16 November 1998, at para. 370.)

- “depending on the circumstances, a commander with superior responsibility under article 7(3) may be a colonel commanding a brigade, a corporal commanding a platoon or even a rankless individual commanding a small group of men” as long as they exercise **effective control** over their subordinates (*Prosecutor v. Kunarac et al*, at para. 398.)
- “both those **permanently** under an individual’s command and those who are so only **temporarily** or on an ad hoc basis can be regarded as being under the effective control of that particular individual”. (*Ibid.*, at para. 399.)

- The existence of a superior-subordinate relationship
- The superior knew or had reason to know that the criminal act was about to had been committed
- The superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.

(Delalic and others, 16 November 1998, at para. 346.)

- Main purpose of this doctrine is regulation of military and civilian discipline
- Form of omission liability : a lawful duty to act, fails to do so. Responsibility for own punishable conduct (versus responsibility for acts of others)
- Formal characterization of authority relationship not required (both *de facto* and *de iure*)
- Knew (actual knowledge): direct or circumstantial evidence
- Had the reason to know (constructive knowledge) - *Celebici* case
- Paramilitary or self-proclaimed governments – role of *de facto*
- Duty to prevent or punish- independent existence of two different obligations, cannot choose whether he will prevent or only punish, came into being at different times

- Responsibility for omission - duty to act necessary
- Duty to act provides justification for moral equivalence between: failure to prevent AND active causation
- General duty (to act) + specific rules of conduct (Arts 86 and 87 of AP I)
- Rules initially addressed to State Parties, but CR doctrine (and offences established by GCs) have been **individualized** by ICL (e.g. ICC Statute) and national implementation laws.

The commander **knew**

- Actual knowledge is required, i.e. knowledge ‘established through direct or circumstantial evidence’
- Actual knowledge that the subordinates were:
 - committing or
 - about to commit crimes punished under the Statute

Delalic and others, 16 November 1998, at para. 383.

The commander had reason to know

- Requires the possession of **information** of a nature which at least would **put him of notice** of the **risk of offences** by indicating the **need for additional investigation** in order to ascertain whether crimes were **committed or were about to be committed** by subordinates-

Delalic and others, 16 November 1998 at para. 383.

Compare with standard in Art. 28 of the ICC Statute:

- (i) That military commander or person either knew, or owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
- (ii) That military commander or person failed to take all **necessary and reasonable measures** within his or her power to **prevent or repress their commission** or to **submit the matter to the competent authorities for investigation and prosecution.**

Civilian Superior

- (b) With respect to superior and subordinate relationships **not described in paragraph (a)**, a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
 - (i) The superior either knew, or consciously disregarded information which clearly indicated that the subordinates were committing or about to commit such crimes;...

Comparison of required mental states with regard to intent

JCE I **JCE II** **JCE III**

Requires general intent
to commit crime?

YES

NO

NO

Requires specific intent
if specific-intent crime?

YES

YES

NO

(Command responsibility same as JCE III: NO general and NO specific intent to commit crime)

Issues

- Simultaneous application of JCE and Command responsibility: (analogy to the rules on concurrence of offences (concoirs d'infractions)- larger crime prevails and absorbs the smaller crime (Konsumtion)
- Need for significant and substantial contribution or not ? (*Tadic* versus *Kvocka* Trial Chamber Judgment)

Further Sources

Useful Links:

- Website of the SCSL: www.sc-sl.org
- Website of the NGO Coalition on the ICC: www.iccnw.org

Bibliography on International Criminal Law:

- Antonio Cassese, *International Criminal Law* (2003).

Bibliography on the International Criminal Court:

- - Otto Triffterer (ed.), *Commentary on the International Criminal Court* (1999).
- - Antonio Cassese et al. (eds.), *The Rome Statute of the ICC: A Commentary* (2002)
- Implementation Manual: www.dfaitmaeci
- gc.ca/foreign_policy/icc/icc_implement_manual-en.asp
- Examples of implementing legislations: www.legal.coe.int/criminal/icc or
- www.iccnw.org/resourcestools/ratimptoolkit.html

Further Sources

Office of the United Nations High Commissioner for Human Rights (all documents listed below available at <http://www2.ohchr.org/english/law/>)

(1) THE CORE INTERNATIONAL HUMAN RIGHTS INSTRUMENTS and their monitoring bodies

(2) WAR CRIMES, CRIMES AGAINST HUMANITY, GENOCIDE

[Convention on the Prevention and Punishment of the Crime of Genocide](#)

[Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity](#)

[Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity](#)

[Statute of the International Tribunal for the Former Yugoslavia \(www.icty.org\)](#)

[Statute of the International Tribunal for Rwanda \(www.icty.org\)](#)

[Rome Statute of the International Criminal Court \(www.icc-cpi.int\)](#)

(3) HUMANITARIAN LAW

[Geneva Convention relative to the Treatment of Prisoners of War](#)

[Geneva Convention relative to the Protection of Civilian Persons in Time of War](#)

[Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts \(Protocol I\)](#)

[Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts \(Protocol II\)](#)

Further Sources

- Security Council resolutions 1325 (2000) and 1820 (2008) on Women, Peace, and Security (S/RES/1325 and S/RES/1820)
- Security Council resolution 1612 (2005) on Children Affected by Armed Conflict (S/RES/1612)
- Security Council resolution 1674 on Protection of Civilians (S/RES/1674)
- Information Package available at: <http://peacekeepingresourcehub.unlb.org>
- Country-specific information on the international humanitarian response is available on Reliefweb at: <http://www.reliefweb.int>
- Standing Committee (IASC) Guidelines and References for Complex Emergencies, January 2009, available at:
<http://www.humanitarianinfo.org/iasc/> (and click on the link “Products”)

Further Sources

- Charter of the United Nations
- Bulletin Observance by United Nations forces of international humanitarian law (ST/SGB/1999/13 Secretariat 6 August 1999)
http://www.un.org/peace/st_sgb_1999_13.pdf
- 1951 Convention relating to the Status of Refugees (available at:
<http://www.unhcr.org/protect/3c0762ea4.html>)
- Guiding Principles on Internal Displacement (available at:
http://www.reliefweb.int/ocha_ol/pub/idp_gp/idp.html)
- DPKO/DFS Policy Directive on Quick Impact Projects (QIPs), 2007
- DPKO/DFS Guidelines on Joint Operational Initiatives: UN Peacekeeping Operations and the World Bank, 2007

