

# Federal Law Academy International Criminal Law Course Day 2

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# **International Crimes & International Criminal Liability**

## Module 2



# The Most Serious International Crimes: *Jus Cogens*

## What makes a crime “*jus cogens*?”

- Affect the interests of the world community as a whole
  - Threaten the peace and security of humankind
  - Shock the conscience of humanity
- Crimes are classified as having “higher status” in international law
- High number of states who have ratified treaties related to these crimes
- Crimes are a part of CIL

## Examples of *jus cogens* crimes

- Aggression
- Genocide
- Crimes against humanity
- War Crimes
- Piracy
- Slavery
- Torture

# Special Rules for *Jus Cogens* Crimes

- **All States** have heightened, non-derogable legal obligations (*erga omnes*)
  - No impunity
  - Prosecute or extradite
  - No statute of limitations
  - No immunities—including for Heads of State
  - Non-applicability of defense of obedience to superior orders
  - Rules apply during war and peace: no derogation during states of emergency
  - Universal jurisdiction

# Origins of *Jus Cogens* Crimes

- War Crimes
  - Grave breaches of the Geneva Conventions (international humanitarian law)
    - IHL governs the legal conduct of war (international or internal)
    - Aims to minimize suffering in war
- Genocide
  - Convention on the Prevention and Punishment of the Crime of Genocide
- Crimes against humanity
  - Customary international law

# Where Can *Jus Cogens Crimes* be Prosecuted?

- **National Courts**
  - National courts using national law
  - National courts using international law
    - Iraqi High Tribunal
  - Universal jurisdiction
    - Hissène Habré (Belgium)
    - Augusto Pinochet (Spain)
- **International Courts**
  - International Criminal Court (ICC)
- UN-established international tribunals
  - ICTY
  - ICTR
- **Hybrid Courts**
  - Blend of international and domestic courts
    - Special Court for Sierra Leone
    - Extraordinary Chambers in the Courts of Cambodia

# International Criminal Court (ICC)



# Brief Review of the International Criminal Court

- Established under the Rome Statute in 1998 & began operating in 2002
- Currently has 124 States Parties
- Rome Statute
  - Defines Crimes under the Court's jurisdiction: aggression, war crimes, crimes against humanity and genocide
  - Codified customary international law with respect to international crimes
  - Complementarity - ICC only has jurisdiction if national courts are *unable* or *unwilling* to prosecute crimes under the Rome Statute

# DEFINING THE ELEMENTS OF INTERNATIONAL CRIMES

# Genocide

## Prove contextual elements (“chapeau”)

- Acts must be committed **with intent to destroy**, in whole or in part, a group based on its
  - Nationality,
  - Ethnicity,
  - Race, or
  - Religion.

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## Prove act/s

- Killing members of the group;
- Causing serious bodily or mental harm to members of the group;
- Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- Imposing measures intended to prevent births within the group; or
- Forcibly transferring children of the group to another group.

# Crimes Against Humanity

## Prove contextual elements (“chapeau”)

- Acts committed as part of a **widespread or systematic attack** directed **against any civilian** population, with perpetrator’s knowledge of the widespread or systematic attack
- Can happen in armed conflict or outside of armed conflict

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## Prove acts

- Murder;
- Extermination;
- Enslavement;
- Deportation or forcible transfer of population;
- Imprisonment or severe deprivation of physical liberty;
- Torture;
- Rape;
- Sexual slavery;
- Enforced prostitution;
- Forced pregnancy;
- Enforced sterilization;
- Sexual violence;
- Persecution;
- Enforced disappearance of persons;
- Apartheid;
- Other inhumane acts.

# War Crimes

## Prove contextual elements ("chapeau")

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## Prove acts

- War crimes must have a **nexus to armed conflict**
  - May be committed against civilians or combatants
  - Grave breaches of the Geneva Conventions of 12 August 1949
  - Other serious violations of IHL both in internal and international armed conflict
- War crimes include:
    - Killing
    - Torture
    - Rape, sexual violence acts
    - Denial of fair trial
    - Unlawful confinement
    - Attacking civilians or persons *hors de combat*
    - Attacking civilian objects
    - Conscripting children
    - Using prohibited weapons & tactics, including chemical weapons or rape
    - Destruction of protected objects, including religious and cultural

# WHO CAN BE PROSECUTED?

# Modes of Direct Criminal Responsibility

- Physical perpetration
- Direct liability does not require that the perpetrator physically commit the act
  - Orders, solicits or induces (attempted or completed)
  - Aiding and abetting
  - Joint criminal enterprise (common purpose) – discussed in Day 3
  - Attempt (substantial step)
- Direct and public incitement to genocide



# Modes of Indirect Criminal Responsibility

- Commander & superior liability
  - Military commanders
    - Effective command and control
    - Knew or should have known
    - Failed to take all necessary and reasonable measures, including to prevent or punish
  - Superiors (civilians, including heads of state)
    - Effective control or responsibility
    - Knew or consciously disregarded information which would inform about the crimes
    - Failed to take all necessary and reasonable measures, including to prevent or punish

# Amnesty & Immunity

- A rapidly evolving area of international law
- Amnesty defined: legal measures
  - Prospectively barring criminal prosecutions and sometimes civil actions against certain individuals or categories of individuals for specified criminal conduct committed before the amnesty's adoption; or
  - Retroactively nullifying legal liability previously established.
- Immunity defined
  - Personal—for people in particular roles **while in office** (i.e. Heads of State, Heads of Government and Ministers of Foreign Affairs)
  - Functional—applies to official acts of state actors; continues after actors leave office



# Amnesties Prohibited for Jus Cogens Crimes

- Security Council
  - Setting up the tribunals (check)
  - Prohibit amnesties for sexual and gender based crimes in Resolutions 1820 and 2106
- International and Domestic Law & Jurisprudence
  - Rome Statute
    - Art. 27 – Irrelevance of Official Capacity (immunities inapplicable at the ICC)
  - International Court of Justice
    - Functional immunity may apply in national courts even after an official leaves office, but not in intentional courts (Belgium v. DRC)
  - Special Court for Sierra Leone
    - Exception to personal immunity for international crimes (Charles Taylor)
  - El Salvador (quote on victims)
    - Violating international law and the constitution and impeding victim's rights to reparations



# Myanmar's Immunity Laws Do Not Apply to Jus Cogens Crimes

- 2008 Constitution, Article 445
  - ... No proceeding shall be instituted against the said Councils or any member thereof or any member of the Government, in respect of any act done in the execution of their respective duties.
- Former Presidents' Security Law, Provision 4 (December 2015)
  - ... No proceeding shall be instituted against the President in respect of any act done in the execution of his or her respective duties.

# QUESTIONS?