

UNIT 10. INTERNATIONAL CRIMINAL RESPONSIBILITY OF THE INDIVIDUAL

1. General ideas.
2. International criminal tribunals.
3. International crimes.

1. GENERAL IDEAS

1.1. Origins of the concept

- 15th c.: first attempt at international punishment in the trial against Peter Von Hagenbach (governor of the annexed territories of Upper Alsace, Breisach and Frictal by Charles of Burgundy), accused of murder, rape, perjury, imposition of illegal taxes and other crimes in violation of "the law of god and man" during the peacetime occupation of Breisach, tried by the Archduke of Austria before an ad hoc tribunal of 28 judges.
- The Versailles Peace Treaty (1919) established the international tribunal to try the Kaiser for "a supreme offense against international morality and the sacred authority of treaties", while all others responsible would be tried before national military tribunals of the Allied states. On the other hand, the Sèvres Peace Treaty with Turkey (1920) included an article by which the Turkish government undertook to hand over the responsible persons.
- 8/8/1945 London Agreement between Allied countries: IMT in Nuremberg.
 - Crimes against peace.
 - War crimes.
 - Crimes against humanity.

- Judgment 30/9/1946:
 - Rejection of objection on "retroactivity" and "right to established tribunal".
 - Rejection of objection on "International law only obliges States".
 - Rejection of "due obedience" objection.
 - Rejection of objection on immunity from jurisdiction.
- Resolution 95 (I) GA (16/12/1946): affirmed the principles of IL recognized by the Statute of the Nuremberg Tribunal.

1.2. The international criminal responsibility of the individual

- Currently firmly recognized under Rome Statute of the ICC (1998).
 - Part III: General principles of criminal law (detailed regulation of international criminal responsibility):
 - *Nullum crimen sine lege.*
 - *Nullum poena sine lege.*
 - Irrelevance of official position.
 - Non-retroactivity *ratione personae*.
 - Non-applicability of statutes of limitations to crimes.
 - Criminal responsibility of natural persons over 18 years of age.

- Types of responsibilities:
 - Direct criminal liability: commit a crime alone, with another or through another. Order, propose or induce the crime. Accomplice or accessory after the fact, or collaborate in any way. Intentionally contribute in any other way to such criminal purpose, knowing the intent.
 - ❖ Crime of genocide: direct and public instigation. Attempt.
 - Indirect criminal liability: responsibility of the command (military or civilian):
 - ❖ Military: armed forces under their command or authority, for failure to exercise proper control, when they:
 - ✓ knew (or should have known) about the commission of the crime or its purpose.
 - ✓ had not adopted necessary and reasonable measures to prevent or repress its commission, or to bring it to the attention of the competent authorities for investigation and prosecution.
 - ❖ Civil: subordinates under their authority and effective control, for failure to exercise proper control, when they:
 - ✓ knew (or should have known) about the commission of the crime or its purpose.
 - ✓ had not adopted necessary and reasonable measures to prevent or repress its commission or bring it to the attention of the competent authorities for investigation and prosecution.

- ✓ The crimes must be related to activities under the responsibility and effective control of the civilian superior.
- Exonerating circumstances of responsibility:
 - Mental illness or deficiency affecting capacity to appreciate the wrongdoing or nature of the conduct.
 - State of intoxication.
 - Self-defense or defense of a third party.
 - Coercion arising from the threat of imminent death or serious bodily injury, continued or imminent.
- What conduct gives rise to the international responsibility of the individual today?
 - Crimes under ICC jurisdiction: aggression, war crimes, Crimes against humanity and genocide.
 - Draft Code of Crimes against the Peace and Security of Mankind: crimes against UN and associated personnel.

2. INTERNATIONAL CRIMINAL TRIBUNALS

- First problem of international criminal responsibility: lack of a pre-established competent tribunal.

2.1. The International Military Tribunals of Nuremberg and Tokyo

- Creation by joint decision of the Allies: issues of "victors' justice".
- Each Statute differed in its regulation of crimes:
 - IMTN: CaH and others linked to the Law of Armed Conflict.
 - CCL10: Inclusion of new crimes:
 - (c) Crimes against humanity. Atrocities and crimes, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds regardless of whether they involve violations of the domestic laws of the country where committed.
 - It eliminates the requirement of a nexus between CaH and armed conflict, as there is no requirement that they be committed "before or during the war" or "in execution of or in connection with any other crime within the jurisdiction of the court."

- IMTFE:
 - Elimination of persecution on religious grounds.
 - Maintains the need for connection between armed conflict and CaH.

2.2. Ad hoc international criminal tribunals

- Following Resolution 95 (I), the GA entrusted the ILC with the formulation and preparation of a Draft Code of Crimes against the Peace and Security of Mankind, with the intention of establishing a Permanent Court. Draft in 1954 paralyzed due to the Cold War.
- End of the Cold War: ad hoc tribunals.
 - The International Criminal Tribunal for the former Yugoslavia (ICTY) 1991:
 - Multi-ethnic conflicts with very serious violations of international humanitarian law, ascertained from the outset by the Security Council.
 - ❖ Res. 713 (1991);
 - ❖ Res. 764 (1992);
 - ❖ Res. 771 (1992);
 - ❖ Res. 780 (1992).
 - Creation of ICTY by Resolution 827 (1993), dated 25/5/1993. Addendum ICTY Statute.

- International Criminal Tribunal for Rwanda (ICTR) April-June 1994:
 - Genocide of approx. 800,000 in the context of internal armed conflict.
 - ❖ SC Resolution 918 (1994)
 - ❖ SC Resolution 955 (1994) Establishment of the ICTR. Statute of the ICTR.
- Internationalized tribunals: mixed or hybrid tribunals (SCSL, SC Cambodia, Lebanon, etc.).

2.3. *The International Criminal Court (ICC)*

a) *Origins*

- Codification efforts after WWII: ILC in charge of drafting Conventions for:
 - Creation of the Permanent Criminal Court (drafts 1951-1954): Problems:
 - Need to define the Code of Crimes against the Peace and Security of Mankind (primary rules).
 - Need to define aggression.
- After the end of Cold War, ILC takes up the project again in 1989.
 - Working Group approved it in second reading in 1994.
 - General Assembly Sixth Committee: does not accept convening conference and decides to create Ad Hoc Committee on Establishment to study the issue, 1994.
 - GA: Preparatory Committee for the establishment of an International Criminal Court to draft text Convention.
 - April 1998: Consolidated text (Rome Conference 15 June-17 July 1998).

- Rome Conference 1998: Multilateral treaty open for signature and ratification by any State.
 - Institution with international legal personality and necessary legal capacity.
 - Prohibition of reservations.
 - Complementary jurisdiction.
 - Procedural issues: modes of initiating the procedure.
 - Rules of procedure.
- Code of Crimes (drafts 1951-1954): Problems.
 - Need for definition of aggression (postponement of the Code).
 - GA Resolution 3314 (XXIX) 14/12/76: definition of aggression.
 - Resumption of the draft code in 1981.
 - New Special Rapporteur: 1991: Draft on first reading.
 - 1996: Dissociated from ICC, draft on second reading.

3. INTERNATIONAL CRIMES

- There is no all-encompassing treaty on crimes. The ICC Statute is the most comprehensive framework, but it is not exhaustive and is dedicated to defining the ICC's jurisdiction over specific crimes.

3.1. The crime of genocide

- Term: Polish jurist, Raphael Lemkin.
- Res. 96 (I), GA of 11/12/1946 requesting ECOSOC to draft a Convention on genocide.
- GA Res. 260A (III), 9/12/1948, Convention on the Prevention and Punishment of the Crime of Genocide (in force: 12/1/1951)
- Nowadays: 149 States parties. Genocide prohibition is considered "*ius cogens*".
- Commission by States/individuals.
- Definition of the crime:
 - The ICTY/ICTR/ICC Statutes repeat verbatim the definition in Article II of the Convention:

In the present Convention, 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 of members of the group; b) Serious injury to the physical or mental integrity of the members of the group; c) Intentional subjugation of the members of the group; c) Intentional subjection of the group to conditions of existence that will lead to its physical destruction, in whole or in part; (d) Measures intended to prevent births within the group; (e) Forcibly transferring children from the group to another group.

- a) The special mens rea of the crime of genocide: “Intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”.**
- DOLUS SPECIALIS, distinguishing genocide from CaH persecution/extermination.
- Intent to destroy a protected group as such.
 - "As such": the protected group is the victim, and more than discriminatory intent is required.
 - "Destroy": physical or biological, excluding sociological or cultural elements (may be considered as evidence of intent to physically destroy the group).
 - ICTY: Usually, intent is not susceptible of direct evidence.

- Genocidal intent: relevant facts and circumstances as the only reasonable inference that can be drawn.
 - Normally: General context.
 - Performance of other culpable acts systematically against the same group.
 - Magnitude of atrocities.
 - Their nature.
 - Execution in a region or country.
 - Deliberate and systematic targeting of victims based on their membership of the group.
 - Exclusion of other groups.
 - Political doctrine.
 - Repetition of discriminatory and destructive acts.
 - Performance of acts that violate the group's own fundamentals.
 - Jurisprudence: no requirement for a formal plan (premeditation). No need for a generalized and systematic attack against the civilian population (CaH).
- Protected groups:
 - Originally: destruction of race, tribe, nation or specific positive identity group defined by them and not by the absence of them.
 - Convention: *national, ethnical, racial or religious group, as such*.

- Relevance of the part of the protected group
 - Complete annihilation is not necessary, it is sufficient if it is a substantial part (significant enough to have an impact overall).

b) *The actus reus of the crime of genocide (behaviors)*

i. Killing of group members

- ICTR case law:
 - Homicide committed with the intent to cause death.
 - Defining elements:
 - Death of victim (action/omission).
 - It is not necessary to prove that the body has been found or recovered.
 - Causing death by the accused (act of the accused or one or more persons for whom they are criminally responsible).
 - *Mens rea* of the perpetrator.

ii. Serious injury to the physical or mental integrity of group members

- Intentional act or omission causing serious injury to the physical or mental integrity of members of the group identified for destruction (proof of the result).
 - Harm that injures health.
 - Harm that causes disfigurement.
 - Serious injury to the senses or internal/external organs.
 - Beyond humiliation, embarrassment or temporary unhappiness.

- Serious and long-term impairment of the person's capacity.
 - Torture, inhuman treatment, sexual violence, interrogations combined with beatings, death threats.
- iii. Intentional subjection of the group to conditions of existence that will lead to its physical destruction, in whole or in part
 - Evidence of result is NOT required.
 - ICTR case law:
 - Denial of medical services.
 - Creation of circumstances that will lead to a slow death (inadequate housing, clothing and hygiene, excessive work or physical exertion).
 - Torture, inhuman treatment, sexual violence, interrogation combined with beatings, death threats.
- iv. Measures to prevent births within the group
 - Sexual mutilation, sterilization, forced birth control, separation of the sexes or prohibition of marriage.
 - ICTR case law: both physical and mental.

v. Forcible transfer of children from the group to another group

- Children under 18 years of age.

3.2. Crimes against humanity

- Origin: Appearance in IMTN (connection with armed conflict by necessity of war crime or connected to war crime).
 - Article 6 c). CRIMES AGAINST HUMANITY: Namely, murder, extermination, enslavement, deportation and other inhumane acts committed against civilian population before or during the war; persecution on political, racial or religious grounds in execution of or in connection with those crimes falling within the jurisdiction of the Tribunal, whether or not they constitute a violation of the domestic law of the country where they were perpetrated.
 - Solution to a double problem posed by the attempt to criminalize the conduct via humanitarian law: (I) if it required the existence of an armed conflict: what about previous atrocities? It did not cover conduct against nationals or nationals of allied countries. (ii) Problem of *nullum crimen*: jurisdictional solution of linking it to crime against peace/war crimes.
- Currently: autonomous character and commission in times of war or peace.

- ICTY-ICTR definition of CaH more in line with its true nature:
 - widespread or systematic attack against civilian population.
 - General elements of crimes against humanity (“the chapeau”):
 - The contextual element "Attack": mode of conduct involving acts of violence not necessarily limited to armed force.
 - ❖ ICTR Case Law: pressure on the population.
 - ❖ ICC: restrictive interpretation of the term (specific limitation, ICC not customary law): Existence of line of conduct. Multiple commission of acts. Pursuant to policy of a State or organization to commit attack or promote such policy. "General or systematic" (neither in IMTN nor in ICTY).
 - ❖ Jurisprudence analyzes (i) consequences of attack on population; (ii) number of victims; (iii) nature of acts; (iv) possible participation of officials or authorities; (v) pattern of conduct.
 - Is the existence of armed conflict necessary? As we have already seen in the definition, this element has been appearing and disappearing in the definition of CaH (ICTY: "during the armed conflict"), but the definition of ICTR and ICC have definitively unlinked it.
 - ❖ Customary international law: the existence of armed conflict is not necessary.

- Is a specific motivation generally required?
 - ❖ ICTR Statute: The ICTR shall have jurisdiction to prosecute those allegedly responsible for the crimes listed below, when committed as part of a widespread or systematic attack against the civilian population on grounds of nationality or for political, ethnic, racial or religious reasons.
 - ✓ It establishes a restriction of the crime that it is not contemplated in customary law.
- Massive and/or systematic nature of the attack (it is not necessary that the act be so): Difficult to discern, as they are usually supported:
 - ❖ "Massive": large scale, plurality of victims, large number of persons harmed (some conduct carries such an idea with it: extermination, deportation). Cumulative effect of individual acts or effect of a single act.
 - ❖ "Systematic": preconceived plan or policy, certain organization (existence of a political objective or ideology towards such an end; preparation and execution with use of significant public or private means; involvement of political and military authorities...).
- Knowledge of the context by the actor: the perpetrator knew or intended that the conduct was part of the attack.
 - ❖ Specific *mens rea* included by ICC but analyzed by ICTY.

- ❖ Blaskić: general knowledge of the context, although it is not necessary to want all of them to occur, but to be aware of the risk of involvement.
- ❖ Intention to commit the crime. Knowledge (awareness of such circumstance) of the existence of the attack against the civilian population. Knowledge that the acts were part of such an attack.
- Is the existence of instigation or direction by the State, political organization or group necessary?
 - ❖ Inclusion in Draft Code 1991
 - ❖ ICC, Art. 7.2: For the purposes of Paragraph 1: (a) "Attack against a civilian population" means a course of conduct involving the multiple commission of acts referred to in Paragraph 1 against a civilian population, in accordance with the policy of a State or an organization to commit such an attack or in furtherance of that policy.
 - ❖ Formal announcement shall not be necessary, but it shall be sufficient that it can be deduced from the manner of commission of the crimes.
- Passive subject: the civilian population. All persons who are not combatants. Broad definition of the term "civilian" in case law (not taking an active part in hostilities, including hors de *combat*).

- Conduct:
 - Common (punishable under the ordinary criminal law of States. Definition completed with the Elements of Crimes of ICC):
 - ❖ Homicide
 - ❖ Rape
 - ❖ Unlawful detention
 - ❖ Crimes against sexual freedom: sexual slavery; prostitution; sterilization; forced pregnancy; sexual violence.
 - ❖ Torture
 - Special conduct:
 - ❖ Extermination
 - ❖ Persecution
 - ❖ Slavery
 - ❖ Deportation or forcible transfer of population
 - ❖ Apartheid
 - ❖ Other inhumane acts (is this an open type?).

3.3. War crimes

- ICC jurisdiction over war crimes "when committed as part of a plan or policy or as part of the large-scale commission of such crimes": restriction.
- Art. 8 ICC Statute: thoroughness of war crimes (closed catalog unlike ICTY-ICTR statutes) structured in three paragraphs.
 - Art. 8.2 ICC Statute: catalog of war crimes under ICC jurisdiction, jointly but responding to two criteria (four distinct groups of war crimes):
 - Reference to two sets of Humanitarian Law norms: Geneva Conventions 1949 and rest of Humanitarian International Law.
 - ❖ Type of armed conflict (international/internal) but without defining them.
 - ❖ Groups of crimes:
 - ✓ Grave breaches of the 1949 Geneva Conventions: armed conflicts of an international character according to the Conventions. Cases of declared war or total/partial occupation.
 - ✓ Other grave breaches of the other rules of international humanitarian law in international armed conflicts: Additional Protocol I.
 - ✓ Grave breaches of Common Art. 3 to the Geneva Conventions 1949.
 - ✓ Other serious violations of humanitarian law in internal conflicts: Add. Prot. II

- The safeguard clause in internal armed conflicts (Art. 8.3 ICC Statute): State powers of self-defense against rebel forces (inspired by Additional Protocol II): not absolute but limited by legitimate means respectful of humanitarian law.

3.4. Aggression

- The crime of aggression is, on many occasions, the precedent to the rest of crimes.
- War of aggression: supreme international crime.
- Origins: principle of prohibition of the use of force (Art. 2.4 UN Charter).
 - Classical international law: *ius ad bellum*, attribute of the State.
 - Evolution of the concept of limitations:
 - St. Augustine: legitimate object of war.
 - St. Thomas Aquinas: requirements for just war (authority, just cause, purpose).
 - Spanish School of International Law: distinction between just/unjust wars.
 - Peace Conferences 1899-1907: Drago-Porter Convention on Limitation of the Use of Force for the Recovery of Contractual Debts (first attempt at restriction) and Convention on the Peaceful Settlement of International Disputes.
 - *Ius in bello*: normative body of law to regulate the conduct of hostilities.

- Covenant of the League of Nations, 28 June 1918 Versailles: Prohibition of the use of force by limiting the use of force.
 - Permanent Commission: Draft Treaty on Mutual Assistance 1923 (criminality of aggression) and Geneva Protocol for the Peaceful Settlement of Disputes 1924. Did not enter into force.
 - League of Nations Assembly Declaration 25/9/1925: war of aggression must constitute an international crime.
 - League of Nations Assembly Resolution 24/9/1927: prohibition of war of aggression and international crime.
 - General War Renunciation Pact (Briand-Kellogg Pact) 8/27/1929: renunciation (no mention of criminal sanctions of individuals).
- New international order: birth of the UN and prohibition of the use of force/institutionalized collective security system (Ch. VII UN Charter).
- Draft Code of Crimes against Peace and Security 1954.
 - Resolution 2625 (XXV) Standard of General International Law.
 - Resolution 3314 (XXIX) of 1974: Definition of aggression.
 - Resolution 44/22, 1987: Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations.

- Draft Code of Crimes 1991-1996.
- International Criminal Court.
- Statements on individual criminal responsibility:
 - Article 227 Versailles Peace Treaty: "preparation of war of aggression".
 - There was no tribunal due to the flight of Kaiser Wilhelm II to Holland.
 - Statute and Jurisprudence Nuremberg: 1943: United Nations War Crimes Commission (investigation and collection of evidence). Divergences between the parties. Problems *nullum crimen nulla poena - sine lege*.
 - 8/8/1945: London Agreement and Statute: Art. 6.a) Crimes against peace. Namely, planning, preparing, initiating or waging wars of aggression, or a war in violation of international treaties, agreements or assurances, or participating in common plans or a conspiracy to achieve any of the above objectives;
 - Indictment and sentence: Count One (participation in a common plan or conspiracy to carry out any of the foregoing acts; position of defendant in the chain of command, presence at meetings with Hitler) and Count Two (planning, preparation, violation of international treaties, agreements and assurances; all of the foregoing and those who carried out acts of war such as signing laws, economic plans of attack and exploitation, or directing war operations).

- IMTFE: *Namely, the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in common plan or conspiracy for the accomplishment of any of the foregoing.*
- ICC:
 - Problems during negotiations.
 - ICC Statute: Deferral of definition to be compatible with UN Charter provisions.
 - Review Conference 2010 Kampala: Entry into force 2/1/2017
 - ❖ Two parts: perpetrator conduct (leadership clause - de facto or de jure control) / act of aggression (State).
 - ❖ Basis: Resolution 3314 (XXIX) of 1974.
 - ❖ Limit: manifest violation (combination of three criteria: characteristics, gravity and scale).
 - Role of the Security Council: is it necessary for it to act beforehand? Solution Art. 15bis and 15ter (in relation to mechanisms for initiating the procedure):
 - ❖ If the SC refers a matter (Art.15ter): no further intervention will be necessary.
 - ❖ If the OTP acts on its own initiative: it must consult the SC:
 - ✓ If the SC determines that aggression exists: OTP proceed without further action.

- ✓ If SC fails to act within 6m or refuses: may proceed if authorized by Pre-Trial Chamber.



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