The aftermath of World War I and II proved to the world the consequences of war when fought without humanitarian standards. In order to avoid such further occurrences in future the Geneva Conventions were introduced with object of protecting innocent civilians and prisoners of war. The aim of this Convention was nothing but to avoid barbarism and brutality committed during war and to remind the violators that their actions would be liable to severe punishments. The atrocity committed by the Nazis was severely condemned by the international community and the need to punish such violators of war was urgently felt. In order to try such offenders International Tribunal was constituted with a purpose to try not only war crimes, but crimes against humanity committed under the Nazi regime. The Nuremberg Tribunal held its first session on 20 November 1945 and pronounced judgments on 30 September / 1 October 1946. A similar tribunal was established for Japanese war crimes (The International Military Tribunal for the Far East). It operated from 1946 to 1948. After the beginning of the war in Bosnia, the United Nations Security Council
established the International Criminal Tribunal for the Former Yugoslavia (ICTY) in 1993 and, after the genocide in Rwanda, the International Criminal Tribunal for Rwanda in 1994. The International Law Commission had commenced preparatory work for the establishment of a permanent International Criminal Court in 1993; in 1998, at a Diplomatic Conference in Rome, the Rome Statute establishing the ICC was signed. The ICC issued its first arrest warrants in 2005. This makes us very clear the nexus between International Humanitarian Law and International Criminal Law.

22.2 OBJECTIVES

After reading this unit, you shall be able to:

- explain the concept of Individual Criminal Responsibility;
- discuss about Nuremberg Tribunal and Tokyo Tribunal; and
- discuss about International Criminal Prosecution.

22.3 INDIVIDUAL CRIMINAL RESPONSIBILITY

The Rome Statute of the International Criminal Court (ICC Statute) was established on 17 July 1998 by a multilateral treaty signed in Rome by 120 States. The ICC Statute entered into force on 1 July 2002 after it had been ratified by 60 states. Like the statutes of the ICTY and the ICTR, the ICC Statute enshrines the principle of individual criminal responsibility of natural persons. Moreover, the ICC Statute applies equally to all persons without any distinction based on official capacity, such as official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or government official. Finally, there is a specific provision dealing with the responsibility of commanders and other superiors.

Self Assessment Question

1) Explain the significance of the principle of International Criminal Responsibility.

22.4 ARTICLE 7 OF THE ICTY STATUTE

(Article 6 of the ICTR Statute)

Article 7 of the Statute of the ICTY, as well as Article 6 of the Statute of the ICTR is the principal provision dealing with individual criminal responsibility. They state as follows:

1) A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 5 of the present Statute shall be individually responsible for the crime.

2) The official position of any accused person, whether as Head of State or Government...
or as a responsible Government official, shall not relieve such person of Criminal responsibility nor mitigate punishment.

3) 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.

4) The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.

The following sections will examine the applicable modes of liability as defined in the jurisprudence of the two UN ad hoc Tribunals: Article 6 of the Statute of the ICTR are the principal provision dealing with individual criminal responsibility. They state as follows:

1) A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute shall be individually responsible for the crime.

2) The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of Criminal responsibility nor mitigate punishment.

3) 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.

4) The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.

The following sections briefly examine the applicable modes of liability as defined in the ICC Statute. As the ICC has not yet ruled on the content of the modes of liability, the below is a mere academic interpretation of the relevant provisions.

1) **Committing**

The concept of perpetration enshrined in Article 25(3)(a) distinguishes between direct or immediate participation ("as an individual"), co-perpetration ("jointly with another person"), and intermediary perpetration ("through another person").

All three forms of perpetration require proof that the accused intended the criminal result and that he or she was aware of the substantial likelihood that a criminal act or omission would occur as a consequence of his or her conduct.
Perpetration “as an individual” can be understood that the perpetrator acts on his or her own without relying on or using another person. Direct perpetration also covers the case where there are other parties to the crime who are merely rendering accessory contributions to the commission by the direct perpetrator.

Co-perpetration or perpetration “jointly with another person” is characterized by a functional division of the criminal tasks between the different co-perpetrators, who all share the same criminal intent.

The jurisprudence of the ICC will determine whether or not the contribution of each of the co-perpetrators needs to be a *conditio sine qua non* for the commission of the crimes. In other words, the *actus reus* of co-perpetration may be interpreted narrowly, in the sense that each co-perpetrator has to physically carry out the objective element of the crime, or it may be interpreted broadly, in the sense that it is sufficient that one of the co-perpetrators carried out the objective element of the crime and the others, having provided assistance in furthering the crime, may be held responsible for the crime. Intermediary perpetration or perpetration “through another person” is characterized by the predominance of a direct perpetrator who uses the person that physically carries out the crime as his or her instrument. Whereas this human tool is typically an innocent agent, the indirect perpetrator – as a kind of master mind – employs higher knowledge or superior willpower to have the crime executed. It requires more than inducing or soliciting a person to commit a crime, as otherwise this mode of perpetratorship would hardly be discernible from instigation in the terms of Article 25(3)(b) of the ICC Statute.

The *actus reus* consist in conduct aimed at instrumentalizing another person to commit a crime, by use of force, the exploitation of an error or any other handicap of the tool's side or in some other way. To establish criminal responsibility.

2) Instigating

The mode of liability of instigation summarizes what is also referred to as the “accessory before the fact”. In the terms of the ICC Statute Article 25(3)(b) refers to “ordering”, “soliciting” or “inducing” the commission of a crime. As a mode of participation distinct from perpetration, instigation must remain in a certain relationship to the principal crime.

The principle of the criminal responsibility of a superior for purposes of this subparagraph applies only to those situations in which the subordinate actually carries out or at least attempts to carry out the order to commit the crime, as indicated by the phrase “which in fact occurs or is attempted”.

The mode of “ordering” a crime presupposes a superior-subordinate relationship between the accused and the physical perpetrator of the crime. The content of this mode of liability may be construed along the lines of the jurisprudence of the ICTY.

The International Law Commission has stated that “(t)he superior who orders the commission of the crime is in some respects more culpable than the subordinate who merely carries out the order and thereby commits a crime that he would not have committed on his own initiative.

“Soliciting” means to command, authorize, urge, incite, request or advice another person to commit a crime. There may be cases where it is difficult to draw a
distinctive line between the mode of “ordering” and “soliciting”. for intermediary perpetration, it is immaterial whether the person physically carrying out the crime is criminally responsible for the crime.

“Inducing” a crime means to affect, cause, influence an act or course of conduct, lead by persuasion or reasoning.

Again, there may be cases where it is difficult to distinguish this mode of liability from the other modes of accessory before the fact. Inducing may be conceived as an umbrella term, covering soliciting which, in turn, has a stronger and more specific meaning than inducing”. Unlike the case of “ordering” a superior-subordinate relationship is not necessary for the mode of “inducing”.

3) Aiding, Abetting or otherwise Assisting

This provision covers the classical field of complicity by assistance. In contrast to the wording of the Statutes of the ICTY and the ICTR, the ICC Statute uses the language “aids, abets or otherwise assists” in the attempt or accomplishment of a crime, including “providing the means for its commission”. Consequently aiding and abetting are not an indistinguishable unity but each of them has its own meaning. Moreover, aiding and abetting are just two ways of other possible forms of ‘assistance.

As far as the mens rea element is concerned; this mode of liability has two different forms. With regard to facilitating the commission of the crime, the aider and abettor must act with ‘purpose’. This requires not only the mere knowledge that the accomplice aids and abets the principle perpetrator; he or she must also wish that the assistance shall facilitate the commission of a crime. Aiding, abetting or otherwise assisting as defined by Article 25(3) (c) of the ICC Statute implies a lower degree of responsibility than in the case of instigating.

4) Complicity in Group Crimes

Article 25(3)(d) presents a compromise with earlier “conspiracy” provisions which since Nuremberg have been controversial. Subparagraph (d) appears to provide the lowest Objective threshold for participation under Article 25 by using the notion “in any other way contributes to […] a crime”.

Unlike Article 25(3)(c), subparagraph (d) requires that the contribution of the accessory must be provided to “a crime by a group of persons acting with a common purpose”. With a fairly low objective requirement, a correction is made through the subjective level. The contribution to the group crime must be intentional and shall be made in one of the two alternative ways: it must either “be made with the aim of furthering the criminal activity or criminal purpose of the group” or “be made in the knowledge of the intention of the group to commit the crime” in addition the mens rea requirement of Article 30 of the ICC Statute are applicable which corresponds with the subjective requirements of aiding and abetting.

5) Incitement to Genocide

Article 25(3) (e) of the ICC Statute criminalizes direct and public incitement of others to commit genocide. It is in substance identical to Article III(c) of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, and the ICTY and ICTR Statutes.

Genocide is the only international crime to which public incitement has been criminalized.
The reason for this provision is to prevent the early stages of genocide even prior to the preparation or attempt thereof.

To incite ‘publicly’ means that the call for criminal action is communicated to a number of individuals in a public place or to members of the general public at large particularly by technological means of mass communication, such as by radio or television to incite ‘directly’ means that a person is specifically urging another individual to take immediate criminal action rather than merely making a vague or indirect suggestion.

This incitement comes very close to, if not even substantially covered by, instigation according to Article 25(3) (b), thus losing much of its own significance. The difference between ordinary form instigation, e.g. instigation on the one hand and incitement to genocide on the other, lies in the fact that the former is specifically directed towards a certain person or group of persons in private while the latter is directed to the public in general.

There is one important difference between incitement to genocide and the forms of complicity under subparagraphs (b), (c) and (d): incitement with regard to genocide does not require the commission or even attempted commission of the actual crime, i.e. genocide. As such, incitement to commit genocide is an inchoate crime.

6) Complicity after Commission

In certain legal systems, for example the German, it is common that contributions are punishable also after its completion. The International Law Commission drafted a compromise according to which “complicity should be regarded as aiding, abetting or means provided ex post facto, if they had been agreed on prior to the perpetration of the crime.

As the ICC Statute did not address this question, it must be assumed that the State Parties were not prepared to accept this position.

7) Attempt and Abandonment

Article 25(3)(f) provides for the criminal responsibility of an individual who attempts to commit a crime within the jurisdiction of the Court if a person commits an act to carry out his or her intention and fails to successfully complete the crime only because of some independent factor which prevents him or her from doing so. The phrase ‘does not occur’ recognizes that the notion of attempt by definition only applies to situations in which an Individual Endeavour to commit a crime and fails in this endeavour. Thus, an individual incurs criminal responsibility for unsuccessfully attempting to commit a crime only when the following elements are present: (a) intent to commit a particular crime; (b) an act designed to commit it; and (c) non-completion of the crime for reasons independent of the perpetrators will.

On the other hand, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime is not criminally responsible. The provision does not clarify at what stage of the commission abandonment is still admissible or under which circumstances the abandonment is voluntarily. This problem is left for the Court.

However, some guidance may be sought in the phrase “by taking action commencing
the execution of a crime” which is used to indicate that the individual has performed an act which constitutes a significant step towards the completion of the crime.

8) **Omission and Command Responsibility**

The different modes of liability under Article 25(3) are complemented by a specific rule on command and superior criminal responsibility. Article 28 establishes responsibility for omission for certain categories, namely military commanders, persons acting as a military commander and other superiors. Article 28(a) establishes that “a military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where: (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.”

Other superiors are, according to Article 28(b), 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; (ii) the crimes concerned activities that were within the effective responsibility and control of the superior; and (iii) the superior 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.

Both of the aforementioned types of command responsibility are similar to the law and jurisprudence of the ICTY. They all require a hierarchical relationship, a mental element, and failure on behalf of the accused to take the necessary and reasonable measures to prevent the crime or punish the perpetrator thereof.

**22.5 COMMAND RESPONSIBILITY**

Commanders are responsible for training their subordinates and for reporting and investigating reportable Incidents, as well as preventing and correcting violations. Additionally, under the UCMJ, commanders are legally responsible for violations committed by subordinates if any one of the following three circumstances apply:

- The commander ordered the commission of the act.
- The commander knew of the act, either before or during its commission, and did nothing to prevent or stop it.
- The commander should have known “through reports received by him or through other means, that troops or other persons subject to his control [were] about to commit or [had] committed a war crime and he fail[ed] to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof”.


In international tribunals, commanders have been held personally responsible for violations committed by subordinates if the commander ordered the commission of the act or if the commander knew or should have known of the act either before or during its commission and did nothing to prevent or stop.

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22.6 WAR CRIMES AND CRIMES AGAINST HUMANITY: ORIGIN AND EVOLUTION OF A LEGAL SPHERE BEFORE THE NUREMBERG AND TOKYO TRIALS

Already in the Ordinance for the Government of the Army, published in 1386 by King Richard II of England, limits were established to the conduct of hostilities and — on pain of death — acts of violence against women and unarmed priests, the burning of houses and the desecration of churches were prohibited. Provisions of the same nature were included in the codes issued by Ferdinand of Hungary in 1526, by Emperor Maximilian II in 1570 (humanitarian rules are found in Articles 8 and 9) and by King Gustavus II Adolphus of Sweden in 1621. Article 100 of the Articles of War decreed by Gustavus II Adolphus established that no man should “tyrannise over any Churchman, or aged people, Men or Women, Maydes or Children”.

The earliest trial for war crimes seems to have been that of Peter von Hagenbach, in the year 1474. Already at the time — as during and after the Nuremberg Trial — punishment of the accused hinged on the question of compliance with superior orders.

Charles the Bold, Duke of Burgundy (1433-1477), known to his enemies as Charles the Terrible, had placed Landvogt Peter von Hagenbach at the helm of the government of the fortified city of Breisach, on the Upper Rhine. The governor, overzealously following his master’s instructions, introduced a regime of arbitrariness, brutality and terror in order to reduce the population of Breisach to total submission. Murder, rape, illegal taxation and the wanton confiscation of private property became generalized practices. All these violent acts were also committed against inhabitants of the neighboring territories, including Swiss merchants on their way to the Frankfurt fair. When a large coalition (Austria, France, Bern and the towns and knights of the Upper Rhine) put an end to the ambitious goals of the powerful Duke (who also wanted to become king and even to gain the imperial crown), the siege of Breisach and a revolt by both his German mercenaries and the local citizens led to Hagenbach’s defeat, as a prelude to Charles’ death in the battle of Nancy.

Already the year before Charles was killed, the Archduke of Austria, under whose authority von Hagenbach was captured, had ordered the trial of the bloody governor. Instead of remitting the case to an ordinary tribunal, an ad hoc court was set up, consisting of 28 judges of the allied coalition of States and towns. In his capacity as sovereign of the city of Breisach, the Archduke of Austria appointed the presiding
Relationship of IHL with other Branches of Law

judge. Considering the state of Europe at the time — the Holy Roman Empire had degenerated to the point where relations among its different entities had taken on a properly international nature, and Switzerland had become independent (even though this had not yet been formally recognized) — it can be concluded that the tribunal was a real international court.

22.7 NUREMBERG AND TOKYO INTERNATIONAL TRIBUNALS

It was only after the Second World War that a movement started up within the international community which clearly began to shape a deeper consciousness of the need to prosecute serious violations of the laws of war with regard both to the traditional responsibility of States and to the personal responsibility of individuals. The horrible crimes committed by the Nazis and the Japanese led to a quick conclusion of agreements among the Allied Powers and to the subsequent establishment of the Nuremberg and Tokyo International Military Tribunals "for the trial of war criminals whose offences have no particular geographical location whether they be accused individually or in their capacity as members of organisations or groups or in both capacities. These special jurisdictions also took into account the new categories of crimes against humanity and crimes against peace.

Article 6 of the Charter of the Nuremberg International Military Tribunal established the legal basis for trying individuals accused of the following acts:

- **Crimes against peace**: the planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

- **War crimes**: violations of the laws and customs of war. A list follows with, inter alia, murder, ill-treatment or deportation into slave labours or for any other purpose of the civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, the killing of hostages, the plunder of public or private property, the wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

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

As far as jurisdiction ratione personae is concerned, it covered "leaders, organisers, instigators and accomplices" who had taken part in the formulation or execution of a common plan or conspiracy to commit any of those crimes: all of them were considered for "all acts performed by any persons in the execution of such plan".

22.8 INTERNATIONAL LEGAL HERITAGE AFTER THE NUREMBERG AND TOKYO TRIALS

The Nuremberg trials (and, with a minor impact, the Tokyo trials) produced a large
number of judgments, which have greatly contributed to the forming of case law regarding individual criminal responsibility under international law. The jurisdictional experience of Nuremberg and Tokyo marked the start of a gradual process of precise formulation and consolidation of principles and rules during which States and international organizations (namely, the United Nations and the International Committee of the Red Cross) launched initiatives to bring about codification through the adoption of treaties. As early as 11 December 1946 the UN General Assembly adopted by unanimous vote Resolution 95(I), entitled “Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal”. After having taken note of the London Agreement of 8 August 1945 and its annexed Charter (and of the parallel documents relating to the Tokyo Tribunal), the General Assembly took two important steps. The first one was of considerable legal importance: the General Assembly affirmed the principles of international law recognized by both the Charter and the Judgment of the Nuremberg Tribunal. This meant that in the General Assembly’s view the Tribunal had taken into account already existing principles of international law, which the court had only to recognize. The second was a commitment to have these principles codified by the International Law Commission (ILC), a subsidiary organ of the UN General Assembly. Through this resolution the UN confirmed that there were a number of general principles, belonging to customary law, which the Nuremberg Charter and Judgment had recognized and which it appeared important to incorporate into a major instrument of codification (either by way of a general codification of offences against the peace and security of mankind” or even as an international criminal code). By the same token the resolution recognized the customary law nature of the provisions contained in the London Agreement.

In 1950, the ILC adopted a report on the Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal. The ILC report does not discuss whether these principles are part of positive international law or not, or to what extent. For the ILC, the General Assembly had already affirmed that they belonged to international law. The ILC therefore limited itself to drafting the content of these principles.

Principle I states that “any person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment”: It constitutes official recognition of the fact that an individual — in the broadest sense (“any person”) — may be held responsible for having committed a crime. And this may be the case even if the act is not considered a crime under domestic law (Principle II). Principles III and IV provide that a person who acts in his capacity as head of State or as a government official and one who acts on the orders of the government or of a superior are not thereby relieved of responsibility. These two principles affirm what was established in Articles 7 and 8 of the Nuremberg Charter. Article 8, on superior orders, accepted the possibility of mitigation of punishment “if the Tribunal determines that justice so requires”.

Principle IV of the ILC text modifies the approach: the individual is not relieved of responsibility provided a moral choice was in fact possible to him. This leaves a great discretionary power to the tribunals that are called upon to decide whether or not the individual did indeed have a moral choice to refuse to comply with an order given by a superior.

Principle VI codifies the three categories of crime established by Article 6 of the Nuremberg Charter. What was defined in the London Agreement as “crimes coming within the jurisdiction of the Tribunal” has now been formulated as crimes under
international law, using the same wording found in Article 6. Principle VI represents the core of a possible international criminal code. The affirmation of the Nuremberg principles by the 1946 General Assembly resolution and their formulation by the International Law Commission were important steps toward the establishment of a code of international crimes entailing individual responsibility. But further progress lay ahead.

Already on 9 December 1948, on the eve of the adoption of the Universal Declaration of Human Rights, an important development of the concept of crimes against humanity led to the adoption (by 56 votes to none) of the Convention on the Prevention and Punishment of the Crime of Genocide. The Convention, which entered into force on 12 January 1951, clearly classifies genocide, whether committed in time of peace or in time of war, as a crime under international law. Article 2 defines genocide as acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, such as killing members of the group, causing serious bodily or mental harm to them, 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, forcibly transferring children of the group to another group. Article 3 of the Convention states that such acts are considered punishable as are various degrees of involvement in them: conspiracy to commit the acts, direct and public incitement, attempts or complicity. But it is Article 4 that establishes the obligation to punish not only rulers or public officials, but also private individuals. As for Article 6, it places the competence to try offenders in the hands of both domestic and international tribunals.

It follows that this important Convention introduces a new crime under international law, directly linked to the legal category already established by Article 6 of the Nuremberg Charter, that of crimes against humanity. And, again, international treaty law goes far beyond the traditional boundaries of State responsibility, underlining that individuals are in the front line with respect to obligations under a particular branch of international law. And, in keeping with the previous documents, the Genocide Convention offers a broad definition of the crime of genocide and of various levels of participation in it (direct acts, conspiracy, incitement, attempts, complicity). The customary nature of the principles which form the basis of the Convention has been recognized by the International Court of Justice.

Shortly afterwards, the four Geneva Conventions of 12 August 1949, drafted on the initiative of the ICRC in the wake of the dramatic experiences of the Second World War, reshaped the entire treaty-based system dealing with the protection of war victims. The parties to these Conventions undertake the basic general obligation to respect and to ensure respect for their rules in all circumstances (Article 1 common to the four treaties).

An entire chapter of each of the Geneva Conventions deals with acts against protected persons. They are called grave breaches— and not war crimes — but they are undoubtedly crimes under international law. These acts are defined in detail in Article 50 of the First Convention, Article 51 of the Second Convention, Article 130 of the Third Convention and Article 147 of the Fourth Convention, and include crimes such as willful killing, torture or inhuman treatment (including biological experiments), willfully causing great suffering or serious injury to body or health, extensive destruction or appropriation of property, compelling a prisoner of war to serve in the forces of a hostile power or willfully depriving him of the right to a fair and regular trial, unlawful deportation, the transfer or confinement of a protected person, and the taking of
hostages not justified by military necessity and carried out unlawfully and wantonly. As far as the scope of application ratione personae is concerned, the Conventions establish the responsibility of the direct authors of those grave breaches and that of their superiors. The scope of the rules is, in fact, very wide since the word “person” comprises both civilians and combatants, whether the latter are members of official or unofficial forces.

The Hague Convention of 14 May 1954 for the Protection of Cultural Property in the Event of Armed Conflict commits the contracting parties to protecting what is called the “cultural heritage of all mankind”. They have “to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions” upon those persons who commit or order to be committed a breach of the Convention.

The two 1977 Protocols additional to the Geneva Conventions of 1949 have added more precise rules to what has become an extensive legal system. In particular, Article 11 strengthens the protection of individuals as far as their physical and mental health and integrity are concerned by stipulating that serious violations constitute a grave breach of international humanitarian law. Moreover, Article 85 adds a great number of violations to the already existing list of grave breaches. Again, with Article 1 of Protocol I, parties undertake to respect and ensure respect for the Protocol in any circumstances.

**22.9 INTERNATIONAL CRIMINAL PROSECUTION**

International Criminal Prosecution as means of Enforcing International Humanitarian Law as is well known, various means are available for enforcing international humanitarian law. First there is the traditional, but controversial, method of reprisals, whereby a belligerent employs illegal means of warfare in response to violations of the laws of war by its adversary. Reprisals are resorted to in order either to induce the adversary to terminate its unlawful conduct or to ‘punish’ the adversary for the purpose of deterring any further breach. This method of enforcement has been criticized on the ground that it more often than not leads to an escalation of conflict and, it is argued, it often proves to be ineffective. Further, the 1949 Geneva Conventions and Additional Protocol I2 severely limit the scope of this enforcement method. In addition, reprisals can under no circumstances take the form of violations of human rights, genocide or ‘crimes against humanity’. second, respect for international humanitarian law can be sought through specific mechanisms agreed upon by the parties to a conflict such as the designation of a Protecting Power to secure the supervision and implementation by the belligerents of their international obligations.4 Granted, the Protecting Power aims to protect the interests of the parties, but it is a mechanism that may be activated in order to contribute to the enforcement of international humanitarian law. This method, however, has proved to be a relative failure, as it has only been resorted to in three cases since the entry into force of the 1949 Geneva Conventions.5 A further means of promoting compliance with International humanitarian law is the utilization of fact-finding mechanisms, such as the ‘Fact Finding Commission’ provided for In Additional Protocol I. One of the advantages of fact-finding is that it enables the creation of a public ‘record’ of violations of international humanitarian law, which can assist in war crimes trials, thereby contributing to enforcement. The Commission of Experts set up
by the Secretary-General of the UN at the request of the Security Council pursuant to Resolution 780 (1992) to investigate and reports on evidence of grave breaches of the 1949 Geneva Conventions and other violations of international humanitarian law in the former Yugoslavia falls within this category. With the establishment of the Commission of Experts, the Security Council was seeking to deter the parties from violating their obligations under international humanitarian law. It was subsequent to the findings of this Commission of Experts that the Security Council decided to establish the International Criminal Tribunal for the Former Yugoslavia (ICTY). This brings us to the next level of enforcement of international humanitarian law, through criminal jurisdiction: that is, through the prosecution and punishment by national or international tribunals of individuals accused of being responsible for violations of international humanitarian law.

Here we discuss on the problems of, and prospects for, this method of enforcement. This method distinguishes itself from the others described above in that it is concerned with individual criminal responsibility as opposed to state responsibility. Its aim is to enforce the obligations of individuals under International humanitarian law, whereas the preceding methods concentrate on the enforcement of the obligations of states.

22.10 THE FAILURE OF PROSECUTION THROUGH NATIONAL JURISDICTION

The obligation of states to prosecute and punish persons accused of serious violations of International humanitarian law through their respective national jurisdictions arises out of their treaty obligations, most notably those under the 1949 Geneva Conventions.

As is commonly known, the jurisdiction provided by the 1949 Geneva Conventions is universal in that those suspected of being responsible for grave breaches come under the criminal jurisdiction of all states parties, regardless of their nationality or the locus commissi delicti. In addition, Article 88 of Protocol I requires that states parties provide mutual assistance with regard to criminal proceedings brought in respect of grave breaches to the 1949 Geneva Conventions or to Protocol I, including cooperation in the matter of extradition.

However, these provisions on national jurisdiction over grave breaches have been, at least until recent years, a dead letter. In situations of armed conflict abroad, a state is generally reluctant to prosecute its own personnel, especially when it is on the ‘winning side’. In such cases, a state may also be disinclined to prosecute enemy personnel because such legal actions carry the risk of exposing war crimes committed by the state’s own personnel. As for crimes committed in an armed conflict in which a state has not participated, both political and diplomatic considerations and the frequent difficulty of collecting evidence normally induce state authorities to refrain from prosecuting foreigners.

Both in the context of International conflicts and-civil wars, political motivations may often lead states to prefer amnesty to prosecution. As Bishop Desmond Tutu, Head of the Truth and Reconciliation Commission of South Africa, put it, referring to gross violations of human rights, political leaders choose ‘reconciliation’ over ‘Justice and ashes’ leaving aside the question of the political advisability of this choice, granting amnesty to persons responsible for grave breaches of international
humanitarian law and mass violations of human rights raises serious moral and legal objections. Moral because, as Justice Robert Jackson commented in relation to the trial at Nuremberg, letting major war criminals live undisturbed to write their 'memoirs' in peace 'would mock the dead and make cynics of the living and legal because the validity of such amnesty is doubtful. Arguably, the prohibition of such crimes and the consequent obligation of states to prosecute and punish their authors should be considered a peremptory norm of international law (*jus cogens*): hence, states should not be allowed to enter into international agreements or pass national legislation foregoing punishment of those crimes. Furthermore, the Human Rights Committee has held that are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their Jurisdiction; and to ensure that they do not occur In the future. States may not deprive individuals of the right to an effective remedy Including compensation and such full rehabilitation as may be possible.

Until very recently, the few trials that had been held within national criminal jurisdictions in respect of violations of norms of international humanitarian law related to crimes committed during the Second World War. The trials in France of Barbie, Touvier and Papon for crimes against humanity are prominent examples.

However, following the establishment of the International Criminal Tribunal for the Former Yugoslavia, and plausibly as a result of the incentive created by that Initiative, National courts in Denmark, Germany, Austria and Switzerland, among others, have begun to try and prosecute persons accused of committing atrocities in the former Yugoslavia. In 1994, for example, Danish courts exercised universal Jurisdiction to try and convict Refik Saric, a Bosnian refugee in Denmark, for atrocities committed in Dretelj camp, Bosnia-Herzegovina.

### 22.11 THE PROBLEMS OF INTERNATIONAL CRIMINAL COURTS AS A MEANS OF ENFORCING INTERNATIONAL HUMANITARIAN LAW

The problems faced by the ICTY demonstrate the difficulties in enforcing international humanitarian law through an International mechanism. Among the complaints regularly aired before the General Assembly of the United Nations in the annual speech of the President of the ICTY and in the Annual Report are that

1) The ICTY Statute places excessive reliance on state cooperation as the primary means of achieving the mandated objectives of prosecuting persons for violations of international humanitarian law. ICTY, having no police force of its own, must rely on international cooperation in order to effect arrests. It has proved extremely difficult to achieve significant state cooperation in complying with the Tribunal’s orders to arrest and deliver indicted persons to The Hague and to provide assistance in evidentiary matters. Impunity is a genuine risk when states and international authorities refuse to arrest Indicted individuals.

2) There is a crucial need for more arrests of military or political leaders. States, if arresting at all, demonstrate greater willingness to arrest lesser figures, whilst allowing...
the leaders to remain at large. The process of restoring peace and security to the affected region is thus made all the more difficult.

iii) There are tremendous financial and logistical obstacles in the way of an effective international criminal tribunal. To establish an effective and fully functioning institution from scratch requires enormous funding. ICTY has had to build a courtroom and offices and supply them with all the necessary equipment hire staff from all around the world, build a detention unit fund programmes for the protection of victims and witnesses, send teams of Investigators into the field, and so on. Yet there remains much to be done. For example, ICTY’s Prosecutor, like the rest of the Tribunal’s organs, has been severely hampered by lack of funds, and there is a genuine need for more investigators to undertake the many complex and time-consuming inquiries necessary to fulfill the Institution’s mandate. Witnesses have to be found amongst the Balkan diaspora. They must be interviewed and brought to The Hague to testify and, if necessary, be placed in a witness protection programme. This applies not only to prosecution witnesses, but to defence witnesses as well.

iv) Finally, the legal regime is not straightforward. Unlike national jurisdictions, which may rely on dozens of codes and hundreds of precedents for guidance, the ICTY has to apply, in addition to its Statute, customary international law, which can only be ascertained by consulting widely-dispersed international law sources. This became particularly clear in the case of Erdevorii when the Judges of the Appeals Chamber had to determine whether international law recognized the defence of duress, a question on which the Statute remains silent. Furthermore, the work of international tribunals is made all the more problematic by the absence of an international code of criminal procedure, although the Rules of Procedure and Evidence which have been laboriously drafted by the ICTY would provide a blueprint for a future permanent institution.

22.12 CONCLUSION

As long as the ideological, political and military leaders behind the serious violations of international humanitarian law still remain firmly in power, flaunting with impunity their rendezvous with Justice, this can only result in a discrediting of the work of international criminal tribunals. So long as states retain some essential aspects of their sovereignty and fail to set up an effective mechanism to enforce arrest warrants and to execute judgments, international criminal tribunals may have little more than normative impact. Thus, we are once again reminded of the limits posed by international politics on international law. In spite of these problems, the most effective means of enforcing international Humanitarian law remains the prosecution and punishment of offenders within national or international criminal jurisdictions.

22.13 SUMMARY

- In this unit, we have covered about the concept and elements of Individual Criminal Responsibility. The ICC Statute enshrines the principle of individual criminal responsibility of natural persons. Moreover, the ICC Statute applies equally to all persons without any distinction based on official capacity, such as official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or government official.
We have also discussed about the Principle of Command Responsibility. Commanders are responsible for training their subordinates and for reporting and investigating reportable Incidents, as well as preventing and correcting violations. Additionally, under the UCMJ, commanders are legally responsible for violations committed by subordinates.

We have also covered about International Criminal Prosecution. International Criminal Prosecution as means of Enforcing International Humanitarian Law as is well known, various means are available for enforcing international humanitarian law.

22.14 TERMINAL QUESTIONS

1) Discuss the concept of War Crime in the IHL.

2) Discuss about Nuremberg Tribunal and Tokyo Tribunal.

22.15 ANSWERS AND HINTS

Self Assessment Questions
1) Refer to Section 22.3
2) Refer to Section 22.5

Terminal Questions
1) Refer to Section 22.6, 22.7, 22.8 and 22.9
2) Refer to Section 22.7

22.16 GLOSSARY

Security Council: Its one of the principal organ of United Nations where important matters pertaining to International Peace and Security are discussed.

Actus reas: the commission of a particular act or doing a particular thing.

Reprisal: In warfare, a reprisal is a limited and deliberate violation of the laws of war to punish an enemy who has already broken them.

Jus Cogens: A fundamental principle of International law which is accepted by the international community of states as a norm from which no derogation is ever permitted.

Expost facto laws: is a law that retroactively changes the legal consequences (or status) of actions committed or relationships that existed prior to the enactment of the law.

Sine qua non: It refers to an indispensable and essential action, condition, or ingredient.
22.17 REFERENCES AND SUGGESTED READINGS

2) Statute of International Criminal Court.
3) Geneva Conventions.
4) Additional Protocol - I