

General Principles of Criminal Law

Academic 2023 -2024

Objectives of the Course

- This module aims at equipping students with the knowledge of general principles of criminal law in general and Rwandan criminal Law in particular.
- The Module further gives students the competencies and skills that will enable them to assess and apply general rules and principles of criminal law in solving specific criminal law related problems.

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At the end of this module, students will be able to :

- Demonstrate knowledge and understanding of general rules and principles governing criminal liability
- Identify, interpret and use relevant criminal rules/principles in solving criminal law related problems.
- To carry out research on criminal law related issues and find updated solutions as a result of research and inquiry
- Effectively draft a criminal law related document

Indicative Content

Major Units are:

- Unit 1. Constitutional aspects of criminal law
- Unit 2. The principle of legality
- Unit 3. Jurisdiction of Rwandan criminal law
- Unit 4. Criminal liability (Split into two chapters)
- Unit 5. Criminal liability of corporate bodies
- Unit 6. Criminal participation
- Unit 7. Inchoate offences: attempt, conspiracy and incitement
- Unit 8. Sentencing

Introduction

1. Importance of general criminal law

- General criminal law deals with rules governing **offences** and their **penalties** in general
- An offence is defined as an **act** prohibited or an **omission** which constitutes a **breach of the public order** and which the law **sanctions by a punishment.**

2. Relationship between criminal law and its auxiliary sciences

Criminal law and criminalistics (specialty under forensic science)

- Criminalistics is a discipline that studies techniques/procedures of searching offences and offenders. It applies scientific principles to recognition, documentation, preservation and evaluation of physical evidence from a crime scene
- Criminalistics sciences include sciences such as Ballistic and toxicology.
- Criminalistic sciences help criminal law to realize its objectives.

Criminal law and criminology

- ✓ Factors of criminality
- ✓ It facilitate the prevention of criminality and a better readaptation of offenders
- ✓ It also helps to create efficient criminal rules corresponding to the social reality

3. Branches of criminal law

Traditional branches:

- General criminal law (General principles of criminal law): General principles governing offences and penalties;
- Special criminal Law: specific rules for offences and penalties .

Modern branches:

- Penitentiary sciences
- Juvenile criminal law
- International criminal law
- Comparative criminal Law

4. Sources of criminal law

a. The Constitution (Read the details on Constitutional aspects of criminal law in Chapter 1 of the course notes)

1. Limitation clauses under the Constitution: rights are not absolute

- The Constitution provides for a number of fundamental rights (eg: the right to liberty - art. 24(1) of the Constitution as revised to date)
- The constitution further provides for limitations on these rights under article 41 which states:

In exercising rights and freedoms, everyone is subject only to limitations provided for by the law aimed at ensuring recognition and respect of other people's rights and freedoms, as well as public morals, public order and social welfare which generally characterise a democratic

- The sentence is one of the justified limitation to these rights (Eg: The right to liberty is lawfully limited by imprisonment for any crime. This is in accordance with article 24(2) of the Constitution.

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2. The Constitution also provides for a number of general criminal principles such as:
 - ✓ The principle of **legality** under article 24,
 - ✓ The **presumption of innocence** and other fair trial principles (art. 29 of the Constitution)

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b. International conventions ratified by Rwanda (eg: The convention against genocide, ICCPR on the principle of non-retroactivity of criminal laws: article 15)

c. Law no N°68/2018 of 30/08/2018 determining offences and penalties in general and

- **the Law n° 69/2019 of 08/11/2019 amending Law n° 68/2018 of 30/08/2018 determining offences and penalties in general**
- **Law no 059/2023 of 4/12/2023 amending Law n° 68/2018 of 30/08/2018 determining offences and penalties in general**

d. Particular penal provisions such as:

- ✓the Law N° 46/2018 OF 13/08/2018 on counter terrorism;
- ✓Law N° 51/2018 OF 13/08/2018 relating to the prevention, suppression and punishment of trafficking in persons and exploitation of others;
- ✓Law n° 54/2018 of 13/08/2018 on fighting against corruption;
- ✓law N° 59/2018 OF 22/8/2018 on the crime of genocide ideology and related crimes;
- ✓law N° 60/2018 OF 22/8/2018 on prevention and punishment of cyber crimes, etc

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e. General principles of law

- ✓ In dubio *pro reo* (*the doubt benefits the accused*)
- ✓ Prohibition of double Jeopardy (*Non bis in idem*)
- ✓ Ignorance of law is no excuse (*Nemo censetur ignorare legem*), etc

f. Case law

- ✓ Some are binding precedents (eg: Supreme Court Precedents)
- ✓ Other judicial decisions are used for persuasive purpose

g. Doctrine (writing of scholars) as a subsidiary source

e. Custom as a subsidiary source - Customary law can not create an offence but customs can be used in interpreting criminal provisions

Chapter 1. CONSTITUTIONAL ASPECTS OF CRIMINAL LAW

The Constitution provides for some criminal law aspects as discussed below:

1. Limitation clauses under the Constitution: rights are not absolute

- The Constitution provides for a number of fundamental rights (eg: the right to liberty - art. 24(1) of the Constitution as revised in 2015)
- The constitution further provides for limitations on these rights under article 41 which states:

“In exercising rights and freedoms, everyone is subject only to limitations provided for by the law aimed at ensuring recognition and respect of other peoples’ rights and freedoms, as well as public morals, public order and social welfare which generally characterise a democratic society”

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A limitation is justified when:

- ✓ Provided by the law
- ✓ Legitimate purpose
- ✓ Less restrictive means to achieve the purpose
- The sentence is one of the justified limitation to these rights (Eg: The right to liberty is lawfully limited by imprisonment for any crime. This is in accordance with article 24(2) of the Constitution.
- The law that infringes on human rights must do so for a legitimate and important purpose. That's why many theories of criminal punishment were developed. The major ones includes
 - ✓ Retribution theory
 - ✓ Theory of Deterrence
 - ✓ Rehabilitation theory
- These theories will mainly be discussed later on the chapter dealing with sentencing
- Any law that prohibit given conduct and thereby restrict specific constitutional rights must also be tested against the limitation clause (i.e, must be justified)

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2. Other constitutional aspects include:

- **The requirement of proportionality between sentence and crime:** Excessively disproportionate sentences should in principle be unconstitutional because they are not justified under the limitation clause: they are not **the less restrictive** means to achieve the purpose
- **The prohibition of discriminatory sentences:** A law that imposed heavier sentences to women than men in case of adultery was declared unconstitutional and the Supreme ordered that equal punishment be imposed to women as to men (**See RS/Inconst/Pén.0001/08/CS(JO n°21bis du 01/11/2008)**).
- **Many general criminal law principles are provided by the Constitution:** eg: The principle of **legality** under article 24, the **presumption of innocence** and other fair trial principles (art.29 of the Constitution), etc.

Chapter 2. The principle of Legality

1.1. THE PRINCIPLE OF LEGALITY

- It is important that mechanisms exist to protect the rights of individuals against abuse.
- The principle of legality plays an important role in this regard.
- Broadly stated, the principle of legality means that there is “no crime without law” and there is “no punishment without law”
- Nullum Crimen nulla poena sine lege

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Legal basis for the principle of legality

- Article 24 of the Constitution, which reads as follows:

No one shall be subjected to prosecution, arrest, detention or punishment unless provided for by laws in force at the time the offence was committed.

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- The principle of legality is also enshrined in article 3 of the law n°68/2018 of 30/08/2018 determining offences and penalties in general, which provides that:
 - No one can be held guilty of an offence on account of any act or omission which did not constitute an offence under national or international law at the time when it was committed.*
 - A heavier penalty may not be imposed than the one that was applicable at the time the offence was committed.*
 - No offence is punished by a penalty which was not provided for by law before the offence was committed.*
- ICCPR, art. 15
- UDHR, art. 11
- *This principle is broader and implies the next rules:*

Rules embodied in the principle of legality

A. The principle of legality in relation to criminal offences (nullum crimen sine lege)

- It includes five distinct rules:
 1. *Ius acceptum*: act committed is recognised by the law as a crime. No crime without law
- ✓ National law
- ✓ International convention or customary law
- Read *Nsengiyumva Case: Court of Appeal, Prosecutor v. Nsengiyumva et al*, RPA 00074/2018/CA, 2019/07/12

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2.lus praevium

- act committed was recognised as a crime at the time of its commission.
- The law must not operate retroactively - The principle of non-retroactivity.
- Penal provisions do not have retroactive effect except:
 - ✓ Retroactivity in *mitius* (art.6 PC)
 - ✓ When the legislator clearly stated it
 - ✓ Interpretative laws

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3. *Ius certum*

- if *ius acceptum* and *ius praevium* rules are complied with, the principle of legality can still be undermined by the creation of criminal norms which are formulated vaguely or unclearly
- In such a case, it would be difficult for individuals to understand exactly what is expected of them.
- Thus, crimes must be formulated **clearly**; they should not to be formulated **vaguely**.

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- An example of a criminal prohibition couched in unacceptably vague language (and hailing from Nazi Germany in 1953) is the following:
“ Any person who commits an act which, according to the fundamental idea behind the penal law, and according to the good sense of the nation, deserves to be punished, shall be punished”

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4. *Ius strictum*

- Even if all the above-mentioned three aspects of the requirement of legality are complied with, the general principle can nevertheless be undermined if a court is free to interpret widely the words or concepts contained in the definition of the crime or to extend their application by analogous interpretation.
- Thus, provisions creating crimes must be interpreted strictly; not by analogy. This rule is enshrined in art. 4 of the Law governing offences and their penalties in General, which provides that:

Criminal laws cannot be interpreted broadly, they must be construed strictly.

Courts are prohibited to make judgment by analogy.

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B. *The principle of legality with respect to penal sanctions (Nulla poena sine lege)*

- *the above-mentioned four rules must also be applied when it comes to imposing a sentence.*
- *ius acceptum (art. 3(1) PC*
- *ius praevium (exceptions **retroactivity in mitius**: see art. 6 PC.*

1.2. Notes on some other criminal law principles

1.2.1. Prohibition of double jeopardy

A person shall not be punished twice for the same offence (article 7 of PC)

1.2.3. Repeal of the law

- A law ceases to apply to an offence committed when the law was still in force in case the repeal occurs **before the final judgment** in relation to such an offence, unless the new law provides otherwise.
- *Quid the case of repeal after final judgment?*

1.2.4.. There are many other principles such as in *dubio pro reo*, the *presumption of innocence*, etc.

- *Some of them will be taught in the course of criminal procedure*

Chapter 3. JURISDICTION OF THE RWANDAN PENAL LAW

1. Territorial application of Rwandan criminal law (art. 9 PC)

- All offences committed on the Rwandan territory, whether by Rwandans or by foreigners are punished according to the Rwandan penal law
- Territory refers to terrestrial territory, rivers, lakes and the aerial space within the boarder of the Republic of Rwanda and the Rwandan embassies in foreign countries.
- The applicable law is Rwandan law
- Some peoples enjoy immunities (eg: ambassadors, Heads of states, etc)

2. Extra-territorial application of Rwandan criminal law

a. Passive personality principle

- Crimes committed on a territory which is not subject to the jurisdiction of any state committed:
- By or against Rwandan citizen
- Any vessel or aircraft with rwandan flag in a territory which is not subject to the sovereignty of any state.
- This offence can be prosecuted on basis of territorial jurisdiction since it is considered to be committed in Rwanda(art. 9 PC)

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b. Nationality Principle (art. 11)

- A **Rwandan** who commits a **felony** or a **misdemeanour**, outside Rwandan territory, may be prosecuted and tried by Rwandan courts in accordance with the Rwandan Law as if the offence was committed on the Rwandan territory if such an offence is punishable by Rwandan Law
- There is no requirement for double criminality
- *Ne bis in idem applicable (if any)*
- *In case of double nationality, consideration is given to rwandan nationality*

C. Protective principle

- Any Rwandan or foreign citizen who commits a felony or a misdemeanour **against the interests of Rwanda** or against a Rwandan citizen outside the territory of Rwanda may be prosecuted and tried in accordance with the Rwandan law as if the offence had been committed in Rwanda.(art.12)
- Usually vital interest of the state
- “against a Rwandan citizen outside the territory”
 - usually Passive personality principle is also applicable.

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c. Universal jurisdiction

- Any person, whether a Rwandan or foreign citizen, a national or foreign non-governmental organization or association, that commits, inside or outside the territory of Rwanda, an international crime or transnational crime may, **if apprehended on the territory of Rwanda**, be punished in accordance with the Rwandan law (**art.14**)
- This is based on the nature of the crimes. International crimes are particularly considered as committed against the international community as a whole.
- Rwandan law applies when the offender is arrested in Rwanda(No universal jurisdiction in absentia)

Chapter 4: Criminal liability

Before a person can be convicted of any crime, the following requirements must be satisfied.

These are:

- An act (or omission)
- Compliance with the definitional elements of the crime
- Lack of justification (Unlawfulness)
- Blameworthiness (Culpability): Lack of excuse

4.1. The requirement of an act (or omission)

- Act or omission
- Thoughts are not punishable
- Act must be human
- Act must be voluntary

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Omissions: special considerations

- Legal duty to act positively
- The defence of impossibility: a lame to come to the aid of a sinking person

4.2. Constitutive elements of an offence

- Once it is established that there was an act or omission, the next step in the determination of criminal liability is to investigate whether the conduct in question complied with (or corresponds to) the “definitional elements” of the crime

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Two elements of each crime:

- the material element (*actus reus*)
- the mental element (*mens rea*).

4.2.1. Actus reus

A. Definition:

- The actus reus comprises all the elements contained in the definition of the prohibition other than the mens rea (intention or negligence).

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- It can refer to the kind of act that is prohibited (for example act of killing)
- the **circumstances** in which the act must take place, such as, for instance the particular way in which the act must be committed (for example “violently”)
- the **characteristics of the person** committing the act (for example, a “soldier” in the crime of desertion),
- the **nature of the object** in respect of which the act must be committed (for example “movable corporeal property” in theft)
- a **particular place** where the act has to be committed (for example in a “public place”) or a particular **time** when or during which the act has to be committed (for example “during the night”)

B. Categories of offences

Basing on their actus reus, offences can be classified in the following category

1. According to their gravity:

- **Felony:** a principal penalty of imprisonment of more than five (5) years or by life imprisonment
- **Misdemeanor:** a principal penalty of imprisonment of six (6) months to five (5) years.
- **Petty offences:** a principal penalty of imprisonment of less than six (6) months or an offence punishable by fine only.

2. The distinction between an offence consisting of an action and an offence consisting of an omission

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3. **The distinction between instantaneous offence, a continuous, successive offence or continued offence**
 - **An instantaneous offence** is completely realized by an accomplishment of a prohibited act or an omission of an act ordered by the law(e.g: theft)
 - **A continuous offence** supposes a certain period of time or persistence in illegal situation
 - **A continued or successive offence**, an instantaneous offence can, by its nature, present characteristics of a continued offence when committed in series of successive acts with the common intent. (eg: a married person who has repeated adultery for several times within a certain period of time) with one person.

Why such distinction?

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- On the level of application of new law
 - It is not applicable to instantaneous act committed before it
 - Continuous offence: governed by new law if its consequences continued until the new law
 - Continued offence: governed by the new law if the last criminal act was committed at the time of the new law

On the level of competent court

- Instantaneous: one court is competent
- Continued and continuous: any court where the act was committed is competent
- On the level of repression:

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4. Simple offence, offence of habit and complex offence

- An offence (instantaneous or continuous) is simple when it consists of only one act.
- An offence is complex, on the other hand, when its material element consists of several acts(e.g: fraud under article 174 PC: this offence requires a fraudulent act accomplished by the fraudulent person and the handover of a thing by the victim. The offence is only realized once the two acts are accomplished)
- offence of habit (different from actual complex offences): It supposes the commission of several acts, which are similar. Each of those acts considered individually is not punishable, but the repetition constitutes the body of the offence(e.g: illegal practice of medicine)

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5. Formally defined crimes and materially defined crimes

- In the case of formally defined crimes (les infractions formelles in French), the definitional elements proscribe a certain type of conduct irrespective of what the result of the conduct is. Fletcher refers to these crimes as “**crimes of harmful actions**”. *Example of the crime of poisoning*
- In the case of materially defined crimes (result/consequence offences (les infractions de resultats in French), on the other hand, the definitional elements do not proscribe a specific conduct but any conduct which causes a specific condition. **Fletcher refers to them as “crimes of harmful consequences** . *Eg: murder*

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- Materially defined crimes are characterized by a causal link between action and consequence
- This is known as ***causation (also known as imputability)***

C. The Concept of causation

(1)Definition

Causation is the name given to the complexities that can break the link between action and consequence; when causation is absent, the harmful consequence is no longer attributable to the suspect.

- For example, in case of murder, the question which always arises is whether or not there is a “causal link”(or nexus) between X’s conduct and the prohibited result (for example Y’s death)

(2)The principles to be applied in determining causation

(a)Factual causation

- *In order to determine whether an act is a factual cause of the prohibited situation courts use the conditio sine qua non formula. This is equivalent to the “but for-causation” test in english law.*
- *According to this formula (or theory) one must ask oneself what would have happened if X’s conduct had not taken place: would the result nevertheless have ensued?*
- *In order to limit the wide ambit of the factual causation and the operation of the conditio sine qua non formula, the second leg of causation intervenes. This is the investigation into **legal causation**.*

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(b) Legal causation

- The theory of adequate causation: According to this theory, an act is a legal cause of a situation if, according to human experience, in the normal course of events, the act has the tendency to bring about that type of that situation
- In the Anglo-American law this corresponds to the “**natural and probable consequences**” or the “**reasonable consequences**” of the act.

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- Eg: To strike a match is to perform an act which tends to cause a fire, or which in normal circumstances has that potential. If, therefore, X strikes a match and uses the burning match to set a wooden cabin alight, one can aver without difficulty that her act was the cause of the burning down of the cabin.

(3) The *novus actus interveniens*

- The expression *novus actus interveniens* means “new intervening event”, and is used to describe a situation where between X’s initial act and the ultimate death of Y, another event which has broken the chain of causation has taken place, preventing us from regarding X’s act as the cause of Y’s death.

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- an act is a *novus actus* if it constitutes an unexpected, abnormal or unusual occurrence
- For example, X administers a poison to Y which will slowly kill her. Shortly afterwards Z, who also bears a grudge against Y, and who acts completely independently of X, shoots Y, killing her. It is then Z's act, and not that of X, which is the cause of Y's death. The death of Y cannot be attributed to X's act because the chain of causation was broken by a *novus actus interveniens*, an unexpected, abnormal or unusual event.

4.2.2. *Mens rea*

- All crimes require a mental element (*mens rea*) in the form of either intention (*dolus*) or negligence (*culpa*).
Article 83 PC
- Unless otherwise provided by the law, only a person who intentionally commits an offence shall be liable to a penalty. [...]
- However, where provided by the law, an offence occurs in case of recklessness, negligence or carelessness. The words “recklessness”, “negligence” and “carelessness” refer to the same concept which is generally simply referred to as negligence

A.Intention (*dolus*)

(1) Definition

- Defined concisely, one can say that intention is to know (connaître) and to will (vouloir) an act or result.
- This definition corresponds to the one contained in article **83(2) PC** which reads as follows:

Only a person who intentionally commits an offence is punishable. However,....

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(2) The two elements of intention: knowledge and will

- The cognitive element(knowledge) consists in X's knowledge or awareness of all the elements and circumstances contained in the material elements of the crime.
- The conative element(will) consists in X's directing his will towards a certain act or result.

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(3) General and specific intentions

- The term **general intention** means the intent to commit the criminal act as defined in the statute, for example, the “intention to kill” (*animus necandi*).
- Specific intention (***dolus specialis***) can be defined as, to use Samaha’s words “general intent ‘plus’”. Eg: the crime of genocide: the offender has a general intention of killing a human being, plus a specific intention (*dolus specialis*) of, “destroying an ethnic group as such”.

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- These crimes are sometimes also referred to as crimes of “double intention

(4) The simple criminal intention and the aggravated criminal intention

Eg: Body injuries with premeditation and ambush lead to raising the sentence

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(5) Distinction between “motives” and intention

- The criminal intention is always the same while a motive, i.e. the interest or the feeling that determines the act varies according to individuals and circumstances.
- In determining whether X acted with intention, the motive behind the act is immaterial.
- Eg: stealing from the rich in order to give to the poor does not exonerate the offender from criminal responsibility.
- A good motive may only have an influence on the degree of punishment.

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(6)The 3 forms of intention:

- Direct intent (dolus directus),
- Indirect intention (dolus indirectus)
- Dolus eventualis.

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Dolus directus first degree:

- *Full intent and willingness to commit crime*
- *Bring about concrete result*

Dolus directus second degree(dolus indirectus):

- *Action purposeful*
- *No concrete desire to cause consequence*
- *Awareness that consequence is end result(e.g: shooting a certain person A with his driver B knowing that it is not possible to shot A only)*

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Dolus eventualis (Lubanga case)

- Awareness that criminal consequence might occur
- Consequence needs to be foreseeable
- acceptance of risk (e.g: shooting the military camp near the civilian camp hoping that civilian will not be shot)
- See also Pistorius case before the Supreme Court of Appeal in South Africa.

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- ***Another eg:*** The following is an example: X wants to burn down a building. He foresees the possibility that somebody (Y) may be inside it (1), but nevertheless decides to proceed with his plan, not caring whether Y is in the building or not (2), and sets fire to the building. Y is indeed inside, and dies in the flames. In the eyes of the law X intentionally caused Y's death.

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(7)Proof of intention

- Direct evidence(eg: confession and guilty plea)
- Circumstantial evidence

B. Negligence (Culpa)

(1)definition:

A person's act is negligent if:

- A reasonable person in the same circumstances would have foreseen the possibility that: the particular circumstance might exist, or his conduct might bring about the particular result;
- A reasonable person would have taken steps to guard against such a possibility; and
- The conduct of the person whose negligence is being determined differed from the conduct expected of the reasonable person.

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(2)The concept of a “reasonable person”

- An ordinary, normal, average person. He is the man of ordinary knowledge or intelligence.
- He is neither an exceptionally cautious or talented person nor an underdeveloped person, or somebody who recklessly takes chances.

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(3)The test of negligence is both objective and subjective

- Objective test: foreseeability of the result or circumstance by a reasonable person.
- Subjective test(exception):
 - The negligence of **children** who, despite their youth, have criminal capacity (i.e. aged between 14 and 18), out to be determined by inquiring what a reasonable child would have done or foreseen in the circumstances;

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- In the case of **experts**, it must be asked whether a reasonable expert who embarks upon a similar activity would have foreseen the possibility of the particular result ensuing or the particular circumstance existing;
- If X happens to have **knowledge** of a certain matter which is superior to the knowledge which a reasonable person would have had on the matter, he cannot expect a court to determine his negligence by referring to the inferior knowledge of the reasonable person. His superior subjective knowledge of a fact of which the reasonable person would have had no knowledge must indeed be taken into account.

C. STRICT LIABILITY: DISREGARD OF THE REQUIREMENT OF *MENS REA*

- In principle, intention or negligence is required for criminal liability.
- However there are cases of strict liability: there is no requirement to prove *mens rea* (*intention or negligence*) in relation to one or more aspects of the *actus reus*
- Once the prohibited act (*actus reus*) is committed, the crime is committed. *Eg*: road-traffic offences such as speeding, driving without insurance, etc.
- In most cases, regulatory offences aimed at businesses in relation to health and safety also lead to strict liability such as pollution, manufacturing harmful products, etc.

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- Also many driving offences are crimes of strict liability eg. speeding, driving without insurance. The use of strict liability in criminal law is controversial as it means a person may be liable where they are not at fault or have taken all reasonable care to ensure compliance of the law

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5. Article 119 of PC states: “Any person who, in bad faith, throws any object at another person which may inconvenience or dirty that person, commits an offence”

- Demonstrate the *actus reus* and *mens rea* of this offence.

4.3. Defences

- Even when the actus reus is committed with the required mens rea, circumstances may exist which make the act justified or excusable
- *For a person to be liable, there must be*
 - ✓ *lack of justification (unlawfulness)*
 - ✓ *and lack of excuse (blameworthiness or culpability)*
- *Thus, a person will not be liable if there are:*
- ***Justificatory defences*** : defenses in which the defendant claims that his actions were right or justified based on the circumstances
- ***excusatory defences*** : *the defendant admits what he did was wrong but claims he should be excused from criminal liability based on the circumstances*

4.3.1. Defences excluding unlawfulness (Justificatory defences)

- The mere fact that there is an act which corresponds to the definitional elements does not mean that the person who performs the act is liable for the particular crime.
- The next step in the determination of liability is to enquire whether the act which complies with the definitional elements is also unlawful
- Below are the defenses that exclude the unlawfulness

A. Self-defence: art 86, para.2 PC

(i) Requirements of self defence

Requirements of the attack

- ✓ be illegal;
- ✓ be directed at an interest which legally deserves to be protected (person or property)
- ✓ have commenced or be imminent, but not yet completed(see Mbanzamihigo case)

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Requirements of the defensive act

- ✓ *be directed against the attacker;*
- ✓ *be necessary (necessity): the defensive act must be the necessary way of protection against the attack*
- ✓ *stand in a reasonable relationship to the attack (proportionality). e.g: it is not self defense to respond to a slap with a gunshot*
- ✓ *be taken while the defender is aware that he is acting in private defence. There is no such thing as unconscious or accidental private defence.*

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- The assessment of **proportionality** can take into account different factors such as:
 - ✓ The relative strength of the parties;
 - ✓ The age of the parties;
 - ✓ The means they have at their disposal;
 - ✓ The value of the interest threatened, etc
- It is import to note that the test for private defence is objective: Putative private defence is not self- defence. It can be an excuse as it will be discussed later.

B. Necessity: article 86 para. 2 PC

It is a justification defense in which the defendant commits a crime out of necessity or to avoid a greater evil.

(i) Requirements of necessity defence

- ✓ the presence of an actual or imminent danger against one self or another person
- ✓ The interest to protect must be of a higher value than the sacrificed one, or at least, the two interests must be of the same value
- ✓ No other means of escaping
- ✓ Proportionality between the means of defense and the danger to avoid

C. Consent and presumed consent

(1) The different effects that consent

- Consent can only operate as ground of justification in respect of certain crimes, and only under certain circumstances.
- ✓ There are crimes in respect of which consent does operate as defence, but forms part of the definitional elements of the crime. Eg: *rape*. Rape is only possible if the sexual act takes place without the person's consent.

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- ✓ There are crimes in respect of which consent by the injured party is not recognized as a defence. Eg: ***murder***. Euthanasia is unlawful(see article 109 PC)
- ✓ There is a group of crimes in respect of which consent is sometimes regarded as a ground of justification and sometimes not. Eg: sporting events (such as Karate) , and where a person's bodily integrity is impaired in the course of medical treatment(such as an operation (such as performing caesarean). The test is the *bonos mores*. *If the act was contra bonos mores (against the good morals), it leads to liability.*

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(2) Requirements for a valid plea of consent

- ✓ The consent must be given voluntarily, without any coercion
- ✓ The person giving consent must be endowed with certain minimum mental abilities (eg: no consent in case of complete intoxication)
- ✓ The consent must be given before the otherwise unlawful act is committed
- ✓ Consent must be given by the “victim” herself.
Exception: Example of informed consent in medical treatment

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(3) Presumed consent

- Known as spontaneous agency
- Example: X is in a critical health condition and is operated by a doctor while she is unconscious. The doctor can rely on the defence of presumed consent if, after recovering, X claims that her body was violated without her consent and institutes a criminal action against the doctor

D. Act ordered by law

- Eg: the policeman who searches an occupied house does not commit “violation of domicile” if he does so with a search warrant.
- This is a law enforcement defence

E. Parents' right of chastisement

- Parents have the right to punish their children with **moderate and reasonable corporal punishment**
- This can be a defence in Rwanda

4.3.2. Defences that negate blameworthiness (excuses)

- The mere fact that a person has committed an act which complies with the definitional elements and which is unlawful (not justified) is not yet sufficient to render him criminally liable
- There must be blameworthiness (also called culpability)
- Test: “Could one in all fairness have expected X to avoid the wrongdoing?”

A. Defences excluding criminal capacity

- People who lack “criminal capacity” are not punishable
- The term “criminal capacity” refers to the mental abilities or capacities to appreciate the wrongfulness of his act and to act in accordance with such an appreciation
- It is different from intent

Cont'd

(1) Minority : article 85 (1) PC

- less than 14 years.
- 14 to less than 18 years: mitigating excuse (art.54)

(2) Insanity: article 85 PC

- It means all forms of mental illness that deprives the individual from the control or supervision of his/her acts at the time of their commission
- “Mental illness” is an illness of the mind. It includes common conditions like depression and less common conditions like bipolar disorder, dementia, etc.
- The defendant bears the burden of proving on the balance of probabilities that he or she is insane

Cont'd

There are cases of **Diminished responsibility**:

- It is a legal doctrine that absolves an accused person of part of the liability for his criminal act if he suffers from such abnormality of mind as to substantially impair his responsibility in committing or being a party to an alleged violation.
- The doctrine of diminished responsibility provides a mitigating defense in cases in which the mental disease or defect is not of such magnitude as to exclude criminal responsibility altogether.

Cont'd

(3) Non-pathological criminal incapacity

- criminal incapacity as a defence outside the situations in which he relies on mental illness and youthful age, fall under the heading “non-pathological criminal incapacity(eg: extreme “intoxication, “provocation” and “emotional stress)
- This is different from sane automatism which is the defence which is raised when it is alleged that an accused’s behaviour was not voluntary:
 - ✓ Reflex movements such as heart palpitations or a sneezing fit;
 - ✓ Somnambulism;
 - ✓ (iii) Muscular movements such as an arm movement of a person who is asleep, or having a nightmare, an epileptic fit, etc.

B. Obedience to superior orders (art 86(2) PC)

- obedience to orders is a defence provided that the order was not manifestly illegal.
- Criminal Law thus provides the subordinate with a defence if he executes an unlawful order in a “reasonable” belief that the order is lawful
- No liability for order issued by legitimate authority(in pple)

Cont'd

What if the order is illegal but is issued by a legitimate authority?

- For some authors, an illegal command should erase criminal responsibility for the subordinated agents who must always and in whatever circumstances obey orders from his superior without discussing or challenging them. Obedience prevails over legality. This system is known as “passive obedience”
- Some other authors, considering serious consequences that can be caused by passive obedience, recognize a right of challenging superior's orders and refuse to execute when they are illegal. The theory is known as “claver bayonet”.
- Others cut out the responsibility only in case when illegal character of the command is manifest and crass.
- Rwanda has adopted this last approach. There is no criminal liability unless the ordered act is manifestly unlawful(article 86 of the Penal code)

C. Duress: Article 86(1)

Notion

- Duress can be physical or moral
- It affects the will of the offender
- Duress is different from necessity. For the latter, the threat to the defendant comes from natural or circumstantial rather than human sources

Conditions

- The threat must be immediate or imminent
- Unpredictable and Irresistible (appreciation by the judge)
- No other means of escaping the threat

NB: The legislator does not clearly indicate whether duress can be accepted for all offences. Some legislations like the UK exclude such defence for some felonies such as murder.

D. Error of facts (art.86)

- This defence applies in case the defendant misunderstood some facts that negate an element of the crime.
- **Eg:** X thinks that he finds herself in a situation of private defence because Y is threatening him with a revolver, whereas Y is merely joking and the “revolver” is in fact a toy. If X “defends” himself and kills Y, he cannot rely on private defence, but can raise the defence of “mistake” in relation to unlawfulness. “putative private defence” situation.
- This defence is provided by art. 32 of the Rome Statute : “A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.
- This defence is provided under art. 86(3) of rwandan penal law of 2018 if such an error entirely removes the intention to commit an offence.

E. Error of the law

- Mistake of law is a defense that the criminal defendant misunderstood or was ignorant of the law as it existed at the time.
- Under Rwandan law, article 176(2) of the Constitution provides that “ignorance of the law which has been duly published is not a defence.
- However, article 86(3) PC provides that an error of law is a defence if such an error entirely removes the intention to commit an offence;
- *This defence is also admitted in some countries such as South Africa and France*
- *To be accepted, the error must be invincible: An invincible mistake or ignorance that any reasonable and cautious individual can commit.*

Cont'd

Mistake of law can generally be used as a defense in limited circumstances such as:

- ✓ When the law has not been published;
- ✓ When the defendant relied upon a law that was later abrogated or declared unconstitutional;
- ✓ When the defendant relied upon a judicial decision that was later overruled; or
- ✓ When the defendant relied upon an interpretation by an applicable official.

NB:

- It would be up to the judge to appreciate if the ignorance negates the mental element of the crime.
- This approach was also adopted by the Rome statute establishing the International Criminal Court(but Rwanda is not party to the Rome Statute).

Chap. 5: Intoxication

- Involuntary intoxication
- Voluntary intoxication

A. Involuntary intoxication

(1) Complete involuntary intoxication

- Complete intoxication occurs when one of the following requirements of criminal liability is impaired:

- ✓ A voluntary act;
- ✓ Criminal capacity;
- ✓ Intention and negligence (*mens rea*)
- It leads to acquittal of the accused

Cont'd

(2) Partial involuntary intoxication

- This intoxication is not a defence to a crime; but there is a way of considering a **mitigating circumstance**

B. Voluntary intoxication

Three different situations of intoxication have to be clearly distinguished:

- The *actio libera in causa*
- Intoxication resulting in mental illness;
- Ordinary voluntary intoxication.

Cont'd

(1)The actio libera in causa

- voluntary act of intoxication with the purpose of committing the crime
- This is not a defence and can be an aggravating circumstance

Cont'd

(2) Voluntary intoxication resulting in mental illness

- If a mental illness(insanity) results from a chronic abuse of alcohol, it constitutes a defence like insanity

Cont'd

(3) Ordinary voluntary intoxication

- *The “unyielding” approach: no defence*
- ✓ **The Rwandan law follows this approach.** Article 85, para.2 PC provides that:

“A person who deliberately deprives himself/herself of mental faculties during the commission of an offence is criminally liable, even if such deprivation was not intended to commit an offence.”
- *The “lenient” approach*

Cont'd

Lenient approach

- There may be situations in which such a person should escape criminal liability, the basis of this being that because of her intoxication he either did not perform a *voluntary act*, or lacked either the **intention** required in the definition of the crime or the **minimum criminal capacity required for a conviction**.
- This situation is especially true in case of “complete voluntary intoxication”. It should be a defence

Intoxication

- Involuntary intoxication
 - ✓ complete – complete defence
 - ✓ Partial- mitigating circumstance
- Ordinary Voluntary intoxication
 - ✓ complete- Not a defence in Rwanda
 - ✓ Partial – Not a defence

Cont'd

- Partial Voluntary intoxication: Not a defence. It can be a mitigating circumstance.

Chap. 6: PROVOCATION AND EMOTIONAL STRESS

- Provocation as a complete defence
- Provocation as mitigating excuse
- Emotional stress

A. Provocation as a complete defence

- In some countries(eg:South Africa) provocation is accepted as a ground for negating culpability (non-pathological criminal incapacity).
- Even in the legal systems where this defence is available, such a judgment of acquittal will be reached only in exceptional cases(eg: extreme anger)

B. Provocation as mitigating excuse

- Rwandan law follows this approach
- Under art 55 -57 PC, provocation may operate only as a ground for mitigation of punishment.
- Determination of sentence in case of provocation will be discussed on the section on sentencing.
- See Mbanzamihigo case

C. Emotional stress

- Emotional stress includes cases such as anger (not immediately caused by provocation) or stress caused by social, health or financial problems.

examples:

- X finds Y sleeping with X's wife. X grabs an axe and strikes Y's head killing him instantly.
- X has sexual intercourse with a woman (Y). After the intercourse Y apologises to X that she is infected with a deadly sexually transmissible disease. X rushes to a nearby hospital to check if he is infected or not. The test is positive, he is infected. He is also informed that no cure is available and that he will die within 6 months!! X is infuriated, returns to Y's apartment and shoots her in the head with a pistol.

Cont'd

- X has lost his Fiance. He passes by the bank and withdraws all his money (say 25 million Rwandan franc) in order to leave the country and go to live abroad. On his way to buy the air ticket, his bag is stolen and all the money is gone. On his way back home, he receives a telephone call informing him that his beloved mother has been killed in a road accident. As he is still under the shock of that terrible news and under anger because of losing his girlfriend and his money, a beggar approaches him begging for money. X loses temper and punches him on the mouth. The beggar is seriously injured and loses one tooth.

Cont'd

- In a criminal trial, Y confesses to have killed Z. He describes the manner in which he killed Z, including raping her before and after her death. He also describes how he chopped off her eyes before killing her. X, Z's son, loses temper and throws a stone to Y killing him on the spot.

Cont'd

- The Rwandan Penal Code is silent on the issue of emotional stress.
- It is left to the discretion of the judge.
- The judges may consider such emotional stress as a **mitigating circumstance**
- There is no exhaustive list of mitigating circumstances. They shall be discussed on the chapter relating to sentencing.

Chapter 7 : Corporate Criminal Liability

- General
- Liability of corporate representatives

1. General

- Natural person
- Juristic person: entity with legal personality
- Corporate Criminal liability is different from vicarious liability
- Vicarious liability: liability imputed to one person for the actions of another. A person is held liable for a wrong in fact committed by someone else.

Cont'd

- vicarious liability is expressly excluded by article 29(5) of the Constitution which provides that “**criminal liability is personal**
- Corporate criminal liability is not vicarious liability since the corporation has separate legal personality distinct from its members and is bearer of rights and obligations.
- The corporation is held liable as juristic persons

The issue of mens rea

- *Mens Rea: Tesco Supermarkets Ltd. v. Natrass*
- *Corporation compared to human body*
- *Representatives represented the brain, intelligence and will of the corporation*
- willpower of the corporations' managers represented the willpower of the corporations

Conditions for corporate liability

In Rwanda: Corporations are punished under these conditions :

- committed by their **representatives** or by those who hold **leadership positions**
- **acting for the benefit of these legal persons**
- **on the basis of:**
 - 1° power of representation;
 - 2° power to take decisions;
 - 3° power of supervision.'

Applicable sentences

- a fine;
- the ban on the conduct of one or several professional or social activities for a fixed period of time;
- confiscation of the object used or intended for use in the commission of the offence or the proceeds thereof;
- publication of the penalty pronounced.

Cont'd

- dissolution;
- permanent closure of establishments in which incriminated acts have been committed or which have been used to commit such acts;
- permanent exclusion from public procurement contracts, either indefinitely or for a fixed period of time provided for by relevant laws;
- the ban on issuing a cheque, a credit card or negotiable instrument;
- placement under judicial supervision.

2. Criminal liability of representatives or their accomplices

- Criminal liability of corporate bodies does not exclude criminal proceedings against their representatives or their accomplices
- Both the corporate entity and representative can be held responsible.

Chap 8: CRIMINAL PARTICIPATION

- I. Categories of persons involved in the commission of an offence
- II. Sentences of involved persons

I. Categories of persons involved in the commission of an offence

1. Offender

- Definition: Under art. 2(3) **a person who commits an act punishable by law or omits to perform an act required by law;**
- This definition should be expanded to include cases where a person commits an offence through another person.
- This the case of article 25(1) of German criminal code

2. Co-offenders (or Co-perpetrators)

- a. **Definition:** a person who directly cooperates with the offender in the commission of an offence
- This term is normally used to refer to joint commission of the offence
 - Plurality of offenders
 - Also known as co-perpetration

Cont'd

(b). The problem of causation and the doctrine of common purpose

- Difficult to find whether that the individual conduct of each member satisfied the requirement of causation.
- Ex: murder committed by many offenders
- the courts apply the **doctrine of common purpose** to facilitate the conviction of murder of each separate member of the group

3. Accomplices

A. Definition

- The accomplice is a person whose conduct does not conform to all the requirements in the definition of the crime, but which is nonetheless punishable because she has intentionally furthered the commission of the crime by another

B. Forms of complicity

1. Complicity by aiding and abetting

- Art 2(5°)(b) defines an accomplice as:
“a person knowingly **aids** or **abets** the offender in preparing, facilitating or committing the offence, or a person who incites the offender”.
- aiding” refers to any act of assistance before or at the time of the commission of the offence

Cont'd

- procuring the means to the offender, transporting the offender to the scene of the crime, giving information that facilitates the perpetration of the offence by the offender (e.g: teaching the offender how to use the gun or giving him any other relevant information)
- The instructions or information given must have been useful for furthering the commission of the offence

Cont'd

- For abetting, it is usually defined in terms of encouragement

2. *Complicity by incitement*

Art 2 (3°)(a, b&c) defines an accomplice as:

“a person who **incites** the offender”.

Cont'd

- Incitement can be committed by:
 - by means of remuneration, promise, threat, abuse of authority or power
 - by uttering speeches, inciting cries or threats in a place where more than two (2) persons gather,
 - by means of writings, books or other printed texts that are purchased or distributed free of charge or displayed in public places, posters or notices visible to the public;

Cont'd

- The problem of considering an instigator as an accomplice is that when the person who was incited did not commit the crime, the instigator cannot be punished because you cannot be an accomplice of a crime which does not exist.

Cont'd

- Example: Lacour case in French Court. The French Court of Cassation held that the conducts of provocation without effects, though they are particularly dangerous, should neither be punished as attempt since they were not beyond acts of preparation nor as complicity since the main offence was not committed.
- incitement should be treated as « **inchoate offence** » punishable independantly of whether the incited offence was subsequently committed or not.

Cont'd

3. Harboursing the offender

- Article 2(5)(d) para. 2 of the Penal Code provides for another form of complicity where a person who, knowingly, hides an individual who committed an offence is considered as an accomplice
- This should not be treated as a form of complicity since a person cannot be an accomplice of a crime when he/she was not aware of the crime prior or at the time of its commission

Cont'd

- In the philosophy of criminal law, one cannot be an accomplice *ex post facto*.
- The act of “harbouring the offender, co-offender or accomplice” should be treated as separate offence.

Cont'd

4. Concealing the object used or meant to commit the offence

- Article 2(5)(e) provides that a person, who knowingly, **conceals** an object or other equipment used or intended for use in the commission of an offence;
- Article 2(5)(d) punishes acts of aiding the offender in concealing such objects as a form of complicity;
- Art. 246 also punishes these acts as from of complicity.

Cont'd

- The act of « aiding the offender in concealing the object used or meant to commit the offence” should not be treated as form of complicity since an assistance given to the offender or accomplices after the commission of the crime should not be treated as a form of complicity.
- In the philosophy of criminal law, this should be treated as a separate offence.

Cont'd

- a person who steals, conceals or deliberately destroys in any way objects that may be used in offence investigation, discovery of evidence or punishment of offenders;

II. Sentences for offenders, co-offenders and accomplices

- Art 84 as amended in 2023: The offender, the co-offender, and accomplice.
- Punishment determined in accordance with the law

Cont'd

- Accomplice can be prosecuted and punished even though the offender is not personally punishable due to causes such as the death, insanity, minority or failure to identify the offender
- Exemption due to relationship up to 2nd degree for petty offence and misdemeanor

III. Joining in: not a form of criminal participation

- Assume that X, acting either alone or together with others in the execution of a common purpose, has already wounded Y **lethally**. Thereafter, while Y is still alive, Z who **has not previously agreed** with X to kill Y inflicts a wound on Y, which however, **does not hasten Y's death**. Thereafter Y dies as a result of the wound inflicted by X.

Cont'd

- The person in Z's position is referred to as a **“joiner-in”**, because he associates himself with others' common purpose at a stage when Y's **lethal wound** had already been inflicted, although Y was then still alive.
- Suppose the **absence of a common purpose** between Z and X.
- **Of what crime must he be convicted?**
- *Motaung* 1990 (4) SA 485 (A) the South African Court of Appeal: considered it as attempted murder.

Cont'd

- **NB: other modes of criminal liability such as** command liability are especially used in international criminal law.
- Command responsibility requires three elements:
 - ✓ the existence of a superior-subordinate relationship of effective control;
 - ✓ the existence of the requisite *mens rea*, namely that the commander knew or had reason to know of his subordinates' crimes; and
 - ✓ that the commander failed to take all necessary and reasonable measures to prevent or punish the crime or to submit the matter to the competent authorities for investigation and prosecution

CHAPTER 9. INCHOATE OFFENCES: ATTEMPT, CONSPIRACY AND INCITEMENT

- Inchoate offences: a person may be guilty of an offence even though the crime that he wanted to commit was **never completed**.

These are:

- Attempt
- Conspiracy
- Incitement

I. Attempt

1. Definition

A person is guilty of attempting to commit a crime if, intending to commit that crime, he engages in conduct that **is not merely preparatory** but has reached at least the **commencement of the execution** of the intended crime, and failed in his purpose only because of circumstances beyond his control

Cont'd

2. Constitutive elements of punishable attempt

a. **Unequivocal acts constituting the beginning of the commission of an offence**

- The conduct must be more than **acts of preparation**
- There must be acts constituting commencement of the commission of an offence and leading to its execution
- The challenge is to know when does an act cease to be merely preparatory

Cont'd

- Theories explaining this situation:
- Embarking upon the crime proper test: *Jones* case, the Court upheld D's Conviction of attempted murder where he got into V's car and pointed a loaded sawn-off shot gun at him, despite an argument by D that he had at least three acts to do: remove the safety catch, his finger on the trigger and pull it

Cont'd

- The unequivocal act theory which holds that before a person is convicted of an attempted crime he must have committed an act of such a nature that the only reasonable inference which can be drawn from a consideration of the act is that it was committed with the intention of going on to commit the crime attempted.

Cont'd

- The stage theory: requires that the accused has reached a certain stage in the commission of his intended crime, characterised as the beginning of the commission of the crime

Cont'd

- Rwandan Penal Code seems to have adopted the unequivocal act theory in its article 21 which clearly states that an attempt is punishable when the plan to commit an offence has been demonstrated by observable and unequivocal acts constituting the beginning of the commission of the offence and leading to its execution; and that were suspended or failed in their purpose only because of circumstances beyond the offender's control.

Cont'd

- *Eg: Mukantagara case*
- The fact that *Mukantagara* paid the money to bring *Ndwaniye* (the Victim) from *Nyaruguru* to Kigali, the co-accused has already brought the victim to Kigali and the payment of advance to both *Nsanzimana* (Co-accused) and *Nyirinkindi* who would kill *Ndwaniye*, these constitute the acts of preparation and thus the act is qualified as attempted aggravated murder (*assassinat*). In the view of the court, these acts were beyond mere acts of preparation.

Cont'd

b. Absence of voluntary withdrawal (or failure to achieve the purpose due to circumstance beyond offender's control)

- The execution must have been unsuccessful because of circumstances beyond the control of the offender;
- *Mukantagara* case: The Court held that it is due to the circumstances beyond their control since *Nyirinkindi* abandoned their criminal plan and informed the police which arrested them before killing Ndwaniye.

Cont'd

c. Felony or misdemeanour

In Rwandan criminal law, attempt to commit a contravention (infringement) is not punishable

Punishment of attempt

- An attempt to commit a felony or a misdemeanour is punishable with one half (1/2) the penalty for the felony or misdemeanour itself.
- For the offence punishable by the penalty of life imprisonment, the attempt is punishable by imprisonment for a term of twenty-five (25) years.

3. *Types of attempt*

a. Completed attempt

- In this type of situation **X does everything he can to commit the crime**, but for some reason the crime is not completed, for example:
 - Where X fires at Y but misses

b. Interrupted attempt

- X's actions reached the stage beyond mere acts of preparation
- They are **acts of execution**,
- they are **interrupted**, so that the crime cannot be completed.

Cont'd

(c). *Attempt to commit the impossible*

- Factual impossibility: it is impossible for X to commit or complete the crime, either
 - the **means** he uses **cannot bring about the desired result. Eg: Shooting with unloaded gun without knowing it**
 - it is impossible to commit the crime in respect of the particular object of his actions. Eg: shooting an already dead person

Cont'd

- Legal impossibility:
- A “**putative crime**” is a crime which does not actually exist but which X thinks does exist
- Eg: X tries to import computer accessories in Rwanda “without paying taxes while there are exonerated.

II. Incitement

1. Incitement to commit a crime as a form of complicity
2. Incitement to commit a crime as an “inchoate offence”

1. Incitement to commit a crime as form of complicity

- This is provided for in art. 2 (5) (a,b,c) which defines an accomplice as:
- “ ... a person who **incites** the offender”.
- See Chap. 8

2. Incitement to commit a crime as an “inchoate offence”

- In limited situations, incitement is punishable as inchoate offence, i.e. incitement is punishable even if it is not followed by any effect.
- See, for example **art. 93(3) PC which punishes incitement to the crime of genocide.**

Cont'd

- *Mugesera case before Rwandan courts;*
- This also punished before international courts and tribunals(see the Hassan Ngeze case before ICTR)

3. Incitement to commit suicide: not an inchoate offence

- According to art 116, **suicide is not a crime** and attempt to commit suicide is also not punishable. However, since a person who incites another person to commit suicide (which is not a crime), is punishable such crime cannot be considered as an “inchoate”.

III. Conspiracy

1. Conspiracy to commit a crime as an inchoate offence
2. Conspiracy to commit some crimes
3. Incitement to commit conspiracy

1. Conspiracy to commit a crime as an inchoate offence(art. 20 PC)

- Definition: Conspiracy is an agreement between two or more persons to engage in the commission of an offence by one or more of them.
- It requires :
 - Existence of an agreement between two or more persons
 - The goal of the agreement is the commission of an offence by one or more of the conspirators
- It is punishable by the same penalty as the intended offence.

2. Conspiracy to commit some crimes

- The Penal law also punishes specific conspiracies defined in specific provisions.

Eg:

- Conspiracy to Offence against the established Government or the President of the Republic: Art. 203.
- Conspiracy to commit genocide: art. 93(1)

3. Incitement to commit conspiracy

- Art 203(2) punishes a person who incites others to conspire to commit offence against the established Government or the President of the Republic is punishable as inchoate offence.

Chapter 10. Sentencing

- Purpose of punishment
- Sentences
- Factors for determination of sentence

I. Purpose of the punishment

- **Retribution:** It refers to the restoration of the legal balance disturbed by the perpetration of the offence.
- This implies that the penalty must be **proportionate** to the seriousness of the offence and the guilt of the offender (see ICTY, Prosecutor v. Krajinisk, Appeal Judgment, para 775)
- Proportionality is very important in criminal law

Cont'd

- **Deterrence:** means that the sentence should be adequate in order to discourage a specific offender to commit the same offence again.
- The punishment also plays a deterrent purpose towards the persons other than the offender.
- The Deterrence and retribution refer to proportionality between the offence and the penalty imposed.
- If the sentence is too lenient, it might not deter the offender.

Cont'd

- However in tailoring the sentence, the court should **not give too much weight** to deterrence or retribution because this could result in a **disproportionately severe** penalty.
- Judges should consider other personal circumstances of the accused in order to rehabilitate him

Cont'd

- **Prevention:** individual and general affirmative prevention aimed at influencing the legal awareness of the accused, the victims, their relatives, the witnesses, and the general public in order to reassure them that the legal system is being implemented and enforced;

Cont'd

- **Rehabilitation:** Rehabilitation serves the purpose of reintegrating the offender into society.
- This should neither play a predominant role since it can lead to a lenient sentence as well.

Cont'd

Conclusion:

- The sentencing judge must try to find a balance between delivering **retribution** for the community; **detering** other would-be criminals from breaking the law; **rehabilitating** the offender to **prevent** re-offending and protecting the community from the harms of anti-social, criminal behaviour.

II. Sentences

1. Types of sentences

- Main sentences: Main sentences are those sentences, which may exist by their own without being accompanied by other sentences
- Additional sentences or Accessory sentences: whose existence depends necessarily on the existence of a main sentence

Cont'd

- Complementary sentences attached to main convictions without being pronounced by the judge. Example: the loss of civil rights attached automatically (by the law) to life imprisonment

1.1. Main sentences

a. Imprisonment

- Life imprisonment
- Fixed term imprisonment: 1 day- 25 years, except some cases specified by the law (eg: the case of recidivism and concurrence of offenses)

NB: Life imprisonment with special provisions was abrogated.

Cont'd

b. The sentence of fine

- The sentence of a fine consists of a payment of an amount of money that goes into a state treasury
- May be Exclusive, optional or cumulative
- The sentence of fines is different from damages and court fees.
- It is imposed individually for each convict

Cont'd

c. Community service

- It consists of executing public interest works.
- Applicable to misdemeanor and petty offences only
- For misdemeanor, only $\frac{1}{2}$ is served as community service
- For petty offence there is possibility of converting the whole imprisonment period into community service

1.2. Additional sentences

a. **The special confiscation**

- The things or goods that constitute the body of the offence (*corpus delicti*) or which served to commit it or were produced by the offence may be confiscated.
- Only for felonies and misdemeanors
- The property subject to confiscation must belong to the convicted person.
- If such items do not belong to the convict or if the offence committed is a petty offence, the confiscation is ordered only in cases specified by the law.
- General confiscation is prohibited.

Cont'd

b. Ban on residence or compulsory residence in a particular location

- The ban on residence: prohibiting a convicted person from being in certain defined places
- Compulsory residence: ordering a convicted person to reside in a certain place

Cont'd

Conditions:

- Imprisonment of more than 5 years or
- 2 consecutive imprisonment sentences of at least 6 months within 5 years
- Duration: 1 year maximum.

Cont'd

c. Publication of imposed penalty

- The court may order publication of a penalty imposed as an accessory penalty in addition to the principal penalty of not less than five (5) years of imprisonment

Cont'd

d. Deprivation of civic rights

- Additional to the principal penalty of imprisonment equal to or more than five (5) years.
- See Rights under article 42
- A person shall not lose all the civic right except in case of a penalty of life imprisonment.
- Duration of the loss of civil rights cannot exceed 10 years.

3. Factors taken into account in the determination of the sentence

- Aggravating circumstances
- Recidivism
- Mitigating Factors (Circumstances)
- Concurrence of offences

3.1. Aggravating circumstances

- Those circumstances **expressly determined by the law** which, attached to the offence (**objective aggravating circumstances**)
- Or to the offender (**subjective aggravating circumstances**)
- **Binding upon the judge**
- Increase the gravity of penalty as determined by law

Cont'd

- Unlike mitigating circumstances, the prosecutor must prove aggravating circumstances beyond reasonable doubt (Čelebidi, A J para 763; Kajelijeli, A J para 294)

Cont'd

Other aggravating circumstances which may not be provided by the penal code

- The scale of the crimes;
- The length of time during which the crime continued;
- The age of victim(s);
- The number of victims;
- The suffering of the victims;
- The nature of the perpetrator's involvement;
- Cruelty of criminal act
- Discriminatory intent;

Cont'd

- Abuse of power by the perpetrator; and
- The perpetrator's position as a superior,
- the sexual, violent, and humiliating nature of the acts and the vulnerability of the victims
- the motive of the offence such as committing murder in order to silence an embarrassing witness, etc
- the effect of the crimes on the victims, etc

3.2. RECIDIVISM (Art. 52-53 penal Law 2018)

Conditions:

For Felony

- Recidivism occurs at any time when a person reoffends after conviction in a final judgment.

For misdemeanor:

- Previous conviction of at least 6 months
- New offence within 5 years
- No recidivism in case of amnesty or rehabilitation
- No recidivism if the person who was sentenced for a military offence re-commits a felony or a misdemeanour except if the previous penalty imposed for an offence that may be punished by ordinary penal laws.
- **Punishment:** the maximum sentence provided for the crime shall be pronounced, and may even be raised to the double.

3.3. Mitigating factors

i. Mitigating excuses (or Mitigating circumstances prescribed by law)

They are:

- Provided by the law
- Binding upon the judge
- Either **general**(when they are applicable to all offenses: Minority and provocation) or **specific**(When applicable to some offences provided within the law)

a. Minority

- Minority: from 14 – below 18 years .
- Minor below 14 years: Absolute excuse(complete defence)- No criminal Liability
- See art. 54 for modalities for mitigating the sentences

Cont'd

b. Provocation:

Elements:

The Penal code leaves it to the discretion of the judge

In *Ndayisaba Disvald* Case: The supreme Court held that it is considered as provocation in case where two persons were fighting each other(Assume X Fights against Y) and one of the two(assume Y) gave up the fight and went back home. X followed him at his home and when he arrives there he started gravely beating his home mates while they were not involved in previous fighting.

Cont'd

- Provocation must be immediate:
Mbanzamihigo case: the act of provocation that occurred in the past can be qualified as revenge.
- See article 57 PC for mitigation of the sentence
- NB: No penalty in case of petty offence

c. Specific circumstances provided by the law for certain offences

Article 216 PC:

Any person who threatens State security benefits from the mitigating circumstances if:

- the denunciation comes after the commission of the offence but before commencement of criminal investigations;

Cont'd

- After the criminal investigations commence, one of the offenders assists in the arrest of co-offenders and accomplices or other persons who committed other similar offences or offences with the same gravity

Cont'd

- ii. **Mitigating circumstances decided by the judge**
 - mitigating circumstances are left to the discretion of the judge. He/she assesses their admissibility.
 - Are prior, during or after the commission of the crime
 - Are not binding upon the judge
 - The reasons for acceptance of mitigating circumstances must be stated in the judgment.

Cont'd

- Some mitigating circumstances provided by article 59 PC:
 - 1° Guilty plea before commencement of prosecution
 - 2° the accused reports him/herself to a competent Court before or during the pre-trial proceedings: **MPITABAKANA case**

Cont'd

3° Guilty plea at the outset of the trial

Note: guilty plea at the appeal level is not considered as a mitigating circumstance.

Prosecution v. MUNYEMANA Eric alias
Nyinya, N° RPAA 00048/2021/CA of
22/07/2022, para22

4° the offence has minor consequences: see
Mukantagara case

cont'd

NB:

- ✓ It is important to note that this list is not exhaustive but indicative
- ✓ There are several other circumstances which are left to the appreciation of the judges:
 - a state of intoxication,
 - mental stress or partial insanity.

Cont'd

- Good character;
- Age;
- Comportment in detention;
- Family circumstances;
- Exceptionally poor health.
- Indirect and limited participation
- The offender's prior criminal record the
- Motive for committing the offence
- Personal situation of the offender

Cont'd

- **Note:** Unlike the mitigating excuses, the mitigating circumstances are not binding upon the judge (see Nyirangondo case before supreme court)
- In ***Nyirangondo case***, the Court noted that the judge is not bound to mitigate the sentence even if there is sincere guilty plea. The judge may not mitigate if he/she finds that there are grounds indicating that mitigation is not adequate.

Cont'd

- In this case, the Court refused to mitigate the sentence despite the guilty plea of the accused. The Court held that the accused does not deserve mitigation (though her guilty plea was accepted as sincere) due to the grave malicious intent of the accused in the commission of the crime.
- With regards to refusal to mitigation due high level wickedness of the offender: See also Prosecutor v BIGIRIMANA Jean Bosco, case n° RPAA 00017/2021/CA of 15/07/2022.
- Art. 49 Pc requires to also consider the gravity of the offence in determining the offence.
- **Another point:** The superior court can reduce despite the fact that the lower already reduced the sentence(**Tuyisenge case before the Supreme Court**)

Cont'd

- **In 2019, Modalities for reduction of sentences** were governed by article 1 of Law n° 69/2019 of 08/11/2019 amending Law n° 68/2018 of 30/08/2018 determining offences and penalties in general.
- This law only limited the mitigation of the sentence to the minimum of the provided sentence. However, The Court had ruled that It was within the power of the Court pronounce a punishment below the minimum provided by the Law . (see *Prosecution v UWAYEZU Damien, N° RPAA 00131/2021/CA 22/07/2022*).
- The law was also prohibiting reduction of the sentence for certain offences: the crime of genocide and some cases of child defilement (see art. 133 PC)
- The Supreme Court has however declared unconstitutional the art. 133, para 5 of the 2018 law determining offences and penalties in general, which was prohibiting mitigation in case of child defilement followed by cohabitation (*Judgment RS/INCONST/SPEC 00003/2019/SC*).
- This is also the cases for some other articles such as at. 133, para 3 RS/INCONST/SPEC00005/2020/CS-RS/INCONST/SPEC 00006/2020/CS of 12/02/2020 by KABASINGA Florida & NIYOMUGABO v. Government of Rwanda
- See also *Prosecutor v. NDAYISHIMIYE Emmanuel, N° RPAA 00194/2021/CA*.

Cont'd

- Currently, Article 2 Law n° 059/2023 of 04/12/2023 amending Law n° 68/2018 of 30/08/2018 determining offences and penalties set new modalities for Reduction of penalty in case of mitigating circumstances decided by a judge

For exemple Article 2 (b) states:

a fixed-term imprisonment from 6 months and above may be reduced but it cannot be less than a half of the minimum sentence provided for the offence committed

3.4. concurrence of grounds for judgment

Article 49(2):

- In the event of concurrence of grounds for judgment, the judge must consider the following while imposing a penalty:

1º aggravating circumstances;

2º mitigating circumstances.

Cont'd

In abrogated penal code, the order was:

- aggravating
- excusable
- recidivism
- Mitigating circumstances

Cont'd

- ***See for example Habukubaho case***
- Aggravating circumstance: aggravated murder against a 7 year old girl after defilement: Life imprisonment
- Excuse: minority: sentence reduced to 10 years
- Mitigating circumstances: Guilty plea. Sentence reduced to 7 years.

3.5. Concurrence of offences

- Concurrence of offences: It occurs when one person commits many offences.
- Concurrence of offence is either:
 - Ideal concurrence
 - Real Concurrence

a. **Ideal concurrence**

- Single act constitute several offences
 - Eg:** rape committed on a public road can be described as rape (art. 134 PC) and as a Public indecency (art.143 PC)

Cont'd

- Several distinct acts united by single criminal intent

Eg:

- Killing a guard (murder) in order to rob a supermarket (robbery).

Cont'd

b. Real concurrence of offences

- **Acts** which are materially distinct, followed one after another and constitute separate offences
- Committed by one Person

Cont'd

Sentences for concurrent offences

- Single acts with several qualifications: The judge imposes penalties provided for the most serious offence.
- Several distinct acts united by single criminal intent: The judge imposes the maximum penalty provided for the most serious offence.

Cont'd

- Real concurrence of offences, the judge imposes penalties for each offence and combine them, taking into account the following:
 - ✓ the penalty of life imprisonment outweighs all other penalties of imprisonment;
 - ✓ the combination of penalties of fixed-term imprisonment cannot be more than twice the maximum of the most severe penalty;
 - ✓ the combination of the sentences of community service cannot exceed two (2) years;

Cont'd

- The combination of penalties of fine cannot be more than twice the maximum of the most severe penalty;
- The combination of penalties of ban on residence or compulsory residence in a particular location or penalties of deprivation of civic rights cannot be more than twenty-five years (25).

CHAPTER 11 . CAUSES OF SUSPENSION AND EXTINCTION OF SENTENCES

I. GROUNDS FOR SUSPENSION OF SENTENCES

1. Suspended sentence
2. Release on parole
3. Presidential pardon

a. Suspended sentences

Definition :

- This allows the judge, when all the conditions provided for by the law are met, to grant a stay of execution by a motivated decision, of all or part of main or accessory sentences pronounced against an offender whose guilt is established.

Conditions (see article 3 of the law of 2023 amending article 64 of the law of 2018 on offences and penalties in General)

- No previous punishment of imprisonment exceeding 6 months
- **Imposed** principal penalty not exceeding five (5) years
- Must be motivated (or justified)
- The suspension period is between 1 year and 5 years

Cont'd

Voidance and Effects of suspended sentences (art. 65-66)

- The execution of a sentence is suspended
- The conviction is included in the criminal record
- In case of no conviction for felony or misdemeanor during suspension period, the suspension of sentence becomes void.
- Otherwise, suspended penalty and subsequently imposed one are combined and executed at the same time.
- The suspension not entail exemption from payment of the legal, damages and from the loss of civic rights as a result of the sentence.
- The loss of civic rights shall cease to have effect on the date the penalty is considered to be void.

Cont'd

b. Release on parole (Article 232-238 of the 2019 Law on criminal procedure)

Conditions:

- if he/she sufficiently demonstrates good behaviour and gives serious pledges of social rehabilitation;
- if he/she suffers from serious and incurable disease approved by a medical committee composed of at least three (3) recognized doctors;
- if he/she has already served his/her penalty for the period of time provided by the law as indicated in next slide.

Cont'd

- 1° if he/she was sentenced to a term of imprisonment not exceeding 5 years and has served at least one fourth ($1/4$) of the penalty;
- 2° if he/she was sentenced to a term of imprisonment more than 5 years and has served at least one-third ($1/3$) of the penalty;
- 3° if he/she was sentenced to life imprisonment, he/she may be granted release on parole only after serving at least 15 years

See article 16 of the law of 2023 amending article 233 of the criminal procedure law of 2019

Cont'd

Procedure

- A provisional release of a convicted person is requested to the Minister in charge of justice through the Commissioner General of Rwanda Correctional Service.
- An applicant for release on parole who is detained in a military correctional facility applies to the Minister in charge of justice for release on parole through the Minister in charge of defence.

See the mentioned articles for details and article 16 of the law of 2023 amending article 233 of the criminal procedure law of 2019

Cont'd

Revocation of conditional release

- The Minister in charge of justice can, upon request by the Public Prosecution, revoke release on parole for the following reasons:
 - The person is sentenced for another offence
 - He/she shows gross misconduct
 - or He/she breaches conditions imposed by the order granting release on parole.
- In cases of emergency, the Public Prosecution can order that a person granted release on parole be re-arrested and immediately inform the Minister in charge of justice thereof.

Cont'd

- A person whose release on parole is revoked must serve the whole or part of the remainder of the penalty to be served at the time of release on parole being combined with any other penalty that can have been subsequently imposed on him or her.

Cont'd

3. Presidential Pardon (see art. 70 PC and 227-231 of the Law of 2019 relating to criminal Procedure)

Meaning and conditions

- The prerogative of mercy, whether collectively or individually can be exercised by the **discretion** of the President of the Republic and for public **interest**.
- It is granted upon application or his own initiative.
- The pardon discredits **total** or **partial remission** of the punishment imposed or its **commutation** into less severe punishments.
- Individual or collective
- Conditional or unconditional
- Applicable to principal and accessory sentences

Cont'd

Effects of presidential pardon

- Extinction of all or any of the penalties imposed on the convict or replacement of them with less severe penalties
- It does not extinguish accessory penalties that are not expressly specified in the pardon order.
- The pardon does not extinguish the effects of conviction such as those related to
 - ✓ recidivism,
 - ✓ suspension of penalty in case of execution and prosecution for new offences
 - ✓ compensation such as restitution of property and payment of damages.

Cont'd

Procedure

- Application for presidential pardon is made in writing and addressed to the President of the Republic through the administration in charge of correctional services if the applicant is in prison, with a copy to the Minister in charge of justice.
- This application must be accompanied by the report from Commissioner General of Rwanda Correctional Service.

Cont'd

- Collective pardon is requested by the Minister in charge of justice after presenting justifications.
- The request must also be accompanied by the Report of the Commissioner General of Rwanda Correctional service.

II.GROUNDS FOR EXTINCTION OF A SENTENCE

1. Death of the convict

- Sentence is extinguished by death of offender
- Criminal liability is personal
- Civil damages are not extinguished

2. Execution of the sentence

Cont'd

3. Prescription of sentences (see art. 75-82 PC)

- A sentence is not executed within a given period, it becomes prescribed and cannot be executed anymore.
- Additional penalties shall be prescribed after the same period of time as the principal penalties.

Cont'd

- Interruption of prescription: arrest and detention
- Suspension of prescription (non-execution due to reasons arising from law or force majeure)
- Penalties for imprescriptible offences are not subject to prescription

Cont'd

4. Amnesty (art.68-69 PC)

- Amnesty extinguishes the penalty and the consequences of the offence.
- The sentence is extinguished in the sense that a sentenced person who was in prison is immediately released.
- Amnesty does not extinguish civil and disciplinary action.

CHAPTER 12 . CAUSES OF EXTINCTION OF CONVICTION

1. Rehabilitation
2. Amnesty
3. Abrogation of criminal law ?

1. Rehabilitation

Rehabilitation

The conditions of rehabilitation are the following:

- the sentence must have been executed, it must have been subject to remission or prescribed;
- a period of 5 years must have expired since the definitive conviction for a fine and the day of the extinction or from the day of the conditional release in case of the sentence of imprisonment. For recidivists or those whose sentences are prescribed, that period is of 10 years .
- during the period, the convicted person must have constantly given the proof of a good behavior .

Cont'd

Procedure

- A convicted person shall apply for rehabilitation in writing to the High Court or the Military High Court for cases tried by military courts
- The Court makes a ruling on the arguments of the public prosecution within a period of two (2) months after hearing or summoning the applicant or his or her counsel in accordance with the law
- When the application for rehabilitation is rejected, it cannot be re-submitted before the expiration of **two years**
- Decision is not appealable.

Effects

- The rehabilitation erases the conviction and terminates the effects of any incapacity, for the future, which resulted from the conviction

Cont'd

Revocation

- Rehabilitation is **automatically cancelled** if, within a period of five (5) years, the rehabilitated convict commits an offence punishable by an imprisonment equal to or exceeding five (5) years and for which he or she has been convicted and sentenced.

2. Amnesty

- amnesty extinguishes an offence.
- When there has been conviction, it removes the conviction and all the consequences arising from the conviction

Chapter 13. Prescription

1. Prescription of criminal action

- ✓ Ten (10) years for felonies;
- ✓ Three (3) years for misdemeanours;
- ✓ One (1) year for petty offence
- The crime of genocide, crimes against humanity and war crimes, corruption, child defilement are not subject to prescription
- The date when the prescription start depends on the type of offence, i.e instantaneous, continued, continuous, etc

Cont'd

2. Interruption and suspension of prescription of criminal action

Interruption

- Interrupted by acts of investigation or prosecution measures, if they are carried out within the time prescribed by the Law on criminal Procedure.
- The prescription starts to run again from the day of the last act

Cont'd

- **Suspension**
 - Suspended whenever the exercise of the action is hindered by an inevitable obstacle resulting from the law or *force majeure*
 - When such an obstacle is removed, the prescription time suspended from the day of the occurrence of the obstacle to its removal continues to run
- For prescription of sentence, it has already been discussed

Question on sentencing

1. During the night of 10th January 2023, Mr Bob, a 25 years old man, went to steal money from a rich man named Eduard. When Bob arrived at Eduard's house, he broke the door and entered Eduard's room, assaulted him by a sharp knife and grabbed his 10 million FRW found in his bedroom. Eduard, who was seriously injured, was rushed to hospital but later died after two days. The Medical report indicated that he died due to the wound inflicted by Bob. The case was reported to investigators. During investigations, investigators received another complaints of fraud (art. 174) committed on 3rd January 2023. Investigators later found that the accused has been punished for 3 years for the offence of assault in January 2016 and served this sentence up to January 2020. At the beginning of the trial, Bob pleaded guilty for all alleged offences and requested the Court for a suspended sentence.

- *Assume Bob is convicted for all these offences; determine the adequate sentence in Bob's case?*