**Session 1**

**Introduction: International Criminal Justice**

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# **CRYER – CHAPTER 2: THE AIMS, OBJECTIVES AND JUSTIFICATIONS OF INTERNATIONAL CRIMINAL LAW**

## **Introduction: Why does international criminal law need justifications?**

International criminal law needs to be justified for a number of reasons:

1. The assertion of criminal jurisdiction over a person, and with it the possibility of the deprivation of person’s liberty or other interests, is one of the most coercive activities any society can undertake

* Requires justification
* Same as domestic society

1. Criminal law is a tool to achieve certain goals, and not necessarily the best one

* Goals like the telling of history of mass crimes, distinguishing from group responsibilities, reconciling societies and capacity-building in domestic judicial systems
* Although situations of international criminal law are different from domestic law (involving only mass criminality), it is often aimed to be implemented by domestic legal systems

But we need to make sure, we do not overestimate the expectation for what criminal law can and should do, because then disenchantment and depression will set in when these goals are not being met.

## **What international criminal justice is for**

There are two approaches to justifying punishment:

* Teleological or consequentialist: forward-looking
* Focus on the consequences of punishment

1. Deterrence: international criminal law and punishment to prevent both the offender and the population more generally from engaging in prohibited conduct
   * Utilitarian: focus on (future-related) benefits of prosecution
   * ICTY Appeals Chamber in Nikolić: During times of armed conflict, all persons must now be more aware of the obligations upon them in relation to fellow combatants and protected persons, particularly civilians. Thus, it is hoped that the Tribunal and other international courts are bringing about the development of a culture of respect for the rule of law and not simply the fear of the consequences of breaking the law, and thereby deterring the commission of crimes. One may ask whether the individuals who are called before this Tribunal as accused are simply an instrument to achieving the goal of the establishment of the rule of law. The answer is no. Indeed, the Appeals Chamber has held that deterrence should not be given undue prominence in the overall assessment of a sentence (paras. 89-90)
     + Assert that deterrence works at the level of rational calculation, but at the preliminary stage, where people are (consciously or otherwise) setting up the available options: where people simply think that certain options are not (in part, morally) open to them, they do not enter the second calculation of their costs and benefits
   * ICC Rome Statute Preamble, para. 5: the parties are determined to put an need to impunity for the perpetrators of these crimes and thus contribute to the prevention of such crimes.
   * Some (mostly anecdotal) evidence for the deterrence function of international criminal law, but evidence is mostly mixed
   * Critiques
     + There is nothing inherently in utilitarianism that prevents exceedingly heavy punishments or punishment of the innocent
       - May actually lead to more prevention
     + Treats people merely as a means to an end fails to recognize individuals moral worth as human beings
     + Treat people as rational calculators
       - Not completely / always the reality of the type of decision-making that often precedes the decision to commit crimes
2. Incapacitation: preventing crimes by keeping the relevant person in detention
   * Linked to individual deterrence
   * Utilitarian justification
   * Not great influence on international criminal law, exception: Judge Röling Tokyo IMT
     + the justification for prosecuting aggression, in spite of the fact that it was not previously criminal, was that the defendants were dangerous and their influence on Japan had to be excluded by their imprisonment
   * critiques: rely on determining who will reoffend and who will not, do not focus on what has been done, but in effect, punish people for what they might do in the future
3. rehabilitation: reformation of the offender
   * not large impact in international criminal justice, mostly because of the believe that the main perpetrators of international crimes are not the appropriate beneficiaries of rehabilitation
     + ICC Trial Chamber in Al Mahdi: the extent to which the sentence reflects the culpability of the convicted person addresses the desire to ease that persons’ reintegration into society, although, in particular, in the case of international criminal law, this goal cannot be considered to be primordial and should therefore not be given any undue weight (para. 67)
   * But sometimes supported/mentioned, especially in relation to the implementation of sentences:
     + ICTY Trial Chamber in Erdemović: sentenced him to a relatively short five-year period of imprisonment on the basis of his corrigible personality and that he was reformable and should be given a second chance to start his life afresh upon release, whilst still young enough to do so (para. 16)
4. Denunciation / education (or communication): criminal procedures and punishment are an opportunity for communicating with the offender, the victim and wide society the nature of the wrong done
   * Positives
     + Designed to engage offenders, and attempt to make them understand what was wrong with what they have done, whilst also reaffirming the norm in the community and educating society about unacceptable nature of the conduct condemned
     + Reaffirms the faith in the rule of law
     + Long-term view
   * Criticisms
     + international criminals are not part of a relevant normative community with whom punishment is meant to communicate, because their acts or attitudes make it impossible or unlikely that they can or will heed the message
       - however, some contend that the relevant normative community to which a person should belong is humanity rather than any thicker conception of community
     + when broad principles of liability which stretch individual culpability, such as joint criminal enterprise, are used, there are difficulties relating to what the moral message is
   * ICC Trial Chamber in Al Mahdi: part of retribution is ‘an expression of the international community’s condemnation of the crimes’ (para. 67).
   * The ICTY Appeals Chamber in Kordić and Čerkez: “the educational function ... [which] aims at conveying the message that rules of international humanitarian law have to be obeyed under all circumstances. In doing so, the sentence seeks to internalise these rules and the moral demands they are based on in the minds of the public.” (paras. 1080-1)
   * Where specific international crimes reflect a relatively recent moral consensus on point, the educative function of criminal law may play a considerable role
     + Where people are unaware of prohibitions, they are less likely to live up to them
     + Example: the prohibition of recruitment and use of child soldiers
   * Relevance of expressive function of punishment:
     + The fact that there are lively debates over whether the term genocide may be applied to certain events implies that the expressive function of punishment and labelling is important in international criminal law
     + ICTY Appeals Chamber in Krstić: …These requirements [for genocide] – the demanding proof of specific intent and the showing that the group was targeted for destruction in its entirety or in substantial part – guard against a danger that convictions for this crime will be imposed lightly. Where these requirements are satisfied, however, the law must not shy away from referring to the crime committed by its proper name (para. 36-7)
   * Related to educative function, function of international criminal justice is to highlight that despite their extraordinary scale and nature, international crimes are still crimes
     + So, it is better to ensure that international criminal law’s utilization is considered normal, rather than needing separate justification from criminal law in general

* Deontological: backward-looking
* Focus on the crime itself

1. Retribution: offenders deserve punishment for what they have done (moral necessity)
   * Focus on perpetrator: necessary to punish those who have violated societal norms
   * Irrespective of possible future benefits: treating offenders as a means to another’s end is to fail to respect them as full, autonomous persons worthy of recognition as rational moral agents
   * ICC Appeals Chamber approach in Al Madhi: it is not to be understood as fulfilling a desire for revenge, but as an expression of the international community’s condemnation of the crimes, , which, by way of imposition of a proportionate sentence, also acknowledges the harm to the victims and promotes the restoration of peace and reconciliation (para. 67).
   * Positives
     + Reflects a fair and balanced approach to the exaction of punishment for wrongdoing: penalty imposed must be proportionate to wrongdoing
   * Issues/negatives:
     + can punishments for international crimes really be proportionate to the levels of wrongdoing and culpability involved?
       - Counter: maybe international criminal law and domestic law have different cardinal points, and retributive theory is as much about ordinal as cardinal proportionality, which does not mean that international criminal cannot give proportionate punishments, per se.
       - Cardinal proportionality: sets out basic level of severity of response
         * E.g., minimum and maximum punishments that a system can give for any crimes
       - Ordinal proportionality: sets where a crime sits on the level of severity within that system
     + We should move beyond a culture of blame
     + Demands punishment without regard to cost
     + Sets impossibly high standards, particularly in relation to disadvantages societies
     + Requires punishment even where it is pointless
     + Risk of moral absolutism and insensitivity to context

*There are two basic senses of proportionality: cardinal and ordinal.*

* *Cardinal proportionality sets absolute measures for punishment that is proportional to a given crime*
* *Ordinal proportionality requires only that more serious crimes be punished more severely than less serious crimes.*

## **Broader goals: What are some other goals for international criminal law on the societies of the crimes committed?**

All of these have a utilitarian and relate in some ways to the future of the societies in which international crimes are committed (teleological approaches):

* Vindicating the rights of victims: international prosecutions may engender a sense of justice having been done or ‘closure’ for victims
* On basis that seeing their prosecutors prosecuted will have that result or that the process of testifying will do so
* ICC Trial Chamber in Al Mahdi: the imposition of a proportionate sentence, also acknowledges the harm to the victims (para. 67).
  + Also ICC Statute various provisions for victims’ participation in proceedings and for reparations (chapter 18; readings 9)
* Criticisms:
  + Do criminal trials and punishment always have cathartic effects for victims
  + Many victims will not have the opportunity to see those people who committed the offences against them in trial (may be better in national courts)
* Recording history / truth telling
* The process of subjecting evidence to forensic scrutiny will set down a permanent record of the crimes that will stand the test of time
* Sometimes the ad hoc tribunals have disavowed an intention to write history and sometimes they have suggested trials should be structured to create a narrative useful to the post-conflict society (lengthy judgments)
* Criticisms: Criminal trials are not always the best place to write history
  + Distortions of history in Nuremberg and Tokyo IMTs
  + Difficult to write the whole history of a period without straying beyond the bounds of the criminal trial; goal is to try a specific person for specific conduct
  + Not the court’s or criminal law’s job to be the arbitrator between competing historical accounts
  + Acquittals are often seen as exoneration of both the defendants and the side on whose behalf they acted, which is not always true (this is the criminal standard of proof)
* Positives
  + The evidence brought before the tribunals can be very useful in combatting later denial of such crimes
* Post-conflict reconciliation: providing a sense of justice through prosecutions for international crimes can facilitate societal reconciliation and provide the preconditions for a durable peace
* No peace without justice
* No clear empirical proof
  + Reconciliation requires forgiveness: not easy
* ICC Trial Chamber in Al Mahdi: proportionate sentencing promotes the restoration of peace and reconciliation (para. 67)
* ICTY Trial Chamber in Plavšić: acknowledgement and full disclosure of serious crimes are very important when establishing the truth in relation to such crimes and together with acceptance of responsibility for the committed wrongs will promote reconciliation (para. 80)
* Criticisms
  + To require prosecutions will simply cause parties to conflicts to fight to the last
* Benefits of international trials (not international criminal law in general):
* International tribunals, with international judges, operating at a distance from the events themselves, are not as open to political manipulation or influence or unconscious bias; international judges being the best judges for international crimes
  + Criticized: claims of judges being biased & tribunals being too distant from their primary audience, the victimized community
  + Arguments: international judges and tribunals are representative of the relevant community affected by international crimes, namely the community of all humanity; and international judges are more familiar with the relevant law
* International tribunals are better able to investigate and prosecute offences which occur across State borders than domestic courts
  + Depends on the extent of the tribunal’s jurisdiction and investigatory powers, which differ between the courts
* International criminal court provides for uniformity in the process and law for punishing international crimes
  + Strongly linked to the merits of the law which becomes the standard (in harmonization of the law at domestic law, as promoted by the ICC Statute)

## **Other critiques of criminal accountability: what are critiques of criminal accountability and international tribunals?**

There are many critiques of criminal accountability, and international tribunals in particular:

* Expensive and budgetary control over international criminal tribunals exercised by their funders
* International tribunals do not really benefit the purported beneficiaries, the victims of the international crimes
* International tribunals (unlike most hybrid courts) are far away from the places where the crimes occurred and thus inaccessible to many of the victims
* Responding more to an international audience than the purported beneficiaries
* The further from the locus delicti that trials are held, the more likely it is that they will encounter domestic resistance there, in part because of misrepresentation of their work and allegations of bias
* International tribunals tend to focus on those most responsible that most victims will not sea their immediate oppressors punished
  + In situations of large-scale commissions, it is, however, difficult to imagine any criminal justice system that could fulfil the task of ensuring that all international criminals were punished
* Is international criminal law an adequate mechanism to comprehend events involving international crimes, particularly large-scale international crimes like genocide
* International criminal law concerns only individual liability which is only part of the answer: individual and collective responsibility is mixed in most international crimes
* Prosecutions of international crimes are designed to legitimate those that create them (powerful states)
* Prosecutions can be used by states and successor governments to attempt to make the point that they are morally different from those on trial, even where there are international crimes that can be laid at their door too
* Used to cover unwillingness to take more decisive action
* Substantive international criminal law fails to deal with some conduct very worthy of censure, thus ironically providing some form of perceived legitimacy for it (selective justice)
* International criminal justice and international tribunals suffer from selective justice
* Selective justice is a problem from the point of view of the rule of law, and it can undermine many of the justifications of punishment
  + Deterrence and retribution, for example: potential offenders take the view that they may be able to obtain exemption from prosecution and lessons that may be taught by international criminal law become confused and equivocal
* Some go further: international criminal law is a Western conduct and is imposed on the other societies
* By using custom rather than treaties, the ad hoc Tribunals have preferred the interests of powerful states, which may have more weight in the creation of custom
* Post-colonial: international prosecutions are instituted mainly against citizens of states that are weak actors in the international arena or fail to enjoy the support of powerful nations
  + Related to selectivity arguments
* Decisions about what to do about international crimes are better left to national authorities

## **Answer to such critiques: How forward?**

A synergistic relationship between national and international approaches to international crimes is probably the most helpful way forward

The answer to such critiques is not to abandon punishment altogether, but to work towards non-selective application of the law

Even some enforcement is probably better than none, and powerful states are finding it more difficult to resist claims for criminal accountability of those who commit international crimes as their officials or on their behalf

# **CRYER – CHAPTER 22: ALTERNATIVES AND COMPLEMENTS TO CRIMINAL PROSECUTION**

## **Introduction: should we have alternatives or complements to criminal prosecution / how to deal with the commitment of international crimes? / international criminal justice ?**

International criminal justice is about more than criminal prosecutions.

Other models have been suggested for dealing with international crimes, because criminal prosecutions does not all things well, some even doing very badly.

Not all of them are mutually exclusive, and indeed there is currently much debate on sequencing or responses to international crime, where different responses are adopted over time to different situations, depending on their feasibility

Moreover, just because other mechanisms perform certain roles in a fashion that prosecutions cannot, does not mean that they are necessarily the most appropriate response to international crimes in any particular situation.

Furthermore, practical limits such as funding, political possibility and available infrastructure, should be kept in mind when dealing with international crimes, especially because international criminal justice often deals with transitional societies or societies emerging from conflicts (but not always, many stable, democratic states also have nationals, including state officials, who have committed international crimes). On the other hand, however, it must be noted that the language of necessity, appropriateness or feasibility is open to abuse, and it often ignores the broader aspects of international crimes.

One of the reasons which may justify a separate regime of international criminal accountability is that crimes which are thought to affect all humanity need to be dealt with sensitively as to both the national and international effects of such crimes

## **Amnesties**

### ***What are amnesties?***

An amnesty = an extraordinary legal measure whose primary function is to remove the prospect and consequences of criminal liability for designated individuals or classes of persons in respect of designated types of offences irrespective of whether the persons concerned have been tried for such offences in a court of law.

* Not all are express
* From being granted by regimes to themselves to being voted upon by the population
* Blanket amnesties: prevent legal proceedings against all persons without distinction
* Some require certain conduct

### ***International law and amnesties: Are amnesties lawful?***

Amnesties are always unlawful

* Contrary to the duty to prosecute international crimes
* Difficult to prove a duty to prosecute every instance of an international crime on the basis of customary law, human rights obligations, or the jus cogens prohibitions that are encapsulated in parts of international criminal law
  + IACtHR: This Court considers that all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law (Barrios Altos (Chumbipuma Aguierre et al. v. Peru, para. 41)
* Is there an exception to any existing duty to prosecute when an amnesty is thought necessary to re-establish peace
  + Human rights bodies have not been very sympathetic to such claims, and are taking more and more measures to require, and oversee, prosecutions
  + ICTY Trial Chamber in Furundžija: jus cogens prohibitions on torture also delegitimizes any amnesty for torture (para. 155).
* Claims that amnesties are always contrary to international law are probably in advance of current law; complete prohibition not emerged, but the scope for lawful amnesties has narrowed
  + Although UN policy is formally against amnesties for international crimes
  + Summed up by the SCSL’s Appeals Chamber in Kallon and Kamara: that there is a crystallising international norm that a government cannot grant amnesty for serious violations of crimes under international law is amply supported by materials placed before the Court [but the view] that it has crystallised may not be entirely correct ... it is accepted that such a norm is developing under international law (para. 82)

### ***ICC and amnesties: Does the ICC allow or support amnesties?***

Preamble Rome Statute: the most serious crimes of concern to the international community as a whole must not go unpunished; state parties are determined to put an end to impunity for the perpetrators of such crimes; the duty of every state to exercise in criminal jurisdiction over those responsible for international crimes (paras. 4-6)

* Does not create legal obligations
* But, a failure to do anything about crimes committed by nations of, or on the territory of, States Parties to the ICC Statute could well lead to the ICC exercising its powers to prosecute offenders itself

A domestic amnesty binds neither the ICC nor its Prosecutor

* ICC’s Office of the Prosecutor took a tough line, refusing to take the possibility of an amnesty into account (Statement of the Prosecutor of the International Criminal Court to the Security Council, UN Doc. S.PV/ 6855)

ICC deciding on amnesty itself or taking account of amnesties:

* Possibility of the Prosecutor deciding to take account of amnesties may remain
* But the Office of the Prosecutor has taken the view that the interests of justice required the ICC to prosecute international crimes rather than refraining from doing so on political grounds
* Office of the Prosecutor: the drafters of the ICC Statute clearly chose prosecution as the appropriate response to international crimes (Policy Paper on the Interests of Justice)
* When Prosecutor is dealing with a matter, the issue is no longer about whether we agree or disagree with the pursuit of justice in moral or practical terms
  + It is the law and non-prosecution is a last resort
* ‘interests of justice; are not the same as the interests of peace, and the Office of the Prosecutor’s mandate does not cover the latter
* This is for political organs of the UN, like UNSC which has the power to defer investigations and prosecutions (Art. 16 of the ICC Statute)

### ***Domestic jurisdictions and amnesties: do domestic amnesties prevent other courts from prosecuting / are amnesties universally effective?***

Domestic amnesties do not bind States other than the granting state; legislation in one State does not alter the jurisdiction of another

* International organizations: no
* Appeals Chamber of the SCSL in Kallon and Kamara: it is not unlawful for the UN to ignore amnesties contained in the Lomé Peace Accord when creating the SCSL. Where jurisdiction is universal, a State cannot deprive another of its jurisdiction to prosecute the offender by the grant of amnesty. It is for this reason unrealistic to regard as universally effective the grant of an amnesty by a State in regard to grave international crimes in which universal jurisdiction exists. A State cannot bring into oblivion and forgetfulness a crime, such as a crime against international law, which other States are entitled to keep alive and remember (para. 67)
  + given its perilous status under international law and the fact that the Court was not part of the Sierra Leonean justice system
* Municipal courts in same jurisdiction: depends on domestic legal system and relation to international law (and amnesties)
* Over time within same jurisdiction: state practice can change
* Happens in majority of domestic decisions
* Could potentially set them aside or interpret them differently
* Third states and internationalized courts: not bound by other states’ domestic amnesties
* No right to set them aside or interpret them

### ***Appraisals of amnesties: Should we use amnesties??***

Why some argue yes:

* Amnesty helps bring an end to conflicts
* to insist on anything more is to condemn others to death or other serious human rights violations, as combatants and others will refuse to relinquish their weapons or power without promises of non-prosecution.
* Amnesties promote reconciliation between previously antagonistic parties and allow populations to move on from the past
* Not empirically proven, but forgiveness has accompanied amnesties in certain circumstances
* Others argue that society cannot move on from the past unless the principle of individual criminal responsibility is respected
  + No (lasting) peace without justice
* Reconciliation is not a simple notion

Why some argue no?

* Granting amnesties is like giving in to blackmail
* Fosters a culture of impunity
* Encourages the future commission of international crimes (undermines deterrent function)
* Warlords and political leaders capable of committing human rights atrocities are not deterred by amnesties obtained, but emboldened
* Amnesties do not lead to peace
* Especially when amnesty processes do not provide for relevations about what has been done, risk of increased denial or relevatization of international crimes (denial and forgetfulness)
* Refusal to acknowledge the suffering of victims, the extent of wrongdoing or forgetfulness of victims
  + Eradication or slippage
* Represents an ugly political compromise
* Between elites who bargain away the rights of victims with little regard for them
* Calls for transitional justice from below
  + Calls of those outside political elites are given greater respect
    - Although it is accepted that this can also be exclusionary
* Many do not like amnesties
* Other forms of amnesties that are not blanket, but require truth telling, apply to the less responsible or are democratically legitimated in the State are more likely to be acceptable

So amnesties not necessarily effective for reconciliation, but international law has not yet developed so fare as to prohibit all amnesties in all situations and there is some political support for them as well.

In spite of the fact that the language of forgiving and forgetting comes easier to the mouths of perpetrators than victims, there have been political defences of amnesties as being necessary measures in post-conflict situations, at least with respect to lower-ranking offenders, and where resources outstrip the possibility of prosecuting any more than a small number of defendants. As a result, amnesties and the criticisms of them are likely to continue to be a feature of responses to international crimes and the foreseeable future

## **Truth commissions**

### ***What are truth commissions?***

A truth commission = a body that: (1) is focused on the past, rather than ongoing, events; (2) investigates a pattern of events that took place over a period of time; (3) engages directly and broadly with the affected population, gathering information on their experiences; (4) is a temporary body, with the aim of concluding with a final report; and (5) is officially authorized by the state under review

Example: South African Truth and Reconciliation Commission

### ***Should we use truth commissions?***

Yes:

* May be better than prosecuting at achieving certain aims
* Acknowledging harm done to victims, truth telling (countering denials), providing a form of healing for victims, and providing a basis for societal reconciliation
* Especially where the clandestine nature of many of the offences means that they are difficult, if not impossible, to prove the relevant criminal standard
* Gets beyond the 'closing of ranks’ that can make prosecution of offences by those in close-knit groups, such as particular regiments or teams, so difficult
* People will be more willing to speak of their conduct if they are not being prosecuted for it
* Enable more victims to tell their story than is possible in a court

No:

* Truth commissions are usually only given a mandate to recommend action and are not normally given any authority to oversee or ensure its implementation
* Recommendations for reform not always taken up
* Their mandates and terms of reference are usually the outcome of negotiations between the relevant parties and, therefore, can reflect their relative power
* Some limitations to the reports they produce
* Unless there is some form of procedural protection for those giving evidence of admitting crimes, names cannot be stated
* Limited mandates sometimes
* So, sometimes able to tell only part of the story
* Quality of report depends on how good the information is that is available to the commission
* Can and do they reflect any form of objective truth and whether they can lead to an agreed history between old enemies
* General trend is towards broader mandates, which, whilst welcome at some levels, can stretch the limited resources of commissions
* Confessions can be limited
* Difficult to persuade perpetrators to testify about their role in repressions
* Difficult to persuade victims to speak about sensitive matters
* Confessions of perpetrators can be framed in a manner which amounts, in fact, to a form of denial
* Issue of the extent to which testimony and evidence-taking by a truth commission can be used in/for prosecutions before courts/tribunals
* Truth commission often requires people to incriminate themselves and, therefore, truth commission sometimes stand in place of prosecutions
* Courts and tribunals that are not from the home state of the truth commissions are not bound directly by any promise of confidentiality or non-use granted by the territorial state
* It is doubted whether truth telling does lead to reconciliation or an ability to move beyond the past
* Can truth alone achieve such a goal?
* Depends on what is reported on and who is included
* Also depends on attitude of perpetrators and engagement that they have with the process ranges from the full to the essentially grudging and formal
  + Some have used the truth and reconciliation hearings as political platforms
* Truth commissions are both high risk and inherently political enterprises
* Sometimes governments may hope that a truth commission will help to exhaust public interest in greater measures of political and legal accountability

Some consider truth commission to be an ersatz (= made or used as a substitute, typically an inferior one, for something else) response to international crimes.

But truth commissions do not always replace prosecutions and go at least part of the way to fulfilling goals that prosecution cannot, particularly for victims.

A lot depends on how the process is designed and run, and a poorly executed truth commission could be worse than no truth commission at al

To overcome some of the critiques, a new approach has emerged in Colombia: the special jurisdiction

* A comprehensive system to provide peace, justice, reparations and truth
* Perpetrators may come forward, acknowledge the truth and accept responsibility for their actions
* Ordinary criminal sanctions will apply to perpetrators of serious crimes who do not confess, offer false confessions, or confess after the deadline
* There is liability to punishment: those who come forward are liable to alternative punishments
* Such as restrictions on liberty for up to 8 years

## **Lustration**

### ***What is lustration?***

Lustration = the purging of public servants who are thought to be responsible for international crimes

* May be seen as a means of removing corrupt or inefficient staff, but the main purpose is often a form of punishment

Example: Liberian Truth and Reconciliation Commission

### ***Should we use lustration?***

Yes

* Can in some ways deal with large-scale complicity

No

* It is (intended to be) a form of punishment involving serious consequences, but done on a mass basis without individual hearings to determine what precise responsibility a lustraed person bears
* Inconsistent with human rights law: the right to have rights and duties at law determined by a judicial process (ICCPR, Art. 14)
* Punishment is only appropriate following criminal proceedings

To overcome this issue, the UN, for example, has undertaken vetting proceedings, for example in Kosovo; however, these are designed as individuated process, where individuals are identified who have engaged in wrongdoing and are given opportunities to answer allegations against them

## **Reparations and civil claims**

### ***When reparations and civil claims?***

Where attributable to states: reparations

* Human right to a remedy for violations of human rights, which may involve some form of financial recompense (ICCPR, Art. 2(3))

Where attributable to private persons or companies: private civil actions or claims, either in the state where the activity occurred or in a third state

* US: Alien Tort Claims Act & Filartiga jurisprudence on it
* Permit non-US nationals to bring tort actions against certain violators of international law
* However, in other countries such claims may be excluded through lack of jurisdiction or because of immunities attaching to state officials

### ***Should we use reparations and civil claims?***

Yes

* Symbolic version of reparations: may mean a lot to victims

No

* Levels of reparations are often controversial
* Many societies in which international crimes are committed do not have large funds to finance reparations programmes
* For civil claims
* limited extraterritorial reach of civil claims, lack of jurisdiction or immunities
* difficult to enforce judgments
* rely on the person sued having money
* evidence gathering difficult
* bringing claims can be expensive
  + even beyond the means of victims s
* financial measures may not bring the same satisfaction to victims as would the criminal prosecution of the offenders

## **Local justice mechanisms**

### ***What are local justice mechanisms?***

Local justice has been said to have three key attributes: (1) it focuses on groups rather than individuals; (2) it seeks compromise and community “harmony”; and (3) it emphasizes restitution over other forms of punishment

Very varied, on the basis of local justice ideas and culture

Example: gacaca trials in Rwanda

ICC Prosecutor: interests of justice has recognized a role for local justice mechanism and the ICC should show more respect for local justice mechanisms to avoid being seen as culturally insensitive

### ***Should we use local justice mechanisms?***

Yes

* Accepts and respects cultural diversity in relation to the implementation of international criminal law
* May have greater legitimacy and capacity than devastated formal systems
* Promise local ownership, access and efficiency
* Could potentially provide a more comprehensive and individuated response to conflicts

No

* Careful not to accept uncritically, romanticize or sentimentalize local justice mechanisms
* They can also be government led, be questionable on human rights and reproduce local hierarchies rather than respond to the needs of all
* May be inappropriate for international crimes
* Not developed for such serious offences or procedures cannot be invoked when the victims (or perpetrators) are dead or unknown
* Can be a fine line between local and parochial

But the debate surround the relationship between indigenous processes and formal justice mehcanisms should not regress to a stark neo-colonialists versus cultural relativism stand-off

In considering options for transition justice, the choice between local and international approaches should not be viewed as exclusive

# **BEN FERENCZ – TED TALK: THE GREATEST TRIAL THE WORLD HAS EVER SEEN**

## **Intro**

Benjamin B. Ferencz was born in Transylvania in 1920 and moved to America when he was ten months old.

After he graduated from Harvard Law School in 1943, he enlisted in the army.

Under General Patton, Ferencz fought in every major battle of the war.

He was later transferred to a newly created War Crimes Branch to gather evidence of Nazi brutality. When the war was over, Ferencz returned to New York and was subsequently recruited for the Nuremberg war crimes trials.

Ferencz was named Chief Prosecutor for the United States in the Nuremberg "Einsatzgruppen Case." Twenty-two defendants were charged with murdering over a million people.

Ferencz was 27-years-old and it was his first case.

He then played a key role in negotiating and implementing German agreements to compensate victims of Nazi persecution.

Since then, Ferencz has devoted his life to studying and writing about world peace and replacing the “rule of force with the rule of law."

## **His time in WWII Europe**

Was still in Law School in Harvard when the Japanese attack on Pearl Harbor happened

He enlisted in the army and was sent to Europe, joined the landing in Normandy France

Horrors he witnessed on assignment from generals headquarters to go into concentration camps as they were being liberated and collect evidence of the crimes, so the perpetrators could be held to account in a court

Get in, get evidence, get out as fast as you can and go to the next

## **Military tribunals**

When war was over, came back to the States

One day, got offered a job to go back to Germany to help with the military commissions (which he had worked on in his days as a soldiers)

Wanted him to help set up these military trials in Munich

He refused to go back into military service unless declaring war to Germany again

Then he was hired by general elfort Taylor, who was in charged to conduct 12 additional trials in Nuremberg, with purpose: to see how it was possible for a civilized country like Germany not just engage in these atrocities but to cheer and encourage them: how possible?

Wanted trial of the doctors who performed medical experiments, lawyers and judges who perverted the law, the generals, members of the SS (who did the actual murdering), the army themselves, the diplomats, and the industrialists who built the concentration camps and provided the funds for them to have free labor (working to death)

General told him: we need the evidence (that you collected) to convict them; we have the suspects but no evidence, so no case. His job was to find enough convicting evidence to hold these suspects in Nuremberg

Found batch of reports and these were reports although very non-descript from the Einsatzgruppen “action groups”, deliberately non descriptive, because didn’t want anyone to know what their assignment was, which was to go behind the front lines and kill or eliminate every single Jewish man, women and child they could lay their hands on. Do the same thing for the gypsies and anybody else who could be perceived as threat or future threat to Germany.

Said to general Taylor: we have to put on a new trial

He said back we will never get approval

But he insisted: mass murder we cannot just walk away with it

He could do it in addition to his other work

Became chief prosecutor of the Einsatzgruppen case

## **The outcomes**

Difficulty: what penalty do I ask for

How do you a balance in the scale of justice, the calculated murder of a million innocent people with the lives of 22 selected defendants out of 3000 who did these killings every day for about 2 years

To just ask for the death penalty, would be inadequate

Didn’t match the severity of the crime

Asked the court to affirm by ICL the right of all human begins to live in peace and dignity regardless of their race or creed, because these people were murdered simply because they didn’t share the race, creed or ideology of their executionists

We should get this rule of law, 1) it focuses on groups rather than individuals, (2) it seeks compromise and community “harmony”, and (3) it emphasizes restitution over other forms of punishment’. which would protect humankind against such future atrocities

Would be more significant than anything else we could do

Judgment of the Court: found all of the defendants guilty, 13 sentences to death, and reaffirmed his plea for the entitlement of all human beings to live in peace and dignity regardless of race or greed

Plea of humanity to law

When the trials were over, he recognized there was more than punishing a handful of offenders

Need to do something for the victims as well

New precedent for law; if you do harm to person (illegally) you have duty morally and legally to try to compensate and undo the harm

Set up restitution programs for all Nazi victims

But most important thing: prevent it from happening again

I am trying to stop war making

Stop taking young people to send to other countries to kill people they don’t even know (to claim a victory)

That’s current system

Dangerous condition today: cyber warfare from space: they can just turn off internet and everything else and death will come

We are moving forward: effective laws, ICC, awakening of human consciousness (but enforcement problem)