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## International Criminal Responsibility of the Individual: A Quantum Leap for Man's Humanity

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### Cover Page Footnote

Prof. Giovanni Distefano Received his PhD in International relations, majoring in International law, from the Graduate Institute of International Studies, Geneva. Since February 2009 he has been a Professor at the Faculty of Law at the University of Neuchatel. He also been Visiting Professor at the Academy of International Humanitarian Law and Human Rights (Geneva). Giovanni Distefano has previously taught at the universities of Geneva, Lausanne, Catania (Italy), Al-Ain (UAE), IHEI (Paris). His current projects are "International Law of Spaces" and Use of Force in International Relations. [giovanni.distefano@unine.ch](mailto:giovanni.distefano@unine.ch)

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### Abstract:

Properly speaking, international criminal responsibility is not a new chapter of public international law, but rather the recent revival of an old chapter of the Law of Nations. In the recent past, we have seen the emergence of *ad hoc* international criminal tribunals that is with a limited competence, as established in their statutes.<sup>(1)</sup> Instead, today's International Criminal Court enjoys, within its statutory (treaty) limits, a general jurisdiction; it is thus a permanent organ of a general character, mirroring the ICJ in matters of international criminal law. It will also be in charge of the international criminal responsibility of the individuals.

In contrast with the two previous approaches, based on 'right', we will deal here with 'obligations' that are bestowed upon the individual, that is, international obligations not to commit some acts characterized as *crimina iuris gentium*. PIL deals with the individual by prohibiting the perpetration of such crimes. The individual is therefore construed as the passive subject within international legal relations; he must account – before municipal and international courts alike – for his misdeeds (violation of international obligations) committed against States as well as other individuals.<sup>(2)</sup> Thus, if,

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(1) For instance, Former Yugoslavia and Rwanda

(2) It ought to be noted that individual's international criminal responsibility is not in fact incurred vis-à-vis those persons who have actually suffered (or were affected) by the perpetration of his crime. Here we find again, yet with inverted roles, the same

from the angle of international human rights protection, responsibility involved an active personality, in this case the personality is deemed to be passive.

Aside from international “crimes” of the States whose existence remains to be carefully considered,<sup>(3)</sup> international law contemplates the existence of certain categories of crimes committed by individuals acting either individually, or as State organs. Still, only a few of these violations are susceptible to be prosecuted and punished on the international plane while others are only prosecuted and punished by national jurisdictions.

The revolutionary developments which have punctuated this province of PIL from the second half of the Twentieth century onwards, severely stepping into one of the core elements of the State reserved domain (of criminal repression), show that the individual must also be considered as an international subject in this domain, as long as he is directly prosecuted and tried by an international judiciary mechanism.

It is indeed on the plane of international punishment of these crimes that the individual arose in international law as a bearer of international obligations, and as such as a subject of international law.<sup>(4)</sup> Finally, it is important to note that an individual's criminal responsibility does not affect, in any way, the eventual concomitant international responsibility of the State, on the contrary this “duality of responsibility continues to be a constant feature of international law”.<sup>(5)</sup> Indeed, if its conduct can be

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equation in the previous two perspectives, i.e. State or the International Community (injured party) and individual (defaulting party).

(3) See: G. Distefano, *Fundamentals of Public International Law. A Sketch of the International Legal Order*, Leiden, 2019, pp. 700-702.

(4) See: G. Balladore Pallieri, 1962, *Diritto internazionale pubblico*, pp. 221-222; S. Romano, *Corso di diritto internazionale* 1933, pp. 76-77; R. Quadri, 1968, pp. 407-408 (since the condition this famous jurist set forward – i.e. the existence of international organs endowed with the power to repress on the international plane these international crimes – has henceforth been fulfilled); A. Cassese, *International Law*, 2001, pp. 79-81; A. Verdross, B. Simma, *Universelles Völkerrecht*, 1984, §§ 430-443 (pp. 260-267);

(5) Application of the Convention on the Prevention and Punishment of the Crime of Genocide, 2007, § 173 (at 116). See Article 25 § 4 of the ICC Statute as well as Article 58 IR 2001, which recites: ““These articles are without prejudice to any question of the

attributed to a State in one way or another,<sup>(6)</sup> then the State's international responsibility can be engaged. Henceforth, there will be two international responsibility (the individual's and the State's) within the international legal order which could give rise to different types of repression and forms of sanctions.<sup>(7)</sup>

**Keywords:** international criminal responsibility, international criminal law, war crimes, crimes against humanity, crime of aggression, crime of genocide, International Criminal Court, ad hoc international criminal tribunals.

## **I. The International Criminalization of Individuals' Conducts: A Very Short Story**

### **I.1. The Forerunners**

Keeping always in mind that any periodization – and all the more a succinct one – is inevitably arbitrary, one may start from 1268 when the grandson of the Holy Roman Emperor and King of Sicily Frederick II, Conradin of Hohenstaufen – the last heir of his dynasty – was beheaded in Naples after having tried to enforce his legitimate rights over the Kingdom. In the wake of his defeat at Tagliacozzo, he was swiftly tried (in fact a sham trial) for having waged an “unjust war” (hence an alleged breach of “ius ad bellum” set of rules)<sup>(8)</sup> against Charles of Anjou, at that time papal-appointed king, and was accordingly executed. In 1474, P. von Hagenbach, following the rebellion of the imperial town of Breisach (Alsace, France), was arrested, tried (presumably, again, an unfair trial orchestrated by the imperial cities of Strasburg, Basel, Colmar and Selestat) and beheaded for having infringed the authority of the Emperor. Even earlier, and more generally, the Law of Nations provided for universal jurisdiction of

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individual responsibility under international law of any person acting on behalf of a State.”

(6) See: G. Distefano, 2019, pp. 653-695.

(7) “The State, and those acting on its behalf, bear criminal responsibility for such violations of international law as by reason of their gravity, their ruthlessness, and their contempt for human life place them within the category of criminal acts as generally understood in the law of civilized countries”, *Oppenheim's International Law*, 8th ed. (Sir Hersch Lauterpacht), p. 355.

(8) See: G. Distefano, “Use of Force”, *Oxford Handbook of International Law in Armed Conflict*, ed. by A. Clapham & P. Gaeta, Oxford, 2014, pp. 545-573

prosecution and trial against pirates, admittedly qualified as “hostis humani generis”,<sup>(9)</sup> i.e. enemies to the whole mankind. The scenario of piracy illustrates vividly one of the distinctive features of (future) international crimes to the extent that the jurisdictional criterion, allowing prosecution and trial by all States whatsoever, is disconnected from all nexus, be it territorial or personal. As it has been observed, piracy is an “assault upon vessels navigated on the high seas, committed *animo furandi* [i.e. with the intention to steal], whether the robbery of forcible depredation be effected or not, and whether or it be accompanied by murder or personal injury”.<sup>(10)</sup> The very concept of an international crime underlies the act of piracy in the high seas since, as an authority rightly emphasized, the juridical consequence of piracy is the “denationalization”<sup>(11)</sup> of the pirate vessel, i.e. it falls within the jurisdiction of any State.

Jurisprudence at large acknowledges that these are the forerunners of international criminal trials (“*delicta iuris gentium*”); in effect, one has to stress that in both cases, as in others which will follow, the tribunals were not at all international but municipal, a national authority standing behind them a bestowing to them the required legality. This can be explained since a rudimentary monism between international and municipal orders exist at that time and persisted for some time until at least the beginning of the XVIII Century.

In effect, the true forerunners of international criminal law and hence of a genuine international punishment date back to the end of WWI, as we will see in the following chapter. However, even before this timeline, doctrine

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(9) Quite revealing, yet in another context, Emer de Vattel attached this formula to those individuals who, during a war, “wantonly deprive [mankind] of these monuments of art and models of taste”, *The Law of Nations*, 1758 (translated from French), Book III, IX, § 168.

(10) Sir Robert Phillimore, *Commentaries upon International Law*, 1879, Vol. I (Part II), Chapter XX, p. 488; likewise: P. Fiore, *IL diritto internazionale codificato*, 1909, Articles 298-300 (p. 192); Th. J. Lawrence, *The Principles of International Law*, 1911, para. 102 (pp. 232-237). Modern definition has not changed substantially; see Article 101 UNCLOS III. This law-making convention provides accordingly for universal jurisdiction in the repression of piracy (Article 100).

(11) F. von Liszt, *Le droit international. Exposé systématique*, 1928 (translated from German), 1928, para. 26 (p. 221). In the same vein: L. Oppenheim, *International Law, A Treatise*, 1912, Vol. 1, para. 278 (pp. 345-346).

paved the way to the normative development; it suffices to peruse any of the most authoritative handbooks of PIL to notice that international criminal (or, synonymously, penal) law features a chapter, let alone a in-depth study on this matter.<sup>(12)</sup> State practice did not lagged, either, and it is especially the Laws of War<sup>(13)</sup> which is furthered thus contributing to the enhancement of this branch of PIL. At the normative level – both municipal and, especially, international – one may mention the Lieber Code (1863)<sup>(14)</sup>, the 1<sup>st</sup> Geneva Convention (1864)<sup>(15)</sup>, the 1906 Geneva Convention on Wounded and Sick Combatants, the The Hague Conventions (1899 and 1907) related to the conduct of hostilities, as well as the 1925 Geneva Protocol<sup>(16)</sup>, to name only a few of them.<sup>(17)</sup> They all, yet at different degrees, contain embryonic elements of international criminal law purporting to punish the individuals having breached the obligations contained therein. As the International Tribunal in Nurnberg stated in an authoritative way:

“That International Law imposes duties and liabilities upon individuals as well as upon States has long been recognized [...] Many other authorities could be cited, but enough has been said to show that individuals can be punished for violations of International Law. Crimes against International Law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of International Law be enforced”<sup>(18)</sup>

(12) Gustave Moynier, one of the co-founders of the Red Cross Movement, threw out the idea, following the conclusion of 1864 Geneva Convention, to establish a permanent international criminal court.

(13) See: G. Distefano, 2014, pp. 545-547.

(14) “Instructions for the government of armies of the United States in the field” issued by US President Lincoln (General Orders n°100) in order to regulate the use of force by US troops (unionists) during the Civil War against the Confederates (thus a non-international armed conflict). Several of its provisions set forth the necessary legal basis allowing municipal jurisdictions to prosecute and punish offences flowing from the breaches of the duties contained therein.

(15) “Convention for the Amelioration of the Condition of the Wounded in Armies in the Field”.

(16) “Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare”.

(17) One may also mention in this context the various international agreements prohibiting the white slave trade and slavery at large.

(18) IMT, Judgement of 1st October 1946, pp. 446, 447.

## I.2. Contemporary

In a way, the two World Wars have, as it happened in other fields of PIL, ignited a process which is still on-going nowadays. Article 227 of the Versailles Treaty provided for the incrimination of Guillaume II while at the same time sketching the substantive criminal law required to assess his conduct. Indeed, Article 227 of the Versailles Treaty considered the German Reich Emperor, Guillaume II of Hohenzollern, as guilty of “a supreme offence against international morality and the sanctity of treaties”. In the same vein, article 228<sup>(19)</sup> of the same treaty set the obligation for Germany to bring before its own jurisdictions<sup>(20)</sup> any individual allegedly guilty of war crimes, flowing from the breach of the so-called “laws and customs of war”.<sup>(21)</sup> Besides, in 1937, alongside with the Convention on the “Prevention and Punishment of Terrorism”<sup>(22)</sup> the League of Nations (hereafter: LoN) adopted

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(19) Paragraph 3 of this provision derogated to the *ne bis in idem* principle of criminal law to the extent that it set out that it was to “apply notwithstanding any proceedings or prosecution before a tribunal in Germany or in the territory of her allies”.

(20) In fact, no tribunal was established by Germany pursuant to this obligation; only 12 German militaries, among 45 selected by the Allies, were eventually tried at Leipzig of which six were acquitted whilst the others were sentenced to (only) 4 years of detention.

(21) In 1915, a joint Declaration (GB-F-Russia) contained the formula “crimes against humanity”: “In the presence of these new *crimes of Turkey against humanity* and civilization, the allied Governments publicly inform the Sublime Porte that they will hold personally for the said crimes all members of the Ottoman Government as well as those of its agents who are found to be involved in such massacres” (quoted in: R. Sarkissian, “The Armenian Genocide: A contextual view of the crime and politics of denial”, in *The Criminal Law of Genocide. International, Comparative and Contextual Aspects*, Ashgate, 2009, p. 3; italics added). The three Allied Governments referred at the violent and systematic persecution of the Armenian and other Christian populations of the Ottoman Empire by the latter government. According to its Art. 230, “The Turkish Government undertakes to hand over to the Allied Powers the persons whose surrender may be required by the latter as being responsible for the massacres committed during the continuance of the state of war on territory which formed part of the Turkish Empire on August 1, 1914”. However, since the Treaty of Sèvres – which never entered into force – was eventually superseded by the Treaty of Lausanne (14 July 1923) – which contains no charge of responsibility upon Ottoman officials – no punishment ever really took place.

(22) It ought to be observed incidentally that this Convention contains the first international general definition of terrorism through a multilateral convention (Article 2).

the “Convention for the Creation of an International Criminal Court”, whose Article 1 established in fact such a Court. None of them entered into force, failing the required number (3!) of ratifications or accessions.

Later on, in the wake of WWII, two international military tribunals (Nuremberg and Tokyo) were instated in order to repress the great Nazis and Japanese war criminals.<sup>(23)</sup> In this regard one has however to make clear that while the IMT of Nuremberg<sup>(24)</sup> was genuinely an international jurisdiction since it was established through an international agreement concluded between the 4 Allies in Europe (USA, USSR, UK and France),<sup>(25)</sup> the second one, Tokyo, was set up by an unilateral act of the occupying power, USA, by virtue of its powers according to the “laws and customs of war”.

As it will be shown further in the text, all these developments<sup>(26)</sup> have led to a dramatic strengthening and deepening of international criminal law both in its substantive and in its institutional dimension. As regards the first one, a whole new body of international norms have enabled the criminalization of some acts, such as the crime of genocide,<sup>(27)</sup> war crimes,<sup>(28)</sup>

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(23) It must be noted in this regard that the first international attempts to punish individual crimes have been carried on by the victors after a major conflict. This reminds us that Ancient Greece philosophical thought distinguished between three forms of justice: a) *Nemesis* (i.e. vengeance); b) *Dike* (ideal form of justice, may be embodied by the ICC); c) *Themis* (the balance between conflicting yet equally relevant interests, pursued by the two *ad hoc* international tribunals set up by the SC).

(24) London Agreement of 8th August 1945 (i.e. the Constitution of the IMT). Alongside with this international jurisdiction, military tribunals were set up by each occupying power – in its own specific area of occupation – that were endowed, again according to PIL, to prosecute and trial Germany criminals; the latter were also tried by German tribunals.

(25) It was created “for the just and prompt trial and punishment of the major war criminals of the European Axis” (Article 1).

(26) It has been wisely observed that contemporary international criminal law fits appropriately in the “Law of cooperation approach”: G. Abi-Saab, *Cours général de droit international public*, 1987, p. 435.

(27) Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), (2007), §§ 143-201 (at 103 – 127).

(28) Cf. i.a. : ICTY, *The Prosecutor v. Delalic*, Judgement of 16 November 1998, §§ 301-307.

crimes against humanity (and torture)<sup>(29)</sup> and crime of aggression. These “new” international crimes have thus accrued to other criminal acts which existed before and which were mainly if not exclusively tried by national jurisdictions<sup>(30)</sup> – even though they are territorially disconnected<sup>(31)</sup> – namely: a) piracy in the high seas;<sup>(32)</sup> b) slavery and slave trade,<sup>(33)</sup> including the historical case of the “white slave trade”;<sup>(34)</sup> c) trafficking of narcotic d) obscene and pornographic publications. In each of these last crimes cases, the author of the crime (an individual or a group thereof) is the final beneficiary of these international obligations, but the institutional mechanisms of repression being merely national, he cannot be considered as being the true holder on the international plane. In fact, these crimes are bestowed the adjective “international” insofar as their repression is extended beyond the traditional jurisdictional nexus (territory and nationality of the author/victim); in fact, what happens is the extension of States’ jurisdictions thanks to the principle of universal jurisdiction. Hence, under these conditions, the mere incrimination under the international legal order of these violations does not at all suffice in view of recognizing individuals an international legal personality.

To sum up, it does not go unnoticed that Nuremberg Trial in penetrating into the State veil had two effects with regard to the status of individuals in PIL: a) on one side it made the individual, as a State organ, personally responsible for perpetrating an international crime; b) on the other side, a

(29) Cf. i.a. : ICTY, *The Prosecutor v. Furundzija*, Judgement of 10 December 1998, paras. 142, 158-164. It ought to be underscored from the outset that “torture” is admittedly a “discrete crime”, that is to say is a crime by itself without thus requiring a nexus either with an armed conflict (torture as a war crime) or with a “widespread or systematic attack” (torture as a CAH). Likewise: ICTY, *The Prosecutor v. Kunarac et al.*, 2001, paras. 466-483.

(30) See: Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, 1953, pp. 208-217.

(31) See: A. W. Heffter, 1866, § 104 (pp. 201-202).

(32) P. Fiore, *Articles 295-300* (pp. 191-193); H. S. Maine, *International Law*, 1888, p. 76; *Oppenheim's International Law*, 9th ed., Vol. 1, § 299 (pp. 746-747); J. C. Bluntschli, *Le droit international codifié*, (translated from German), 1870, Article 343 (p. 194); A.W. Heffter, 1866, § 104 (p. 202); W.E. Hall, *International Law*, 1924, p. 317.

(33) J. C. Bluntschli, 1870, Article 363 (p. 204); J. Westlake, *International Law*, 1904, Vol. I, p. 253; A.W. Heffter, 1866, § 104 (p. 202).

(34) F. Despagnet, *Cours de droit international public*, 1905, §§ 262-263 (pp. 281-283);

State has become internationally responsible for violating (nascent) HR vis-à-vis its own nationals, hence making them true subjects of PIL.<sup>(35)</sup>

There are some principles – both of procedural and substantive nature – which underlie international criminal law and thus the engagement of an individual responsibility thereof.<sup>(36)</sup> Most, if not all, of them derive from municipal law and in this respect their original source may thus be found in Article 38 (1) c) ICJ Statute, i.e. the so-called “general principles of Law”.<sup>(37)</sup>

## **II. Substantive General Principles of International Criminal Law**

### **II.1.1. General Remarks**

By substantive International Criminal Law is admittedly meant the body of rules, some of which plunging their roots quite far in the past, by which not only patterns of behaviours are prohibited, but their infringements are hereby qualified as crimes, thus leading to a universal punishment. Traditionally, one of the most ancient and striking examples of “international crime” is that of “piracy in High Seas”<sup>(38)</sup>; in accordance with the Latin maxim, they were considered “enemy of Mankind” (“*hostis humanis generis*”), as they put themselves (or tried to) outside and against the Law, i.e. thus “Outlaws”. This qualification allowed any State to prosecute and punish those who committed such acts; in a nutshell, so went

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(35) “International law has in the past made some claim that there is a limit to the omnipotence of the state and that the individual human being, the ultimate unit of all law, is not disentitled to the protection of mankind when the state tramples upon his rights in a manner which outrages the conscience of mankind”, British Prosecutor, *Trial of the Major War Criminals*, vol. 19, 471-472.

(36) “This term [international criminal law] has at least six different meanings. It may be identified with the territorial scope of municipal criminal law. It may be equated with internationally authorised municipal criminal law. It may mean municipal criminal law common to civilised nations. It may signify international co-operation in the administration of municipal criminal law and, finally, stand for international criminal law in the material sense of the term”, G. Schwartzenberger, *International Law*, 3rd. ed., 1957, p. 255.

(37) See: G. Distefano, 2019, pp. 559-579.

(38) According to Art. 11 of the 1982 UN Law of the Sea Convention, any State can punish those who commit such acts (the definition of which is given in that same provision).

the application of the universal jurisdiction,<sup>(39)</sup> according to which the usual requirements of criminal law (personal and territorial links) were discarded for the purpose of justice.<sup>(40)</sup> In short, when a State put a pirate on trial, it somehow acted as an organ of the International Community as a whole. Since then, substantive International Criminal Law has steadfastly developed, especially since the end of XIX Century.

Restraining ourselves to the development occurred since the beginning of the last century, one has to stress that they took place within the province of the Law of War (including both branches of *ius ad bellum* and *ius in bello*), notably the outlawing of War (1928 Briand-Kellogg Pact) as well as through the furtherance of the “laws and customs of war”, notably the two 1929 Geneva Conventions (prisoners and wounded and sick).<sup>(41)</sup>

IMT in Nuremberg and, on lesser extent, US-established Tokyo Military Tribunal have later on dramatically contributed to the enhancement and clarification of substantive international criminal law, especially through the definition of international crimes, their elements and excuses, etc. With regard to international delinquencies, Article 6 of the IMT Statute enumerated the three categories of crimes being prosecuted by this jurisdiction; alongside with a) crime against peace and b) war crimes, emerges, from the “legal conscience of civilised nations” – one would be tempted to say - , “crime against humanity” (lit. c). The latter will generate afterwards the crime of genocide, a new crime which will emancipate itself as a specific crime from the general category of “crimes against humanity”, thanks to the 1948 UN Convention on Prevention and Punishment of the Crime of Genocide. In this context, it is noteworthy to stress that in the light of the IMT Statute it is apparent that the crime against peace is not only the

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(39) This idea had been around for centuries, at least since Grotius who so wrote in the middle of Seventeenth century: “We must also know, that Kings, and those who are invested with a Power equal to that of Kings, have a Right to exact Punishments, not only for Injuries committed against themselves, or their Subjects, but likewise, for those which do not peculiarly concern them, but which are, in any Persons whatsoever, grievous Violations of the Law of Nature or Nations”, Book II, Chapter XX, para. 40.1.

(40) See: R. Higgins, *International Law and the Avoidance, Containment and Resolution of Disputes: General course on Public International Law*, 1991, at 93-95.

(41) One might also mention in this connection, the 1927 IDI's resolution aimed at the unification of international penal law.

supreme crime<sup>(42)</sup> but also that its overarching character means that the perpetration of the other two (i.e. war crimes and crime against humanity) depends on its existence. In sum, a nexus must be established between the existence of an unlawful war (hence a crime against peace or crime of aggression) and either a war crime or a crime against peace; therefore, these two crimes were subordinated to the crime against peace so that, according to IMT Statute and jurisprudence, they couldn't exist without and outside it.<sup>(43)</sup> We will see later on that the requirement of a nexus will disappear and that nowadays, as illustrated by the ICC Statute, the hierarchy, if any, between international crimes has been substantially upended (*infra* II).<sup>(44)</sup>

Among other relevant contributions to substantive international criminal law, one may also recall the rule according to which “the official positions of the defendant shall not be considered as freeing them from responsibility or mitigating punishment” (Article 7). Thus, for the first time ever, bar Emperor William II unlucky precedent, by this principle a profound wedge was inserted in States' immunities for acts accomplished by organs in their official capacity. In a germane key, another rule provided for the discarding of “superior order” as a circumstances precluding responsibility since Article 8 sets that “the fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires”.

(42) “In the opinion of the Tribunal, those who wage aggressive war are doing that which is equally illegal, and of much greater moment than a breach of one of the rules of the Hague Convention”, IMT, Judgement of 1st October 1946, p. 445.

(43) “To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole”, IMT Judgment of 1st October 1946, p. 421.

(44) Indeed, ICTR affirmed: “The ICTR Statute does not establish a hierarchy of norms, but rather all three offences are presented on an equal footing. While genocide may be considered the gravest crime [in respect to war crimes and crime against humanity]”, *The Prosecutor v. Jean-Paul Akayesu*, 1998, para. 470. True, in this case, the tribunal did have no jurisdiction over crime of aggression – the conflict in Rwanda having a non-international character – but the listing of international crimes in the ICC Statute may nevertheless hint to that hierarchy, if any.

Furthermore, the development and fortification of international criminal law took place thanks to the jurisprudence of the IMT which remained nearly until the end of last century the reference for PIL and still represents today a landmark achievement. Its lasting contribution appeared so conspicuous that already in 1946, UNGA adopted its 95/1 resolution whereby it “affirms {that}the principles of international law recognized by the Charter of the Nurnberg Tribunal and the judgement of the Tribunal”.<sup>(45)</sup> Moreover, UNGA mandated ILC to study the “desirability and possibility” of the establishment of a (permanent) international criminal court as well as to clarify substantive international criminal law. After adopting in 1950 a Text whereby it stated the “Principles of International Law recognized in the Charter of the Nurnberg Tribunal and in the Judgement of the Tribunal”,<sup>(46)</sup> the ILC decided, alas, to adjourn its mandate pending the definition of the crime of aggression (i.e. crime against peace). It will be in 1981 only that UNGA invited again ILC to resume its work (in abeyance since then).<sup>(47)</sup> Eventually, in 1996 ILC adopted the “Code of Crimes against the Peace and Security of Mankind”<sup>(48)</sup> which constituted at that time the most exhaustive attempt to reunite under a single text a comprehensive tableau of international crimes as well as their definition. The same year UNGA adopted a resolution deciding to hold a diplomatic conference aiming at establishing an international criminal court.<sup>(49)</sup> ILC “draft code” formed hence the basis of negotiation in Rome of the future Statute of ICC which was eventually adopted the 17<sup>th</sup> July 1998. According to its Article 126<sup>(50)</sup> the Statute entered into force the 1<sup>st</sup> July 2002 and today 123 States are Parties to it. Rome Statute is today the most recent international conventional instrument in matters of substantive international criminal law; hence, we

(45) Paragraph 1 of the resolution adopted on the 11th December 1946 (“Affirmation of the Principles of International Law recognized by the Charter of the Nurnberg Tribunal”). See also: : M. Whiteman, *Digest of International Law*, Vol. 1, pp. 201-205.

(46) ILC Report to the UNGA, A/5/12, 1950, paras. 13-14.

(47) UNGA Resolution 36/106 (10 December 1981).

(48) A/51/10, 1996, Chapter II, paras. 30-50.

(49) UNGA Resolution 51/207 (17 December 1996); however, one has to wait another year for the UNGA to implement its previous resolution (Resolution 52/160 of 15 December 1997).

(50) This provision required 60 States’ instruments of ratification and/or accession to be deposited for the Statute to enter into force and hence for the establishment of the ICC.

will refer to it in order to unearth this body of law, keeping nonetheless in mind that customary international law may supplement, integrate and even modify it.<sup>(51)</sup>

### II.1.2. The Principle of Legality

Also known under the Latin maxim “Nullum crimen sine lege praevia” (NCSL), this principle embodies a fundamental requirement of justice: an individual act can be criminalized only if at the time it was committed there was (already) a rule bestowing this qualification. In the seminal IMT judgement *France and al. v. Goering and al.* (1946), the Tribunal affirmed:

“It was urged on behalf of the defendants that a fundamental principle of all law -international and domestic- is that there can be no punishment of crime without a pre-existing law: “*Nullum crimen sine lege; Nulla poena sine lege*”.<sup>(52)</sup> It was submitted that ex post facto punishment is abhorrent to the law of all civilised nations, that no sovereign power had made aggressive war a crime at the time the alleged criminal acts were committed, that no statute had defined aggressive war, that no penalty had been fixed for its commission, and no court had been created to try and punish offenders”<sup>(53)</sup>

This principle has henceforth been codified in several international instruments establishing international criminal jurisdictions<sup>(54)</sup> and largely reflects international<sup>(55)</sup> and domestic<sup>(56)</sup> jurisprudence.

(51) On the relations between the two principal sources of PIL, see G. Distefano, 2019, pp. 369-391.

(52) This second principle is the corollary of the first one since punishment of an individual presupposes his act to be qualified beforehand as “criminal” (hence “Nullum crime sine lege”). ICC Statute aptly distinguishes the two principles (*infra* note 54).

(53) IMT, judgment of 1 October 1946, in *The Trial of German Major War Criminals. Proceedings of the International Military Tribunal sitting at Nuremberg, Germany, Part 22* (22nd August, 1946 to 1st October, 1946), p. 444.

(54) Article 7 (3) ICTY, Articles 22 & 23 ICC, as well as HR instruments: Article 12 (2) ICCPR 1966, Article 7 (1) ECHR. It is not too bold to affirm that it constitutes nowadays a peremptory norm of PIL, thus its absence in some of international criminal courts’ statute (e.g. ICTR, Special Court for Sierra Leone, etc.) does not at all imply that it is not applicable, far from that.

(55) ICTY, *the Prosecutor v. Dusko Tadic*, 1995, § 135; ECHR, *Streletz and Kessler v. Ad*, 22/03/2001, §§ 87-88; ICTY, *the Prosecutor v. Vasilievic*, 2002, §§ 193, 196, 200-202.

### II.1.3. Crime of aggression (or formerly known as “Crime against peace)

From the commencement, one has to underline that this crime (formerly known as “Crime against Peace”) differs at least from the other three international crimes to the extent that it is the only one that requires an official capacity (as an organ of a State) for an individual to be pinned down as a criminal. In sum, this crime entails, at the same time, the responsibility of the State whose organ has planned or decided a war of aggression.

The criminalization of this conduct logically depended from the outlawing of war, i.e. offensive use of force; hence, as long as war was not banned from the realm of PIL, it was not conceivable to construe such an international crime. In fact, Article 227 of Versailles Treaty did not provide for the trial of William II for having, strictly speaking, waged a war of aggression, but for having disrespected conventional obligations guaranteeing the neutrality of Belgium and Luxembourg. One has to wait 1928 Briand-Kellogg Pact for war of aggression to be outlawed.<sup>(57)</sup> Though, this international agreement does not necessarily convey the necessary criminalization since it restricts itself to ban war, thus creating rights and obligations incumbent upon States parties to it and not their organs for having waged it. IMT Statute and jurisprudence will be instrumental in bridging the gap between the “mere” unlawfulness of war and the necessary criminalization of State organs for having decided and planned it.<sup>(58)</sup> Indeed, referring precisely to the 1928 Pact of Paris, the Tribunal stated, in order to satisfy the requirement set by the principle of legality, that:

“In [its] opinion, the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is

(56) Supreme Court of Canada, Finta case, 1994

(57) More on this treaty, G. Distefano, “La longue marche vers l’abrogation du droit d’auto-protection armée : *happy end* ou *remake* en vue ? », in *Unité et diversité du droit international. Ecrits en l’honneur du Professeur Pierre-Marie Dupuy*, sous la direction de D. Alland et al., Paris, 2014, pp. 299-320 ;

<https://www.youtube.com/watch?v=1dYLOmqMoqI&t=2609s>.

(58) The indictment as regards the crime against peace concerned the invasion of Austria (1938), Czechoslovakia and Poland (1939), Belgium, Netherlands, Luxembourg, Denmark and Norway (1940), Yugoslavia, Greece and USSR (1941),

illegal in International Law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing”<sup>(59)</sup>

The completion of the crime against peace goes through the adoption by the UNGA in 1974 of the definition of aggression (resolution 3314)<sup>(60)</sup>, branded herein as the “most serious and dangerous form of the illegal use of force”. Indeed, this UNGA normative resolution<sup>(61)</sup> marks the end of a series of attempt to define aggression carried out since the LoN. However, this resolution does not per se convey the criminalization of the aggression as far as the international criminal responsibility of the individual (organ of a State) is concerned.<sup>(62)</sup> One has to wait the 1996 ILC Draft Code whose Article 16 states:

“An individual who, as leader or organizer, actively participates in or orders the planning, preparation, initiation or waging of aggression committed by a State shall be responsible for a crime of aggression”<sup>(63)</sup>

Finally, the connection with resolution 3314 is made through Article 8*bis* of the Rome Statute<sup>(64)</sup> which, while referring implicitly to the UNGA

(59) IMT, Judgement of 1st October 1946, p. 445.

(60) Admittedly considered nowadays as genuinely reflecting CIL in this regard, see: G. Distefano, “Use of force”, 2014, *supra* note 8.

(61) On the meaning of this concept, see: G. Distefano, 2019, pp. 383-391.

(62) On the contrary, Article 5 (2) provides that a “war of aggression is a crime against international peace. Aggression gives rise to international responsibility”. The latter refers to State international responsibility whilst the “crime” alludes to a specific form of internationally wrongful act committed by a State of a particular gravity. Quite ironically, though, the “crime of State”, as it was at that time known and as such codified by the ILC in its provisional draft code on State responsibility, was eventually, and regrettably, expunged from the final text adopted in 2001.

(63) *YILC*, 1996, Vol. II (Part II), para. 50.

(64) “1. For the purpose of this Statute, “crime of aggression” means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

1. For the purpose of paragraph 1, “act of aggression” means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the

resolution, enumerates the relevant elements of this international crime in a more detailed way than the 1996 ILC Draft Code.<sup>(65)</sup>

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Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:

1. (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
2. (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
3. (c) The blockade of the ports or coasts of a State by the armed forces of another State;
4. (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
5. (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
6. (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
7. (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein".

(65) Article *8bis* was inserted into ICC Statute by resolution RC/Res.6 of 11 June 2010 adopted by the Assembly of States parties to the Rome Statute. In fact, in 1998, at the time of the adoption of the latter, there was no consensus with regard to the crime of aggression and thus the question was remanded for further consideration. The real bone of contention, though, did not lay in the definition of this crime, in other words the substantive law, but strong tensions existed with regard to its institutional aspects. In other words, how to reconcile the ICC's jurisdiction over this crime and the UNSC powers with regard to the determination of aggression within the system of collective security. UNSC's permanent members fretted above all that to bestow upon the ICC jurisdiction on this crime would prejudice or even fetter UNSC's competence in this regard. That's why the most salient ICC provisions related to the crime of aggression are not aforementioned Article 8, but rather (long) Articles *15bis* and *15ter* which are respectively (and aptly) named: "Exercise of jurisdiction over the crime of aggression (State referral, *proprio motu*)" and "Exercise of jurisdiction over the crime of

**II.1.4. War Crimes**

This category of international crimes probably encompasses the oldest criminalization of individuals' conducts.<sup>(66)</sup> Admittedly, this formula refers to the so-called "grave breaches of IHL", notably of 1949 GE Conventions (plus the additional protocols) as well as of The Hague Conventions. As the very formula clearly indicates, for a war crime to occur, the existence of an armed conflict must be proved, either international armed conflict (IAC) or (as it will be shown) a non-international armed conflict (NIAC) and the existence of a nexus between the material act perpetrated by the accused and the conflict must also be established.<sup>(67)</sup>

According to the World Court, and the dictum can hardly be challenged, contemporary IHL is made up of two branches of the "Laws of war" which have sprouted and developed alongside yet independently:

"A large number of customary rules have been developed by the practice of States and are an integral part of the international law relevant to the question posed. The "laws and customs of war" - as they were traditionally called – were the subject of efforts at codification undertaken in The Hague (including the Conventions of

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aggression (Security Council referral)". It is apparent that the last provision embodies the sensitive balance of interests between international criminal justice (ICC) and system of collective security (UNSC). This is all the more relevant since, as it will be shown, ICC is not an organ of the UN while entertaining strong links with its system. Other ICC's provisions reflect the (could be sometimes tense) relations between UNSC and ICC; for instance, Article 15ter (referral of a situation by the UNSC to the ICC) and Article 16 (by virtue of which a "No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect". UNSC has indeed, alas, not disdained to make recourse to this provision, e.g.: "[UNSC] Requests, consistent with the provisions of Article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise;" (para. 1).

(66) IMT, Judgement of 1st October 1946, p. pp. 449-463.

(67) ICTY, *The Prosecutor v. Kunarac et al.*, paras. 55-59; ICC, *The Prosecutor v. Lubanga*, 29 January 2007, paras. 286-293.

1899 and 1907), and were based partly upon the St. Petersburg Declaration of 1868 as well as the results of the Brussels Conference of 1874. This "Hague Law" and, more particularly, the Regulations Respecting the Laws and Customs of War on Land, fixed the rights and duties of belligerents in their conduct of operations and limited the choice of methods and means of injuring the enemy in an international armed conflict. One should add to this the "Geneva Law" (the Conventions of 1864, 1906, 1929 and 1949), which protects the victims of war and aims to provide safeguards for disabled armed forces personnel and persons not taking part in the hostilities. These two branches of the law applicable in armed conflict have become so closely interrelated that they are considered to have gradually formed one single complex system, known today as international humanitarian law. The provisions of the Additional Protocols of 1977 give expression and attest to the unity and complexity of that law"<sup>(68)</sup>

As it was the case for the previous category of international crimes, the primeval sources of war crimes may be traced back to the IMT Statute,<sup>(69)</sup> whose Article 6 (b) introduces the first (yet non exhaustive) enumeration of conducts – during an international conflict<sup>(70)</sup> – the commission of which engages criminal responsibility. Without entering into details, it noteworthy to underline that the majority of these conducts amount to a violation of The Hague Conventions; in other words, they are governed by the rules regulating the conduct of hostilities.<sup>(71)</sup>

(68) ICJ, Legality of the Threat or Use of Nuclear Weapons, 1996, para. 75 (p. 256).

(69) The existence of these crimes is practically unchallenged, bar very isolated, and highly contestable doctrinal stands, such as: "[W]e are not persuaded, even when viewing them in 2010 through the prism of the many subsequent positive developments, that those instruments [notably The Hague Conventions] could, in 1944, have formed a sufficiently sound and acknowledged legal basis for war crimes to be regarded as having been precisely defined at that time, and for their definition to have been foreseeable", ECHR, Kononov v. Latvia, Judgement of 17 May 2010, para. 10 (separate opinion of Judge Costa joined by Judges Kalaydjieva AND Poalelungi).

(70) For the time being and until a recent past, war crimes could only be perpetrated during an international armed conflict, i.e. grossly speaking between States.

(71) E.g.: "namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of

The other branch of IHL, i.e. “Geneva Law”, makes its appearance, as far as international criminal law is concerned, through the four 1949 GE. Indeed, it’s thanks to these universal international agreements that the very formula “grave breaches” is introduced in an international convention related to IHL. Each of these four conventions deals with a specific subject-matter, respectively: I (wounded and sick in armed forces in the field),<sup>(72)</sup> II (wounded, sick shipwrecked members of armed forces at sea),<sup>(73)</sup> III (treatment of prisoners of war)<sup>(74)</sup> and IV (protection of civilian persons in time of war).<sup>(75)</sup> Consequently, each of them devotes at least one specific provision to the identification of “grave breaches” whose perpetration “against persons and property protected by the present convention”<sup>(76)</sup> leads to the entailment of international criminal responsibility (“penal sanctions” in the jargon of the 1949 GE). In the same vein, Articles 11 (4)<sup>(77)</sup>

public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;”.

(72) Article 50: “wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly”.

(73) Article 51, the content of which is identical to Article 50/I (*supra* note 72).

(74) Article 130: “wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention”

(75) Article 147: “wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly”.

(76) This formula is common to the four 1949 GE.

(77) “Any wilful act or omission which seriously endangers the physical or mental health or integrity of any person who is in the power of a Party other than the one on which he depends and which either violates any of the prohibitions in paragraphs 1 and 2 or fails to comply with the requirements of paragraph 3 shall be a grave breach of this Protocol”

and 85<sup>(78)</sup> of the 1977 Additional Protocol I to the 1949 GE (thus applicable international armed conflict) follow the same path, accruing to the conducts likely to trigger penal sanctions.

International Criminal Tribunals are roughly in tune with the 1949 GE and The Hague Conventions; ICC Statute adopts a two-tier structure since war crimes are made up not only of the aforementioned “grave breaches” of the four 1949 GE but also of: “other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely ...”.<sup>(79)</sup>In sum, “grave breaches” constitute a narrower group within that of war crimes which hence encompasses “other violations ...”, too.

Besides, this provision embodies another two-layer approach having regard to the international (or not) character of the armed conflict. Some words must then be spent with regard to one of the major topics of IHL, namely the qualification of an armed conflict in the context of war crime. Grossly speaking, and for the purposes of the present volume, an IAC comprises nowadays not only an armed conflict between two or more States<sup>(80)</sup> but also “wars of national liberation”, i.e. conflicts where:

“peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations”<sup>(81)</sup>

On the other hand, NIAC find themselves below that threshold since they are, according to Article 8 (2) f) of the ICC Statute, armed conflicts:

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(78) “This provision, in addition to reiterate and complete the grave breaches envisaged by the four 1949, GE adds a further list of violations « when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health” (Art. 85 (3)).

(79) A detailed list follows en suite.

(80) According by the way to Common Article 2 of the 1949 GE.

(81) Article 1 (4) 1977 P/I. On the concept of right of peoples to self-determination, see *G. Distefano, 2019, pp. 185-202.*

“that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups”<sup>(82)</sup>

Below this threshold lays a final category of situations – within the territory of a State<sup>(83)</sup> – characterized by “internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature”, as called for this same provision in its first sentence. Again, this definition of the lowest threshold of application of IHL represents the ultimate definition of “what is not” a NIAC under PIL.

We have hitherto briefly expounded the major features of war crimes while referring to their perpetration in the context of an IAC. Instinctively, the reader has intuitively grasped that they may also occur during a NIAC. True, yet this is certainly a recent novelty in international criminal law, in fact a bold (and very welcome) jurisprudential conquest. Indeed, one has to applaud the wise farsightedness of the ICTY’s Appeals Chamber judgement in the *Tadic* case, whose contribution to PIL at large, as it will appear in other sections of this volume, is highly precious. In the 1995 Judgement the Appeals Chamber faced with the thorny question of whether war crimes may be perpetrated in a NIAC developed a series of argumentation that ultimately led to their existence. The relevant paragraph – of this founding

(82) This definition, which may considered as reflecting CIL in this regard, does in fact transcend, and in some respects modify, previous categorizations purported by the GE 1949 (common Article 3) as well as by 1977 P/II, whose article 1 (1) is in effect more stringent since it restricts the application of the P/II to “armed conflicts which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol”. No such conditions were set forward by Common Article of the 1949 GE which merely requires that the conflict takes place on the territory of one of the HCP. Hence, in the light of the foregoing it can be argued that Article 8 (2) f) ICC Statute codifies a CIL definition of NIAC which has in fact modified both Common Article 3 1949 GE and Article 1 (1) P/II. Otherwise, this situation may also be seen through the lens of the law of treaties and more specifically the succession of treaties in time. See: G. Distefano, 2019, pp. 446-449.

(83) Or of several States, as it happens with regard to the so-called “Daesh” or “IS” having taken up the arms against Iraqi and Syrian governments in their respective territories.

decision of international criminal law – undoubtedly deserves to be quoted in its entirety:

“Since the 1930s, however, the aforementioned distinction has gradually become more and more blurred, and international legal rules have increasingly emerged or have been agreed upon to regulate internal armed conflict. There exist various reasons for this development. First, civil wars have become more frequent, not only because technological progress has made it easier for groups of individuals to have access to weaponry but also on account of increasing tension, whether ideological, inter-ethnic or economic; as a consequence the international community can no longer turn a blind eye to the legal regime of such wars. Secondly, internal armed conflicts have become more and more cruel and protracted, involving the whole population of the State where they occur: the all-out resort to armed violence has taken on such a magnitude that the difference with international wars has increasingly dwindled (suffice to think of the Spanish civil war, in 1936-39, of the civil war in the Congo, in 1960-1968, the Biafran conflict in Nigeria, 1967-70, the civil strife in Nicaragua, in 1981-1990 or El Salvador, 1980-1993). Thirdly, the large-scale nature of civil strife, coupled with the increasing interdependence of States in the world community, has made it more and more difficult for third States to remain aloof: the economic, political and ideological interests of third States have brought about direct or indirect involvement of third States in this category of conflict, thereby requiring that international law take greater account of their legal regime in order to prevent, as much as possible, adverse spill-over effects. Fourthly, the impetuous development and propagation in the international community of human rights doctrines, particularly after the adoption of the Universal Declaration of Human Rights in 1948, has brought about significant changes in international law, notably in the approach to problems besetting the world community. A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach. Gradually the maxim of Roman law *hominum causa omne jus constitutum est* (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well. It follows that in the area of armed conflict the distinction between interstate wars and

civil wars is losing its value as far as human beings are concerned. Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted "only" within the territory of a sovereign State? If international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight"<sup>(84)</sup>

Thanks to this revolutionary finding by the ICTY's Appeals Chamber it is nowadays unchallenged that war crimes may be perpetrated in the context of a NIAC,<sup>(85)</sup> as ICC Statute adamantly states in its Article 8 (2) c) and e).<sup>(86)</sup>

### II.1.5. Crime against Humanity (CAH)

Introduced for the first time<sup>(87)</sup> in 1945 by the IMT through its Article 6 (c), the definition of this category of international crimes is, unlike crime of

(84) ICTY, *The Prosecutor v. Dusko Tadic*, 1995, para. 97. Among other elements, the Appeals Chamber makes a decisive reference to the so-called Martens clause (embodying the famous "elementary considerations of humanity"). In this regard, see: G. Distefano, 2019, pp. 620-632.

(85) Quite correctly, ICTY made clear, instead, that "grave breaches" of the GE 1949 may, of course, occur only in the context of a NIAC (*ibid*, para. 80).

(86) Furthermore, ICTR Statute provided in its Article 4 the legal basis for this criminalization ("Violations to Article 3 common to the Geneva Conventions and of Additional Protocol II"). In this regard, one may refer the reader back to the ICTR's Judgement in the *Akayesu* case (1998), in many respects as important as *Tadic* case (in 1995) has been to the ICTY, notably paras. 617-637.

(87) However, a timid prodrome may be traced back to the Allied (France, Great Britain and Russia) Declaration issued in 1915 with regard to the massacres perpetrated against Armenians in the Ottoman Empire: "For about a month the Kurd and Turkish population of Armenia has been massacring Armenians *with the connivance and often assistance of Ottoman authorities* [...] *In view of these new crimes of Turkey against humanity and civilization the Allied governments announce publicly to the Sublime Porte that they will hold personally responsible these crimes all members of the Ottoman government and those of their agents who are implicated in such massacres*"

genocide that flows from it, not uniform as one may in fact expect. Moreover, there exist manifold definitions of crime against humanity within municipal law of States, that happen sometimes, in addition, more accurate than in PIL.

Perhaps the diversity of these definitions – especially in their penumbra – is due to the fact that this category of international crimes represents, in a higher degree compared to the two previous groups of crimes, a genuine shrinking of States' domestic jurisdiction (leaving aside the situation of the rights of minorities). It is not too bold to assert then that HR are begotten through the crime against humanity, and hence the normative “bing bang”<sup>(88)</sup> of crime against humanity is undoubtedly Article 6 (c) of the IMT Statute which reads as follows:

“namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, *before or during the war*; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated”<sup>(89)</sup>

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(May 29, 1915, italics added). See in this respect the fascinating book of Ph. Sands, *East West Street. On the Origins of Genocide and Crimes against Humanity*, London, 2016 (88) In fact, Article 230 (penalties) of the 1920 Sèvres Treaty, which was meant to seal the peace between the Allied Powers and Turkey but was never ratified by the latter, provided that “the Turkish Government undertakes to hand over to the Allied Powers the persons whose surrender may be required by the latter as being responsible for the *massacres* committed during the continuance of the state of war on territory which formed part of the Turkish Empire on August 1, 1914” (emphasis added). Quite intuitively, the massacres referred to are those concerning notably the Armenian population of former Ottoman Empire. Paragraph 4 of this same provision envisaged the possibility that the LoN created a “tribunal competent to deal with the said massacres”, in such an instance Turkey would have been bound by the duty to defer to it those accused of such crimes to it. Failing the entry into force of the Treaty of Sevres (which was later on replaced by the Treaty of Lausanne of 1923 which embodied no clauses of this nature), there has been neither domestic punishment nor international repression for the aforementioned massacres.

(89) Italics added. See also the consonant definition of this crime in the US Control Council Law n° 10 (December 1945) applicable to the US-occupied Germany allowing the occupying power to prosecute German individuals on the account of this crime.

The definition of this new category of international crimes implied and required the existence of an IAC, i.e. the so-called *nexus* with a (unlawful) war (that is to say a war of aggression). Furthermore, one ought to highlight the explicit specification to the irrelevance of municipal law for the purposes of qualifying such acts as being an international crime. This also proves the newness of these crimes.

Yet, some authors as well States were not satisfied with the requirement of a *nexus*, especially since the crime of genocide – indeed a offspring of crime against humanity – which was on the verge of being defined (in 1948) got rid of it [*infra* II.1.6]. And indeed this happened thanks to Article 3 of ICTR Statute<sup>(90)</sup> which in a certain way replaced the nexus requiring an “armed conflict” with “*widespread or systematic attack* against any civilian population on national, political, ethnic, racial or religious grounds”.<sup>(91)</sup> Next conventional definitions<sup>(92)</sup> will confirm this substitution certainly due to the parallel evolution of HR. During the diplomatic conference in Rome<sup>(93)</sup> a lot of discussion took place around the formula “widespread or systematic”, for example in comparison with ICTR Statute’s which has “and” instead of “or”. On the grounds of a literal interpretation one may tentatively infer from the latter that ICC’s formula is larger than ICTR’s. Yet, some ambiguities remain since Article 7 (2) a) ICC seems to encompass both the *systematic*<sup>(94)</sup> and the *widespread* characters;<sup>(95)</sup> in this connection, the policy (or plan), aiming at the

(90) True, the nexus was reaffirmed in Article 5 of the ICTY Statute which in effect required the CAH to be perpetrated during an “armed conflict, whether international or internal in character, and directed against any civilian population”. In this connection, it ought to be added that the substantive definition contained in the aforementioned provision has been considered fleshed up compared to that enshrined in IMT Statute.

(91) Italics added.

(92) Article 2 of the Special Court for Sierra Leone Statute, Article 7 ICC Statute, Article 9 of the Extraordinary Chambers in the Courts of Cambodia (which makes an explicit renvoi to Article 7 ICC).

(93) It must be nonetheless underlined that quite a few delegations argued to maintain this nexus during the conference.

(94) ICTY, *The Prosecutor v. Kunarac*, 2002, para. 98.

(95) This section of Article 7 reads as follows: “ ‘Attack directed against any civilian population’ means a course of conduct involving the multiple [thus *widespread*] commission of acts referred to in paragraph 1 against any civilian population, pursuant

perpetration of one of the CAH while not being one of its constitutive elements, undoubtedly represents a compelling evidence that the attack directed against the civilian population was widespread and systematic.<sup>(96)</sup> It is hence wise to await a further jurisprudential clarification.

In any case, and at this stage, the following elements may be distilled from the definition of CCA embodied in Article 7 ICC Statute. Firstly, the attack must be directed, contrariwise to war crimes, to the civilian population. Secondly, the attack in question does not have to be perforce a military attack, that is to say an attack triggered by military forces. Thirdly, the attack must occur "pursuant to or in furtherance of a State or organizational policy to commit such attack", hence a CAH may also be perpetrated by NSA.<sup>(97)</sup> Fourthly, the actor of a CAH must act "with knowledge of this attack". This seems to encompass a sort of special intent which nevertheless is less hard to prove than the *dolus specialis* requires for the genocide. Therefore, lack of this knowledge will prevent the existence of a CAH, leaving only possible war crimes or simple "killing".<sup>(98)</sup> Fifthly, as far as the "criminal intent" or motive (*dolus*) is concerned, no such element is required,<sup>(99)</sup> bar in one of the eleven acts listed in the definition of CAH, i.e. persecution.<sup>(100)</sup> However, motive remains useful in view of determining the penalty that hence will be higher without it (it is indeed considered as an "aggravating circumstance").

Regarding the list of acts likely to constitute a CAH, it appears clearly that it is much longer than that of Article 6 (c) IMT, and again this is due to the tremendous evolution of HR since 1945, especially to their substance. For instance, apartheid, torture and "enforced disappearance of persons" may surely be ranked among the most recent acquisitions. Another great novelty

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to or in furtherance of a State or organizational policy [*systematic*] to commit such attack".

(96) ICTY, *The Prosecutor v. Krstic*, 2004, para. 225, whereby the Appeals Chamber reversed Trial Chamber's judgement (2001, para. 685). In the same vein : ICTY, *The Prosecutor v. Kunarac*, 2002, para. 98.

(97) ICTY, *The Prosecutor v. Jelusic*, 1999, paras. 100-101.

(98) However, as attested by Article 7 (paragraph 2 of the Introduction) of the "Elements of Crimes", this condition must be loosely construed to the extent that it does not require "proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization".

(99) ICTY, *The Prosecutor v. Tadic*, 1999, para. 275.

(100) ICTY, *The Prosecutor v. Kupreskic et al.*, para. 636.

is represented by the new generation of CAH constituted by the so-called “gender crimes”, comprising “forced pregnancy”; this acquisition, though, was not carried without some difficulty, since some States which banned abortion (Holy See, Ireland, etc.) did not clearly intend the latter to be criminalized, that’s why an interpretation of this new crime took account of this need.<sup>(101)</sup> On the other hand, other acts which were within the compass of Article 6 (c) have been subsequently developed and extended.<sup>(102)</sup> On the contrary, other alleged CAH, strenuously defended by some delegations in Rome, have not been included: economic embargo, terrorism as well as mass starvation.

In some other cases, yet, Article 7 ICC has ended up – at least pending further jurisprudential refining – restricting the scope of CAH. For instance, with regard to persecutions, section 1 (h) of this provision defines this crime as “Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, *in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court*”. If, on one hand, the substantive list is noticeably larger than previous definitions, on the other, the last fragment (in added italics) seems to include a nexus which was not hitherto required. At first glance, indeed, this condition may lead to a restriction of the scope of this CAH. One may wonder why this has happened; a tentative and intuitive answer could be that States at large – and some more specifically – are at pains in apprehending this CAH<sup>(103)</sup> and

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(101) Article 7 (2) f) of ICC Statute indeed provides that by “forced pregnancy” is meant “the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. *This definition shall not in any way be interpreted as affecting national laws relating to pregnancy*”. The last phrase (in added italics) specifically addresses this sensitive question by excluding from the definition of this CAH legislations and acts adopted thereof which relate to the national policy in matter of pregnancy.

(102) In this regard, one may mention deportation which has been supplemented by “forcible transfer of population” which refers to ethnic cleansing within the borders of a single (or same) State.

(103) Article 7 (1) h) of the Elements of Crimes provides that “the perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights”.

hence they feel the need, to all intents and purposes, to limit its material field of application.

Finally, this definition is open-ended one to the extent that Article 7 (1) k) sets forth “Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health” may be qualified as CAH.<sup>(104)</sup> Thanks to this last section of Article 7 ICC – aptly termed as umbrella clause – ICTR was able to consider – because of an identical provision – the fact of enforcing Tutsi women to be exposed naked before notably (Hutus) men as a CAH.<sup>(105)</sup>

## **II.1.6. Crime of genocide**

### **II.1.6.1. Birth of the Concept and its Definition**

In some respects, this species of international crime is the most famous in the eyes of the layman who even may tend to subsume – erroneously of course – all the others under it. Historically speaking, genocide is certainly a sub-category of CAH even though it originally found its place within Article 6 (c) IMT.<sup>(106)</sup> The very term of genocide is made up from the Greek word “γένος”, i.e. race, and a Latin verb, “caedo” (infinite “caedere”), i.e. “I kill”. In 1944, Raphael Lemkin, a Polish lawyer of Jewish origin, published a book entitled: “*Axis Rule in Occupied Europe: Laws of Occupation - Analysis of*

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(104) ICTY, *The Prosecutor v. Mitar Vasiljevic*, 2002, paras. 234-240.

(105) ICTR, *The Prosecutor v. Jean-Paul Akayesu*, 1998, paras. 429, 447.

(106) Indeed, while not being mentioned in the very terms of this provision, the Prosecutor got availed of in his Indictment (Count Three): *US et al. v. Goering et al.*, The Trial of the Major War Criminals before the IMT (1945-1946), pp. 43-44. Furthermore, US Military tribunal prosecuted and condemned upon this indictment: *US v. Alstoetter*, III Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law n° 10 (1951), p. 954. Even though it was originally subsumed on Count 3, i.e. War Crimes (Indictment, adopted 8 October 1945, *Trial of the Major War Criminals before the International Military Tribunal*, Nuremberg, 1947, 43.

*Government - Proposals for Redress*”,<sup>(107)</sup> in which he sketched a definition of genocide, while coining, obviously, for the first time the very term:

“Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group”<sup>(108)</sup>

As it will be delved into later on, the intimate relation between an individual and a specific group are material in order to grasp the very essence of this crime; the belonging of the former to the latter makes him (her) a target of the unlawful action. Therefore, it is due to this link that the individual is targeted so that the ultimate victim of action is the group through the individual appertaining to it. The definition is larger and narrower than that purported by the UN 1948 Genocide Convention<sup>(109)</sup> at the same time, since it covers cultural genocide while at the same time taking solely into account the national group.

Thanks also the IMT jurisprudence, the definition and autonomous character of the crime of genocide underwent a rapid ripening since in 1946, UNGA resolution 96 (I) not only enshrines for the first time the criminalization of genocide but also affirmed that it represents:

“a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings”

Hence, the nexus between individual (and crime directed against) and the group to which he (or she) belongs (and the crime directed against) are intimately intertwined on the grounds of specific intention (*dolus specialis*) according to which the ultimate goal of the crime is to “destroy entirely or in part” it.<sup>(110)</sup>

(107) The uprising of the ghetto of Warsaw and its bloody repression are not without influence on the awareness by the author of the terrible policy waged by Nazis in Europe and surely constitutes a point of non-return in the awakening of the *legal conscience of mankind* (UNGA resolution 96 (I)). See also: ICJ, Application of Genocide Convention, 2007, para. 193 (p. 125). See in this regard: Ph. Sands, *East West Street. On the Origins of Genocide and Crimes against Humanity*, London, 2016.

(108) Washington, 1944, at 79.

(109) A masterly commentary of this law-making convention: *The UN Genocide Convention. A Commentary*, ed. by P. Gaeta, Oxford, 2009.

(110) UNGA Resolution 96 (I), 11 December 1946. It is noteworthy to observe that this resolution did not encompass, contrary to Lemkin’s definition, cultural genocide.

Lastly, “in order to liberate mankind from such an odious scourge”<sup>(111)</sup>, UNGA adopted *unanimously* on 9 December 1948 the Genocide Convention.<sup>(112)</sup> A brief perusal of the main substantive provisions of this Convention is not without interest especially because the definition enshrined therein will not noticeably evolve through the successive international treaties up to and included ICC Statute, contrariwise to the other international crimes, as we have seen.

In accordance with Article 1, genocide – which is established as “a crime under international law” – may be perpetrated either in time of peace and war and hence high contracting parties commit themselves to prevent and punish it. It ought to be observed in this respect that UN Genocide Convention sets thus forward an obligation for States to prevent and punish genocide while at the same time making it a crime if committed by an individual hence engaging the latter’s international responsibility. In 2007 ICJ, unsurprisingly held that a State party to it *may also* entail its responsibility for committing genocide and *not only* for not preventing and/or punishing it. Indeed, even though “such an obligation [not to perpetrate a genocide] is not expressly imposed by the actual terms of the Convention”, this obligation flows from a combined construction of two provisions of the Convention, namely I and III, alongside with the Preamble (i.e. contextual interpretation). The Court affirms indeed that in its view:

“taking into account the established purpose of the Convention, the effect of Article I is to prohibit States from themselves committing genocide. Such a prohibition follows, first, from the fact that the Article categorizes genocide as a ‘crime under international law’: by agreeing to such a categorization, the State parties must logically be undertaking not to commit the act so described. Secondly, it follows from the expressly stated obligation to prevent the commission of acts of genocide. That obligation requires the States parties, *inter alia*, to employ the means at their disposal ... to prevent persons or groups not directly under their authority from committing an act of genocide or any of the other acts mentioned in Article III. *It would be paradoxical if States were thus under an obligation to prevent, so far*

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(111) Preamble of the UN 1948 Genocide Convention, which entered into force in 1951.

(112) UNGA Resolution 216 (III) A.

*as within their power, commission of genocide by persons over which they have a certain influence, but were not forbidden to commit such acts through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law. In short, the obligation to prevent genocide necessarily implies the prohibition of the commission of genocide”<sup>(113)</sup>*

Article II enshrines the definition of genocide which requires both the commission of an act (“actus reus”) and the specific intention (“dolus specialis”) aiming at destroying entirely or partially a national, racial or religious group. Therefore, as already underscored, the individual which is affected by the criminal act is transcended by its appurtenance to the group in point which is then ultimately the true target of the genocide. The following acts convey – and substantiate – the specific intention to destroy the group concerned: a) “killing members of the group”, in effect at least two; b) “causing serious bodily or mental harm to members of the group”; c) “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part”; d) “imposing measures intended to prevent births within the group”; e) “forcibly transferring children of the group to another group”. By way of consequence, the UN Genocide Convention criminalizes the following acts mentioned in Article III: a) the commission of genocide; b) “conspiracy to commit genocide”, which will not be encompassed by ICC later on; c) “direct and public incitement to commit genocide”; d) “attempt to commit genocide”; e) “complicity in genocide”. As provided in Article IV, any individual may commit genocide: “constitutionally responsible rulers, public officials or private individuals”.

Articles VI to IX make up the institutional part of the Convention, i.e. they relate to the means of its implementation through the setting up of the different forms of jurisdiction and responsibilities (individual and States parties). They will be examined later on (*infra* III.2).

As already highlighted, the last of the international crimes, in order of appearance in PIL, undoubtedly features the most resilient definition insofar as it has barely evolved since 1948. Without entering into a tedious enumeration, ICTY (article 4) as well as ICTR (2) Statutes repeat *pari passu*

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(113) ICJ, Application of Genocide Convention, 2007, para. 166 (p. 113; italics added).

the definition of genocide embodied in Article II of the UN Genocide.<sup>(114)</sup> The same can be said as regards ICC Statute (Article 6) save the deletion of “conspiracy” as one of the elements of this crime enumerated in Article III,<sup>(115)</sup> the definition being thus the same as that enshrined in Article II of the UN Genocide.

Against the backdrop of this (unvaried) definition of genocide, it is not without interest to say a few words on the assets and shortcomings of the 1948 UN Genocide Convention. Among its assets, one has to mention, beside the definition of this crime, the criminalization of the “conspiracy” aiming at committing a genocide and the reaffirmation of a parallel international responsibility of individual *and* State which failed to prevent and/or to punish the author(s) of a genocide, but also for having perpetrated the very crime of genocide through its own organs.<sup>(116)</sup> On the negative side, one may regret the failure to include cultural genocide.<sup>(117)</sup>

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(114) Likewise: Article 1 of the 1968 “Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity”, UNGA resolution 2391 (XXIII); Article 1 (para. 1) of the 1974 Council of Europe “Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes”; ILC 1996 Code of Crimes against the Peace and Security of Mankind, UN doc. A/51/10, paras. 46-48, whose Article 17 borrows word-for-word the definition in Article 2 of the 1948 UN Genocide Convention.

(115) Indeed, “conspiracy” is not listed in Article 6 of the “Elements of Crimes” of the ICC.

(116) *Supra* note 113.

(117) In its wake, ICJ has rejected the allegation of a crime of cultural genocide: “The rejection of proposals to include within the Convention political groups and cultural genocide also demonstrates that the drafters were giving close attention to the positive identification of groups with specific distinguishing well-established, some said immutable, characteristics. A negatively defined group cannot be seen in that way”, Application of Genocide Convention, 2007, para. 194 (p. 125). Likewise, para. 334 (p. 186). The Court reiterated its stance in the Application of Genocide Convention (Croatia v. Serbia), 2008, para. 141 (p. 465). However, ICTY argued that even though cultural genocide is not within the compass of the definition of genocide as an international crime, the mere fact of destroying all the cultural (land-)marks of a group (otherwise defined) may well prove the special intent to destroy it: *The Prosecutor v. Krstic*, 2001, para. 580: “The Trial Chamber is aware that it must interpret the Convention with due regard for the principle of *nullum crimen sine lege*. It therefore recognises that, despite recent developments, customary international law limits the definition of genocide to those acts seeking the physical or biological destruction of all

Furthermore, the Convention adopts a narrow definition of the belonging to one of the groups encompassed by Article II, insofar as it is based on the involuntary appurtenance of the individuals, i.e. since their birth, thus excluding the voluntary belonging of individual to a group whatsoever, for instance genocide on “political grounds”.<sup>(118)</sup> Moreover, one may also deplore that the four groups within the compass of genocide (national, ethnic, racial and religious) are not accurately defined. On another key, that of implementation, the means provided to this effect by the 1948 UN Genocide Convention are far from being optimal.

ICJ has stated already back in 1951 that the crime of genocide appertains to customary international law in a famous dictum which deserved to be quoted extensively:

“[T]he principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation [...] The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality. In such a convention the contracting States do not have any interests of their own; they merely have, one and au, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or

or part of the group. Hence, an enterprise attacking only the cultural or sociological characteristics of a human group in order to annihilate these elements which give to that group its own identity distinct from the rest of the community would not fall under the definition of genocide. The Trial Chamber however points out that where there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group. In this case, the Trial Chamber will thus take into account as evidence of intent to destroy the group the deliberate destruction of mosques and houses belonging to members of the group”. Likewise: ICJ, *Application of Genocide Convention*, 2007, para. 344 (p. 186).

(118) *Supra* note 117.

of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions”<sup>(119)</sup>

Other international jurisdictions have by all means followed in the ICJ's footsteps by reaffirming the customary character of the definition contained through its illustration by specific examples.<sup>(120)</sup>

#### **II.1.6.2. “Mens rea” & “Actus reus”, or respectively the material act and (special) intent**

The distinctive feature of genocide as an international crime is by far the requirement of the “mens rea”, in sum the intent underlying the criminal act itself. This Latin formula, which deeply pervades criminal law, can be literally translated into: “guilty mind”, conveying thus one of the elements of criminal responsibility, i.e. the intent to harm by performing a (criminal) act, that is to say the “actus reus”. Hence, the existence of both elements must be then verified for the crime of genocide to occur.

##### **II.1.6.2.1. “Mens rea” and the crime of genocide: the intention to destroy entirely or partially a national, ethnic, racial or religious group (NERR)**

Contrariwise to the other international crimes, genocide requires then a specific intention (“dolus specialis”) which is at the origins of the act. The simple “dolus” (intention) is not sufficient as a “specific intention” (“dolus specialis”) is required, i.e., in accordance with Article II of the UN Genocide Convention, an act committed with the “intent to destroy, in whole or in part, a national, ethnical, racial or religious group”. Therefore, the individual affected by the criminal act of genocide is not for instance killed for what he (or she) is, but on the grounds of his (or her) appurtenance to one of the

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(119) ICJ, Reservations to Genocide Convention, 1951, p. 23.

(120) Eichmann case, Israel District Court, 1961, para. 80; ICTR, *The Prosecutor v. Akayesu*, 2008, paras. 499-522; ICTY, *The Prosecutor v. Jelusic*, 1999, paras. 66-77, 80-83, 100-108; ICTY, *The Prosecutor v. Jelusic*, 2001, paras. 44-57, 66-77; ICTY, *The Prosecutor v. Krstic*, 2001, paras. 549-550, 569-572, 580-598; ICTY, *The Prosecutor v. Krstic*, 2004, paras. 12-23.

groups listed in the definition.<sup>(121)</sup> This intent – which seems very much like aggravated criminal intention – is required in addition to the criminal intent of killing, or causing serious bodily harms, or any other acts enumerated in Article II. By way of consequence, “recklessness” or knowing negligence (“culpa”) are not sufficient.<sup>(122)</sup> As the ICTR made clear in the *Akayesu* case:

“Special intent is a well-known criminal law concept in the Roman-continental legal systems. It is required as a constitutive element of certain offences and demands that the perpetrator have the clear intent to cause the offence charged. According to this meaning, special intent is the key element of an intentional offence, which offence is characterized by a psychological relationship between the physical result and the mental state of the perpetrator”<sup>(123)</sup>

This special intent – quintessential of the *mens rea* as regards the crime of genocide – may either be corroborated by the very confession of the suspect or be objectively inferred from the relevant factual circumstances. With regard to the latter, ICTY deduced the special intent from the analysis of the facts brought before it: in the case in point, it reached the conclusion that a genocide had been perpetrated in Srebrenica by raising two separate yet intertwined questions: a) what is the targeted group?; then, b) is there any *special* intent in targeting this *specific* group? In the case in point: a) the group was exclusively made up by Bosnian Muslims of Srebrenica who belonged to the group of Bosnian Muslim; b) the intent to eradicate this group in a given geographical area may be considered as genocide. Indeed, the intention to destroy entirely or partially a group is tantamount to endeavour to destroy a part thereof as opposed to other individuals (even regardless of their high number) who do not appertain to it. Therefore, it is not required to destroy the entire group, the intention to eliminate only a part of it in a given geographic area suffices to infer the *mens rea* and hence the crime of genocide. In effect, the fact of systematically killing in this area

(121) Hannah Arendt lucidly observed that the banalization of evil has been made possible thanks to the depersonalization of the victim (the individual) transcended by his appurtenance to the group (*Eichmann in Jerusalem: A Report on the Banality of Evil*, New York, 1963).

(122) On the contrary, the “wilful blindness” suffices to substantiate the *mens rea*. For instance, a guard in a concentration camp may not pretend that he did not know what was going on.

(123) ICTR, *The Prosecutor v. Jean-Paul Akayesu*, 1998, para. 518.

the members of a part of this group may entail genocide. Conversely, to kill here and there some members of this group might likely not prove the specific intent to destroy the entire group. Referring again to Srebrenica, all Bosnian Muslims males have been killed, alongside with the expulsion of the rest of the population from this area and the destruction of mosques and houses belonging to this religious group. By way of consequence, this policy resulted in the disappearance of all male Bosnians able to fight to retake Srebrenica as well as in the impairment of reproduction *within* this religious group.

#### **II.1.6.2.2. "Actus reus": the material act constituting the crime of genocide**

The material act that concretises the special intent to destroy in whole or in part a group may result in an action or inaction;<sup>(124)</sup> this feature applies to all acts exhaustively listed in the definition of the crime of genocide. The most obvious example of genocide by *inaction* is by way of "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part" (Article II c) of the 1948 Genocide Convention).

Furthermore, whilst for the acts of "killing" (a), "Causing serious bodily or mental harm to members of the group" (b) and "Forcibly transferring children of the group to another group" (e), the final outcome must be proved, the same is not all required for the acts of "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part" (c) and those of "imposing measures intended to prevent births within the group" (d).<sup>(125)</sup>

Some words must be briefly spent for each of these acts. Regarding (a), in the light of the *Akayesu* case, 2 material elements are required: i) the death of the member of a group; and, b) that the individual has deceased as a result of an unlawful act or of an inaction of the accused or of his (or her) subordinate. It goes without saying that if an individual is killed in a context of genocide, but he (or she) does not belong to the targeted group, then this

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(124) ICTY, *The Prosecutor v. Sikirica et al.*, 2001, paras. 15, 40-42.

(125) The numbering of the acts forming a crime of genocide is drawn from Article II of the 1948 UN Genocide Convention; as it has been made clear this list is the same for the ICC as well as for the ICTY and ICTR.

acts does not amount to an act of genocide.<sup>(126)</sup> A thornier question is that of the meaning of “killing” especially by taking into account the other working language of both the ICC Statute and the 1948 UN Genocide Convention. While the French text has retained the word “meurtre” – etymologically winking to “murder”, which requires the intention – English text has opted for the more neutral “killing” which may also comprise “to cause death by negligence or recklessness”. Thus, in accordance with the usual rules of interpretation of international treaties as adjusted by the general principles of international criminal law (i.e. “favor rei”,<sup>(127)</sup> that is to say the more favourable interpretation for the accused must be referred to), the term “killing” has better chances to be referred to instead of “murder”. This conception has been indeed embraced by the ICTR in the aforementioned *Akayesu* case,<sup>(128)</sup> whilst, pending further jurisprudential

(126) ICTR, *The Prosecutor v. Jean-Paul Akayesu*, 1998, para. 710.

(127) See *infra* note 128.

(128) “[500]. With regard to Article 2(2)(a) of the Statute, like in the Genocide Convention, the Chamber notes that the said paragraph states “meurtre” in the French version while the English version states “killing”. The Trial Chamber is of the opinion that the term “killing” used in the English version is too general, since it could very well include both intentional and unintentional homicides, whereas the term “meurtre”, used in the French version, is more precise. It is accepted that there is murder when death has been caused with the intention to do so, as provided for, incidentally, in the Penal Code of Rwanda which stipulates in its Article 311 that “Homicide committed with intent to cause death shall be treated as murder”. [501]. Given the presumption of innocence of the accused, and pursuant to the general principles of criminal law, the Chamber holds that the version more favourable to the accused should be upheld and finds that Article 2(2) (a) of the Statute must be interpreted in accordance with the definition of murder given in the Penal Code of Rwanda, according to which “meurtre” (killing) is homicide committed with the intent to cause death. The Chamber notes in this regard that the *travaux préparatoires* of the Genocide Convention, show that the proposal by certain delegations that premeditation be made a necessary condition for there to be genocide, was rejected, because some delegates deemed it unnecessary for premeditation to be made a requirement; in their opinion, by its constitutive physical elements, the very crime of genocide, necessarily entails premeditation”. Therefore, the killing must be intentional, yet without premeditation. In the same vein: ICTY, *The Prosecutor v. Radislav Krstic*, 2001, paras. 484-485; ICTY, *The Prosecutor v. Stakic*, 2003, para. 515.

refinement, ICC's Elements of Crimes has, on the contrary, enshrined an opposite view<sup>(129)</sup>, thus discarding the intentional component of "killing".

With regard to (b), that is to say "Causing serious bodily or mental harm to members of the group", States have thus accepted the idea that ICC punishes acts of physical violence which have not (yet) attained the threshold of "killing". On the contrary, the very concept of "mental harm" is far more problematic.<sup>(130)</sup> The precise scope of this material act of crime remains thus particularly tendentious.<sup>(131)</sup> To cause a serious bodily or mental harm does not mean perforce that the harm in point to be permanent and irremediable. It seems in fact widely accepted that physical harm does not require to be permanent,<sup>(132)</sup> while it is more debated with regard to the mental harm wherein the irremediableness character might be required.<sup>(133)</sup> In any case, it is on the contrary undisputed, that a serious bodily and mental harm within the compass of the definition of the crime of genocide comprises the following acts: torture, rape, sexual violence, inhuman and degrading treatments.

With regard to (c), that is to say to "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part", this "actus reus" must be construed "as ... methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction".<sup>(134)</sup> Without being exhaustive, Article 2 (2) of the ICTR Statute encompasses " [the subjection of] a group of people to a subsistence diet, systematic expulsion from homes and the reduction of essential medical

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(129) Through the lens of "Elements of Crimes" attached to the ICC Statute takes care to underscore that "The term 'killed' is interchangeable with the term 'caused death'", Article 6 a) 1, footnote 2.

(130) China, for instance, insisted for the necessary requirement of the use of psychotropic substances, but the proposal was rejected.

(131) Again, in the eyes of the ICTR, rape and sexual violence may at the same time result in a serious bodily and mental harm: ICTR, *The Prosecutor v. Jean-Paul Akayesu*, 1998, paras. 731-734.

(132) ICTY, *The Prosecutor v. Stakic*, 2003, para. 516.

(133) "[M]ental harm is understood to mean more than the minor or temporary impairment of mental faculties", ICTY, *The Prosecutor v. Radislav Krstic*, 2001, para. 510.

(134) ICTR, *The Prosecutor v. Jean-Paul Akayesu*, 1998, para. 505.

services below minimum requirement”.<sup>(135)</sup> In the same vein and in the light of international jurisprudence, one may also mention: withholding sufficient living accommodations, deportation,<sup>(136)</sup> razing of villages, destruction of property, burning of harvest, far-reaching health and environmental damages, etc. It clearly appears that in this category of “actus reus”, the omission is particularly important; however, this inaction may not be equated to mere negligence, but it requires an *intentional* component (*dolus specialis*). Lastly, contrariwise to the two previous criminal material acts, the “actus reus” in question does not require the actual fulfilment of the action/omission, but the “group conditions of life [must be] calculated to bring about its physical destruction in whole or in part”.<sup>(137)</sup>

In respect of (d), that is to say, “imposing measures intended to prevent births within the group”, in the same manner as the previous criminal material act, it is not necessary to demonstrate that aim has been fulfilled. In the same vein, one ought to underscore that “measures intended to prevent births within the group” must not be calculated to destroy the group; it suffices that they “prevent the births within the group”. This kind of measures are indeed often instrumental to a genocidal plan, as it had been the case for the Holocaust perpetrated by the Nazis during WWII. In the light of the aforesaid, the following acts are within the compass of the “actus reus” in point: sterilization and or compulsory abortion, castrations; segregation of sexes, obstacles to marriage (within the group), etc.<sup>(138)</sup> That’s why it is not inappropriate to speak of these material acts as constituting a “biologic genocide”. In this connection, “rape” might also be included as the ICTY put forward: “The systematic rape of women ... is in some cases

(135) *Ibid.*, para. 506. For the purposes of a systemic construction of the material acts encompassed by this specific “actus reus”, one might also refer to the relevant provisions of 1966 International Covenant on Economic Social and Cultural Rights.

(136) Not to be mistaken with mere expulsion which is not per se a material act likely to trigger the crime of genocide: ICTY, *The Prosecutor v. Stakic*, 2003, para. 519.

(137) For instance, Israel Supreme Court (Attorney-General (Israel) v Adolf Eichmann 36 ILR 5, 1962, para. 80) considered that this “actus reus” applied only to the survivors of the Holocaust; on the contrary, for those who had been actually exterminated by the Nazis, that was a “killing”, i.e. another material act encompassed by the definition of the crime of genocide under (a).

(138) ICTR, *The Prosecutor v. Jean-Paul Akayesu*, 1998, para. 507.

intended to transmit a new ethnic identity to the child".<sup>(139)</sup> Likewise, measures subsumed under heading may also feature a psychological dimension (and not only a physical one) as the ICTR made clear with regard to rape or sexual violence:

"[T]he Chamber notes that measures intended to prevent births within the group may be physical but can also be mental. For instance, rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate"<sup>(140)</sup>

The last category of material acts amounting to a crime of genocide, i.e. "Forcibly<sup>(141)</sup> transferring children of the group to another group" (d), may raise a few questions, insofar as 1948 UN Genocide Convention's drafters had rejected cultural genocide. Indeed, this "actus reus" may in some respects be misled with the latter. In this case, perhaps as a way to reinvigorate this type of genocide, the actual result of the action must be proved for the crime to be perpetrated. In other words, one has to show that children are actually transferred from a protected group to another, even though ICTR has gone further admitting also the threat to do so.<sup>(142)</sup> Finally an ancillary issue to the application of this provision must be addressed, i.e. the UN 1948 Convention does not specify what is meant by "children". Therefore, the question must be sought elsewhere and, through systemic interpretation, a potent hint to this effect can be found in the UN 1989 Convention on the rights of the child, whose Article 1 states that "a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier". However, the threshold appears to be too high since, if the aim is to prevent for a child to lose its roots, then at 17 years old it is unlikely that he could be deprived of its culture.

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(139) ICTY, *The Prosecutor v. Karadzic and Mladic*, 1996, para. 94. In the same vein: ICTR, *The Prosecutor v. Jean-Paul Akayesu*, 1998, para. 507.

(140) ICTR, *The Prosecutor v. Jean-Paul Akayesu*, 1998, para. 508.

(141) This adverb must be construed as including not only physical acts of coercion but also threats of intimidation (e.g. aboriginal children in Australia).

(142) ICTR, *The Prosecutor v. Jean-Paul Akayesu*, 1998, para. 506.

Two aspects related to the crime of genocide and its application: identification of group and difference and similarities with the CAH

### II.1.6.2.3. Identification of protected group under the concept of genocide

The concept of group is pivotal in view of grasping the crime of genocide. As shown by international jurisprudence, a group must be stable and permanently constituted, thus the automatic (as opposed to voluntary) appurtenance of an individual (the victim) to it. Hence, the group is definitively circumscribed as well as those individuals belonging to it. In the *Akayesu* case, ICTR rebutted the allegation according to which a genocide can be perpetrated against a “more ‘mobile’” group, i.e. that people are free to adhere to it, for instance a group founded upon political values.<sup>(143)</sup> Furthermore, a group must be defined in a positive way (in sum “who those peoples are”) and not negatively (i.e. “who they are not”),<sup>(144)</sup> since the very concept of genocide implies the aim of destructing (entirely or partially) a group by targeting an individual on the grounds of its appurtenance to it.

In this same case, ICTR provides us with useful remarks with regard to the four types of “group” against which genocide may be directed (i.e. NERR). A “national” group refers to a group made up of human beings “perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties”.<sup>(145)</sup> A “ethnic” group, instead, comprises all individuals sharing “a common language and culture”;<sup>(146)</sup> whilst a “racial” group

(143) “On reading through the *travaux préparatoires* of the Genocide Convention, it appears that the crime of genocide was allegedly perceived as targeting only ‘stable’ groups, constituted in a permanent fashion and membership of which is determined by birth, with the exclusion of the more ‘mobile’ groups which one joins through individual voluntary commitment, such as political and economic groups. Therefore, a common criterion in the four types of groups protected by the Genocide Convention is that membership in such groups would seem to be normally not challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner”, ICTR, *The Prosecutor v. Jean-Paul Akayesu*, 1998, para. 511.

(144) ICJ, *Application of Genocide Convention*, 2007, para. 193 (p. 125) ; also para. 196 (pp. 125-126). Likewise, ICTY, *The Prosecutor v. Stakic*, 2003, para. 512.

(145) ICTR, *The Prosecutor v. Jean-Paul Akayesu*, 1998, para. 512. The Tribunal rightly makes reference to the ICJ’s decision in the *Nottebohm* case ICJ, 1955, p. 23).

(146) *Ibid.*, para. 513.

focuses on the “hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors.”<sup>(147)</sup> Lastly, a “religious” group is made of peoples who “share the same religion, denomination or mode of worship”.<sup>(148)</sup>

Closely intertwined with this question lays the crux of the problem, i.e. how to identify a group, be it national, ethnic, racial or religious. Indeed, ICTR was faced with the thorny problem of the distinction – and the nature thereof – between Hutus and Tutsi who allegedly belonged hence to two different “ethnic” groups. To this effect, the Tribunal made recourse in turn to identity cards<sup>(149)</sup> as well as to testimony of witness as proof of the appurtenance. These two elements of evidence reveal in fact two different approaches to the question, i.e. the objective and subjective ones. The former emphasizes on the external standpoint, in other words how peoples are seen and categorized from the outside world (identity cards,<sup>(150)</sup> official and public statements, etc.)<sup>(151)</sup> whilst the latter stresses on the self-perception, in sum how the individual concerned sees himself and hence considers himself as belonging to one group or not. As the Court seemed to hint that the two approaches must be combined hence yielding to a “combined subjective-objective approach”.<sup>(152)</sup> In another case, though, ICTR, bound to elaborate on the characteristics of a ethnic group, observes that the appurtenance to it has to depend on three (alternate) criteria: a) the individuals have to share a common langue and culture (i.e. objective

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(147) *Ibid.*, para. 514. The Tribunal seems to insist that in order to demonstrate the appurtenance of an individual to a “racial” group, priority must be given to the genotype (genetic identity) in lieu of the phenotype (its appearance or morphology). The question was far from being academic in the Rwandan case where the distinction between Hutus and Tutsis was “popularly” based on physical traits which might be more easily observed than the “genetic heritage”. Likewise: ICTR, *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, 1999, para. 98.

(148) *Ibid.*, para. 515. Likewise: ICTR, *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, 1999, para. 98.

(149) *Ibid.*, paras. 123, 170.

(150) ICTR, *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, 1999, para. 35.

(151) In Nazi Germany, for instance, the obligation to bear openly – sown on a garment – the Star of David (better “Shield of David”) made to the German Jews was a clear “mark” of appurtenance to a religious group.

(152) ICJ, *Application of Genocide Convention*, 2007, para. 191 (p. 124).

elements), or b) they consider themselves as belonging to the group (victim's subjective element), or c) they are identified (perceived) as such by the outside world, including and especially, by the author of the genocide (author's subjective element).<sup>(153)</sup> Hence, this case would tend to corroborate the thesis according to which, in view of grasping a group, a tribunal has to make recourse to three alternate (subjective and objective) elements. Yet again, in another case, ICTR stresses even further the subjective element; assuming that the very concept of group under the 1948 UN Convention (bar the national ones, which is objectively and more easily assessable) does not enjoy a universal definition, the Tribunal reaches the conclusion that this concept is definitely more subjective than objective. Therefore, what matters is how the victim is perceived by the author ("mens rea") of the genocide as belonging to the group in point; alternatively, it may be made recourse to the self-interpretation by the victim himself. In sum, the two sides of the subjective approach may concur to the identification of the group, first, and to the appurtenance, then, of the victim to it.

#### **II.1.6.2.4. Crime of genocide as opposed to Crime against humanity**

The comparison between these two international crimes is in all regards evident, not least because the two share a common origin, better, as it has been previously outlined crime of genocide is historically speaking a species of a wider category of crimes, i.e. CAH. Indeed, as the District Court of Jerusalem (Israel) stated in the famous *Eichmann* case:

"It is hardly necessary to add that the 'crime against the Jewish People', which constitutes the crime of 'genocide' is nothing but the gravest type of 'crime against humanity' (and all the more so because both under Israeli law and under the [UN 1948] Convention a special intention is requisite for its commission of a 'crime against humanity'). Therefore, all that has been said in the Nuremberg

(153) ICTR, *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, 1999, para. 98: "An ethnic group is one whose members share a common language and culture; or, a group which distinguishes itself, as such (self-identification); or, a group identified as such by others, including perpetrators of the crimes (identification by others)".

principles on the 'crime against humanity' applies a fortiori to the 'crime against the Jewish People'"<sup>(154)</sup>

Therefore, it is unsurprising that as far as the "actus reus" is concerned their similarities far exceed the scarce oddities.<sup>(155)</sup> In both cases: a) we are faced to grave crimes committed by individuals; b) they are not made up from isolated behaviours disconnected between them, on the contrary they are underpinned by a plan or policy; c) very often, it is the fact of a State or at the very least with the latter's acquiescence or even connivance; d) criminal acts are targeted against civilian population (in this respect they differ substantially from crimes of war). Due to the profound similarities with regard to the material acts comprised by these two crimes, quite a few overlaps may occur between genocide and CAH. In fact, to kill all the members of a protected group (national, ethnic, religious or racial) in a *systematic* and *widespread* manner "with intent to destroy" it, constitutes *both* a genocide and a CAH.<sup>(156)</sup> On the contrary, torture arbitrary imprisonment make up a CAH whilst to kill human beings belonging to anyone of the protected groups result (only) in a genocide.

Hence, if there are some differences between them, and there are indeed, they must lay perforce on the plane of *mens rea*, where in effect no overlap can be found. As it has been authoritatively observed, while is irrefutable that "[a]ll true crimes require proof of intent"<sup>(157)</sup>, that of genocide stands apart from the other international crimes insofar as the *mens rea* is specially characterized, thence the so-called "dolus specialis" or *special intent*.<sup>(158)</sup>

(154) Israel v. Eichmann, Supreme Court of Jerusalem, judgement of 29/05/1962, *ILR*, vol. 36 para. 26. Likewise: ICTY, *The Prosecutor v. Tadic*, 1995, paras. 139-141.

(155) For instance, forcible deportation is comprised within CAH and does not amount to a crime of genocide: ICTY, *The Prosecutor v. Radislav Krstic*, 2001, para. 519; ICTY, *The Prosecutor v. Stakic*, 2003, para. 519.

(156) On the overlaps between CAH and crime of genocide, see: ICTR, *The Prosecutor v. Kyiashima and Ruzindana*, 1999, paras. 628-636.

(157) W. Schabas, *Genocide in International Law: The Crime of Crimes*, Cambridge, 2001, p. 213.

(158) "Special intent is a well-known criminal law concept in the Roman-continental legal systems. It is required as a constitutive element of certain offences and demands that the perpetrator have the clear intent to cause the offence charged. According to this meaning, special intent is the key element of an intentional offence, which offence

As regards CAH, historically the parent crime of genocide, one has to verify the intent to commit (“*dolus generalis*”) one of the constitutive material (and criminal) acts in addition of the *knowledge* of the “widespread or systematic attack”<sup>(159)</sup> against the civilian population. Instead, with respect to genocide, one has to determine the quintessential “special intent” (*dolus specialis*) to “destroy in whole or in part” one of the targeted groups, in addition to the “general intent” underpinning the killing or any other of the material acts encompassed by the definition of the crime of genocide. As the ICTR stated in its landmark case:

“Genocide is distinct from other crimes inasmuch as it embodies a special intent or *dolus specialis*. Special intent of a crime is the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged. Thus, the special intent in the crime of genocide lies in ‘the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such’”<sup>(160)</sup>

For instance, persecution represents by all means a CAH if discrimination is carried out in widespread scale. Under the scenario of genocide, discrimination is required too, but one has also to determine the “special intent” to destroy in whole or in part the group”. In a nutshell, one might resume the major differences between crime of genocide and CAH from the standpoint of *mens rea*, with two simple words: quantity vs quality. The former underlies the CAH (widespread and systematic attack) and normally requires huge numbers whilst the latter features the crime of genocide which focus on the contrary on the “special intent” enabling thus to distinguish a mere killing from genocide through killing if performed with the aim of destroying the group to which the victim belongs. In other words, special intent required by PIL for a crime of

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is characterized by a psychological relationship between the physical result and the mental state of the perpetrator”, ICTR, *The Prosecutor v. Jean-Paul Akayesu*, 1998, para. 518. Likewise: ICTY, *The Prosecutor v. Stakic*, 2003, para. 520.

(159) The element of “plan” which may prove the systematic character of a CAH must not be mistaken with the “special intent” required for the crime of genocide, even though the two concepts may share some commonalities: “although a specific plan to destroy does not constitute an element of genocide, it would appear that it is not easy to carry out a genocide without a plan or organization”, ICTR, *The Prosecutor v. Kyieshima and Ruzindana*, 1999, para. 94.

(160) ICTR, *The Prosecutor v. Jean-Paul Akayesu*, 1998, para. 498.

genocide to be committed may palliate the huge numbers (widespread) needed for the commission of a CAH.<sup>(161)</sup>

Lastly, in the case of a simultaneous perpetration of a crime of genocide and a CAH – for the same material act – then the former encompasses and absorbs the latter,<sup>(162)</sup> hence revealing its graver nature compared to the CAH, since it shows a special (thus aggravated) intent to destroy in whole or in part a protected group. In this connection, and on the account of the focus placed by the crime of genocide on *quality* instead of *quantity*, it is not worthless to address the question whether a genocide might be perpetrated by a single individual, a rare hypothesis that cannot be yet excluded at least from a conceptual standpoint.<sup>(163)</sup> In the *Genocide* case, the World Court tackles indirectly this crucial question in connection with the germane issue of determining the “ ‘part’ of the ‘group’ for the purposes of Article II” of the 1948 UN Genocide Convention. The ICJ considers then that both the “substantiality requirement” (i.e., the victims’ toll) and the “qualitative approach”<sup>(164)</sup> cannot “stand alone” and hence they concur jointly to verify the conditions set out by Article II of the UN 1948 Genocide Convention.

(161) “This Trial Chamber emphasises that in view of the requirement of a surplus of intent, it is not necessary to prove a *de facto* destruction of the group and therefore concludes that it is not necessary to establish, with the assistance of a demographer, the size of the victimised population in numerical terms. It is the genocidal *dolus specialis* that predominantly constitutes the crime”, ICTY, *The Prosecutor v. Stakic*, 2003, para. 522.

(162) ICTR, *The Prosecutor v. Kyieshima and Ruzindana*, 1999, paras. 628 ff.

(163) ICTY, *The Prosecutor v. Jelusic*, 1999, paras. 100-101. In the case in point, the Tribunal, while admitting *in abstracto* such hypothesis – provided that the single killing took place within and in accordance with a plan (i.e. a genocidal policy) –, established that the accused randomly killed the victim and not in the pursuance of a plan, thence the lack of “special intent”. Indeed, later on the Tribunal made clear that “The Trial Chamber observes, however, that it will be very difficult in practice to provide proof of the genocidal intent of an individual if the crimes committed are not widespread and if the crime charged is not backed by an organisation or a system”. It is hard to not agree with this finding.

(164) I.e. : “If a specific part of the group is emblematic of the overall group [leaders?], or is essential to its survival [women?], that may support a finding that the part qualifies as substantial within the meaning of Article 4 (of the [ICTY] Statute which exactly reproduces Article II of the Convention)”, ICJ’s quoting ICTY case (*The Prosecutor v. Krstic*, 2004, para. 12), para. 200.

Furthermore, in the *Akayesu* case, ICTR makes the finding according to which a single victim is sufficient to substantiate genocide if the intent to destroy partially or entirely the group in point is proved. However, the Tribunal seems to override the literal interpretation of its Statute (which mentions “killing members of the group”, i.e. plural)<sup>(165)</sup> for the benefit of the teleological means of interpretation.<sup>(166)</sup>

### Synoptic Table of International Crimes

	Genocide	Crime against Humanity	War Crimes	Crime against Peace
Nurnberg Tribunal <sup>(167)</sup>	----- <sup>(168)</sup>	Art. 6 litt. c)	Art. 6 litt. b)	Art. 6 litt. a)
1948 Convention <sup>(169)</sup>	Art. 2			
I.C.T.Y. Statute <sup>(170)</sup>	Art. 4	Art. 5	Art. 3	-----
I.C.T.R. Statute <sup>(171)</sup>	Art. 2	Art. 3	Art. 4	-----
Rome Statute (ICC) <sup>(172)</sup>	Art. 6	Art. 7	Art. 8	Art. 8 bis <sup>(173)</sup>

(165) Article 2 (2) a) ICTR Statute.

(166) Both find their place in the toolbox of interpretation of international treaties. See *infra* VII.2.4.5.2.

(167) Nurnberg International Military Tribunal (8 August 1945): <http://www.icrc.org/dih>.

(168) It was at that time subsumed under the heading “crime against of humanity”, as one of its illustrative components.

(169) Convention on the Prevention and Punishment of the Crime of Genocide (9 December 1948). An authoritative commentary of this fundamental multilateral convention may be found in: *The UN Genocide Convention – A Commentary*, ed. by P. Gaeta, Oxford, 2009.

(170) UNSC Res. 827 (25 May 1993).

(171) UNSC Res. 955 (8 November 1994).

(172) [http://www.icc-](http://www.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools/Official+Journal/Rome+Statute)

<http://www.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools/Official+Journal/Rome+Statute>. Htm. An authoritative commentary of the cornerstone of contemporary international criminal law can be found in: *The Rome Statute of the International Criminal Court*, ed. by A. Cassese, P. Gaeta and J.R.W.D. Jones, Oxford, 2002.

(173) Art. 5 § of the 1998 Rome Statute provides that: “The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision

### III. Procedural Law: The Repression of International Crimes

Quite intuitively PIL, as a province of Law, is made up of substantive and institutional norms; criminal international law makes of course no exception. Indeed, PIL has established domestic and international repression mechanisms for the violation of individual's conducts which are qualified as international crimes. It consists of the aforementioned trilogy of international crimes expressed by the IMT Statute (war crimes, crimes against peace and crimes against humanity) and the crime of genocide (emancipated from this latter category to attain its own autonomy).

As in other provinces of PIL, the guarantee of international criminal norms is carried out both on the international and on the municipal plane. The following subsections will deal respectively with both of them.

#### III.1. The Domestic Implementation of International Criminal Responsibility

From an historical standpoint, domestic punishment has emerged as the first means of sanction of international crimes and for quite a long-time, despite several attempts in Modern History, has remained the sole mechanism permitting the enforcement of this province of PIL. This historical fact is the outcome of the weak institutionalization of the international legal order especially in this field. Failing an international, or at very least of a multinational tribunal, international punishment could hardly be envisaged.<sup>(174)</sup> Therefore, it was, and it can be argued that it is still roughly the same nowadays, up to States to proceed to crime repression, through the means of domestic judiciary mechanisms, and according to the

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shall be consistent with the relevant provisions of the Charter of the United Nations". During the review session of the Assembly of the State Parties (13th meeting, Kampala, 11 June 2010), the crime of aggression was finally defined and inserted within the ICC jurisdiction (res. 6) under the heading of Art. 8 bis. See *supra* note 65.

(174) S. Glaser, *Infraction internationale, ses elements constitutifs et ses aspects juridiques*, Paris, 1957, p. 31: "Les infractions internationales sont soumises, aussi longtemps qu'une juridiction criminelle internationale n'existe pas au régime de la répression ou de la compétence universelle. Dans ce régime, les auteurs de pareilles infractions peuvent être poursuivis et punis en quelque pays que ce soit, donc sans égard au lieu où l'infraction a été commise: *Ubi te invenero, ibi te judicabo*". This excerpt has been quoted verbatim by the District Court of Jerusalem (Israel) in the Eichmann case (April-December 1961).

usual criteria of jurisdiction: a) *ratione loci* (or territorial criterion), the location where the crime was committed);<sup>(175)</sup> b) *ratione personae* (or personal criterion), which can be two-fold, both the nationality of the author of the crime and that of the victim of the crime.

These three nexuses which allow linking the crime to State jurisdiction and ultimately the punishment, are provided for in States' criminal code allowing them to prosecute and eventually punish the authors of the crime. Of course, as it happens in other criminal domains others than that of international crimes, several States may entertain jurisdiction over a single criminal act: a) the State over whose territory the crime has been committed; b) the State of nationality of the author of the criminal act; c) as well as the State of nationality of the victim of the criminal act.

Alongside, with these jurisdictional criteria, PIL has established through either international treaties and customary international law what is called the universality principle or universal jurisdiction. According to this deep-rooted procedural principle, any State can bring before justice the alleged criminal independently of his/her nationality, the victims' nationality or where the crime was committed – as it occurred in the Pinochet case).<sup>(176)</sup>

Indeed, the Nuremberg trilogy (plus genocide) created obligations for States: they must adopt this typology of crimes in their domestic legal order as well as allow the jurisdictional application in their own domestic legal order. This translates into universal competence, or universality of jurisdiction. However, the path leading to such universal jurisdiction went had to go through the exclusiveness of jurisdiction of the territorial State and that respectively of the offender's and victim's. As for the genocide, for

(175) Article 6 of the 1948 Genocide Convention; in this regard the ICJ pointed out that: "Article VI only obliges the Contracting Parties to institute and exercise territorial criminal jurisdiction; while it certainly does not prohibit States, with respect to genocide, from conferring jurisdiction on their criminal courts based on criteria other than where the crime was committed which are compatible with international law, in particular the nationality of the accused, it does not oblige them to do so", Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), cit. (2007), § 442 (at 226-227).

(176) The criminal proceedings against were eventually dismissed and charges dropped since the offences in question occurred before the entry into force of the Convention against torture vis-à-vis UK which was requested by Spain to extradite Pinochet (former head of State of Chile).

instance, Article 6 of the 1948 Convention provides for the domestic criminal repression, i.e. that of the State on the territory of which the crime was perpetrated (*locus commissi delicti*).<sup>(177)</sup> This same article then goes on by establishing a parallel international criminal repression via an international jurisdiction to be created – the “International Penal Tribunal” – which will never actually materialise.<sup>(178)</sup> No special obligation in matters of extradition was introduced, aside from a mere statement to the point of referring to existing relevant treaties.<sup>(179)</sup> In fact, the rule establishing universal jurisdiction in matter of genocide emerged outside the Convention itself so that ultimately the latter was accordingly modified.

Flowing from the principle of universal jurisdiction (an entitlement rule) is the *aut dedere aut iudicare* principle (a prescriptive rule), i.e. a State is bound to transfer an accused to another State willing and being able to prosecute the suspect<sup>(180)</sup> and thus to ignite the appropriate judicial proceedings,<sup>(181)</sup> if it not able or not willing do it itself. Moreover, States are bound to take all necessary means in order to prevent the punishable violations.<sup>(182)</sup> These alternative obligations allow States to coordinate their

(177) Literally: the place where the criminal offense has been committed.

(178) However, by virtue of a dynamic interpretation (of the 1948 Convention) the ICJ felt rightly confident to say that “co-operation with the ICTY constitutes an obligation stemming from(i.a.) ... an obligation arising from its status as a party to the Genocide Convention” (Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), cit. (2007), § 442 (at 228], notwithstanding thus the letter of the Convention itself which nowhere explicitly provides for such cooperation. Indeed, as it will be shown later on, dynamic interpretation represents a powerful tool for normative change in PIL.

(179) Article 7 of the 1948 UN Genocide Convention.

(180) “Although Senegal is not required under the Convention to institute proceedings concerning acts that were committed before 26 June 1987, nothing in that instrument prevents it from doing so”, ICJ, Questions related to the Obligation to Prosecute or Extradite, 2012 § 102.

(181) As the World Court recently held regarding the Convention against torture, (whose article 7 (1) provides for the these two obligations), the State concerned must abide by them “within a reasonable time” and “without delay”, even though the aforementioned convention does not set a precise time frame (ICJ, Obligation to Prosecute or Extradite, cit., §§ 114-115). By analogy, it can be inferred that such a temporal requirement is equally applicable under current general international law.

(182) “It follows that the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*. The Court notes that the obligation each State thus has to

concurrent domestic jurisdictions. From this perspective, and despite the fact that most obligations are international, repression is articulated in the national sphere of the State. Several examples of national punishment can be cited in this respect: Eichmann, Barbie, Papon, Priebke, Kappler, etc.

A few words must be spent with regard to the immunity an organ<sup>(183)</sup> of a State might enjoy before municipal tribunal prosecuting him or her for any of the aforementioned international crimes, when he (or she) is *still in office*.<sup>(184)</sup> In a case brought before it, the World Court asserted such immunity, though with a clear dismay from some authorities of PIL. The Court affirmed that:

“in international law it is firmly established that, as also diplomatic and consular agents, certain holders high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal”<sup>(185)</sup>

In sum, as long as one of these State’s organs holds is in office, he (or she) cannot be prosecuted by another State’s municipal tribunal in accordance with the principle of sovereign equality of States (Article 2 (1) UNC) and its procedural corollary, i.e. “*par in parem non habet iurisdictionem*” (No

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prevent and to punish the crime of genocide is not territorially limited by the Convention”, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), 1996, § 31, p. 616; ICJ, Wall in the Occupied Palestinian Territory, 2004 § 157 (at 199).

(183) With regard to State’s and State organs immunities, see: G. Distefano, 2019 pp. 122-133.

(184) Indeed, it ought to be made clear that immunity is an exception to the principle recognizing a State to wield its criminal jurisdiction (and this is all the more true in the context of international crimes). As the ECHR adamantly affirmed a State organ cannot “plead immunity in respect of gross human rights violations”, such as torture or inhuman and degrading treatments (ECHR, Al-Adsani v. UK, Application n° 35763/97, Judgement of 21 November 2001 (Grand Chamber), § 24).

(185) ICJ, Arrest Warrant, para. 51 (pp. 21-22). The Court is referring to the so-called “Troika” of a State in PIL (according to Article 7 § 2 (a) VCLT 1969, Head of State, Head of Government, Minister of Foreign Affairs), see: G. Distefano, 2019, pp. 408-410. The Court – by analogy with article 29 VCDR stating the inviolability of a diplomatic agent – reiterated in a later case the uncontroversial existence of “international obligations regarding the immunity from criminal jurisdiction and the inviolability of foreign Heads of States”, ICJ, Questions of Mutual Assistance, 2008, para. 173 (p. 238).

dominium between equals). In recognizing this immunity, PIL hence seems to make no distinction between ordinary crimes committed by one of State organs (Rainbow Warrior) and major *international crimes*. The Court hastened, though, to add that

“the *immunity* from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy *impunity* in respect of any crimes they might have committed, irrespective of their gravity. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility”<sup>(186)</sup>

In brief, prosecution by its own State or by any other State may be triggered when he (or she) will be no more in office (as it was rightly pretended with regard to Pinochet, for example); in this case immunity has ceased and cannot shield any more the beneficiary from a criminal proceedings.<sup>(187)</sup>

More importantly, yet, an organ of State *in office* may be prosecuted, as it will be dealt with later on, by a competent international tribunal, before which, since the Nuremberg Trials, no such immunity may be invoked to dodge international punishment:

“[A]n incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction”<sup>(188)</sup>

Indeed, the principle of sovereign equality can no more be referred to build up a shield, since the jurisdiction is not wielded by a State but by the International Community through a treaty so empowered either by a treaty, either directly (such as the ICC) or indirectly (such UNCS established *ad hoc* international criminal tribunals). In both cases, States concerned have

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(186) *Ibid.*, para. 60 (p. 26).

(187) “[A]fter a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States, *loc.cit.*

(188) *Ibid.*, para. 61(p. 26).

discarded the rule of immunity recognized to their incumbent organs with a view to permit the exercise of international criminal jurisdiction.<sup>(189)</sup>

Finally, in the light of individual's asserted international personality, domestic repression must be distinguished from international repression, as it takes place within the States' legal order and as such has no influence on the individual's status. Thus, we cannot speak in terms of international subjectivity of the individual, when the repression is carried out in the domestic sphere before national courts.

### **III.2. The International Implementation of International Criminal Responsibility**

#### **III.2.1. The Two *Ad hoc* International Tribunals: ICTY and ICTR**

In the cases set under international instruments establishing repression mechanisms at the international level, the individual can be subjected to an international criminal trial.<sup>(190)</sup> Such a system was shaped by Article VII of the Convention for the prevention and punishment of the crime of genocide 1948 – which provided for the creation of an “International Penal Tribunal” – but was never materialized.<sup>(191)</sup>

Technically speaking in fact, and taking into account its genesis and its context, IMT of Nuremberg was not a genuine international (criminal) tribunal, but more accurately a *multinational* tribunal created by the victorious States against Nazi Germany with a view to prosecuting and

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(189) See *infra* III.2.3.2.

(190) For example, see Art. 9 of the ICTY Statutes as well as Art. 1 combined with Art. 17 of the ICC Statute which establishes the complementarity jurisdiction of the ICC in cases of non or lacking functioning of the Member States' national criminal jurisdictions.

(191) As a matter of fact, by this same resolution adopting the Genocide Convention, UNGA “invited” in its Part B “the International Law Commission to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions”, Resolution 260 (III) of 9 December 1948. As it will be shown further on, for the purposes of application of the 1948 UN Genocide Convention, one might consider ICC as being the “international penal tribunal” referred to in its Article VI.

punishing major war criminals of the defeated State.<sup>(192)</sup> The four Allies indeed drew their power from their status of occupying powers under IHL. They thus administered criminal justice through the application of PIL which was of course applicable to Germany and over German territory (and State organs) as the “Law of the Land”.

That's why it is more correct to trace back the first true international tribunals to those created by the UNSC respectively in 1993 and 1994 with regard to former Yugoslavia and Rwanda. In fact, the two conflicts, yet different in their legal nature and characteristics, awoke the *legal conscience*<sup>(193)</sup> of the international community through the action of the UNSC in the field of collective security.<sup>(194)</sup> After quite a few procrastinations, the UN organ vested with the “principal responsibility” for the maintenance and restoration of international peace and security decided to create first the ICTY – 1993 – and then ICTR – in 1994 -, that is to say two international criminal tribunals empowered to prosecute individuals having committed international crimes during these two conflicts.

It was in effect the first time that an *ad hoc* international criminal tribunal had been established by a unilateral act of an organ of an IO. With regard to the situation in former Yugoslavia, the response from international community has not spared criticisms both for its delayed and its insufficient character. That's why quite a few commentators saw in the creation of the ICTY a fig-leaf concocted with a view to saving the face of the UN and the international community at large. It was then hoped that its establishment had not only a retrospective effect – through the punishment – but also a deterrent effect over those potential authors of future criminal acts, since the conflict was still raging. The creation of the tribunal via the UNSC<sup>(195)</sup> was

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(192) The adjectival difference between international and multinational resonates *mutatis mutandis* as that regarding collective security between international forces and multinational forces.

(193) On the exact meaning of this oft-abused formula, see G. Distefano, 2019, pp. 559-564..

(194) See: ICTY, *The Prosecutor v. Tadic*, 1995, para. 32..

(195) In accordance with the UNC, all UN main bodies are endowed with the power to create subsidiary organs if necessary for the accomplishment of their mandate (Article 7 (2) UNC). However, the establishment was challenged – and this contention duly rebutted – in the first case brought before the ICTY: *The Prosecutor v. Dusko Tadic*, 1995, paras. 26-48.

the fruit of a joint proposal stemming from France, Germany and USA and was eventually preferred to the other solution consisting in its creation through the conclusion of international treaty, which would have required a much longer time to enter into force and thus for the tribunal to operate.<sup>(196)</sup>

In both cases, UNSC resorted to the establishment of these two tribunals<sup>(197)</sup> after having duly determined that the UN was faced to a “threat of peace” thus allowing it to avail itself of coercive measures envisaged in UNC Chapter VII. The “threat of peace”, one of the three situations likely to trigger UNSC’s powers under this chapter, consisted, in the two cases in point, of : mass murders, acts of genocide, widespread and systematic violations of HR, ethnic cleansings, violations of “laws and customs of war”, etc.<sup>(198)</sup>

Hence, by adopting its resolution 827 UNCS established ICTY and accordingly requested all Member States to fully cooperate with the tribunal for the purposes of prosecuting and punishing the authors of acts of genocide, crimes against humanity and war crimes (Articles 2 to 5 of the ICTY Statute, annexed to the aforementioned resolution). A year later,<sup>(199)</sup> UNSC adopted resolution 955 thereby establishing ICTR entrusted with the

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(196) It ought to be noted that whilst an external committee of internationally renowned jurists was entrusted with the task of drafting the ICTY Statute, the ICTR Statute was framed “in-house” through the recourse of the UN legal affairs department.

(197) Statute of the international Court to judge the individuals allegedly responsible of grave breaches of international humanitarian law committed on the territory of the Former Yugoslavia since 1991, SC Resolution 827 (1993) of 25 May 1993, ICTR Statute, SC Resolution 955 (1994) of 8 November 1994. The last version of the text of the Statutes are available on the respective websites of these courts: <http://www.icty.org> and <http://www.icttr.org>

(198) With regard to the pregnant formula “threat to peace”, see: A.L. Graf-Brugère, *La “menace contre la paix” dans la pratique du Conseil de sécurité des Nations Unies. Réflexions sur un concept de droit international*, Geneva, 2019.

(199) UN rightly decided to act in the same way in the African continent, as it had previously done with regard to the situation in former Yugoslavia, lest international community might have thought of a double standard of action. Furthermore, the new Rwandan government, which seized power after the civil war, asked the UNSC to act likewise.

mandate of prosecuting and punishing the authors of genocide,<sup>(200)</sup> crimes against humanity and of violations of common Article 3 to the four GE 1949 and their P/II 1977 (Articles 2 to 4 of the ICTR Statute).<sup>(201)</sup> The aforementioned provisions aimed thus at defining both tribunals' jurisdiction *ratione materiae*.

*Ratione loci*, i.e. territorial jurisdiction, encompassed, as far as ICTY is concerned, all criminal facts occurred on the territory of former Yugoslavia, whilst ICTR's was confined to the territory of the Rwandan State. However, with the regard to the latter, the Tribunal may entertain any claim based on criminal acts perpetrated by Rwandan nationals on neighbour States' territories (the territorial extension of the ICTR's jurisdiction is hence limited having regard to its goal, i.e. the punishment of criminal acts perpetrated during the civil war in Rwanda, notably, yet not exclusively, genocide).

*Ratione temporis*, i.e. temporal jurisdiction, ICTR's jurisdiction is clearly determined: all criminal acts committed between January 1<sup>st</sup> and December 31<sup>st</sup>, 1994. The temporal dimension of ICTY is instead a bit more complex, insofar while the *dies a quo* (the commencement) has been fixed at January 1<sup>st</sup>, 1991 (in accordance with Article 8 of the ICTY Statute and paragraph of the UNSC resolution 827), the setting of *dies ad quem* (the end) was left for a further determination by the UNSC "upon the restoration of peace" in former Yugoslavia's territories.<sup>(202)</sup>

A crucible aspect related to the exercise by the two *ad hoc* tribunals of their jurisdiction was related to the concurrence of domestic jurisdiction with domestic courts of States, precisely by virtue of the principle of universal jurisdiction. By virtue of Articles 9 ICTY and 8 ICTR Statutes – which affirm the concurrence of jurisdiction (paragraph 1) –, both tribunals "shall

(200) In both *ad hoc* tribunals, *ratione personae* jurisdiction was limited to physical persons and was not extended, contrariwise to the IMT's, to legal corporations.

(201) Contrariwise to the conflict which was eventually qualified as a IAC, thus allowing for the application of the four 1949 GE and their P/I 1977, the conflict in Rwanda – which feature by the way a strong genocide character both in its roots and its further developments – was a NIAC; hence, only claims based on the infringements to common Article 3 of the four 1949 GE and their P/II 1997 could be entertained by the ICTR. In both cases, *ad hoc* tribunals Statutes were annexed to the respective UNSC resolutions purporting to their creation.

(202) ICTY, *In re The Republic of Macedonia I*, Trial Chamber, October 4, 2002.

[nonetheless] have the primacy over the national courts of all States. At any stage of the procedure, the ... Tribunal ... may formally request national courts to defer to its competence in accordance with the present Statute and [its] Rules of Procedure and Evidence". Hence, the two international criminal tribunals have been endowed by the UNSC, by virtue of its powers under Chapter VII alongside with Article 103 of the UNC,<sup>(203)</sup> with a true primacy over municipal courts. By way of consequence, in accordance to the principle "ne bis in idem",<sup>(204)</sup> the latter cannot re-trial an individual who has already been tried – for the same acts – by the ICTY or ICTR; instead, a individual may be re-tried by ICTY or ICTR, but:

"only if: (a) The act for which he or she was tried was characterised as an ordinary crime; or (b) The national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted"<sup>(205)</sup>

The principle of primacy of the two international criminal tribunals pursues also the aim of ensuring that States truly cooperate with the requests issued by them, such as ; information, witness and of course the referral of suspects. Further, UN did not entertain a profound trust of the fairness of justice delivered by municipal courts in the States concerned, i.e. States belonging to former Yugoslavia.<sup>(206)</sup>

In 2003, UNSC adopted resolution 1503 whose paragraph states the following: "Calls on the ICTY and the ICTR to take all possible measures to complete investigations by the end of 2004 (date at which the final indictments were accordingly issued), to complete all trial activities at first instance by the end of 2008, and to complete all work in 2010 (the Completion Strategies)".<sup>(207)</sup> However, UNSC couldn't fail to note that this

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(203) See: G. Distefano, 2019, pp. 262-265.

(204) See: G. Distefano, 2019, pp. 575-577.

(205) Article 2 (1) ICTR Statute; Article 10 (2) ICTY Statute has an identical content.

(206) It was in effect fretted that, in order to defeat any incrimination from the international tribunal concerned, the accused could be tried by a benevolent municipal jurisdiction; the opposite phenomenon had also to be averted, i.e. a suspect tried by a malevolent jurisdiction. In both cases, there was a true danger of an unfair trial.

(207) Further, according to UNSC resolution 1534 (2004), "assessments on the progress made towards implementation of the completion strategy of the Tribunal" are to be submitted to the UNSC every six months.

strategy did not fully work and in 2010 it adopted resolution 1966 according to which it:

“Decides to establish the International Residual Mechanism for Criminal Tribunals (“the Mechanism”) with two branches, which shall commence functioning on 1 July 2012 (branch for the ICTR) and 1 July 2013 (branch for the ICTY), respectively (“commencement dates”), and to this end decides to adopt the Statute of the Mechanism in Annex 1 to this resolution;”<sup>(208)</sup>

Hence, in accordance with this resolution, ICTY and ICTR have henceforth merged<sup>(209)</sup> in a single institution deemed to complete its works within the following timelines: a) with regard to the ICTY, 4 years after July 1<sup>st</sup>, 2013; b) with regard to the ICTR, 4 years after July 1<sup>st</sup>, 2012. After these dates, the Mechanism continues to operate as a stand-alone institution. At the same time “lower- or intermediate-rank accused to the Chamber” were to be referred to a special chamber established to this effect, in order to relieve the burden of the Mechanism.

A few years after the end of functioning of these two tribunals, it is not unworthy to briefly take stock of their works and impact on PIL. On the asset side, it is beyond any doubt that both tribunals have helped crystallised, strengthened and developed the substantive body of international criminal law. It is hence not too bold to affirm that thanks to their jurisprudence, this, until then quite less-developed, field of PIL has undergone a dramatic

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(208) As acknowledged by this same resolution itself, “administrative and budgetary aspects” linked to the functioning of both international criminal tribunals played a role in the establishment of this “Mechanism”, deemed to accelerate the trials and streamline the two institutions. Another key means aimed at accelerating the completion of the ICTY’s works was the “establishment under the auspices of the High Representative and early functioning of a special chamber within the State Court of Bosnia and Herzegovina (the “War Crimes Chamber”) and the subsequent referral by the ICTY of cases of lower- or intermediate-rank accused to the Chamber,” (*ibid.*, 11th preambulatory section). Since then, UNSC review the progress of the work of the Mechanism every two years.

(209) It is interesting to observe that while this merger was decided in order to expedite the works of the two *ad hoc* tribunals, an opposite decision was taken with, though, the same aim. In 2003, UNSC decided to appoint a separate chief prosecutor for the ICTR, which was until then and since the beginning the same as ICTY’s (paragraph 8 and Annex I to UNSC resolution 1503).

expansion. Furthermore, the two tribunals' jurisprudence has spilled over on another province of PIL, i.e. IHL which has greatly benefited not only, obviously, with regard to war crimes but also in respect of CAH. One may even put forward that the henceforth these two provinces of PIL have nourished mutually and have tightened their ties between them. On a more practical note, one has to observe that all the suspects have been eventually brought before the two tribunals; that's far from being a minor victory taking into account the flaws of municipal criminal courts of the States concerned and the fact that it was only in 2002 that a permanent international criminal jurisdiction was established. In a different, yet non unrelated, register, this these two *ad hoc* tribunals have contributed, to varying extent, to the reconciliation between the populations scarred by these terrible conflicts. They have hence enabled the punishment of the most heinous international crimes and might in the long-term serve as a deterrent for future crimes elsewhere in the world. Finally, one does not have to underscore the impact, again in the long-term, of the judicial truth – determined by the two tribunals – on the historical narrative. It is then today too early to assess the actual legacy of these two international *ad hoc* tribunals.

On the negative side, it has been contended, quite rightly in fact, the high functioning cost of the two tribunals; as it has been earlier observed, this was one of the reasons leading to the implementation of the “completion strategy”. On a more technical key, it was harshly criticized the impossibility for both tribunals to render a judgement in absentia as well as for the civil parties to appear before the tribunals other than as simple witnesses. On a conceptual registry, it has been asserted, more or less rightly, that the mere existence of an international criminal tribunal might have induced States not to prosecute internally these crimes. On a germane plane, it was noted, too, that a two-speed criminal justice has popped up on the account of these two *ad hoc* tribunals for the same crimes whether their authors are prosecuted before them or before municipal courts: a) capital punishment, contrariwise to many domestic criminal legislations, could not be inflicted by the two international tribunals; b) conditions of imprisonment are generally far better in the Netherlands (or in another country willing to accept offender in their gaols) than elsewhere in the world; c) judicial guarantees offered by the international process are far better too since they meet all the stringent international UN standards. On a different note, some States

and scholars alike have voiced criticism in regard of the jurisprudence of the two international tribunals; critiques range from its excessive development (*de lege ferenda*) not always genuinely mirroring current state of customary international law, to its technical inaccuracies, especially in matter of IHL. Finally, and the present author may share the perplexities of this last strand of criticism, it has been held that justice, all the more criminal justice, rendered far away from the site of the crime might have less impact on the human society concerned, thus voiding one of the aims of criminal justice, i.e. the satisfaction of the victims as well as its deterrent function related hereto.

### **III.2.2. Hybrid Criminal Tribunals or the (varying) Internationalization of Municipal Criminal Justice**

Before delving into the ICC, one has to note that another category of criminal jurisdictions has seen the light in the wake of the establishment of the two *ad hoc* tribunals by the UNSC, that is to say the so-called “mixed” or “internationalised” criminal tribunals. Having in mind the limited and specific purpose of this contribution, we will but briefly dwell on them. Of course, the hybrid character (between domestic and international dimension) is highly variable among them; hence, following the criterion of the increasing internationalization of the administration of criminal justice, one shall have to cite in the first place the system established (indirectly) by UNSC resolution 1244 in Kosovo, which provided for a “civil section” within the UN peace-keeping forces, the MINUK. The possibility was thus left open to appoint a foreign judge – sitting in the bench of municipal courts – in order to shatter the image of an unfair domestic criminal system. This solution is in effect the closest possible to an exclusive domestically rendering of criminal justice, yet with a light touch of internationalisation.

The second case is represented by East-Timor, where the UNSC had sent a peace-keeping force – INTERFET (“International Force for East Timor”) – with the aim of accompanying the Timorese people to the independence, after its struggle against unlawful and illegal Indonesian occupation (following decolonization from Portugal). Due to the sheer absence of judiciary, UN decided to establish a tribunal in Dili entrusted with the task of trying international crimes. In view of managing this newly founded judicial system, the UNTAET (“United Nations Transitional Administration in East Timor”), carried out the function of training local judges. In addition, to the

(international) training, international jurists have been appointed by the UNTAET to sit on the bench so that at the end a mix of domestic and international judges made up the new judiciary the mandate of which is to try authors of international crimes during the war of national liberation against Indonesia. As far as applicable law is concerned, it is noteworthy to observe that failing a proper municipal code envisaging international crimes, UN has framed the required substantive and procedural law to this effect. The three major crimes (bar then the crime against peace) are defined in the same manner as in the 1998 Rome Statute, which is thus considered as a genuine mirror of customary international law in this matter as it existed (already) during the war of national liberation against Indonesia. However, the system has not been hitherto noticeably brilliant.

The third – and hitherto the last in time – example of a hybrid criminal tribunal is that of Lebanon. On December 13<sup>th</sup>, 2005, the Government of Lebanon requested to the UN to establish a tribunal – having thus an international character – entrusted with the task to try the authors of the attack leading to the killing of Mr. Rafic Hariri, former Lebanon’s PM, as well as of 22 other peoples. In accordance to UNSC resolution 1664 (2006), UN and the Government of Lebanon have negotiated an international agreement aiming at the establishment of the future “Special Tribunal for Lebanon” (STL). Hence, following UNSC resolution 1757 (2007), the provisions contained in the document annexed thereto – regarding the creation and the Statute of the STL – entered into force on June 10, 2007, thus leading to the actual creation of the STL. As specified earlier, the mandate of the Tribunal is to try the authors of a bomb attack having led to the death of Mr. Rafic Hariri and other 22 persons; having regard to the complex religious dimensions and the intricacies – both social and political – inherited from a lengthy civil war (including more than a couple of foreign unlawful invasions from Israel and Syria), the set up of a “mixed” tribunal deemed to establish the judicial truth over the violent death of a leading Lebanon political figure, was considered the best if not the only available solution to this effect. For these same reason, it was decided that the seat of the tribunal “shall have its seat outside Lebanon” (Article 1 of the Annex to UNSC resolution 1757) and was eventually based at The Hague. STL’s jurisdiction might extend even before and after the aforementioned attack (i.e. between October 1<sup>st</sup>, 2004 and December 12<sup>th</sup>, 2005), if it determines that other terrorist attacks occurred in Lebanon have had, according to well-

founded general principles of criminal law, a nexus with the terrorist attack of February 14, 2005 and provided that they present a similar gravity and nature. The nexus in point may include, without being limited to: “a combination of the following elements: criminal intent (motive), the purpose behind the attacks, the nature of the victims targeted, the pattern of the attacks (*modus operandi*) and the perpetrators” (Article 1 of the Annex to UNSC resolution 1757). With regard to the structure of the STL, it is made up of a Prosecutor, a Registry, a Defence office and of course of three Chambers: pre-trial (one international judge), trial (one Lebanese and two international judges) and an appeals chamber (two Lebanese and three international judges). Hence, the international character, which is clearly mirrored in the composition of the STL, is not though found in the applicable law, insofar the Tribunal may *only* apply, according to Article 2 of its Statute (annexed to UNSC resolution 1757), Lebanese law and more precisely: “a) provisions of the Lebanese Criminal Code relating to the prosecution and punishment of acts of terrorism, crimes and offences against life and personal integrity, illicit associations and failure to report crimes and offences, including the rules regarding the material elements of a crime, criminal participation and conspiracy; and (b) Articles 6 and 7 of the Lebanese law of 11 January 1958 on “Increasing the penalties for sedition, civil war and interfaith struggle”.”. However, late STL President Prof. Cassese demonstrated in a widely resonating decision that there exists a customary (general) definition of terrorism; hence, since customary international law applies to (and within) every State, then this definition is an integral part of Lebanese law. According to Professor Cassese, the international crime of terrorism possesses:

“the following three key elements: (i) the perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or threatening such an act; (ii) the intent to spread fear among the population (which would generally entail the creation of public danger) or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it; (iii) when the act involves a transnational element.”<sup>(210)</sup>

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(210) STL, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Case No. STL-11-01/I (February 16, 2011), para. 85.

This conceptualization of the crime of terrorism as well as the very determination of its existence in customary international law has raised some criticism from a few scholars. Yet, and the present author profoundly share the finding of late Professor Cassese, this decision remains one of the most potent legacies of this distinguished jurist and, as far STL is concerned, it surely permitted the tribunal to avoid the dire consequences of lack of definition in PIL and thus within Lebanese Law. Finally, as the very STL website prides itself to underscore, the Tribunal, notwithstanding its tormented genesis (in fact quite similar to all the other hybrid tribunals) and functioning<sup>(211)</sup>, presents some “unique features”: a) the existence of an autonomous pre-trial chamber; b) the existence of a Defence offices as an integral part of the STL itself; c) the possibility of *in absentia* trials; d) the participation of the victims to the proceedings (without though having the right to seek compensation before it); e) a true terrorism trial.

A fourth example is that of “Extraordinary Chambers in the Court of Cambodia” mandated to deal with the Cambodian genocide occurred during the Khmer Rouge regime (1975-1979) until the Vietnamese invasion of this country.<sup>(212)</sup> Since Hun Sen’s rise to power in 1993 as Prime Minister, he endeavoured to establish a judicial system with a view to trying the crimes committed during this period; however, this purely domestic attempt faced manifold difficulties and eventually aborted. The solution was then found out through cooperation with the UN and an agreement was finally concluded on June 6, 2003 between the latter and the Cambodian Government (“Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea”) which led to the establishment of “extraordinary chambers” entrusted with the task of trying were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979” (Article 1). The Chambers consisted of a Trial Chamber – composed by three Cambodian

(211) Not to mention the early demise of its President, the world-renowned Law Professor Antonio Cassese.

(212) Initially, the Vietnamese tribunals had sentenced to death Khmer Rouge’s leader Pol Pot (and some of his acolytes), but the Vietnamese reverted finally to a general amnesty in order to find an agreement with the new Cambodian rulers.

judges and two international judges – and of Supreme Court Chamber – made up of four Cambodian judges and three international judges (Article 3). It appears evident that in each of the two degrees of jurisdiction there is (decisive) majority of Cambodian judges. Applicable law is not referred to in this agreement, but it is instead mentioned in a domestic law to be adopted by Cambodia. The bill in question (promulgated in 2004 not without a subsequent amendment) provides that the crimes falling within the compass of the “extraordinary chambers” are the following: a) homicide, torture, religious persecution as defined in Cambodian Penal Code (Article 3 new); b) genocide (Article 4 makes an explicit renvoi to the 1948 UN Genocide convention); c) CAH (Article 5);<sup>(213)</sup> d) “grave breaches” of the four 1949 GE (Article 6);<sup>(214)</sup> e) “the destruction of cultural property during armed conflict pursuant to the 1954 Hague Convention for Protection of Cultural Property in the Event of Armed Conflict” (Article 7); f) “crimes against internationally protected persons pursuant to the Vienna Convention of 1961 on Diplomatic Relations” (Article 8). Jurisdiction *ratione personae* was unsurprisingly limited to physical persons regardless of their nationality and of course that of the victims.

The fifth example is that of Sierra Leone after civil war which devastated this country as well as one of its neighbour States, Liberia. The “Special Court for Sierra Leone” (SCSL)<sup>(215)</sup> was created thanks to an international agreement<sup>(216)</sup> concluded in 2002 between Sierra Leone and the UN represented by its Secretary-General.<sup>(217)</sup> The judiciary so established is though an independent system outside the UN which aims at recovering a

(213) The lists of acts falling within the competence of this tribunal are much shorter than, for instance, Article 7 ICC’s: murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial, and religious grounds, other inhumane acts.

(214) By inserting this crime among those falling within the jurisdiction of the tribunal, it was – rightly – determined the international nature of the armed conflict.

(215) The headquarters of the SCSL are based in Freetown, except for the trial of former president of Liberia, Charles Taylor, whose has been held at The Hague. He was eventually convicted on April 2012 on 11 charges ranging from war crimes to CAH. It is noteworthy to SCSL has been the first international criminal tribunal to sentence a sitting head of State since IMT.

(216) The Statute of SCSL is annexed to the aforementioned agreement.

(217) Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone signed on 16 January 2002.

collapsed municipal judicial system whose last sentence went back to 1991...<sup>(218)</sup> The agreement provides for the establishment of a tribunal made up of two levels: Trial and Appeals Chamber. In both of them sit foreign (majority) and national judges who, according to the Statute of SCSL, are bound to apply: a) PIL related to CAH (Article 2); b) violations of Common Article 3 to the 4 1949 GE thus allowing the Tribunal to punish authors of crimes of war (Article 1); c) “other serious violations of IHL” (Article 4); and finally d) “Crimes under Sierra Leonean Law” (Article 5). Roughly speaking and save the last item of applicable law, SCSL’s jurisdiction *ratione materiae* is similar to that of the ICTR; this is unsurprising since in both cases there had been a civil war, though with a further complication for the Sierra Leonean case due to the implication of Liberia. SCSL’s jurisdiction *ratione loci* is limited to one of the aforementioned crimes perpetrated over Sierra Leonean territory regardless of the nationality of its victim and/or its author; *ratione temporis*, only the *dies a quo* (i.e. the commencement of the temporal jurisdiction) is defined (Article 1), while the setting of the *dies ad quem* (i.e. the end) has been left to the assessment by the SCSL. Finally, the latter’s jurisdiction *ratione personae* encompasses all “person(s) persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed ... including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone” (Article 1 (1)).<sup>(219)</sup> In 2013 SCLS has completed its mandate and it has been transformed into a residual mechanism, not dissimilar to that of ICTY and ICTR.<sup>(220)</sup>

Lastly, what does the future hold for hybrid tribunals? Obviously, an important element of the answer rests with the ultimate efficacy of these

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(218) SCSL is the first international (or better hybrid) criminal tribunal to be funded by voluntary contributions.

(219) The exceptions to this provision are members of the peace-keeping operations – either under the umbrella of UN or any other regional organization – who remain within “the primary jurisdiction of the sending State” (Article 1 (2)). However, if the latter is unwilling or unable to prosecute its own national then SCSL may, “if authorized by the Security Council on the proposal of any State, exercise jurisdiction over such persons” (Article 1 (3)).

(220) The transition to the Residual Mechanism meant a hugely reduced staff – both administrative and judicial (<http://rscsl.org>).

tribunals in each specific case; another hint may be also found in the ICC itself and in its efficacy, too. If the ICC eventually meets the expectations of the international community at large, States may well resort to it and, conversely, have no more alibi not to do so.

### **III.2.3. ICC: a permanent international criminal jurisdiction: a Long-nurtured dream made True**

#### **III.2.3.1. Introductory remarks**

The idea of a permanent international criminal court dates back at least to the Nineteenth century; for instance, one of the founding fathers of the Red Cross, Gustave Moynier,<sup>(221)</sup> considered the establishment of such tribunal as a natural, indeed necessary, institutional complement for the implementation of the newly developed IHL and thus with a view to punishing the authors of war crimes. Later on, a conspicuous number of jurists wish to create a special chamber – entrusted to prosecute and trial individual's international crimes – within the future PCIJ, yet with no avail. The situation did not change at all after WWII and the jurisdiction of the ICJ – the successor of PCIJ – did not extend to international criminal responsibility. Hence, the creation by the UNSC of the two *ad hoc* tribunals renovated this old struggle for a permanent criminal justice by awaking the (legal) conscience of States and international community alike, theretofore in a state of torpor. The circumstances had never been in effect so favourable to this renaissance: conflicts in former Yugoslavia, Rwanda, Somalia, Pinochet and Barbie cases, etc. not to mention the end of the Cold War and the need to revive an international order of which international criminal justice is certainly a pillar.

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(221) P. Boissier, *Histoire du Comité international de la Croix-Rouge. De Solférino à Tsushima*, Paris, 1963; C. K. Hall, "The first proposal for a permanent international criminal court", *International Review of the Red Cross*, vol. 322. For the Text of the proposed 1872 draft by Gustave Moynier, see :

<https://www.icrc.org/eng/resources/documents/misc/57jp4m.htm> or Willem-Jan van der Wolf, Claudia Tofan, *Documentary history of the International Criminal Court. Part I*, International Courts Association, 2008 (at 1).

On July 17, 1998 in Rome the diplomatic conference, convened by the UN, gave birth to the ICC Statute.<sup>(222)</sup> It would have not taken much for this attempt to be – again – unsuccessful, but thanks notably, to the enormous pressure of the NGOs as well as of the international civil society at large that this multilateral convention could finally see the day. The Rome Statute represents in certain respects a triumph of the internationalists (i.e. international jurists and diplomats alike) over (municipal) criminal law jurists.

By making the ICC Statute, the international community establishes an international judicial body, entrusted with the task of trying individuals having committed international crimes. Contrariwise to the IMT (which remained, as said before, a multinational tribunal) and in fact to the two *ad hoc* tribunals, ICC is not created after a war by the victors to prosecute criminal acts perpetrated by the vanquished. Furthermore, another distinctive feature, ICC's jurisdiction, again compared to the aforementioned tribunals, is not circumstantial but potentially universal (in other words it aims at covering the entire world).<sup>(223)</sup>

In effect, ICC's jurisdiction encroaches to that of States; unlike the two *ad hoc* international tribunals' jurisdiction which principally infringed upon two States (i.e. respectively former Yugoslavia, for the ICTY,<sup>(224)</sup> and Rwanda, for the ICTR), ICC's jurisdiction encroaches to all States parties to its Statute. As one may intuitively imagine, this feature of the ICC was not warmly appreciated by all States,<sup>(225)</sup> especially, as it will be shown later on, by those

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(222) An authoritative and widely acclaimed Commentary may be suggested for further reading and enhanced knowledge: A. Cassese, P. Gaeta, J.R.W.D. Jones, *The Rome Statute of the International Criminal Court. A Commentary*, Oxford, 2002.

(223) To-date, 123 States are parties to the ICC Statute (yet only the two European Permanent Members of the UNSC are among them) whilst 139 have only signed it. According to Article 126 (1) of the Statute 60 States' ratifications or accessions were needed for its entry into force; this happened the 1st of July 2002, i.e. one month after the 60th State has deposited its instrument of ratification.

(224) To be more precise, one may include all States successors to former Yugoslavia, hence six in all in all.

(225) For example, France fretted that its armed forces abroad – acting either under a UNSC authorization under Chapter (VII) or within a peace-keeping operations – might fall within the ICC's jurisdiction (e.g. at the time of the making of ICC Statute France had some forces in former Yugoslavia). Inversely, Ivory Coast, which was enthusiast

States which are not parties to the Rome Statute. One shall not to forget that the latter is an international treaty; it has hence to be interpreted according to the customary international law principles codified in the 1969 VCLT. Criminal law jurists, who make nowadays the bulk of the bench of the ICC, are not necessarily at ease with that and are not pleased either. Furthermore, the recourse to ICC's *travaux préparatoires* might well left the jurist deeply unsatisfied since several questions remain in the dark; in fact, the negotiations were not particularly long in time: the Conference lasted a month only, while it took nearly 3 years to for the two *ad hoc* tribunals. statutes to be drafted The brevity of the negotiations alongside with the staunch resistance of some States – which took part at the Conference the avowed goal to torpedo it or at least to water down the final outcome – may explain why this text is the result of a manifold compromises which affects in some respects its legal consistency. Numerous contradictions, alas, punctuate it with the risk of weaken the overall structure; in addition, ICC Statute was adopted not by consensus by qualified majority (two-thirds of the present and voting States).<sup>(226)</sup>

### III.2.3.2. ICC's Jurisdiction

The different dimensions of the ICC's jurisdiction stem from those of the States parties; hence, the consolidated ICC's jurisdiction isn't but the sum of these national jurisdictions, both personal and territorial. States parties have thus devolved their jurisdictions to the ICC with regard to some international crimes (the so-called "core-crimes"). In principle, all States enjoy under general international law (i.e. "universal jurisdiction) a complete jurisdiction to prosecute and try war crimes, CAH, genocide as well as crimes against peace. Being thus members of the ICC involves the attribution of their jurisdiction to the latter. Yet, ICC's jurisdiction is not as large as of that of States parties, insofar as it does not comprise the (passive) personal jurisdiction, i.e. the power of the State of the victim's nationality to prosecute and try the authors of the crime regardless of his (or her) nationality. Indeed, ICC's personal jurisdiction (*ratione personae*) encompasses solely the active ones, i.e. the nationality of the author of the

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during the Rome conference, was much less when it was faced to a bloody and devastating civil war.

(226) The score was 120 States voting for it, 7 against, and 21 abstaining.

crime.<sup>(227)</sup> In other words, for the ICC to entertain a claim, the State of the suspect's nationality must be party to the ICC Statute. Alongside, with this one-dimensional personal jurisdiction, ICC enjoys of course of the territorial jurisdiction (*ratione loci*), i.e. it has jurisdiction if the crime has occurred on the territory of one of the States parties to its Statute again independently of the nationality of victim and that of the suspect.<sup>(228)</sup> In sum, for the Court to have jurisdiction, only one of these two (hence alternatives) jurisdictional criteria has to be met.<sup>(229)</sup> Hence, ICC may well prosecute and try a suspect who is a national of a State which is not party to the ICC Statute provided that the crime has been committed on the territory of a State that is party to the ICC at the time of its perpetration.<sup>(230)</sup> This is in fact but what international jurists call the territorial dimension of the application of an

(227) "The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft" (Article 12 (2) a) ICC Statute).

(228) "The State of which the person accused is of the crime is a national", (Article 12 (2) b) ICC Statute).

(229) During the negotiations, some States endeavoured to further limit ICC's jurisdiction. France, for instance, claimed that both criteria of jurisdiction – territorial (*locus commissi delicti*) and personal (the nationality of the suspect) – had to be reunited with a single State party for the ICC to try the suspect. Russian Federation argued for a two-fold territorial jurisdiction: the *locus commissi delicti* and the place of the suspect's arrest had to be the same (i.e. in the same State territory) for the ICC to enjoy jurisdiction over the international crime in point. Luckily enough these two proposals were rebutted.

(230) This (sensitive) aspect of the ICC's jurisdiction has irritated some States, among which the USA which has hence manoeuvred to undermine it by concluding bilateral treaties with more than one hundred States which are (or are bound to become) parties to the ICC. The object and purpose of these almost identical international bilateral agreements is precisely to obtain the commitment of these States *not to surrender US nationals to the ICC* without the consent of the USA (e.g. Article 2 of the bilateral agreement between USA and Albania, May 2, 2003; [http://www.law.georgetown.edu/library/research/guides/article\\_98.cfm](http://www.law.georgetown.edu/library/research/guides/article_98.cfm)). Indeed, per Article 89 ICC Statute, States parties are under the obligation to surrender to the ICC a suspect. True, as Article 98 (2) ICC Statute, "[t]he Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender".

international treaty (Article 29 VCLT). This is far from being surprising, insofar if the ICC had not existed or if the State on whose territory the crime was committed was not party to the ICC, then that State would have normally enjoyed, by virtue of the principle of universal jurisdiction, the power to try and prosecute the (alien) suspect.

Furthermore, ICC's jurisdiction may be extended to cover a State's both personal and territorial jurisdiction, even though it is not member of the ICC – if this State expresses its consent to this effect according to Article 12 (3). Some scholars have criticized this provision on the ground that it would allow States to recognize ICC's jurisdiction *à la carte*, that is to say only when it suits them.

Finally, ICC's jurisdiction *ratione personae* is limited to physical persons only (of 18 years old or older)<sup>(231)</sup> and does not extend to legal corporations (contrariwise to the IMT).<sup>(232)</sup> Another important feature, inherited from the IMT and the two *ad hoc* tribunals was the absolute lack of immunity which could shield a suspect from trial and possibly a punishment. Article 27 ICC reads indeed as following:

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

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(231) Article 26 ICC Statute. UK – alongside some African States – strived to lower this threshold to 16 years, hence linking this age-limit with that of enrolment in their army.

(232) Draft ICC Statute envisaged the prosecution and trial of legal corporations; there were indeed at least three main reasons underlying the need and usefulness of doing so: a) physical persons rarely participate to the reparation of damages whilst legal corporations are more often endowed of material resources in this respect; b) since the criminal code of numerous States does not allow for their prosecution, ICC's jurisdiction would have filled this gap; c) this additional personal jurisdiction would have had a general deterrence effect upon arms dealers and manufactures or those corporations involved in the unlawful plundering of national resources during armed conflicts, or in any other similar situations such as that of "Radio Mille Collines" in Rwanda prompting Hutus to kill Tutsis thus triggering in fact the genocide.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.<sup>(233)</sup>

*Ratione temporis*, ICC's jurisdiction applies since the entry into force of the Rome Statute vis-à-vis the State party concerned. It then suffices that at the moment of the commission of the crime, the State on whose territory it has been committed or the State of the suspect's nationality must be party to the ICC Statute.<sup>(234)</sup>

*Ratione materiae*, ICC's jurisdiction represents to date the most successful attempt to codify customary international law<sup>(235)</sup> with regard to the four core international crimes: genocide (Article 6), CAH (Article 7), war crimes (Article 8), crime of aggression (Article 8bis).<sup>(236)</sup> A few words on each must be spent in connection with what has already been said in this regard.<sup>(237)</sup>

(233) Recently, the regrettable decisions of South Africa, Burundi and Gambia to withdraw from the ICC Statute are ostensibly founded on the alleged (though inexistent) incompatibility between Article 27 and the Law of State immunities. To so pretend would be tantamount to revert to the legal framework before Nuremberg: it's unfortunate.

(234) Article 24 (1) ICC Statute. However, any State party to the ICC may temporarily "opt-out" from the ICC's jurisdiction: "Notwithstanding article 12, paragraphs 1 and 2, a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory. A declaration under this article may be withdrawn at any time. The provisions of this article shall be reviewed at the Review Conference convened in accordance with article 123, paragraph 1". This provision was inserted at the instigation of France.

(235) It goes without saying that States parties to the ICC have to insert these crimes in their criminal codes lest they would give up prosecuting and trying them on the municipal plane; failing to do so would make the States completely dependent – for their prosecution and trials – from the ICC.

(236) The definition of this last international crime was inserted in 2010 by a resolution adopted the Assembly of States parties convened in Kampala Uganda in accordance with Article 5 (2) ICC Statute (resolution RC/Res.6 of 11 June 2010).

(237) It ought to be observed in this connection that the Court will ineluctably be faced with some sensitive questions of criminal policy: standardization of charges since the substantive criminal acts encompassed are not exactly the same as those provided for

With respect to the crime of genocide that is placed at the first rank of the international crimes over which ICC may wield its jurisdiction, there is not too much to comment except that it is, unsurprisingly, the Xerox-copy of the definition enshrined in the 1948 UN Genocide.<sup>(238)</sup> Regarding CAH, the contribution of the ICC Statute is far more substantial. First of all, it dispels some doubts insofar as it frees up the commission of a crime against humanity from the existence of an armed conflict (be it international or non-international), by borrowing instead from Article 3 ICTR Statute the formula “committed as part of a widespread or systematic attack against” (Article 7 (1) ICC Statute). Secondly, it appears now more neatly that States have definitely rejected the need of a “special intention” (*dolus specialis*): what is instead required is that the author of the crime had “knowledge of the attack” (*ibid.*). Thirdly, Article 7 (2) finally compiles an exhaustive (or near-to) list of breaches encompassed by this category of international crimes. This provision gives besides due attention to the details of these violations; something international criminal jurists will be surely happy about. Yet, this is not necessarily the case for the usual clause of Article 7 (1) k), a residual clause, which provides that “[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health” may likewise be qualified – by the ICC – as CAH.

Regarding war crimes – in fact the oldest among the four core international crimes- Article 8 ICC constitutes the culmination of a lengthy development. Its structure is double two-fold, subdivided firstly having regard to the international – or not<sup>(239)</sup> character of the conflict, and then having regard to the object of the breach. With respect to the IAC, it encompasses the famous “grave breaches” of the four GE 1949 as well as “other serious violations of the laws and customs applicable in international armed conflict” (Article 8 (2) b)). This same skeleton is replicated with regard to NIAC, to the extent that war crimes in this connection comprises any violation to common Article 3 of the four GE 1949 as well as “other serious

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by municipal systems (as well as, sometimes, by international conventions). The same applies all the more with regard to penalties.

(238) A not too strong attempt to include therein genocide against social and political groups was outright rejected in Rome.

(239) The question whether a war crime can be committed during a NIAC is henceforth clearly settled since ICTY Appeals Chamber’s judgement in the *Tadic* case (1995), see *supra* II.1.4.

violations of the laws and customs applicable in armed conflicts not of an international character” (Article 8 (2) e)). In both types of armed conflict (IAC<sup>(240)</sup> and NIAC<sup>(241)</sup>) the use of “asphyxiating, poisonous or other gases” is a war crime.<sup>(242)</sup>

Finally, regarding the “crime of aggression”, which was considered by IMT’s jurisprudence as “the crime of crimes”, it was inserted into the ICC’s Statute after its adoption (in fact, as it has been said earlier, even after its entry into force). The reasons underlying the postponement of the introduction of this category of international crimes within the compass of the ICC’s jurisdiction rest not so much on substantive grounds but rather on institutional ones, that is to say the relations with the UNSC powers under Chapter VII UNC. Article 8*bis* eventually included in 2010 manages to reconcile the respective powers of a UN organ, entrusted with the principal responsibility to maintain and restore international peace and security. And of an international judicial body which does not pertain to the UN system. Indeed, some legitimate concerns were voiced by the UNSC with respect to its powers of defining an act of aggression faced in the context of, for instance, a (parallel) judicial finding by the ICC having determined its existence or inversely its inexistence. These questions – of which more later on – are notably settled in Articles 13, 16 and 18. From the standpoint of substantive law, as earlier said, Article 8 *bis* reproduces verbatim, by through an explicit reference, Article 3 of the UNGA resolution 3314 that is largely considered as being the faithful reflection of customary international law regarding (the crime of) aggression.<sup>(243)</sup>

The substantive law as enunciated by Articles 6 to 8 *bis* for each of the four core international crimes is not, by all means, forever frozen – PIL evolves as any other legal system – as Article 10 takes care to specify and warn:

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(240) Article 8 (2) b) xviii)

(241) Article 8 (2) e) xiv)

(242) Instead, this provision is unsurprisingly less bold – on the grounds of the uncertainty reigning in this regard - with respect of the use of nuclear weapons in an armed conflict. This is also mirrored by the World Court’s advisory opinion in 1996.

(243) See *supra* II.1.3.

“Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute”

Hence, State parties to the ICC may not only amend the ICC Statute – that’s one of the functions of the Assembly of States parties (and it has already acted this way in respect of the crime of aggression) – but they may also conclude treaties or develop customary international law (through their *opinio iuris*) leading thus to a modification of current general international law in respect of the definition of (or adjunction of new) international crimes.

### III.2.3.3. ICC’s Modus operandi

#### III.2.3.3.1. Criminal proceedings

Some States insisted during the Rome conference that any criminal penal action by the ICC should be authorized by the UNSC. This subordination of the ICC’s investigative and prosecution actions to the UNSC would have paralyzed the Court and was wisely rejected.<sup>(244)</sup> Hence, the Prosecutor – one of the ICC’s organs – may “initiate an investigation” (Article 13) whilst the Court (Pre-Trial Chamber) is vested with the power of authorizing or not its commencement. This solution guarantees on one side the necessary independence of the judicial power from the UNSC (i.e. sort of Executive power) while on the other side checking over the Prosecutor’s action preventing it to be politically motivated or abused.<sup>(245)</sup>

By virtue of Article 13 (a) States may also refer a “situation” to the Prosecutor “for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes” (Article 14 (1)). In the same vein, UNSC may too refer a situation as provided by Article

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(244) It ought to be nonetheless observed that in some countries the executive power may defer or even stop an investigation.

(245) In the same vein, it ought to be noted that the Prosecutor may “upon investigation” concludes that the prosecution does not serve the “interests of justice” (Article 53 ICC Statute). This may also be construed as an attempt to reconcile, for instance, the imperatives of international criminal justice with those stemming from a wider need of a transitional justice. UNSC’s power of deferral may also be looked through this prism, see *infra* III.2.3.3.1.

13 (b). In brief, according to Article 13, the Court may exercise jurisdiction in any situation referred to by a State (a),<sup>(246)</sup> by the UNSC (b)<sup>(247)</sup> through the investigation of the Prosecutor (c).<sup>(248)</sup>

Given the highly sensitive aspects of the crime of aggression, a more complex procedure aimed at reconciling States', UNSC's and ICC's powers in this regard is established. Article 15 *bis* and *ter* indeed provide respectively for the procedures to be followed in the case of a referral by a State and by the UNSC of a situation characterized by an act of aggression.

Finally, it seems that ICC Statute takes in due consideration the competences and powers of the UNSC under Chapter VII, thus endeavouring to fit the action of the ICC into the wider scope of the maintenance of international peace and security. In effect, UNSC may, under the Rome Statute refer a situation to the Court (Article 13 (b) & 15 *ter*),<sup>(249)</sup> even though none of the two alternative jurisdictional criteria is met, availing itself of its powers under Chapter VII<sup>(250)</sup> that are thus unaffected by the ICC.<sup>(251)</sup> Conversely, UNSC may block the prosecution or investigation initiated by the Prosecutor for one year (renewable) by adopting a resolution to this aim under Chapter VII:

“No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of

(246) These States are hitherto exclusively African: Ivory Coast, Central African Republic, Democratic Republic of Congo and Uganda.

(247) UNSC has already availed itself of this power and has heretofore referred two situations to the ICC: Libya, (Darfur) Sudan (resolution 1593 (31 March 2005) “to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court” (para. 1).

(248) Under the terms of Article 15 (1), in fact, “The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court”.

(249) In so doing the Court will act pursuant to the principle of universal jurisdiction.

(250) This seems absolutely consistent with the UNSC powers in this field, for if it can create *ex novo* an *ad hoc* tribunal it may all the more refer a situation to a pre-existing international judicial criminal body.

(251) Furthermore, by virtue of Article 103 UNC, obligations under the UNC “shall prevail” over any other international obligations, save of course obligations stemming from *ius cogens* rules.

the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions”<sup>(252)</sup>

The UNSC power to defer investigation or prosecution – recognized by Article 16 ICC – stems from its “principal responsibility” for the maintenance of international peace and security. The interest of this provision lay with the limitation of the role of the P5 which otherwise might have put their veto to the seisin of the Court. However, this power to defer the exercise of jurisdiction (investigation or prosecution) by the Court must not be overstated since it needs not only the “concurring” (yes, abstention or “vacant seat”) of the P5 but also at least four non-permanent UNSC members for the resolution to be adopted according to Article 27 UNC.<sup>(253)</sup> To-date only one case may be cited as an example of application of this oft-criticized provision, by which UNSC eventually bestowed a general immunity from the ICC’s jurisdiction all “operations established [peace-keeping forces] or authorized [peace-enforcing forces] by the United Nations Security Council ... deployed to maintain or restore international peace and security”.<sup>(254)</sup> Furthermore, this is all the more true shall the UNSC intend to extend for another year-term this deferral.

### **III.2.3.3.2. ICC vis-à-vis States’ concurrent Jurisdictions**

(252) Article 16 ICC Statute.

(253) With regard to the “actual” construction of this major provision relating to voting procedures within the UNSC, see: G. Distefano, 2019, pp. 249-250.

(254) Paragraph 2 of the Preamble of UNSC resolution 1422 (12 July 2002); by OP 1 it is “requested” to the ICC, “consistent with the provisions of Article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise;”. This general deferral of jurisdiction has already been renewed once. See UNSC Resolution 395 (25 August 1976) ; and GA Resolution 1142 (XII) and 1361 (XIV), see also Giovanni Distefano and Etienne Henry, ‘The International Court of Justice and the Security Council: disentangling Themis from Ares’, in: Karine Bannelier, Theodore Christakis and Sarah Heathcote (ed.), *The ICJ and the Evolution of International Law*, Routledge, 2012, § 5.3 (at 67).

While the two *ad hoc* international tribunals – ICTY and ICTR – enjoy a primacy over municipal courts in prosecuting and trying those persons accused of international crimes falling within their jurisdiction, member States of the ICC retain their whole jurisdiction in this respect and are under “the duty to exercise [their] criminal jurisdiction over those responsible for international crimes”.<sup>(255)</sup> Hence, in the terms of jurisdiction, the relations between ICC and its Members may be qualified of “subsidiarity” in lieu of primacy to the extent that if the latter initiate an investigation, it has the right to oppose that the Court try the suspect (even though if this same State concludes that there is no reason to bring a prosecution). This won’t apply, nonetheless, if the Court determines this State’s bad faith<sup>(256)</sup> or alternatively its incapacity (“non possumus”) or unwillingness (“non volumus”) to try the suspect (Article 17 ICC Statute). This provision – enabling States to refer a situation to the ICC – undoubtedly represents the backbone of the functioning of the Court with respect to the concurrent jurisdictions of Member States. It may be assumed that this clause was particularly appreciated and backed by many developing countries that considered themselves unable (“non possumus”)<sup>(257)</sup> or preferred, for other reasons such as political or social sensitiveness (“non volumus”), not to prosecute and try international crimes encompassed by the jurisdiction of the ICC. It falls then to the Court to assess the fulfilment of either two situations; in so doing the Court will hence intervene concretely within the municipal framework of the national prosecution with a view to assessing

(255) Sixth preambular part of the ICC Statute.

(256) Furthermore, according to the principle general of law “ne bis in idem”, the Court may not try a second time a person “with respect to the same conduct unless the proceedings in the other court” have been carried out “ a) with the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or b) were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice” (Article 20 (3) a), b)).

(257) Among the reasons why a State would be unable to prosecute and try a person suspect of having committed an international crime may lay with the immunity the accused would enjoy according to domestic law, for example a Head of State, such it has been the case for the President of the Republic of Kenya, accused of CAH and who appeared before the ICC on 2014. The Prosecutor eventually withdrew the charges against him on December 4, 2014.

the real intention of the State in point to prosecute a given international crime. The Court will thus make a finding on a national system's willingness or capacity to prosecute and try international crimes.<sup>(258)</sup>

Moreover, ICC Statute (Article 17 (1) d))<sup>(259)</sup> pointedly states that the Court has jurisdiction over case of "sufficient gravity", such as for example CAH, "large-scale commission" of war crimes (Article 8 (1)). Hence, the principal aim of the ICC Statute is not that of prosecuting and trying any international crime, but to allow States to refer to the ICC the gravest crimes<sup>(260)</sup> while at the same time (for any international crime encompassed by the ICC Statute) enabling the Court to verify whether States duly abide by their obligations under the Rome Statute and general international law. In this respect, the ICC is expected to play the rôle of "watch-dog" towards Member States. This provision would then surely encourage (push?) the latter to carry out their judicial function on the municipal plane.

### **III.2.3.3.3. Member States as "control agents" and "executive agents" of the ICC**

The effective operation of the ICC depends to a large extent from the goodwill of its Member States. They are indeed at the same its "control agents" and its "executive agents". With regard to the former, Member States are meant to control – through the Assembly of States Parties – ICC's activity (Article 112 ICC Statute); in this context they may be led to confer more resources and means of action to the ICC (Article 121 ICC Statute). With regard to the second aspect, i.e. "executive agents", the seat of the ICC being at The Hague, States are expected to provide appropriate places of detention and imprisonment. Further, since the Court's funding falls inevitably on Member States' shoulders, this might fuel a perverted relation

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(258) In this connection, the Court will be led, it is too early to make an assessment today, to incidentally develop a jurisprudence on the construction of the concept of "due process of law" as envisaged by Article 17 (2). This concept is in fact instrumental to trigger its subsidiary jurisdiction with regard to the State's.

(259) In addition, 4th PP of the ICC Statute refers to the "most serious crimes of concern to the international community".

(260) Contrariwise to the two *ad hoc* international criminal tribunals which, at least initially, were endowed with the mandate of prosecuting and trying any international crimes within their jurisdiction.

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with some of the Member States at some point with the risk of affecting the Court's activity. In this connection, one does not have to forget that ICC does not have judicial police; hence it will rely on States' goodwill to collect evidence, arrest suspects, search and bring witnesses, etc. True, by virtue of the pre-eminence of the Court over the requested State, hence unlike to the classical system of international judicial cooperation between States, requested States are under the obligation to carry out the request made by the Court. If they do not – and it is for the Court to make such a finding – then ICC may refer the problem for further action either to the Assembly of States Parties or to the UNSC, if the situation in point has been referred by it to the Court under Article 13 (b) ICC Statute. However, in both cases the latter instrument does not provide for any specific sanction.<sup>(261)</sup> Moreover, if the requested cooperation affects State's "national security" (Article 72 ICC Statute), then the procedure becomes far more heavy and complicated with the risk of a substantial loss of time for the Court.<sup>(262)</sup>

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(261) Of course, UNSC may avail of its general powers under Chapter VII in order to make the recalcitrant State to comply with the ICC Statute and Court's order.

(262) This argument is likely to be raised notably in connection with the commission of war crimes "where the disclosure of the information or documents of a State would, in the opinion of that State, prejudice its national security interest" (Article 72 (1) ICC Statute).

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## المسؤولية الجنائية الدولية للفرد: قفزة نوعية لإنسانية الإنسان

أ.د. جيوفاني ديستيفانو:

حصل على درجة الدكتوراه في العلاقات الدولية تخصص القانون الدولي من المعهد العالمي للدراسات الدولية في جنيف. منذ فبراير ٢٠٠٩ يعمل أستاذاً في كلية الحقوق بجامعة نيوشاتيل. كما كان أستاذاً زائراً في أكاديمية القانون الدولي الإنساني وحقوق الإنسان (جنيف). عمل جيوفاني ديستيفانو سابقاً في التدريس في جامعات جنيف ولوزان وكاتانيا (إيطاليا) والعين (الإمارات العربية المتحدة) ومعهد IHEI (باريس). مشاريعه الحالية هي "القانون الدولي للمساحات" واستخدام القوة في العلاقات الدولية.

### الملخص باللغة العربية:

بالمعنى الصحيح، فإن المسؤولية الجنائية الدولية ليست فصلاً جديداً من القانون الدولي العام، بل هي إعادة إحياء مؤخرًا لفصل قديم من قانون الأمم. في الماضي القريب، شهدنا ظهور محاكم جنائية دولية مخصصة، ذات اختصاص محدود، على النحو المنصوص عليه في أنظمتها الأساسية<sup>(٢٦٣)</sup>. وبدلاً من ذلك، تتمتع المحكمة الجنائية الدولية اليوم، ضمن حدودها القانونية (المعاهدة)، بولاية قضائية عامة؛ وبالتالي فهي جهاز دائم ذو طابع عام، يعكس محكمة العدل الدولية في مسائل القانون الجنائي الدولي. كما سيكون مسؤولاً عن المسؤولية الجنائية الدولية للأفراد.

على النقيض من النهجين السابقين، بناءً على "الحق"، سنتعامل هنا مع "الالتزامات" التي تُمنح للفرد، أي الالتزامات الدولية بعدم ارتكاب بعض الأفعال التي توصف بأنها جريمة (يوريس جنتيوم) قانون الأمم. يتعامل قانون العزل السياسي مع الأفراد من خلال حظر ارتكاب مثل هذه الجرائم. لذلك يتم تفسير الفرد على أنه الذات السلبية في العلاقات القانونية الدولية؛ يجب عليه أن يحاسب - أمام المحاكم البلدية والدولية على حد سواء - عن أفعاله السيئة (انتهاك الالتزامات الدولية) المرتكبة ضد الدول وكذلك الأفراد الآخرين.<sup>(٢٦٤)</sup> وبالتالي، إذا كانت المسؤولية، من زاوية الحماية الدولية لحقوق الإنسان،

(٢٦٣) على سبيل المثال، يوغوسلافيا السابقة ورواندا

(٢٦٤) وتجدر الإشارة إلى أن المسؤولية الجنائية الدولية للفرد لا يتم تكبدها في الواقع تجاه الأشخاص الذين عانوا (أو تأثروا) بالفعل بارتكاب جريمته. هنا نجد مرة أخرى، ولكن مع الأدوار المقلوبة، نفس المعادلة في المنظورين السابقين، أي الدولة أو المجتمع الدولي (الطرف المتضرر) والفرد (الطرف المتخلف).

تنطوي على شخصية نشطة، في هذه الحالة، تُعتبر الشخصية سلبية.

بصرف النظر عن "الجرائم" الدولية للدول التي لا يزال وجودها بحاجة إلى النظر بعناية، فإن القانون الدولي يفكر في وجود فئات معينة من الجرائم التي يرتكبها أفراد يتصرفون إما بشكل فردي أو كأجهزة تابعة للدولة<sup>(٢٦٥)</sup>. ومع ذلك، فإن عددًا قليلًا فقط من هذه الانتهاكات عرضة للمقاضاة والمعاقبة على المستوى الدولي، بينما لا تتم مقاضاة ومعاقبة الآخرين إلا من قبل السلطات القضائية الوطنية.

تُظهر التطورات الثورية التي تخللت مقاطعة قانون العزل السياسي منذ النصف الثاني من القرن العشرين فصاعدًا، والتي تدخلت بشدة في أحد العناصر الأساسية للمجال المحجوز للدولة (للقمع الإجرامي) أنه يجب أيضًا اعتبار الفرد موضوعًا دوليًا. في هذا المجال، شريطة أن تتم مقاضاته ومحاكمته مباشرة من قبل آلية قضائية دولية.

في الواقع، على مستوى العقوبة الدولية على هذه الجرائم نشأ الفرد في القانون الدولي كحامل للالتزامات الدولية، وبالتالي كموضوع للقانون الدولي<sup>(٢٦٦)</sup>. أخيرًا، من المهم ملاحظة أن المسؤولية الجنائية للفرد لا تؤثر، بأي شكل من الأشكال، على المسؤولية الدولية المصاحبة للدولة في نهاية المطاف، بل على العكس من ذلك، فإن "ازدواجية المسؤولية هذه تظل سمة ثابتة من سمات القانون الدولي"<sup>(٢٦٧)</sup>. والواقع أنه إذا كان من الممكن أن يُنسب سلوكها إلى دولة بطريقة أو بأخرى<sup>(٢٦٨)</sup>، فيمكن عندئذٍ تحميل الدولة

(٢٦٥) انظر:

G. Distefano, Fundamentals of Public International Law.

رسم تخطيطي للنظام القانوني الدولي، ليدن، ٢٠١٩ ص ٧٠٠-٧٠٢.

(٢٦٦) انظر:

G. Balladore Pallieri, 1962, pp.21-222 ;

س. رومانو، ١٩٣٣، ص ٧٦-٧٧؛ كوادري، ١٩٦٨، ص ٤٠٧-٤٠٨ (منذ أن تم الوفاء بالشرط الذي قدمه هذا الفقيه الشهير - أي وجود هيئات دولية تتمتع بسلطة قمع هذه الجرائم الدولية على المستوى الدولي)؛ كاسيزي، ٢٠٠١، ص ٧٩-٨١؛

A. Verdross, B. Simma, 1984, §§ 430-443 (pp.260-267)؛

(٢٦٧) تطبيق اتفاقية منع جريمة الإبادة الجماعية والمعاقبة عليها، ٢٠٠٧، § ١٧٣ (في ١١٦). انظر المادة ٢٥ الفقرة ٤ من النظام الأساسي للمحكمة الجنائية الدولية وكذلك المادة 58 IR 2001، التي تنص على ما يلي: "لا تخل هذه المواد بأي مسألة تتعلق بالمسؤولية الفردية بموجب القانون الدولي لأي شخص يتصرف نيابة عن دولة".

(٢٦٨) انظر:

المسؤولية الدولية. من الآن فصاعداً، ستكون هناك مسؤوليتان دوليتان (الفرد والدولة) في إطار النظام القانوني الدولي يمكن أن تؤدي إلى أنواع مختلفة من القمع وأشكال العقوبات. (٢٦٩)

: G: Distefano, 2019, pp.653-695.

(٢٦٩) "تتحمل الدولة ومن يتصرفون باسمها المسؤولية الجنائية عن انتهاكات القانون الدولي بسبب خطورتها، وخطورتها، وازدراءهم للحياة البشرية، وتضعهم في فئة الأفعال الإجرامية كما يفهمها القانون عموماً الدول المتحضرة"، قانون أوبنهايم الدولي، الطبعة الثامنة. (السير هيرش لوترباخ)، ص. ٣٥٥.