INTERNATIONAL CRIMINAL JUSTICE

a dialogue between two cultures

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Introduction[1]

INTERNATIONAL CRIMINAL JUSTICE – A FRAMEWORK

The implementation of the idea that individuals, wherever they are and regardless of their official status, may be accountable for crimes against humanity breaks away from the Westphalian paradigm that each State is responsible for prosecuting (or not) its citizens. After the Cold War, several international criminal jurisdictions were created, namely the *ad hoc* courts for the former Yugoslavia and for Rwanda and a permanent criminal jurisdiction, the International Criminal Court (ICC). Power no longer serves as a means for impunity in the same way. Those leaders involved in conflicts have learned to fear international criminal justice as a "sword of Damocles". On the other hand, the creation of international criminal jurisdictions has become a means to consolidate peace in post-conflict situations so as to restore justice.

The foundation of the ICC in 2002 – and the preference for a permanent a jurisdiction rather than *ad hoc* courts – represents the pinnacle of international criminal justice. The Court is even referred to as a paradigmatic institution in terms of the universalistic perspective of International Law, which aims at a reinforced international public order. As Bogdandy and Dellavalle state, "in the global context, the development of a truly international public order and of true International Law is now largely dependent on the development of International Criminal Law" (2008: 2). The creation of the ICC should be viewed not merely as an innovation but, above all, as a civilizational conquest for the defense of human dignity and the promotion of peace.

[1] The text represents the personal opinion of the authors and cannot be understood in any way as the official position of any other person or institution, including the United Nations or the Government of Portugal.

However, the criticisms addressed to the universalistic narrative, namely in what concerns a global imposition of institutions and liberal legal standards, also impact the Court. Hard criticism has been made against the ICC regarding its structural fundaments which reflect, to a certain extent, a concern regarding the imposition of "Western" liberal ethical and legal solutions. On a more functional level, criticism has also been made against the power attributed to the United Nations Security Council in relation to the Court, which suggests political intrusion in a criminal body, and that up to now the great majority of situations being investigated and prosecuted by the Court related to Africa, which leads to suspicion on its selection criteria. This criticism raises questions as to the bases of the ICC.

The ICC is no longer in a state of grace and the risk of marginalization is increasing (Kowalski, 2011). In 2016, Burundi, South Africa and Gambia have notified their decision to withdraw from the Statute of the International Criminal Court.

At the same time criminal justice is becoming universal, alternative forms of justice are being promoted in situations in which serious international crimes have been committed. In Rwanda, for instance, justice was a core element for reconciliation. Given the limited role of the International Criminal Tribunal for Rwanda and the limitations of the Rwandan legal system, traditional collective structures were used to administer justice after the genocide (the *Gacaca* courts) with emphasis being given to the restorative dimension of justice. The case of Rwanda is, therefore, a good example of how alternative forms of justice may be mobilized with a restorative purpose (Kowalski, 2009). This has fueled the debate on international criminal justice and its complementary jurisdictional role.

Reflecting on the ideals that are at the basis of international criminal justice should be permanent so as to allow the development of a discourse of ethical legitimacy needed to provide international criminal justice with an effective ability to resist and change. Yet, for there to be legitimacy, criticism, deconstruction and uncovering must take place. This means that the hope in international criminal justice – and in particular in the International Criminal Court – has to be linked to the hope in critical thought and in the will of all relevant international actors – States, international organizations, civil society, victims.

INTERNATIONAL CRIMINAL JUSTICE BETWEEN TWO CULTURES

Peace and Law are ancient concepts of theorization and of social construction. Their scientifically autonomization, their conceptual development and their aca-

demic acceptance and in practice have never been and will never be simultaneous. Yet, their aims are similar: material and emotional well-being of human beings. In the last hundred years, the debates between realism and idealism/liberalism have influenced both International Relations (Richmond, 2008) and International Law (Koskenniemi, 1992), including in what concerns theoretical construction of peace. The term "peace" is today a structured and extraordinarily multilayered concept. In terms of International Law, its wide material and personal scope, as well as the imperative nature of some of its rules pave the way to a "Law of Humanity" (Pureza, 2002). Peace is a concept that has evolved from the idea of negative peace to the present idea of positive and structured peace (Galtung, 1975; Richmond, 2008). This peace is composed of several elements from different fields which evidences an aspiration for a holistic well-being in a non-violent environment. International Law may play a role in standardizing the elements of peace and ensuring their effective and fair implementation. The academic divide between International Relations and International Law (Beck, 1996) leads to what Young (1992: 174) described as the "syndrome of two cultures". The divide between those two scientific fields are, to a certain extent, the result of the discourse promoted by authors of each of those fields as well as of political and diplomatic practice which tends to have a (moderate) Cartesian perspective of diplomatic legal and political discourses. International Relations authors tend to view International Law as marginal or as a dangerous myth (Kewenig, 1973). The state-centered world order and the impossibility to enforce sanctions would make legal regulation irrelevant. Others have questioned the contribution of Law to peace (Boasson, 1968), namely in what concerns the activity of international criminal courts (Meernik, 2005) or the conventions on human rights (Hafner-Burton & Tsutsui, 2007).

There are also those who believe the opposite: the international order will only truly be order, and the international society will only be a community when international social relations are regulated by Law (Tomuschat, 1993; Fassbender, 1998). Abbott (2005) even describes international lawyers as architects of global governance. International Law scholars often view International Relations as a theoretical rather than an active and changing political discourse, limited to the analysis *ad nauseum* of relations between States and the power relations that they are condemned to be part of. Moreover, it is sometimes referred that, considering that the history of Law can be dated to Roman Law and that of International Law in particular to the "legal theologians" and to Grotius in the 16th and 17th centuries, International Relations are still a young and immature scientific field of the 1950s. From a

more subjective perspective, this discourse adds to the corporate sense of superiority of certain International Law scholars over International Relations. This then fuels reactions of International Relations' scholars who declare the irrelevance of International Law. In any case, and as Pureza points out, this syndrome of two cultures is grounded on the different perspective each field has: International Relations has an expository and analytical point of view while International Law has a prescriptive and normative one" (1998).

"International criminal justice" has been widely analyzed. This is, in fact, a subject-matter that requires a wide and encompassing approach which includes themes belonging to different scientific fields, as for example: the typification of serious crimes against the international community; the functioning of the courts; the contribution to the development of International Law; the promotion and protection of human rights; the relevance of the individual in the international space; the impact in the prevention and resolution of conflicts; or the States' foreign policy towards the ICC. This is usually an analysis carried out separately by different scientific fields, and "international criminal justice" has drawn more attention from International Law than from International Relations.

There is, however, space and relevance for a discourse under a multilayered approach. Firstly, "international criminal justice" can be a case study for several of the current theoretical problematics under the radar of International Law and International Relations scholars. Moreover, "international criminal justice" has the potential to become a discourse element congregating those two fields, which have stubbornly been kept separate. Additionally, "international criminal justice" may benefit from an integrated approach by International Law and International Relations, which would enrich and providing it with new perspectives.

THE PROJECT "INTERNATIONAL CRIMINAL JUSTICE: A DIALOGUE BETWEEN TWO CULTURES"

The project "International Criminal Justice: A Dialogue between Two Cultures", developed in the Observatório das Relações Exteriores (Observare) at Universidade Autónoma de Lisboa, aims to be a hub that brings together researchers, experiences and methodologies from both International Law and International Relations. Whenever deemed relevant, researchers from International Law may be asked to step out of their comfort zone and that,

though keeping their scientific background, deal with issues usually studied within the scope of International Relations (and vice-versa). The research center invited authors, national and foreign, with different scientific backgrounds and who have either an academic point of view or practical experience within the scope of international criminal justice.

This research project has four objectives. The first is to design a discourse on "international criminal justice" that combines International Law and International Relations perspectives on common themes, contributing to more creative and well-founded responses. The second is to identify point of convergence and divergence (and their consequences) on common themes to those scientific fields. The third objective is to find new proposals for some of the current issues in international criminal justice. Finally, this project also aims at providing research results that evidence a wide perspective of international criminal justice that may benefit researchers, diplomatic agents, international justice agents or students.

THE BOOK "INTERNATIONAL CRIMINAL JUSTICE: A DIALOGUE BETWEEN TWO CULTURES"

The contributions to the project, in the form of scientific papers, were published in Portuguese and/or in English at JANUS.NET e-Journal of International Relations. The present volume is a compilation of those papers.

The first chapter, entitled "International Criminal Justice and the Erosion of Sovereignty", was written by Miguel de Serpa Soares. The author emphasizes the fact that the International Criminal Court is still "in its teens" in the world legal order. However, as it affects institutional balance and the powers in force since 1945, the Court evidences the tensions between supranationalism and the erosion of State sovereignty, which the author views differently depending of being big or small/medium-sized States in terms of "judicial sovereignty". The text analyzes in detail the process that led to the inclusion of the definition of crime of aggression as well as the conditions to exercise jurisdiction in the Rome Statute (the jurisdiction over the crime was already included in 1998) at the Kampala Conference in 2010, concluding that the compromise obtained evidences the differences in position between, on the one hand, the five permanent members of the Security Council, whose objective was to maintain the prerogatives the United Nations Charter assigned to them in determining situations of aggression and, on the other hand, a set of different alliances between groups of coun-

tries whose common element was the defense of ICC independence before the Security Council, as well as autonomy in the legal determination that a crime of aggression was committed. The author considers that the compromised attained at Kampala represents a defeat for the five permanent members of the Security Council and, just like the Rome Statute, it has created gaps in the punishing monopoly of States and the Security Council. The paper concludes that the existence of an international criminal justice is in opposition with the idea of state sovereignty. Yet, the relation between the two should not be viewed as antagonistic but rather as complementary to and transformative of the concept of sovereignty itself. However, so that the ICC may impose itself, especially before more powerful States, Miguel de Serpa Soares contends that it must consolidate impeccable jurisprudence, as did the Court of Justice of the European Union or the International Court of Justice and. As such, time must be given to this new institution.

Francisca Saraiva has authored the second chapter entitled "Major violence (crimes) against the international community". The author notes that ICC has provide the international community with a permanent legal mechanism to dissuade and repress barbarous and extremely cruel acts. Yet, the result attained by the Rome Statute in 1998 and by the definition of the crime of aggression at the Kampala Conference in 2010, was nevertheless influenced, in the author's point of view, by the negotiation strategies of the great powers, organized considering their long term interests, which led to selective multilateralism. In particular, the author contends that the hostility towards the Court from the United States of America is not due to American power vitality but is a political survival strategy so as to delay the rise of new hegemonic powers which will take the United States' place in the international system. The negotiation of the crime of aggression showed that what was in question in the ICC was the right of big powers to maintain their freedom in strategic (and warfare) action and to protect their own humanitarian agenda.

Mateus Kowalski brings to the discussion a concern about the place of the ICC within the universalistic approach to international relations and the world order. In the chapter entitled "The Stormy Waters of the International Criminal Court: Universal Fight Against Impunity or Liberal Universalization?", the author examines on the type of universalism the ICC represents. The author notes that a rational approach to international social relations is different from an ethical one. The rational approach is based on a unique rational process and its prioritization - a universal process which

can be extended to all human beings. Therefore, it would be possible to identify a wide range of interests and objectives common to the global community, usually universal and self-evident when deriving from a correct deductive rational process which leads to unique and universal truths. An ethical approach, on the other hand, resorts to a more subjective analysis based on a minimum common ethical ground reached through dialogue: diversity, plurality and locality are in this case more relevant. While the rational approach may lead to universalization of localized specific moral models (e.g. the liberal Western model) promoting its hegemony, the ethical approach promotes diversity by considering non-reducible differences and common human phenomena in which only a minimal common ethics is universal. In his paper, the author argues that the answer to this structural question is crucial to understand if the Court is essentially a hegemonic tool to expand the predominant Western liberal model or rather a mechanism to fight impunity with due regard to diversity and rooted on an axiological concern. Against this backdrop, Mateus Kowalski observes that the ICC is immersed in stormy waters given that it is not always possible to separate a universalizing liberal approach from an ethical universal approach. Nevertheless, the author concludes that the Court is essentially defined by the universalization of the fight against impunity through reference to a minimal common ethics, even if at times and to a limited extent may serve as a hegemonic tool. Therefore, the author concludes that the Court has to be seen as an important pathway towards the defense and promotion of human dignity and justice. However, there has to be a constant vigilance against its instrumentalization.

In a contribution entitled "The International Criminal Court and the evolution of the idea of combating impunity: an assessment 15 years after the Rome Conference, Patrícia Galvão Teles evaluates the International Criminal Court's first years of operation, taking stock of the institution's activity. The main challenges which confronted this institution at the age of fifteen are described and analyzed, namely: a) the quest for universality, complementarity and cooperation; and b) the dilemma between peace and justice. The paper focuses the specific situation of Kenya, where the President and Vice-President of the Republic were suspected of committing crimes against humanity. Considering the positions taken by the African Union, the text discusses whether the introduction of immunity from criminal jurisdiction, albeit temporary, to Heads of State and Government while in Office could come to represent a step backwards for the idea of combating impunity for the most serious international crimes.

Sofia Santos, in the chapter with the title "The International Criminal Court and the construction of International Public Order", discusses how envisioning an international public order means envisioning an order sustained by a legal and institutional framework that ensures effective collective action with a view to defending fundamental values of the international community and to solving common global problems, in line with the universalist vision of International Law. The author argues that the establishment of the ICC added an international punitive perennial facet to international humanitarian law and international human rights law and linked justice to peace, to security and to the well-being of the world, reaffirming the principles and objectives of the Charter of the United Nations. Nevertheless, the affirmation process of an international criminal justice by punishing those responsible for the most serious crimes of concern to the international community as a whole faces numerous obstacles of political and normative character. The article identifies the central merits of the Rome Statute and ICC's practice and indicates its limitations caused by underlying legal-political tensions and interpretive questions relating to the crime of aggression and crimes against humanity. Finally, the article argues for the indispensability of rethinking the jurisdiction of the ICC, defending the categorization of terrorism as an international crime, and of articulating its mission with the "responsibility to protect", which may contribute to the consolidation of the ICC and of international criminal law and reinforce its role in the construction of an effective international public order.

In a chapter with the title "The Prosecutor within international criminal justice", Almiro Rodrigues discusses the duties and powers of the Prosecutor within international criminal justice and how to some extent they equate those of the Prosecutor at domestic level. However, they differ substantially and methodologically within the framework of international criminal justice. The challenges posed by the investigation and prosecution of crimes on a large scale or massive criminal violations committed years ago in a sovereign foreign country are unique. Thus, it is both remarkable and surprising in many ways that the legal investigating tools available to the international Prosecutor have produced results that one can see and quantify. Although the challenges remain, the author argues that the work of the Prosecutor within international criminal justice is a considerable achievement in the fight against impunity for serious violations of Human Rights and International Humanitarian Law.

Luís Moita, in the chapter entitled "Opinion Tribunals and the Permanent People's Tribunal", highlights that justice is not necessarily confined to formal courts and tribunals, providing an interesting reflection on the "Permanent People's

Tribunal" as an alternative forum of justice. The author notes that there is a dialectic relationship between public opinion and the enforcement of justice by the competent authorities. History contains numerous examples where international opinion movements stand against judicial decisions, since, either by act or by omission, established jurisdictions sometimes pronounce questionable verdicts or leave unpunished crimes that were committed. That may take a variety of forms, ranging from international commissions of inquiry to truth and reconciliation commissions. Among such exercises of citizenship from civil society, the author singles out the so-called "opinion tribunals", whose first major initiative was due to Bertrand Russell in the 1960s. Following this tradition, the Permanent People's Tribunal has been very active between 1979 and 2014, organizing deliberative assemblies and pronouncing decisions in a "quasi-judicial" framework. Even when dealing with internal issues of a particular country, they address global issues and the echoes of their deliberations extend beyond national borders. Luís Moita notes that critics of the Permanent People's Tribunal point a finger at its resemblance with justice used for ideological purposes. However, the author argues that the legitimacy of this and similar initiatives, backed by current International Law, is defendable for their capacity to shake consciences and for being a legal innovation at the service of the rights of peoples. The author concludes that legal normativity is a tool for progress and humanization. Opinion tribunals and in particular the Permanent Peoples' Tribunal have shared responsibility for contributing to avoid the impunity of crimes committed and for fostering the enforcement of law, not as an oppressive norm but rather as a liberating matrix.

Miguel Santos Neves, in his chapter entitled "Human Rights, International Criminal Law and the Challenges of a Victim-Centred Reparatory Justice: the ICC Contribution" explores the contribution of the ICC's legal framework and the Court's recent practice to the promotion of human rights in general and in establishing a paradigm shift towards a victim-centred criminal justice, looking at the innovations introduced, their effectiveness, limits and systemic impact. The author argues that the ICC Statute is the symbol of a new relationship between international human rights law and international criminal law. He claims that, from a human rights perspective, the fundamental achievement of the Court is the enhancement of the status and rights of victims. Miguel Santos Neves also points out some shortcomings of the system established by the ICC Statute in what concerns the victims, including the difficulty in achieving a significant participation of victims in the proceedings; the fact that the way reparations are established and awarded do not necessarily ensure individual, prompt and adequate reparation of victims, and fail

to protect them from victimization; and the underfunding of the Court which may negatively affect the implementation of the restorative justice paradigm. The author concludes that Member States, non-governmental organizations and civil society have a major role in providing finance and political support to the work of the Court so it may fulfil its purposes and thus become an important part of the global system of human rights.

The final chapter authored by Patrícia Galvão Teles entitled "The ICC at the Centre of an International Criminal Justice System: Current Challenges", brings an update on the current challenges facing the ICC. The author argues that the ICC has entered into its second decade of operations and has established itself at the centre of an international criminal justice system, comprising also domestic jurisdictions and other international courts and tribunals. However, many challenges continue to face the ICC and, indeed, are part of its own features and stem from the specificities of International Law and International Relations. Recent political events are testing the Statute's universality, the system of complementarity with national jurisdictions, the reliance on State's cooperation and the possible exercise of the Court's jurisdiction with regard to the crime of aggression. These challenges illustrate how the ICC and international criminal justice inhabit both the cultures of justice and politics and how these two aspects have to be taken into account in order for such challenges to be overcome, so that the mission of a permanent and central instrument for the fight against impunity, that historically started in Rome in 1998, becomes an inherent part of today's world.

FINAL REMARKS

The project "International Criminal Justice International: A Dialogue between Two Cultures" allowed to place in the same space of reflection perspectives not only from two different scientific areas but also from diverse functional contexts. In our view, this diversity of scientific and functional backgrounds has resulted in a very rich analysis of relevant aspects of international criminal justice.

The outcome of this project indicates the importance of strengthening the idea of interdisciplinary research as a methodology for the reading, analysis and socio-international construction, as well as to the need for scientific research that contributes to the overcoming of the "two cultures syndrome". Law does not dismiss other disciplines such as philosophy, history, economics, political science, sociology or even psychology. In particular, International Law cannot dismiss political science in the form of International

Relations. Just as the field of International Relations should not dismiss International Law as means of analysis, as a mechanism of transformation and as a normative vehicle (regulating and protecting) of essential aspects related to the value system and to social everyday life.

A final note on the challenges currently facing international criminal justice. The international criminal tribunals for the former Yugoslavia and for Rwanda appear to have been relatively successful in fulfilling their mandates and have indeed contributed in an innovative way to the individual criminal accountability of the perpetrators of the most serious crimes of international concern. The International Criminal Court, which is intended to be the universal and permanent result of those previous experiences, today faces a barrage of structural criticism with accusations that the Tribunal is biased against African countries, that it undermines ongoing peace processes or that it interferes in the internal sovereignty of States. Moreover, the Court often faces difficulties with regard to the judicial cooperation with States. The situation is currently particularly challenging with several States having already indicated their withdrawal, or their wish to withdraw from the Rome Statute.

The centrality of the International Criminal Court in the international criminal justice system and the challenges the Court is facing are clearly reflected in the articles published in this book. An opinion that seems to be transversal to the book is the recognition of the great potentialities of international criminal justice for the promotion and protection of human rights as well as for the prevention and resolution of conflicts. The success of the Tribunal is therefore essential for the civilizational progress of today's turbulent international society and for the well-being of all individuals. This success depends above all on the political will of States. However, the active participation of civil society in this debate, including academics and practitioners in the areas of International Law and International Relations, is absolutely crucial not only in creating a moral reserve of international conscience but also in pointing out ways and propose creative and sustained solutions oriented towards what should matter the most – the human-beings.

In concluding, we wish to express our sincere gratitude to all authors for the knowledge that they lent to the project "International Criminal Justice: A Dialogue between Two Cultures" and now compiled in this book. It is our hope that this extraordinary group of thinkers may continue to reflect together on these relevant matters, and provide ideas and act on them towards a more just and peaceful world.

Mateus Kowalski and Patrícia Galvão Teles

References

ABBOTT, K. (2005). "Toward a Richer Institutionalism for International Law and Policy". *Journal of International Law and International Relations*. 1,9-34.

BECK, R. (1996). "International Law and International Relations: the Prospects for Interdisciplinary Collaboration". In Beck, R. et al. (eds.) *International Rules: Approaches From International Law and International Relations* (pp 3-30). Oxford: Oxford University Press.

BOASSON, C. (1968). "The Place of International Law in Peace Research". *Journal of Peace Research*. 5, 28-43.

BOGDANDY, A. & DELLAVALLE, S. (2008). "Universalism and Particularism as Paradigms of International Law". *IILJ Working Paper 2008/3*. Available at www.iilj.org/publications/documents/2008-3.Bogdandy-Dellavalle.pdf

FASSBENDER, B. (1998). *UN Security Council Reform and the Right of Veto: a Constitutional Perspective*. The Hague: Kluwer Law International.

GALTUNG, J. (1975). *Essays in Peace Research*. Copenhagen: Christian Ejlers.

HAFNER-BURTON, E. & TSUTSUI, K. (2007). "Justice Lost! The Failure of International Human Rights Law to Matter Where Needed Most" *Journal of Peace Research*. 44(4), 407-425.

KEWENIG, W. (1973). "The Contribution of International Law to Peace Research" *Journal of Peace Research*. 10, 227-234.

KOSKENNIEMI, M. (1992). "Introduction". In Koskenniemi, M. (ed.) *International Law*(xi-xxxii) Aldershot: Dartmouth Publishing Company.

KOWALSKI, M. (2009). "Justiça e Reconciliação ao Nível Comunitário no Ruanda" .*Centro de Estudos Sociais da Universidade de Coimbra, Cabo dos Trabalhos 3.* Available at http://cabodostrabalhos.ces.uc.pt/n3/documentos/5_Mateus_Kowalski.pdf

KOWALSKI, M. (2011). "O Tribunal Penal Internacional. Reflexões para um Teste de Resistência aos seus Fundamentos". *JANUS.NET: e-Journal of International Relations*. 2(2), 119-134.

MEERNIK, J. (2005). "Justice and Peace? How the International Criminal Tribunal Affects Societal Peace in Bosnia". *Journal of Peace Research*. 42(3), 271-289.

PUREZA, J. M. (1998). "O Lugar do Direito num Horizonte Pós-Positivista". *Política Internacional*. 2(18), 79-91.

PUREZA, J. M. (2002). "Ordem Jurídica, Desordem Mundial: um Contributo para o Estudo do Direito Internacional". *Revista Crítica de Ciências Sociais*. 64, 3-40.

RICHMOND, O. (2008). *Peace in International Relations*. Abingdon: Routledge.

TOMUSCHAT, C. (1993). "Obligations Arising for States Without or Against their Will" .In *Recueil des Cours de l'Académie de Droit International de la Haye, Tomo 241 – 1993 (IV)* (194-374). Dordrecht: Martinus Nijhoff Publishers.

YOUNG, O. (1992). "International Law and International Relations Theory: Building Bridges – Remarks".*Proceedings of the Annual Meeting of the American Society of International Law. 86, 172-175.*

International Criminal Justice and the Erosion of Sovereignty

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International Criminal Justice and the Erosion of Sovereignty

INTRODUCTION

International Criminal Law and the International Criminal Court are institutions still in their early years in terms of world legal order. Ten years after its implementation, the International Criminal Court is an institution that still has to prove its credibility in international criminal narrative in the prevention of international crimes that "*affect the international community as a whole*" and that "*are a threat to peace, to security and to the well-being of Humanity*", in the words of the Rome Statute. All international legal bodies are restraints to the legal and even constitutional sovereignty of States. However, the relations between these institutions of legal supra-nationalism and States do not necessarily have to be antagonistic or competitors. Affirmation of any legal, supranational, regional or universal, legal order will always go through periods of conflict and rivalry that represent the time needed for national sovereignties to adapt to new scenarios. In the case of the International Criminal Court, this tension is heightened because, inevitably, institutional balances and an arrangement of powers in place since 1945 are affected.

The times to come will be a period for observing rather than for explaining. We will observe the way in which the Court will create a judicial language against impunity and how complementary relations with national jurisdictions will be defined.

STATE SOVEREIGNTY: A FLEXIBLE CONCEPT

Before analyzing some specific instances that will allow us to reflect on the emergence of International Criminal Law and the erosion of sovereignty, it is important to state some basic facts.

The first is that there are two separate but overlapping realities in international legal order and these correspond to two different paradigms of thought. The "*Grocian*" (or "*Hobbsian*") paradigm, based on a state perspective of international relations and the "*Kantian*" paradigm, cosmopolitan and universal[1].In the first case, sovereign States develop cooperation relations with the single purpose of better pursuing interests they considered national interests. In the second case, States develop cooperation relations also bearing in mind the interests of an international community separate from the States themselves.

In 2013, the State is still the primary subject of International Law and international society is basically the result of the interaction among territorially-based political communities, independent, protected by formal legal equality and having certain essential features. Simultaneously, the recent dynamics in international relations and the huge development of International Law, in particular after 1945, lead us to acknowledge the existence of real conditions, perhaps restraints, to the sovereign powers of States. In the latter case, the explosion of multilateralism, the appearance of international subjects such as international organizations, some including supranational elements, the restraints to jus ad bellum, the relativization of the principle of State immunity[2], the consolidating of a Humanitarian International Law and a Human Rights International Law, as well as the concept of international crimes and the creation of a permanent International Criminal Court, all contribute to the idea of a relative, flexible Sovereignty, in any case a sovereignty that needs to adapt to external factors affecting its powers, whether these are legal rules or competing centers of political and judicial power.

It is not important to understand the concept of sovereignty as mere emanation of realistic thought in which power politics is at the core but rather identify in international legal narrative, *in casu*, in International Criminal Law, the real implications of these possible restraints.

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[1] Cassese, A (2005). *International Law*, Oxford: University Press, p.20 and in particular texts by M. Wight e H. Bull mentioned in footnote 11.

[2] Under Portuguese jurisdiction on the jurisdictional immunity of States, see Margarida Salema D'Oliveira Martins (2011). "Comentário ao Acórdão do Tribunal da Relação de Lisboa relativo ao Processo 135/06.2TVLB.L1-7". In *Anuário Português de Direito Internacional 2011, M.N.E.* p.119.

Noteworthy is to establish the basic idea that sovereignty is made manifest in power and independence. Identified as a feature of territorial State, sovereignty is essentially the possibility to enforce all powers of authority on a specific territory and on all the individuals living therein. These powers are put into practice through the adopting and enforcing rules (administratively or judicially) and in the ability to restore the Law, either though coercive enforcement of sentences or through *jus punendi*. As a consequence, the sovereign State has the right to exclude enforcing the powers of authority by any other State within its territory and the other State has the duty of non-interference. Choosing this basic concept, which corresponds to an absolute and realistic sovereign paradigm, is for analytical purposes only, so as to deconstruct the concept.

In 1928, the referee Max Huber stated that: *"La souveraineité dans les relations entre États signifie l'independance"*[3].

Independence affirmed against other subjects of international Law and a fundamental consequence of international legal personality exclusively acknowledged by International Law, in accordance with the formula of legal immediacy referred by Allain Pellet (Pellet, 2002,p 424). In 1758, Vatel wrote that *"Un nain est aussi bien un homme qu'un géant: une petite republique n'est pas moins un État souverain que le plus puissant royaume"* (Vatel, 1863,p 100)

In the formal and legal translation of this principle, nothing fundamental has changed since the 18th century: article 2, nº 1 of the United Nations Charter lays down this principle of formal equality among States and, thus, adopts several principles which ensure that equality and independence.

Based on these elements, *potestas* or internal authority and independence, sovereignty should be seen as the ability States enjoy of enforcing their prerogatives, both internally and externally, as well as the ability to influence the development of international law.

The current analysis of the conditions under which States exercise their sovereignty cannot ignore the historical process by which modern States were formed, which is intertwined with the process of how the *Jus Gentium* have developed.

Claim by States that they are *superiores non recognescentes* beings stems essentially from the rebellion by the princes against the double authority of the Emperor or the Pope and their refusal to acknowledge the secular universal authority of both (*potestas directa*). The fact that each community aspires to exercise sover-

[3] Decision on 4 April 1928 «L'Île des Palmes», Recueil des Sentences Arbitrales II-838.

eign powers within its territory and to relate with other political communities without the interference of other secular authorities embodies this first "aggressive" concept of sovereignty, which must be affirmed against other existing powers. Interestingly, the Portuguese are also at the base of extreme reactions against secular authority by the pope and in speeding the creation of the Modern State. The Treaty of Tordesillas in 1494, based on the assigning of new territories and seas exclusively to Portugal and Spain by papal edict added to the anger of other European nations against the power of the Pope and the old order *civitas christianna*. Sovereignty was argued as a claim for a space of freedom, freedom to gain territory, freedom to navigate and do commerce against a secular authority with a transcendent foundation[4].

The destruction of medieval order, symbolized by the Peace of Westphalia in 1648, marks the foundation of the modern State and of International Law. However, in the beginning, State sovereignty is still included in the sovereignty of the prince; only with the onset of liberal constitutionalism at the end of the 18th century, subjects are considered citizens and "the sovereignty of the prince" becomes the sovereignty of the State. The affirmation of sovereignty-power, seen as exclusive jurisdiction and supremacy of public powers over citizens and territory, and of sovereignty-independence, the capacity for direct and autonomous relation with other powers reached a climax during 19th century legal positivism which only ended in 1945.

In this international legal order, basically consisting of a European public legal order, in the concert of "civilized nations", the principle of quasi-absolute State sovereignty has become the basis for all international relations and Law[5]. The slow historical process leading to the collapse of this concept of absolute sovereignty starts after the 1950s.

The first interventions by International Law on defining the restraints to State sovereignty are in the Right to War. The freedom to initiate war as an essential feature of the sovereign State is limited firstly through the first attempts to regulate *jus ad bellum*, a process which started with the foundation of the International Red Cross and the Hague rule of law. *Jus ad bellum* remains unchanged until the Briand-Kellog Pact in 1928.

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[4] On the historic development of the concept, see H. Steinberger (2000). "Sovereignty " in *Encyclopedia of Public International Law* – IV, R. Bernhardt ed. North Holland:Max Planck Institute.

[5] And, according to Martti Koskenniemi (2008), especially a justification for International Law resulting from European history and culture as a means to justify the colonial expansion in Africa by means of a distinction between civilized and uncivilized peoples, the latter having no Sovereignty which was an exclusive feature of civilized nations in The Gentle Civilizer of Nations – The Rise and Fall of International Law 1870-1960. Cambridge: University Press. p. 127.

From 1945 onwards, the international legal *acquis* and the multilateral institutional framework starts to be formed and develop in which sovereignty will be exercised. The United Nations Charter and the principle to forbid the threat to use force as means of conflict resolution, Humanitarian International Law including, namely the Geneva Conventions, the legal protection of the individual, even if in its early stages, through the adoption of different universal and regional treaties on human rights, the sophisticated formulas of joint exercise of sovereignty, as in the case of the European Union, and finally, the emergence of International Criminal Law, all create a mulch-layered reality in which the idea of absolute sovereignty cannot be reconciled with the idea of absolute sovereignty[6]. All these changes imply specific restrictions in exercising state sovereignty, largely based on legal rules that discipline the freedom of States.

So as to reflect on the current nature of sovereignty we must also establish the concept of sovereignty that is at stake. Is it a military, monetary, economic or judicial sovereignty? A sovereignty as exclusive powers of authority over citizens and territory? A legal sovereignty as an imperviousness of international legal order to International Law or as an ability to influence the production of international laws? Sovereignty as an exclusive set of rights and prerogatives or sovereignty that also includes the duties of States?

For the author of this text, a Portuguese citizen, in March 2013, the following statement must be made: Portugal is a member of the European Union, to which the country transferred several of its sovereign powers, namely monetary sovereignty, and is currently under the intervention of a troika of foreign institutions under a financial assistance program. This intervention implies a restraint to its sovereign powers so as to make fundamental political choices. Portugal signed, among many other treaties, the European Union Treaty which includes several provisions on European citizenship. Portugal accepts the compulsory jurisdiction of the International Court of Justice, it is under the jurisdiction of the Luxembourg and the Strasbourg Courts and has signed the Rome Statute. Portugal does not have its own currency, has no relevant military power and has its Constitution which is

[6] For the sole purposes of this analysis, we use artificially simplified versions of concepts. The concept of absolute sovereignty cannot in itself be acknowledged in theoretical terms except as a denial of International Law, a concept accepted since long by the international legal Doctrine.
As G. Scelle states in 1932, "La notion de souveraneité est donc incompatible avec celle de droit objectif comme avec celles de sujet de droit. C'est une tâche vaine de vouloir construire le Droit, et en particulier le Droit international, sur la notion de la souveraineté de l'Etat. Là encore, le concept ne peut aboutir pratiquement qu'à soustraire la volonté des gouvernements à l'emprise du Droit, à détruire la notion de compétence et, avec elle, celle de légalité» (Scelle, 1932,p 14).

mainly in agreement with International Law[7] and which even automatically accepts laws from general International Law. Portugal is not a permanent member of the Security Council, does not have significant natural resources beside a wide EEZ, its diplomacy has limited material resources and its population is rather small in world terms.

The understanding of what may be the erosion of national sovereignty cannot be separated from the national perspective of each observer nor from the strategies of adaption by each small or medium-sized State.

A permanent member of the Security Council will likely assess the erosion potential of its sovereignty differently from the author. Exercising sovereignty in Portugal is largely based on a link with the multilateral system, in the joint exercising of sovereign powers, namely within the framework of the European Union and in an openness to those outside its legal order. An American or a Chinese citizen will probably view the same phenomenon under the perspective of real restraints that full participation in a multilateral system may bring to its powers. This is especially true in Law and in International Criminal Law in particular. Through observing the relation between the permanent members of the Security Council and the International Criminal Court we aim to evidence this idea.

THE END OF THE PUNISHING MONOPOLY OF STATES: CRIME AND PUNISHMENT IN INTERNATIONAL LAW

In 1919, article 227, n.º 1 of the Treaty of Versailles laid down that *"Art. 227 – Les puissances alliées et associées mettent en accusation publique Guillaume II de Hohenzollern, ex-empereur d'Allemagne, pour offense suprême contre la morale internationale et l'autorité sacrée des traités. Un tribunal spécial sera constitué pour juger l'accusé en lui assurant les garanties essentielles du droit de défense. Il sera composé de cinq juges, nommés par chacune des cinq puissances suivantes, à savoir: les États-Unis d'Amérique, la Grande Bretagne, la France, L'Italie et le Japon.*

Le tribunal jugera sur motifs inspirés des principes les plus élevés de la politique entre les nations avec le souci d'assurer le respect des obligations solennelles et des engagements internationaux ainsi que la morale internationale.

[7] See Miranda, Jorge (2010). "O Artigo 8º da Constituição e o Direito Internacional" in Augusto de Athayde/ João Caupers/ Maria da Glória F.P.D. Garcia (eds.) *Estudos em homenagem ao Professor Doutor Freitas do Amaral*. (p. 415). Coimbra: Almedina.

Les puissances alliées et associées adresseront au Gouvernement des Pays-Bas une requête le priant de livrer l'ancien empereur entre leurs mains pour qu'il soit jugé»[8].

The ending of this story is well-known: Kaiser William II took refuge in the Netherlands, whose Government refused his extradition invoking the nonexistence of a competent international court as well as a preliminary incriminating rule. Nevertheless, it is interesting to analyze the language used at Versailles ("international morals", "high political principles among nations"), as well as a true novelty which was the a Sovereign was described as a defendant, accused of "offense suprême" (supreme offense, yet not qualified as crime), to " international morals"[9]. Equally noteworthy is the subtle and continuous change in international legal language which emerges after the appearance of International Criminal Law and progresses with the successive attempts at rules and limiting the "warring" sovereignty of States.

In 1814, the Declaration of Vienna against Slave-trading refers to civilized nations", essentially European nations, slowly shifting the moral speech, in particular that of European powers, in a speech on International Law, gradually translated in legal rules. The Hague Peace Conferences in 1899 and in 1907 mark the first coding process of the laws of war and the so-called "Martens Clause"[10], included in the preambles of the Conventions II of 1899 and 1907 stated that *"until a more complete code of the laws of war is adopted, the parties consider adequate to declare that, in the cases not included in the provisions adopted, the populations and the warring parties are under the protection and observation of the Rights of People, considering they derive from customs among civilized nations, the laws of humanity and the demands of public conscience"*[11].

Noteworthy is also that some of this language survived the new world order after 1945: article 38, nº 2c) of the Statute of the International Court of Justice still refers to the general principles of Law recognized by the "civilized nations" as a source of International Law.

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[8] «Pages d'Histoire -1914-1919» (1919). Paris: Librairie Militaire Berger-Levrault. 108.

[9] In 1932, Hans Kelsen in his course in the Hague Academy, used the examples of the Versailles rules on the responsibility of the Kaiser to evidence the idea that only States could be subjected to International Law would be a false one in R. Kolb (2003). *Les Cours Généraux de Droit International Public de l'Academie de la Haye*(p.82). Brussels: Bruylant.

[10] In 1883, the same Fyodor Martens, Professor at the university of St Petersburg, defined International Law as follows: "Les États indépendants jouissant de la civilisation européenne constituent le domaine régi par le droit international et jouent un rôle actif das la communauté internationale (…) C'est de cette action des États civilisés que provient le droit international » (Martens, 1883,p 307).

[11] See Kowalski, M & Serpa Soares, M. (2011) "Cláusula Martens" in M. A. Ribeiro, F. P. Coutinho & Isabel Cabrita (eds) *Enciclopédia de Direito Internacional*.(p.91) Coimbra: Almedina.

The peace of Versailles originated the first instances of institutionalization of multilateralism, such as the failed Society of Nations as well as the transference of a criminal narrative to international scenario. The Legal Advisory Committee, appointed by the Society of Nations recommended in 1920 that an International Supreme Court should be founded with competence to try crimes committed against international public order and the universal law of nations. This court would also be assigned competence to define the list of crimes and applicable punishments, the means to enforce them as well as its rules of procedure. In 1920, Elihu Root asked the following question on this project: *"Are the Governments of the world prepared to give up their individual sovereign rights to the necessary extent?"* (Ferencz, 2000,p 40)[12].

The question, obviously rhetoric in 1920, was not answered in a positive way before the adoption of the Rome Statute in 1998 and even then it was only partially positive.

The Nuremberg and Tokyo Trials led to the collapse of the Sovereign's punishing monopoly and are a turning point in the erosion process, the adaptation *rectius* of state sovereignty. Several perspectives are possible on these historic trials: from considering it was all mere winner justice to a judicial catharsis of guilt and redemption; historians, political scientists and lawyers will hardly understand these events in the same way[13].

In the aftermath of the victory by the allies in 1945, two possibilities opened to the winners: mere execution or imprisonment of the losers and their punishment following a trial. Benjamim Ferencz, the youngest member of the American prosecution team in 1945, says, in a rather humorous and acid tone about the British that "In fact, the Foreign Office still did not favor war crimes trials. To avoid long legal proceedings, that might become a propaganda forum for Nazi leaders, the United Kingdom preferred a «*political disposition*». Always noted for their «*fair play*», the British argued that «*execution without trial is the preferable course*». Exactly who was to shoot whom and when to stop shooting was not made clear" (Ferencz, 2000,p 42).

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[12] Elihu Root was the American Secretary of War (1899-1904) and Secretary of State (1905-1909) with President Theodore Roosevelt. Nobel Peace Prize in 1912, Root presided to the Carnegie Endowment for International Peace. Elihu Root's political thought was made public in his book (1927) *Politique Exterieure des États-Unis et Droit International: Discours et Extraits*. Paris: A. Pedone.

[13] For a contemporary critical perspective on Nuremberg and Tokyo, see G. Mettraux (ed.) (2008). Perspectives of the Nuremberg Trial. Oxford: University Press and Yuma Totami (2009). *The Tokyo War Crimes Trial*: The Pursuit of Justice in the Wake of World War II. Harvard: University Press.

The London Agreement on 8 August 1945, which led to the creation of the Nuremberg court, resulted mainly from the American perspective which, with the Soviet support, managed to be imposed on the remaining allies. In a vaguely grand speech about the trial, Judge Robert Jackson, Chief Prosecutor of the American team at Nuremberg, said: *"That four great nations, flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power as ever paid to Reason"* (Ferencz, 2000, p 37).

The Charter of the International Military Court established as crimes under its competence for which individuals may be held accountable the crimes against peace, crimes of war and crimes against humanity, thus creating, for the first time a criminal list of international crime - the origins of the International Criminal Code. Article 6 typifies ("the following acts or some of them") as *"crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility"*: crimes against peace (the precedessor of the "crime of aggression" adopted in the Kampala Conference in 2010); crimes of war ("namely the violations of the laws or customs of war"); crimes against humanity ("namely murder, extermination, enslavement, deportation and other inhumane acts"). A national criminalist today cannot but wonder in face of the open typification of these crimes.

There is ample literature on the Nuremberg and Tokyo trials as well as hard criticism, in particular American criticism, on the exceptional nature of an *ex post facto justice*.

The discomfort of some judges at the time, namely in terms of the crimes against peace, stemmed from the knowledge that the Nuremberg and Tokyo International Military Courts operated outside the framework of Criminal Law principles, namely the principles of *nullen crimen sine lege* and *nulla poena sine lege*. Judge William Douglas expressed his criticism on criminalizing "crimes against peace" as follows: *"(I) thought and still think that the Nuremberg trials were unprincipled. Law was created ex post facto to suit the passion and clamor of the time"* (Glennon, 2010,p 75).

In 1946, Federal Judge Charles E. Wyzansky stated the following on criminalizing war of aggression: *"The body of growing custom to which reference is made is custom directed at sovereign states and not individuals. There is no Convention or Treaty which places obligations explicitly upon an individual not to aid in wagging an aggressive war"* (Glennon, 2010,p 76) and to the question whether the bases for Nuremberg may lie in the general principles of Criminal Law common to all "civilized nations", he said that *"(…) it would be a basis that would not satisfy*

most lawyers. It would resemble the universally condemned law of June 28, 1935 which provided: 'Any person who commits an act which the law declares to be punishable or which is deserving of penalty according to the fundamental conceptions of the penal law and sound popular feeling, shall be punished'. It would fly straight in the face of the most fundamental rules of the criminal justice – that criminal laws shall not be ex post facto and there shall be nullum crimen et nulla poena sine lege – no crime and no penalty whiteout an antecedent law" (Glennon, 2010,p 76).

This debate was equally present at the Tokyo trial, two judges having voted against the final decision to sentence. The dissenting opinion of the Indian judge Radhabinod Pal, absolving all defendants at Tokyo is an extremely relevant text in the recent history of International Law, representing, under the appearance of a confrontation between naturalism and positivism, the first serious challenge to international legal order by western empires and is worth being reread today[14].

However, Nuremberg and Tokyo are a turning point in International Law. Despite their flaws, these trials mark the beginning of a criminal narrative in International Law. Offenses to morality or to the laws and customs of the "civilized nations" are clearly defined as criminal conduct, though ex post facto, and considered of individual criminal liability. The hanging of some Nazi convicted at Nuremberg and the conviction of Hideki Tojo, Japanese Prime Minister at the time of the attack to Pearl Harbor are highly symbolical moments of this turning point. State sovereignty is no longer the last and ultimate protection of its citizens, of its policy-makers and military high ranks *maxime*. International legal order, even considering that the order in 1945 included mainly the winners of WWII, is more important than state sovereignty and holds the individual directly accountable in criminal terms. Drawing a parallel with Anglo-Saxon doctrine on the disregard of legal personality, in Nuremberg and Tokyo, there was a lifting of the sovereignty veil, disregarding state personality as subject with international liability and focus on the political or military leader as subject of criminal liability, traditionally protected by state sovereignty. The hanging of those convicted in Nuremberg and Tokyo ends the State punishing monopoly: crime and its punishment are no longer exclusively defined and enforced by the Sovereign. Even with the physical disappearance of the individual.

[14] Documentation on the Tokyo processes is available at http://avalon.law.yale.edu/imt/imtconst.asp On the Pal doctrine see Kirsten Sellars (2011) "Imperfect Justice at Nuremberg and Tokyo". *European Journal of International Law*. 21, 1095. http://avalon.law.yale.edu/imt/imtconst.asp

Something changed since the exile of Kaiser William II: the lawyer took hold of the area belonging to the historian and the diplomat at the time when the narrative on War is no longer the sole responsibility of history and the peace-treaty makers. Through the hands of the judges, the narrative of War becomes a legal and judicial narrative, as is made evident in the thousands of pages with minutes from the Nuremberg and Tokyo trials. The best evidence of how the Law has taken possession of areas reserved to sovereign States is the new criminal speech in international law and the definition of crimes and their sentencing. Despite its flaws (criticized since that time), the fact that criminal speech is now present at international level and the gaps in States punishing monopoly are irreversible.

In the period after 1945, the concept of individual criminal liability before International Law, withdrawn from States exclusive power to punish its nationals, began its slow consolidation process. First through adopting the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly in 1948[15]. Noteworthy is that the term "genocide" did not exist before 1946[16], the extermination of the Jews was tried and punished at Nuremberg as a crime of war or a crime against humanity. The narrative of the Law itself has undergone a change in the new order established in 1945: genocide, universal jurisdiction and universal punishment are terms that did not exist or were almost nonexistent in the period of almighty sovereignties[17].

On 11 December 1946[18], the first session of the United Nations General Assembly adopted a set of Resolutions with significant impact for the later development of International Criminal Law. In particular Resolution 95 restated the principles of International Law recognized in the Nuremberg Charter and appointed a Commission to prepare an International Criminal Code.

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[15] Convention on the Prevention and Punishment of the Crime of Genocide (approved through Resolution by Assembleia da República nº 37/98, of 14 July in DR, 1ª Série-A, nº 160.

[16] Term created in 1946 by the Polish lawyer Raphael Lemkin, author of the preliminary draft of the 1948 Convention. See Kowalski, M. & Serpa Soares, M. (2011) "Cláusula Martens". In M. A. Ribeiro/F. Pereira Coutinho & I. Cabrita (eds) *Enciclopédia de Direito Internacional*(p.143). Coimbra: Almedina and L. May (2010) Genocide: a Normative Account, Cambridge: University Press. p. 2010.

[17] Except for the crime of sea piracy.

[18] Resolutions AG 94(I), 95(I) and 96(I) on (i) the appointment of a Committee for the Study of Coding International Law, (ii) affirming the principles of international Law laid down in the London Charter and the mandate awarded to a new Committee to write an International Criminal Code and (iii) condemning genocide and assigning a mandate to organize a convention on the subject.

The founding of international criminal courts ad hoc for Yugoslavia and Rwanda are a relevant step in this process. The collapse of the Soviet Empire, symbolized by the fall of the Berlin War, provided a new political scenario and a cycle of significant economic growth. According to Henry Kissinger, in 1990: "The world was entering a post-sovereign era" characterized "by the rule of law aspects of international law over traditional State sovereignty". It is in this "mood of triumphalism" (Kissinger, 2011,p 454, when speaking on the main political spirit in Washington) or in the "naive and rather obtuse spirit" (Cutileiro, 2003,p 12), in the words of Ambassador José Cutileiro, Coordinator for the European Community Peace Conference in Yugoslavia in 1992, presided by Lord Carrington, that the Nuremberg principles are recovered. The concept of global justice, embodied in the idea of Nuremberg as having competence on international crimes, appeared in this period of "global optimism" (Koh, 2003,p 1503) which was in full force from 1989 and 2001. This generalized optimism of a global justice was made manifest not only in the creation of ad hoc Courts in Yugoslavia and Rwanda but also in the creation of mixed courts for Sierra Leone and Cambodia, the Lockerbie trial, the indictments in Spain and Chile against Pinochet. It reached its peak with the signing by President Clinton of the Rome Statute in 2001, before the USA began its period of open hostility against the International Criminal Court.

William Schabas[19] declares that the idea of an international criminal justice was vaguely approached by George Bush and Margaret Thatcher in the 1990s when discussing the invasion of Kuwait by Iraq, according to preliminary studies by the American army. The idea would have been viewed positively by some European leaders but resulted in nothing.

After mid-1992, the USA were the biggest promoters for adopting Security Council Resolution 827 (1993) of 25 May 1993. This Resolution, adopted by consensus, is special because it was based on article VII of the Charter, in particular in articles 39 and 41, a new interpretation of the United Nations Charter. As Paula Escarameia points out, the Charter *"was probably not thought based on the principle that impunity of international criminals was a threat to or a breach of world peace and security and that the Council may, therefore, create courts with competence to try them. Thus, though that interpretation may be possible, it was only viable at a moment when world polarization had disappeared (..)"* (Escarameia, 2003,p 34).

[19] W. Schabas (2004) "United States Hostility to the International Criminal Court: It's All about the Security Council", *European Journal of International*. 15,p 707.

This rather unprecedented consensus among the five permanent members allowing for the approval of Resolution 827 was somehow a consensus on the role of international law in the restraints to States sovereign prerogatives. However, it evidenced selective justice as it was a consensus of "some" to be applied to "others".

A specific and rather obvious example of the tension between international criminal justice and sovereignty occurred when the Security Council was discussing Resolution 955 (1994) of 8 November 1994 on the creation of the International Criminal Court for Rwanda; Rwanda itself, a non-permanent member of the Council, voted against it.

Analyzing the role of the two ad hoc Criminal Courts above mentioned is not in the scope of this paper. However, two elements should be emphasized: (i) from a purely legal perspective, these courts contributed to the development of an international criminal *corpus juris* and (ii) they prepared the way for a non-selective and permanent (and independent) criminal justice by adopting the Rome Statute[20].

THE ROME STATUTE: A PERMANENT AND INDEPENDENT JURISDICTION

After 1946 several attempts were made to codify International Criminal Law[21]. In July 1994, the Committee submits its draft statute of the Court and in 1996 it presented a draft for the Criminal Code. The approach of 1994 project by the Committee for International Law was extremely conservative and basically defined a model of criminal justice fully integrated in the United Nations system and, in particular, dependent on the Security Council. This project proposed a mode inspired in the ad hoc versions for Yugoslavia and Rwanda in a rather paradoxical way - an ad hoc type of court but permanent.

Among its most striking features was its full subordination to the Security Council, the only body with trigger mechanism and the fact that there was no Prosecutor with power to independently investigate and submit cases to court *proprio moto*.

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[20] So as to analyze the contributions of these courts see Pocar, F. (2010). "The International Criminal Tribunal for the Former Yugoslavia" In R. Bellelli (ed) *International Criminal Justice*.(p.67) UK: Ashgate, p. 67 and E. Mose (2005) Main Achievements of the ICTR. *Journal of International Criminal Justice*. 3,p 920.

[21] The General Assembly Special Committee for the Criminal Jurisdiction present a draft statute for an International Criminal Court in 1951. In 1953 the General Assembly tried to create two new Committees to create an International Criminal Court and a Special Committee to establish a definition of aggression through Resolution AG 697 (VII) of 5 December 1952. Following the adoption of resolution AG 3314, on 14 December 1974, on the definition of aggression, the Committee for International Law started writing an international criminal code and its jurisdiction.

The history of the negotiation on the Court Statute during the Intergovernmental Conference in the summer of 1998 in Rome is in itself a very significant element for our analysis.

It is important to understand the dynamics of negotiation processes in a enlarged multilateral environment. In June 2010, the author participated in the Portuguese delegation to the Intergovernmental Conference in Kampala, Uganda, convened to adopt, in particular, the amendments to the Rome Statute on the crime of aggression. This type of negotiations is a formidable diplomatic mechanism involving hundreds of people assigned with the negotiation of legal texts to be adopted by the largest number of States possible. During the two long weeks of negotiation in Kampala, final compromise on the texts of the amendments was reached on the 25th hour on the last day of the Conference, after its official date of conclusion. These negotiations are a series of lower or higher dramatic intensity, where alliances are formed and broken at an impressive speed, with a series of informal bilateral meetings, by geographical groups, spontaneous groupings of States with ephemeral or permanent common interests, with alternative texts, proposals and counter-proposals.

This element should not be neglected: the process of negotiating this type of texts is also exercising differentiated sovereignty. The ability to manage negotiations, aggregate interests and form alliances and influence the final content of the law is evidence of the power and of specific interests of States in specific solutions. In Kampala, as in Rome, this dynamic was made obvious: you can imagine the difference between the US delegation, which included dozens of delegates and promoted many bilateral meetings, a uniting element in the Informal Group of the five permanent members, author of written proposals adopted in the Final minute of the conference and the Portuguese delegations which included two representatives during the two weeks. And we must not forget that the USA are not even a State Party of the Statute.

Nevertheless, not even a State like the USA have enough capacity to influence the final meaning of a law produced in a multilateral environment. The history of the negotiations in Rome is a particularly significant example of this.

Philip Kirsch[22] recalls that in the beginning of the negotiations, on 15 June 1998, the draft written by PrepCom was presented with about 1400 items about which there was disagreement, which were incomplete and hundreds of alternative proposals. Although the Statute was not approved in a consensus, its adoption

[22] Legal consultant from the Canadian Foreign Ministry, presided to the "Joint Committee" during the Rome Conference.

was almost a miracle even if we consider that *"The Statute is nor a perfect instrument; no internationally negotiated instrument can be. It includes uneasy technical solutions, awkward formulations and fully satisfied no one"* (Kirsch, 1999,p 2).

Negotiation agenda of the five permanent member at Rome was extremely heavy. Based on the direct testimony by David Scheffer[23], the USA's main goals were those of a court similar to the ad hoc courts and with an important role in the Security Council, having no independent power to investigate or submit cases, complementary and whose criminal list would be very limited. To sum up, a Statute that would take into consideration the fact that *"United States has special responsibilities and special exposure to controversy over our actions. This factor cannot be taken lightly when issues of international peace and security are at stake. We are called upon to act, sometimes at great risk, far more than any other nation. This is a reality in the international system"* (Scheffer, 1999, p 12).

Still according to Sheffer *"Throughout the Rome Conference our negotiators struggled to preserve appropriate sovereign decision making in connection with obligations to cooperate with the court"* (Scheffer, 1999 ,p 15).

The end result did not live to American expectations, the delegation complained of process's lack of transparency[24] and asked for formal voting of the final project and voted against it, thus breaking the desired consensus.

France, the only State that submitted its own Statute to the ICC (in August 1995), had a very restrictive perspective of a permanent Court without any type of independence and under the exclusive responsibility of the Security Council.

Alain Juppé's government proposed a system which required three levels of authorization for a case to be submitted to the Court (that of the State where the crime had occurred and those of the national States of both the

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[23] The Head of the American Delegation in Rome and Ambassador- at- Large for the Crimes of War.

[24] According to Scheffer "The process launched in the final forty-eight hours of the Rome Conference minimized the chances that these proposals and amendments to the text that the U.S. delegation has submitted in good faith could be seriously considered by delegations. The treaty text was subject to a mysterious, closed-door and exclusionary process of revision by a small number of delegates, mostly from the like-minded group, who cut deals to attract certain wavering governments into supporting a text that was produced at 2:00 A.M. on the final day of the Conference, July 17. Even portions of the statute that had been adopted by the Committee of the Whole were rewritten. This 'take it or leave it' text for a permanent institution of law was not subject to the rigorous review of the Drafting Committee or the Committee of the Whole and was rushed to adoption hours later on the evening of July 17 without debate" (Scheffer, 1999,p 20). On another occasion, before a room of American army lawyers, Scheffer, when referring to the final outcome at Rome, declared the following on the limitations to American diplomatic power: "A negotiating room is not a conventional battlefield, but it is a theater of diplomatic conflict and cooperation.
Within the negotiating arena, as in the courtroom, overwhelming force is defined by logic (…) Our superpower status and the magnitude of our military forces mean very little in these settings. That is the hard reality today. We need to adjust and turn that reality to our own advantage with winning strategies and not self-righteous tactics that impress no one but ourselves" (Scheffer, 2001,p 9).

victim and the aggressor) after a very difficult internal process of agreement among the different French Ministries. The compensation for France voting for the Resolution was the introduction of article 124, the possibility of opting-out for a seven-year period in terms of crimes of war committed by French nationals (France and Colombia were the only States that used the possibility allowed by article 124)[25].

The United Kingdom changed its position and, after the election of Tony Blair, abandoned the P5 alliance and joined the like-minded countries group, which provided the main support to the ICC project.

Four areas laid down in the Rome Statute include the key elements in the tension between sovereignty and judicial supra-nationalism, thus exemplifying the main ideas in the 1998 discussion of this issue[26].

Firstly, the preliminary conditions to exercising the Court jurisdiction, laid down in article 12 of the Statute. Based of the criteria established for this precept, the court may exercise jurisdiction in cases the States (that are parties in the Statute or have declared they accepts its jurisdiction, pursuant to article 12, n.º 3) (i) where the crime takes place (pursuant to article 5) or (ii) of nationality of the defendant. This precept makes it possible for the Court to exercise its jurisdiction on individuals who are nationals from States not party to the Rome Statute. Considering that one of the criteria for assigning jurisdiction is the place the crime was committed, resorting to article 12, n.º 1a) of the statute allows, in fact, that the court exercises its jurisdiction on nationals from States outside the Statute. From a conservative approach, this precept is an unacceptable shift in relation to the basic principle that international obligations derive from the consent of States pursuant to the general principles of the Law on Treaties (questions have been raised that the precept is compatible with article 36 of the Vienna Convention on the 1969 Law on Treaties); its element of "universal jurisdiction" is also unacceptable as it allows that nationals from States that have not accepted to adopt the Treaty can be punished. From a

[25] "La position de la France a évolué au rythme d'un double arbitrage, difficile, entre le ministère de la Défense, le Quai d'Orsay et le ministère de la Justice d'une part (c'est à dire in fine de la décision du Premier ministre, ce que M. Lionel Jospin a fait pour les plus importants d'entre eux en avril 1998), et entre Matignon et l'Elysée d'autre part (son histoire et en grande partie secrète et reste à écrire, sauf à rappeler que les changements de premier ministre n'ont pas empêché que l'Elysée et le ministère de la Défense soient globalement sur la même ligne). L'article 124 a été l'une des exigences du Ministère de la Défense et de l'Elysée» (Bourdon, 2000,p 297).

[26] The content of the Statute would represent a compromise in relation to Westphalia legacy, according to Pureza, J.M. (2001). "Da Cultura da Impunidade à Judicialização Global: o Tribunal Penal Internacional". *Revista Crítica de Ciências sociais*. 60,p 129.

progressive approach, the precept was not up to expectations because it requires consent (by the State where the crime was committed or of the aggressor's nationality), because of its nature as a treaty among states and the idea of complementarity (see below).

The second element concerns the powers of the Judge in article 15. Under n.º 1 of this precept, the Prosecutor "may, on his own initiative, open an inquiry based on information on crimes committed that are under the jurisdiction of the Court". Within the scope of his powers to investigate and in case he believes there is evidence supporting starting an inquiry, the Judge will ask permission to do so to the Investigating Judge. The Security Council can only intervene pursuant to article 16.

Articles 15 and 16 are the main innovations: for the first time at international level there a truly independent legal power (even if we consider all its restraints), independent from political interference and, in particular, from the interference of the Security Council. The control over the Prosecutor's power of investigation and inquiry is carried out by a judicial body, the investigating judge, a change in comparison with the previous model.

The third element is related with the power of the Prosecutor and concerns the role of the Security Council and its relation with the Court. Though the Security Council holds a privileged procedural position (under article 13, the submission by the Security Council to the Prosecutor of a situation does not require the consent of the implicated States), it is in huge contrast with the solution found for previous ad hoc courts and with the 1994 project of the Committee for International Law. In the 1994 project, the Prosecutor could only start a case after the Security Council had authorized; in the current article 16, the Security Council has only the power to suspend an already ongoing investigation. In the draft by the international law committee, as in previous ad hoc courts, exercising international criminal jurisdiction was completely conditioned to the powers of the Council and, as a result, to being vetoed by any of the five permanent members. This shift in balance is crucial: a permanent Member State that wishes to suspend an inquiry, either that it begins or that it develops, has to simultaneously ensure 9 of the 15 votes in the Council as well as the positive vote of the remaining permanent members.

Lastly, the fourth element concerns the commitment to complementarity/cooperation in the international criminal system as a whole. The idea of complementarity, laid down in the preamble and in article 1 of the Statute, is the formula that allows to reconcile judicial sovereignty and supranational or national justice. In the European Union there was

heated debate on the affirmation of the principle of primacy and the affirmation of a judicial federal system, a debate where there was sometimes a conflict with constitutional courts from some Member-States. Similarly, in the international criminal system proposed by the Rome Statute, national criminal jurisdictions have primacy over the International Criminal Court jurisdiction. The latter cannot intervene unless as an alternative, in cases described in the Statute, which contradicts the idea of universal jurisdiction. Articles 17 to 19 include very detailed rules on this dynamic between national jurisdictions and the international jurisdiction. Articles 86 and following establish different specific cooperation obligations, thus tempering this primacy of national criminal jurisdiction. According to Marten Zwanenburg *"The principle of complementarity constitutes a deference to national sovereignty, which is contrary to a development in international law away from broader notions of sovereignty"* (Zwanenburg, 1999,p 130).

The discussing taking place today in terms of applying the principle of complementarity in the cases of Kenya and Libya are of extreme importance from the point of view of applying complementarity.

Considering the initial compromise adopted in Rome, William Schabas states that "*The adoption of the Rome statute on the international Criminal Court represents a singular defeat for American diplomacy. The world's only superpower found itself outmanoeuvred by a constellation of small and medium powers, including some of its closest friends and allies (…) Faced with an accelerated pace of ratification and entry into force, the United States took several aggressive measures directed against the Court"* (Schabas, 2004,p 720).

The degree of hostility, if not of active aggression, evidenced during the Bush administration against the court can only be understood if you consider the USA point of view that an international criminal justice that is permanent and independent is a threat to strategic interests, a serious attack to national sovereignty. President Clinton signed the treaty on the last day possible, in a possible strategy to change the text as Member party, and this signature was immediately withdrawn by the new administration, in the famous episode of unsigning[27].

[27] See the interesting paper by Swaine, E. (2003). *Unsigning*. Stanford Law Review. 55,p 2061, in which the author discusses the meaning of this practice in the Law on Treaties, its legality in view of the 1969 Vienna Convention and possible effects in negotiation and signing of international treaties.

This escalating of hostility reaches its peak in 2002 with the adoption of the American Service-members' Protection Act (ASPA). Regardless of the gap between republicans and democrats, American legal and legal-political literature is divided on this matter[28].

In Portugal, as in several other States, the debate on the accession to the Rome Statute focused on the constitutionalization of the transference of sovereignty. The starting point for a constitutionalist is the sovereignist perspective: the national Constitution preserves the commanding capacity of a political community over its territory and a greater or lesser openness to the outside by the constitutional order is in itself a constitutional issue. Accession to the Rome Statute (as to other Treaties of European integration) is viewed as a surrender of sovereignty[29], which must first be included in the international Constitution, with its amendment if necessary. Vital Moreira[30] refers to the issue of accession to the Statute as an issue of judicial sovereignty: the capacity to investigate and try crimes committed in its territory is an essential feature of State sovereignty (in the Portuguese case, constitutional laws describe the courts as bodies of sovereignty). Therefore, specific laws in the Rome Statute represent derogation of the "Criminal or judicial Constitution". For a State like Portugal, judicial sovereignty, as any other type of sovereignty, has an adaptation strategy which includes flexibility in relation to its constitutional order. Article 7 of the Portuguese Constitution, amended in 1997, solves the conflict with a solution of openness, of a sovereignty able to accept limited schemes of supra-nationalism or of real legal federalism.

FROM ILLEGAL WAR TO THE CRIME OF AGGRESSION

On 12 June 2010, in Kampala, Uganda, the first amendments to the Rome Statute were adopted concerning criminalization of certain type of arms and the crime of aggression, in particular in terms of the conditions the International Criminal Court can exercise its jurisdiction.

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[28] See for example Wedgwood, R(1999). "The International Criminal Court: an American View". *European Journal of International Law*. 10, p 93, Casey, (2002) "The Case against the International Criminal Court". *Fordham International Law Journal*. 25, p 840, Monroe, L. (2001)."The United States and the Statute of Rome". *American Journal of International Law*. 95,p 124.

[29] The affirmation process of the principle of primacy by the Luxembourg Court was a latent conflict which lasted decades and included the constitutional courts and governments of Member-States. See Alter , Karen (2001). *Establishing the Supremacy of European Law – The making of an International Rule of Law in Europe*. Oxford: University Press.

[30] Moreira, V. (2004). "O Tribunal Penal Internacional e a Constituição". In V. Moreira, L. Assunção, P. Caeiro & A. L. Riquito, *O Tribunal Penal Internacional e a Ordem Jurídica Portuguesa*(p.20). Coimbra: Coimbra Editora.

This progress opens very interesting discussion for the theme studies here and will contribute to future discussions on International Criminal Law.

Article 6 of the London Charter on the International Criminal Court, which preceded the Nuremberg Trials, established, among the crimes submitted to the Court jurisdiction, *"Crimes against peace: namely, planning, preparation, initiation or wagging of a war of aggression, or a war in violation of international treaties, agreements and assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing".*

The International Court Charter for the Far East, of 19 January 1946, included a very similar provision.

Indictment and conviction for the crime of aggression "the supreme international crime" was one of the most revolutionary and controversial issues in the Nuremberg and Tokyo processes, there being a huge opposition between normativists and jus naturalists which remain until today.

The collective security system laid down in the United Nations Charter solemnly proclaimed the prohibition of the threat to use force, pursuant to article 39 of the Charter, assigned competence to the Security Council to determine, among others, the existence of an act of aggression, as well as the appropriate measures to restore collective peace and security.

During the period before the Rome Statute, there had been attempts at codifying International Criminal Law and they included the issue of the crime of aggression.

The fact that the General Assembly adopted Resolution 3314 on 14 December 1974 is one of the most important milestone in this process, in particular the inclusion in article 5 of the declaration that "a war of aggression is a crime against international peace". The International Court of Justice analyzed issues related to the illegality of aggression in Nicaragua[31] and referred some of the provisions in Resolution 3314. There was growing affirmation of the illegality of aggression, based on the system of the United Nations Charter, but still acts of aggression had not been clearly typified as an international crime. Though the prosecutions in Nuremberg and Tokyo were based on the assumption of an international crime of aggression having been committed (or a crime against peace as it was called at the time), the issue was not resolved until 1998.

The reasons leading to the crime of aggression not being definitely included in the Rome Statute are well-known and aimed only at making the compromise pos-

[31] Decision of 27 June 1986 Nicaragua vs. the United States, in particular paragraphs 187 to 201.

sible, a compromise that was difficult to achieve. Therefore, this discussion was postponed to a later date. Article 5, n.º 1 included the crime of aggression as submitted to the court jurisdiction but, under n.º 2 of the same precept, that jurisdiction could only be exercised with the adoption of amendments with the definition of the crime and the conditions for the exercise of jurisdiction by the Court.

Between 2002 and 2009, a Special Working Group for the Crime of Aggression, created by the first Assembly of States Party to the International Criminal Court and assigned to write a project of amendments, held several formal and informal meetings to attain the objective mentioned in article 5, n.º 2[32]. The work carried out by this Group was the basis for the 2010 Diplomatic Conference.

The text adopted in Kampala suffers from the flaws commonly found in legal texts prepared, discussed and broken down in a multilateral scenario, as was mentioned when discussing the Rome Statute.

As a consequence of the clash of absolutely different interests and legal cultures, the texts resulting from the compromise are technically opaque and somewhat ambiguous, frequently allowing for different interpretations on what was agreed on.

The Kampala texts include amendments to article 8 (criminalizing the use of three new types of arms), a new article was added, article 8bis, which defines crime of aggression, and new articles 15 bis and 15 were added on exercising jurisdiction.

The 2010 amendments are based on a still rather complex system that separates (i) entering in full force of (ii) exercise of jurisdiction by the Court and the still (iii) possible differentiated activation of the jurisdiction when cases are resubmitted by the Security Council or submitted by States and following

[32] These results were influenced by the informality of several meetings held in academic environment and the process is known as the Princeton Process. Documentation on these meetings may be found in S. Barriga, W. Danspeckgruber & C Wenaweser (eds.) (2009) *The Princeton Process on the Crime of Aggression*. Princeton: The Liechtenstein Institute on Self-Determination at Princeton University. On the technical negotiations in the Special Group, see Barriga, S. (2010)" Against the odds: The results of the Special Working Group on the Crime of Aggression". In R. Bellelli (ed.) *International Criminal Justice* (p.621) UK: Ashgate and Clark, R. (2009) "Negotiating Provisions Defining the Crime of Aggression, its Elements and the Conditions for ICC Exercise on Jurisdiction over it". *European Journal of International Law*. 20, 1103.

an investigation initiated by the Prosecutor.[33] There is limited possibility for opting out in some jurisdiction situations, subjected to final decision at the Assembly of States party after 1 January 2017.

The amendments will enter into force under article 121, n.º 5 of the Statute, i.e., they will enter in force individually for each State that ratifies them one year after being ratified. However, the fact that the amendments enter into force will have no effect on the Court's jurisdiction; two general and special additional steps must be taken. For the Court's jurisdiction to be activated, a minimum number of 30 ratifications must take place (preferably until the end of 2015) and a final decision must be taken by the Assembly of States Party (after 1 January 2017) allowing the Court to start exercising its jurisdiction (voted positively by 7/8 of the Assembly members). Besides these conditions, another set of special conditions have to be met, depending on the procedure involved. In case of resubmissions by the Security Council, the court may exercise its jurisdiction without conditions in case of any of the four crimes in the Rome list and no consent by the States involved is required. In case of submissions by States or investigations proprio motu by the Prosecutor, the following conditions must be met: all situations of aggression involving States not party are excluded from the court's jurisdiction. For situations in which the aggression involves States parties to the Rome Statute at least in one of the States (either the aggressor or the victim) the amendments must be in force and cannot have been opted out in terms of accepting jurisdiction on these cases (in the moments prior to the aggression). Besides these, there are specific obligations in the relationship between the Prosecutor and the Security Council and the powers of the latter as a jurisdiction filter as well as its being able to stop ongoing investigations under article 16 of the Statute.

Considering the description above is rather simplified and does not account for specific issues in interpretation regarding the application of regime 121, n.º 5 of the Statute and of the opting out system for some situations, this provides us with a very clear idea of the maze of interpretations this type of texts arouses. The road towards the full functioning of the Court as far as the crime of aggression is concerned will not be straightforward. In March 2013 only five State

[33] A clear explanation of what was agreed on in Kampala and the different issues in terms of interpretation regarding entering in full force and the conditions for jurisdiction exercise may be found in Barriga, S. (2012) "Exercise of Jurisdiction and Entry into Force of the Amendments on the Crime of Aggression". In G. Dive, B. Goes & D. Vandermeersch (eds.) *From Rome to Kampala: the first 2 Amendments to the Rome Statute*(p.31) Brussels: Bruylant and also in Clark, R. (2010) "Amendments to the Rome Statute of the International Criminal Court Considered at the First Review Conference of the Court, Kampala, 31-May-11 June 2010". *Goettingen Journal of International Law*. 2,p 689.

have ratified the Kampala amendments, which makes it seem difficult that the Court jurisdiction will be ensured after 2017 on the crime of aggression.

Besides the referred procedural aspects, some significant amendments introduced in 2010 are of major importance for the theme we are discussing.

The most important aspect of the Kampala compromise concerns the relations between the Security Council and the Court in terms of the latter's exercise of jurisdiction. In fact, this was a key issue in the negotiation process and in the gap between two opposing positions. This gap is easy to understand: on the one hand, the five permanent members of the Council advocating the prerogatives the United Nations Charter grants them in situations of aggression and, on the other hand, a set of different alliances among countries that only share the fact that they advocate independence of the Court before the Security Council, as well as a certain judicial autonomy in establishing the existence of a crime of aggression.

According to what is laid down in numbers 6 to 8 of the new article 15 bis[34]: *"6 - If concluded there are sufficient grounds to open an inquiry regarding a crime of aggression, the prosecutor should ensure first that the Security Council has verified the existence of the act of aggression by that State. The prosecutor should notify the United Nations Secretary-General of the case to be presented in court, as well as any other relevant information or documentation. 7 - Upon verification by the Security Council of the existence of an act of aggression, the prosecutor may open an inquiry in relation to the crime of aggression. 8 - Whenever the act of aggression is not confirmed within six months from the notification date, the prosecutor may open an inquiry in relation to an act of aggression as long as the inquiry office has authorized the opening of an inquiry in relation to an act of aggression pursuant to procedure laid down in article 15, and except if the Security Council decides otherwise, pursuant to article 16".*

The text above was only possible after huge negotiation effort and mostly represents the defeat of the position of the five permanent members. The latter defended that the Court should be activated based on a green light proposal: in those cases submitted by the States or by the prosecutor, the latter could only pursue the investigation after a request by the Security Council to do so[35]. The proposal that was approved is, thus, closer to a red light proposal: in case of inaction by the Security Council, the Prosecutor may pursue the investigation (authorized by the investigating judge) except if the Security Council decides otherwise (pursuant to article 16).

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[34] Translation from English originals into Portuguese by the Department of Legal Affairs from the Ministry in 2011.

[35] On the history and documentation of the negotiation and the different proposals submitted, see Barriga, S. & Kreβ, Claus (eds.) (2012). *Crime of Aggression Library: the Travaux Préparatoires of the Crime of Aggression*. Cambridge: University Press.

The implications are rather significant: in the so-called green light proposal the Court jurisdiction is completely subordinated to a prior decision by the Council. In the second proposal, closer to the final Kampala text, despite the important conditions imposed on the exercise of jurisdiction in terms of the crime of aggression, this is a concurring jurisdiction (even if partially so) with the Council prerogatives to determine the existence of a situation of aggression (independently of its classification as criminal conduct). Though the Prosecutor being able to pursue investigation is restricted (requires authorization by the investigating judge), this restriction in judicial and independent, and can also be stopped due to political reasons, considering the Security Council may suspend it for a 12 month period (renewable), nevertheless the impact in the Council's prerogatives is obvious.

Firstly, the inaction by the Security Council in determining the existence of aggression does not necessarily lead to an impasse. This inaction has a time limit, six months, after which the Prosecutor may use his independent powers, though under judicial control. If the Security Council wants to stop an investigation (this halt has also a time limit), it will have to have 9 votes in the Council and ensure that none of the permanent members opposes its veto.

The dynamics of the action or inaction of the Security Council in determining the existence of a situation of aggression will be necessarily affected by there being a judicial alternative in criminal terms which can be put in motion in case of inaction.

Though an assessment of aggression for political reasons exclusively is the Security Council's responsibility only, the Council's inaction leads to no consequences. The Council adopts no resolution and nothing can be done from then onwards. Today, the Council does not have the monopoly in determining aggression as the Prosecutor and the Court may determine the existence of a crime of aggression. The specific balances of vote and veto within the Security Council are now crucial to halt jurisdiction rather than to allow Court jurisdiction, which is assigned to it by the international treaty, the Rome Statute.

Another especially interesting situation is the one that will occur when the Security Council, required by the Prosecutor to determine by means of a resolution the nonexistence of a situation of aggression. The Prosecutor, when pursuing the investigation, or later the Court reach the opposite conclusion and declare that a crime of aggression was committed. Or the opposite situation occurs: under its prerogatives the Security Council determines the existence of a situation of aggression and the Prosecutor or the Court conclude the opposite, that no crime of aggression was committed. Perhaps these are more theoretical than

practical possibilities but the two are consequences of the amendments introduced in the Statute. And in these cases it is not worth it to state that the Security Council has an essentially political exercise while the Court has a judicial exercise. Even though from a different perspective - political or judicial - the possibility that the same facts may be classified as aggression or not (situation or crime of aggression) is nonetheless disturbing[36].

The history of determining the existence of aggression by the Security Council may easily be summarized considering the small number of cases about which there was such a decision. In truth, the Security Council assessed only one situation of aggression in five cases: South Rhodesia, South Africa, Benin, Tunisia, Malvinas/Falkland Islands and Iraq/Kuwait. In the cases of South Rhodesia and South Africa, the Council adopted different resolutions throughout the years, considering the "acts of aggression" against neighbor States as situations of threat against international peace and stability. In the case of Benin, the mercenary attacks in 1977 were equally classifies as acts of armed aggression. In the case of Tunisia, the Council classified the Israeli attacks as acts of aggression and condemned them. In the case of the Malvinas/Falkland Islands, the Council expressed its concern with the Argentinian military attack in the archipelago though they did not classify it as an act of aggression. Lastly, the case of Kuwait being invaded by Iraq, undoubtedly the most evident situation of aggression in the past years, the different resolutions adopted never classified the military invasion of Kuwait or its annexing of territory as an act of aggression.

It is not bold to state that the Security Council's natural tendency is towards inaction: the Council naturally tends to not declare the existence of a situation of aggression.

This derives not so much from the balances related to votes and vetoes but mostly from the silent nature of the Council. Within the framework of the exercising of powers by the Council under article 39, silence may in itself be a decision: to not determine that in a specific situation there were acts of aggression may be a conscious option with very different motivations. The Council may even, through silence, aim to not resort to any of the possible measures under Chapter VII of the Charter, insisting on political and diplomatic solutions for events that indeed include acts typified as conducts of aggression. Regardless of the Council's motivations, at the moment the Kampala amendments are able to be executed, there will be an alternative to that inaction.

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[36] Murphy, S. (2012). "The Crime of Aggression and the ICC". *George Washington University Law School, Legal Studies Research Paper* 50,p 39, has created fear that the existence and expansion of jurisdiction by the International Criminal Court may limit the Security Council's ability to manage situations of armed conflict.

The theme in itself includes a "constitutional" issue for public international order which are linked to the exclusive or not exclusive powers of the Security Council pursuant to chapter VII of the Charter, as well as the exact scope of article 103.

Before dealing with this issue, it is important to review some comments on the Kampala amendments. Zhou Lulu[37] should be quoted here, firstly because international legal Chinese thought is not well known and secondly because Zhou Lulu participated in the Chinese delegation to the Kampala Conference.

Zhou Lulu globally assesses the Kampala compromise on the conditions for exercise of jurisdiction as a disturbing factor for international peace and security by introducing negative impact to the current international legal and political system.

The ability awarded to the Court to assess situations of aggression in case there is inaction by the Council is not compatible with powers that article 39 the Charter awards the Council and the system of concurring competences between the two bodies affects the whole collective security system in force after 1945. The author also expresses great concern with the possibility of the two bodies (one of which, the Court, is independent from the United Nations system) being able to reach completely opposite conclusions as far as the existence of aggression in a real situation. In this situation, what type of obligations would arise for the States in article 103? The author refers implicitly that the precept would impose on States the disrespect for a Court sentence if that sentence would go against a prior decision by the Security Council. And the final result of different decisions by the Council and the Court would be that *"(…) not only will the international community be faced with the disorder brought on by the lack of clear right-or-wrong standards, the fragmentation of international law will be exacerbated which may stimulate states to go more on their own ways. In the long term, this will be harmful to preventing acts of aggression and maintaining international legal order"* (Zhou, 2012,p 35).

Guo Yang describes the possible conflict in terms of decisions, saying *"(…) to authorize the Prosecutor to proceed with the case in disregard of the decisions of the Council will put the reputation and credibility of both institutions at risk if their decisions conflict each other. It will also put the States into a dilemma when faced with conflicting decisions because they are required to give priority to the obligations*

[37] Zhou, L (2012). "Brief Analysis of a Few Controversial Issues in Contemporary International Criminal Law". In M. Bergsmo & Ling Yang (eds.) *State Sovereignty and International Criminal Law*.(p 21) Beijing: Torkel Opshal Academic EPublisher.

from the Council under Article 103 of the Charter, which could hinder their co-operation with the Court (…) The intervention of the Court under these circumstances might not be a contribution to peace and security" (Guo, 2012,p 97).

Much of this debate presupposes that the powers of the Security Council under chapter VII of the Security Council (rather the mixed interpretations of articles 24, 25 and 39 of the Charter) are exclusive powers in the scope of international peace and security and, as a results, excludes all concurrent powers. The idea that the powers of the Council are exclusive is based on the perspective that determining aggression is, in its essence, a political decision and, therefore, one that only the Council as a political body is able to take. This is a narrative of excluding any attempt to judicially assess aggression, of excluding any technical-legal assessment of conducts. This is an aggressive narrative against the existence of judicial powers independent from the Council aimed at eliminating any alternatives to the Security Council in matters of international security. There would be several ways to counter this concept of exclusive powers by the Council. Yet, you just have to consider that the uncompromising defense of this monopoly would in fact create a difference between Giant States and other States that Vattel referred to, a situation in itself incompatible in legal terms with the sovereign equality laid down in article 2 of the Charter. Ultimately, if the Court (or any ad hoc court) jurisdiction is made dependent of the veto dynamics would lead to absolute jurisdiction immunity in favor of five States for any international crime.

No reconciling is possible between judicial independence and political assessment, largely discretionary and cannot be contested, and an objective judicial assessment on the existence of certain conditions typified as criminal conduct in an already existing law. These assessments have different objectives: the Security Council assesses the existence of "situations" of aggression so as to determine threats to international peace and security while the Court assesses the practice of "crimes of aggression" so as to assign individual criminal liability and apply a possible sentence.

However, up to 1998[38], both were kept under Council control: the creation of ad hoc courts allowed for the Council claiming also the administration of international criminal justice, of crime and punishment, at least at an early stage. Two recent events, in 1998 and in 2010, have opened gaps in a punishing monopoly, which the 1945 order progressively took sovereignty from States

[38] That requirement challenges the view that the Security Council has the exclusive authority to determine an act of aggression" (Scheffer, 2010,p 16).

to assign it to Super-Sovereigns at the Security Council. Article 15-bis, paragraph nº 4, makes it hard to support this exclusivity, as David Scheffer points out "However, in order for the pre-trial Division to authorize the investigation of a crime of aggression, it will need to determine (…) that a crime of aggression arises from an act of aggression.

The expansion of the Court jurisdiction to areas exclusive to the Security Council, as is the assessment of (criminal) legality of War, may, if conducted according to model judicial patterns from a technical point of view will slightly alter existing balances.

As Kreβ and von Holtzendorff state, if the Court *"(…) succeeds, it is not unreasonable to assume that world opinion will begin to slowly exert its soft power towards the expansion of the ICC's jurisdictional reach"* (Kreβ & Holtzendorff 2010,p 1179).

CONCLUSIONS

The existence of an international criminal justice that is permanent and independent is against the idea of state sovereignty in terms of judicial and punishing sovereignty.

However, it is not accurate to state that the relations between sovereignty and international criminal justice are simply of opposition, there is no need for choice between sovereignty and international criminal justice[39]. National sovereignties, usually subject to factors of erosion, have their own adapting and changing strategies, which can even be viewed as consented and not permanent cessions of items of power and independence. Noteworthy is to remember that the Security Council has already submitted real situations of aggression for the Court to assess.

In terms of criminal justice, it will not be the small and medium-sized countries that will have difficulties to adapt to the growing erosion of sovereignty through internal political consensus, more or less peaceful, but the big States, in particular the Super Sovereigns with a permanent position in the Security Council. Secondly, these difficulties will also arise from other Big Sovereigns, which do not have such a militarized sovereignty or the prerogatives granted to the differentiated legal status derived from being a permanent member.

[39] See Robert Cryer's comment: "An excess of sovereignty and state power can lead to international crimes, as in the Holocaust, but so can a lack of sovereign powers, as in Somalia or Sierra Leone. Ironically, we act through state sovereignty in order to restrict actions justified in the name of sovereignty" (Cryer 2005, p 1000).

After 1945, the consensus among the Super Sovereigns allowed for the inclusion of criminal judicial mechanisms in international legal order as the Nuremberg and Tokyo trials. This model of selective international criminal justice has essentially a punishing function rather than a preventative function regarding international crimes and thus contribute to international peace and security.

The survival of the Nuremberg model in the experiences in former Yugoslavia and in Rwanda is still an interesting proposal for the Super Sovereigns, which decide when, to whom and how punishment is used. Only in 1998 and now in 2010 does this model of selective justice is no longer under the control of its creators, really opening new possibilities, even if limited, and alternatives to an established power scheme embodied in the composition of the Security Council. The malaise and even hostility shown by the five permanent members of the International Criminal Court evidence that international criminal justice is a possible judicial counter-power and is viewed as an undesired conditioning to sovereignty. This malaise may be seen as the result of a subtle shift from a model of international justice that is still, in its core, a sub-product of the interstate Westphalian-style model to one, perhaps more sophisticated, cosmopolitan and universalist one. This malaise is also a consequence of the difficulties in communication between diplomats and lawyers: at its core, the diplomatic method is based on secrecy, cession, composition of interests even if achieved *contra legem* or *praeter legem*, while a lawyer cannot work outside the framework of pre-established and publicized rules. And yet, international peace and security clearly require parallel intervention from Diplomacy and the Law and their tools. The international lawyer cannot be restricted to mere writer of formulas agreed on by the diplomats, similarly, International Law is not only the Law on Treaties.

The judicial alternative has only formally been created: the International Criminal Court can only be affirmed through its technical credibility and through consolidating jurisprudence by means of its model application. The fact that international criminal law is still rudimentary should be progressively changed so as to be closer to interpretation and application of criminal rules used by the criminalist in internal legal orders, defining a set of patterns in the administration of criminal justice, based on clear precepts of universal "consciousness and morals".

The events in the next few years will be critical to assess the credibility of this judicial alternative for world peace and security and for the fight against impunity: the implementation of the Kampala amendments, the dynamics in the discussions on complementarity and maturity process of a set of rules in International Criminal Law will be crucial tests to that very same credibility.

Despite everything, we must bear in mind that in March 2013 the Rome Statute includes 122 States party and, therefore, the objective of universality is not naive or lyrical but a perfectly realistic goal.

The International Criminal Court must be given time. That is why this is the time to observe but not yet the time to explain.

References

ALTER, K. (2001). *Establishing the Supremacy of European Law – The making of an international Rule of Law in Europe*. Oxford: University Press.

BARRIGA, S. E. (2009). *The Princeton Process on the Crime of Agression*. Princeton : The Liechtenstein Institute on Self-Determination at Princeton University.

BARRIGA, S. (2010). "*Against the Odds: The results of the Special Working Group on the Crime of Agression".* In R. Bellelli (ed.) *International Criminal Justice* (p 621) UK: Ashgate.

BARRIGA, S. (2012). "*Exercice of Jurisdiction and Entry into Force of the Amendments on the Crime of Agression".* In G. Dive, B. Goes & Damien Vandermeersch (eds.*) From Rome to Kampala : the first 2 Amendments to the Rome Statute* .(p.31). Bruxelles: Bruylant.

BARRIGA, S. E. (2012). *Crime of Agression Library: the Travaux Préparatoires of the Crime of Agression*. Cambrige: University Press.

BOURDON, W. (2000*). La Cour pénale internatioale*. Paris: Éditions du Seuil

CASSESE, A. (2005). International Law. Oxford: University Press.

CASEY, L. (2002). "The Case against the International Criminal Court". *Fordham International Law Journal*. 25, 840.

CLARK, R. (2009). "Negotiating Provisions Defining the Crime of aggression, its Elements and the Conditions for ICC Exercise of Jurisdiction Over it". *European Journal of International Law*.20, 1103.

CLARK, R. (2010). "Amendments to the Rome Statute of the International Criminal Court at the First Review Conference of the Court, Kampala 31-May-11 June 2010". *Goettingen Journal of International Law*. 2, 689.

CRYER, R. (2005). "International Criminal Law vs State Sovereignty: Another Round?" *European Journal of International Law*.16, 979.

CUTILEIRO, J. (2003). *Vida e Morte dos Outros: a Comunidade Internacional e o fim da Jugoslávia*. Lisboa: Instituto de Ciências Sociais.

ESCARAMEIA, P. (2003). *O Direito Internacional Público nos Princípios do séc.XXI*. Coimbra: Almedina.

FERENCZ, B. (2000). "The Crime of Agression" in G. K. McDonald,O. Swaak-Goldman (eds.) *Substantive and Procedural Aspects of International Criminal Law – The Experience of International and National Courts* .The Hague: Kleuwer Law International. Separata.

GLENNON, M. (2010). "The Blank-Prose Crime of Aggression". *Yale Journal of International Law*. 35, 71.

GUO, Y. (2012). "International criminal Court: A Judicial Guarantee for International Peace and Security".In M. Bergsmo & Ling Yan (eds.), *State Sovereignty and International Criminal Law* (p 97). Beijing: Torkel Opsal Academic EPublishers.

KIRSCH, P. (1999). "The Rome Conference of an International Criminal Court: the Negotiating Process". *European Journal of International Law*. 93, 2.

KISSINGER, H. (2011). *On China*. London: Allen Lane.

KOH, H. (2003). "On American Exceptionalism". *Stanford Law Review*.55, 1479.

KOLB, R. (2003). *Les Cours Généraux de Droit International public de l'Académie de la Haye*. Bruxelles: Bruylant.

KOSKENNIEMI, M. (2008). *The Gentle Civilizer of Nations – The Rise and Fall of International Law 1870-1960*. Cambridge: University Press.

KOWALSKI, M. (2011). "Cláusula Martens". In M. A. Ribeiro, F. P. Coutinho & I. Cabrita (eds.) *Enciclopédia de Direito Internacional*. Coimbra: Almedina, 91.

KRESS, C. & HOLTZENDORFF, L. VON (2010). "The Kampala Compromise on the Crime of Agression". *Journal of international Criminal Justice*. 8, 1179.

LEIGH, M. (2001). "The United States and the Statute of Rome". *American Journal of International Law*. 95, 124.

MARTENS, F. (1883). *Traité de Droit International I*. Paris : Maresq Ainé.

MAY, L. (2010). *Genocide: A Normative Account*. Cambridge: University Press.

METTRAUX, G. ED. (2008). *Perspectives of the Nuremberg Trial*. Oxford: University Press.

MIRANDA, J. (2010). "*O Artigo 8º da Constituição e o Direito Internacional*". In A. de Athayde, J. Caupers & M.G. F.P.D. Garcia (eds.) *Estudos em homenagem ao Professor Doutor Freitas do Amaral*(p 415). Coimbra: Almedina.

MOREIRA, V. (2004). *"O Tribunal Penal Internacional e a Constituição*". In V. Moreira, L. Assunção, P. Caeiro & A.L. Riquito , *O Tribunal Penal Internacional e a Ordem Jurídica Portuguesa.* Coimbra: Coimbra Edições, 20

MOSE, E. (2005). "Main Achievements of the ICTR". *Journal of International Criminal Justice*. 3, 1990.

MONROE, L. (2001). "The United States and the Statute of Rome". *American Journal of International Law*. 95, 124.

MURPHY, S. (2012*).* "The Crime of Aggression at the ICC". *The George Washington University Law School: Legal Studies Research Paper,* 50.

PELLET, A. & DAILLIER, P. (2002). *Droit International Public*. Paris: LGDC.

POCAR, F. (2010). "The International Criminal Tribunal for the former Yugoslavia". In R. Bellelli (ed.). *International Criminal Justice* (p.67). UK: Ashgate.

PUREZA, J. M. (2001*).* "Da cultura da impunidade à judicialização global: o tribunal Penal internacional". *Revista Crítica de Ciências sociais*. 80, 121.

ROOT, E. (1927). *Politique Exterieure des Etats Unis et Droit International – Discours et Extraits.* Paris : Pedone.

SALEMA D'OLIVEIRA MARTINS, M. (2011). "Comentário ao Acordão do Tribunal da Relação de Lisboa relativo ao Processo 135/06.2TVLB.L1-7" In *Anuário Português de Direito Internacional*.(p 119). Lisboa: Ministério dos Negócios Estrangeiros.

SCELLE, G. (1932). *Précis du Droit des Gens I*. Paris : Recueil Sirey.

SCHABAS, W. (2004*).* "United States Hostility to the International Criminal Court: It's All About the Security Council". *European Journal of International Law*. 15, 701.

SCHEFFER, D. (1999). "The United States and the InternationalCcriminal Court". *European Journal of International Law*. 93, 12.

SCHEFFER, D. (2001). "A Negotiator's Perspective on the International Criminal Court". *Military Law Review*. 167, 1.

SCHEFFER, D. (2010). "States Parties Approve New Crimes for International Criminal Court". *American Society of international Law – Insight*. 14, 16.

SELLARS, K. (2011). "Imperfect Justice at Nuremberg and Tokyo". *European Journal of International Law*. 21, 1095

SERPA SOARES, M. (2011). "*Crime de Genocídio*". In M. A. Ribeiro, F. Pereira Coutinho/ Isabel Cabrita (eds.), *Enciclopédia do Direito Internacional*.(p 143). Coimbra: Almedina.

STEINBERGER, H. (2000). *"Sovereignty*". In R. Bernhardt (ed.). *Encyclopedia of Public International Law – IV*.(p 500) North Holland: Max Planck Institute.

SWAINE, E. (2003). *Unsigning*. Stanford Law Review, 55, 2061.

TOTAMI, Y. (2009). *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II*. Harvard: University Press.

VATEL (1863). *Le Droit des Gens ou principes de la loi naturelle I*. Paris : Guillamin Libraires.

WEDGWOOD, R. (1999). "The International Criminal Court: an American View". *European Journal of International Law*. 10, 93.

ZWANENBURG, M. (1999). "The Statute for an International Criminal Court and the United States: Peacekeepers under Fire?" *European Journal of International Law*. 10, 124.

ZHOU, L. (2012). "*Brief Analysis of a Few Controversial Issues in Contemporary International Criminal Law"*. In M. Bergsmo & LingYang (eds.*) State Sovereignty and International Criminal Law.* (p 21). Beijing: Torkel Opshal Academic EPublisher.

Major violence (crimes) against the international community

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Major violence (crimes) against the international community

INTRODUCTION

International life presents increasingly complex phenomena, such as the atrocities against innocent civilians and the systematic violations of war laws and customs by regular armed forces and resistance forces.

For many, international criminal justice is the main tool in the fight against impunity and iniquity of these behaviors, considering that it is in court that the victims are compensated for the acts of violence and arbitrariness by means of fair and unbiased trial of events and through dissuading future illegal actions.

This is the justice that after the 1990s has been building a complex national, regional and global regime that has led before international courts individuals who are suspect of committing serious crimes against society as a whole and are therefore considered crimes under International Law.

The entry into force of the Rome Statute in 2002 has provided the international community with a permanent criminal justice able to prevent and repress war and to punish those responsible for it. However, the particularly negative circumstances surrounding the negotiation and entry in force of the Statute have led to the court's low level of autonomy which, according to many, has resulted in growing inadequacy of the Court's objectives to the concepts for its creation.

In particular, the balance established in the Court's Statute and the amendment approved in the Kampala Conference provide no guarantees considering there is the need to protect the Court from the interventionist policies of the great powers. On the one hand, the increasing empirical evidences of the growing number of internal conflicts, visible since 2005 and which has not yet reached its turning point, and, on the other hand, the policy for selective involvement in multilateral mechanisms, which is part of American involvement in these conflicts, have raised turmoil in the international systems whose scope is yet to be fully understood.

The practical solutions found for these problems have not been satisfactory and it does not seem they will be so in the short run. These solutions, defended primarily by the small powers, evidence mobilization deficits because of the inability to attract great powers and even medium-sized powers, which tend to be autonomous in the issues they present to the Court and focus on the like-minded agenda.

In fact, the United States opposition to the Court's jurisdiction (which has caused some embarrassing diplomatic situations) shows, in our opinion, that the chosen policy is counterproductive because it endangers the long term interests of the United States and of other technologically developed powers. In this sense, the analysis of events indicates that this is mostly a survival strategy by Washington before an international system in rapid change which it does not fully control anymore. It is true that many other States have also resisted the International Criminal Court. These are mostly great powers, such as China, India, Pakistan, Indonesia, Malaysia, Turkey (which did not sign it; noteworthy is that the first three are nuclear powers) and the Russian Federation (which signed but did not ratify it), just to mention the most obvious. Some small and medium-sized powers – especially but not only from Africa – have also opposed to it with more or less vigor, motivation and success: from Libya to Saudi Arabia, from Cuba to El Salvador, from Mauritania to Sudan[1]. It is, however, our contention that the USA are the country which has resisted more successfully (considering American power), more consistently (because better explained by authors such as Henry Kissinger and virtually all Secretaries of State for Defense, both Democratic and Republican) and more clearly, in the sense that they themselves have publicized it widely. It is important, therefore, that we focus some of our attention to the American administration, though we reserve the right to further conduct more fully, less "*ad hominem*" and reductionist analyses.

[1] http://www.iccnow.org/, retrieved on March 3, 2013.

THE SOCIAL CONTRACT AND POLITICAL VIOLENCE

Violence exists since the beginning of times but it has changed as humankind has built new societies. In this sense, violence is a political and social construction in all organized societies.

Generally, governments claim the responsibility to protect the citizens living in their jurisdiction. The State as a conflict mediator is, in fact, the main guarantee for social stability and internal peace. In times of war, the State claims the monopoly for the legitimate use of physical violence to maintain the political space of the community and ensure that the most essential asset, human life, is not placed at risk by external and internal threats to the community[2].

The mechanisms of international criminal law are a result of the fact that the social contract between those governing and those governed has failed and fundamental human rights need to be defended before violence and impunity.

Hannah Arendt clearly explained the relationship between power and violence, which some consider umbilical. Arendt's innovative conclusion was that the wielding of political power corresponds to the acknowledgment of State authority and not the affirmation of power through violence. After years of study, Arendt demonstrated that the wielding of power is neither linked with violence nor does it need violence to be enforced (Arendt, 1969a). This position contradicts the well-known thesis by Carl Schmidt on conflict as an element of power (of which war is an extreme manifestation) (Schmidt, 1932). Arendt nevertheless recognizes, like Schmidt, that power is the essence of government. If we consider power from this perspective, authority should keep order by using violence as a power establishing strategy as little as possible.

This does not mean that power does not require violence from time to time as a tool of political action. Yet, according to Arendt, when power is fully wielded, violence is not necessary. For Arendt, the use of power symbolizes, above all, the failure of power rather than its essence (Arendt, 1969b).

For a significant number of governments, the conflicting character of politics prevails over the idea that power must become authority to legitimize politics. This is why the United Nations' founding fathers realized that the world needed a new social contract based on the principle of the illegality of vio-

[2] Jean Bodin (1530-1596) contributed to the concept of State as sovereign power with internal and external sovereignty. Later, Thomas Hobbes (1588-1679) and John Locke (1712-1778), theorized the social contract and its relation with sovereignty, namely the usefulness of the social contract for preventing social chaos in politically organized societies.

lence as a mechanism for conflict resolution, except in the case of self defense or under the global collective safety mechanism. In this sense, the rules in the United Nations Charter intentionally dissociate the concept of power from the idea of violence, reiterating the perspective that violence is a tool that, though available, is not the essence of power.

Theoretically, the institutionalization of collective security fulfills the urban dream of replacing the alliances and the balance of power by indivisible peace attained through national power being submitted to collective interest.

Collective security works mainly as a tool to reduce abuse of power and prevent future eruptions of organized international violence at the service of a permanent objective – to ensure stability and the predictability of the international system (Saraiva, 2001).

Thus, the enlarged mandate of the United Nations Charter – reflected in the triptych security/human rights/development – is, in fact, a formula that emphasizes security, which is in focus in the founding document, practically separated from the other two components.

States have always been the main subjects of International Law. Little by little, though, the notion that rulers who plan and order barbaric and brutal acts that harm the common good of humanity should answer before the international community as a whole.

The idea that rulers have responsibilities they should answer for arose after WWI, due to the atrocities committed by the armies during the conflict. This new era of Criminal Law establishes, besides common crime, more atrocious and heinous crime, characterized by violence, cruelty and barbarity. Hence, the concept of international crime as "an act universally seen as criminal, a serious issue that raises international concern and that, for some reason, cannot be considered of the exclusive jurisdiction of a State which, under normal circumstances, would have control over it" (Military Tribunal V 1947-1948, Hostage case).

At the core of international governances is now a type of crimes against international order committed by specific individuals, and these individuals may be assigned criminal accountability for their actions.

From the point of view of international security, the contributions of the Nuremberg International Military Tribunal and of the Tokyo International Military Tribunal are indisputable for establishing the limits to rulers' freedom. These trials are a first draft of an urban justice that represses the most serious international crimes of individual criminal accountability committed by political and military leaders, in this case German and Japanese leaders. They were, however, ad hoc courts which disappeared once the specific cases they had been created had been tried.

Yet, in the period after WWII and in the next decades of the Cold War, the significant increase in international crimes led the international community to set as an objective the creation of an international court permanently provided with sufficient power to enforce International Law on individuals accused of committing serious violations to Humanitarian International Law.

At the end of the 20th century the conditions existed for this project to be put in practice.

In the 1990s, the USSR started to break up and globalization was spreading fast, leading to new forms of violence and terror and conflict "civilnization". The core feature of armed conflicts at the end of the 20th century is the narrowing of the gap between fighters and non fighters. The result is increased pressure on those who are not linked to the conflict, the civilians – direct victims of the hostilities or killed by hunger or disease as a consequence of armed conflicts[3]. Technology has also made a great impact in the new conflict morphology and in the global effects it has in the international system. Finally, a third element, the narrative on the insecurity of the international system – the "war on terrorism", presented as a response to the new terrorist threat, is perhaps the most significant narrative created by the American foreign policy in the post bipolar era – is now so pervasive in the political debate that it has considerably influenced the creation of a permanent international criminal court able to effectively repress those responsible for more serious international crimes.

These signs of change in the international system, which are part of a long term trend, suggest that the sovereignist paradigm is used up and that a model is gradually becoming more used in which sovereignty limited by accountability where human fundamental rights are violated.

One of the achievements of the Statute of the International Criminal Court (ICC), completed in 1998, was exactly the fact that the crime of aggression (jus ad bellum) – as well as genocide, crimes against humanity, crimes of war (jus in bello) – was included in its jurisdiction, unlike what occurred in the International Criminal Court for the former Yugoslavia and in the International Criminal Court for Rwanda. In this sense, the Court is an international institution whose mission is to dissuade and repress extreme atrocity and cruelty and discourage the use of war as a mechanism for social change and political control over populations and resources.

[3] On the development of this problem, see (2009) *Human Security Report 2009/2010*. Oxford: Oxford University Press.

The truth is that the new Court has a mandate to prevent and repress war and punished those responsible for war but it cannot forget that there are other institutions able to limit the external sovereignty of States. This is, thus, an institution that is not alone. There is practical need to coordinate the ICC and the UNSC, as the latter is responsible for monitoring the full respect for the law preventing the strategic use of armed coercion outside the (restricted) framework of self-defense.

COLLECTIVE SECURITY AND INDIVIDUAL CRIMINAL RESPONSIBILITY FOR INTERNATIONAL CRIMES

In this section, we aim to analyze the decision made by the great powers at the end of WWII of providing the international system with a collective security mechanism.

As stated previously, the development of a collective global security model adopted by the United Nations in 1945 aims to ensure order, stability and continuity in a post-war world. The institutionalized model is largely driven by the powers assigned to the UNSC, which has the material resources and the political will to maintain a global system that can work in favor of all States in the international system.

In theory *"the sine qua non condition for collective security is collective self-regulation: a group of States tries to reduce the threats to security by agreeing to collectively punish any State that goes against the rules of the system"*(Downs & Ida, 1994).

In this sense, it is different from collective defense in three aspects.

Firstly, the problems related with internal security of political space are more important than the external challenges to this group of countries. Secondly, the coalition of States within the space collectively has more power than their possible opponents. Finally, the system participants are united by a common objective: to react against any use of armed forces considered illegal under International Law (Downs & Ida, idem).

The institutionalized mechanism is essentially reactive, based on surveillance of States that are not UNSC members, solely when these disrupt the system and go against the most fundamental collective interests, namely, the safeguarding of international *status quo*.

However, the originally crucial principle of non-intervention in the internal affairs of States has, today, new parameters of analysis the UNSC must necessarily account for.

We do not aim to preview new UNSC trends, nor would it be advisable to do so;

the most important is to emphasize that these parameters have decisive implications for the future of this institution.

One of the most important issues in the discussion regarding the limits to the use of armed forces is the possibility of armed humanitarian intervention in case of humanitarian disaster (under the doctrine of responsibility to protect, or R2P). Other possibilities are not completely legal, such as the forced (re) implementation of democratic regimes or the preventative use of force if possession or development of massive destruction weapons is suspected (Saraiva, 2009,p 97).

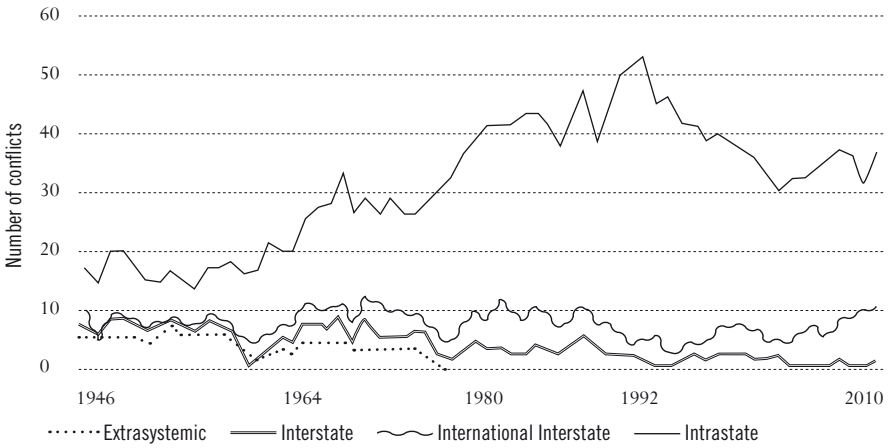
In 1945, it seemed viable to build a system of global collective security based on legal convergence and spreading of consensus at international level. This was possible because there was a coalition of States strong enough to impose their will on other system members. During the Cold War, the balance of power United States/USSR prevented any public understanding from occurring which would allow the UNSC to act against perpetrator States. Yet, in this case, there was little interest in acting and no lack of capacity for acting.

The crucial issue in post-bipolar geopolitics is completely different: the historic tension between law and power has increased after the falling apart of the USSR because the United States, the country that maintains order in international system since it won WWII, aims to keep its dominant position by resorting to military power to continue deciding the rules of the game and eventually stop the rise of a new hegemonic power.

One of the main guarantees of this strategy is the United States' huge military and technological power which leads to a "revolution in military affairs", a process linked to new technologies in terms of long range shooting precision and permanent information on present forces and possible targets. "Clean war" allows for a strategy of protection against potential threats based on the perception that hegemony (American or otherwise) is a transient situation in the international system. Hence, it is not only important to face those that challenge American power but a need to delay in time the loss of hegemonic status, which is deemed inevitable (Saraiva, 2009,p 113).

In fact, the end of the Cold War was important in the change in the international agenda. The change was twofold: in terms of the themes included in the agenda and mostly the importance awarded to international issues.

Chart 1 – Armed Conflicts by Type (1946-2011)



Source: Uppsala Data Program, http://www.pcr.uu.se/digitalAssets/122/122554_conflict_type_2011jpg.jpg

The dynamic triggered by the implosion of the USSR immediately influenced the occurrence of non international armed conflicts, which started to steadily decrease after 1989. No consequence was visible in conflicts among States, they are almost non-existent statistically, as visible in the chart below on armed conflicts from 1946 to 2011.

In terms of the relevance given to problems in the decade after the fragmenting of the USSR and which coincided with the negotiation of the Rome Statute, a deep change occurred in the international perspective of assassinations, genocides, looting and crimes of war in former Yugoslavia, in Rwanda, in the Democratic Republic of Congo and many other forgotten places in the world.

Nevertheless, we cannot state that current strategic balance is the result of a new speech on the importance of human rights. What the strategic scenario has evidenced is that the international agenda has become more complex as a result of an important strategic revaluing of political violence and that rules forbidding the use of armed forces have become more fluid. As we suggested earlier and is visible in the chart, from 2005 onwards, we can see an increase in armed conflictwhich, as a global trend, has not shown real signs of decrease.

Simultaneously, a trend is obvious for a more systematic violation of laws and war rules – both in the institutionalized powers and in non State actors – thus keeping in pace with the rules of *jus ad bellum*.

In terms of the other superpower, the omnipresence of the United States in the main armed conflicts is to be taken into account, considering that, as we have mentioned, the laws against war as *jus in bello* are looser (in terms of weapons and war strategies). This is partly a consequence of a deliberate strategy by more advanced military powers to take advantage of a plethora of innovative weapons and military equipment produced by western powers' military industries. We reiterate it is partly a consequence though it may (and should) be seen from a wider perspective; this paper focuses on the case of the US but a more thorough and complete explanation may be found through complementary analyses of other superpowers, as well as of groups of small and medium-sized superpowers, such as the African powers and their alternative types of "resistance". Thus, with this paper we aim to take a step (just one step) in that direction.

Another important aspect of the strategic scenario, sometimes overlooked, is the access to new technologies by some armed groups in the opposition, which has transformed them in global and informational movements, whose behavior is similar to that of technologically advanced States. The matter is extremely important because what is at stake here is a real strategic balance in terms of relation between groups in the opposition and the existing authorities, though there is a huge imbalance in terms of capacity (Saraiva, 2009,p 156).

All these changes in strategic scenario have had consequences in the negotiation of the ICC Statute. The different opinions of great and small powers on these and other matters has led to long debates and negotiations which have almost always resulted in political concessions to the interests of the great powers.

There was only one case in which there was shared interest in making the ICC jurisdiction more flexible – that of the case of crimes of war. The military powers wanted to preserve the Network Centric Warfare, based on information control, on air-space superiority, the use of unmanned air vehicles (UAVs) and on cyberspace operations, but they were aware that the new paradigm of conflict completely chanced the traditional concepts of war and combat. Non democratic regimes, on the other hand, concerned with the need to neutralize armed opposing movement, also considered it advantageous to support the establishing of a transitional period for the crimes of war (Escamareia, 2003,p 18).

The discussion around the Court's jurisdiction on the crime of genocide and crimes against humanity was more heated but the political divisions evidenced, though important, did not reach a critical point. The crime of aggression was rather unanimously considered as the most controversial political issue. In fact, in Rome it was almost excluded from the Court's jurisdiction.

VIOLENCE, CRUELTY AND POWER

Violence and cruelty are universal and timeless and are at the core of the challenges politics faces today.

International crimes and their typification correspond to systematic violations of human rights in armed conflicts and practices in arbitrary regimes by means of atrocities and acts of violence and cruelty over victims. This trivialization of violence is frequently linked to a need by perpetrators to assert their power projects, either political or economical.

There is no clear definition of atrocity. There are also no clear definitions of cruelty, violence and power, though there are proposals as to their differences.

In terms of the concept of cruelty, several authors propose that cruelty is at a different level than violence and power because it involves the complete denial of the other's existence (Rundell, 2012).

In Rundell's opinion, here viewed essentially in a physical sense, it is an instrument of power. More precisely, it corresponds to a relation established between individuals, as power acknowledges the other's existence, though cruelty is often a main feature of the opposition between the one that coerces and the one that is coerced inside and outside the battlefield.

We may, thus, conclude that torture, violation and extermination of another we deny the existence of is more difficult when there is a power relation, which limits useless cruelty though the relation is still under a zero-sum logic (Rundell, idem).

The more serious crimes against society as a whole are an attempt to limit the manifestations of cruelty and violence in politically organized societies where law and power are basically antithetical realities.

The crimes against the civilian population, genocide and crimes against humanity, are the visible side of a barbarian and cruel State that persecutes and kills common citizens as a political strategy to maintain power, in the context of armed conflicts or within their policies of repression. They are also expressions of violence used by irregular armed groups over defenseless populations. Generalized violence against civilians is now part of many people's daily life, which allows for perverse coordination between this violence and external and transnational conflict, thus creating a complex mix of tension that destroys societies.

The crimes of war are another aspect of violence and cruelty. As violations of law and war rules include acts committed during military conflicts that are condemned and forbidden both by international rules and by the Hague legislation, by the Geneva legislation and, ore recently, by the New York legislation. These crimes are framed by rules on the use of armed force in terms

of allowed weapons and methods of combat once the decision has been made to use armed force by States or resistance groups.

Finally, noteworthy is import progress being carried out in institutionalizing the crime of aggression in regards to accountability of individuals involved in the decision to use force to attain political objectives in the outside.

The agreement on this matter achieved in Nuremberg, then denominated "crime against peace", has not only made it clear that peace, security and justice are deeply interdependent but that their concepts are not consensual. Though fifty years have passed, the political and strategic tensions connected with crime have not been resolved despite the efforts of the delegations in Rome and Kampala, as will be made evident in this paper.

THE CRIME OF GENOCIDE

This is a nameless crime and an international crime under international custom.

This is the crime, along with the crime of aggression, which has more political depth of all those listed in the ICC Statute

Genocide has happened in all eras and is closely linked with intolerance towards human diversity (Nersessian, 2007,p 243). Genocide is the premeditated plan to exterminate or weaken national, religious, racial or ethnic groups. The plan aims to destroy political and social institutions such as culture, language, national feelings, religion and national groups' own economic survival.

Thus, "Genocide is a systematic criminal state and it develops in two stages: the first consists in destroying the national model of the oppressed group, and the second in imposing the oppressor's national model on the remaining oppressed population." (Nersessian, idem,p 246).

The origin of the word can be found in a treaty on National Socialism and its policy of occupation written in 1944 by a Jew, Raphael Lemkin, who was a Polish Law professor. In the Nuremberg trials, no defendant was convicted of the crime of genocide per se because, at that time, genocide was included in the crimes against humanity (Nersessian, idem,p 243).

In fact, at the end of WWII, the legal lexicon did not include a category expressing the act of mass extermination of the Jewish people. Some years later, a convention in 1948[4] defined and made autonomous a new type of international

[4] Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, United Nations General Assembly, 10 December 1984.

crime, "genocide", which meant crimes against humanity, against the dignity of humanity.

This crime's barbarity and cruelty is so against the principle of humanity that it is politically impossible for Western democratic governments to ignore it, there being no possibility of not moving forward once the crime has admittedly been committed.

In this sense, the typification of this crime in ICC Statute, which merely transcribes its definition from the one adopted in the **Convention** for the **Prevention** and Repression of the **Crime** of **Genocide** (mentioned above) reassured most States involved in the creation of the ICC because the crime was still limited the intentional (physical and biological) destruction of a national, religious, racial or ethnic group (Cardoso, 2012,p 48). The adopted concept excludes, for instance, persecution or intentional destruction of political groups, allowing governments to not be held accountable for these crimes which, though considered serious, are not viewed as endangering common well-being.

Our comments aim to underline that legal concepts become merely instrumental in manipulating reality when used in political speech. This reference seeks to remember that reality is interpreted according to political interests, at each given moment being able to opt for a course of action in the name of the common good.

In the case of the crime of genocide, its denial almost always indicates political lack of interest in punishing this type of crime. On the other hand, international accusation of genocide does not necessarily mean there is political will to repress and punish these actions.

This is made evident through one example, of the many available: the United States eagerly condemned the events in Darfur as genocide, at a time when the report of the International Commission of Inquiry on the situation in Darfur[5], created at the request of UNSC and presided by Antonio Cassese, had been unable to obtain conclusive evidence of the intent to eradicate groups completely or partly, therefore concluding there was no genocide policy in Darfur but military actions to counteract rebel action by a political group (Hamilton, 2011). Having the means at their disposal, it would have been easy for the United States to support the Commission's recommendation, which referred the need to reference the case to the ICC, thus allowing

[5] International Commission for Inquiry on Darfur, Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, UN Doc, S/2005/60, Jan, 25, 2005.

for the trial of those responsible for the atrocities committed in Darfur. Instead of supporting the proposal, the United States suggested the creation of a hybrid African court.

The crisis in Darfur evidences the existence of a moral duality in American political thought (as in the case of similar interventions by great powers), simultaneously specific and universal, and that this duality raises political difficulties when decisions need to be made.

In the beginning of September 2004, after the investigation promoted by the American administration on the crimes committed in Darfur, the State secretary Colin Powell described the crimes in Darfur as genocide and President George W. Bush used the same term in a speech in the United Nations some weeks later (Hamilton, 2011). In the crisis in Darfur, American foreign policy broke with tradition and spoke about this type of atrocity. Yet, direct reference to the ongoing dehumanizing process in Sudan did not lead to decisive action towards the serious events.

Thus, American discourse practice does not confirm that the country assumes responsibility in international repression of the crime of genocide. Rather the opposite. UNSC resolution which reported the situation to the ICC was approved only because it was known that a majority of 9 countries (the like-minded group) would vote for the text and place the United States in a spot: only American veto would stop the resolution from being approved.

The American administration opted for abstention and thus allowed resolution 1593 to be approved which reported the case to the ICC (Mackeod, 2010). This decision, which apparently evidenced a commitment with international criminal justice, does not in fact impose human rights international protection on the country because the American administration demanded in exchange for allowing the resolution to pass, namely jurisdiction immunity before the ICC for American citizens involved in military operations in that region.

As this episode involves the United States, a great power with a very specific discourse, it evidences the contradictory and ambivalent discourse which attempts to reconcile the promotion of human rights (focusing on the principle of human dignity at the core) and the reaffirmation of its status as exceptional nation which, in this case, makes it possible to be exempt from abiding to the rules provided by the international regime of protection of human rights.

We conclude, in this case, that, from the point of view of the United States' strategy, international legal tools are closely linked with a national strategy to promote democratic regimes, within the framework of a wider and more

integrated security which includes, among others, defining spheres of interest, maintaining hegemony and the country's energy security. We believe the interventions of other great powers have a very similar dual pattern.

CRIMES AGAINST HUMANITY

We have been witnessing government-sponsored violence since the end of WWII.

Governments that intentionally kill civilians use lethal policies such as genocide and politicide.

As you have seen, genocide includes a policy of organized killing in which the victims are chosen because they belong to a specific group.

Policides, on the other hand, have a completely different pattern, victims are essentially defined in terms of their hierarchical position or their opposition to the regime or to the ruling group. Politically, this concept reflects the need to gather in one single type a set of practices in authoritarian regimes to which there is no corresponding legal category in International Criminal Law (Krain, 2005,p 364).

In both crimes the aggressor's intention is to destroy the target group, either partially or completely (Krain, idem). Thus, what truly distinguishes the two crimes is not intent but target groups.

Mass murder is typically a crime committed by States but it can be applied to other perpetrators who control the region where the massacre takes place and operate as if they were a State and they are the authority in the region (Krain, idem).

For International Criminal Law, persecuting political groups is a crime against humanity in the framework of a generalized or systematic attack against any civilian population, and this attack[6] is known in the framework of armed conflicts or outside that framework.

However, as Cassese mentions, there is still no agreement on what practices to include in this type of crime. The Nuremberg Trials, when faced with this difficulty, decided to consider part of this category the "inhuman actions" carried out by the Germans. Despite the differences on the scope of the concept, the International Criminal Court for former Yugoslavia, the International Criminal Court for Rwanda and the ICC generically agreed on this concept which defines the crime based on the inhumanity of the actions under analysis.

[6] ICC Statute, article 7.

In Cassese's opinion, this is a set of hateful offenses that constitute a serious attack on human dignity or a serious humiliation or the degradation of dignity (Mackeod, 2010,p 283). ICC Statute considers part of this group the crimes of sexual violence and the crime of apartheid, for example.

The inclusion and definition of the crimes of sexual violence in the ICC Statute was one of the most significant victories of Portuguese diplomacy and in particular a result of Paula Escarameia's[7] commitment, who largely contributed to in-depth studying of these issues during the negotiations of the Statute and of the Crime Elements.

The impact of the crimes of sexual violence in armed conflicts has continuously increased. Governments' security forces, military forces, military companies hired by western governments and armed groups in the opposition, all resort to psychological war so as to humiliate the enemy and destroy their and the population's morale, as was made manifest in Afghanistan and Iraq (Zawati, 2007). Considering that sexual offenses always have devastating consequences for the communities and that those responsible for these actions hope the social stigma stops the victims from openly speaking about the crime, thus drastically reducing their chances of being punished.

Systematic sexual violence is, therefore, a means to weaken society because their consequences do not only affect the individuals involved.

Sexual violence has affected men, women and children. The rape of men in times of war is essentially a manifestation of power and aggression rather than a means to satisfy the perpetrators' sexual desires. The winner violates these men as a way to guarantee they will never fight or lead others again. Men submitted to these abuse become outcasts.

In contemporary societies, the social contract has been unable to oppose this and other acts of violence over civilians. The practical responses for this difficulty have not been satisfactory.

One of the most discussed solutions is the use of armed force in a scenario of humanitarian emergency where the physical integrity and survival of the civilian population are at risk because of human action. However, implementing a more flexible model of sovereignty does not seem to be viable, at least for now because a large part of the international community opposes to this change.

Other solutions are, thus, needed. Yet, as seen previously, the technical and legal difficulties and the political reservations regarding the typification of some

[7] As Legal Advisor at the Mission of Portugal to the United Nations.

behaviors as crimes against humanity make it more difficult the implementation of international criminal justice based solely on a permanent universal jurisdictional institution. It is, therefore, obvious that the inter-relation between Law and international politics requires more thought.

Crimes against humanity deal with criminalizing human atrocities that endanger the security of those communities affected by that indignity and outrage. Thus, international responsibility not only includes the possibility to try these crimes as it is in politics that the defense of human dignity has its last resort.

CRIMES OF WAR

Crimes of war were defined by the ICC Stature based on the serious violations to Humanitarian International Law within The Hague Legislation and the Geneva Conventions and their additional Protocols from 1977.

Crimes of war include two elements: the crimes are committed within the context of armed conflict and the crime is connected with that conflict. The different between crimes of war and crimes against humanity is the need for an armed conflict, international or not[8].

Though the ICC gives primacy to the Nation-state, allowing it to try their citizens in case of serious violations to human rights and this way preventing these cases from being tried by the ICC (principle of complementariness), it was France, a western country, that demanded (and succeeded in it being approved in Rome) that a State that has become part of the Statute has a 7-year period after it entered in force to accept the ICC jurisdiction over these crimes whenever committed by their nationals or in their territory (Escarameia, 2003,p 18).

Currently, France is no longer in the transient period but the truth is that this clause may be used by other States in a Court created to act in a wide territory and supposedly has general jurisdiction.

On the other hand, the dynamic triggered by France was used by the United States that initiated a policy to protect its armed forces stationed abroad, either in peace missions or more muscular armed intervention (Escarameia, idem).

All these developments evidence a securitization of human rights and a growing availability by the great powers to carry out humanitarian interventions as a justification for their unilateral military actions.

[8] ICC Statute, articles 7 and 8.

Let us return, then, to our example: the United States. This logic justifies that the US attempted to limit the ICC jurisdiction to crimes occurring in the territory of a State party "and" were committed by a national of a State party. What happened was that the delegates reached a radically different consensus, convinced that the disjunctive "or" (Lindberg, 2010,p 17) would reinforce the idea the the individual was at the core of International Law and the paradigm of justice serving the unity of human community.

Before this achievement of international public order, the United States doubled their efforts to find alternatives to the Statute because in theory the American military abroad may be subject to ICC jurisdiction if they commit crimes in the territory of States party and they do not want or cannot try them[9].

The defense of sovereignty is not incompatible with international commitments signed by the States themselves, in a clear extension of the social contract, but cannot be be question when a citizen from a State that is not part of the Statute is reported to the ICC to be tried. Aware of this fact, the United States have skirted around the Court's jurisdiction using several means.

At UNSC, Washington has been committed in ensuring jurisdiction immunity to the military in peace missions abroad, despite most countries considers these clauses are contrary to the letter and the spirit of the Rome Statute. Tensions have reached a critical point when the United States informed they aimed to renovate the guarantees for immunity of all American forces in UN missions or missions authorized by the UN, as the coalition of forces in Iraq after July 30, 2004 (Birdsall, 2010,p 460; Johansen, 2006, p 308-310).

The Council was not receptive to the US proposal because they were again forcing the approval of a status of exception for American military at a particularly delicate time when the legality of the intervention in Iraq was being discussed. At that time, only the Russians, the Angolans and the Philippines supported the US proposal, so they were left isolated and had to withdraw their proposal (Johansen, idem,p 310).

Washington reacted to this failure by withdrawing 9 American soldiers from the peacekeeping missions in Ethiopia and Kosovo, States that had not signed bilateral agreements with the United States (Johansen, idem) and were not part of the ICC either.

The policy of the United States towards multilateral mechanisms is not a new factor in international relations: what concerns the United States is that the

[9] Considering that in the ICC Statute there are no exceptions.

ICC has the capacity to enforce international rules at a global level, thus conditioning the design of great powers' national policies, in this case, their policies (May et al, 2006,p 354).

Another example of the policy followed is the network of bilateral agreements signed between the United States and a large number of countries which determine that the countries in the Statute should not hand in American nationals or nationals from other countris that are not in the Statute to the ICC; these include people linked to the Department of Defense and the CIA, even civilians.

Another important aspect of this period is the American Servicemember's Protection Act (ASPA), legislation which prohibits military assistance to countries that ratified the Statute unless they have bilateral agreements with the United States (Johansen, 2006, pp 313-314).

There is already evidence of the counter productivity of these policies in Latin America. The Latin American countries refused to sign bilateral agreements with the United States and signed military assistance agreements with China. Confronted with the loss of these close contacts, Congress aproved a legislative amendment in September 2006 which lays down the exclusion of military training programs from the list of sanctions applicable to countries that refuse to sign these agreements (Birdsall, 2010,p 462), thus making it possible to sign military cooperation agreements.

An additional problem to the increasingly interventionist agenda of the great powers is the power assigned to the Prosecutor of the ICC, who can begin a process.

Noteworthy, however, is to acknowledge that the Prosecutor has shown prudence in exercising his functions. In the case of the intervention in Iraq, the Prosecutor received several messages requesting that Blair, Bush and Rumsfeld were tried (Lindberg, 2010,pp 24-25). In a letter made public, the Prosecutor recognized that American soldiers (belonging to a State that is not a State party, just like Iraq) acted in collusion with British soldiers (belonging to a State party) in the way they treated their prisoners in Iraq. Nevertheless, the Prosecutor decided that the UK was internally investigating the facts and, from his point of view, it made no sense to involve the ICC[10].

Besides everything that was mentioned so far, the United States created a new conflict with international justice regarding the prohibition to use torture, a principle laid down in International customary Law and in the interna-

[10] OTO, Policy Paper, On the Interests of Justice, September of 2007.

tional treaties as jus cogens. This is banned practice by all peoples and criminalized in the ICC Statute as crime of war, crime against humanity and genocide[11].

Amnesty International, among other organizations, accused the former President Bush, former vice-president Dick Cheney and the former secretary of State for the Defense Donald Rumsfeld, as well as the former CIA director George Tenet of having ordered practices legally considered torture against prisoners in the context of "war against terrorism"[12] in secret detention facilities ran by the CIA[13]. Former president George W. Bush's statements on television acknowledging that he had authorized torture and official documents confirmed these practices (Guantanamo, Abu Grahib) (Ross, 2007).

Torture is always carried out in the name of national security. The main feature of torture is its specialization as a routine tool in interrogation about activities by the opposition to military regimes and other non-democratic types of government.

Torture in democracy is not acknowledged as official policy and it is simply a method of illegally obtaining information. This is why it is particularly difficult to understand why George W. Bush acknowledged he had authorized **torture** to prisoners in the custody of the United States. The Bush administration openly compromised the universal prohibition of torture, laid down in article 2 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, threatening the bases of political liberalism and the idea that people are the objective. To relativize the immorality and illegality of torture and its institutionalization in the democratic state represents a flaw in the information system, in particular of HUMINT, unacceptable because this is a country with huge international responsibilities and global interests.

Obama tried to remedy the situation and approved a new National Security Strategy that condemns the use of torture as a means of fighting terrorism, suggesting that the United States are willing to abolish this practice once and

[11] Article 8. paragraph ii, article 7f), and article 6b) of the ICC Statute.

[12] Amnesty International (2012). USA Human Rights Betrayed, 20 Years After the Ratification of ICCPR, Human Rights Principles Sidelined by "Global War" Theory. UK, p.3

[13] Many sectors are still not convinced there was an armed conflict with Al Qaeda. Anyway, as seen previously, the Rome Statute allows to try acts of torture within the framework of crimes against humanity.

for all[14]. Yet, the truth is that the doctrinal discussion on the legitimacy of torture in exceptional cases cannot be dissociated from the doctrine on preventative war, which the 2010 National Security Strategy maintained in full. This has made it difficult to consolidate the principles of international law and justice.

To sum up, unilateralism and exceptional policies deepen the difficulties for international public order and fpr International Law regarding the protection and promotion of human rights and thus foster the conceptual contradictions of the text approved in Rome. In fact, the differences in perspectives have allowed countries parties (and non-parties) to the Statute to exploit the mentioned flaws and has made it possible for them to project their interests rather than the values of a global society the Statute aims to defend.

CRIME OF AGGRESSION

Crime of aggression is a crime against the main international peace promotion institution, the sovereign State.

The crime of aggression is crucial in the legal construction of the ICC as it is up to the Court to end "abuse of power", discourage violent competition and promote peace through preventing and trying crimes of aggression in the international legal structure.

It is relatively consensual that the Briand-Kellog Pact (1928) was the first legal document to introduce the idea that war is not the solution for all international problems, a revolutionary idea at the time. Before this dates the focus was completely different, the use of force and armed aggression were simple political concepts used to describe the conduct of strong and powerful States (Meddi, 2008,p 658).

The atrocities committed in WWII drew the attention of the international to the need to judge the war of aggression. The Nuremberg Trials are the first attempt in codifying International Criminal Law and an important political compromise with the new international regime based on the general rule to prohibit the use of force in international relations.

[14] According to the 2010 National Security Strategy, the American administration "prohibit torture without exception or equivocation: brutal methods of interrogation are inconsistent with our values, undermine the rule of law, and are not effective means of obtaining information. They alienate the United States from the world. They serve as a recruitment and propaganda tool for terrorists. They increase the will of our enemies to fight against us, and endanger our troops when they are captured. The United States will not use or support these methods". In USA (2010). National Security Strategy. Washington: the White House, p. 36.

Yet, despite its importance, the contradictions in international politics at the end of WWII were evident in the Nuremberg Trials. Bass (2002,pp 173-174), for example, states the the preparatory negotiations to the trial show that the American and British national interests were more important than the responsibilities of the international community in punishing the crimes committed by the Nazi political and military elite. The preparatory work to the Nuremberg Trials allow us to understand the importance of the effects of war on American society and the need to stop the suffering inflicted on the American people. This national circumstance would sideline the memory of national-socialism and the suffering of the Jewish people in the holocaust (Bass, 2002,pp 173-174)[15].

This specific feature of American home politics helps to understand the extreme importance of the "crimes against peace" in the post-war period:"At the International Conference on Military Tribunals, held in London between 26 June and 8 August 1945, the most controversial issue was still aggressive war criminality. The USA insisted on defending the idea that aggressive war was an international crime that implies that those responsible should be criminally made accountable. The crime of aggression was presented at the Conference on the same day that the San Francisco Conference made it illegal to use force in the United Nations Charter" (Saraiva, 2009,p 221).

Fifty years after these events, the United States radically changed their position regarding criminalization of aggression within the ICC Statute negotiations, having influenced considerably to exclude the crime of the Court's jurisdiction.

Yet, despite the pressure by the USA and by other UNSC permanent members, the crime of aggression was included in the Statute as a result of the feeling shred by the delegates to the Rome Conference that aggression is a major threat to collective peace and security. Nevertheless, due to lack of time and political consensus – let us not forget that the great powers accepted the reference to the crime near the end of the conference – its definition was postponed to future amendment conferences.

The first amendment conference occurred in Kampala, in 2010. As expected, the discussion on the definition of crime of aggression met numerous political obstacles, which did not allow for fine tuning several elements in the adopted version, which reflects the strategic priorities of the great powers.

[15] Perhaps this positions helps to explain the need for other trials, in Israel and in Western Germany, to try the holocaust.

The crime of aggression is, in fact, the crime under the ICC jurisdiction that best reflects the current balance of powers in the international system – an asymmetric distribution of power among States.

The succession of obstacles placed by the dominant power throughout this whole process evidences its deep suspicion of international laws in force that rule the use of armed force as these are like a defensive barrier to territorial integrity of the most fragile political units in the international system (Saraiva, idem). The Non-Aligned Movement (NAM) has questioned the position of the P5 and has already stated it is not willing to effect the interventionist agenda of western powers as a specific solution for humanitarian emergency erupting in their territories and which the local authorities cannot control or are the primary responsible for. In this sense, NAM always have favored the EU proposals in the like-minded group, advocating the inclusion of the crime of aggression and a wider scope of action for the Court against the open opinion of great powers.

Despite the initial inflexibility in their position, as negotiations continued, small and medium powers would have to give in and admit the role of the UNSC in this matter, making this the only crime in the Statute that establishes a pre-condition for an individual to be held accountable fro a crime of aggression that that person has planned, prepared, started or carried out an act of aggression that makes the State responsible (scope of action of UNCS).

In any case, the resolution adopted in Kampala on the crime of aggression is an amendment to the ICC Statute that finally defines the crime the conditions to the exercise of the jurisdiction.

However, as I have said, the final text evidences a very fragile consensus and the ambivalence of great powers towards multilateralism. The final architecture of the crime of aggression took into account the strategic doctrines in force in the United States, in NATO and in other western countries deeply based on the Revolution of Military Affairs, the Transformation and in related concepts aiming to reconcile military forces and the information era we live in.

Information and Communication Technologies (ICT) have a multiplying effect that 'allows the Armed Forces that have already incorporated the technological requirements of RMA to start considering a more pro-active strategic attitude, of military prevention of "new threats" (Saraiva, 2009,p 338).

This strategic option of the United States, put in practice by the Bush administration and continued by Obama, is base on the preventative war doctrine because it is a long-term strategy, "by definition, a strategy that is developed in a framework of strategic superiority because only when in military advan-

tage is it possible to stop the emergence of potential rivals (Saraiva, idem,p 2029). In this sense, the idea that technological superiority would be decisive in future conflicts, which would make them shorter, less intense and with less casualties (Espírito Santo, 2007) has won over other permanent UNSC members and allowed for the adoption of a common position by the P5 in regards to the crime of aggression.

The history of the negotiation around the crime of aggression shows that what is in dispute at the ICC is the right by great powers to keep their freedom in terms of strategic action and pursue their humanitarian agenda.

During the negotiation of the crime, many strategies were followed to attain the objective. For example, in 1999, in the aftermath of NATO intervention in Kosovo, the German delegation advocated that the restricted concept of the crime sets aside categories of the crime beyond the idea of "armed attack whose objective or effect is the military occupation or annexation of a territory by another State"[16]. This means, air bombing and sea blockade would not be acts of aggression (Saraiva, 2009,p 295). AS you know, the argument was not accepted by the Preparatory Commission (PrepCom) because it dis not seem reasonable to thus exonerate NATO of responsibility in the air campaign in Kosovo[2].

The controversial issur of legality/legitimacy of "humanitarian interventions" in Kosovo, Aghanistan, Iraq and Georgia was back on the table in Kampala. Yet, a final position related to legality/illegality of armed unilateral bona fide humanitarian intervention (Trahan, 2011,pp 75-76) was ultimately not included in the final text because this was not a stable matter and is still under discussion by the legal community (and among scholars in international relations), essentially under R2P. Despite this being the decision, the final wording still leaves open some indirect approaches on this issue.

In terms of the concept of exceptional illegality of armed humanitarian interventions, as was the proposal by Franck, Chesterman and Byers (2003), there is the idea, especially among the NAM, that illegality has led to over 130 unilateral or collective interventions of countries formally opposing to its being laid down (Leckerc-Gagné & Byers, 2009,p 380).

However, in Kampala the diplomatic initiatives of the United States managed to win over the resistance of African and Asian countries. According to the wording of the final approved text, the crimes committed in States not party are excluded from the Court's jurisdiction. This implies that the crime of

[16] German proposal (PCNICC72000/DPPP-139 (1999), Discussion Paper PCNICC/2000/WGCA/DP.4 (2000)

aggression committed by American nationals in a State party can no longer be tried by the Court, thus making it easier for military coalitions to be formed for interventions. These coalitions include the United States (State not party) and a State party to the Statute (UK or France, for example) in the territory of a State not party, because, in this case, the ICC cannot try the crime of aggression (Trahan, 2011,pp 91-93).

Let us not forget that one of the aims underlying the creation of the ICC was to avoid trials on specific situations and geographical areas. The issue in terms of States party is that article 15 bis (4) previews a statement of exclusion that allows these States to declare that they do not accept the Court's jurisdiction in relation to the crime of aggression by means of submitting a simple declaration to the Secretariat (Arribas, 2011).

The situation is worsened by the fact that the solution found does not allow that s crime can be tried before 2012, at best[17].

We may conclude that the Court and the countries supporting it were unable to handle the sovereignist position of States in the issue of crime of aggression, which reinforces the idea that the Court will only be able to try individuals suspected of the crime of aggression in limit cases.

As far as the definition of the crime is concerned, we consider the result rather more satisfactory though not particularly innovative.

Crime of aggression was defined as planning, preparing starting or executing an act of aggression by an individual in a position to control or lead political or military action of a State. The seriousness and scale of this act of aggression is such that it violates the United Nations Charter (Arribas, idem).

From the point of view of the great powers, the text was not up to expectations in terms of the role of the UNSC on this matter, as at a time the P5 believed it would be possible to introduce in the text the need for Council authorization to begin the procedure by a State party or the Prosecutor him or herself. The delegates to the Kampala conference opted to defend the integrity and independence of the Court by kept the UNSC prerogative to be able to suspend the inquest or the criminal procedure for one year (extendable).

The compromise formula rather reverts the initial strategy of the great powers which was focused on a restricted definition of the crime of aggression. This strategy was eventually put aside and replaced by another, focused not on the definition but on the conditions to exercise the Court jurisdiction. In practical terms, the Court will be very selective and will have greater diffi-

[17] See amendment to the Rome Statute, Kampala, 11 June 2010, available at http://www.iccnow.org/?mod=aggression.

culty in trying crimes of aggression involving the great powers, which emphasizes the multilateralism à la carte of the Statute. On the other hand, the establishing of a broader definition of the crime of aggression allows appropriate trying of reported cases, considering that the crime, as it was typified, allows to place in the Court jurisdiction most aggressive phenomena that are typical of current conflicts and, thus, contribute to the reinforcement of international legal order.

CONCLUSION

The creation of the ICC is a milestone in the history of International Criminal Law because, though its jurisdiction is not universal, as many had wanted, the Statute allows a citizen of a State that is not a State party to be handed in to the Court to be tried.

This limitation of sovereignty through a culture of responsibility is a legal revolution and, above all, it is a threat to the right of great powers to maintain their freedom in terms of strategic action and to pursue their ambitious humanitarian agenda.

In this sense, there is a delay between this structural feature of the Rome Statute and the post-bipolar geopolitics, characterized by a significant increase in armed conflict situations and a permanent involvement of the United States in these armed conflicts.

However, as we have shown throughout the text, the strategy for ICC institutional weakness, which involves great powers but is clearly led by the US in our opinion, does not only change the high innovative character of the Court but also provides an explanation on the nature of the international system and the role of the United States in that system.

In conclusion, we may say that the international system is in rapid change and the great powers cannot (and in most cases, do not want) satisfactorily control the process.

References

ARENDT, H. (1969a). *On Violence*. New York: Harcourt, Brace and World.

AREND, H. (1969b). "Special Supplement Reflections on Violence". In *The New York Review of Books*. 27 Feb 1969. Disponível em http://www.nybooks.com/articles/archives/1969/feb/27/a-special-supplement-reflections-on-violence/?pagination=false&printpage=true.

ARRIBAS, G. F. (2011). "El Compromisso de Kampala sobre el Crimen de Agresión". In W. Brito, J. P. Losa (dir.), Conflitos Armados, Gestão Pós-Conflito e Reconstrução (pp.625-646). Santiago de Compostela: Scientia Iuridica, Andavira Editora .

BASS, G. J. (2002). Stay the Hand of Vengeance: The Politics of War and Tribunals. Princeton: Princeton University Press.

BIRDSALL, A. (2010). 'The "Monster That We Need to Slay"? The United States and the International Criminal Court" '. Global Governance. 16, 451–469

BYERS, M. B.& CHESTERMAN, S. (2003). "Changing the Rules about Rule? Unilateral Humanitarian Intervention and the Future of International Law". In Humanitarian Intervention: Ethical, Legal and Political Dilemmas (pp 177-203). Cambridge: University Press.

CARDOSO, E. (2012). Tribunal Penal Internacional: Conceitos, Realidades e Implicações para o Brasil. Brasília: Fundação Alexandre de Gusmão.

DOWNS, G. W.& IIDA, K. (1994). "Assessing the Theoretical Case Against Collective Security". In G. W. Downs (ed.). *Collective security Beyond the Cold War* (pp.17-42). Ann Arbor: University of Michigan.

ESCARAMEIA, P. (2003). "Prelúdios de uma Nova Ordem Mundial: O Tribunal Penal Internacional". Nação e Defesa. nº104, 11-35.

ESPÍRITO SANTO, A. (2007). "Revolução nos Assuntos Militares e Revolução Militar". In Jornal do Exército Disponível em http://www.revistamilitar.pt/modules/articles/article.php?id=164

FRANCK, T. M. (2003). "Interpretation and Change in the Law of Humanitarian Intervention". In J. L. Holzgrefe & R. O. Keohane (eds.). Humanitarian Intervention: Ethical, Legal and Political Dilemmas (pp.204-231). Cambridge: University Press.

HAMILTON, R. (2011). "Inside Colin Powell's Decision to Declare Genocide in Darfur". In *The Atlantic* Disponível em http://www.theatlantic.com/international/archive/2011/08/inside-colin-powells-decision-to-declare-genocide-in-darfur/243560/?single_page=true

HAWKINS, D. (2008 Sum.-Fall). "Power and Interests at the International Criminal Court". *SAIS Review*, XXVIII, (2),107-119.

JASON, R. (2005). "International Society, the International Criminal Court and American Foreign Policy". *Review of International Studies*. 31, 27-44.

JOHANSEN, R. C. (2006). "The Impact of US Policy Toward the International Criminal Court. Human Rights Quarterly. 28, (2), 301-331.

KRAIN, M. (2005). "International intervention and the Severity of Genocides and Politicides". *International Studies Quarterly*. 49, 363-387.

LECKERC-GAGNÉ & E.,BYERS, M. (2009). "A Question of Intent: The Crime of Aggression and Unilateral Humanitarian Intervention". *Case W. Rest. J. Int'l L.*.41, 379-390.

LINDBERG, T. (2010 Feb./Mar). "A Way Forward with the ICC". *Policy Review,*15-31.

MACKEOD, C. (2010)."Towards a Philosophical Account of Crimes Against Humanity". *EJIL*. 21: 2, 281-302.

MAY, L. ET AL (2006). "Crimes Against Humanity/Response to Crimes Against Humanity". Ethics and International Affairs. 20, (3),349-382.

MEDDI, V. J. (2008). "The ICC and the Crime of Aggression. A Need to Reconcile the Prerrogatives of the SC, the ICC and the ICJ". *International Criminal Law Review*. 8, 655-686.

NERSESSIAN, D. L. (2007). "Comparative Approaches to Punishing Hate: Intersection of Genocide and Crimes Against Humanity". *STAN. J.INT'LL*. 43, 221-260.

RALPH, J. (2005). "International Society, the International Criminal Court and American Foreign Policy". *Review of International Studies*. 31, 27-44.

RODMAN, K. A. (2009). "Is Peace in the Interest of Justice? The Case for Broad Prosecutorial Discretion at the ICC". *Leiden Journal of International Law*. 22,99-126.

ROSS, J. (2007). "Black Letter Abuse: the US Legal Response to Torture since 9/11". IRRC. 89, 867.

RUNDELL, J. (2012). "Violence, Cruelty, Power: Reflections on Heteronomy". Cosmos and History: The Journal of Natural and Social Philosophy. 8, (2), 3-20.

SARAIVA, M. F. (2001). Governance, um Caminho para a Segurança Colectiva. Lisboa: ISCSP.

SARAIVA, M. F. (2009). Poder Militar e Agressão Armada em Ambiente Pós-Militar: Análise Jurídico-Estratégica das "Guerras High Tech" e das "Novas Guerras" nos Discursos e Práticas sobre Agressão e Legítima Defesa. (Tese de Doutoramento não editada) Lisboa: ISCSP.

SCHMITT, C. (2007, 1932). *The Concept of the Political. (*expanded edition). Chicago: University of Chicago Press.

TRAHAN, J. (2011). "The Rome Statute's Amendment on the Crime of Aggression. Negotiations at the Kampala Review Conference". *International Criminal Law Review.* 11, 49-104.

ZAWATI, H. M. (2007). "Impunity or Immunity: Wartime Male Rape and Sexual Torture as a Crime Against Humanity". Torture. 17(1), 27-47.

The stormy waters of the International Criminal Court: Universal Fight against Impunity or Liberal Universalization?

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INTRODUCTION

The Rome Statute which creates the International Criminal Court[2] starts with a very meaningful statement by which States Parties to the Statute[3] affirm that they are "conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and [are] concerned that this delicate mosaic may be shattered at any time"[4]. The preamble to the Rome Statute also appeals to "the conscience of humanity" and to "the peace, security and well-being of the world"[5]. These lines evidence the universalistic perspective of an ethics common to all humanity which must be protected, disseminated and fostered. It is in this spirit that the President of the International Criminal Court, the South Korean judge Sang-Hyun Song, refers to the Court as a "moral imperative for humankind" (2013,p 4).

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[1] Paper written within the research project "International Criminal Justice: A Dialog between Two Cultures" currently underway in Observatório das Relações Exteriores – Observare / UAL, coordinated by Mateus Kowalski and Patrícia Galvão Teles. The paper represents the personal opinion of the author and cannot be understood in any way as the official position of the Ministry of Foreign Affairs of Portugal.

[2] Formally it is designate Statute of the International Criminal Court, adopted in Rome on 17 July 1998.

[3] Currently, 122 States are Parties to the Rome Statute.

[4] See paragraph 1 of the preamble of the Rome Statute.

[5] See paragraphs 2 and 3 of the preamble of the Rome Statute.

The universalistic dimension of the International Criminal Court's (ICC) nature and function is, therefore, clear. Yet, this dimension must be thoroughly defined. We must ask "what universalism"? A rational approach to international social relations is different from an ethical one. The rational approach is based on a unique rational process and its prioritization – a universal process which can be extended to all human beings. Therefore, it would be possible to identify a wide range of interests and objectives common to the global community and usually universal and self-evident when deriving from a correct deductive rational process which leads to unique and universal truths. An ethical approach, on the other hand, resorts to a more subjective analysis based on a minimum common ethical ground reached through dialog: diversity, plurality and locality are considered more relevant. While the rational approach may lead to universalization of localized specific moral models (e.g. the liberal Western model) promoting its hegemony, the ethical approach promotes diversity through considering non-reducible differences and common human phenomena in which only a minimal common ethics is universal. This explains the relevance of understanding which of these approaches is that of the ICC.

This paper argues that the reply to this structural issue is crucial to understand if the ICC is essentially a hegemonic tool to expand the predominant Western liberal model or rather a mechanism to fight impunity regarding diversity and rooted on an axiological concern. If the former, the ICC must become irrelevant and we must be glad that it has been rarely successful[6]. If the latter, the ICC must be preserved and improved so as to make it one of the guardians of international criminal justice in the fight against impunity and in the protection and promotion of human being's fundamental rights.

Therefore, this paper will firstly analyze the two universalistic approaches – the rational and the ethical. Secondly, we aim to integrate the ICC in the analysis considering the Court's nature in the international legal order as well as some of the institution's features such as, possible selectivity, its relation with the United Nations Security Council, its legal-criminal design as well as its complementarity.

The universal fight against impunity does not imply universalization of a western liberal model and an artificial and hegemonic blurring of what is socially and axiologically different. The ICC is immersed in these stormy waters.

[6] In the past 12 years since the ICC was founded, it has only issued sentencing on the case Prosecutor v. Thomas Lubanga Dyilo (case ICC-01/04-01/06) e *Prosecutor v. Germain Katanga* (case **ICC-01/04-01/07**). At this time, both sentences are still subject to appeal.

WHICH UNIVERSALISM?

Rational Universalism and Universal Ethics

Any narrative on universalism will always include a universal ethical-legal dimension. Therefore, we may distinguish two lines of thinking on universalism: that of tradition, which affirms there is universal reasoning common to all human beings; that of post-positivism, which rejects the concept of universal reasoning and whose concept of universality is rather based on the acknowledgment of non-reducible differences from which it derives[7]. This means that universality cannot question these non-reducible differences but is rather guided by the following joint proportions: non-reducible differences and phenomena common to all humanity that require a collective and potentially universal response (e.g. climate change). The issue of knowing whether different social communities are forced to be part of a universal discourse is less important than the debates on the nature of real dialog and its subjective scope (Linklater, 1998).

Universalism is, therefore, 'all that separates us and all that unites us'. The question is, then, 'universalism regarding what'? Tradition answers indicating truths found through reason. Critical theory, introducing the subjective element, advocates universalism based on moral principles that can be operationalized through human being's ability to communicate, including within the framework of an institutional architecture that may be universal. Reason, according to this perspective, is not the only human feature that influences human

[7] The debates on universalism – its defense, refusal or mitigation – derive from different epistemological attitudes. The differences are striking in positivist discourses (also defined as 'tradition' or 'orthodox') and in post-positivist ones, whose criticism to the predominant liberal approaches is at the bases of their narrative. 'Positivism' is the name given to the school of thought that advocates that knowledge of the world is based on experience, observation and verification – a method very similar to that of natural sciences – this providing theoretical thought focused on problem resolution, its bases being supposedly objective and justified by repeatedly registered facts. This is the predominant scientific approach today and the most appealing (because it deals with power at the proclaimed end of history) – in International Law and in International Relations as well – that post-positivists usually designate as 'positivism'. Positivism involves a cartesian separation between mind and matter, between subject and object. The positivist researchers aim that values and interests do not interfere in their observation, reading and analysis of empirical data – neutral objectivity – thus searching for the one solution – the 'truth' – deducted using reason supposedly universal.
On the other hand, post-positivism searches new models that overcome the shortcomings of the positivist approach. Positivists advocate a research model that acknowledges the gap between subject and object; post-positivists, on the other hand, claim that all knowledge is contextual and that subjectivity cannot and should not be banned. The post-positivist approach therefore refuses dichotomies' empiricism (true/false, good/bad, war/peace) and proposes a less naive and more sophisticated general approach, where there are no truths solely guided by reason. All this has led 'tradition' theories being questioned by post-positivist approaches, mainly through critical theory.

thought and action – others should be considered such as social, cultural, political and economic context as well as other personality-related features. Within the framework of post-positivist attitudes, critical theory uses deconstruction of hegemonic discourse, program and action. For this approach, reason-based universalistic perspective may kill diversity and foster hegemony. Therefore, this perspective is cautious in what concerns rules proclaimed as universal which may be nothing more than a means of imposing interests and domination by those more powerful. Universalism could, then, lead to an expanding hegemony based on a national hegemony established by those in power and that would become a pattern to be replicated by others. Cox, when discussing the economic aspect of production relations, defines hegemony as "an order within a world economy with a dominant mode of production which penetrates into all countries and links into other subordinate modes of production" (1993,p 62). Such expansionism has less resistance from peripheral States as if it was a passive revolution.

As Hoffman (1988) indicates, critical theory resists universalism as means of hegemony and rather tries to find a path for a more representative type of universalism. The issue is, therefore, not universalism itself but in how the concept is used by power structures, in particular the ones based on the liberal Western model.

Yet, the issue can have a positive reading: that there is a true common ethical basis which must be acknowledged so that the limits of diversity can be identified and preserved. This common basis exists, therefore, in its own limits which cannot be hegemonically expanded beyond diversity and social plurality. However, plural reality does coexist with universalistic trends regarding the so-called minimal common ethics and cross-cutting issues to all humanity arising in the same historical time. In that regard, Küng states that "for today's pluralistic society, ethical consensus means the necessary agreement in fundamental, ethical standards which [...] can serve as the smallest possible basis for humans living and acting together" (1997,p 97).

Linklater (1998) highly contributes to understanding this, as the author refers that non-ethical concept is only satisfactory if based on systematic exclusion of any member of the human community who can potentially become universal. Universality is neither the essence of Natural Law perspectives nor the teleology of speculative philosophies associated to the Enlightenment. Universality becomes a responsibility to address others, regardless of their race, nationality or other features, in an open dialog on matters regarding their well-being. In fact, there is moral discourse that is cross-culturally valid. Examples of this are the discourses against slavery, genocide or the

prevalence of justice and environmental sustainability even in situations of conflict. We must also find procedures that tend to be universal and allow peaceful living.

A common ethics is visible in legal principles and rights that are present in cultural communities where they are accepted with the possible exception of an individual anomaly. Their denomination, their content, as well as their interpretation and application may vary. Yet these principles' legal and philosophical essence is shared. As Kartashkin declares, "toutes les cultures et civilisations partagent, dans leurs traditions, coutumes, religions et croyances, un ensemble commun de valeurs traditionnelles qui appartiennent à l'humanité dans son ensemble" (2011,p 7). The fact that these ethical principles are crucial to communities justifies the need for those principles to originate at the local level, in a horizontal as well as a vertical bottom-up dialog.

Justice, in its legal and philosophical dimension, is one of the principles of common ethics. International Law aims to apply justice, though it may not do so. Thus, justice precedes Law. Rawls enthusiastically states that "justice is the first virtue of social institutions, as truth is of systems of thought" (1999,p 3). Yet, we must not confuse liberal precedence of the fair over the good (system of values) mentioned by Rawls with precedence of justice over Law. Fairness is defined based on a society's system of values in a given time. The dynamics of justice thus reflect the constant social and cultural development which is not fully reflected in Law – i.e. in legal regulation. Hence, justice is a determining factor in social change via International Law: its dynamics is transferred to the legal international corpus juris, which will only be perfect when in line with the moral or cultural social context it is supposed to protect. From a legal-philosophical point of view, justice corresponds to the demand and to the application of what is fair according to axiological regulatory principles of a specific society.

THE INTERNATIONAL 'MORAL COMMUNITY'

The concept of an international community linked by universal ethics (not to be confused with an international society diplomatically disguised as international 'community') puts in practice the ethically based approach to universalism, what Linklater (1996) describes as 'moral community'. A community that, though subject to change, allows the individual to build his own history and to induce progress in the social system.

Within the context of an international order in a process of globalization, building a 'moral community' may serve as a means to affirm the ethical element in a universal International Law undergoing an institutionalization, socialization and humanization process (Carrillo Salcedo, 1984) and whose potential for change is huge. This process finds echo in the International Law regarding human beings and objectives referred to by Bedjaoui (1991), in Simma's Law of communitarian intention (1994) or in the Humanity Law suggested by Abi-Saab (1991). However, this process – potentially positive – should be carefully conducted and assessed so as to avoid "the return to anarchy under the disguise of community"[8] (Pureza, 2005,p 1180).

Morality is the social glue and must be historically and socially translated in an axiological and legal understanding at a given moment. The issue here is how this can be done without there being a rupture with modernity. Critical theoreticians claim it can be done (Richmond, 2011); post-structuralists say it is not possible (Hawley, 2001). The concept of 'moral community' may help to solve the problem from a plural yet not sectarian perspective; in a rising (plural) perspective rather than from an imposing one (universalism without legitimacy). The issue lies also in determining how legitimacy is possible without a World State arising and simultaneously denying the particularistic perspective that legitimacy only derives from the State. Two possibilities immediately arise: either you trust reformed international organizations (although deep reforms are not feasible in the near future); or international society is kept loose, unstructured and thus legitimacy is given to ethnically and culturally based communities without a State system being again implemented. However, from another perspective, the plural multilevel system may provide yet other solutions.

Within this theoretical context, we must therefore understand what unites plural legal scenarios. Global issues cannot be contained and regulated within State borders. Thus, considering that issues related to shared assets are at stake, regional or global solution must be found. However, that solution may be expressed plurally or asymmetrically (for different starting points) and distributively. This suggests the need for a regulation through directives (principles and objectives). A multi-level approach could make sense here. Far from any World State idea, this would aim to join solidarity responses in one system, considering that the items in that system would meet in contexts of different needs, capacities and identities. Legitimacy must no longer be a prerogative

[8] Translation from the original in Spanish "el regresso a la anarquía bajo el disfraz de la comunidade" (Pureza, 2005,p 1180).

exclusive to the sovereign State. Therefore, and using Habermas's (2008) ideas on this matter, supra-state institutions may provide legitimacy without resorting to the World State concept – which would otherwise be the only means of providing legitimacy at international level. On the other hand, this means accepting that plurality or opposition of legal regimes is the current legal and political platform. The biggest issue may be homogeneity of knowledge, perception and methodology regarding this plurality (Koskenniemi, 2005), which is exactly what critical theory approaches aim to overcome.

Ethical and legal plurality poses several challenges to contemporary International Law, considering that the latter imposes values to local communities which they do not share. The concept of a plural world contends that there are sets of different and unchangeable values; these values may conflict in certain circumstances; the response to these conflicts cannot be assessed as good or bad; at individual and collective levels there are different ways to act according to values and those actions may conflict. Thus, there is not one ideal means of social interaction. Thus a universal public order would become an imposition on the others (and would inevitably impose global values, currently mostly Western liberal values). While the liberal approach fosters respect for moral or religious convictions either through tolerance or by ignoring them, from a post-positivist perspective, respect for those convictions is carried out through compromise (Sandel, 2005). This means paying attention to them, listening to them and challenging them. Respect based on communication does not ensure (and does not aim to achieve) a consensus regarding those convictions. Rather, in the context of a plural society, it is an assumption that allows differences in terms of values, thought and legal regimes to coexist.

Plurality, though, should not mean the denial of universalism. Shaffer says that "the normative vision of legal pluralism rather aims to foster transnational and global legal order out of the plural"[9] (2012,p 673). Universalism evidences the relevance of mechanisms being found to provide common answers regarding common issues. This may even imply the foundation of a universal public order, but only as an exception – better, as a complement – to plurality, which preserves non-reducible differences. As such, a multilevel legal system should be built which, within a plural framework, allows non-hierarchical dialog and non-hegemonic relations among several social contexts

[9] Translation from the original in Portuguese "o global acontece localmente. É preciso fazer com que o local contra-hegemónico também aconteça globalmente" (Sousa Santos, 2001,p 79).

– the moral community. This plural universalistic approach organized in a multilevel system allows for a leveled approach – the opposite of a totalizing approach – dependent on the level of the need for common action. Sousa Santos's statement is here relevant: "global occurs locally. One must make local counter-hegemonic to occur globally as well" (2001,p 79). The most difficult level is the global level because of the risk of universal dissemination of hegemonic power relations. In any case, there are global legal assets, (e.g. the environment, justice or peace), a (universal) common ethics, a (translocal) group ethics and a (local) cultural ethics, all sharing the global level ethics and many sharing translocal ethics. This assumption implies the need for communicative structures for emancipation that clear the risk of hegemony. Organizing pluralism does not imply imposing a homogeneous or even hegemonic universal public order but to provide conditions for political legitimacy to create order and respect pluralism (Delmas-Marty, 2009).

THE ICC AND THE UNIVERSAL PUBLIC ORDER

A Body of Universal Sovereignty

Building and developing a public and global legal order – nowadays dominant in the thinking on the global system – is based on a liberal perspective of universality founded on human reason. The subjective mental process led by the mind of each individual becomes the shared element on which universalism is based. Kant's (2009) ideals of a cosmopolitan Law and a world republic based on reason are at the starting point of universalistic thought regarding predominant public order and influence liberal thinking greatly. An element that characterizes modern universalistic concepts is, therefore, the existence of a universal reason that allows to see reality objectively and identify a single rational perception of the same facts.

Unlike what occurs with conservative and particularistic[10] views of International Law, schools focused on universalism claim that universal public order is possible and advisable, even if not built on reason (Dellavalle, 2010). These

[10] Particularistic concepts advocate that politics is nothing more than a struggle for power, a phenomenon different from and not subject to Law. Considering the need to link internal political process with globalization, particularistic concepts arose to refocus the State as a predominant actor in international space, thus denying the existence of true international order and preserving its sovereign self-sufficiency. On this matter, see, among others, Rabkin (2004), Kagan (2004) or Goldsmith and Posner (2005).

schools share a universal concept of public order with a legal core common to international actors and institutions towards collective actions for universal goals. According to Tomuschat, International Law is a "comprehensive blueprint for social life" (1999,p 42).

The mechanisms used to organize global reality go far beyond State in its individual perspective. For universalism, International Law must, therefore, comprehensively regulate international society in terms of human actions within the jurisdiction of the State and regarding its actors, namely, the individual. The development of International Law and consequently the reinforcement of universal public order are viewed as boosters of civilizations because it allows regulation of global phenomena depending on universal principles and values defined by reason.

Incorporating in global public order natural and inalienable rights of the individual is an example of this: an individual's situation is no longer viewed as limited to State jurisdiction but becomes relevant to the global community. The development of a human rights system represents the application of a classic principle in State constitution at global level – promotion and protection of fundamental rights of individuals within a community. Therefore, it is not a mere constitutionalization process of an international human rights system – and subsequent laying down of international constitutional rights – but this process also promotes global constitutionalism (Gardbaum, 2008), an apologetic version of rational objective universalism (Kowalski, 2012). This conclusion derives from the predominant liberal perspective on human rights focus on the universal individual. However, we must stress that other perspectives on human rights may not lead to the same conclusion, namely those who believe the individual can only be seen within his or her social and cultural context. Therefore, the approach that focuses on collective rights and peoples' rights questions the liberal assumption of human universal rights claiming that certain groups (among others, religious, social and ethnic groups) may invoke specific rights or specific interpretations of those rights, which then do not apply universally but to that group alone (Jones, 1999). On the other hand, other approaches question the validity of 'Western' universalized human rights in other social and cultural contexts (Freeman, 2011).

International judicialization is a feature of liberal approaches to universal legal order (Kingsbury, 2012). The ICC is evidently part of this universalistic liberal concept (Kowalski, 2011). In the context of universal public order, from an institutional point of view, 'sovereign bodies' tend to be created. The ICC criminal action illustrates it assuming typically State functions at

the level of global governance. Criminal prosecution is a power typical of a State's sovereignty. The creation of the ICC represents a break: criminal prosecution can now be exercised in an order beyond the State when serious crimes that affect the international community as a whole are involved. This international criminal power does not require State authorization. The investigation, the arrest warrant or the trial may be initiated by a Court decision and they may even be against the will of those States that have primary jurisdiction on the case at hand. This occurs in situations where the ICC Prosecutor or the United Nations Security Council, pursuant to article 13 of the Rome Statute, have established jurisdiction; this may even imply taking on jurisdiction regarding States that are not Parties to the Statute.

The rational universalistic approach to universal public order is not without concerns or challenges. Zolo (1997) identifies in his thesis on 'legal cosmopolitanism' a set of assumptions that, according to the author, pose a series of difficulties and have several shortcomings: firstly, the definition of the primacy of International Law and of formal equality of States is only apparent because, in practical terms, the differences between rich and poor countries necessarily imply a hierarchy in international public order and inequality among individuals; secondly, trusting a centralized international jurisdictional system is not compatible with the fact that jurisdictional decisions are highly dependent on a small number of powerful States which have excluded themselves from international jurisdiction as in an absolutist system; thirdly, it rejects contemporary International Law ability to eradicate war; finally, the individual is a subject of International Law with limited capacity because there are no jurisdictional mechanisms at the international level that ensure them acknowledged human rights. These difficulties and shortcomings evidence the weaknesses of the liberal universalistic approach.

In fact, in the current framework of international social relations, the project of universal public order, present also in 'sovereignty bodies' such as the ICC, runs the risk of fostering power dynamics which already influence more or less institutionalized, more or less informal mechanisms in international social relations. In this case, the idea to limit power and create an international dynamics based on Law may be – more or less naively – coopted by other predominant power interactions unduly pursued in the name of justice. It would become a Leviathan under a veil of apparent legitimacy provided by International Law.

A UNIVERSALIZING LIBERAL DISCOURSE

Currently, hard criticism has been made against the ICC regarding its fundaments which to a certain extent reflects a concern regarding the imposition of 'Western' liberal ethical-normative solutions (Kowalski, 2011). Two major types of criticism are possible here: one regarding the selectivity of situations for assessment by the ICC, in which the 'liberal West' is always the prosecutor and never the defendant; another regarding the relation between the (prevailing) political and the legal domains.

In terms of the first type of criticism, a serious accusation heard mostly at political and diplomatic levels has given origin to some hostility by the African States towards the ICC, in what regards a factual aspect: up to the present all eight situations submitted for ICC assessment are related to Africa[11]. This evidences selectivity in the Court's action. The conclusion, based on undeniable facts, has fostered the accusation that the ICC is biased in establishing its jurisdiction, and has given rise to at least implicit accusations of neo-colonialism[12] [13]. The argument is that the accusation and the issuing of arrest warrants regarding African leaders poses greater threat to international peace and security, thus implicitly claiming this is a conflict between peace and justice.

The reasons behind this criticism are essentially political. Discourse based on liberal universalism responds through strict observance of the ICC Statute, which includes thirty-four African States, making this the most represented group. Thus, if the Court opened criminal procedures on the situations in those Africans States, that is due to either the States reporting the situation – which is the most common reason[14] – or because there was strong evidence of serious crimes of relevance to the international community as a whole and the States with primary jurisdiction did not want or could not

[11] Situations in Uganda, in the Democratic Republic of Congo, in the Central African Republic, in Sudan (Darfur), in Kenya, in Libya, in the Ivory Coast and in Mali.

[12] These accusations have been heard from several African States that, more or less united in a common claim, mostly through the African Union. For example, after an arrest warrant by the ICC against Omar Al Bashir there was harsh reaction against the Court's attempt to try African leaders, namely by States that are not Parties of the ICC Statute. Another example is the reaction by the African Union in 2011 after an arrest warrant was issued by the ICC against Libyan leader Muammar Gaddafi, which asked its Member-States to ignore the referred warrant.

[13] As if summarizing the concerns of several African States, the then President of the African Union Commission, Jean Ping, referred that the ICC discriminates because it is only concerned with crimes committed in Africa and ignores those committed by the "Western powers" in Iraq, Afghanistan and Pakistan – see Associated Press "African Union calls on Member States to Disregard ICC Arrest Warrant Against Libya's Gadhafi", 2 July 2011.

[14] The situations in Uganda, the Democratic Republic of Congo, the Central African Republic, the Ivory Coast and Mali.

able try the case. Thus, more than the relevance of the cases under assessment being related to situations in Africa, what is at stake here is rather the injustice regarding the fact that some situations remaining unpunished[15].

The second type of criticism focuses on the relation between jurisdictional action and politics, as a perversion of the function and independence of the ICC. Several non-governmental human rights organizations have denounced 'promiscuity' between jurisdictional action and politics with negative effects in international criminal justice (Bourdon, 2000). Criticism is evident on the fact that ICC action is excessively dependent on the Security Council and therefore that the attribution of jurisdiction it is largely determined by political criteria rather than legal criteria. This is a concern related to the Statute. In fact, the power of the Security Council on ICC action is laid down in the Court's Statute, namely in articles 13 and 16.

Article 13 b) lays down that the Security Council may submit a situation to the Prosecutor in which there is evidence of serious crimes having been committed and which are under the ICC competence. Therefore, of the eight situations under analysis, two were submitted by the Security Council[16]. This power awarded to the Security Council has received much criticism since the preparatory work on the ICC Statute: this includes criticism on the fact that the Court thus loses independence and credibility to those claiming that the Security Council has no competence in international criminal law under the Charter of the United Nations or even others stating that this leads to selectivity in establishing jurisdiction (Yee, 1999).

This criticism is based on the fact that submission of cases to the ICC is dependent on political decision criteria different than admission criteria typical of a jurisdictional body as the ICC. Moreover, of the five permanent members of the United Nations Security Council three are not Parties in the Rome Statute: China, the United States of America, and Russia. Considering that

[15] The existence of armed conflict is a good indicator that serious internationally relevant crimes may occur. Therefore, in 2012 there were 32 armed conflicts, most of which in Africa, Asia and the Middle East; six of these 32 were war-like (over 1000 casualties a year). Afghanistan, Yemen, Pakistan, Syria, Somalia and Sudan (Themnér e Wallensteen, 2013). Noteworthy is also the fact the Office of the Prosecutor of the ICC is preliminarily analyzing the following situations: Afghanistan, Georgia, Guinea, Honduras, North Korea and Nigeria. These situations under preliminary assessment include facts allegedly committed by official and pro-governmental forces, opposition forces and foreign forces (OTP, 2013). Moreover, of the five permanent members of the United Nations Security Council three are not Parties to the Rome Statute: China, the United States of America, and Russia. According to 2012 data, these three States are exactly those which have the highest annual expenditure on the military (Perlo-Freeman et al., 2012).

[16] The situations in Sudan (Darfur) and in Libya.

they have veto power[17], any situation that takes place within their territory or involves their nationals would certainly never be submitted to the Court via the Security Council. This reinforces the idea that the Court jurisdiction may be selective, and in accordance with the dynamics of the Security Council.

The power of the Security Council laid down in article 16 of the Statute is, however, the one that has been pointed out as representing the most serious political interference. According to that article, the Security Council may decide to suspend an ongoing ICC criminal inquiry or procedure for a renewable period of twelve months. The Security Council has even approved resolutions awarding immunity to people involved in peace operations at the service of a State that is not a Party to the ICC Statute[18]. We may even argue that this is an amendment to the Rome Statue by the Security Council (Jain, 2005). This, on the one hand, clashes with the objective of the fight against impunity on serious international crimes and, on the other hand, it evidences the degree of interference that the Security Council is willing to undertake[19].

In the case of the crime of aggression, the role of the Security Council is even more relevant. The conference to revise the ICC Statute, which was held in Kampala in 2010, introduced the crime of aggression – not initially defined in the Statute – laying down that the Court's jurisdiction would depend on previous establishment by the Security Council that an act of aggression has been committed[20].

Underlying this criticism of the role of the Security Council towards the ICC is a concern with the performance of functions by an executive body that is focused on the restricted circle of its permanent members and which has no real political or jurisdictional control mechanisms (Kowalski, 2010). The liberal discourse does not provide any other argument for this concern except that the intervention of the Security Council in the ICC was the result of a necessary consensus to create the Court.

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[17] See articles 27, n. º 3 of the Charter of the United Nations Charter and 13 b) of the ICC Statute.

[18] See, for example, Resolutions S/RES/1422, of 12 July 2002, and S/RES/1487, of 12 June 2003.

[19] The ICC is analyzing the post-electoral violence in Kenya in 2007-2008 in which several crimes against humanity were allegedly committed. Among those accused are Uhuru Kenyatta and William Ruto, President and Vice-President of Kenya, respectively. Kenya, upon a decision by the African Union, requested that the Security Council delayed any procedure by the ICC regarding the situation in Kenya for 12 months, under article 16 of the ICC Statute. In a meeting on 15 November 2013, the Security Council decided not to delay by one vote.

[20] See UN Depository Notification C.N.651.2010.TREATIES-8, 29 November 2010. The Court may exercise jurisdiction if the Security Council does not pronounce any decision within six months after being informed by the Prosecutor of intention to open inquiry regarding an act of aggression.

ELEMENTS OF PLURALISM

The Rome Statute reflects an understanding that, at least from a formalistic point of view, is one that puts at center the protection and promotion of a minimal common ethics for humanity. The mission to fight impunity and promote justice is awarded to the ICC by the Statute from an *ultima ratio* perspective and aiming to ensure diversity of legal systems and of participating social actors.

Firstly, there is a universal ethical and legal consensus on the crimes under the jurisdiction of the ICC, considered unacceptable according to any community's ethical code, genocide[21], crimes against humanity[22] and crimes of war[23] [24]. These are the crimes under ICC jurisdiction that the Rome Statute describes as "the most serious crimes of concern to the international community as a whole"[25]. This is also why the Rome Statute rejects any immunity regime that prevents the ICC from exercising jurisdiction regarding these crimes[26]. This is an exception (that is not unanimous) when compared to other international criminal immunity regimes[27].

The last legitimizing source of the legal criminal order must be searched in the social system, in its axiological order(s) (Figueiredo Dias, 1996). As Saraiva refers on the crimes typified in the Rome Statute, "violence and cruelty are universal and timeless" (2013: 48). The list of crimes under the ICC jurisdiction does, therefore, derive from consensus on minimal common ethics, allowing for identification of 'interests of the global community' which legitimize universal action to protect them[28] – dignity, fundamental rights and justice for the individual and his or her community.

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[21] This corresponds to the actions aimed at destroying, in whole or in part, a national, ethnical, racial or religious group (article 6 of the Rome Statute).

[22] This corresponds to the crimes committed within a widespread or systematic attack against any civilian population, which results in a violation of International Law on Human Rights (article 7 of the Rome Statute).

[23] This corresponds to violations of Humanitarian International Law, in particular when committed as part of a plan or policy or as part of a large scale commission of such acts (article 8 of the Rome Statute).

[24] Although the crime of aggression is included in article 5 of the Rome Statute, its definition and inclusion in the ICC jurisdiction has not been concluded. A definition and the jurisdiction criteria for the crime of aggression were reached in the 2010 Kampala conference to revise the Statute. Those amendments are not yet in force.

[25] See paragraph 9 of the preamble to the Rome Statute.

[26] Article 27 of the Rome Statute.

[27] For example, the regime laid down in the Convention on Diplomatic Relations adopted in Vienna, on 18 April 1961.

[28] For example, the International Court of Justice, in its decision on the Reserves towards the Convention on Genocide, stated that the Convention on Genocide expressed community's common interest rather than States' individual interests (ICJ, 1951).

Secondly, the Rome Statute claims the precedence of all States to exercise their criminal jurisdiction on those responsible for international crimes. This means that the ICC is a last resort court that only exercises jurisdiction subsidiarily.

Complementarity is thus a relevant principle of the ICC jurisdiction, which means that, pursuant to article 1 of the Rome Statute, the ICC complements national criminal jurisdictions – which have the main competence – and exercises its jurisdiction only when these choose not to or have no ability to try[29] [30]. This subsidiary position regarding national jurisdictions aims also to foster States to open criminal procedures in case of extremely serious crimes (Kleffner, 2008). Complementariness of the ICC ensures its subsidiarity to local jurisdictional systems and, therefore, its non-hegemonic position.

Thirdly, we must not neglect the fact that there is a concern regarding representation of different legal and judicial systems in the ICC. In fact, one of the criteria for electing the 18 Court judges is the need to ensure that the main legal systems in the world are represented there[31]. However, it is also true that this is a criminal jurisdictional system essentially accusatory, closer to the Anglo-Saxon judicial system. Other criteria, such as equitable geographic representation[32] and equitable representation of female and male judges[33] evidence the diversity in terms of perspectives within the Court.

Organizations and individuals have made a mark in the Court and contributed to the ICC more independent functioning concerning simplistic power considerations and State political interests. Referring to the creation of the ICC, it is noteworthy that in the diplomatic conference which adopted in 1998 the Rome Statute, two hundred and thirty-seven non-governmental organizations from all over the world were accredited[34]. Those organizations had a direct influence in the writing of some of the Statute preamble through their participation in the conference (Struett, 2008). Moreover, non-governmental organizations were always in close contact with serious human rights' violations, documenting and denouncing those situations. Their contribution may be decisive for reporting and investigating some cases (HRF, 2004).

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[29] The principle of complementarity is opposed to the primacy that ad hoc courts for the former Yugoslavia and for Rwanda have towards national criminal jurisdictions.

[30] We must also stress that "not being able to try" which can determine complementary intervention by the ICC includes cases in which the suspects have been covered by amnesty (Cassese, 2008).

[31] Article 36, paragraph 8 i) of the Rome Statute.

[32] Article 36, paragraph 8 ii) of the Rome Statute.

[33] Article 36, paragraph 8 iii) of the Rome Statute.

[34] See UN Document A/CONF.183/INF/3, 5 June 1998.

CONCLUSION

Focusing on the organization ethics of international society necessarily implies criticizing and overcoming rational universalism. Building the universal based on a purely rational process is an epistemological error – it neglects the subjective dimension that is typical of any human phenomenon. This error easily leads to a dispute on who has the competence to define true axioms. A dispute that, in turn, is inevitably won by those (States, organizations, universities, individuals, companies, networks, etc.) with power to export their vision and impose their interests, more or less coercively. The term is 'hegemony'. Hegemony not only in ethical terms, but also as a moral divide which sees peripheries as the only pariahs and the developed center as the moral beacon which behaves in the correct manner.

Thus, basing concerted international action on minimal common ethics – a rather more complex and indeterminate process, not very immediate-solution-friendly (these being potentially simplistic solutions) frequently required in everyday life – is a counter-hegemonic antidote. The concept is based on two assumptions: non-reducible differences; common phenomena that require collective potentially universal response dependent on the scope of that phenomenon. Universalism respects a common ethics that may be operationalized through human communication ability, including within the framework of a multilevel architecture that includes a universal level. At its core it is an ethical pluralist system with pluralist traits regarding a common ethics – socially identified and not hegemonically imposed or disseminated – and phenomena common to all humanity at a given time: human being's spirit of cooperation and solidarity may imply, in certain circumstances, a universal common action. The fight against impunity when serious internationally relevant crimes are at stake, such as genocide, crimes against humanity or crimes of war, effectively requires criminal action at universal level. An action that is based on the acknowledgment that human dignity and justice are part of the minimal common ethics.

The ICC is immersed in stormy waters where it is not always possible to separate a universalizing liberal approach from an ethical universal approach. On the one hand, its quality as a *quasi* constitutional body that easily becomes part of the 'universal legal order', as well as its excessive dependency regarding the United Nations Security Council and other powers (whose cooperation it depends on) integrate the Court in a rational universal liberal approach. The still few successful cases have contributed to the distrust regarding the Court ever fulfilling its role or even to the idea that this was created as a

means of soothing consciences but allowing gaps that ensure impunity of the most powerful. On the other hand, the order of fundamental and (apparently) universally shared values visible in the typified crimes, the fact that it is a last resort court or even the search for guaranteeing that diversification of legal traditions and actors is maintained, all include the ICC in an approach closer to ethical universalism.

Now, going back to our initial question, whether we can claim that the ICC – even if partially and at times serving as a tool for hegemony – is essentially defined by the universalization of the fight against impunity by reference to a minimal common ethics. Universal application of certain values and principles can be positive. However, for it to have legitimacy beyond a political and economic hegemony apparently ethical, it must be based on other paradigms. The ICC must be seen as a (good) path towards the defense and promotion of human dignity and justice, which will always require caution against its instrumentalization.

References

ABI-SAAB, G. (1991). «'Humanité' et 'Communauté Internationale' dans la Dialectique du Droit International». In *Humanité et Droit International: Mélanges offerts à René-Jean Dupuy* (pp 1-12). Paris: Pedone.

BEDJAOUI, M. (1991). *Droit International Public: Bilan et Perspectives*. Paris: Pedone.

BOURDON, W. (2000). *La Cour Pénale Internationale: Le Statut de Rome*. Paris: Éditions du Seuil.

CARRILLO SALCEDO, J. (1984). E*l Derecho Internacional en un Mundo en Cambio*. Madrid: Tecnos.

CASSESE, A. (2008). *International Criminal Law*. Oxford: Oxford University Press.

COX, R. (1993). "Gramsci, Hegemony and International Relations: An Essay in Method". In G., Stephen (ed.) *Gramsci, Historical Materialism and International Relations* (pp 46-66). Cambridge: Cambridge University Press.

DELMAS-MARTY, M. (2009). *Ordering Pluralism: A Conceptual Framework for Understanding the Transnational Legal Order*. Oxford: Hart Publishing.

FIGUEIREDO DIAS, J. DE (1996). *Direito Penal: Questões Fundamentais; A Doutrina Geral do Crime* [ed. policopiada]. Coimbra: Faculdade de Direito da Universidade de Coimbra.

GOLDSMITH, J., POSNER, E. (2005). *The Limits of International Law*. Oxford: Oxford University Press.

HABERMAS, J. (2008). "A Political Constitution for the Pluralist World Society?". In H., J. (ed.) *Between Naturalism and Religion* (pp 312-352). Cambridge: Polity Press.

HAWLEY, J. (2001). *Encyclopedia of Postcolonial Studies*. Westport: Greenwood Press.

HOFFMAN, M. (1988). "Conversations on Critical Theory". *Millennium: Journal of International Studies*. 17,(1), 91-95.

HRF: HUMAN RIGHTS FIRST (2004). "The Role of Human Rights NGOs in Relation to ICC Investigations". In *Human Rights First*. Available at www.amicc.org/docs/Human%20Rights%20First%20NGO_Role_Discussion_Paper.pdf.

ICJ: INTERNATIONAL COURT OF JUSTICE (1951). Reservations to the Convention on Genocide – Advisory Opinion of 28 May 1951. *International Court of Justice Reports*,15-69.

JAIN, N. (2005). "A Separate Law for Peacekeepers: The Clash Between the Security Council and the International Criminal Court". *European Journal of International Law*. 16,(2), 239-254.

LINKLATER, A. (1996). "The Achievements of Critical Theory". In Smith, Steve et al. (eds.), *International Theory: Positivism and Beyond* (pp279-298). Cambridge: Cambridge University Press.

LINKLATER, A. (1998). *The Transformation of Political Community: Ethical Foundations of the Post-Westphalian Era*. Columbia: University of South Carolina Press.

KAGAN, R. (2004). "America's Crisis of Legitimacy". *Foreign Affairs*. 83,(2), 65-87.

KARTASHKIN, V. (2011). «Étude Préliminaire de la Façon dont une Meilleure Compréhension des Valeurs Traditionnelles de l'Humanité peut Contribuer à la Promotion des Droits de l'Homme et des Libertés Fondamentales». *United Nations General Assembly Document A/HRC/AC/8/4* of 12 December 2011.

KLEFFNER, J. (2008). *Complementarity in the Rome Statute and National Criminal Jurisdictions*. Oxford: Oxford University Press.

KINGSBURY, B. (2012). "International Courts: Uneven Judicialisation in Global Order". In *J.,Crawford & M.,Koskenniemi (eds.), The Cambridge Companion to International Law*(pp 203-227). Cambridge: Cambridge University Press.

KOSKENNIEMI, M. (2005). "Global Legal Pluralism: Multiple Regimes and Multiple Modes of Thought". In *University of Helsinki*. Available atwww.helsinki.fi/eci/Publications/Koskenniemi/MKPluralism-Harvard-05d[1].pdf.

KOWALSKI, M. (2010). "O Conselho de Segurança das Nações Unidas: o Grande Leviatã". *Negócios Estrangeiros*. 18, 159-184.

KOWALSKI, M. (2011). "O Tribunal Penal Internacional: Reflexões para um Teste de Resistência aos seus Fundamentos". *JANUS.NET: e-Journal of International Relations*. 2,(2),119-134.

KOWALSKI, M. (2012). "A 'Ordem Pública Universal' como o Fim da História? Universalização e Dilemas na Codificação e Desenvolvimento do Direito Internacional". *Boletim da Faculdade de Direito da Universidade de Coimbra*. 88, (2), 857-880.

KÜNG, H. (1997). *A Global Ethics for Politics and Economics*. Oxford: Oxford University Press.

OTP: OFFICE OF THE PROSECUTOR (2013). "Report on Preliminary Examination Activities 2013". In *International Criminal Court*. Available at www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/OTP%20Preliminary%20Examinations/OTP%20-%20Report%20%20Preliminary%20Examination%20Activities%202013.PDF.

PERLO-FREEMAN, S. ET AL. (2012). "Trends in Military Expenditure, 2012". In *Stockholm International Peace Research Institute*. Available at http://books.sipri.org/files/FS/SIPRIFS1304.pdf.

PUREZA, J. M. (2005). "Encrucijadas Teóricas del Derecho Internacional en la Transición Paradigmática". In E. Vera, A. Carrión (eds.), *Soberanía del Estado y Derecho Internacional: Homenaje al Profesor Juan Antonio Carrillo Salcedo* (pp 1169-1181). Sevilla: Secretariado de Publicaciones de la Universidad de Sevilla.

RABKIN, J. (2004). *The Case for Sovereignty: Why the World should Welcome American Independence*. Washington: American Enterprise Institute.

RICHMOND, O. (2011). *A Post-Liberal Peace*. Abingdon: Routledge.

SANDEL, M. (2005). *O Liberalismo e os Limites da Justiça*. Lisboa: Fundação Calouste Gulbenkian.

SARAIVA, F. (2013). "As Violências (Crimes) Graves de Relevância para a Comunidade Internacional". *JANUS.NET e-journal of International Relations*. 4,(2), 39-63.

SHAFFER, G. (2012). "International Law and Global Public Goods in a Legal Pluralist World". *European Journal of International Law*. 23,(3), 669-693.

SIMMA, B. (1994). "From Bilateralism to Community Interest in International Law". In *Recueil des Cours de l'Académie de Droit International de la Haye* (vol. 250 – 1994 IV) (217-384). The Hague: Martinus Nijhoff Publishers.

SONG, S.-H. (2013). "Keynote remarks at Human Rights Council side event 'The International Criminal Court after 15 Years: Prospects for the Future'". In *International Criminal Court*. Available atwww.icc-cpi.int/iccdocs/presidency/130910-President-Speech-Eng.pdf.

SOUSA SANTOS, B. (2001). "Os Processos de Globalização". In S. S, Boaventura de (ed.), *Globalização: Fatalidade ou Utopia?* (31-106). Porto: Afrontamento.

STRUETT, M. (2008). *The Politics of Constructing the International Criminal Court: NGOs, Discourse and Agency*. New York: Palgrave Macmillan.

THEMNÉR, L. & WALLENSTEEN, P. (2013). "Armed Conflicts, 1946–2012". *Journal of Peace Research*. 50(4), 509-521.

YEE, L. (1999). "The International Criminal Court and the Security Council: Articles 13(b) and 16". In R. Lee (ed.) *The International Criminal Court: The Making of the Rome Statute*(143-152). The Hague: Kluwer Law International.

ZOLO, D. (1997). *Cosmopolis: Prospects for World Government*. Cambridge: Polity.

The International Criminal Court and the evolution of the idea of combating impunity: an assessment 15 years after the Rome Conference

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The International Criminal Court and the evolution of the idea of combating impunity: an assessment 15 years after the Rome Conference

INTRODUCTION

The signing of the Statute of the International Criminal Court (ICC)[1] took place in Rome on 17 July 1998 and it entered into force on 1 July 2002. There are now 122 States part of this Statute, which corresponds to approximately two-thirds of the members of the international community. Specifically, there are 34 States from Africa, 27 from Latin America and the Caribbean, 25 from Western Europe and Others Group, 18 from Eastern Europe and 18 from Asia.

The International Criminal Court is currently adjudicating approximately twenty cases in eight different countries: Uganda, Democratic Republic of Congo, Sudan/Darfur, Central African Republic, Kenya, Libya, Ivory Coast and Mali. The Democratic Republic of Congo, Uganda, Central African Republic and Mali situations were submitted by the respective States. The UN Security Council has submitted two: Darfur and Libya. The final two were the result of the powers of the Prosecutor to investigate *proprio motu*: Kenya and the Ivory Coast.

The ICC is the first permanent international criminal court with jurisdiction to try those responsible for the most serious principal international crimes:

[1] For detailed information on the ICC, its cases, organs, etc., see: www.icc-cpi.int

aggression[2], genocide, crimes against humanity and war crimes. Today, it is the main forum for international criminal justice, although *ad hoc* tribunals and the universal jurisdiction remain in existence.

The Statute of the ICC is, without a doubt, one of the principal treaties of the post-cold war period. International law received popular support at the time of the Statute, which was at the center of the political discourse, particularly in response to the most serious atrocities since World War II, such as Rwanda and the Former Yugoslavia, celebrating now the 20th anniversary since these cases justified the creation of *ad hoc* tribunals.

During the genesis and early years of the ICC, fighting impunity was a constant challenge, regarding the prevention of atrocities and their repression. Yet, how has the idea of fighting impunity evolved over the last 15 years and what are the main challenges facing the ICC today?

If the creation of the ICC was an enormous (and for some an unexpected) success, international criminal justice is currently under pressure. Expectations were high and thus generating high expectations which may explain the frustration with the fact that the Court, disposing of a substantial budget[3], has taken ten years for the first conviction[4], especially at a time of global economic crisis and austerity measures.

Nevertheless, the major challenges, besides the delay of justice or the financial burden of the institution, are political in nature. The fact that the ICC focuses mainly on cases involving African states arouses criticism of selectivity. Moreover, in the absence of full international ratification there are always "*double standards*" in the struggle against impunity, even though this can be remedied – but only in part – by the UN Security Council since the "P5" will always be "safe", given their power of veto).

Likewise, the lack of adoption of national legislation criminalizing international crimes undermines the ICC system, which is based on the principle of complementarity. Non-cooperation and lack of Court custody of many of the defendants, particularly from Uganda and Sudan, weaken the reputation and credibility of the Court.

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[2] Despite the amendments adopted at the Review Conference in Kampala in 2010, the definition of the crime of aggression and the conditions for the exercise of jurisdiction have not yet entered into force.

[3] Approximately 120 million Euros per year.

[4] Conviction, in 2012, of Thomas Lubanga Dyilo, sentenced to 14 yrs. of prison for recruitment of child soldiers during the Democratic Republic of Congo conflict. The second sentence of the ICC relates to the same crime, in the case of Germain Katanga. The conviction of March of 2014 is still subject of appeal.

On the other hand, the fact that the Court is called to exercise its jurisdiction in some cases pending conflict resolution, and that Heads of State in office are the subject to criminal proceedings, invigorates the debate on "peace" and "justice", and which of these objectives should be promoted and achieved first.

Therefore, we can group two main challenges around the following themes: a) Universality, Complementarity and Cooperation; and b) Peace vs. Justice or Peace and Justice.

The Kenyan case and recent issues raised by the African Union, climaxing during the last Assembly of States Parties in the autumn of 2013, also calls for reflection. Still unresolved, these tensions may leave a mark in the fight against impunity.

CURRENT CHALLENGES FACING THE ICC

a) Universality, Complementarity and Cooperation

Universality[5]

Although based on classical international law, an international treaty like the Rome Statute, whose ratification or accession is a sovereign and voluntary decision of states, is not akin to other multilateral agreements. Like the Charter of the United Nations or major treaties on human rights and international humanitarian law, the Statute aspires to universality. To this end, a campaign for universal ratification is consistently promoted (on the part of some member States, the European Union and NGOs). This is likewise echoed in resolutions adopted annually by the Assembly of States Parties (ASP) of the ICC[6], the political body where the State Parties convene, as well as observer States. The ASP meets at least once annually and is responsible for ICC management and legislation.

Ideally, the ICC would have jurisdiction to try the most serious crimes committed in each country, but during the first decade, attention was directed toward conflicts in African countries. This is explained by three facts: atrocities were committed in several States that are not party to the Statute (still approxi-

[5] See, e.g., X. Philippe, "The principles of Universal Jurisdiction and Complementarity: How do the two principles intermesh?

[6] See the most recent Resolution ICC /12/Res. 8, November 27, 2013.

mately a third of the international community), referral according to the action of the Security Council (which refereed only the cases of Sudan[7] and Libya[8]), and that half of the cases were submitted by States themselves, by coincidence African States.

However, preliminary investigations have started in several other cases, such as Afghanistan, Colombia, Georgia, Equatorial Guinea, Honduras, North Korea, and Nigeria. Nevertheless, for the moment, such investigations have not yielded results.

On the other hand, Commissions of Inquiry, mandated by the UN Human Rights Council on atrocities committed in Syria and North Korea, recommended the submission of such cases to the ICC in 2013 and 2014.[9] In the first case, Syria is not a State Party to the ICC and there was a decision against sending the case to the ICC[10], despite the favorable position of some of the UN Security Council members. In the case of North Korea, which is not part of the ICC either, the outcome is pending.

As Navi Navanethem Pillay, the Un High Commissioner for Human Rights stated, "*broadening the reach of the ICC is necessary so as to turn the ICC into a universal court and close the loopholes of accountability at the international level*"[11].

While the ICC is not a truly universal court – and one wonders if some day it may be – its "partial" or "incomplete" jurisdiction will always be a challenge, as long as "*loopholes of accountability*" remain open.

Complementarity

The ICC was designed as a *Court of last resort*, as each State has the primary duty to protect its population from the most serious international crimes and to prevent and repress the offences defintedin the Rome Statutein accordance with national criminal systems.

The Statute states clearly, in the preamble, that the ICC is intended to judge the crimes of greater severity and, in particular, Article 17 establishes the principle of complementarity, whereby the ICC only has jurisdiction to try

[7] Resolution 1593 (2008).

[8] Resolution 1970 (2011).

[9] It was also the case in relation to Darfur and to Libya, whose reports of the UN Commissions of Inquiry led the Security Council to refer these cases to the ICC in 2005 and 2011.

[10] Cf. Resolution 2118 (2013).

[11] Opening Remarks at the Side-Event at the 24th Session of the UN Human Rights Council, "The International Criminal Court 15 years after the Rome Statute: Prospects for the Future", September 10, 2012.

crimes when the State having jurisdiction over the same crime is "unwilling" or "unable" to exercise that jurisdiction.

To this extent, the appropriate legislation and the capacity for effective investigation and judicial procedures are necessary at the national level. This is encouraged and supported by the ICC and the ASP (cf. Resolution ICC-ASP/12/Res. 4) in order to avoid the so-called "*impunity gap*", i.e. criminal cases that are not judged at the national or international level[12].

However, not all of the 122 States Parties to the Rome Statute have the appropriate legislation or competent judiciary to prosecute crimes within their jurisdiction. A thorough analysis of national legislation, to ensure its appropriateness, remains to be done and technical assistance can be provided to help these State Parties improve and adopt the necessary domestic legislation.

On the other hand, it is not always evident how to determine the situations in which a member State, in accordance with Article 17 (1) of the Statute, refuses or lacks the capacity to carry out the national jurisdiction over crimes. Only in the case of a negative assessment, can the Court declare the case inadmissible. As of yet, consolidated case law determining with certainty if the State "does not want" or "does not have the capacity" is lacking. Nor is it the practice of States on when to invoke such an objection of inadmissibility or of the Prosecutor for not pursuing investigations.

Are there other ways to avoid the "*impunity gap*"?

Cooperation

Non-cooperation with the Court is a phenomenon that strongly affects the credibility of the ICC. The States Parties are under an obligation to cooperate in accordance with Part IX of the Statute, specifically, in the implementation of the decisions of the Court and execution of the arrest warrants. In the event of cases referred by the Security Council under Chapter VII of the Charter, it would be fair to say that even the States not party shall be obliged to cooperate with the Court, in accordance with, at least, the aspects referred to in the resolution.

The most serious case of non-cooperation is, of course, the non-compliance with arrest warrants or requests for delivery. Arrest warrants or requests for delivery of more than half of the defendants have gone unheeded, as is out-

[12] Cf. Informal Summary by the Focal Points, "Stocktaking of international criminal justice – Taking stock of the principle of complementarity: bridging the impunity gap", Review Conference of the Rome Statute, Kampala, 31 May-11 June 2010.

lined in the Resolution ICC-ASP /12/Res.3. Considering that all the members of the international community are under obligation to cooperate, arrest, or surrender those under warrant to the Court, it is striking that the the accused in situations submitted by the Security Council under Chapter VII (Darfur, President Bashir[13], and Libya) or in the first case, initiated in 2005 by Uganda, none of the suspects are in Court custody.

Pursuant to Article 63 of the Statute, the accused shall be present during the trial. Since there is no provision for trials in *absentia*, the Court's role diminishes, as a case cannot proceed to trial by reason of non-presence of the accused.

b) Peace vs. Justice or Peace and Justice[14]

The idea of peace and justice, whether conflicting or complementary, is a relatively new issue, coming to light by the creation of the ICC. Previously, instances of establishment of international criminal tribunals took place at the end of the conflict as a consequence of crimes committed. The cases of the military court in Nuremberg or the *ad hoc* tribunals for the Former Yugoslavia and Rwanda demonstrate this point.

In the ICC's case, jurisdiction can be triggered during any stage of the conflict, provided that there is suspicion that crimes, in accordance with the Statute, have been committed and that the situation will be referred by the State in whose territory the crimes are committed, by the Security Council, or in accordance with the powers *proprio motu* by the Prosecutor of the Court.

Likewise, being that the majority of current conflicts are intrastate or civil wars, their resolution will depend on a process of negotiated internal peace, where it is often necessary to gather all the conflicting parties to the negotiating table. It is frequently the case that some of these parties – government or rebels – have committed crimes, i.e., war crimes or crimes against humanity.

In the case of such peace negotiations, some argue that it is necessary to carry out the peace process first and, subsequently, commence the fight against impu-

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[13] See G. P. Barnes, "The International Criminal Court's Ineffective Enforcement Mechanisms: the Indictment of President Omar Al Bashir".

[14] For a brief interesting summary of this debate, its history and different positions, see Draft Moderator Summary, "Stocktaking of international criminal justice – Peace and Justice", Review Conference of the Rome Statute, Kampala, 31 May-11 June 2010. See also the "Nuremberg Declaration on Peace and Justice", Annex to the letter dated 13 June 2008 from the Permanent Representatives of Finland, Germany and Jordan to the United Nations addressed to the Secretary-General (A /62/885).

nity and for justice[15] through a process called "*sequencing*". This is illustrated by the example of Uganda, where the case was brought to the Court by the government in an attempt to weaken the rebels of the "*Lord's Resistance Army*". However, the warring parties would only accept negotiations if the peace agreement gave them immunity from ICC indictments[16].

The Rome Statute and general international law seem incompatible with granting amnesty for the most serious international crimes. Yet, the Rome Statute recognizes the importance of suspending investigations or trials in cases of the maintenance of international peace and security (Article 16), when the crimes are subject to processes at the national level (Article 17), or when the Prosecutor believes that suspension best serves the interests of justice (Article 53).

For the ICC and the ASP, these concepts are complementary: *"There can be no lasting peace without justice and (…) peace and justice are thus complementary requirements"* (Resolution ICC-ASP/12/Res. 8)[17] Moreover, it is the only way to enhance the effect of deterrence[18] regarding the commission of the most serious international crimes, which was the initial rationale for the creation of the first permanent international criminal court.

THE ICC, THE CASE OF KENYA, THE AFRICAN UNION (AU) AND THE FUTURE OF THE IDEA OF COMBATING IMPUNITY

In the autumn of 2013, the African Union raised concerns[19] directed toward the ICC, especially concerning the case of Kenya, hitting its climax in the Assembly of State Parties. Still ongoing, these tensions continue to challenge the idea of combating impunity.

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[15] See the opinion of the African political figure, Thabo Mbeki, co-author of an article in the New York Times, published in February 5, 2014, with the provocative title of "Courts can't end civil wars."

[16] Cf. L. M. Keller, "Achieving peace without justice: the International Criminal Court and Ugandan alternative justice mechanisms", and L. M. Keller, "The false dichotomy of Peace versus Justice and the International Criminal Court".

[17] See also the article of the Prosecutor of the ICC, Fatou Bensouda, the New York Times, 19 March 2013, entitled "International Justice and Diplomacy."

[18] K. Cronin-Furman, "Managing expectations: International criminal trials and the prospects for deterrence of mass atrocity".

[19] For an evolution of the relations between the ICC and Africa see N. Waddell and P. Clark, Courting Conflict? Justice, Peace and the ICC in Africa; A. Arieff et al, International Criminal Court Cases in Africa: Status and policy issues; E. Keppler, "Managing setbacks is the International Criminal Court in Africa"; A. Warrior, The resistance of the African States to the jurisdiction of the International Criminal Court; F. M. Benvenuto, "La Cour Penale Internationale en juge"; and C. C. Jalloh, "Reflections on the indictment of Child Heads of State and Government and its consequences for peace and stability and reconciliation in Africa"-

The African Union has taken several tough positions on the question of universal jurisdiction, the fight against impunity,[20] and the International Criminal Court, specifically with the cases of Sudan and Kenya.

Regarding Kenya, the case was not referred to the ICC by the State directly, although it is a party to the Rome Statute, but triggered by a Prosecutor investigation *proprio motu*. The referral occurred after the discovery that crimes against humanity were committed in the wake of the 2007 national elections. Specifically, murder, rape, forms of sexual violence, deportation, forced transfer of populations, and other inhumane acts were reported. The Prosecutor's findings led to the 2010 indictment for crimes against humanity of three suspects, two of whom were elected in 2013, President Uhuru Kenyatta (trial postponed) and Vice President William Ruto (trial started in 2013) of the Kenyan Republic.

During the 21st Session of the Assembly of the African Union in May 2013, the African Union, by resolution (Assembly /AU/13 (XXI), reiterated its, *"strong conviction that the search for justice should be pursued in a way that does not impede or jeopardize efforts at promoting lasting peace" and the "AU's concern with the misuse of indictments against African leaders."*

As a result of this decision, a letter[21] was addressed on 10 September, coinciding with the start of the trial of Vice-President Ruto, to the President of the ICC referring to the need of the creation of a national mechanism to investigate and prosecute crimes committed in the context of the post-electoral violence in Kenya in 2007. The same letter stated that the Court proceedings affect the ability of Kenyan leaders to lead, who – despite possible liability for the crisis of 2007 -, are democratically elected and must remain in the country to fulfill their constitutional responsibilities. Furthermore, the trial period requiring the physical presence of the President and the Vice-President at The Hague would not be feasible, since the Constitution of Kenya states that when the President is abroad, the Vice-President cannot be also, and vice versa.

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[20] On this theme see "The AU-EU Expert Report on the Principal of Universal (AHJ) (Council of the European Union 8672 1/09, 16 April 2009). The theme of universal jurisdiction and the International Criminal Court has caused wide friction between the African Union and the European Union, which gave rise to the above-mentioned report.
The Declaration of the most recent EU-Africa Summit, which took place in Brussels on 2 and April 3, 2014, with total absence of reference to the ICC, states in paragraph 10: "We confirm our rejection of, and reiterate our commitment to, fight impunity at the national and international level. We undertake to enhance political dialogue on international criminal justice, including the issue of universal jurisdiction, in the agreed fora between the parties."

[21] Cf. Doc. BC/U/1657.10.13.

In response, the ICC denied any procedural statute to that letter or the May decision since it fell outside the scope of the process and was not sent the request of the parties or the Security Council, and responded negatively to the pretense of suspending the process[22].

In October 2013, a Special Session of the Assembly of the AU adopted a new resolution, this time entitled: "*Decision on Africa's relationship with the International Criminal Court*" (cf. Ext /Assembly/AU/Dec .1 (Oct. 2013)). This resolution reiterated the concern with the politicization and misuse of accusations against African leaders by the ICC. Regarding the question of Kenya, the resolution stated that the indictment prompts a serious and unprecedented situation in which both the President and Vice President in Office of a country are the target of a international criminal process, affecting the sovereignty, stability and peace in that country, as well as the national reconciliation and the normal functioning of constitutional institutions. The resolution decided, *inter alia*, the following:

- For the safeguarding of constitutional order, stability, and integrity of the Member States, no prosecution can be initiated or continued by any international tribunal against any head of State or Government in Office or someone who acts or with the right to act in that capacity during his tenure;
- That the trials of the Chairman Uhuru Kenyatta and the Vice-president William Samoei Ruto, who are the current leaders in Office of the Republic of Kenya, must be suspended until theirterms are completed;
- Creation of a Contact Group of the Executive Board, to be headed by the President of the Council, which shall consist of five members (one per region) to conduct consultations with the members of the UN Security Council (UNSC), specifically, the five Permanent Members, with a view to collaborate with the UNSC in all concerns of the AU on their relationship with the ICC, including the postponement of the cases against Kenya and the Sudan, in order to obtain the answer before the beginning of the trial, the 12 November 2013;
- Accelerate the extension process of the African Court on Human and Peoples' Rights (TADHP) mandate to judge international crimes, such as genocide, crimes against humanity, and war crimes;
- The African States Parties to the Rome Statute to propose relevant amendments to the Rome Statute, in accordance with Article 121 of the Statute;

[22] Cf. 2013/PRES/00295-4/VPT/MH, Letter from September 13, 2013.

– Ask the African States Parties to the Rome Statute of the ICC, in particular the members of the Bureau of the Assembly of States Parties, to include in the Agenda of the next session of the ASP the question of the prosecution of a Head of State and of Government in Africa in Office by the ICC, and its consequences for the peace, stability, and reconciliation in the Member States of the African Union;
– That any member State of the AU wishing to refer a case to the ICC should inform and obtain the approval from the African Union;
– That Kenya should send a letter to the Security Council of the United Nations, requesting postponement of the case against the President and the Vice President of Kenya, in accordance with Article 16 of the Rome Statute, which is supported by all African States Parties;
– In accordance with this Decision, ask the Court to postpone the trial of President Uhuru Kenyatta, marked for November 12, 2013 and to suspend the procedure against the Vice-president William Samoei Ruto up to the moment in which the UN Security Council considers the request of Kenya for deferral, supported by the AU;
– That the President Uhuru Kenyatta not be required to appear before the ICC until the moment that the concerns raised by the AU and its Member States have been duly considered by the Security Council of the United Nations and the ICC.

On November 15, 2013 the Security Council rejected, though extremely divided (7 votes in favor and 8 abstentions) a draft Resolution (doc. S/2013/660) which sought, pursuant to Article 16 of the Rome Statute and Chapter VII of the Charter, to defer the investigation and trial of the President and Vice-President of Kenyan, for a period of one year. Voted in favor Azerbaijan, China, Morocco, Pakistan, Russia, Rwanda and Togo. Abstained Argentina, Australia, France, Guatemala, Luxembourg, the Republic of Korea, United Kingdom and USA (for individual explanations of vote see S/PV. 7060).

Nevertheless, the 12th session of the ASP included, at the request of the African Union, a special segment entitled, *"Indictment of Sitting Heads of State and Government and its consequences on peace and stability and reconciliation."*

During the November 2013 intervention on behalf of the AU in the ASP, it was stated; "*... I would like to turn now to the situation in Kenya and to highlight the inescapable link between peace and justice. We at the AU would like to see an intelligent interaction between justice and peace because it is only in this way that we can succeed in promoting democratic governance with strong institutions, the rule of law and constitutionalism. The African Union believes that if Kenya does not qualify for use of Article 16 of the Rome Statute and subsequently the principle of complementarity then no other*

State Party will. If this turns out to be the case, then not only Article 16 would be deemed to be redundant for the United Nations Security Council to legitimately and constructively resort to it, but the irresistible conclusion will also be that the ICC, whose establishment Africa and the Organization of African Unity strongly supported and advocated for is no longer a Court for all but only to deal with Africans in the most rigid way"[23].

According to the proposal submitted by the African States – adopted by consensus – substantial amendments to the Rules of Procedure and Evidence of the ICC – namely Rule 134 – were drafted, specifically allowing the justification of absence or that of physical presence in the trial to be replaced by participation via video technology. In accordance with the Resolution ICC-ASP/12/Res. 7, the following was inserted after Rule 134 of the Rules of Procedure:

Rule 134bis
Presence through the use of video technology

1. An accused subject to a summons to appear may submit a written request to the Trial Chamber to be allowed to be present through the use of video technology during part or parts of his or her trial.
2. The Trial Chamber shall rule on the request on a case-by-case basis, with due regard to the subject matter of the specific hearings in question.

Rule 134ter
Excusal from presence at trial

1. An accused subject to a summons to appear may submit a written request to the Trial Chamber to be excused and to be represented by counsel only during part or parts of his or her trial.
2. The Trial Chamber shall only grant the request if it is satisfied that:
   (a) exceptional circumstances exist to justify such an absence;
   (b) alternative measures, including changes to the trial schedule or a short adjournment of the trial, would be inadequate;
   (c) the accused has explicitly waived his or her right to be present at the trial; and
   (d) the rights of the accused will be fully ensured in his or her absence.
3. The Trial Chamber shall rule on the request on a case-by-case basis, with due regard to the subject matter of the specific hearings in question. Any absence must be limited to what is strictly necessary and must not become the rule.

[23] http://www.icc-cpi.int/iccdocs/asp_docs/ASP12/GenDeba/ICC-ASP12-GenDeba-AU-Uganda-ENG.pdf.

Rule 134
Quarter Excusal from presence at trial due to extraordinary public duties

1. An accused subject to a summons to appear who is mandated to fulfill extraordinary public duties at the highest national level may submit a written request to the Trial Chamber to be excused and to be represented by counsel only; the request must specify that the accused explicitly waives the right to be present at the trial.
2. The Trial Chamber shall consider the request expeditiously and, if alternative measures are inadequate, shall grant the request where it determines that it is in the interests of justice and provided that the rights of the accused are fully ensured. The decision shall be taken with due regard to the subject matter of the specific hearings in question and is subject to review at any time."

There will be those who question the compatibility of these amendments with Article 27 of the Rome Statute and the principle of equal treatment. The Court, in a decision from November 26 2013 on the Kenyan process, contended that the absence of the accused should only occur in exceptional circumstances and be limited to what is strictly necessary. Although the trials *in absentia* were allowed in the Nuremberg trials, they were excluded, as a general rule, in the Tribunals for the former Yugoslavia, Rwanda and by the Statute of the ICC.

Article 27 of the ICC Statute confirms, in addition, that the official capacity of a defendant is irrelevant for the purposes of a trial before this Court, providing that immunities or special procedural rules that may be inherent to the official duties of a person, according to national or international law, does not prevent the Court from exercising its jurisdiction over such a person. In addition, Article 98 of the Statute does not refer to the personal immunities of Heads of State, Government, or Ministers of Foreign Affairs in absolute terms, but rather to the diplomatic immunities between Member States and the possible need to obtain consent prior to the delivery of a suspect to Court.

The proposals made during the ASP for amendment to the Rules of Procedure, its acceptance policy and strategy of containement, did not prevent, however, the Government of Kenya from notifying, on November 22, 2013, the Secretary-General of the United Nations,[24] as depositary of the Rome Statute, the following proposed changes to the Statute in accordance with Article 121 (1), in particular with regard to Articles 63 (Trial in the

[24] Officially circulated on March 14, 2014 (C.N.1026.2013.TREATIES-XVIII.10 – Depositary Notification).

Presence of the accused), 27 (Irrelevance of official capacity) and to the paragraph of the Preamble on complementarity:

Article 63 (2) – the Presence of the accused at trial

"Notwithstanding article 63(1), an accused may be excused from continuous presence in the Court after the Chamber satisfies itself that exceptional circumstances exists, alternative measures have been put in place and considered, including but not limited to changes to the trial schedule or temporary adjournment or attendance through the use of communications technology or through representation of Counsel.

(2) Any such absence shall be considered on a case-by-case basis and be limited to that which is strictly necessary.

(3) The Trial Chamber shall only grant the request if it determines that such exceptional circumstances exist and if the rights of the accused are fully ensured in his or her absence, in particular through representation by counsel and that the accused has explicitly waived his right to be present at the trial."

Article 27 (3) – Irrelevance of official capacity

"Notwithstanding paragraph 1 and 2 above, serving Heads of State, their deputies and anybody acting or is entitled to act as such may be exempt from prosecution during their current term of office. Such an exemption may be renewed by the Court under the same conditions"

Introductory Paragraph on Complementarity

"Emphasizing that the International Criminal Court established under this Statute shall be complementary to national and regional criminal jurisdictions."

If the proposed amendment to Article 63 – the new rules introduced in ASP 2013 are to some extent already accepted – represents a 60 year step backwards to the trials in *absentia* of the Nuremberg Tribunal, the proposed amendment to Article 27 goes against a fundamental "sacrosanct" principle upheld since Nuremberg and incorporated in the Statute of all criminal courts: international criminal law applies to everyone, regardless of official capacity. Article 7 of the Charter of the International Military Tribunal stated "*the official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment*."

The proposal for the amendment of Article 27, supported by the African States and proposed for discussion in an extraordinary ASP, would alter a fundamental principle of the Statute and customary international criminal law, recognized by ICJ in the Case Arrest Warrant of 2000. It would be "*a shameful retreat in the global fight against immunity*".[25] Additionally, according to the same author, this Amendment to Art. 27 could even be a stronger incentive for taking power (by democratic means or not) in order to avoid a trial in The Hague. The proposal, likewise, contradicts the principle of speedy justice for the victims, because the Court would be prevented from exercising jurisdiction with regard to persons that occupy high political positions.

In our view, and as mentioned above, the appropriate safeguards for complex cases, such as the case of Kenya are already incorporated in the Rome Statute, therefore, no change to the aforementioned articles is required. However, the safeguards in Articles 17 (Complementarity and Admissibility), 53 (Powers of the Prosecutor) and 61 and 63r (Presence of the accused at trial), could be readdressed to improved consistent and continuity. In any case, in extreme circumstances, the power to appeal will remain, and in cases in which peace is seriously threatened, the Security Council, pursuant to Article 16 of the Statute, may suspend, for periods of 12 months, the proceedings before the ICC. The fact that that body has not accepted the use of this prerogative in Sudan´s case, where it did not formally take a decision, or Kenya, where the request was denied by a narrow margin, does not mean that this safeguard is ineffectual.[26]

CONCLUSIONS

Due to the challenges of the current cases, some perceive the idea of combating impunity and international criminal justice as declining. Others view this as a process of stabilization developing in the ICC; which after a revolutionary achievement, despite maturing over many decades, materialized in a relatively short period.

However, the African attempt to introduce immunity from criminal jurisdiction

[25] C. C. Jalloh, "Reflections on the indictment of sitting Heads of State and Government and its consequences for peace and stability and reconciliation in Africa", p.15.

[26] On the relationship between the ICC and the UN Security Council see H. Mistry and D. Ruiz Verduzco (Rapporteurs), "The UN Security Council and the International Criminal Court, International Law Meeting Summary"; D. Kaye et al, "The Council and the Court: Improving Security Council Support for the International Criminal Court"; e J. Trahan. "The relationship between the International Criminal Court and the UN Security Council: Parameters and best practices".

for current Heads of State for the most serious international crimes – even if temporarily – is a severe setback to the idea of fighting impunity.

The future credibility of the ICC's role, pursuant on how and when these challenges and ideas are approached, awaits judgment. The proposal for a separate International Criminal Court for Africa (suggested by the African Union and the proposed amendment to the Statute of Rome from Kenya) and the possible withdrawal from the ICC Statute (authorized but with limited effects on current cases) by Article 127 (2) by some African states has yet to materialize.

Kofi Annan succinctly clarified the issue when he stated, *"it is the culture of impunity and individuals who are on trial at the ICC, not Africa"*[27].

It is our hope that the entire international community will understand these words of wisdom and that the struggle against "impunity" will not lose its "p" and become, in fact, for some, "immunity" from crimes against humanity.

[27] Speech of K. Annan in " 3rd Annual Desmond Tutu International Peace Lecture", October 7, 2013.

References

ARIEFF, A ET AL. (2010). *International Criminal Court Cases in Africa: Status and policy issues*. Diane Publishing.

BARNES, G.P. (2011). "The International Criminal Court's Ineffective Enforcement Mechanisms: the Indictment of President Omar Al Bashir." *Fordham International Law Journal*. 34, (6), 1584-1619.

BEAUVALLET, O. (ed.) (2012). "10e anniversaire de la Cour Pénale International", *La Semaine Juridique*. 86,(52), 1-24.

BELLELLI, R. (Ed.). (2010). International Criminal Justice: law and practice from the Rome Statute to its review. AshgateBenvenuto, F.M. (2013). "La Cour Pénale Internationale en accusation." *Le Monde Diplomatique*. 60, (716),11.

BLAISE, N. (2012). "Les interactions entre la Cour Pénale Internationale et le Conseil de Sécurité : justice versus politique?". *Revue de la Faculté de Droit de L'Université de Liége*. 57,(1-2),61-98

BOAS, G., W. SCHABAS & M. SCHARF (EDS.) (2012). *International Criminal Justice: legitimacy and coherence*. Cheltenham: Edward Elgar Publishing.

CRONIN-FURMAN, K. (2013). "Managing expectations: International criminal trials and the prospects for deterrence of mass atrocity"(pp 1-21). *The International Journal of Transitional Justice*.

GUERREIRO, A. (2012). *A resistência dos Estados Africanos à jurisdição do Tribunal Penal Internacional*. Coimbra, Almedina.

JALLOH, C. C. (2014). "Reflections on the indictment of sitting Heads of State and Government and its consequences for peace and stability and reconciliation". *Africa, Legal Studies Research Paper Studies*. University of Pittsburgh, Working Paper.

KAYE, D. ET AL. (2013). *The Council and the Court: Improving Security Council Support for the International Criminal Court*. School of Law, University of California.

KELLER, L.M. (2008). "Achieving peace without justice: the International Criminal Court and Ugandan alternative justice mechanisms". *Connecticut Journal of International Law.* 23, 209-279.

KELLER, L.M. (2008). "The false dichotomy of Peace versus Justice and the International Criminal Court". *Hague Justice Journal.* 3,(1), 12-47.

KEPPLER, E. (2012). "Managing setbacks for the International Criminal Court in Africa." *Journal of African Law.* 56, (1), 1-14.

MENDES, E. (2010). Peace and Justice at the International Criminal Court: A Court of last resort. Cheltenham: Edward Elgar Publishing Mistry, H. & Verduzco D.R. (2012). *The UN Security Council and the International Criminal Court, International Law Meeting Summary*. London: Chatham House.

PHILIPPE, X. (2006). "The principles of Universal Jurisdiction and Complementarity: how do the two principles intermesh?" *International Review of the Red Cross.* 88, (862), 375-398.

PIRANIO, C. ET AL. (2011). "Reflections on the Rome Statute." *Cambridge Review of International Affairs.* 24, (3), 307-447.

ROACH, S. C. (2013). "Legitimising negotiated justice: the International Criminal Court and flexible governance." *International Journal of Human Rights.* 7,(5-6), 619-632.

SCHABAS, W. (2012). "The International Criminal Court: struggling to find its way." In A. Cassese (ed.) *Realizing Utopia: the future of International Law*. OUP.

SIDIKI, A. (2012). "La Cour Pénale Internationale: une justice a double vitesse?" *Revue du Droit Public et de la Science Politique.* 128, (4), 1013-1030.

TRAHAN, J. (2013). "The relationship between the International Criminal Court and the UN Security Council: Parameters and best practices." *Criminal Law Forum.* 24,417-473.

WADDELL, N. , P. CLARK. (2008). *Courting Conflict? Justice, Peace and the ICC in Africa*. The Royal African Society

The International Criminal Court and the construction of international public order

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The International Criminal Court and the construction of international public order

The ICC will not be a panacea for all the ills of humankind. It will not eliminate conflicts, nor return victims to life, nor restore survivors to their prior conditions of well-being and it will not bring all perpetrators of major crimes to justice. But it can help avoid some conflicts, prevent some victimisation and bring to justice some of the perpetrators of these crimes. In doing so, the ICC will strengthen world order and contribute to world peace and security.

M. Cherif Bassiouni, Ceremony for the Opening for Signature of the Convention on the Establishment of an International Criminal Court, Rome, 18 July 1998

… justice is a fundamental building block of sustainable peace

Kampala Declaration, 11 June 2010.

INTRODUCTION

Envisioning an international public order means envisioning an order sustained by a legal and institutional framework that ensures effective collective action with a view to defending fundamental values of the international community and to solving common global problems, in line with the universalist vision of international law. Such an international order implies institutions, procedures and international instruments that enable the achievement of common objectives (Bogdandy & Delavalle, 2008,p 1-2).

Envisioning the construction of an international public order means considering that this framework which embraces and promotes the respect for human rights focused particularly on human dignity, aiming to safeguard peace, security and well-being of the world, is consolidating and evolving based on a permanent and independent court, the International Criminal Court (ICC).

The preludes of an international criminal court as a protector and as a driving force of a public order date back to the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 under the auspices of the United Nations (UN)[1]. Indeed, the General Assembly, taking into account the question raised during the discussion on the punishment of crimes of genocide and the increasing need for a competent body for the trial of certain crimes under international law in a developing international community invited the International Law Commission to study the desirability and possibility of its establishment[2]. The positive response of the Commission[3] resulted in a draft statute, elaborated over several decades and submitted to the General Assembly in 1994 that advocated the importance of the creation of an international criminal court[4]. In this sense, the Assembly established a preparatory committee in 1996 with the aim of producing a draft text, which served as the basis for negotiations at the Rome Conference in 1998, culminating in the signature of the Statute.

Armin von Bogdandy and Sergio Dellavalle stress that the progress of an international public order and effective international law largely depends on the fate of international criminal law and on the success of the Statute's regulatory project (2008,p 2). However, how is this dependence manifested? How could the regulatory project and, more specifically, the ICC be more successful and influence this construction in a more effective manner?

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[1] Convention on the Prevention and Punishment of the Crime of Genocide, the Official Gazette, 1st Series A, No. 160, 07.14.1998.

[2] U.N. Doc. A/RES/3/260 B (III), Study by the International Law Commission of the Question of an International Criminal Court, 09.12.1948.

[3] U.N. Doc. A/CN.4/34, Report of the International Law Commission on its Second Session, 5 June to 29 July 1950, Official Records of the General Assembly, Fifth session, Supplement No.12 (A/1316), Yearbook of the International Law Commission, vol. II, 1950, (140) p. 379. Ricardo J. Alfaro, Special Rapporteur pointed out in his report submitted to the Commission that "*The community of States is entitled to prevent crimes against the peace and security of mankind and crimes against the dictates of the human conscience, including therein the hideous crime of genocide. If the rule of law is to govern the community of States and protect it against violations of the international public order, it can only be satisfactorily established by the promulgation of an international penal code and by the permanent functioning of an international criminal jurisdiction*", UN. Doc. A/CN.4/15 and Corr.1, Report on the Question of International Criminal Jurisdiction, Question of international criminal jurisdiction, Yearbook of the International Law Commission, vol. II, 1950, §136, p. 17.

[4] U.N. Doc. A/49/10, Draft Statute for an International Criminal Court, Report of International Law Commission on the work of its forty-sixth session, 2 May-22 July 1994, Official Records of the General Assembly, Forty-ninth session, Supplement No.10, Yearbook of the International Law Commission, 1994, vol. II(2), pp. 26 ff.

This article examines the merits of the Rome Statute and ICC's practice and then explicates its limitations. Lastly, it argues for the indispensability of a process of acquiring new dimensions and of deepening existing facets, formulating some proposals.

THE ROME STATUTE AND THE RECENT PRAXIS OF THE ICC: KEY CONSIDERATIONS

The Rome Statute of 1998 reaffirmed the relevance of the UN Charter objectives and principles[5] and recognized the existence of common values such as peace, security and well-being of the world which should be safeguarded by the court.

The Statute established the notion of "most serious crimes" of concern to the international community as whole and which are enumerated in Article 5: crime of genocide, war crimes, crimes against humanity and the crime of aggression. In this context, the statute added a punitive facet to international human rights law and to international humanitarian law, since until then the punishment of its violation depended solely on national criminal jurisdictions.

Specifically, regarding International Human Rights Law, the Statute incorporated, in Article 6, the definition of the crime of genocide as stated in Article II of the Convention on the Prevention and Punishment of the Crime of Genocide. Hence, genocide means any act committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group: homicide, causing serious bodily or mental harm to members, deliberately inflicting conditions of life designed to bring about its physical destruction in whole or in part, imposing measures intended to prevent births, and the forced transfer of children to another group.

The punitive facet of international humanitarian law was embodied in Article 8 related to the war crimes prescribed in the Geneva Conventions of 1949. The Court has jurisdiction over these crimes "when committed as part of a plan or policy or as part of a large-scale commission of such crimes". This article covers grave breaches of these conventions, i.e., acts against persons or property and serious violations of the laws and customs applicable in international armed conflict under international law. In the case of non-

[5] See Articles 1 and 2 of the UN Charter.

international armed conflicts, war crimes refer to violations contained in Article 3, common to the Geneva Conventions. That is, acts committed against individuals taking no active part in the hostilities, including members of armed forces who have laid down their arms or were placed hors of combat: acts of violence to life and person, outrages upon personal dignity, hostage-taking, the passing of sentences and the carrying out of executions, without previous trial by a regularly constituted court, which affords all indispensable judicial guarantees as well as other serious violations of the laws and customs applicable to such conflicts under the international law framework.

Under the Statute, crimes against humanity are any act committed as part of a widespread or systematic attack against a civilian population with knowledge of the attack, such as murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment in violation of fundamental rules of international law, torture, rape, sexual slavery, persecution against an identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender grounds or on other universally accepted criteria, crimes against humanity, forced disappearance of persons, the crime of apartheid, and other inhumane acts of a similar nature intentionally causing considerable suffering, serious injury or affect mental or physical health (Article 7).

In contrast to the crimes of genocide and war crimes, the crimes against humanity are not codified in an international convention and the analysis of the jurisprudence of the international *ad hoc* criminal tribunals reveals different understandings. The systematization contained in the Statute encompasses acts that had not been specified previously as crimes against humanity, being therefore the most comprehensive listing on this matter.

The merits of the Statute are not solely limited to codifying the most serious crimes, except the crime of aggression whose definition and conditions for the exercise of the ICC's jurisdiction were procrastinated to a review Conference (Article 5, paragraph 2). By prescribing the application of the general principles of criminal law (Part III), the principles of the presumption of innocence (Article 66) and of the prohibition of double jeopardy – *ne bis in idem* (Article 20) by the Court, the Statute contributes significantly to the consolidation and development of international criminal law (Stein & von Buttlar 2012,p 438).

This punitive system is based on the complementarity principle (Article 1), that even though constraining the ICC's power, enables the Court to exercise influence over the states' sphere of authority. It forms part of a gradual ero-

sion process of the Westphalian view of the sacrosanctity of state sovereignty and internal affairs. As Miguel de Serpa Soares argues: *"any form of international justice always represents a means of limiting national sovereignty. In the case of International Criminal Law this limitation is even more evident by compromising elements essential to the classic paradigm of International Law, as for example the punitive monopoly of States or the concept of a quasi-absolute State sovereignty"* (Soares, 2014,p 9).

In effect, the Court is competent to determine a state's unwillingness to carry out the investigation or prosecution: situations where the proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility within the Court's jurisdiction, existence of an unjustified delay in the proceedings or the proceedings were or are not being conducted independently or impartially, and they are or were being carried out in a manner that is inconsistent with an intent to bring the person concerned to justice (Article 17, paragraph 2).

In addition, the Statute imposes upon the States Parties the obligation to cooperate with the Court in the investigation and prosecution of crimes within its jurisdiction (Article 86) and to adopt procedures under national law for all of the forms of international cooperation and judicial assistance specified under Part IX (Article 88).

The *praxis* evidences an increasing activity of the Court, demonstrating its commitment to ending impunity.

In 2012, Thomas Lubanga Dyilo was sentenced to 14 years in prison for war crimes. He was found guilty of enlisting and conscripting of children under 15 years of age to actively participate in a non-international armed conflict in the Democratic Republic of the Congo from 1 September 2002 to 13 August 2003[6]. In 2014, Germain Katanga was found guilty and sentenced to 12 years in prison for one count of crime against humanity (murder) and four counts of war crimes (murder, attacking a civilian population, destruction of property and pillaging) committed on 24 February 2003 during the attack on the village of Bogoro in the Democratic Republic of the Congo[7].

[6] See ICC-01/04-01/06-2901, Trial Chamber I, Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo, Decision on Sentence pursuant to Article 76 of the Statute, 10.07.2012.

[7] See ICC-01/04-01/07-3484, the Trial Chamber II, Situation in the Democratic Republic of the Congo, The Prosecutor v. Germain Katanga, Decision on the sentence (Article 76 of the Statute), 23.05.2014.

Presently, the Office of the Prosecutor is investigating several situations by state party referral – Uganda (2004), Democratic Republic of Congo (2004), Mali (2012), The Union of the Comoros (2013) and Central African Republic (2005 and 2014) – by *proprio motu* action of the Prosecutor: Kenya (request submitted in 2009, authorization of the Pre-Trial Chamber in 2010), Ivory Coast (request submitted and authorization of the Pre-Trial Chamber in 2011) – and conducting preliminary examinations concerning several states, namely Ukraine, a non-state party which accepted the jurisdiction of the Court (2014). Even more important is the referral of the situations in the Darfur region, in Sudan (2005) and in Libya (2011) by the UN Security Council due to the existence of evidence of international crimes[8]. It can be considered that these referrals are in line with the argument of universalism that this competence of the Council allows the extension of the Court's jurisdiction to non-States Parties and thus constitutes an "evolution in shaping the international order" (Kowalski, 201,p 124).

LIMITATIONS OF THE ICC AND IMPLICATIONS FOR THE APPLICABILITY OF INTERNATIONAL CRIMINAL LAW

The limitations of the ICC result, firstly, from legal and political tensions arising from its relationship with the Security Council and the complementary character of its jurisdiction and, secondly, from the ambiguity of certain formulations contained in the provisions concerning the "crime of aggression" and "crimes against humanity", raising interpretive problems which the law applicable by the Court under Article 21 of the Statute[9] does not clarify categorically.

[8] Resolution 1593 (2005) which refers the situation in Darfur (since July 1, 2002) to the ICC does not specify possible international crimes committed in the region. However, the Security Council took note of the report of the International Commission of Inquiry on Darfur – this Commission was established by former UN Secretary General, Kofi Annan, on the basis of resolution 1564 (2004) with a mandate to investigate reports of violations of international human rights law and international humanitarian law in the region – which considered that the crimes committed may amount to war crimes and crimes against humanity (UN Doc. S/2005/60). Resolution 1970 (2011) which refers the situation in Libya to the Court mentions that the widespread and systematic attacks taking place against the Libyan civilian population could constitute crimes against humanity.

[9] According to Article 21, paragraphs 1 and 2, the Court must in the first place, apply the Statute, the Elements of Crimes and the Rules of Procedure and Evidence, and in the second place, where appropriate, applicable treaties and the principles and rules of international law including the established principles of the international law of armed conflict. Failing that, general principles of law derived by the Court from different national legal systems and principles and rules of law as interpreted by the Court in previous decisions.

LEGAL-POLITICAL TENSIONS AND THE PROBLEM OF DECISION IMPLEMENTATION

Article 13, paragraph b) of the Statute provides for the possibility of the Security Council to refer a situation to the Prosecutor under Chapter VII. This means that the consent from the state in which the acts were committed or of the nationality of the person alleged to have committed international crimes is not required. The Security Council's referrals of the situations in Darfur, Sudan, in 2005 and in Libya in 2011 were considered historic. However, in the first case, the Security Council has not actively supported the ICC with respect to detention and to the states' duty to cooperate with the Court. In the second case, despite the swift reaction of the Council, the resolution, as the Darfur referral decision, was flawed, as it, for instance, excluded the Court's jurisdiction over nationals of non-states parties (Stahn, 2012,p 328).

But it is mainly Article 16, according to which an investigation or a prosecution may not be initiated or proceeded with for a period of 12 months if the Council has requested the Court to that effect in a resolution adopted under Chapter VII, with the possibility of renewal, that raises sharper criticism based on the argument that this action undermines the independence of the Court[10]. Jorge Bacelar Gouveia qualifies this mechanism as "whimsy" and underlines that "*It is very difficult to accept the interference of a political organ in the heart of the exercise of public power of a body that should be jurisdictional, whose intervention, above all, can not only happen at any time in the proceedings, but also repeat itself, though it has in its favor the temporality and the astringent context of Chapter VII of the UNC*" (2013,p 792-793).

The Court's complementary nature to national criminal jurisdictions means that, as Judge Philippe Kirsch noted, the Statute is a two-pillar system: a judicial pillar represented by the Court and an enforcement pillar represented by the States[11]. Yet, the absence of a permanent mechanism that ensures com-

[10] The definition of the crime of aggression involved the establishment of procedures that emphasize this dependence in the case of a state party referral or *proprio motu* action by the Prosecutor, although paragraph 9 of Article 15 *bis* underlines that such determination by an external body is not binding on the Court. According to paragraphs 6 and 8 of this Article respectively, when the Prosecutor concludes that there is a reasonable basis to proceed with the investigation, he/she must first ascertain whether the Security Council made a determination of such an act committed by the State concerned and notify the United Nations Secretary-General of the situation before the Court; if no determination is made within six months after the date of notification, the Prosecutor may continue the investigation as long as the Pre-Trial Chamber has authorized the initiation of the investigation and the Security Council has not decided otherwise under Article 16.

[11] ICC, Philippe Kirsch, Opening remarks at the fifth session of the Assembly of State Parties, 23.11.2006.

pliance with the court's decisions hampers the implementation of this pillar and, therefore, the fight against impunity.

In fact, the execution process of the warrants of arrest has been to a certain extent troubled. Therefore, it cannot be considered a coincidence that the first words of the declaration of the first Review Conference of the Statute – the Declaration of Kampala of 2010 – focus on a renewed spirit of cooperation and solidarity, emphasizing the States Parties' commitment to fight impunity and ensure lasting respect for the enforcement of international criminal justice.

The case of Sudanese President Omar al-Bashir is representative of this problem. The origins of this case date back to 2005 when the Security Council referred the Darfur situation to the Court in resolution 1593. The former ICC Prosecutor, Luis Moreno-Ocampo, initiated an investigation later that year and in 2008 requested the Pre-Trial Chamber to issue a warrant of arrest against the Sudanese President (first warrant issued on 4th March 2009 and the second warrant issued 12th July 2010, accused of indirect responsibility for war crimes, crimes against humanity and genocide)[12]. This was the first case in which an arrest warrant was issued against a head of state in office. Subsequently, the African Union (AU) submitted a request, pursuant to Article 16 of the Statute, to the Council to adopt a resolution under Chapter VII to defer the decision, which was declined by the Security Council. As a result, the AU appealed repeatedly to Member States not to cooperate with the ICC in the arrest of Omar al-Bashir[13]. As David Luban stated, the Court's weakness, namely, the gap between the aspiration for criminal justice and its accomplishment, became evident when most African and Arab states gathered to support the Sudanese President against the ICC's decision (2013,p 508).

On several occasions, the ICC urged, unsuccessfully, the States Parties and non-States Parties to execute the arrest warrants issued against al-Bashir during his presence on their territory. In April 2014, the Pre-Trial Chamber determined that the Democratic Republic of the Congo failed to comply with its obligations to arrest and surrender Omar al-Bashir during his visit to the country. Consequently, in accordance with Article 87, paragraph 7, the Pre-

[12] ICC-02/05-01/09-1, Pre-Trial Chamber I, The Prosecutor v. Omar al Bashir, Warrant of Arrest for Omar Hassan Ahmad al-Bashir, 04.03.2009 and ICC-02/05-01/09-95, Pre-Trial Chamber I, The Prosecutor v. Omar al-Bashir, Second arrest warrant for Omar Hassan Ahmad al-Bashir, 12.07.2010.

[13] See Reinold, T. (2012) "Constitutionalization? Whose constitutionalization? Africa's ambivalent engagement with the International Criminal Court". *International Journal of Constitutional Law*, 10(4), p1076-1105, Obura, K. (2011) "The Security Council's Power to Defer ICC Cases under Article 16 of the Rome Statute," *Journal of African and International Law*, 4(3),p 581-583 and Stella Nyana (2011) "The ICC at a Crossroads: Between Prosecution and Peace in Africa". *Journal of African and International Law*. 4 (1),p 1-74.

Trial Chamber informed the Assembly of State Parties and the Security Council[14]. The fact that the latter may take the necessary measures on this matter demonstrates that the power to enforce the decisions of the Court lies also on this organ.

Another relevant case regards the current President of Kenya, Uhuru Muigai Kenyatta, accused of being criminally responsible as an indirect co-perpetrator for crimes against humanity. This case concerns the violence that occurred in Kenya following the 2007 presidential elections that caused numerous victims. In 2009, Luis Moreno-Ocampo submitted a request to the Pre-Trial Chamber for authorization of an investigation, which culminated, at request of the Prosecutor, with the issuance of an arrest warrant against six Kenyan officials, the so-called "Ocampo six", by the Pre-Trial Chamber in 2011. That year, the AU endorsed the Kenyan government's request to the Security Council to adopt a resolution, requesting the ICC to defer the proceedings against the Kenyan president and the vice president, William Ruto, pursuant to Article 16. The AU renewed the request in 2013, which was once again declined by the Security Council[15].

In June 2014, the AU adopted an amendment to the protocol of the Statute of the future African Court of Justice and Human Rights, with jurisdiction over international crimes, that grants immunity from prosecution to heads of state and senior government officials, in opposition to Article 27[16] of the Rome Statute, which allows for the prospect of the persistence of legal and political tensions between the AU and the ICC.

WEAKNESSES IN THE INTERPRETATION OF THE ROME STATUTE "CRIME OF AGGRESSION" AND "ACT OF AGGRESSION"

[14] ICC-02/05-01/09-195, Pre-Trial Chamber II, The Prosecutor v. Omar al-Bashir, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar al-Bashir's Arrest and Surrender to the Court, 09.04.2014.

[15] See Reinold, T. (2012), "Constitutionalization? Whose constitutionalization? Africa's ambivalent engagement with the International Criminal Court" *International Journal of Constitutional Law*, 10(4),p 1076-1105, Obura, K. (2011) "The Security Council's Power to Defer ICC Cases under Article 16 of the Rome Statute". *Journal of African and International Law*. 4(3), p 581-583 and Nyana, S. (2011) "The ICC at a Crossroads: Between Prosecution and Peace in Africa". *Journal of African and International Law.* 4(1),p 1-74.

[16] Article 27, paragraph 1 determines that "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". Article 27, paragraph 2 states that "immunities or special procedural rules may attach to the official capacity of a person under national or international law, shall not bar the Court from exercising its jurisdiction over such a person".

The failure to reach an agreement on a definition of "crime of aggression" and respective elements at the Rome Conference resulted in the inclusion in the Statute of an additional clause to the incorporation of this crime as a "core crime". This clause provided for the exercise of jurisdiction once a provision was adopted in a Review Conference, in accordance with Articles 121 and 123, defining this crime and setting out the conditions for that purpose (Article 5, paragraph 2). In this sense, resolution F in Annex I of the Final Act of the Rome Conference established a preparatory commission with various tasks including the preparation of proposals for a provision on this crime[17]; this task was subsequently attributed to the *Special Working Group on the Crime of Aggression*.

The definition of the crime of aggression adopted at the Kampala Conference represents a significant development in international criminal law[18]. It is undeniable that the exercise of jurisdiction over the crime of aggression will constitute an evolution, since it will be the first time that a permanent criminal justice system imposes criminal liability for the illegal use of force. However, it is subjected to formal and material constraints, the latter giving rise to interpretive issues that may hinder the determination of the existence of such a crime.

Regarding the formal constraints, the Court will only have jurisdiction over crimes committed one year after acceptance or ratification by a minimum of thirty states[19] and after a decision to be taken only after 1 January 2017 in the Assembly of States Parties to activate the Court's jurisdiction (Articles 15 *bis* and 15 *ter*, paragraphs 2 and 3). These limitations garner criticism by some authors as Mary Ellen O'Connell and Mirakmal Niyazmatov, who qualify this process as "byzantine" (2012,p 191).

As for the material constraints, the new Article 8 *bis*, paragraph 1, defines the crime of aggression as *"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*".

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[17] U.N. Doc. A/CONF.183/13 (Vol. I), United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Official Records, Rome 15 June-17 July 1998, United Nations, 2002, 7, pp. 72 and f.

[18] See, among others, Blokker,N. & Kress, C. (2010). A Consensus Agreement on the Crime of Aggression: Impressions from Kampala, *Leiden Journal of International Law*. 23(4),p 889-895.

[19] Currently, 15 states accepted the amendments concerning the crime of aggression: Andorra, Austria, Belgium, Botswana, Croatia, Cyprus, Estonia, Germany, Liechtenstein, Luxembourg, Samoa, Slovakia, Slovenia, Trinidad and Tobago and Uruguay.

Criminal liability is solely applicable to individuals in a position effectively to exercise control over or to direct a state's political or military action. In other words, the leadership position is a determining factor.

Paragraph 2 refines the notion of "act of aggression". It means the use of armed force by a State against the sovereignty, territorial integrity, political independence of another State or in other manner inconsistent with the principles of the UN Charter. This provision absorbed Article 1 of the Definition of Aggression of the UN General Assembly – resolution 3314 (XXIX) of 1974. Simultaneously, it listed several acts that may qualify as an act of aggression, as mentioned in Article 3 of the Definition of Aggression, such as invasion, military occupation and bombardment by the armed forces of a State against another State's territory. It is also important to note that the act of aggression must be considered in the context of its "character", "scale", and "gravity". This means that a determination of the existence of a crime of aggression presupposes an act of aggression constituting a manifest violation of the Charter. Thus, although the act of aggression can only be perpetrated by a State, the responsibility for such unlawful acts lies on the individual who is responsible for the state's action.

Articles 15 *bis* and 15 *ter* establish the procedures under which the Court may exercise jurisdiction. The first article concerns the possibility to open an investigation pursuant to a state referral or a *proprio motu* action by the Prosecutor. Article 15 *ter* prescribes the possibility of a Security Council referral, which means that in this case the Court will also be competent for the investigation and prosecution of crimes of aggression regardless of the acceptance of the Court's jurisdiction by the concerned States.

The Kampala Conference defined the crime of aggression and its elements which serve the purpose of clarifying and assisting the Court in the interpretation and application of the amendments to the Statute. However, the enunciated provisions and clarifications contain some ambiguities.

As far as "act of aggression" is concerned, while the criteria of "gravity" and "scale" were included to avoid overloading the Court with minor cases, the criterion of "character" aimed to exclude controversial cases involving the use of force (Mancini, 2012, 236). However, the criteria of "character," "gravity" and "scale" used to assess whether an act constitutes a manifest violation of the Charter lack definition. The latter two undefined criteria are also used in the determination of an armed attack in Article 51 of the UN Charter and this lack of clarity could be problematic, particularly given the existing divergences regarding the lawful use of force in self-defence or in the case of humanitarian intervention (Santos, 2012). The elements of crimes refer

that the determination of a "manifest" violation of the Charter is objective, but this process within the UN is not peaceful.

At the same time, the remission of paragraph 2 of Article 8 to resolution 3314 of the General Assembly with the purpose of clarifying the term "act of aggression" raises some questions. Firstly, some formulations in the resolution are vague and the enunciated list is not exhaustive, which may lead to controversial situations. Secondly, the article does not provide clarification whether and to what extent other articles of the resolution were applicable or relevant to the Court (Surendran Koran,p 252).

In addition to the political character of the Definition of Aggression – the General Assembly can only make recommendations, devoid of any binding effect –, paragraphs 6, 7 and 8 of Article 15 *bis* confirm the power of the Security Council. In fact, Article 39 of the Charter stipulates the exclusive power of the Council to determine the existence of an act of aggression and it may refer to cases which are not mentioned in the Definition of Aggression. The practice, however, is not uniform, and, repeatedly, in its Chapter VII decisions the Security Council uses different wording.

Other aspects have been criticized such as the complete exclusion of acts committed by nationals of non-states parties – unlike the procedures relating to the "most serious crimes" – and the "*retrograde opt-out clause*" (Alam, 2010,p 179-180) that provides for the possibility of voluntary exclusion from the Court's jurisdiction (Article 15 *bis*, paragraph 4). Other critics consider the resolution as a political guidance in determinations of state responsibility and, therefore, it did not contemplate its application to individual liability (Alam, 2010,p 170).

But, an essential criticism can be pointed to the fact that the definition of aggression adopted in Kampala did not contemplate a possible aggression by non-state actors. The terrorist attacks of 11 September 2001 demonstrated the likelihood of such an act being committed by non-state actors as well as the magnitude, comparable to an action perpetrated by a State.

In fact, this solution reveals problems that cannot be underestimated otherwise it could hamper the proper functioning of the ICC. However, the pessimistic view of some more critical authors like Mary Ellen O'Connell and Mirakmal Niyazmatov who argue that "the substantive provision leaves experts unclear to what the prosecutable crime even is" cannot be corroborated. These authors doubt the feasibility of criminal proceedings and regret that the solution presented is different from the definition of crime of aggression under international law, affirming that this prohibition of aggression must not be undermined by the political compromise reached at Kampala (O'Connell & Niyazmatov 2012,p 191, 207).

"CRIMES AGAINST HUMANITY"

Some formulations of Article 7 reveal a certain ambiguity. Several authors highlight interpretive difficulties and their consequences.

Jordan J. Paust considers the formulations too restrictive and unclear: "Article 7 contains a limiting definition of 'attack' that is lacking in common sense. Instead of recognizing that one attack can constitute an 'attack', Article 7 (2) (a) requires that an 'attack' involves 'a course of conduct involving the multiple commission of acts'" (2010,p 691). The author also argues that the use of the word "attack" instead of, for example, act(s) committed (against) is problematic, since this may result in the impossibility to include certain situations linked to crimes of this type and that are included in the listing. Moreover, according to the author, the phrases "course of conduct" and "multiple commission of acts" are debatable, since they do not include acts of torture, rape, persecution among others (*ibid.,* 692-693).

Further criticism can be pointed to the expression "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack", since it leaves open the following question: Which is the threshold of "widespread or systematic"?

Another interpretive problem relates to the understanding of the formulation "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental and physical health" (paragraph 1, subparagraph k). This interpretation became relevant for the first time in the joint indictment of Germain Katanga and Mathieu Ngudjolo Chui in 2008. The Office of the Prosecutor accused both of perpetrating such acts and in its decision confirming the charges, the Pre-Trial Chamber decided that the wording should be interpreted strictly. However, several authors like Bernhard Kuschnik support a broad interpretation (2010, p 524-530).

According to Cameron Russell, one of the interpretive problems relates to the notion of "civilian". The author advocates that the parameters are not clear, which is partly a result of the decoupling of these crimes from the requirement of the existence of an armed conflict. This concept was employed to differentiate civilians from "combatants", but the fact that these crimes can be committed in times of peace generates interpretive problems (2011,p 60-61). In addition, an "attack directed against any civilian population" implies a conduct "pursuant to or in furtherance of a State or organizational policy to commit such attack" (Paragraph 2, subparagraph a), since the term "organizational" is imprecise, which also results from the dissociation with the existence of an armed conflict. Thus, it becomes necessary to define "organization" to distin-

guish it from the entity of the state (*Ibid.*,p 63). In the author's opinion, the requirement of "policy" seems to create some inconsistency within the Statute (*ibid.*, p 70). Leila Nadya Sadat notes that the Pre-Trial Chambers have been demonstrating different positions on the interpretation of Article 7, especially, regarding the phrase "State or organizational policy" (2013,p 335). This element for the prosecution for these crimes remains controversial (*ibid.*,p 352) and should be interpreted broadly otherwise it could result in the fragmentation of international criminal law (*ibid.*,p 375). The dissenting opinion of Hans-Peter Kaul, following the request of the Prosecutor to the Pre-Trial Chamber to open an investigation into the post-election violence in Kenya, showed an opposite understanding. According to the judge, only states or organizations with similar characteristics to a State following criminal policies may perpetrate crimes against humanity. This position has gathered support in the doctrine and within the Court (Sadat, 2013,p 336).

It is also important to refer the minority opinion of Christine Van den Wyngaert of March 2014 concerning the case of Germain Katanga, since it illustrates this problematic and it can have repercussions in future trials. The judge disagreed with Germain Katanga's conviction for lack of evidence of his criminal responsibility to intentionally contribute to the perpetration of crimes by a group of persons with knowledge that this group had such purpose (Article 25, paragraph 3, subparagraph d, vii) and the interpretation of the evidence could have been made in a different and more convincing manner. As for the accusation of crimes against humanity, the judge argued numerous points. Firstly, the number of victims was insufficient to qualify the acts as crimes against humanity and, therefore, there was no multiple commission of acts; secondly, the intent of targeting the civilian population was not proved in an incontestable manner; thirdly, the existence of a policy and of an organization was not proved incontestably and, finally, the attack could not be considered systematic[20].

In this context, the decision of the International Law Commission to add the topic "crimes against humanity" to its program in June 2013 – following the recommendation of the *Working Group on the Long-term Programme of Work* based on the proposal prepared by a working group member, Sean Murphy – is to be welcomed. As the author of the proposal notes *"For example, the mass murder of civilians perpetrated as part of an international armed conflict would fall within the grave breaches regime of the 1949 Geneva Conventions, but*

[20] ICC-01/04-01/07-3436-Anxl, Minority Opinion of Judge Christine Van den Wyngaert, 07.03.2014.

the same conduct arising as part of an internal armed conflict (as well as internal action below the threshold of armed conflict) would not (…). A global convention on crimes against humanity appears to be a key missing piece in the current framework of international humanitarian law, international criminal law, and international human rights law."[21]

Sean Murphy stressed the importance of the elaboration of an international convention on the prevention and punishment of such acts. The author mentioned aspects that should be taken into account by the Commission for the purposes of the Convention such as defining the offense of "crimes against humanity" as expressed in Article 7.

As for the articulation between the Convention and the ICC, Sean Murphy claims that the Convention would benefit substantially from the language of the Statute and related instruments as well as jurisprudence. In turn, the adoption of the Convention could address aspects that were not covered by the Statute and it could support the ICC's mission[22]. In particular because, among other aspects mentioned by the author, the Statute regulates relations between States Parties and the Court, but not among States Parties themselves and between State Parties and non-States Parties. Part IX, headed "International Cooperation and Judicial Assistance" implicitly recognizes that inter-state cooperation on crimes under the jurisdiction of the Court may occur outside the Rome Statute. The Convention could help to promote inter-state cooperation in relation to the investigation, detention, prosecution and punishment of individuals who commit such crimes, which would be consistent with the object and purpose of the Statute. The Convention would require the enactment of national legislation prohibiting and punishing these crimes, which in the author's opinion has not been made by several Member States yet, helping to fill a gap and, thus, encouraging all States to ratify or accede to the Statute. In the case of States that have adopted legislation in this regard, frequently it only authorizes the prosecution of crimes committed by nationals of that State or in its territory. The Convention would require the State Party to broaden its legislation to cover other individuals who are in their territory – nationals of other States who commit an offense in the territory of another State Party to the Convention. In the event that a State Party receives a surrender request from the Court

[21] U.N. Doc. A/68/10, Sean D. Murphy, Annex B, Report of the International Law Commission, Sixty-fifth session, General Assembly, Official Records, Sixty-eighth session, 2013, §2 and §3, pp. 140-141.

[22] *Ibid*., §8, §9, pp. 142 and f.

and at the same time, an extradition request from another State in accordance with the Convention, Sean Murphy proposes that the Convention should be designed to ensure that States which are party to the Statute and to the Convention can continue to follow the procedure outlined in Article 90 of the Statute on competing requests.[23]

MULTIFACETING THE ICC

Certain challenges such as terrorism in all its forms and manifestations, the profusion of intrastate conflicts with different nuances and complexities and the phenomenon of fragile states, failed or collapsed demonstrate the increasing number of distinct and intricate situations in which a state is unwilling or unable to conduct an investigation or prosecution or is incapable of protecting its population from international crimes.

Thus, these challenges justify the indispensability of rethinking the ICC through a process of adding new facets and deepening facets foreseen in the Statute. More specifically, rethinking the competence of this body to expand its jurisdiction to the crime of international terrorism – i.e. large-scale terrorist acts, which "*threaten the peace, security and well-being of the world*", acts of atrocities "*that deeply shock the conscience of humanity*" and of concern "*to the international community as a whole*", paraphrasing the preamble, similarly to what occurs with the most serious crimes under the jurisdiction of the Court – and rethinking the action of the ICC with a view of protecting populations from those crimes which should be implemented in articulation with the "*responsibility to protect*" concept.

CATEGORIZATION OF TERRORISM AS AN "INTERNATIONAL CRIME"

Terrorist acts, methods and practices can take many forms and manifestations and aim the destruction of human rights and fundamental freedoms[24]. The dissemination of a new type of terrorism of transnational nature and the proliferation of terrorist groups in different parts of the globe, including the territories of States Parties to the Statute, groups that could include nation-

[23] *Ibid.*, §10 and §12. See Article 90 of the Rome Statute.

[24] U.N. Doc. A/RES/60/288, The United Nations Global Counter-Terrorism Strategy, 20.09.2006, p. 2.

als of those States, imply to revisit the question of the possibility of ICC jurisdiction over this matter.

The idea of including terrorism as one of the most serious crimes of concern to the international community dates back to the Draft Statute for an International Criminal Court of the International Law Commission of 1994. The Commission's proposal contained an article – Article 20 – which contemplated – along with the crimes of genocide, aggression, serious violations of the laws and customs applicable to armed conflict and crimes against humanity – a specific subparagraph, subparagraph e), regarding the "treaty crimes" which included terrorism: "Crimes, established under or pursuant to the treaty provisions listed in the Annex, which, having regard to the conduct alleged, constitute exceptionally serious crimes of international concern."[25]

Similarly, the Preparatory Committee on the Establishment of an International Criminal Court created by the UN General Assembly in 1996 – with the purpose of preparing a widely accepted consolidated text, serving as a basis for negotiation for the establishment of an international criminal court – suggested the inclusion of the crimes of terrorism among others (Article 5, subparagraph e))[26] as an offense covered by the conventions mentioned in the Commission's draft statute (paragraph 2), but it went further by specifying these crimes as follows: "*Undertaking, organizing, sponsoring, ordering, facilitating, financing, encouraging or tolerating acts of violence against another State directed at persons or property and of such a nature as to create terror, fear or insecurity in the minds of public figures, groups of persons, the general public or populations, for whatever considerations and purposes of a political, philosophical, ideological, racial, ethnic, religious or such other nature that may be invoked to justify them*" (paragraph 1)."*An offense involving use of firearms, weapons, explosives and dangerous substances when used as a means to perpetrate indiscriminate violence involving death or serious bodily injury to persons or groups of persons or populations or serious damage to property"* (paragraph 3).

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[25] U.N. Doc. A/49/10, Draft Statute for an International Criminal Court, Report of International Law Commission on the work of its forty-sixth session, 2 May-22 July 1994, Official Records of the General Assembly, Forty-ninth session, Supplement No.10, Yearbook of the International Law Commission, 1994, vol. II (2), p. 38. The Annex refers, for example, the Convention for the Suppression of Unlawful Seizure of Aircraft of 1970, the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1971, the International Convention against the Taking of Hostages, 1979 and the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988, pp. 67 ff.

[26] U.N. Doc. A/CONF.183/13(Vol. III), Report of the Preparatory Committee on the Establishment of an International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Official Records, Rome 15 June-17 July 1998, United Nations, 2002, p. 5 and p. 21.

The dissent among States at the Rome Conference prevented the incorporation of the crime of terrorism in the Statute, but States in resolution E of Annex I to the Conference Final Act recognized that "*terrorist acts, by whomever and wherever perpetrated and whatever their forms, methods or motives, are serious crimes of concern to the international community*". At the same time, the States, deeply apprehensive about the persistence of this serious threat to international peace and security, recommended that a Review Conference pursuant to Article 123 of the Statute[27] should consider the crimes of terrorism to achieve a consensual definition and their inclusion in the list of the most serious crimes[28]. However, this topic was not discussed at the Kampala Review Conference of 2010. Undoubtedly, the main difficulty lies in the absence of an universal legal and political definition enshrined in a comprehensive convention on international terrorism, prescribing that large-scale terrorist acts constitute an international crime.

Several authors stress that acts of international terrorism as the 11 September 2001 attacks could qualify as crimes against humanity under Article 7 of the Statute and be tried by the ICC. Mireille Delmas-Marty argues that paragraph 2 of this article which establishes the notion of an attack directed against a civilian population as an element of crimes against humanity could have been applied to these terrorist acts (2013,p 561). In this regard, Vincent-Joël Proux adds: *"other acts of international terrorism, which do not compare in magnitude to the events of September 11th, yet still constitute an affront to the principles of humanity, should be prosecuted under this mechanism"* (2004,p 1085). Lucy Martinez contemplates the possibility of individual acts of international terrorism falling under crimes against humanity or war crimes, under the condition of the existence of an armed conflict (2002,p 50). In turn, Surendra Kumar although arguing that crimes with the magnitude of 11 September attacks could be considered crimes against humanity, minor terrorist acts may not reach the

[27] Article 123, paragraph 1 provides that "seven years after the entry into force of this Statute the Secretary-General of the United Nations shall convene a Review Conference to consider any amendments to this Statute. Such review may include, but is not limited to, the list of crimes contained in Article 5."

[28] UN Doc. A/CONF.183/13 (Vol. I), United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Official Records, Rome 15 June-17 July 1998, United Nations, 2002, pp. 71 and f. At the Rome Conference, several States supported the court's jurisdiction over the crimes of terrorism, ibid., Vol. II (for example, Algeria, §18, p. 73, Kyrgyzstan, §71, p. 77, Costa Rica, §74, p. 77, Armenia, §83, p. 78, Albania, "institutionalized State terrorism" §12, p. 82, India, §52, p. 86 and f., Tajikistan, §17, p. 92, Russian Federation, "most serious terrorist crimes", §20, p. 115, Congo, §49, p. 117, Sri Lanka, §35, p. 123, Turkey, "Terrorism shouldn't have been included among crimes against humanity, since it was often the root causes of such crimes", §41, p. 124).

threshold and, therefore, not fall under the jurisdiction of the ICC. Moreover, the author sustains that while some terrorist acts, to some extent, can be perceived as a crime of genocide – the conviction for such acts will always depend on whether the evidence is sufficient to meet the elements of the crime of genocide – or as a war crime – when committed in armed conflicts, terrorist acts may not always hold these characteristics (2008,p 200-202). In this sense, Surendra Kumar proposes an amendment to the Statute, *"the need of the hour is that crimes of terrorism, inducing suicide terrorism should be incorporated as a separate category and deserves separate contemplation and prosecution"* (2008,p 202).

The arguments put forward in favor of including the crime of terrorism within the jurisdiction of the Court relate to the limitations of national judiciary systems and to the fact that such acts possess features which are common to the most serious crimes under the Statute.

The Netherlands proposed an amendment to the list of such crimes in 2009 and explained the problematic as follows: *"We have all committed ourselves to cooperate fully in the fight against terrorism, in accordance with our obligations under international law, in order to find, deny safe haven and bring to justice, on the basis of the principle of extradite or prosecute, any person who supports, facilitates, participates or attempts to participate in the financing, planning, preparation or perpetration of terrorist acts or provides safe haven. Yet, at the same time, there is all too often impunity for acts of terrorism in cases where states appear unwilling or unable to investigate and prosecute such crimes. (…) In the light of the absence of a generally acceptable definition of terrorism, the Netherlands proposes to use the same approach as has been accepted for the crime of aggression, i.e. the inclusion of the crime of terrorism in the list of crimes laid down in article 5, paragraph 1, of the Statute (…)"*[29].

According to this proposal, the crime of terrorism would be integrated in a new subparagraph (subparagraph e) of Article 5, paragraph 1. Furthermore, this article would include a third paragraph that would reproduce *ipsis verbis* the content of the second paragraph concerning the crime of aggression in the Statute:*"The Court shall exercise jurisdiction over the crime of terrorism 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 shall be consistent with the relevant provisions of the Charter of the United Nations"* (Article 5, paragraph 3).

[29] ICC-ASP/8/43/Add. 1, Report of the Bureau on the Review Conference, Annex IV, 10.11.2009, pp. 12 and f.

The proposal also provided for the establishment of an informal working group on the crime of terrorism at the Kampala Conference tasked to assess to what extent the Statute would require changes as a consequence of the introduction of the crime of terrorism within the jurisdiction of the Court as well as other relevant questions linked to the extension of its jurisdiction.

If the attacks of 11 September 2001 relaunched the question on whether large-scale terrorist acts could constitute "international crimes" and fall within the jurisdiction of the ICC, presently several arguments can be enunciated that support the inclusion of terrorism as a crime within the jurisdiction of the Court.

The Security Council referred to these attacks as a threat to international peace and security (resolution 1368 (2001)). In several resolutions, this organ reaffirmed that terrorism in all its forms and manifestations constitutes one of the most serious threats to international peace and security. The UN Global Counter-Terrorism Strategy of 2006 referred to this phenomenon in the same terms[30].

The seriousness of this threat is accentuated by its different and multiple forms and manifestations, being also perpetrated by non-state actors, groups resorting to different methods and with different motivations.

It is important to underline that terrorism can not and should not be associated with any religion, nationality, civilization or ethnic group – as mentioned by the Security Council in Chapter VII decisions and by the General Assembly in the above-mentioned Strategy[31] – currently, the actions of several extremist groups, most of them considered terrorist groups, in which nationals of States Parties may be participating and whose acts may occur in the territories of these states is an argument in this sense.

It is undoubtedly significant that the ICC Prosecutor, Fatou Bensouda, has initiated an investigation (January 2013) due to the existence of evidence indicating that war crimes had been committed since January 2012. These acts are mainly attributed to the National Movement for the Liberation of Azawad (MNLA), the Defenders of the Faith group (Ansar Dine), the Organization of Al-Qaida in the Islamic Maghreb (AQIM) and the Movement for Unity and Jihad in West

[30] U.N. Doc. A/RES/60/288, The United Nations Global Counter-Terrorism Strategy, 20.09.2006, p. 1.
[31] *Ibid.*, p. 2.

Africa (MUJAO)[32], the last three terrorist groups are ideologically inspired and linked to al-Qaida[33]. Likewise, it is significant that the Prosecutor conducts a preliminary examination concerning the activities of the jihadist group Boko Haram, a terrorist group linked to al-Qaida[34], which according to the report could have committed crimes against humanity since July 2009[35]. Nevertheless, if the Prosecutor decides to prosecute, formulating an accusation, it is for the Pre-Trial Chamber and, eventually, the Trial Chamber to corroborate these assessments.

The acts committed by the jihadist group "Islamic State"[36], a splinter group of al-Qaida, against Iraqi security forces and civilians were condemned by the Security Council. This organ, and several State Parties, qualified these acts as terrorist attacks/acts[37]. The proclamation of a transnational caliphate by this group – comprising northern Syria and eastern Iraq, with expansionist tendencies, threatening neighbouring countries including Jordan, a State Party to the Statute – could increase the perpetration and the magnitude of terrorist acts and diversify the characteristics of such acts.

In this regard, it is important to mention resolution 2170 (2014), in which the Security Council: "*Deplores and condemns in the strongest terms the terrorist acts of ISIL and its violent extremist ideology, and its continued gross, systematic and widespread abuses of human rights and violations of international humanitarian law*".

"Recalls that widespread or systematic attacks directed against any civilian populations because of their ethnic or political background, religion or belief may constitute a crime against humanity, emphasizes the need to ensure that ISIL, ANF [Al Nusra Front] and all other individuals, groups, undertakings and entities associated with Al-Qaida are held accountable for abuses of human rights and violations of international humanitarian law (…)".

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[32] ICC, The Office of the Prosecutor, Situation in Mali, Article 53 (1) Report, 16.01.2013, pp. 13-28. This investigation follows a preliminary examination based on the Mali government's referral dated of 13 July 2012 in accordance with Article 14 given the impossibility of pursuing or prosecuting those responsible for crimes against humanity and war crimes especially in the northern part of the territory. See Referral Letter, Republique du Mali, Ministère de la Justice, 13.07.2012.

[33] The Security Council linked the Ansar Dine group on 20 March 2013 and the MUJAO on 5 December 2012 to al-Qaida. The AQIM had originally been associated with the name Salafist Group for Preaching and Combat on 6 October 2001.

[34] On 22 May 2014, the Security Council placed Boko Haram in the list of entities associated with Al-Qaida.

[35] ICC, The Office of the Prosecutor, Report on Preliminary Examination Activities, 2013, §206 and §209-§219.

[36] Since June, the designation replaced the previous self-designation of the group of "Islamic State of Iraq and the Levant", also known by the acronym ISIS (Islamic State of Iraq and Syria) or ISIL (Islamic State of Iraq and the Levant).

[37] U.N. Doc. SC/11437, Security Council Press Statement on Iraq, 11.06.2014. On 30 May 2013, the Security Council included this group and the al-Nusra Front in the list of terrorist organizations linked to al-Qaida.

It is also relevant that the Security Council alludes to the possibility of certain acts constitute crimes against humanity and, at the same time, to the existence of other types of international crimes, while reaffirming, however, that the acts of ISIL can not and should not be associated with any religion, nationality or civilization.

However, not all terrorist acts can be covered by the provisions and respective elements relating to the most serious crimes of international concern.

Whilst the qualification as a war crime implies the existence of an armed conflict, the crime of genocide – although alluding to the "intent to destroy", which is also a characteristic of terrorist acts – requires that this intent aims to destroy in part or in whole a national, ethnical, racial or religious group as stated in Article 6, which might not be the purpose of certain terrorist acts or it might not be unequivocally proven. With regard to crimes against humanity, the Statute's definition states that the attack must be widespread or systematic and this prevents a large-scale attack that does not possess these characteristics from being subsumed under this article. In addition, the definition states that an attack against any civilian population means a course of conduct pursuant to or in furtherance of a State or organizational policy. But it may be difficult to establish a link between the conduct and a policy of a State or an organization, since terrorist acts can be perpetrated by isolated individuals. The crime of aggression can only be committed by a person in a leadership position of an act of aggression; as it requires an act of aggression by a State it would not apply to non-state entities.

Besides, the principle *nullum crimen sine lege* provides that a person shall not be criminally responsible for a conduct unless it constitutes, at the moment it takes place, a crime within the jurisdiction of the Court (Article 22), this could mean that the perpetrators of terrorist acts, shielded by this principle, would go unpunished.

The underlying ideas of terrorism are the creation of feelings of terror, fear and insecurity in individuals and the perpetration of indiscriminate violence involving the use of different types of weapons. Hence, the proposal of the Preparatory Committee appears the most appropriate solution, but the definition enshrined in paragraph 1 should be further broadened to include non-state entities. Terrorist acts such as the use of a conventional explosive combined with radioactive material in order to disperse it over a wide area, exposing victims to radiation (the so-called "dirty bomb") or the intentional release of pathogenic microorganisms could be covered by paragraph 3 of the Committee's proposal. At the same time, in line with the Commission

and the Committee, the insertion of the reference to treaties on terrorism could circumvent the existing gap concerning a comprehensive international convention on terrorism and a binding and consensual definition. Also a procedure that would enable the inclusion of future conventions, which is justified by the increase in the number of conventions on this matter in recent years, should be incorporated.

Alternatively, although the amendment proposal submitted by the Netherlands did not gather sufficient support for its consideration at the Kampala Conference and it was withdrawn in June 2013, within the *Working Group on Amendments* established by the Assembly of States Parties as a mechanism for discussing amendment proposals[38], the proposal could be an intermediate solution to resolve this impasse, similarly to what happened with the crime of aggression.

THE ICC AND THE RESPONSIBILITY TO PROTECT

The rethinking of ICC's action with a view of protecting populations from international crimes should be implemented in articulation with a "responsibility to protect" of the international community.

Similarly to the ICC, this responsibility focuses on the crimes of genocide, ethnic cleansing, crimes against humanity and war crimes. This concept was developed by the "*International Commission on Intervention and State Sovereignty*" (ICISS) and presented in the report "*The Responsibility to Protect*" of 2001. Its relevance was acknowledged by the UN Member States in the final document of the 2005 World Summit, which incorporated its general features: the responsibility to protect resides primarily at the State level and encompasses the prevention of such crimes, including its incitement through appropriate and necessary means. When appropriate, the international community should encourage and assist a State so that it can exercise this responsibility; if national authorities are unwilling or are unable to protect its population, the international community should take appropriate collective measures to protect it from genocide, war crimes, ethnic cleansing and crimes against humanity in a timely and decisive manner under Chapters VI, VII and VIII of the UN Charter[39].

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[38] ICC-ASP/12/44, Report of the Working Group on Amendments, 24.10.2013, §4.

[39] U.N. Doc. A/Res/60/1, World Summit Outcome, 24.10.2005, §138 and §139.

The UN Secretary-General, Ban Ki-moon, has clarified the responsibility to protect concept and, as the Prosecutor of the ICC, Fatou Bensouda, has defended this articulation. The Secretary-General affirmed, in the report "*Implementing the Responsibility to Protect*" of 2009, that an important measure under the pillar on the protection responsibilities of a State – which include the prevention of such crimes and their incitement – concerns first of all the accession to the Statute as well as to relevant international instruments and the incorporation of international standards in national legislation to ensure that the crimes and their incitement are criminalized under national law and practice[40]. Ban Ki-moon stressed that the threat of referrals to ICC may have a preventive effect[41].

The deepening of the foreseen preventive facet by the Court is essential, making the most of its permanent character – unlike the international ad hoc criminal tribunals, implementing, thus, a preventive justice system, also through the encouragement and provision of assistance to States Parties in order to build capacity to protect their populations, when such need exists.

In other words, "prevention" should be regarded as a dissuasive and as a deterrent measure. As Ban Ki-moon underlines: "*by seeking to end impunity, the International Criminal Court and the United Nations-assisted tribunal have added an essential tool for implementing the responsibility to protect, one that is already reinforcing efforts at dissuasion and deterrence*"[42].

In the same vein, Phakiso Mochochoko, Director of the Jurisdiction, Complementarity and Cooperation Division of the ICC, affirms "*Prevention is key to all our efforts. For the Office, this preventive role is foreseen in the Rome Statute Preamble and reinforced in the Office's prosecutorial strategies. In fact, the Preamble makes clear that prevention is a shared responsibility in writing that State Parties are `determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes`. The Office of the Prosecutor will make public statements referring to its mandate when violence escalates in situations under its jurisdiction; it will visit situation countries to remind leaders of the Court's jurisdiction; it will also use its preliminary examinations activities to encourage genuine national proceed-*

[40] U.N. Doc. A/63/677, Implementing the responsibility to protect, Report of the Secretary-General, 12.01.2009, §17.
[41] U.N. Doc. A/66/874, Responsibility to protect: timely and decisive response, Report of the Secretary- General, 25.07.2012, §29.
[42] U.N. Doc. A/63/677, Implementing the responsibility to protect, Report of the Secretary-General, 12.01.2009, §18.

ings and thereby attempt to prevent the recurrence of violence. Given that the commission of massive crimes can threaten international peace and security, the Security Council can complement the OTP's [Office of the Prosecutor's] preventive efforts"[43].

In this context, the Prosecutor could play a significant role in the preventive efforts since he/she may initiate an investigation *proprio motu* based on information on crimes (Article 15). The Office of the Prosecutor, as a separate and independent organ, is "responsible for receiving referrals and any substantiated information (…), for examining them and for conducting investigations and prosecutions before the Court" (Article 42, paragraph 1). It is important to note, however, that a greater celerity and agility on the part of these entities is needed in order to prevent violence, i.e., in the pre-violence stage or when it is unfolding, to prevent further occurrence of crimes, restraining it within a short period of time.

The establishment of the *Scientific Advisory Board* on June 25, 2014 by the Office of the Prosecutor represents a major change. This board will meet annually and make recommendations to the Prosecutor about the most recent technological developments as well as new scientific methods and procedures that can reinforce the Office's capabilities in the collection, management and examination of scientific evidence relating to an investigation and prosecution[44]. But the creation of an early warning and situation evaluation capability that could materialize in the establishment of a specific organ by the Prosecutor or by the Assembly of States Parties, with competence to establish subsidiary bodies, would be indispensable. This organ would pay particular attention, but not exclusive, to the phenomenon of fragile, failed or collapsed states that are unable to meet their international commitments. This organ could assist in the detection, bringing to the attention of the Prosecutor and of the Office relevant situations and support and assist the Court in the determination whether the State, due to a total or substantial collapse of the national judicial system or its unavailability, is unable to conduct an investigation or prosecution (Article 17, paragraph 3).

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[43] ICC, The Office of the Prosecutor, Phakiso Mochochoko, Address on behalf of the Prosecutor, Open Debate of the United Nations Security Council on "Peace and Justice, with a special focus on the role of the International Criminal Court", 17.10.2012.

[44] ICC, Press Release, The Office of the Prosecutor of the International Criminal Court Establishes a Scientific Advisory Board, 27.06.2014.

A joint study conducted by experts from Oxford University and the Australian Government suggests that the Court's preventive dimension should be implemented through encouraging the Statute's ratification, namely among non-signatories, strengthening capacities at the national level, raising awareness activities to inform populations on crimes under the jurisdiction of the Court, developing clear and more objective criteria for Security Council referrals and guaranteeing a more consolidated alignment between preventive instruments as non-military coercive measures and mediation and criminal justice mechanisms[45]. These measures could be implemented in the articulation process of the ICC with the responsibility to protect.

As for the materialization of this interconnection, the Security Council referral[46] of the situation in Libya in 2011 took on a paradigmatic significance for two reasons. Firstly, resolution 1970 linked the Court's role to the responsibility to protect and, secondly, the resolution was unanimously adopted, despite the reluctance of the United States, the Russian Federation and China regarding the ICC's mission, permanent members of the Council, which seems to indicate a change in the perception of the Court.

Although the resolution does not explicitly allude to a responsibility to protect by the international community, it refers in the Preamble "*recalling the Libyan authorities' responsibility to protect its population*". This decision imposed an obligation on the Libyan authorities to cooperate and provide the necessary support to the Court and the Prosecutor. In resolution 1973 (2011), the Council reiterated the authorities' responsibility to protect the Libyan population. In addition, it authorized coercive military measures and recalled the decision to refer the situation to the ICC, emphasizing that those responsible for or complicit in attacks against the civilian population, including aerial and naval attacks, must be held accountable.

Carsten Stahn (2011) affirmed regarding resolution 1970 that "*This resolution marked the first incident in which the ICC was expressly recognized in Council practice as a core element of preventing and adjudicating atrocities in line with the 'R2P' [responsibility to protect] concept (…) With the Security Council referral, international justice has become one of the primary means of constraining violence and securing accountability, not only in the context of hostilities, but also in ensuring justice after conflict*".

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[45] "Oxford Institute for Ethics, Law and Armed Conflict, Australian Government, Australian Civil-Military Centre, The Prevention Toolbox: Systematising Policy Tools for the Prevention of Mass Atrocities, The International Criminal Court"(Sep. 2013). *Policy Brief Series* .5, p. 3.

[46] The importance of the "responsibility to protect" was highlighted for the first time in resolution 1674 (2006).

Nevertheless, the author warned that the Libyan case became a test for the management of the idea of "*shared responsibility*", after the detention of Saif Al-Islam Gaddafi by the Libyan authorities (Stahn, 2012), who is still not under the custody of the Court, despite several unsuccessful attempts to challenge its jurisdiction.

The articulation between the ICC and the responsibility to protect, more specifically, the role of this jurisdictional organ will inevitably be conditioned by the Security Council, i.e., by its decision to refer situations relating to non-states parties under Chapter VII if one or more crimes under ICC jurisdiction appear to have been committed, after its determination of the existence of a threat to peace under Article 39 of the Charter. The lack of a Security Council decision with respect to failed states and the divergences among permanent members on the interpretation of "threat to peace" will certainly hinder the referral of certain situations to the ICC.

In fact, the Security Council lacks objective binding criteria to determine a threat to peace and is held hostage to political discretion. The establishment of criteria in this regard and the introduction of changes concerning the right of veto (Santos, 2012, p 560-561) would avoid situations in which the Council is unable to refer the case to the ICC due to the threat or use of the veto, as in the case of Syria. Even recently, in May 2014, the Russian and Chinese vetoes prevented the adoption of a resolution in this regard.

The process should, therefore, be allied to an uniform application to similar situations by permanent members and to previous changes to the veto system to avoid such situations. It is important to note that the ICISS in its report *"The Responsibility to Protect"* declared *"(…) the Commission supports the proposal put to us in an exploratory way by a senior representative of one of the Permanent Five countries, that there be agreed by the Permanent Five a "code of conduct" for the use of the veto with respect to actions that are needed to stop or avert a significant humanitarian crisis. The idea essentially is that a permanent member, in matters where its vital national interests were not claimed to be involved, would not use its veto to obstruct the passage of what would otherwise be a majority resolution. The expression "constructive abstention" has been used in this context in the past (…)"*[47].

[47] International Commission on Intervention and State Sovereignty (2001), The Responsibility to Protect, §6.21, p. 51.

Among the Security Council reform proposals it should be referred the introduction of a voluntary conduct limiting the exercise of the veto right in situations of genocide, war crimes, crimes against humanity or ethnic cleansing or the elimination of this right, which appears infeasible, or the need of current and eventual new permanent members to justify this action.

This articulation is justified by the observation of common denominators, at the beginning of a timid practice – which should be explored and deepened – and by the possibility of contributing to the consolidation and enabling a broader exploration of the Court's role and to increased human rights protection.

This jurisdictional organ could be relevant in the prevention prior to the occurrence of violence or when it is unfolding as a reaction mechanism – which could occur alongside an intervention with use of force by the international community. The objective is to end violence through its intervention by putting those responsible under its custody. This action is justified by the fact that a State's judicial system may be unable to function in times of conflict or even in the reconstruction phase, after the international intervention with use of force, i.e., in the reconciliation and criminal retribution process. Regarding justice and reconciliation, the ICISS warned of the possibility that in many situations the state in whose territory a military intervention took place may have never had a non-corrupt or properly functioning judicial system[48].

The effects of the "responsibility to protect" and the mission of the ICC will have a greater impact if this concept acquires the status of an international norm (Santos 2012,p 562). Although the relationship between the ICC and the Security Council is viewed with scepticism and concern, which is to some extent justifiable due to the Security Council's political nature, a tripartite cooperation in this context may be beneficial.

CONCLUSIONS

An effective international public order is desirable. The sustainability of an order with such features, however, requires a permanent construction process in order to meet adequately the increasing and different challenges and to overcome emerging vulnerabilities. International criminal law embodied in the ICC will be crucial to achieve this aspiration.

[48] *Ibid.*, §5.13, p. 41.

By resorting to "a graphical representation" it can be concluded "that the substantive law that the ICC applies is a smaller concentric circle within a larger circle, which represents the total international criminal law" (Gouveia, 2013,p 784) and important limitations can be pointed out to the ICC such as the possibility of its activity be constrained by the Security Council, tensions deriving from the complementary nature of its jurisdiction and interpretive questions raised by certain provisions of the Statute, but focusing only on those facts entails the risk of obtaining a reductive assessment of the merits and potential of the ICC.

The Statute's regulatory project and, specifically, the Court may be more successful and influence the construction of an international public order in a more effective manner if the process of permanent construction of this body takes into account the need to fill gaps and the challenges of the contemporary world.

In this sense, there should be clarification of ambiguous aspects by the Court relating to the crime of aggression and crimes against humanity, as underestimating these aspects could hamper the efficient and expeditious delivery of justice. In the case of the crime of aggression the evolutive process cannot be oblivious to the Security Council's determinations. In the case of crimes against humanity, the Court shall specify the content of Article 7, a task that would be facilitated by the entry into force of a future international convention on the prevention and punishment of such crimes.

The Court should also explore new facets and deepen those foreseen in the Statute, making the most of its independent and permanent character, which allowed its detachment from a "victor's justice" connotation attributed to the international ad hoc criminal tribunals.

The distinct and intricate situations of passivity, inaction or impunity on the part of States that require the protection of the human dignity, which result from new challenges, imply a greater involvement of the ICC. Thus, a rethinking of its jurisdiction, extending its scope to the crime of terrorism, subjecting the perpetrators of terrorist acts to international justice is necessary. This inclusion is justified by the increasing dissemination of terrorism at the global level and by the fact that its different forms and manifestations may not be covered by the provisions and elements of crimes prescribed in the Statute. Simultaneously, this article proposes an articulation of the ICC's mission with the "responsibility to protect" of the international community which should be expressed in the different dimensions of this responsibility: prevention, reaction and rebuilding a lasting peace.

Although the jurisprudence is still scarce, namely concerning convictions, it cannot be ignored that the threshold of the first decade of the 21st century marks a turning point in the activity of the ICC. The gradual confluence around the Court by States Parties, by non-party States and by the Security Council demonstrates the growing recognition of the Court's relevance by the international community as well as the application of the system envisioned in the Statute.

These reasons and the potential of the ICC allow for the prospect of a passage from the present adolescence (Soares, 2014,p 10) to adulthood characterized by increasingly confident steps, a maturing process leading to a consolidated and more effective criminal justice system.

References

ALAM, A. (2010). "ICC and the Crime of Aggression: The Kampala Compromise or Consensus?". *ISIL Yearbook of International Humanitarian and Refugee Law*. (Vol. X, ,149-181).

BACELAR GOUVEIA, J. (2013). *Manual de Direito Internacional Público*. (4ªed), Coimbra: Almedina.

BLOKKER, N. & KRESS, C. (2010). "A Consensus Agreement on the Crime of Aggression: Impressions from Kampala", *Leiden Journal of International Law*. 23 (4), 889-895.

BOGDANDY, A.& DELLAVALLE, S. (2008). "Universalism and Particularism as Paradigms of International Law". *IILJ Working Paper 2008/3*. Available at http://www.iilj.org/publications/documents/2008-3.Bogdandy-Dellavalle.pdf.

DELMAS-MARTY, M. (2013). "Ambiguities and Lacunae, The International Criminal Court Ten Years on". *Journal of International Criminal Justice*. 11(3), 553-561.

INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY (2001). "The Responsibility to Protect". Available at http://responsibilitytoprotect.org/ICISS Report.pdf.

KORAN, S (2012). "The International Criminal Court and Crimes of Aggression: Beyond the Kampala Convention". *Houston Journal of International Law*. 34(2), 231-288.

KOWALSKI, M (2011). "O Tribunal Penal Internacional, Reflexões para um teste de resistência aos seus fundamentos". *Janus.net, e-journal of International Relations.* 2(2), 119-134. Available athttp://observare.ual.pt/janus.net/images/stories/ PDF/vol2_n2/pt/pt_vol2_n2_art6.pdf.

KUMAR, S.Y. S (2008). "Suicide Terrorism and International Criminal Court", *ISIL Yearbook of International Humanitarian and Refugee Law*. VIII, 194-206.

KUSCHNIK, B.(2010). "Humaneness, Humankind and Crimes Against Humanity", *Goettingen Journal of International Law*. 2(2),501-530. Available at http://www.gojil.eu/issues/22/22_article_kuschnik.pdf.

LUBAN, D. (2013). "After the Honeymoon, Reflections on the Current State of International Criminal Court", *Journal of International Criminal Justice*. 11(3), 505-515.

MARTINEZ, L. (2002). "Prosecuting Terrorists at the International Criminal Court: Possibilities and Problems", *Rutgers Law Journal*. 34(1), 1-62.

NYANA, S. (2011). "The ICC at a Crossroads: Between Prosecution and Peace in Africa", *Journal of African and International Law*. 4(1), 1-74.

OBURA, K. (2011). "The Security Council's Power to Defer ICC Cases under Article 16 of the Rome Statute". *Journal of African and International Law*. 4(3), 563-588.

O'CONNELL, M. E. & NIYAZMATOV, M. (2012). "What is aggression? Comparing the *Jus ad Bellum* and the ICC Statute". *Journal of International Criminal Justice*. 10(1), 189-207.

OXFORD INSTITUTE FOR ETHICS, LAW AND ARMED CONFLICT, AUSTRALIAN GOVERNMENT, AUSTRALIAN CIVIL-MILITARY CENTRE (2003), "The Prevention Toolbox: Systematising Policy Tools for the Prevention of Mass Atrocities, The International Criminal Court", Policy Brief Series. 5,1-4. Available at http://acmc.gov.au/wp-content/uploads/2013/09/1-The-Prevention-Toolbox-Mediation.pdf.

PAUST, J. J. (2010). "The International Criminal Court does not have complete jurisdiction over customary crimes against humanity and war crimes". *Public Law and Legal Theory Series*. 680-713.

PROUX, V.-J. (2004). "Rethinking the Jurisdiction of the International Criminal Court in the Post-September 11th Era: Should Acts of Terrorism Qualify as Crimes Against the Humanity?". *American University International Law Review*. 19(5), 1009-1089.

REINOLD, T. (2012) "Constitutionalization? Whose constitutionalization? Africa's ambivalent engagement with the International Criminal Court". *International Journal of Constitutional Law*. 10 (4), 1076-1105.

RUSSELL, C. C. (2011). "The Chapeau of Crimes Against Humanity, The Impact of the Rome Statute of the International Criminal Court". *Eyes on the ICC*. 8(1), 25-72.

SADAT, L. N. (2013). "Crimes Against Humanity in the Modern Age". *The American Journal of International Law*. 107(2), 334-377.

SANTOS, S. (2012). "O Uso da Força no Direito Internacional e os Desafios ao Paradigma Onusiano". *Revista da Faculdade de Direito da Universidade Federal de Minas Gerais*, Julho-Dezembro. 61, 533-568. Available at http://www.direito.ufmg.br/revista/index.php/revista/article/view/P.0304-2340.2012.

STAHN, C. (2012). "Libya, the International Criminal Court and Complementarity, A Test for 'Shared Responsibility'". *Journal of International Criminal Justice*. 10(2), 325-349.

STAHN, C. (2011). "R2P, the ICC and the Libyan Arrests". *The Hague Justice Portal*. Available at http://www.haguejusticeportal.net/index.php?id=12998.

STEIN, T. & VON BUTTLAR, C. (2012). *Völkerrecht*. 13. Auflage, München: Vahlen.

SOARES, M S. (2013). "A justiça penal internacional e a erosão da soberania", *Janus.net, e-journal of International Relations*. 4(2), 9-38. Available at http://observare.ual.pt/janus.net/images/stories/PDF/vol4_n2/pt/pt_vol4_n2_art1.pdf.

ICC Documents

ICC, Press Release, The Office of the Prosecutor of the International Criminal Court Establishes a Scientific Advisory Board, 27.06.2014.

ICC-01/04-01/07-3484, La Chambre de Première Instance II, Situation en République Démocratique du Congo Affaire Le Procureur c. Germain Katanga, Décision relative à la peine (article 76 du Statut), 23.05.2014.

ICC-02/05-01/09-195, Pre-Trial Chamber II, The Prosecutor v. Omar al Bashir, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court, 09.04.2014.

ICC-01/04-01/07-3436-Anxl, Minority Opinion of Judge Christine Van den Wyngaert, 07.03.2014.

ICC-ASP/12/44, Report of the Working Group on Amendments, 24.10.2013.

ICC, The Office of the Prosecutor, Situation in Mali, Article 53 (1) Report., 16.01.2013.

ICC, The Office of the Prosecutor, Report on Preliminary Examination Activities, 2013.

ICC, The Office of the Prosecutor, Phakiso Mochochoko, Address on behalf of the Prosecutor, Open Debate of the United Nations Security Council on "Peace and Justice, with a special focus on the role of the International Criminal Court", 17.10.2012.

ICC, Referral Letter, Republique du Mali, Ministère de la Justice, 13.07.2012.

ICC-01/04-01/06-2901, Trial Chamber I, Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo, Decision on Sentence pursuant to Article 76 of the Statute, 10.07.2012.

ICC-02/05-01/09-95, Pre-Trial Chamber I, The Prosecutor v. Omar al Bashir, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir, 12.07.2010.

ICC-ASP/8/43/Add. 1, Report of the Bureau on the Review Conference, Annex IV, 10.11.2009.

ICC, Review Conference of the Rome Statute, The Crime of Aggression, RC/Res.6, 11.06.2010.

ICC-02/05-01/09-1, Pre-Trial Chamber I, The Prosecutor v. Omar al Bashir, Warrant of Arrest for Omar Hassan Ahmad Al Bashir, 04.03.2009.

ICC, Philippe Kirsch, Opening remarks at the fifth session of the Assembly of State Parties, 23.11.2006.

United Nations Documents

U.N. Doc. SC/11437, Security Council Press Statement on Iraq, 11.06.2014.

U.N. Doc. A/68/10, Sean D. Murphy, Annex B, Report of the International Law Commission, Sixty-fifth session, General Assembly, Official Records, Sixty-eighth session, 2013, pp. 140-144.

U.N. Doc. A/66/874, Responsibility to Protect: timely and decisive response, Report of the Secretary-General, 25.07.2012.

U.N. Doc. A/63/677, Implementing the responsibility to protect, Report of the Secretary-General, 12.01.2009.

U.N. Doc. A/RES/60/288, The United Nations Global Counter-Terrorism Strategy, 20.09.2006.

U.N. Doc. A/Res/60/1, World Summit Outcome, 24.10.2005.

U.N. Doc. A/CONF.183/13 (Vol. I), United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Official Records, Rome 15 June-17 July 1998, United Nations, 2002.

U.N. Doc. A/CONF.183/13 (Vol. II), United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Official Records, Rome 15 June-17 July 1998, United Nations, 2002.

U.N. Doc. A/CONF.183/13 (Vol. III), Report of the Preparatory Committee on the Establishment of an International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Official Records, Rome 15 June-17 July 1998, United Nations, 2002.

U.N. Doc. A/49/10, Draft Statute for an International Criminal Court, Report of International Law Commission on the work of its forty-sixth session, 2 May-22 July 1994, Official Records of the General Assembly, Forty-ninth session, Supplement No.10, Yearbook of the International Law Commission, Vol. II (2), 1994.

U.N. Doc. A/CN.4/34, Report of the International Law Commission on its Second Session, 5 June to 29 July 1950, Official Records of the General Assembly, Fifth session, Supplement No.12 (A/1316), Yearbook of the International Law Commission, vol. II, 1950.

U.N. Doc. A/CN.4/15 and Corr.1, Report on the Question of International Criminal Jurisdiction, Question of international criminal jurisdiction, Yearbook of the International Law Commission, vol. II, 1950.

U.N. Doc. A/RES/3/260 B (III), Study by the International Law Commission of the Question of an International Criminal Court, 09.12.1948.

The Prosecutor in international criminal justice

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The Prosecutor in international criminal justice

Justice is an indispensable ingredient in the process of national reconciliation. It is essential for the restoration of peaceful and normal relations among people who have had to live under a reign of terror. It also breaks cycles of violence, hatred and extra-judicial retribution. Thus, peace and justice go hand in hand.

Antonio Cassese, former President of the ICTY

The duties and powers of the Prosecutor in international criminal justice to some extent can be nominally equated to the Prosecutor at a domestic level. However, there are substantial and methodological difference. The challenges posed in the investigation and prosecution of large-scale crimes and massive criminal violations committed years ago in a sovereign foreign country are unique. Thus, it is both remarkable and surprising that the legal tools of investigation available to the international Prosecutor have produced results that one can observe and quantify. Although challenges still remain, the work of the Prosecutor in international criminal justice is a considerable achievement in the fight against impunity for serious violations of Human Rights and International Humanitarian Law.

INTRODUCTION

The theme "the Prosecutor in international criminal justice" is part of the "international criminal justice" project that aims to bring together researchers, experiences and methodologies that can be found in International Relations and International Law.

Some people know the duties, powers and functions of the Ministério Público (MP)[1] at a national level, though few have a good understanding of what the Prosecutor in international criminal justice entails. The very name of the position causes some confusion due to its similarities with near national equivalents (the attorney of justice, the justice promoter, the public prosecutor, the deputy prosecutor, the prosecutor of the Public Prosecutor's Office, General Prosecutor). In today's world, the magistrate usually refers to the exercise of judicial power, and has the ability and prerogative to judge according to the constitutional rules and laws created by the legislature. The notion of *magistracy*, which in some places includes judges and prosecutors, is unknown as such in countries that have adopted common law, which extend these constitutional guarantees only to their judges, and where the word *magistrate* has a different meaning. The Portuguese magistrates (judges and prosecutors) enjoy the constitutional guarantees of life tenure.

THE NATIONAL CONSTITUTIONAL FRAMEWORK

Knowing the duties, powers and functions of the MP in the national framework can help to better understand the institutional identity of the Prosecutor in international criminal justice.

All organisation and jurisdiction of the MP is the remit of the Assembly of the Republic. Article 163 of the Constitution states the *"Assembly of the Republic, with regard to other entities, is responsible for… electing in accordance with the proportional representation system… members of the High Prosecutorial Council"*.

Article 165 establishes that: *"1. It is the sole responsibility of the Assembly of the Republic to legislate on the following matters, unless it authorises the Government to do so: … p) organisation and jurisdiction of the courts and Ministério Público as well as the*

[1] The Ministério Público is the constitutional organ empowered to start investigations on criminal violations and institutes criminal proceedings before criminal courts. The term equates, more or less, to the French Ministere Public and the English State Prosecutor's Office, Chief Prosecutor's Office or Attorney General.

status of the corresponding judges and prosecutors and non-judicial bodies for alternative dispute resolution."

In the terms of Article 219 (1): *The Ministério Público represents the State and safeguards the interests prescribed by law, takes part in the enforcement of the criminal policy as defined by the sovereign bodies, carries out the prosecution according to the principle of legality, and defends democratic legality.*

Article 219 (2) also confers that the MP's has its "own statute" and "autonomy".

Article 219 (4) states that *"officials of the Ministério Público shall be accountable judicial officers, shall form part of and be subject to a hierarchy and shall not be transferred, suspended, retired or removed from office except in cases provided for by law".*

Article 219 (5) establishes that *"[t]he appointment, assignment, transfer and promotion of officials of the Ministério Público and the exercise of discipline over them shall be the responsibility of the State General Prosecutor's Office".*

On the other hand, Article 220 of the Constitution states that *"[T]he State General Prosecutor's Office shall be the highest authority of the Ministério Público"* and that: "*State General Prosecutor's Office shall be presided over by the State Public Prosecutor and shall contain the High Prosecutorial Council, which shall include members elected by the Assembly of the Republic and members whom the public prosecutors shall elect from among their number".*

These constitutional provisions derive some fundamental rules and principles that sustain the operation of the MP. They are the principles of autonomy, independence and legality of prosecution.

Article 2 (2) of the MP's Statute2 provides that "*the autonomy of the Ministério Público is characterised by it being bound by legality and objectivity criteria and by the exclusive submission of agents of the Ministério Público to the directives, orders and instructions laid down by the [Statute]*".

In fact, the MP enjoys autonomy not only in relation to central, regional and local authorities, but also in relation to the judiciary. Firstly, the autonomy of the MP means that it takes no orders or instruction from central, regional and local authorities, nor can they influence its governance or administration. Secondly, the autonomy of the MP means that officials are organic and functionally separated from the judiciary, giving the MP a prerogative of stability identical to that of judges.

[2] Approved by Law no. 47/86 of 15 October, republished in Law no. 60/98 of 27 August, and changed by Laws 42/2005 of 29 August, 67/2007 of 31 December, 52/2008 of 28 August, 37/2009 of 20 July, 55-A/2010 of 31 December and 9/2011 of 12 April.

Thus, the MP is a constitutional body of justice organised as an independent procedural body in two ways: in terms of independence from political power in the exercise of prosecution and in terms of being separated from, and parallel to, the judiciary.[3]

Consequently, the MP is autonomous in the exercise of its duties, powers[4] and functions. This principle is based on the idea that no crime should go unpunished and, therefore, that the MP is legally obliged to act.

The principle of legality of criminal prosecution is reflected in the obligation of the MP to prosecute, provided that it has been informed of the crime and there are no obstacles preventing it from acting. This principle has a democratic character and meets the requirements of social defence in that it subjects the public body's actions to law. Thus, the action is imposed on the State not as a mere power, but as an obligation to carry out one of its essential purposes, which is to maintain and reintegrate the legal system. Therefore, the MP has the duty to prosecute without being led by political criteria of opportunity or social utility.

Prosecution is thus the most important function of the MP.[5] Moreover, the gradual democratisation of criminal proceedings has imposed the accusatorial principle that places the MP in a position of near monopoly in the exercise of prosecution.

As mentioned earlier, the State General Prosecutor's Office is the highest authority of the Ministério Público, which is organically and functionally independent. The independence of the MP lies in an organisational-institutional framework through which interference, dependences or limitations regarding other state powers such as the President, the Assembly of the Republic and the Government are neutralised.

Moreover, Article 219 (4) of the Constitution states that *"Ministério Público agents are accountable and. subject to hierarchy".*

Hierarchical subordination means that MP[6] agents receive orders and instruction from the State General Prosecutor's Office, which seems to contradict the

[3] This view is reaffirmed in several parts of Criminal Procedure Law when stating the principle of objectivity (Article 53), by applying to magistrates of the MP the provisions concerning impediments, refusals and excuses of judges (Article 54), when making it compulsory for the MP to investigate à charge and à décharge (Article 262), by exempting the MP from the rules on the conduct of lawyers and defenders (Article 326), and recognising the right to appeal in the sole interest of the accused (Article 401).

[4] Article 3 of the MP Statute specifies its duties and Paragraph 3 states that "in the exercise of its duties, the Ministério Público is aided by justice officers and criminal police bodies, and has access to advisory services".

[5] The magistrate is a speaking law, and the law is a silent magistrate (Cicero).

[6] Article 8 (Agents) of the MP Statute states: 1 — The agents of the MP are: a) The General Prosecutor; b) The Deputy General Prosecutor; c) The Assistant General Prosecutors; d) The Prosecutors; e) The Assistant Prosecutors.

MP's principle of independence. It is necessary to note that the independence that characterises the structure and functioning of the MP, which every MP agent benefits from, is a functional independence that has to be seen in light of the MP's unity and indivisibility.

Indeed, the agents that comprise the MP are under the aegis of a single higher body, the State General Prosecutor's Office,[7] to the extent that the MP appears as a single institution, with the division being essentially functional. Thus, the principle of unity has an administrative character. The organisation of the MP into various sectors only intends to establish a rational division of labour; however, all agents in the different sectors are guided by the same principles and goals, thus constituting a single institutional body.

The indivisibility of the MP is a direct consequence of its unity. Thus, a MP agent can be replaced by another without any practical implications, since acts are regarded as practised by the MP and not by a single individual. The entity that is present in all cases is the MP, albeit through a given agent. The term "representative of the Ministério Público",[8] therefore, is not technically correct when referring to MP agents.

This principle allows MP agents to be replaced by another during cases. However, the replacement cannot be made arbitrarily: it has to be done in line with terms provided by law (in case of promotion, transfer, suspension, dismissal, retirement, death, etc.), without constituting or implying any procedural change. Incidentally, Article 4 of the Statute envisages that *"agents of the Ministério Público can be replaced according to the provisions of this law".*

Thus, the principle of functional independence means that MP agents act independently in the exercise of their duties. They base their conduct on law and personal conviction, and may refuse to comply with illegal directives, orders and instructions on the grounds of them being a serious violation of their legal conscience. Accordingly, the hierarchical subordination of MP agents exists only at an administrative level, not functionally.

In short, the autonomy of the MP is characterised by its links to legality and objectivity criteria and by the exclusive subjection of agents of the MP to directives, orders and instructions provided by law.

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[7] Article 7 (Organs) of the MP Statute. The bodies of the MP are: a) The State General Prosecutor's Office; b) The District General Prosecutor's Offices; c) The State Prosecutor's Offices.

[8] Article 4 (Representation) of the MP Statute: 1 — The MP is represented before the courts: a) In the Supreme Court of Justice, the Constitutional Court, the Supreme Administrative Court, the Supreme Military Court and in the Court of Auditors, by the State General Prosecutor; b) In High Courts and the Central Administrative Court, by Assistant General Prosecutors; c) In Courts of First Instance, by prosecutors and Assistant Prosecutors.

THE INTERNATIONAL INSTITUTIONAL FRAMEWORK

Introducing and reviewing the national constitutional framework of the MP and its agents can help understand the role of the Prosecutor in international criminal justice as perceptions are usually preceded and influenced by perceptions of the national justice. Identity and the institutional framework in which the Prosecutor stands internationally will be examined below in order to understand the evolutionary process and historical circumstances behind the positon's existence, as well as its importance today.

The Prosecutor of the International Criminal Tribunal for the former Yugoslavia

In 1993, the UN Security Council created the International Criminal Tribunal for the former Yugoslavia (ICTY).[9] The sheer scale of human rights violations in Bosnia and Herzegovina – think of the images of destroyed cities and people looking like cadavers in the death camps of Omarska, Keraterm and Trnopolje[10] – generated huge international outcry and prompted the international community to embark on its first course of international criminal justice since the Nuremberg and Tokyo trials.

Article 16 of the ICTY Statute states that: *The Prosecutor shall be responsible for the investigation and prosecution of persons [allegedly] responsible for serious violations of international humanitarian law… The Prosecutor shall act independently as a separate organ of the International Tribunal. He or she shall not seek or receive instructions from any Government or from any other source.*

A similar decision was made with regard to the Prosecutor of the International Criminal Tribunal for Rwanda (ICTR), according to Article 15 of the ICTR Statute. Paragraph 3 of the Article states that *"the Prosecutor of the International Criminal Tribunal for the former Yugoslavia shall also serve as the Prosecutor of the International Criminal Tribunal for Rwanda".*[11]

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[9] On 25 May 1993, the UN Security Council formally adopted Resolution 827, establishing the International Criminal Tribunal for the former Yugoslavia, known as the ICTY. This resolution contained the ICTY Statute, which determined the Court's jurisdiction and organisational structure as well as criminal proceedings in general terms. This was the first war crimes tribunal established by the UN and the first international court of war crimes since the Nuremberg and Tokyo trials. This date marked the beginning of the end of impunity for war crimes in former Yugoslavia.

[10] This situation was tried at the ICTY, Kvočka et al. (IT-98-30/1) "Omarska, Keraterm & Trnopolje Camps"; in the BiH Court, Mejakić et al. (IT-02-65) "Omarska and Keraterm Camps".

[11] For this reason, only the Prosecutor of the ICTY is mentioned here.

As shown in Articles 16 and 15 of the Statutes of the ICTY and ICTR respectively, the Prosecutor is independent and does not seek or take instruction from any government or international organisation, or from any of the other two organs of the Court. The ICTY Prosecutor's Office is mandated to investigate and prosecute those presumed responsible for serious violations of International Humanitarian Law (IHL) committed in the territory of the former Yugoslavia.[12]

"*[In early 1994] the Office of the Prosecutor has had to invent itself. Starting from nothing… a staffing plan was first formulated and qualified and experienced staff were recruited. Then an information management and litigation support system was developed… Following the work of the investigators, the final stage of the Prosecutor's task begins with the framing of indictments and the ensuing trial process*".[13]

Indeed, the ICTY Prosecutor's Office investigated many of the worst atrocities that have taken place in Europe since World War II – such as the 1995 Srebrenica massacre – and has prosecuted civilian, military and paramilitary leaders for crimes and atrocities. In 2011, the last two accused by the ICTY Prosecutor, Ratko Mladić and Goran Hadžić, were arrested and transferred to a UN detention centre in The Hague after many years on the run, thus ensuring that none of the 161 individuals accused went unpunished.[14]

The Prosecutor's Office is headed by a Prosecutor appointed by the UN Security Council for a renewable term of four years. A Deputy Prosecutor is appointed by the UN Secretary General.

In accordance with the Resolutions of the Security Council and the Statute of the Tribunal – notably pursuant to Chapter VII of the UN Charter – UN Member States are obliged to cooperate with the Prosecutor's Office in the investigation and prosecution of persons accused of committing serious IHL violations.

The Prosecutor's Office was organised into an investigation division and a prosecution division. The latter had three sections: trial, appeal, and information and evidence. The Prosecutor's Office employed staff (such as police officers, investigators, forensic experts, analysts, lawyers, trial lawyers and legal advisers) from approximately 80 countries, whose experiences with national systems were combined into a single system of international criminal procedures.

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[12] Since 1 January 1991.

[13] ICTY *Annual Report*, A/49/342, S/1994/1007, of 29 August 1994.

[14] In accordance with the Tribunal's completion strategy, the final charges were issued in late 2004.

When the ICTY began its pioneering work of investigating and prosecuting perpetrators of serious IHL violations, the statute only gave the Prosecutor the power to "initiate investigations" and "to question suspects, victims and witnesses, collect evidence and conduct investigations on the ground".[15] Unlike the criminal codes of national legal systems, the ICTY Statute contains a rather limited set of legal tools to investigate and prosecute crimes in the jurisdiction of the International Tribunal.

The situation that the ICTY Prosecutor faced in carrying out the mission was completely different from the one Prosecutor Robert Jackson met in the Nuremberg Tribunal. In the latter case, the accused were within reach, the archives were open and the witnesses were available; in the former Yugoslavia, everything took place at a distance (between The Hague and Belgrade, Sarajevo and Zagreb) and within sovereign countries that were unwilling to detain suspects or cooperate with the Prosecutor.

At the beginning in 1994, even those who encouraged and supported the establishment of the ICTY doubted that it would have any impact or success. Almost twenty years later, its jurisprudential legacy and its effect on peace and reconciliation remain a topic of vibrant academic debate. For the ICTY, it is generally accepted that there is a before and after, with new precedents being set for international law, international criminal justice and international humanitarian law.

Indeed, with the establishment of the ICTY, the UN Security Council hoped to deter civilian and military officials of the former Yugoslavia from committing further atrocities, sending a clear message that those responsible for atrocities would be brought to justice. Unfortunately, the establishment of the ICTY had little or no deterrent effect, with the Srebrenica massacre in July 1995 – the greatest crime of all in the armed conflict – occurring after the tribunal had been established. Following Srebrenica, the Prosecutor filed charges and arrest warrants were issued against the Bosnian Serb leader Radovan Karadžić and his Chief of General Staff, General Ratko Mladić. Again, many doubted that they would ever face justice; however, they were arrested and transferred to The Hague's detention centre in 2008 and 2011 respectively.

[15] The statute is silent as to how to accomplish these tasks and by what means. In fact, there are more paragraphs in the Statute on the appointment and qualification of the judges than on skills and research tools.

The ICTY was created in May 1993. The conflict began in 1991 and ended in December 1995 with the Dayton Accord. Even before that date, and during the conflict, the Prosecutor sent several investigation teams to Bosnia and Herzegovina (BiH).

In 1996, the Bosnian Serb Duško Tadić became the first to be tried for war crimes and crimes against humanity at the ICTY. This case was an important sign that the Tribunal would prosecute the perpetrators of serious international crimes. The evidence and testimonies collected for the trial of Duško Tadić proved to be very useful in the Prosecutor's guidance for other cases, a bottom-up approach that culminated on 28 June 2001 with the arrest of former President Slobodan Milošević.

The ICTY created a large and rich body of jurisprudence that decisively influenced international criminal justice and which, to a large extent, has been adopted by the International Criminal Court (ICC). For approximately two years (1996-1997), the Prosecutor investigated the July 1995 Srebrenica massacre. On 2 November 1998, the Prosecutor filed an indictment. The trail started on 13 March 2000 and ended on 2 August 2001. The trial took place over 98 days, with hearings lasting five hours a day. Being a first for European history, the July 1995 Srebrenica massacre was judged by the Tribunal as genocide.

The most immediate goal of the ICTY was to end impunity and prosecute those presumed responsible for the most serious crimes in the former Yugoslavia. Another more ambitious and long-term goal was to contribute to peace and reconciliation in the region and provide resolution for victims and their families.

The Prosecutor of the International Criminal Court

On 17 July 1998, the international community reached a historic landmark when 120 States adopted the Rome Statute, through which the ICC Statute was approved. The Rome Statute entered into force on 1 July 2002 after ratification by 60 countries, including Portugal.

One of the ICC organs is the Prosecutor's Office, which is responsible for receiving reports of the crimes that fall within its jurisdiction, examine them and eventually institute criminal proceedings.

The roots of the ICC Statute are close to those of the ICTY and the ICTR, although there are differences regarding several legal and structural characteristics. In

fact, the ICC is a permanent judicial body with universal reach[16] and its activity complements that of national courts.[17] The ICTY and the ICTR are subsidiary bodies of the UN Security Council; the ICC was established and is maintained by the Assembly of States Parties, who acceded to the Treaty of Rome. The UN Security Council appoints the Prosecutors of the ICTY and the ICTR; in the case of the ICC, the Prosecutor is elected by States party to the Treaty of Rome. One of the major differences in the two *ad hoc* tribunals is the possibility for victims to appear before the ICC to express their opinions and to claim reparation for the injustices they have suffered.[18]

The Court's exercise of jurisdiction is dependent on referrals being made to the Prosecutor by a State Party or by the UN Security Council, whenever one or more crimes have been committed within its jurisdiction (Article 13 of the ICC Statute). Information received by the Prosecutor about crimes committed within the Court's jurisdiction may lead to the initiation of an investigation by itself if it is believed that there are sufficient grounds to do so and if the Pre-Trial Chamber's permission to start the investigation has been obtained (Article 15 of the ICC Statute). When conducting investigations, the Prosecutor has to trigger some preliminary decision on admissibility to ensure the functioning of the complementarity principle of intervention (Article 18 of the ICC Statute). That is, *"it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes" (Preamble of the ICC Statute)*; the Prosecutor may start criminal proceedings only if the State is genuinely unable or unwilling to investigate and prosecute.

The Prosecutor may, as a rule – only once and before the trial or at its commencement – ask the ICC to rule on issues related to jurisdiction and admissibility. If it is decided that an inquiry is to be transferred to a State, the Prosecutor may request the State in question to pass on information about the progress of the proceedings. This information should be kept confiden-

[16] The ICTY and ICTR are *ad hoc* tribunals with limited territorial and temporal jurisdiction. It can be said that the ICC is forever and for all. The difference between *ad hoc* and permanent justice was and still is a major obstacle to the ratification of the Rome Statue by some countries, which, having supported *ad hoc* justice solutions (in the case of some countries and if deemed convenient), are reluctant to support a permanent justice solution (for all and on every occasion).

[17] The jurisdiction of the ICTY and ICTR is concurrent with that of national courts and has primacy over national courts. The ICC operates on the principle of complementarity, i.e. exercising jurisdiction only when national courts are unwilling or unable to genuinely investigate and prosecute.

[18] In the former Yugoslavia and Rwanda tribunals, victims stood before the courts as witnesses. However, in the ICC Statute, victims were elevated to the category of procedural participants in their own right. Indeed, several provisions in the ICC Statute stipulate the involvement of victims at all stages of the proceedings. Most importantly, victims of international crimes can claim redress for violation of their rights.

tial if the State so requests. If the Prosecutor thereafter decides to open an investigation, the decision must be shared with the State in question (Article 19 of the ICC Statute).

Article 42 of the ICC Statute, in its nine paragraphs, presents the ICC Prosecutor's Office as acting autonomously from the Court. It is chaired by the Prosecutor and assisted by one or more Deputy Prosecutors, who must be highly competent individuals of high moral character with extensive practical experience in the prosecution or trial of criminal cases. The Prosecutor is elected by the members of the Assembly of States Parties through a secret ballot and must gain an absolute majority. The Prosecutor and the Deputy Prosecutors are subject to the exclusivity rule and they may be subject to disqualification if their impartiality is in question.

A Victims and Witnesses Unit, established within the ICC Registry, takes protective measures and prepares security arrangements. It also provides counsel and other assistance to witnesses and victims who appear before the Court, or others at risk (Article 43 of the ICC Statute).

The Prosecutor appoints *"such qualified staff as may be required to [its] respective [office]", namely, investigators. In the employment of staff, the Prosecutor ensures the "highest standards of efficiency, competency and integrity".*

In exceptional circumstances expertise of seconded personnel offered by States Parties, intergovernmental organisations or non-governmental organisations may be employed (Article 44 of the ICC Statute).

The Prosecutor, Deputy Prosecutors and staff from the Prosecutor's Office, when engaged in the business of the Court, enjoy privileges and immunities that are necessary to the fulfilment of their duties (Article 48 of the ICC Statute). The primary function of the Prosecutor is to investigate and prosecute the perpetrators of massive violations of human rights and IHL.

It is possible to discern some similarities between the prosecution of massive crime violations internationally and the prosecution of organised crime at a national level. There are also important differences that make the types of procedure dissimilar. At least two in international prosecution stand out. The first has to do with a lack of external administrative structure able to carry out investigations in the territory of a State without its help – as well the absence of an international police force to make arrests, giving paramount importance to the State's cooperation.[19] The second is that the procedural

[19] Section 9 of the ICC Statute provides for international cooperation and judicial assistance of the States Parties. Article 86 (General Obligation to Cooperate) establishes that "States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court".

model of international criminal tribunals is a combination of elements of the accusatory system (common law) and the inquisitorial system (civil law).

Several concepts and procedures from both legal traditions can be found in the Statutes of the Courts and the Procedure and Evidence Rules; in the approach of the Prosecutor, judges and defence lawyers; in the introduction of evidence; and the manner in which the case is conducted in general.

As a result of that combination of elements of the different legal systems, some general principles are acquired in relation to the international rules of evidence: national rules of evidence not binding, application of the rules of evidence which best favor a fair determination of the matter, admissibility of any relevant evidence with probative value, exclusion of evidence if its probative value is substantially outweighed by the need to ensure a fair trial, possibility of verification of the authenticity of evidence obtained out of court and reception of the evidence of a witness orally or, where the interests of justice allow, in written form[20]. Further examples of that combination in the production of evidence are the testimony of the accused[21] and a statement of the accused[22] (common law), and the possibility for the Court *proprio motu* to summon witnesses and order their attendance[23] (civil law).

Still, some methods commonly used in national criminal proceedings may be of use internationally, such as resorting to "insiders" as witnesses. Although national systems are aware of this practice, it may have a particular meaning in the context of the prosecution of international crimes, especially when the accused enjoy top hierarchical positions. It may also be relevant in certain forms of criminal participation (such as joint criminal enterprise). The testimony of an insider in a case of joint criminal enterprise is one of the best ways to prove the purpose of the criminal enterprise and its members. Insiders can and should be used in complex criminal cases, because finding evidence of a complex criminal organisation and its leaders can be difficult and consuming in terms of time and resources.

Although similar investigating tools or legal concepts can be used nationally, unique challenges arise when investigating and prosecuting international crimes. Some are obvious, such as a lack of police or enforcement officers; others are less obvious, such as the impact of the combined common law/civil law process.

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[20] Rule 89 of ICTY Rules of Procedure and Evidence. See also Article 69 of the ICC Rules of Procedure and Evidence.

[21] Rule 85 C of ICTY Rules of Procedure and Evidence

[22] Rule 84 bis of ICTY Rules of Procedure and Evidence

[23] Rule 98 of ICTY Rules of Procedure and Evidence

Such challenges have an impact on the type of investigation methods, the recruitment of personnel as well as the legal tools used and their effectiveness. Only a mix of traditional and innovative criminal investigation tools and a balance of the different national legal cultures can ensure effective investigation and prosecution of international crimes.

Similar to what had happened with the ICTY, the ICC adopted the accusatory model, which is one of the fundamental pillars on which all functions and activities of the Prosecutor stand. Thus, it is up to the Prosecutor to investigate *à charge* et *à dècharge* suspicions of the existence of crimes and, where appropriate, indict suspects. However, there are at least three important exceptions in the accusatory model.

Firstly, as at Nuremberg and Tokyo, there are no technical rules for the admissibility of evidence. Consequently, all relevant evidence may be included in the process unless their probative value is substantially offset by the need to ensure a fair trial or if the evidence was obtained through serious violations of human rights.

Secondly, while in the accusatory system courts must normally be satisfied with the evidence submitted by the parties, the Court may *proprio motu* order the production of additional evidence. This allows the Court to be fully satisfied with the evidence on which it bases its final decisions. It was considered that, in the international sphere, the interests of justice are best served by this provision and that the decrease, if any, of the rights of the parties is minimal by comparison.

Thirdly, the granting of immunity and plea-bargains have no place in the Rules of Procedure and Evidence. It remains entirely a matter for the Prosecutor to determine whom to investigate and to prosecute. Cooperation of an accused person will also be taken into account as a mitigating circumstance, as well as for the purpose of granting pardon or commutation of the sentence. The Prosecutor's Office operates independently from the Court's judges. There is, however, a close and cooperative relationship between the Prosecutor's Office and the rest of the Court in administrative, personnel and other issues related to the functioning of the Court as a whole.

The selection of personnel is a demanding and time-consuming exercise. It is no exaggeration to note that the success of the Court as a whole depends largely on the quality of the Prosecutor's Office investigation staff. Having experienced and qualified prosecutors is important: If the prosecution evidence is not exhaustive, relevant and complete – or is insufficiently prepared – the risk of failure of the charge is high, given the principle of *in dubio pro reo* and the requirement of evidence beyond reasonable doubt.

The ICC Prosecutor, as in other cases, governs actions through the principle of mandatory prosecution whenever there are elements of criminal conduct and action must be taken, and when not acting is not an option. There is no police force at an international level. Thus, the Prosecutor must rely on the support of State police in carrying out investigation, accusation and prosecution functions. There is no international enforcement body, but the Prosecutor can count on numerous other investigation mechanisms, be them governmental or not.

The Prosecutor's Office is one of the organs that make up the Court (Article 34 of the ICC Statute). Article 42 of the ICC Statute guarantees its functional autonomy, stating that the Prosecutor "shall act independently as a separate organ of the Court". The Prosecutor is responsible for receiving, through any suitable form, *notitia criminis* about crimes within the jurisdiction of the ICC and then investigates and institutes criminal proceedings.

The Prosecutor may also propose amendments to the Elements of Crimes (Article 9 (2) of the ICC Statute) and the Rules of Procedure and Evidence (Article 51 (2) c) of the ICC Statute). For an independent and impartial ICC, the Prosecutor enjoys privileges and immunities in carrying out duties in the territory of each State party (Article 48 of the ICC Statute).

The Prosecutor's Office is headed by a Prosecutor (who holds full directive and administrative powers) and assisted by dedicated Deputy Prosecutors of different nationalities, working on a full-time basis.

THE PROSECUTOR AND INTERNATIONAL CRIMINAL PROCEDURE

The international criminal procedure is different from the national in several ways. One of the most striking differences is the symbolic function of international criminal procedures, which are deemed essential to the peace and reconciliation process in post-armed conflict societies; in other words, there can be no peace without justice and reconciliation. "Thus, Peace and Justice go hand in hand". *(*Antonio Cassese).

However, this is only possible when the communities involved give legitimacy to these procedures, and when the messages of the procedures are received and accepted by their communities. Thus, if courts are to contribute to peace and reconciliation in affected communities, there is a need to communicate with the people involved. Although much progress has been made over the past decade, outreach programmes remained a significant challenge for *ad hoc* tribunals and still remain for the ICC.

In addition to these external communication obstacles, there are also internal barriers. On the one hand, there are those who repeatedly ask for more resources to enable the court to achieve their ambitious goals. On the other hand, others question whether it is appropriate for prosecutors and judges to be involved in dissemination activities. After all, the international criminal courts are modelled on national courts, which, as a rule, do not have such a role.

Domestic prosecutors and judges focus mainly on the technical elements of crimes and procedural aspects of the case. In addition to the application of the law, any activity is considered to be "political" (a taboo term). Nevertheless, it should be pointed out that the rhetorical functions of international criminal law are fundamentally different from nation legislation. There are important reasons for international courts to carefully manage public evaluation and their image, which incidentally should also be done at a national level.

International criminal justice is still in its infancy. The ICTY, as the first *ad hoc* tribunal in recent history, was established only two decades ago. Unlike domestic criminal law that could be centuries old in terms of history and jurisprudence, there is still a lack of understanding about what purpose the international criminal tribunals serve. The ICC also remains either unknown or unaccepted in many parts of the world.

Besides this alienation and ignorance, international criminal justice is normally intended for communities with little previous experience of an impartial and independent judiciary – otherwise they would be willing and able to investigate and prosecute the crimes by themselves. It is therefore important for international criminal law to establish a new beginning for these communities and to be an example to the national courts. This is only possible if the public has a positive and fair view of international criminal courts.

International criminal justice essentially covers genocide, crimes against humanity and war crimes. Of course, communities devastated by these crimes are traumatised, fearful, eager to find a culprit, and take revenge. In turn, in most cases, local politicians and media agitate these feelings, jeopardising the peace and reconciliation process, with no other help being available, except the intervention of international courts. National criminal law seeks mainly to punish and prevent crimes; international criminal law is intended to also contribute to peace, reconciliation, security and the wellbeing of the international community.

Being a case of massive violations of human rights and international humanitarian law, the Srebrenica massacre presented exceptional legal and logistical challenges due to the large number of victims, witnesses, forensic investigations, incidents and supporting documents involved,[24] as well as the original legal complexities of the various crimes in question.[25]

The ICTY and the ICTR were created as auxiliary bodies to the UN, which until then had never practised international criminal justice. Therefore, the need to strike a balance between the priorities of criminal operations, the detention of suspects and compliance with other UN principles posed legal, institutional and operational challenges specific to the Prosecutor in terms of fulfilling mandates to investigate crimes and initiate criminal proceedings before the Court. These challenges increase with the complexity of crimes, their size, the safety concerns of potential witnesses, and the fact that in the early years arrests of suspects often preceded the investigation[26].

SOME QUESTIONS

Genocide, crimes against humanity and war crimes are, by definition, massive. International crimes can be widespread and systematic, with multiple offenders and victims. Thus, perpetrators are often coordinated and organised by senior military and/or civilian officers. Their nature requires national jurisdictions to have a different approach in terms of "selecting", investigating, indicting, proving, adjudicating, defining responsibilities, punishing, repairing, and enforcing penalties.

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[24] In the first instance, and after much filtering in the preparation for trial, the case had 103 witnesses called by the Prosecutor; 13 witnesses called by the Defence (including the very General Radislav Krstić). The Prosecutor filed 910 documents (some of which extensive dossiers) and the Defence presented 183 documents.

[25] See ICTY,KRSTIĆ (IT-98-33) "SREBRENICA DRINA CORPS" and other related cases: BLAGOJEVIĆ & JOKIĆ (IT-02-60) "SREBRENICA; ERDEMOVIĆ (IT-96-22) "PILICA FARM"; KARADŽIĆ (IT-95-5/18) "BOSNIA AND HERZEGOVINA" & "SREBRENICA"; MILOŠEVIĆ (IT-02-54) "KOSOVO, CROATIA AND BOSNIA"; MLADIĆ (IT-09-92) "BOSNIA AND HERZEGOVINA" & "SREBRENICA"; NIKOLIĆ MOMIR (IT-02-60/1) "SREBRENICA"; OBRENOVIĆ (IT-02-60/2) "SREBRENICA"; ORIĆ (IT-03-68); PERIŠIĆ (IT-04-81); POPOVIĆ et al. (IT-05-88) "SREBRENICA"; STANIŠIĆ & SIMATOVIĆ (IT-03-69); TOLIMIR (IT-05-88/2) "SREBRENICA"; TRBIĆ (IT-05-88/1) "SREBRENICA".

[26] When investigating and prosecuting massive violation of human rights or international humanitarian law, it is extremely important to first investigate suspected violations, then jointly indict the suspects who participated in the same criminal action, and arrest the accused in an organised manner. Those suspected of having committed war crimes are heroes to the other side of the conflict and keep communication lines and networks of relationships that can disrupt investigations, destroy evidence, intimidate witnesses, and organise escape from detention.

In short, this means that criminal theory built on common cases of individual criminal offense is unsuitable in cases of massive criminal violations. In all, prosecuting war crimes is not the same as dealing with common individual criminal cases.

In addition, a national court with jurisdiction to try war crimes must regard the cases as urgent and recognise their international impact, considering the circumstances and nature of violations of IHL. In fact, war crime trials must be timely, given the requirements of peace and reconciliation processes, and conducted by independent and impartial judges. National judges, even if they have not taken up arms in conflict,[27] in a sense have always taken the side of a party in the conflict. In principle, those who took part in a conflict cannot be completely independent and impartial or, at least, cannot be publicly perceived as such. Justice must be done and must be seen to be done.

Is there a need for strategy in the prosecution and trial of war crimes? The answer is clearly yes. The Prosecutor must act with a view of closure and completion considering that: war crimes are usually committed in the past; most criminal operations have been investigated and documented by different public and private entities; the majority of suspects have been identified; there is a risk of losing evidence; fatigue and a lack of witnesses motivation increases over time; new generations are more focused on the future; expeditious and fair trials are the only way to close the door to the past and open the door to the future[28]; and justice is about the past and reconciliation is about the future.

After considering these points, the Prosecutor is asked how many cases to investigate and prosecute and what strategy (selecting and mapping cases, establish interactive and centralised databases, and deduce accusations) [29] is being considered. The Prosecutor also needs to take into account available resources (human, financial and material) and organise interaction in order achieve the common goal of closing the door to the past.

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[27] Most armed conflicts that took place after World War II were not international conflicts, but civil wars. Thus, the public perception of independence and impartiality of the Court becomes even more important and decisive. Without this dimension, trials, regardless of how fair and fast they may be, will have no effect and impact on the peace and reconciliation process of communities.

[28] In Sarajevo (2008) diplomats said that the issue of "war crimes" in Bosnia was poisoning the political, social and economic environment, as well as personal relationships. It was necessary to clean up this type of poison and close the issue of war crimes as quickly as possible.

[29] See the Office of the UN High Commissioner for Human Rights, Rule-of-Law tools for post-conflict States, Prosecution initiatives, UN, New York and Geneva, 2006.

The joint criminal enterprise is particularly applicable in circumstances when senior leaders share the intent of committing a crime and each contributes to fulfilling the criminal purpose. The relationship among perpetrators may or may not be hierarchical, although this is not decisive.[30]

It is the practice of joint murder with shared intention that defines relationships. Even if perpetrated by others, enterprise members, and not necessarily those individuals who physically carried out the crimes, are culpable. The concept reflects a reality where large-scale atrocities are committed by the combined action of various forces or agents, and criminal purpose can only be shared by leaders who take action to achieve their ends.

In August 2003, the Security Council issued Resolution 1503, urging the ICTY to "focus on the prosecution and trial of senior leaders suspected of being responsible for crimes within the jurisdiction of the ICTY" and transfer other cases to competent national courts in Bosnia, Herzegovina, Croatia and Serbia.

The transfer of a case from an international to a national court proved to be a complex subject and raised a series of new legal and organisational issues that were difficult to foresee and solve. However, the efficient and effective manner in which the War Crimes Section of the Court of Bosnia and Herzegovina – in cooperation with the ICTY – handled the situation should be stressed.[31]

Other legal principles that were also developed as a result of the transfer process also deserve analysis. They include the development of the ICTY and Court of Bosnia and Herzegovina Prosecutors' cooperation mechanisms, the notion of "proven facts" and "documental evidence" from the ICTY proceedings. These developments contribute to the heritage of the ICTY, leaving a lasting legacy for future national courts dealing with international crimes. Despite the different legal natures of the ICTY and the ICC, this experience

[30] On the contrary, the hierarchical relationship is crucial for assessing and establishing the responsibility of the superior, be it civil or military, i.e. de jure or de facto responsibility.

[31] The case of Radovan Stanković was the first to be transferred from the ICTY to the War Crimes Section of the Court of Bosnia and Herzegovina. On 10 July 2002, he was placed in custody in the ICTY detention unit. On 1 September 2005, the ICTY decided to transfer the case to the Court of Bosnia and Herzegovina, and on 29 September 2005, the accused was transferred to Bosnia and Herzegovina. On 7 December 2005, the indictment was confirmed/accepted. This was also the first "11bis case" finalised in the Court of Bosnia and Herzegovina. In fact, on 14 November 2006, the first trial sentenced Radovan Stanković to crimes against humanity and imposed a prison sentence of 16 years. On 28 March 2007, the Board of Appeal modified the sentence to 20 years. Other cases transferred from the ICTY to the Court of Bosnia and Herzegovina were Ljubičić (IT-00-41) ''Lašva Valley"; Mejakić et al. (IT-02-65) "Omarska and Keraterm Camps"; Stanković & Janković (IT-96-23/2) "Foča"; Todovic & Rasevic (IT-97-25 /1) "Foča"; Trbic (IT-05-88/1) "Srebrenica"; Stanković & Janković (IT-96-23/2) "Foča" ; Todović & Rašević (IT-97-25/1) "Foča" ; Trbić (IT-05-88/1) "Srebrenica"

can be seen as supplementing the principle of complementarity and constitutes critical learning for the future relationship between international and national criminal jurisdictions.

One of the pre-project objectives of investigation in "International Criminal Justice" is "to bring about new proposals for some of the problems that currently arise in the context of international criminal justice".

Given the above, and particularly due to the nature of war crimes, some relevant questions regarding the work of the Prosecutor in international criminal justice will need to be asked in the hope that they will translate into new proposals for some of the problems that currently arise from international criminal justice.

Accordingly, what will be the impact on court independence and impartiality, at least in terms of public perception, especially in cases of non-international armed conflict?

What criminals and crimes should be tried? How should charges of large-scale international crimes be addressed? How should cases that are investigated and submitted to trial be selected when it is impossible to try all those presumed as responsible for the crimes committed in armed conflicts?

What form of criminal responsibility (individual, command or joint criminal enterprise) does the Prosecutor choose to accuse suspects of having committed massive violations?

How should evidence be collected and taken to trail in order to build a case, given that under certain circumstances it is not possible to gather modern evidence (i.e. wiretapping, pictures, video and audio records). What if the investigation depends on the cooperation of States that are not always willing to collaborate?

What about victims and witnesses? How should reparations for victims be determined? What contribution, if any, does national law make to the process? Which concept of reparation should be used, given that not all people displaced by conflict return home? Should reparation mean collective reparation or a reconstruction of life?

How investigation and prosecution at an international and national level should be combined, given that international crimes contain general (chapeau elements, e.g. widespread or systematic attacks) and more specific elements (underlying criminal offences, e.g. murder)?

How should the proven facts be transferred from the international tribunal to the national court and how should technical and human resources and criminal investigation materials be shared?

What kind of evidence has proved to be useful in rendering serious IHL violations? What are the challenges affecting the collection of relevant evidence? How should the presentation of evidence, including collecting and stabilising witness testimony in order to be used in different processes be optimised? For example, why subject a victim of rape to different testimonies in different cases in different places on different dates? Is it necessary and permissible to traumatise victims on behalf of justice and reconciliation?

What are the most effective means of dealing with the external factors that influence the investigation and prosecution of suspected IHL violations?

CONCLUSION

The Prosecutor in international criminal justice is an organ that is part of the International Criminal Court. To some extent, duties and power nominally equate to those at a national level; however, such powers and tasks differ substantially and methodologically in the framework of international criminal justice. Experience required nationally does help, but is clearly not enough for an efficient and effective performance of duties at an international level. A special requirement is having a good understanding of the dynamics of massive criminal violations and, consequently, approaches to investigation, prosecution and some specifics of international criminal proceedings.

The challenges posed in the investigation and prosecution of large-scale crimes or massive criminal violations committed years ago in a foreign sovereign country are unique. Thus, it is both remarkable and surprising in many ways that tools of investigation available to the Prosecutor have produced results that one can see and quantify. It is important to remember that these legal tools were developed in an environment with contributions from common law and civil law systems, and were always geared towards answering the essential question of how to execute a fair and expeditious trial. Although challenges remain, the work of the Prosecutor in international criminal justice is a considerable achievement in the fight against impunity for serious violations of human rights and international humanitarian law.

Opinion tribunals and the Permanent People's Tribunal

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Opinion tribunals and the Permanent People's Tribunal

Although not always widely known, the existence of "opinion tribunals" has been a reality for the past decades. As a rule, they act in the international arena. Even when dealing with internal issues of a particular country, they address global issues and the echoes of their deliberations extend beyond national borders. The purpose of this paper is to critically reflect on the nature and role of opinion tribunals, particularly the Permanent People's Tribunal, created in Bologna in 1979. This reflection is part of a research project about international jurisdiction conducted by OBSERVARE, the international relations research unit of Universidade Autónoma de Lisboa[1].

The term "opinion tribunal" encompasses two concepts: the idea of "tribunal" is immediately associated with the enforcement of justice based on a legal norm; the concept of "opinion" refers to the somehow diffuse idea of public opinion, in which collective feelings, widely shared trends of ideas and beliefs insistently emphasized in public manifest themselves. There is a peculiar dialectic between law and public opinion – in our case, between national and

[1] When preparing this text I received valuable indications and suggestions from Gianni Tognoni (Secretary General of the PPT) and Piero Basso, former comrades in mobilizing causes, as well as from Simona Fraudatario (of the Lelio Basso International Foundation). My colleagues Mario Losano, of the University of Eastern Piedmont, and Miguel Santos Neves, of Universidade Autónoma de Lisboa, enriched the original text with important comments and suggestions and other colleagues, jurists Patrícia Galvão Teles, Constança Urbano de Sousa, Mateus Kowalski and Pedro Trovão do Rosário, helped overcoming my limitations in this field. Brígida Brito offered meticulous support in all methodological aspects. To all I give special thanks.

international law and international public opinion. Due to their imperative nature and also to their gaps, laws enforced by the courts impact their influence on public opinion, projecting their values on them, disseminating rules of conduct and promoting consensus around commonly accepted principles, sometimes leaving issues unresolved; conversely, the sensitivity of public opinion displays interfere in the formulation of laws, require their enforcement or refute their failure. As a French sociologist of international relations defined wisely: *Public opinion and international law should not be confused and gain nothing if they were to be confused. It is the inevitable and necessary tension between them that may lead to a bit more fairness in the world. If lawyers were to be freed of the pressure of public opinion, they would risk becoming strictly technicians of the established order. If opinion was to be left to itself, it would risk wandering endlessly in search of its projects: only law can help it realize its ideal by providing it with the staff and the institutions of a new world. Accordingly, it is in the interest of the community of human beings that the dialogue between international law and public opinion never ceases.* (Merle, 1985,p 97).

Having accepted this viewpoint, prior clarification is still required: one should not perceive "opinion tribunal" as a trial carried out by public opinion. The concept of public opinion is too volatile to support the consistency of a founded, dispassionate and weighted judgement. Justice cannot be at the mercy of the emotions of current opinion or of the vicissitudes of published views. Legal procedures, in their rigour and technical complexity, in their connection to the current legislation, in their respect for the guarantees of accused persons, are not comparable to floating perceptions and preferences, however widespread they may be. Still, that does not prevent, quite the opposite, consensus around certain principles from being gathered, so as to anticipate norms that have not yet been legislated which may later be legally enforced, or to protest against the insufficient implementation of international laws, or to fill legal loopholes or institutional omissions responsible for the impunity of criminals.

OPINION MOVEMENTS AND COURT RULINGS

The history of the twentieth century is dotted with examples of opinion movements that acted as critical conscience regarding controversial acts in the enforcement of justice. Sometimes, their impact was limited to restricted circles of informed elites. In other cases, they had a long echo in public opinion. It is worth remembering some emblematic cases that were symbolic moments in the dialectic between law enforcement and international public opinion.

At the end of the nineteenth century, the famous Dreyfus Affair shook public French and international opinion, with the particularity of disclosing perverse anti-Semitism reactions and triggering vehement protests that later led to justice being made. Alfred Dreyfus, an officer of Jewish origin, held posts of responsibility in the French army and in 1895 was accused of spying in favour of Germany, when the resentments of the Franco-Prussian war were still felt. After having been dispossessed of his post and deported to a distant island, Dreyfus always claimed his innocence and his case raised a wave of indignation that led to his credibility being restored.

A few decades later, the United States were shaken by a tremendous miscarriage of justice that led to the death sentence of Nicola Sacco and Bartolomeo Vanzetti. These two Italian immigrants, anarchists, carriers of illegal weapons, were suspected of murder and robbery, arrested in 1920 and convicted in court for murder, despite the absence of evidence and the massive appeal against their conviction: solidarity committees were created, large demonstrations were held in several countries and eminent international figures claimed for their release. All was in vain and Saco and Vanzetti were electrocuted seven years later. It was not until 1973 that the truth was officially restored and the memory of the two anarchists posthumously rehabilitated.

Meanwhile, the rise of National Socialism in Germany had a dramatic episode that marked both Hitler's escalating seizure of power and the anti-Communism hatred of his regime: the fire at the Reichstag – the palace of the Berlin Parliament – in February 1933. The Nazi investigation identified a suspect, a young left wing Dutch who ended up sentenced to death, and the blame was attributed to the Communists, leading to the arrest of many thousands of people who resisted Nazism. However, in September of the same year, the " Legal Commission of Enquiry into the Burning of the Reichstag" was set up in London and organized a counter-case that concluded that the Nazi leaders were likely to be guilty[2].

Between 1936 and 1938, the Moscow Trials triggered major international repercussions. On the orders of Stalin, a massive purge was carried out that physically killed most of the Soviet elite. Following forged complaints or "confessions" of convenience, the courts pronounced ruthless sentences against the ruling class, especially against Trotsky and his followers. The European Left reacted with ambiguity to the events, despite the severe criticism of people like the surrealist poet André Breton and the Marxist

[2] For a detailed analysis of this case see Klinghoffer, A.J. and Klinghoffer, J.A. 2002,pp 11-50.

Victor Serge; an international investigation commission was created in the United States, chaired by the prestigious philosopher of morals John Dewey, who concluded that Trotsky was innocent, despite the fact that the majority of the members of the commission distanced from his ideas[3].

Another trial, also in the United States, that caused intense international outcry was the one involving the Rosenberg couple after the end of World War II. They were accused of spying on the nuclear program in favour of the USSR, which would have allowed the Soviet Union to accelerate the production of the atomic bomb. Trialled in 1951 and executed in 1953, Julius and Ethel Rosenberg were Jewish and communism sympathizers and even today there is controversy about their guilt, especially that of his wife Ethel. Numerous prominent world figures, such as Einstein, Pius XII, Sartre, and Brecht protested against the sentence, denouncing primary anti-communism and the latent anti-Semitism, asking for clemency for a couple that was convicted without conclusive evidence.

In their symbolic strength, all the above mentioned cases illustrate the tension between the enforcement of legal norms and international public opinion, as well as between formal bodies that have judicial authority and informal bodies that contest them. Like a kind of dialogue or confrontation between powers and counter-powers, a dialectical opposition and complementarity between legal judgments and currents of opinion emerges. The enforcement of justice, fallible as it is, vulnerable to all sorts of abuses, is not limited to the jurisdiction of the courts and extends itself to the social capacity of protest, which does not mean that the latter has any guarantee of being right or any prerogative of "moral superiority." By act or omission, whether due to deficit of interpretation or due to a legal void, the law, and especially international law, does not always respond to the demands of complex human situations. Hence this apparent historical necessity of creating correction, rehabilitation and contesting moments as an antidote to the potential perversion of justice caused by its own agents.

Perhaps it is this very same need to do justice outside the conventional structures that leads to the creation of special bodies when regular courts do not seem to be the most appropriate places to judge collective or individual behaviour, as is the case of truth and reconciliation commissions. There are known initiatives in this area, such post-apartheid South Africa or Latin American societies after the military dictatorships. Seeking to avoid the settling accounts

[3] For more detailed information, see also Klinghoffer, A.J. and Klinghoffer, J.A. 2002, pp 51-101.

that are likely to reopen wounds of the past, but also taking as inadmissible the impunity of those responsible for the crimes committed, such commissions have had the role of preserving the memory of the facts and of determining the responsibility of political actors, with the aim of obtaining recognition, disclosure, forgiveness and reconciliation, and not so much punishment. In these cases, the wisdom of the transition phase with a view to consolidating democracy prevails, more than the mechanical enforcement of criminal laws.

There was a similar process in Rwanda as a therapy against the memory of the tragic genocide of the Tutsis perpetrated by Hutu militias between April and June 1994, which killed over 800,000 Rwandans and forced nearly two million people to flee. A special international tribunal was set up to indict those responsible for the crimes, but a large number of prisoners, over 100,000, remained in the country, for which reason the official courts were unable to prosecute all cases. The local government encouraged resorting to the traditional conflict resolution institution – called Gacaca – as a way to mobilize the population for the fulfilment of justice, with emphasis on the role of the elders and the function of social integration, according to the best African traditions.

The aforementioned examples attest the variety of ways that have been used to find solutions to challenge or complement the role of established judicial systems, either through opinion movements, or international commissions of inquiry, truth and reconciliation commissions, or via customary practices, in the aforesaid tension between law and public opinion. Ultimately, this action can even be conducted by individuals, as shown in the special case of the blog of the great American jurist Richard Falk, one of the most influential names in the field of international law[4]. It is a blog he created on the day he turned 80 and is an impressive repository of his independent and critical thinking on legal and political issues, with a title that is, in itself, a programme: Global Justice in the 21st Century.

INTERNATIONAL JURISDICTIONS AND OPINION TRIBUNALS

For centuries, international law has been regulated by treaties agreed between two or more states, which, despite the legal nature of the established rela-

[4] See Falk, Richard (2014). *Homepage*. Acessed on Dezembro 29,2014 em http://richardfalk.wordpress.com/

tionship, were only morally obliged to abide by their provisions, without the strict existence of an international jurisdiction with instruments to ensure compliance therewith, and, if necessary, by enforcement action. However, back in 1899, a Permanent Court of Arbitration was created following an international Hague Conference, and although there was already a Permanent Court of International Justice established under the Covenant of the League of Nations, it was only in 1946 that the International Court of Justice, based in The Hague, started functioning as part of the multilateral framework of United Nations. Its role was clearly defined: to resolve conflicts between states. The European Court of Human Rights, based in Strasbourg, created in 1959 by the Council of Europe, had a different purpose. Much later, in 2002, after its statutes were adopted in Rome, the International Criminal Court was created, coincidentally also based in the capital of the Netherlands, different from the ICJ due to its capacity to judge individuals accused of committing aggression, genocide, war crimes, and crimes against humanity.

Meanwhile, at the initiative of the United Nations Security Council, three other tribunals were created to trial one-off concrete situations: the International Criminal Tribunal for the former Yugoslavia, established in May 1993, the International Criminal Tribunal for Rwanda, set up in November 1994, and the Special Court for Sierra Leone, created in 2000[5], intended to judge the crimes of genocide, war crimes and crimes against humanity in these countries. Somehow, they are actual replicas of the special tribunals set up immediately after the 1939-45 war to try crimes perpetrated by the Germans and the Japanese, the Nuremberg Tribunal and the Tokyo War Crimes Tribunal, respectively. The latter, of course, had very particular characteristics, as they were military courts organized by the victors of the war; they created jurisprudence as the decisions were based on norms that had not been previously legislated, thus calling into question the principle of non-retroactivity of criminal law; however, they had the merit of judging the individual responsibilities of political leaders – no longer sheltered behind the regime under which they were fulfilling orders – and of condemning crimes not previously explained, such as crime against peace, war crime, the crime of genocide and crime against humanity.

[5] On this truly special case, since it was a hybrid national and International tribunal, see Paula, Thais and Mont'Alverne, Tarin "A evolução do direito internacional penal e o Tribunal Especial para Serra Leoa: análise da natureza jurídica e considerações sobre sua jurisprudência", *Nomos: Revista do Programa de Pós-Graduação em Direito da UFC*, Available at http://mdf.secrel.com.br/dmdocuments/THAISeTARIN.pdf, accessed on 30/1/2015.

Thus, we have two kinds of international courts: the emergency courts, with ad hoc functions and powers limited to specific situations (Nuremberg, Tokyo, former Yugoslavia, Rwanda, Sierra Leone …) and the regular or permanent courts – two in The Hague, the ICJ and the ICC, and the European Court of Human Rights – which are stable elements of the international legal architecture.

Opinion tribunals appeared in a totally different situation. One can doubt the relevance of this designation, as we will see later. In any case, numerous initiatives of citizens without any official mandate have taken the form of judicial processes to enunciate pronouncements on issues when fundamental human rights are at stake. Thus, they are a kind of informal international jurisdiction arising from the civil society and not from established powers, devoid of coercive force but aspiring to sensitize international opinion and public authorities thanks to the moral value of their sentences, which are in fact based on current international law.

The most representative of these opinion tribunals is perhaps the Permanent Peoples' Tribunal (PPT), which has been active since 1979 and is the central object of this study. Its creation, however, lies in a context that should be recalled.

The PPT originated in a previous truly "founding" experience, the international tribunal against war crimes committed in Vietnam, known simply as the Russell Tribunal[6], which was the source of inspiration for all subsequent similar actions. The initiative was taken by Lord Bertrand Russell, philosopher, mathematician and Nobel Prize winner for Literature in 1950, who also stood out as an activist for the cause of peace and disarmament. He was joined by an extremely prestigious group of persons, including another big name in twentieth-century thought, Jean-Paul Sartre, at first reluctantly, then convinced by Simone de Beauvoir, accepting to chair the court sessions in London in 1966. The work was resumed in Stockholm (1967) and finally in Roskilde, Denmark, in the same year. It was due to be held in Paris, but General De Gaulle, then president of France, did not consent, although he opposed the US policy towards Vietnam. In a letter to Sartre he explained that his decision in no way restricted freedom of expression, but argued that "I shall not teach you that any justice, in principle and in its implementation,

[6] Very detailed analysis in Klinghoffer, A.J. and Klinghoffer, J.A. 2002: 103-162.

belongs exclusively to the State"[7]This is an issue of primary importance that shall be further addressed. In his response, Sartre defined the foundation of the PPT's legitimacy: *Why have we appointed ourselves? It was precisely because no one else did. Only governments or the peoples could have done it. As for governments, they want to retain the possibility to commit crimes without running the risk of being judged; therefore, they would create an international body empowered to do so. With regard to the peoples, except in case of revolution, they do not assign courts, for which reason they could not appoint us*[8].

Somehow, this first Russell Tribunal recovered the previous one constituted by the Nuremberg Tribunal (Jouve, 1981,pp 670-671; Merle, 1985,pp 56-59), dealing with a typology of crimes that included crimes against peace, war crimes, crimes against humanity and the crime of genocide[9], with the key difference that it was a tribunal that was aware that it did not have the capacity for physical coercion or to enact effective sanctions.

After Bertrand Russell died, a second Russell Tribunal with identical structure was summoned by Italian Senator Lelio Basso, who had integrated the jury of the first one and distinguished himself due to his intervention. Three sessions were held in Rome and Brussels between 1973 and 1976, dedicated to denouncing and condemning the crimes conducted by various Latin American military dictatorships, namely Brazil and Chile but also Bolivia, Uruguay, Argentina and other Central American countries, with significant impact on the public opinion of this sub-continent[10]. The name of Lelio Basso reappeared later, definitely connected to the Permanent Peoples' Tribunal: it is possible that the contact he maintained with the atrocities of Latin American dictatorships gave him intuition: there are governments that are at war against their own people, and these must be given voice, in addition to the states that are supposed to represent them.

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[7] General De Gaulle's letter, dated 19 April 1967, is available online at http://bernat.blog.lemonde.fr/2008/06/10/le-tribunal-russell-et-le-proces-du-11-septembre/ Accessed on 29/12/2014.

[8] *Ibid*. There is a lot of information about the Russell Tribunal, including the complete list of members, technical contributions and individual testimonies available at http://911review.org/Wiki/BertrandRussellTribunal.shtml, accessed on 29/12/2014. The English version of Sartre's inaugural speech can be read in http://thecry.com/existentialism/sartre/crimes.html, accessed on the same date.

[9] The term "genocide" is a neologism first used by the Polish Jewish lawyer Raphael Lemkin to describe the systematic Nazi persecution of Jews: information at http://www.ushmm.org/wlc/en/article.php?ModuleId=10007043, accessed on 29/12/2014.

[10] The most detailed study on the Russell Tribunal II is available online in a PDF in *academia.edu* by Julien Louvrier: http://www.academia.edu/166082/Le_Tribunal_Russell_II_pour_l_Amérique_latine_1973-1976_Mobiliser_les_intellectuels_pour_sensibiliser_l_opinion_publique_internationale, accessed on 29/12/2014.

There are also brief allusions to a Russell Tribunal III which met in Frankfurt in 1978 on a seemingly local theme – professional bans in West Germany – and a Russell Court IV based in Rotterdam in 1980 to denounce the "ethnocide "of the Amerindian peoples (Jouve, 1981,p 671).

In this context of the Russell Tribunal sessions, a remarkable initiative of similar contours took place in Portugal in 1977-78: the Humberto Delgado Civic Court (a general who opposed the Salazar regime, murdered by the PIDE – Salazar's political police), created to trial the dictatorship crimes in Portugal. It was a brief but intense experience motivated by the lack of prosecution of those responsible for the dictatorial regime, in particular the political police. It brought together prestigious democratic individuals[11] and made a final decision entitled "Judging the PIDE, condemning fascism".

Shortly after, in 1982, the Russell Tribunal on Congo met in Rotterdam to judge the crimes committed during the dictatorship of Mobutu Sese Seko[12], President of Zaire. Seemingly, the name "Russell Tribunal" was taken as a "brand" used in different circumstances.

Meanwhile, the IPT – Indian Independent People's Tribunal – also called Indian People's Tribunal on Environment and Human Rights[13], was created in 1993, in the tradition of the grassroots movements crossing the Indian society, focusing on human rights issues and particularly on environmental justice.

In 2000, an Opinion Tribunal was held in Tokyo (*minshû hôtei* in Japanese, meaning people's court) on the "comfort women"[14] used in military brothels: an initiative of the Violence against Women in War Network, the aim was to judge responsibilities relating to kidnapping and mass deportation of women for sexual favours made to Japanese soldiers in the territories occupied by the Japanese expansionism in the years 1930-40. This issue was well-known but had always been silenced, despite having affected women from Korea, Taiwan, Indonesia, East Timor, China, and Vietnam.

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[11] See the analysis available at http://www.esquerda.net/artigo/tribunal-c%C3%ADvico-humberto-delgado-uma-experi%C3%AAncia-breve-1977-1978/28229, accessed on 28/12/2014. The full sentence can be found at http://ephemerajpp.com/2014/01/11/tribunal-civico-humberto-delgado/, accessed on 29/12/2014.

[12] Check the brief description at http://fr.wikipedia.org/wiki/Tribunal_Russell_sur_le_Congo, accessed on 29/12/2014.

[13] The website is http://www.iptindia.org, accessed on 29/12/2014.

[14] See Rumiko Nishino, «Le tribunal d'opinion de Tôkyô pour les « femmes de réconfort » », *Droit et cultures* [online], 58 | 2009-2, made available on 1/10/2009, accessed on 29 /12/2014. URL: http://droitcultures.revues.org/2079.

There are also references to the meeting held in Berlin in 2001 of the Court of Human Rights in Psychiatry[15], also referred to as the Russell Tribunal, which had the particularity of having concluded its work with a double verdict: a majority one that considered the existence of serious abuse of human rights in psychiatric practice, and a minority one that just alerted for possible deviations in the practice.

From the years 1998-2000 to the present, the Latin American Water Tribunal, also linked to the so-called Central American Water Tribunal, has been very active conducting activities on contamination and water resources issues in a number of countries in the region. There were sessions in Rotterdam in 1983 about the contamination of the river basin of the Rhine, as well as those held in 1992 in Amsterdam on ecological crimes in several continents, and also to the National Water Tribunal in Florianopolis, Brazil, in 1993, on the mining contamination and pesticide products[16]. Defending the democratization of environmental justice, these Latin American documents use the term "ethical court" (noted for its nature) and the category of "ecocide" (to characterize environmental crimes).

The Western military intervention in Iraq was one of the events that gave rise to several initiatives such as opinion tribunals. A World Tribunal on Iraq[17] was created in 2003 in Brussels, also called the Brussels Tribunal or BRussells Tribunal (playing with the phonetic proximity of Brussels to Russell), confirming that the Russell Tribunal remains the key reference. It held sessions in Brussels and in Istanbul in 2004 and 2005 and examined the Project for a New American Century, of the American neo-conservatives and the resulting aggression against Iraq. A session took place in Lisbon in 2005, with the collaboration of several Portuguese lawyers[18]. Later the World Tribunal on Iraq became a permanent forum, evolving into an international network of "academics, intellectuals and activists."

Since 2007 a commission has been active in Malaysia to investigate war crimes. It is called Kuala Lumpur War Crimes Commission (KLWCT), also known as Kuala Lumpur War Crimes Tribunal and is an alternative to the International

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[15] See Ian Parker, "Russell Tribunal on Human Rights in Psychiatry & "Geist Gegen Genes", *PINS (Psychology in society)*, 2001, 27, 120-122 30 June-2 July 2001, Berlin, available at http://www.pins.org.za/pins27/pins27_article12_Parker.pdf, accessed on 29/12/2014. See also http://www.freedom-of-thought.de/rt/accusation.htm, accessed on the same day.

[16] See http://tragua.com, accessed on 29/12/2014, as well as http://www2.inecc.gob.mx/publicaciones/libros/363/cap18.html, accessed on the same day.

[17] See its website http://www.brusselstribunal.org, accessed on 30/12/2014.

[18] Documentation available at http://tribunaliraque.info/pagina/ap_tmi/o_que_e.html, accessed on 30/12/2014.

Criminal Court, deemed to be ineffective[19]. It is chaired by the former prime minister of Malaysia, Mahathir Mohamad and in 2011 it condemned the intervention in Iraq, personally blaming President Bush and Prime Minister Blair for it. In 2013, it accused the Israeli state for the genocide of the Palestinian people.

Again in Brussels, the opinion tribunal on the detention of foreign children in closed centres was held in 2008[20]. At the initiative of the NGOs Coordinator for Children's Rights, the verdict symbolically condemned the Belgian State for infringing the relevant international conventions.

Despite the distance in time with respect to the events, in 2009 the opinion tribunal met in Paris on the use of "Herbicide Orange"[21] (or "Agent Orange"), the name of a powerful chemical defoliant, comprising a mixture of two strong herbicides used by the US in the Vietnam War, whose impacts are still being felt. As a chemical weapon of devastating effects, this defoliant is prohibited by international conventions. The tribunal condemned not only the US government, but also the companies producing the product, such as Monsanto Corporation and Dow Chemical.

One of the most representative opinion tribunals is perhaps the Russell Tribunal on Palestine[22], which held sessions from 2010 to 2013 in Barcelona, London, Cape Town, and New York and, more recently, an extraordinary session (September, 2014) in Brussels on violations of international law by Israel in Gaza. As a rule, however, the aim is not so much to condemn Israel (Israel's violations of international law are all too familiar), but rather to show the responsibilities of the entities that objectively support Israel in its violations of international law. It described the situation in Israel as similar to the South African *apartheid* regime and introduced the category of "sociocide" to characterize the attack on Palestinian identity.

In addition, an "informal" tribunal was held in Venice in September 2014 on the situation in the Ukraine[23]. Not entirely explicit and even dubious in nature, it also claimed to follow the Bertrand Russell tradition. It ended up condemning US President Obama and the Ukrainian President Poroshenko,

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[19] See the respective website in http://criminalisewar.org, accessed on 30/12/2014.

[20] Reference in http://www.lacode.be/tribunal-d-opinion-sur-la.html, accessed on 29/12/2014.

[21] About the tribunal see http://www.mondialisation.ca/agent-orange-le-tribunal-international-d-opinion-de-paris-condamne-les-tats-unis-et-les-firmes-tasuniennes/13667?print=1, accessed on 29/12/2014. Additional information at http://www.history.com/topics/vietnam-war/agent-orange, accessed on the same day.

[22] Plenty of information available at http://www.russelltribunalonpalestine.com/en/, accessed on 29/12/2014.

[23] News in http://rt.com/news/187584-russell-tribunal-obama-ukraine/ accessed on 29/12/2014.

NATO and the European Commission, charging them with war crimes committed in the East of the country.

Besides these initiatives, several appeals to the formation of opinion tribunals according to the Russell model on a range of issues have been reported. For example, in Paris, in 2010, there was an appeal for a world opinion tribunal on climate and biodiversity[24], based on the lack of success of major international conferences on the subject. The following year, a petition whose signatories called for an opinion tribunal to judge nuclear crimes[25] was started, prioritizing, in this case, nuclear disasters affecting civilians, as in the Chernobyl and Fukushima tragedies.

Tokyo, Kuala Lumpur, Brussels, Rome, Paris, Florianopolis, Rotterdam, Amsterdam, Lisbon, Venice, Cape Town, New York, London, Stockholm, Roskilde, Frankfurt, Berlin, Istanbul, New Delhi, San Jose in Costa Rica, The Hague – cities in three continents expressing the cultural and geographical dispersion of events that the organizers designate in many ways as courts, opinion tribunals, citizens' tribunals, international courts, ethical courts, conscience tribunals[26].... However, in addition to their geographic spread and variety of designations, they have some common features: they are civil society initiatives; they are participatory processes involving intellectuals and activists; they are technically grounded on current norms of the community of nations; they seek to compensate for shortcomings of international law or its implementation; they denounce and condemn the most serious crimes against human beings and against peoples; generally they have a clear anti-imperialist and anti-colonialist ideological standpoint; they are carriers of causes of emancipatory intent; they use analogies with legal procedures to make their conclusions; they aim to raise public awareness and through it call the attention of powers that be.

[24] News available at http://www.lemonde.fr/idees/article/2010/10/27/pour-un-tribunal-mondial-d-opinion-pour-le-climat-et-la-biodiversite_1431693_3232.html, accessed on 30/12/2014.

[25] As can be seen in http://www.rene-balme.org/24h00/spip.php?article1358, accessed on 30/12/2014.

[26] The designated "peoples' tribunals are very different from these, promoting summary sentences and sometimes summary executions, leading to a true perversion of justice, such as those conducted by the Red Brigades in Italy in the sentencing of Aldo Moro, or that have been promoted even by governments in periods of instability, as happened in Angola (see http://www.casacomum.org/cc/visualizador?pasta=04308.001.017, accessed on 27/1/2015).

THE PERMANENT PEOPLE'S TRIBUNAL (1979-2014)

In the above context, the Permanent Peoples' Tribunal (PPT) has special importance. Its main aspects include: Lelio Basso, senator of the Italian independent left, of unusual political stance, had been part of the Russell Tribunal I and was the soul of Russell Tribunal II. He died in 1978, leaving incomplete a project involving three institutions: the Lelio Basso Foundation, the International League for the Rights and Liberation of Peoples and the Permanent Peoples' Tribunal. The Foundation is based in Rome and still exists today; the League, established in 1976, was an extended social movement of meritorious action but in the last years of the twentieth century its members dispersed to various causes; as for the Tribunal – already after Basso's death – it was only formed in 1979 in the city of Bologna. Its first president was François Rigaux, an eminent Belgian jurist and a professor at the Catholic University of Leuven[27]. The general secretary was Gianni Tognoni, a physician in Milan professionally connected to health policies.

This set of institutions used a kind of "magna carta" as a reference: the Universal Declaration of People's Rights[28], proclaimed by Lelio Basso in Algiers on 4 July 1976, a symbolic day marking the 200 years of the independence of the United States. The Algiers Declaration, a document anchored in values that were emerging at the time, was characterized by some fundamental traits: it considered people as collective subjects of rights, in line with the UN's own approaches, thereby complementing the current vision about human rights; it addressed a new kind of recently recognized rights, so-called "third generation" rights (in addition to the civic-political, economic and social rights), such as the right of peoples to existence, cultural identity, political and economic self-determination, the right to scientific progress as the common heritage of humanity, the right to environmental protection and access to common resources of the planet, and the rights of minorities. Moreover, the spirit of the Declaration was fully in line with the claim for a "new international political and economic order," which was then so insistently present in the political discourse of the leaders of the Third World and European left, and assumed by multilateral institutions.

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[27] François Rigaux died in December 2013; he had already been succeeded as Chairman of the PPT by Salvatore Senese and later by Franco Ippolito, Italian jurists.

[28] Full text available at http://www.internazionaleleliobasso.it/?page_id=214, accessed on 30/12/2014.

After describing briefly the circumstantial framework and ideological milieu that led to the creation of the Permanent Peoples' Tribunal – PPT -, its characteristics are described below.

First of all, it is a **permanent** tribunal. The majority of other similar experiences were initiatives of opinion tribunals aimed at specific issues and particular cases, geographically defined and circumscribed in nature. Instead, the PPT has existed for 35 years (1979-2014) and deals with a large number of situations, since it is open to the variety of processes that come its way. Hence the relevance of being considered "permanent", as it operates in the long run and is constantly ready to cater for those suffering from violations of fundamental rights.

Secondly, it is an **international** tribunal, for many reasons: a) its composition (the jury members come from 29 different countries); b) the topics it covers include many sensitive issues of world politics and the cases it addresses-even when they are local – have an impact across borders; c) its constant references to international law and human rights and peoples, bearers of universal values; d) it has the ambition to influence international public opinion, global decision centres and the initiatives of the community of nations.

Third, it is a tribunal of the **peoples** (regardless of the known ambiguity of the term "peoples"). Lelio Basso refused the possible designation of "citizens' tribunal" for its alleged "bourgeois" connotations, preferring "peoples' tribunal" (Klinghoffer, AJ and Klinghoffer, JA 2002: 164). The subject of rights that the PPT privileges is the collective subject, a particular people, a particular human community, a particular society as a whole. It is true that human rights are at the forefront of its agenda but, according to its status, "the Tribunal has no jurisdiction to rule on particular cases of single individuals, except where there is a relationship with the violation of the right of peoples"[29] . This is in line with the Algiers Declaration (Universal Declaration of Peoples' Rights) and the designation of the International League for the Rights and Liberation of Peoples. In a context where states are conventionally considered to be the only subjects of international law, the PPT breaks away from this view and affirms the prerogative of the people being themselves subjects of international law, so that they can act as interlocutors of international jurisdictions.

[29] Article 1 of the PPT Statutes, available at http://www.internazionaleleliobasso.it/?page_id=213, accessed on 2/1/2015.

Fourth, the PPT has a similar function to that of a **tribunal**. It is guided by the "Nuremberg principles[30]", its statute and practice set out a series of procedures inspired in court cases: when a "complaint" is received, it can be filed (in case of inconsistency) or accepted for the inquiry to be open; the situations are examined in-depth in a widely participatory process aiming to identify violations of international law, listing witnesses, hearing experts, and preparing reports; public sessions are chaired by a jury; the defendants are invited to attend and present their version of the facts (which rarely happens); the jury meets in closed sessions and prepares a final judgment for which there is no appeal; the judgment is made public and sent "to the United Nations, relevant international bodies, governments, and the media." The entire basis for the decision is grounded strictly on existing international law and the formalism of the public sessions reproduces the model of a court hearing. This analogy with the judicial process will be discussed later.

In fifth place, the **jury's composition** is also statutorily regulated, requiring the presence of seven members for a valid sentence. The current members[31] co-opted by the central structure are altogether 71 from 29 different countries and are called on a case by case basis for the PPT sessions. Over its 35 years of activity, numerous other people formed this body of judges, many of them world-renowned. Most of the members are lawyers, academics, scientists, writers, established artists, leaders and former leaders, members with experience of international organizations, some Nobel laureates, and prominent figures of social movements.

Finally, in sixth place, comes the **financing** of the PPT activities. The everyday functions of the secretariat have the logistical and operational support of the Lelio Basso International Foundation, while the costs of conducting public sessions are supported by public and private sponsors contacted for this purpose by the Tribunal's secretariat and the entities interested in presenting the process.

THE SENTENCES OF THE PPT

With over forty sessions in very different cities in various continents, the cases proposed to the Tribunal were examined and the ensuing rulings are an

[30] *Ibid*. The following points always refer to the Statute.

[31] The current list can be read in http://www.internazionaleleliobasso.it/?page_id=215, accessed on 3/1/2015.

important collection of factual, legal and political documentation[32]. Given that it is impossible to analyse the contents of each of the sentences pronounced by the PPT, a systematization of the topics is proposed here [33].

The first area has to do with **minor aspects of unresolved decolonization processes**, as in the cases of Western Sahara, a former Spanish colony annexed by Morocco, Eritrea, a former Italian colony annexed by Ethiopia, and East Timor, a former Portuguese colony annexed by Indonesia, in sessions that took place in Brussels (1979), Milan (1980) and Lisbon (1981), respectively. They were typical situations which concerned the principle of self-determination, in accordance with the rules of the international community, and processes were introduced by liberation movements recognized as such: the Polisario Front, the Popular Front for the Liberation of Eritrea and FRETILIN. The situation in Puerto Rico was also addressed (Barcelona, 1989).

Another series of sentences were linked to **violations of minority rights**, a theme already referenced in the Algiers Declaration and the PPT statutes. The regime in the Philippines and the violation of the rights of the Bangsa-Moro people was tried (Antwerp, 1980); Another sentence condemned the historical genocide of the Armenians (Paris, 1984); the rights of indigenous communities in the Brazilian Amazon were addressed in a session (Paris, 1990); the violations of the Tibetan people's rights were equally judged (Strasbourg, 1992); the rights of the Sri Lankan Tamil people, later silenced by military action, were the subject of two sessions (Dublin, 2010, and Bremen ,2013).

The PPT also took on cases concerning **regimes oppressing their own people**, whether in the context of military dictatorships, or as part of systematic denial of the rule of law. This was the case of the session that condemned the military junta in Argentina (Geneva, 1980); shortly after the repressive El Salvador regime was judged (Mexico City, 1981); the following year the regime of Zaire's President Mobutu was sentenced (Rotterdam, 1982); this was followed shortly after by the trial of authorities in Guatemala (Madrid, 1983); the Philippine regime, which had already been tried in the session concerning the Bangsa-Moro people, was sentenced again (The Hague, 2007).

[32] The sentences for the years 1979-1998 are compiled into a book in their Italian version in Tognoni, Gianni (org) (1998). To see the rest check http://www.internazionaleleliobasso.it/?cat=15, accessed on 3/1/2015.

[33] Klinghoffer, A.J. & Klinghoffer, J.A. 2002, pp 165-181 proposed a systematization that is different from the one shown here.

Some of the Tribunals' sessions focused particularly on **human rights violations** in different societies, starting with Latin America (Bogota, 1991), specifically against "impunity for crimes against humanity"; restrictions on the right to asylum in Europe were also judged (Berlin, 1994); the special case of violation of the rights of children and minors in the world was addressed in a process that unfolded in three cities (Trento, Macerata, Naples, 1995); the same theme on the rights of children and adolescents in the Brazilian society was judged (São Paulo, 1999); a session (Paris, 2004) was devoted to human rights violations in Algeria in the 1992-2004 period.

On several occasions the PPT spoke out about **situations of armed conflict** where the fundamental rights of people were violated. First, the Soviet intervention in Afghanistan was described as "aggression" that went against the rules of the international community and the USSR was thus condemned as a country-aggressor (discussed in two sessions: Stockholm, 1981 and Paris, 1982); Likewise, crimes against humanity committed in the conflicts in the former Yugoslavia were treated in two sessions (Bern, 1995 and Barcelona, in the same year); earlier, there had been a statement condemning the US military aggression against the Sandinista regime in Nicaragua (Brussels, 1984); a special historical case can be included in this area: the conquest of America and the denial of the rights of the Amerindian peoples, analysed five hundred years after the arrival of Columbus to that continent (Padua and Venice, 1992); Finally, predicting the imminent aggression ("preventive war") against Iraq in 2003, the PPT organized a session on "international law and the new wars" (Rome, 2012).

A separate chapter in the PPT's sentences concerns **environmental crimes** of extreme gravity representing large-scale violations of human rights to life, health and sustainable environment. This was the case of the chemical industry accident of the Union Carbide company in Bhopal, India in 1984, resulting from a gas leak that killed thousands of people and had health consequences on hundreds of thousands (sessions on industrial risks and human rights in Bophal, 1992 and in London, 1994); the same applied to the Chernobyl nuclear accident in 1986, tried ten years later (Vienna, 1996).

More recently, the **economic policies** of multilateral organizations and the activities of **multinational corporations** that affect the rights of the people have figured prominently in the PPT's agenda, thus addressing the root causes of structural violence affecting our societies. The macro-economic policies of the International Monetary Fund and the World Bank were the subject of two important sessions (Berlin, 1988 and Madrid, 1994), with a harsh judgment of their practices; clothing manufacturing companies were

condemned for disrespect for workers' rights, including for subcontracting companies in the poorest countries (Brussels, 1998); the oil company Elf-Aquitaine was judged for criminal activities in Africa (Paris, 1999); in general, the role of multinationals was discussed in a PPT session (Warwick, 2000); the specific case of human rights violations by multinationals in Colombia was judged over a long period of time(2006-2008); in turn, the practices of the European Union and multinationals in the whole of Latin America were scrutinized and condemned (Madrid, 2010) for violation of often forgotten rights, such as the right to land, the right to food sovereignty, the right to public health, the right to the environment and so on; multinational companies operating in the agro-chemical sector had their own specific judgment (Bangalore, 2011); Finally, a series of hearings in several Mexican cities culminated in a final session in Mexico City in 2014, on "free trade, violence, impunity and peoples' rights in Mexico".

Now that the characterization of the Permanent Peoples' Tribunal and the systematization of its contents[34] have been done, the essential issues raised by previous observations will be analysed and the questions regarding the legitimacy and functions of the PPT and their relationship with international law will be addressed.

WHAT IS THE LEGITIMACY OF THE PPT?

Earlier we quoted de Gaulle's phrase: "any justice in principle and in its implementation, belongs exclusively to the state". The classical theory is very clear in this respect, in that it considers the enforcement of justice as a sovereign function, in the framework of rule of law being based on the famous division of powers, where precisely the legislative and the judicial powers are cornerstones of the sovereign state, with any non-public authority being excluded from its remit. In this respect, the initiative of the opinion tribunal is summarily deprived of legitimacy, further aggravated, according to the critics, by the fact that it stages a simulation of justice without any mandate to do so, at the service of a political struggle that swings according to ideo-

[34] The PPT obviously was interested in other cases and causes which, in one way or another, came its way, but never made it to a session. The problem of the Kurds, widely considered to be a stateless nation, was considered but it was blocked due to circumstances that led to breaks in contact. Similarly, the issue of the Palestinian people's rights was repeatedly raised, despite the difficulties caused by divisions between Palestinian nationalists and, dramatically, by the murder of three of its high-level interlocutors.

logical motivations. The aforementioned sociologist Marcel Merle uses the same harsh criticism, denouncing the "mockery of justice for propaganda purposes" (Merle, 1985,p 85). The composition of the tribunal is "somewhat elitist, rather than democratic, composed of self-appointed committees (…) selected more for their ideological preferences than for their legal righteousness" (Klinghoffer, AJ and Klinghoffer, JA 2002,p 7). By politicizing the supposed enforcement of the law, the opinion tribunal undermines the very idea of justice, because it renounces the principle of impartiality as a precondition for the correctness of the judgement. In this sense, the "sentence" is inevitably damaged by the absence of exemption and the process is nothing more than the assembling of parts leading to the desired conclusion. The "accused" is previously "condemned" and the audience of the "tribunal" is a mere theatrical procedure for propaganda purposes.

These harsh critical questions should be taken seriously for, due to their vehemence, they question the practice of opinion tribunals. If taken literally and to their ultimate consequences, they would end up disallowing these initiatives, removing credibility and even respectability from them.

In contrast, it is possible to reflect about opinion tribunals and in particular the PPT taking into account their real configuration and reconsidering the sources of their legitimacy. In this sense, it can be argued that their nature is "quasi-judicial" and that their legitimacy is founded on imperatives of conscience, referring to existing international law and involving the broad participation of witnesses to establish the facts where flagrant violations of human rights and the rights of peoples occur.

First of all, the "quasi-judicial" nature should be examined. This expression is used here by analogy with another term that recently entered the vocabulary of international relations studies: "paradiplomacy". Traditionally, diplomatic action is also considered to be a sovereign function and, as such, the exclusive competence of states. However, at present, an increasing number of entities other than central powers conduct external relations initiatives that are close to the concept of diplomacy, as in the case of interests and cooperation projection actions undertaken by cities, regions, companies, foundations, NGOs, and various other associations … All these activities have been described by some authors as "paradiplomacy"[35]

[35] See, for instance, Santos Neves, M. (2010 Fall) "Paradiplomacy, knowledge regions and the consolidation of 'soft power'" . JANUS.NET, *e-journal of International Relations*, 1, (1) , pp. 12-32.

Similarly, the "quasi-judicial" nature can be attributed to events outside the sphere of public powers but which have a formality similar to that of official courts and follow procedures based on both national and international legal proceedings. As was abundantly stressed at the outset, numerous initiatives have used this "quasi-judicial" paradigm, ranging from international commissions of inquiry to opinion tribunals.

In the case of the PPT, the procedures were described above, justifying the analogy now invoked. The indictment, the sentence, the opening of the inquiry, the right to a full defence, the testimony of witnesses and expert reports, the reference to the laws in force, bear resemblance to court proceedings, giving symbolic and moral strength to verdicts. As it turned out, all this is happening on the understanding that the term 'tribunal ' is merely analogical, almost metaphorical, especially as we know that the decision is devoid of coercive power. In a word, it lies in the sphere of the "quasi-judicial".

The term "quasi-judicial" has the advantage of pointing implicitly to some ambivalence in the concept of justice. On the one hand, justice is the enforcement of the rule of law and in this sense one says that the courts do justice. But justice is also an ethical and social value, an ambition of fairness in the relationships between humans, and, in that sense, justice is something programmatic into the future. Opinion tribunals stand somehow on the border of these two concepts: on the one hand they are close to the legal procedure and codified law, on the other they try to echo the aspiration of justice that positively permeates societies.

This being its specific nature, the question of its legitimacy is left open. On this, one can say that the legitimacy of the PPT is based on the fundamental democratic right to freedom of opinion and expression of thought and is based first and foremost on the shaking of consciences. Given the countless violations of people's rights, the impunity of those responsible, the omission of both national and international judicial bodies, it is natural that the conscience of those reacting with nonconformity to these situations wants to be heard, like a cry. It is as if the authority of ethics comes to the aid of non-compliance with legal authority with the aim of replicating its action, as if it stood at "post-conventional level" (to use the expression used by Lawrence Kohlberg[36]), in the sense that respect for standard is superiorly assumed and overcome by the apprehension of values. For some reason we found expressions such as

[36] See Kohlberg, L. (1981) Essays on Moral Development, I: The Philosophy of Moral Development: Moral Stages and the Idea of Justice. San Francisco: Harper & Row.

"ethical tribunal" or "conscience tribunal" along the way: they illustrate the ambivalence where the legal and the axiological cross, on the side of "reasons of state" or the convenience of international jurisdictions.

Such legitimacy, however, is enhanced by a component of PPT sessions: the initiative of civil society and, even more, the broad participation of numerous grass-roots institutions that collaborate in establishing the facts, the testimony of experienced situations in denouncing violations of rights. These facts act as an antidote against any arbitrariness temptation and at the same time ensure the rooting in social reality, where the cry of the victims is heard louder.

If we take one example among many others, the PPT's ruling on the social and environmental crimes in the Brazilian Amazon lists no less than 26 local organizations that formed the basis of the prosecution and supported the argument of the whole process[37] of the session organized in Paris on 16 October 1990. This is how the legitimacy of a citizenship exercise is built, deriving from collective perceptions, based on shared feelings and, above all, on verifiable facts, while giving voice to the voiceless. Its connection to social movements enables giving the PPT a counterpower quality that affirms itself, under democratic principles, against the established powers. This also helps legitimize its practices, because the existence of countervailing powers is healthy in any society, and their action should not be regarded as abusive, since they act as balancing factors as a precaution against the pathology of "official truth" or single thought.

The PPT also benefits from another kind of legitimacy that is achieved a posteriori. The fact that, as a rule, the majority of its deliberations is subject to recognition by the international community at a later stage can mean a kind of ratification that is legitimizing. This is illustrated by the cases the Tribunal has chosen to take on, such as the Western Sahara, Eritrea and East Timor ones, making us conclude that the alleged rights came to be widely acknowledged. This retrospective look sheds new light on the set of sentences by giving them both legal and political relevance, timeliness and consistency.

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[37] These are: Centro dos Trabalhadores da Amazónia, Associação Brasileira de Reforma Agrária, Associação dos Geógrafos Brasileiros, Instituto de Apoio Jurídico Popular, Instituto Vianei, Conselho Indigenista Missionário, Comissão Pró-Índio, Campanha Nacional para a Defesa e o Desenvolvimento da Amazónia, OIKOS, Salve a Amazónia, Fase (Nacional), Amigos da Terra (Rio Grande do Sul), IBASE (Instituto Brasileiro de Análises Económicas e Sociais), Movimento Nacional de Defesa dos Direitos Humanos, Sociedade Parense para a Defesa dos Direitos Humanos, UNI (União das Nações Indígenas), CPT (Comissão Pastoral da Terra), Campanha Nacional pela Reforma Agrária, Campanha Nacional dos Seringueiros, CEDI (Centro Ecuménico de Documentação e Informação), IAMA (Instituto de Antropologia e Meio Ambiente), MAGUTA (Centro de Documentação e Pesquisa do Alto Solimões), NDI (Núcleo de Direitos Indígenas), CTI (Centro de Trabalho Indigenista), INESC (Instituto de Estudos Sócio-económicos) and CUT (Central Única dos Trabalhadores). In Tognoni (org) (1998) p.358.

Finally, the legitimacy of the PPT is further evidenced by the impartiality of its decisions. It condemned both the US aggression against the Sandinista regime in Nicaragua and the invasion of Afghanistan by USSR troops. It condemned both the social and environmental crimes in Bhopal, India and the ones in Chernobyl, in the Soviet Ukraine. Against suspected ideological partisanship, the reference to the rights of people became a guarantee of impartiality and, therefore, of credibility.

THE PPT AND INTERNATIONAL LAW

In the context of the aforementioned "quasi-judicial" perspective, the deliberations of the Permanent Peoples' Tribunal relate permanently, and logically as, to acquired legal norms. Thus, it resorts to the multiple codification of the rules that safeguard human rights and the rights of peoples, and regulates the roles of international political and economic agents and the relationships of the members of the world community. A legislative and contractual collection of texts resulting from sedimentation and ripening over the centuries that the PPT uses as a basic reference is available.

The example that follows is particularly illuminating: the resolution on the social and environmental rights in the Brazilian Amazon[38], examined in October 1990. The sentence passed at the time listed the legal documents that informed it, starting with Brazil's own Constitution and making reference to more than 40 norms of national law, to which a further 24 documents of international law were added: declarations, conventions, agreements, resolutions, and relevant international treaties. This is a rule present in all of the PPT's verdicts, namely the rigour of the reasoning based on positive law, emanating from both the national legislatures and the international community or contracted through treaties between states as well as the jurisprudence of other bodies.

However, the PPT does not just reproduce the processes established by judicial bodies. Conversely, it has, with regard to them, the function to replace and complement them. An example of this was the decision made on crimes in the former Yugoslavia at a meeting in Bern in 1995, which explicitly stated: *Asserting itself as heir to the International Tribunal on American war crimes in Vietnam and to the Russell Tribunal II on Latin America, the Permanent Peoples'*

[38] Available at http://www.internazionaleleliobasso.it/wp-content/uploads/1990/10/Amazzonia-brasiliana_TPP_it.pdf, accessed on 13/1/2015.

Tribunal takes upon itself a supplementary role, due to the deficiency and inadequacy of existing international tribunals, and the impossibility for peoples, individuals and NGOs to access such courts, which are exclusively entitled to judge conflicts between states or act upon a strictly regulated mandate[39].

This need is particularly felt in the area of political and economic activities, which are outside the scope of international jurisdictions, despite its human and social relevance. For all the above reasons, it can be affirmed that the PPT seeks to fill a void and play a subsidiary role: "opinion tribunals played a relevant role since the end of World War II in the dispute to illuminate the historical and geographical gaps in the persistent selectivity of international criminal law" (Feirstein, 2013,p 118).

Another feature concerns the understanding of the judging function. More than punish, which would be out of the question due to the absence of coercive force, the PPT favours not the criminal role but awareness about the violation of rights and – by recognizing the role of people – the capacity of liberating energies. The legal field thus seems to be brought back to its original vocation: *The original role given to law is thus recovered. Far from being an instrument of control, it acts as an instrument of liberation from all forms of domination, exclusion, and denial. The 'judges' also leave behind the traditional role of judiciaries, surpassing the criminal and punitive dimension of law, so as to become overseers whose role is to guide the interpretation of the facts for the reconstruction of the truth that legitimates complaints and resistances* (Fraudatario & Tognoni, 2013,p 5) [40].

The initiatives of the PPT thus have the role of pointedly warning against the crushing of collective rights, aiming at bridging gaps and anticipating regulations that may be imposed. The exercise of citizenship is consequently a contribution to the advance of positive law itself, in the manner of a "reservoir of ideas" (Merle, 1985,p 58), becoming a pressure group for the improvement of international law in its normativity and applications. Therefore, we find a dynamic vision of law whose norms are always receptive to innovation, not only to deal with the amazing vicissitudes of our history, but also to improve its humanization mechanisms.

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[39] See http://www.internazionaleleliobasso.it/wp-content/uploads/1995/02/ExYugoslavia_I_TPP_it.pdf, accessed on 13/1/2015.

[40] See also the following: "Far from affirming itself as a producer of convictions, the real purpose and mission of the PPT is to give victims the recognition and the legitimacy of their truth – which never corresponds to the official one – so that it becomes an instrument of struggle and claim before the official bodies. On the other hand, the legitimacy of the Tribunal and of its sentences, truths and memory depends on the subsequent recognition of those same truths reconstructed by the victims, which turns the PPT into an instrument of anticipation of truths, minimizing any argument about their impotence". In Fraudatario and Tognoni (2011) p. 3.

Interestingly, in this regard the texts on the PPT by the main authorities on the topic are instructive: François Rigaux, who was its president for many years, and Gianni Tognoni, who has always been its secretary general. More than any other, they theorized about the PPT and clarified their views on it. They have different views about the same reality that complement the identity of the PPT. Rigaux is essentially a jurist and so his views refer to the imperative nature of the law: *The permanent peoples' tribunal is not a people's court, but an opinion tribunal. Its unique strength lies in rationality itself: gathering the facts, hearing witnesses, requesting clarification from the rapporteurs, and then verifying whether the facts that it declares to be proven are contrary to any legal norm. (…) The objective foundation of the activities of the Permanent Peoples' Tribunal can be inferred from the dynamism inherent in the rule of law.* (Rigaux, 2012,p 168-169).

Here the emphasis is placed on the rationality of the legal procedure and legal basis of its deliberations. The source of authority of the PPT's pronouncements lies basically in its conformity to the international legal order. Gianni Tognoni's views, in turn, are not distant from Rigaux's, but he emphasizes a versatility and creativity that foster a different intellectual approach. His words fully illustrate his different stance. For him, the PPT is a "research exercise" involving "choosing intelligence over power, having the responsibility to seek the roots of things and of their future potential, more than manage the balance of the present". He sees it as "a borderless exercise in listening and observing, out of respect for people with needs and those seeking a sense of liberation", pursuing a" shared research logic "(Tognoni, 1998,p I). In another text written with Simona Fraudatario, they state that the documentation produced by the PPT is like a "working agenda" and that its practice is primarily a "permanent tool for exploring and experimenting" (Fraudatario & Tognoni, 2013,p 2). When describing the backbone of the project underpinning the tribunal, they write that the PPT: *Experiments practices and languages for the structural restitution of the role of active protagonists to the victims of violations, which were caused by invisibility, non-recognition, and impunity by the existing international law (…). Its deepest mission is the continued pursuit of observation instruments and to interpret reality with a comparative and critical stance directed at the capacity of the right to prevent, protect and guarantee the existence of people, victims, and offended persons* (Fraudatario & Tognoni, 2013 ,p 2, 4).

Research, observation, and experimentation: these words express a "laboratory" view of the relationship between the PPT and law. The vitality of the communities, the unpredictability of history, the complexity of collective processes, and the deepening of awareness of the values in question, require

legal innovation. This "experimentalist" conception of international law seems especially interesting: the codification of rules of conduct is not a static and finished process, but rather an open process that seeks new solutions, in reference to the social dynamics and the growing ethical requirements perceived by people. One can describe it as a constructivist perspective of law, understood as something *in fieri*, under construction. The legal normativity is thus a tool for progress and humanization. Opinion tribunals and in particular the Permanent Peoples' Tribunal, coming from the private sector, citizenship, civil society, linked to social movements from the base, have shared responsibility for contributing to avoid the impunity of crimes committed and for fostering the enforcement of law, not as an oppressive norm, rather as a liberating matrix.

References

AAVV (1989). *Tribunal Permanente de los Pueblos. Processo a la impunidad de crimenes de lesa humanidad*. Bogotá – Colombia, 4-6 Noviembre.

AAVV (2000). *Lelio Basso e le culture dei diritti*. Fondazione Internazionale Lelio Basso. Roma: Carocci Editore.

FEIRSTEIN, D. (2013). "Los nuevos desafios del Tribunal Permanente de los Pueblos en el siglo XXI: las luchas por la hegemonia en la creación del derecho penal internacional". In *Expert Seminar on Peoples' Tribunals and International Law*,*Roma*, *Setembro* 2013 . Australian Human Rights Center, Faculty of Law, University of New South Wales, Sydney.

FRAUDATARIO, S. & TOGNONI, G. (2011). "La definición jurídica y substancial del genocídio a la prueba del encontro entre el Tribunal Permanente de los Pueblos y las víctimas". In *Genocício, verdad, memoria, justicia, elaboración,* 9 *Conferencia anual de la International Association of Genocide Scholars, Buenos Aires, 19-23 de julio*. Available at http://www.genocidescholars.org/sites/default/files/document%09%5Bcurrent-page%3A1%5D/documents/IAGS%202011%20Simona%20Fraudatario.pdf

FRAUDATARIO, S. & TOGNONI, G. (2013).[Doc.policopiado]. "La participación de los pueblos en la formulación del derecho internacional. El laboratório del Tribunal Permanente de los Pueblos".

JOUVE, E. (1981). "Du tribunal de Nuremberg au Tribunal permanent des peuples". *Politique étrangère*, 46 (3), 669-675. doi: 10.3406/polit.1981.3070. Available at http://www.persee.fr/web/revues/home/prescript/article/polit_0032-342X_1981_num_46_3_3070,

KLINGHOFFER, A.J. & KLINGHOFFER, J. A. (2002). *International Citizens' Tribunals: Mobilizing Public Opinion to Advance Human Rights*. New York: Palgrave Macmillan.

MERLE, M. (1985). *Forces et enjeux dans les relations internationales*.(2ªed.) Paris: Economica.

RIGAUX, F. (2000). "Lelio Basso e i tribunali di opinione" In AAVV (2000). *Lelio Basso e le culture dei diritti*, Fondazione Internazionale Lelio Basso. Roma: Carocci Editore.

RIGAUX, F. (2012). *I diritti dei popoli e la Carta di Algeri*. Torino: Edizioni Gruppo Abele.

TOGNONI, G. (org) (1998). "Alle radici del Progetto TPP". *Tribunale Permanente dei popoli. Le sentenze: 1979-1998*. Fondazione Internazionale Lelio Basso, Lecco: Casa Editrice Stefanoni.

TOGNONI, G. (2008). "La storia del Tribunale Permanente dei Popoli. Premesse e metodologia". In Bimbi, L. & Tognoni, G. (org) *Speranze e inquietudini di ieri e di oggi. I trent'anni della Dichiarazione Universale del Diritto dei Popoli*, Roma: Epup.

Human Rights, International criminal law and the challenges of a victim-centred restorative justice – the ICC contribution

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Human Rights, International criminal law and the challenges of a victim-centred restorative justice – the ICC contribution

INTRODUCTION

International criminal justice has developed mostly associated with international armed conflicts and international humanitarian law. The international human rights law was by and large ignored and the protection and role of victims seen as marginal in the context of a predominantly state-centric securitarian approach. In the post Cold War era the influence of a human rights perspective has been gradually increasing as a result of the interplay between three factors: the proliferation of non-international armed conflicts that led to the intensification of levels of violence and serious mass violations of human rights; rapidly growing diffused power of Non-State Actors, namely transnational organized crime, which not only use more violence against communities but reached the point of developing new "businesses" based on the systematic and planned violation of human rights such as human trafficking; greater awareness of human rights triggered by information technologies, global social networks and effective action of NGOs and civil society organisations.

As a result, it is possible to depict a new dialectic relationship between human rights law and international criminal law in the sense that on the one hand human rights standards and values have been incorporated in international criminal law instruments and, on the other, the rules and operation of international criminal justice make effective contributions to enhance the protection of human rights. The Rome Statute of the International Criminal Court (ICC)

is the main symbol of this new relationship. Although the main achievements of ICC are in general associated with its permanent nature, freeing international criminal justice from the vagaries of political convenience, and the rigorous definition of international crimes thus strengthening the rule of law and legitimacy, the fundamental achievement from a human rights perspective is undoubtedly the new priority attached to victims and the enhancement of their status and rights in the judicial process and beyond.

This paper explores precisely the contribution of the ICC Statute and the Court's recent practice and jurisprudence to promote human rights in general and a paradigm shift towards a victim-centred criminal justice, looking at the innovations introduced, their effectiveness, limits and systemic impact. The paper is structured in four parts. The first section looks at the broader picture of the ICC potential contribution to human rights protection and its different manifestations. Section two addresses the question of the historical precedents of ICC and critical aspects of the transition from the predominant retributive justice paradigm to the emerging restorative justice paradigm taking into consideration the main aspects of the international regime of victims of human rights violations. The third section looks at the main innovations introduced in the ICC to enhance victims' status and attain better protection of their rights and discusses their strengths and weaknesses/inconsistencies from the point of view of human rights standards. Finally, section four analyses the structural limitations of the ICC system to contribute to a more robust global system of protection of human rights thus suggesting potential areas of reform to be considered.

THE ICC AND INTERNATIONAL CRIMINAL LAW CONTRIBUTION TO HUMAN RIGHTS PROTECTION

The ICC can make three fundamental contributions to protect and strengthen human rights related to the consolidation and enrichment of the human right to a fair and equitable trial; to the streamlining and renovation of concepts crafted by human rights law; and to the enhancement of the status and rights of the victims of human rights violations in the context of the judicial process.

Firstly, it contributes directly to ensure the respect and implementation of the human right to a fair and equitable trial insofar it incorporates and ensures in practice effective respect for all the fundamental guarantees of defence of the accused. At the same time it can have a powerful demonstration effect on States and national courts to consolidate this human right making clear

what are the requirements and the substantive contents of the right to a fair and equitable trial, thus adding to the relevant work carried out by the Human Rights Committee through the general comments[1] and the European Court of Human Rights[2]. The ICC has been regarded by some authors[3] as a promising platform for transference of regional interpretations of fair trial rights to the international legal order.

Secondly, the ICC Statute made an important contribution at the conceptual level to consolidate the international human rights law framework by contributing to streamline and renovate important concepts of human rights crafted in human rights instruments. One case in point is the concept of torture.

The ICC Statute contributes to widen and adapt to new circumstances the concept of torture insofar it introduces an innovation to the concept incorporated in article 1 (1) of the 1984 International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment. The concept enshrined in the Convention implies three main structural elements: (i) an action, infliction of severe pain, physical or mental; (ii) a specific objective, to obtain information or a confession; (iii) a special quality of the person in control of the action who has to be a public official. The doctrine has added a fourth one, the requisite of powerlessness as the victim must be impotent at the hands of his/her torturer, typically in reclusion/custody. This means that, according to the 1984 Convention against Torture, only States can practice torture, it must be carried out by, or with the authorisation of, a representative of a State.

In the definition contained in article 7 (2 e)) of the ICC Statute while the requisites of infliction of severe pain and custody are explicitly mentioned, the requisite of participation of a public official has been dropped. Therefore, the concept has been widened as Non-State Actors, rebel groups or transnational organized crime groups, can commit and be accused of torture just like States. This is particularly important in a context where Non-State Actors became increasingly responsible for the violation of human rights, challenging the assumption that States were the exclusive violators of human rights prevailing in the post 1948 initial structuring of the international human rights system.

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[1] On the contents of the right to a fair and equitable trial and the detailed definition of the obligations of States see the General Comment of the Human Rights Committee nº32 "Right to equality before courts and tribunals and to a fair trial" (2007) (available at http://www.refworld.org/docid/478b2b2f2.html)

[2] European Court of Human Rights, 2014, Guide on Article 6 of the European Convention on Human Rights – Right to a fair trial (criminal limb) (http://www.echr.coe.int/documents/guide_art_6_criminal_eng.pdf)

[3] See Nicolas Croquet, 2011, *The International Criminal Court and the Treatment of Defence Rights: A Mirror of the European Court of Human Rights' Jurisprudence?* In Human Rights Law Review, Vol.11, Issue 1, pp.91-131.

The widening of the concept also results from the fact that the specific purpose of obtaining information or a confession is no longer mentioned which means that this is a more open concept insofar a larger range of objectives are admissible. The change in the concept enlarges responsibility and ends the differentiation between state and non-state actors which was the object of some criticism and posed limitations to the implementation of the principle of "Non-refoulement"[4]. As a result we are bound to be confronted with the coexistence of two international law norms on the concept of torture which present relevant differences likely to originate divergent decisions in international jurisprudence.

In contrast, in other matters the concepts adopted by the ICC Statute are not in line with international human rights standards and remain closer to international humanitarian law standards whenever there is a contradiction between the two areas of international law. A good example is the concept of child soldier which according to IHL presupposes the direct participation in hostilities as combatants of children under the age of 15 years according to art.77 (2) of Additional Protocol I (1977) to the Geneva Conventions applicable to international armed conflicts. Accordingly, the ICC Statute in article 8 (e)vii considers the recruitment and use of children under 15 years who participate directly in hostilities to be a war crime, thus adopting a narrower definition of child soldier which is not in line with international human rights law.

In fact comparatively the child soldier concept in international human rights law is wider in two respects. On the one hand in terms of age limit as it includes a prohibition of participation in armed conflicts of all children under 18 years in military hostilities seen as a violation of children's rights as foreseen in Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict[5]. On the other, in terms of categories it is considered that the prohibition covers not only combatants

[4] See Committee on Torture, the Guclu case report, Communication No. 373/2009 Munir Aytulun, and Lilav Guclu vs. Sweden CAT/C/45/D/373/2009, published in 2010 (available at http://www.manskligarattigheter.se/Media/Get/355/ladda-ner-dokument-pdf,). In the proceedings Sweden argued that there was no risk of torture in relation to PKK terrorist group based on the argument that torture could only be committed by States. As Sweden also considered that there was no risk of torture committed by the Turkish State it supported the idea of legitimacy of forced return to Turkey in a case where, as the Committee recognised, there were serious risks and as a consequence Sweden was violating its obligation of "non-refoulement".

[5] According to the 2000 Optional Protocol on the Involvement of Children in Armed Conflict, States or armed groups can not recruit under 18 years; children could voluntary join the armed forces from 16 to 18 but can not take part directly in hostilities.

participating directly in military operations but also children performing other support functions, involved in logistics or forced to become sexual slaves as set out in the Cape Town Principles and Best Practices (1997) and the Paris Principles (2007)[6], two soft law instruments that resulted from the cooperation between UNICEF and several NGOs.

Thirdly, the ICC Statute makes an important contribution to consolidate the rights of victims insofar it attaches greater priority to, and enhances the status of victims of violations promoting a transition to a victim-centred judicial process in line with human rights requirements. This is certainly the most important systemic impact of ICC on international human rights practice and protection which justifies a more detailed analysis to be developed below.

INTERNATIONAL CRIMINAL COURT AND A HUMAN RIGHTS APPROACH: EMERGING NEW PARADIGM OF VICTIM PROTECTION

The ICC Statute represents a fundamental shift in the international criminal justice paradigm not only because of the creation of a permanent court with all its implications but also because it promotes a transition from the traditional "retributive justice" paradigm to a "restorative justice" paradigm which puts greater emphasis on victim's participation, protection and reparation, thus adopting for the first time an approach more consistent with human rights requirements.

From international retributive justice to restorative justice

The traditional paradigm was dominated by the concept of "retributive justice" geared towards the punishment of criminals and restoration of order, peace and security while paying little attention to victims. As a result it does not provide neither for the participation of victims in the proceedings nor for the enforcement of their right to reparation. Victims are marginal to the system and perceived mainly as instrumental procedural actors that are only relevant in their capacity as witnesses and as long as they accept to collaborate in the administration of justice to condemn criminals.

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[6] The Paris Principles – Principles and Guidelines on Children associated with armed forces or armed groups, February 2007 (https://www.unicef.org/emerg/files/ParisPrinciples310107English.pdf, acceded on 20 November 2016)

Furthermore, it can be argued that this view is associated with a securitarian approach based on a state-centric view focused on the security of the State and restoration of State authority rather than on human security. This was clearly demonstrated, as argued by Schabas[7], by the fact the Nuremberg Tribunal considered aggression as the "supreme" crime, not the crimes against humanity, although ironically the concept of the latter turned out to be the main contribution of the tribunal to the evolution of international criminal law. The focus was on the State and the crimes against the State and even the consideration of crimes against individual human beings were relevant insofar they were linked with aggression and committed in the context of an international armed conflict. As a result the crimes against humanity committed by the Nazi regime before its involvement in World War II were not considered and remained unpunished.

This "retributive justice" approach has been dominant in the post World War II international criminal justice both during the first phase with the ad hoc International Military Tribunal in Nuremberg and the International Military Tribunal for the Far East in Tokyo, set up in 1945 in the aftermath of World War II by the winning powers to prosecute and punish defeated Axis powers war criminals; but also in the second phase with the ad hoc International Criminal Tribunal for the Former Yugoslavia (ICTY), set up by the UN Security Council in 1993 (Res. 808) and the International Criminal Tribunal for Rwanda (ICTR), set up by the UN Security Council in 1994 (Res. 955), created by the international community in the post-Cold War to respond to the atrocities committed in the context of non-international armed conflicts (common art. 3 of the Geneva Conventions).

It is interesting to note that in spite of the fact that the second phase developed in a different context marked by the consolidation of international humanitarian law with the 1949 Geneva Conventions and the build up of the post-1948 International Human Rights legal framework, paradoxically victims still remain by and large absent from the ICTY and ICTR Statutes. The only exception was article 22 of the ICTY Statute related to the protection of victims as witnesses but this still reflected the instrumental approach to victims seen as procedural actors as it refers to the protection of witnesses and the protection of the identity of victims in the context of the trial.

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[7] William Schabas, *An introduction to the International Criminal Court*, Cambridge University Press, third edition, 2007, pp. 324-325

The Rome Statute has operated a major paradigm shift. For the first time ever in international criminal justice the ICC Statute adopted a "restorative justice" approach, even with some limitations, which is the most adequate to respect and enforce human rights standards. This approach implies three critical changes. Firstly, a greater focus on the effects of crimes, the harm caused to victims and to communities and not only on the punishment of criminals. Secondly, a greater emphasis on the importance to upgrade the status of victims and their role in the judicial process as a relevant mechanism to recognize their condition which by itself is an important component of rehabilitation. Thirdly, a new priority attached to the reparation of the victim.

This approach is not only more consistent with human rights standards but also attaches greater priority to human security striking a better balance between State security and human security. The new priority attached to victims' protection and reparation by the ICC system departs from the international criminal law tradition, associated with international armed conflicts and international humanitarian law where a state-centric approach prevails, and clearly reflects an increasing influence of the international human rights law and the protection of the individual human being on the restructuring of international criminal law. In other words, it depicts an evolving conception in the historical dialectic relation and tensions between the state sovereignty tradition and the human rights tradition, at odds since the origins of international law as reflected in Francisco Vitoria's pioneer thinking, in particular in the *De Indis*[8] a pioneer text on human rights where the universal natural rights of Indians (property, liberty, freedom of religion) constitute a limit to the sovereignty of the Spanish State and its alleged rights of "discovery" and conquest.

Evolution of the international regime of victims of violations of human rights

To better understand the contribution of the ICC Statute to enhance victims' status and protection it has to be analysed in the context of the evolution of the international regime for victims of human rights violations. This regime has been structured around two fundamental soft law instruments: the 1985 "Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power" approved by the UN General Assembly Resolution A/RES/40/34;

[8] Francisco de Vitoria , Relectio de Indis, 1538, CSIC, Madrid

and the 2005 "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law" approved by the UN General Assembly Resolution 60/147.

There is a clear continuity and complementarity between these two instruments but also relevant differences. Firstly, in terms of the subjective scope as the 1985 Declaration applies to victims of domestic crimes resulting from the violation of domestic criminal laws, while the 2005 Principles and Guidelines apply to victims of international crimes resulting from the violation of international human rights law and international humanitarian law. Secondly, in terms of objective scope the 1985 Declaration applies to all violations, all types of crimes while the 2005 Principles and Guidelines is more restrictive applying formally only to "gross" violations.

Thirdly, whilst the human rights approach is largely absent from the 1985 instrument as crimes are not equated with violations of human rights, except in the reference to victims of abuse of power (para.18), it is strongly present as the dominant feature of the 2005 instrument. Fourthly, the 2005 Principles and Guidelines incorporate a more comprehensive concept of remedies, in particular of reparation in contrast with the 1985 Declaration which contains a more limited concept referring only to restitution, compensation and assistance. Moreover, the 2005 instrument is more prone to facilitate operational implementation as it presents a more detailed contents of different dimensions of reparation incorporating relevant field experience. It is particularly noteworthy that the 2005 Principles and Guidelines enlarges the scope for compensation in comparison with the 1985 instrument insofar it goes beyond body or mental harm to include also lost opportunities and loss of earnings as criteria for compensation.

Fifthly, the issue of access of victims to justice is more widely foreseen in the 1985 Declaration which refers not only to judicial remedies to obtain reparation but also, unlike the 2005 instrument, to the need that the views and concerns of victims should be considered and heard in the course of the judicial proceedings, in other words opens the door to victims' participation. Finally, the 2005 instrument puts greater emphasis on the strategies of prevention of violations of human rights while the 1985 Declaration does not attach a relevant role to prevention.

There was a relevant development in the discussions leading to the conclusion of the 2005 Principles and Guidelines. Even though they are built upon the framework of State international responsibility and influenced by the 2001 Articles on the Responsibility of States for Internationally Wrongful Acts,

the issue of the international responsibility of Non-State Actors was raised in the discussions, in particular of insurgent groups exercising effective control over a territory. As a result there are timid and cautious references to Non-State Actors' responsibility in art. 3 c) and principle 15 of the Principles and Guidelines. In spite of the modest outcome the 2005 instrument left the door open and is a first contribution to undertake a global effort aimed at solving the serious blackhole in international law related to the non-accountability and non-responsibility of powerful transnational Non-State Actors. This is of great importance for human rights protection and enforcement insofar Non-State Actors became important systemic human rights violators in a context of inexistence of corporate international criminal liability.

The definition of the concept of victim is one important common structural element that registered a clear continuity insofar the 2005 Principles and Guidelines is clearly influenced by, and adopts the same concept foreseen in art.1 of the 1985 Declaration. A victim is defined as a person who has suffered physical or mental harm, economic loss or impairment of his/her rights as a result of violations of criminal laws or international human rights laws. The concept has been widened and goes beyond the direct victim to include also indirect victims, i.e. the immediate family, friends or dependents of the direct victim as well as the persons that suffered trying to assist the victim or to prevent victimization as foreseen in art.1 (2) of the 1985 Declaration. In addition, the harm can be suffered individually or collectively. The 2005 instrument introduced a relevant innovation regarding the collective nature of violations of rights related to the possibility of groups of victims to present joint claims (art. 13)[9].

[9] This is an interesting example of an instrument originated in the continental roman law tradition but unknown to common law systems which illustrates the phenomenon pointed out by McCracken who noted that the 2005 Basic Principles and Guidelines includes different techniques from the common law, continental roman law and islamic legal systems, all blended in a creative manner. See Kelly McCRACKEN , "Commentary on the basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law", in *Revue internationale de droit pénal*, 1/2005 (Vol. 76), p. 77-79.

THE ICC INNOVATIONS IN THE STATUS AND RIGHTS OF VICTIMS: RULES AND PRACTICE

As far as the status of victims is concerned the ICC Statute introduced three important innovations which are interlinked depicting a comprehensive strategy to upgrade victims' status. Firstly it allows victims and their families to participate in the judicial process, to have access to the court and express their views article 68 (3). Secondly, the Rome Statute allows victims to claim reparation in article 75 (1) recognising their right to reparation. Thirdly, a Trust Fund for Victims was created in article 79.

Victims' Right to participation in the proceedings

Concerning the victims' participation in the judicial process, the ICC Statute provides for a right to participation in the proceedings in art. 68 (3) which is regarded as one of the great innovations of the Statute and an important departure from the international criminal law tradition, thus initiating a new trend in international law likely to have a significant impact on States and change the practice of domestic jurisdictions. Traditionally victims were relegated to the passive role of witnesses in international criminal proceedings, somehow used instrumentally to convict the accused. More recently victims' active participation started to be seen as a key condition to ensure not only the effectiveness but also the legitimacy of international justice thus facilitating the restoration of peace and the social acceptance of judicial outcomes.

This ICC Statute provision, directly influenced by the 1985 Declaration of Basic Principles of Justice for Victims (art.6 b)), clearly contributes to reinforce the dignity of victims, facilitate healing and making clear they are not marginal to the judicial process and are not limited to participate exclusively as witnesses. Most importantly, the ICC Statute ensures victims an independent voice and role in the proceedings, namely in relation to the Prosecutor, as recognised by the Pre-Trial Chamber I jurisprudence[10]. Victims emerge

[10] See Situation in the Democratic Republic of Congo ICC-01/04-101-t, Decision on the Application for Participation in the Proceedings of VPRS1, VPRS2. VPRS3, VPRS4, VPRS5, VPRS6, 17.1.2006, para.51 *"In the Chamber's opinion, the Statute grants victims an independent voice and role in proceedings before the Court. It should be possible to exercise this independence, in particular, vis-à-vis the Prosecutor of the International Criminal Court so that victims can present their interests. s the European Court has affirmed on several occasions, victims participating in criminal proceedings cannot be regarded as "either the opponent – or for that matter necessarily the ally – of the prosecution, their roles and objectives being clearly different"* (consulted https://www.icc-cpi.int/CourtRecords/CR2006_01689.PDF on 10.10.2016). See also, *Policy paper on Victims' participation*, April 2010, Office of the Prosecutor, ICC.

no longer as mere passive subjects but as actors that have the right to pursue their interests.

However, there has been controversy over the merits of this "revolutionary" solution. Some authors adopt a very positive stand and consider that granting participatory rights to victims has a positive impact in terms of restoring victims' dignity and increasing self-esteem, contributing to their rehabilitation and even to a more robust investigation insofar it allows more evidence to come to light[11]. The opposite view adopts a more skeptical position arguing that there are potential risks in this participation that can lead to longer proceedings, weaken the prosecutor's investigation and bring about undesirable discrimination between different categories of victims[12].

The controversy extends to the definition of the limits of victims' involvement. One view held that participation in proceedings should be restricted to the trial phase as sustained by the ICC Prosecutor. Another view supported the position that proceedings should be interpreted in a more flexible way and should also include the earlier investigation phase. The latter position was supported by the jurisprudence of the Pre-Trial Chamber I which in the decision of 17.1.2006 allowed victims to be involved in the stage of investigation, making reference to jurisprudence of the European Court of Human Rights[13].

The materialization of victims' participation tends to face some practical obstacles when there is a large number of victims or/and the group tends to be very heterogeneous thus making it more difficult to coordinate a common position[14]. In order to address this challenge the Rules of Procedure and Evidence of the ICC foresee that the Court should encourage victims to choose a common legal representative and might even provide financial assistance to victims to enable them to be represented.

The extent to which the participation of victims has been effective and attained its purposes remains to be seen and fully evaluated. To be consistent with the assump-

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[11] See Mariana Pena and Gaelle Carayon, "Is the ICC Making the Most of Victim Participation?," in International Journal of Transitional Justice 7(3), November 2013, pp. 518–35 and Luke Moffet, *Justice for Victims at the International Criminal Court*, New York, Routledge, 2014.

[12] See ; Brianne McGonigle Leyh, "Victim-Oriented Measures at International Criminal Institutions: Participation and Its Pitfalls," in International Criminal Law Review 12(3), 2012, pp.407.

[13] ICC Pre-Trial Chamber I Situation in the Democratic Republic of Congo ICC-01/04-101-t, Decision on the Application for Participation in the Proceedings of VPRS1, VPRS2. VPRS3, VPRS4, VPRS5, VPRS6, 17.1.2006, para. 54 " (consulted https://www.icc-cpi.int/CourtRecords/CR2006_01689.PDF on 10.10.2016)

[14] In the Lubanga case the ICC granted 146 persons the status of victim authorised to participate in the proceedings , see The Prosecutor v. Thomas Lubanga Dyilo ICC-01/04-01/06 case Information Sheet (at https://www.icc-cpi.int/drc/lubanga/Documents/LubangaEng.pdf, acceded on 15.12.2016)

tions of a participatory approach it is essential that victims are fully involved in the assessment of results. Based on this principle, one of the most interesting exercises was the assessment carried out in 2015 by the Human Rights Center of the University of California, Berkeley, based on 622 interviews with victims (from Uganda, Democratic Republic of Congo, Kenya, and Côte d'Ivoire) who have taken part in the proceedings[15]. The results of the survey point to three fundamental findings. First, victims participants' main motivation is to receive individual reparations and to see convictions materialise, although there is a certain frustration with the fact the ICC does not trial lower levels offenders but only high level criminals. Second, the majority of victims do not want to participate directly in trial procedures as they fear reprisals and being too much associated with the ICC. Third, victims consider as one of the most negative aspects the length of trials that delay reparations and increase security risks; in contrast valued very positively and showed satisfaction with their personal interactions with ICC staff and their legal representatives.

There is clearly a gap between real victims' perceptions on participation and the principles and aims of the ICC Statute which tends to see victims as an homogeneous, abstract and idealised whole. In general victims have a deficit of knowledge about the ICC and its role and adopt a pragmatic short-term view. A certain consensus seems to be emerging that the results are below expectations and that the victims' participation system has to be reformed and strengthened.

Reparation of Victims

The right to reparation of victims foreseen in article 75 (1) of the Rome Statute constitutes one of the pillars of victims' status and one of its fundamental rights.

The regime of reparation in international law was defined in reference to the State and the international Responsibility of States and foreseen in the Articles on Responsibility of States for Internationally Wrongful Acts [16]. The commission of internationally wrongful acts generates two types of obligations: cessation

[15] Human Rights Center, 2015, *The Victim' Court? A Study of 622 Victim Participants at the International Criminal Court*, University of California, Berkeley, School of Law.

[16] The Articles on the Responsibility of States for Internationally Wrongful Acts were adopted in 2001 by the International Law Commission, Report of the International Law Commission, Fifty-third session, A/56/10, Chapter IV. The UN General Assembly has subsequently included the Articles as an annex to GA Res 56/83 (10.12.2001) and recommended them to the attention of governments. It is a soft law instrument but some of its provisions are hard law reflecting rules of international custom.

of the activity (art. 30) and reparation (art.31). In this context reparation can assume three different forms: restitution (art.35), which implies recreating the existing conditions before the breach of the international norm; compensation (art.36), implying the indemnity of the damages; satisfaction (art.37), a more symbolic form whose modalities are mentioned in a non-exhaustive way in art. 37(2) "acknowledgement of the breach, expression of regret, a formal apology or another appropriate modality".

For obvious reasons this framework is not completely suitable to address the question of reparation of victims of human rights violations. As a consequence the concept of reparation has been widened and the contents of different reparation modalities adapted to the specific circumstances of victims by the 2005 UN Basic Principles and Guidelines on the rights of victims. The recognition as a victim is an essential first step not only to the healing process of the person who suffered the violation, but also to gain access to all the other rights encapsulated in reparation through one of the different forms foreseen in the Principles and Guidelines:

Restitution, implying the reconstitution of the situation prior to the violation of rights (article 19 of the Principles and Guidelines) which might involve restitution of liberty, return to the place of residence, return of property;

Compensation, for the damages both material and moral suffered (article 20), including physical and mental harm, lost opportunities of employment and education, moral damages, costs with legal assistance and medical treatment;

Satisfaction, involving not only public apologies, but also search for the disappeared, recovery and burial of remainings, full disclosure of the truth, inclusion of an account of violations in the IHL and International Human Rights training and educational materials (article 22);

Rehabilitation of victims, direct and indirect (article 21), involving medical, physical, psychological, legal;

Guarantees of non-repetition (article 23), involving human rights and humanitarian law education to all sectors of society including the military, training of public officials, protection of human rights defenders, strengthen independent judiciaries.

The inclusion of art. 75 in the ICC Statute was largely influenced by the Draft Basic Principles and Guidelines on the rights of victims which was in preparation since 1989 by the Sub-Committee on Prevention of Discrimination and Protection of Minorities and would finally be approved by the 2005 UN General Assembly Resolution on the "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and serious violations of International Humanitarian Law".

The influence of this fundamental soft law instrument reveals an interesting dynamic interaction between soft law and hard law, frequently seen in international law. As mentioned by Van Boven[17] a rather complete version of the Draft Principles was already available in 1996 which influenced the works of the 1998 Rome Conference. In short, a soft law instrument in process has directly influenced the drafting of the hard law instrument, the ICC statute.

In turn, the hard law instrument and its implementation has influenced the 2005 UN Resolution that approved the final version of the Basic Principles and Guidelines, a soft law instrument – para. 5 of the UNGA Resolution refers to the Rome Statute and its articles 68 and 75 as positive examples. Furthermore, the influence of the ICC statute can be also detected to the extent that the Basic Principles and Guidelines adopted a restrictive view by concentrating on the "gross violations" (that can relate either to the gravity of violations or the type of human rights being violated) of human rights or grave breaches in international humanitarian law, as opposed to the consideration of all violations, which basically correspond to international crimes under the Rome Statute. Although this restriction was formally adopted, it has to be made clear that the principles apply to all violations of human rights taking into account the general principle of non-discrimination and the principle of non-derogation foreseen in art.26.

As far as the contents of reparation is concerned the ICC Statute adopts formally a more restrictive concept of reparation than the 2005 Principles and Guidelines. According to art.75 (1) reparation includes only three forms, restitution, compensation and rehabilitation, thus not including two other forms, satisfaction and guarantees of non-repetition, foreseen in the 2005 soft law instrument. However, this should not be seen as an exhaustive enumeration and the Court can adopt a wider perspective to ensure the best possible protection of victims.

The ICC statute does not exist in isolation, the Court applies other instruments of international law both hard law, namely treaties and customary law on human rights, and soft law instruments such as the two declarations on the rights of victims or the jurisprudence of regional human rights tribunals and the Treaty Bodies of Human Rights treaties. Indeed, the ICC has already

[17] See Theo Van Boven, 2010, The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of gross violations of International Human Rights and serious violations of International Humanitarian Law, UN, UN Audiovisual Library of International Law. Van Boven was the Special Rapporteur of the Sub-Committee of the Commission on Human Rights on Prevention of Discrimination and Protection of Minorities that prepared the document.

applied the soft law instrument in its decisions such as in the Lubanga case when the trial chamber of the ICC referred to the concept of "harm" foreseen in principle 8 of the Principles and Guidelines in order to fulfill the gap generated by the absence of any definition in the ICC Statute[18].

As far as the concept of reparation is concerned both the ICC Statute and the 2005 Principles and Guidelines confuse reparation with other concepts, namely rehabilitation and prevention, and do not contribute to its precision. The Principles and Guidelines adopt a too broad concept, everything is reparation, eliminating relevant conceptual distinctions from other categories of actions. For example, it includes in reparation what is labeled as "guarantees of non-repetition" which in reality when we look at the contents are prevention measures. Reparation is a response to violation of human rights and tends to minimize negative effects while prevention precedes violation and aims at deterring it.

In this context it seems more accurate to follow a more structured approach inspired in the experience of fighting human trafficking involving three layers from the more general to the more specific[19]. In the first layer there are the 4 Ps, four dimensions of a strategy to fight human rights violations: Protection (of the victim); Punishment (of perpetrators); Prevention (changing conditions to reduce the risk of violations occurring); Partnership (institutional and operational cooperation between the three sectors, public, private and NGOs, to attain effective action). These are complementary and should be pursued in a coordinated manner on the basis of a holistic approach.

The second layer involves the detailed components of each of the Ps. The Protection of victims involves the 3 Rs, i.e. Reparation, Rehabilitation and Reintegration which have to be implemented in a coordinated and mutually reinforcing way although the rationale and responsible actors are different. In the third layer, we consider the forms of reparation which include restitution, compensation and satisfaction as already established in international law in the context of the international responsibility of States.

In short, it seems from a conceptual and operational point of view more adequate to consider that rehabilitation and prevention are not forms of reparation but distinct concepts. Furthermore, making the distinction contributes to better protect the rights of victims insofar it prevents the funds devoted to

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[18] Case Prosecutor vs. Thomas Lubanga Dyilo, decision of 18.1.2008 ICC-01/04-01/06

[19] On this see UNODC, 2012, A Comprehensive strategy to combat trafficking in persons and smuggling of migrants , New York and Miguel Santos Neves and Claudia Pedra, 2012, *A Proteção dos Direitos Humanos e as Vítimas de Tráfico de Pessoas – Rotas, Métodos, Tipos de Tráfico e Setores de Atividade em Portugal*, IEEI, POAT_FSE, e-book.

grant the victim compensation for the damages suffered to be diverted to cover the costs of rehabilitation. This is an autonomous obligation of States and the international community and therefore should not be financed with the compensation due to the victim.

The implementation of the right for reparations by the ICC raises several questions. The issue of collective reparations decided in the Lubanga case[20] is a very relevant matter from a human rights perspective and give rise to some controversy. Although collective reparations are adequate to respond to the consequences of mass atrocity crimes one should bear in mind that the rights of victims, like the right to reparation, are individual rights (including compensation), and that different individuals suffered different levels of harm and damages that should be reflected proportionally in the awards. In other words, collective reparation awards should coexist with and complement, not replace, individual and differentiated reparation awards. The difficulty in dealing with large number of victims should not lead to treat victims as an homogeneous whole which is contrary to human rights standards considering that first and second generation human rights have an individual nature.

The second problem is the potential violation of the non-discrimination principle. The management of reparations awards is a very delicate matter where the ICC runs into the risk of discriminating between victims paving the way to a violation of international human rights law, in particular the principles of equality and non-discrimination.

Thirdly, in order to meet human rights standards the compensation awards must be adequate and prompt. From this point of view the ICC decision in the Lubanga case has violated both criteria. On the one hand the process lasted too long and so reparation has not been prompt. Moreover, in spite of the existence of the Trust Fund and the assistance dimension, the payment of compensation by the Fund is still dependent on the completion of the judicial process, implying not only delays but also forcing victims to go through that ordeal thus promoting soft re-victimisation. The best practices involving

[20] The process of reparations award has lasted for too long with successive changes introduced by the Court, and became extremely confusing as a result of recurrent hesitations to take a decision. After the 2012 decision of the Trial Chamber I to grant reparations to the victims, the Appeal Chamber decided in March 2015 to amend that decision and to award collective reparations requesting the Trust Fund to draw up an implementation plan. This plan was presented in November 2015 to the Trial Chamber II which requested further changes postponing decision until December 2016. Meanwhile in October 2016 Trial Chamber II approved an intermediate plan for symbolic collective reparations and there will be a second and final non-symbolic collective reparations to be approved at a later stage. The Prosecutor v. Thomas Lubanga Dyilo ICC-01/04-01/06, Case Information Sheet (at https://www.icc-cpi.int/drc/lubanga/Documents/LubangaEng.pdf, acceded on 15.12.2016).

human rights treaties such as the Council of Europe Warsaw Convention to Fight human trafficking, point to the need to ensure payment of compensation autonomously without the victim having to wait for the result of long lasting trials.

On the other hand, the decision to grant symbolic collective reparations by Trial Chamber II in October 2016, even if it is an interim decision, violates requirements as compensation can not be merely symbolic or involve ridiculous sums which amounts in practice to a violation of the rights of victims. Even the total amount of 1 million euros available in the TFV to pay compensation to victims of the Lubanga case seems clearly insufficient given the large number of victims involved. In this matter ICC member States have the obligation to provide the financial resources to ensure the payment of adequate compensations.

The Trust Fund for Victims

The Trust Fund for Victims (TFV) created under art.79 of the ICC Statute is a fundamental innovation with far reaching systemic implications as it can contribute to coordinate in a coherent triangle three different dimensions: the effective reparation for victims; prevention of mass atrocity crimes and other human rights violations; reconciliation of communities after violent armed conflicts contributing to long term positive peace.

The Fund is financed through contributions of States and marginally private sources which amounted in 2014 to €4.9 million. Between 2004-2015 the total amount of financial contributions reached € 24.7 million mainly coming from EU Member States with Sweden as the top donor followed by the UK and Germany. Overall 8 EU States are the top 8 donors with only Australia and Japan included in the top 10. However, it should be stressed that although the EU accounts for 84,3% of total donations, only 17 out of the 28 EU members have so far contribute donations[21].

The TFV operates on two legs reflecting a two-fold mandate: the "reparations mandate" and the "assistance mandate". The reparations mandate aims at ensuring the effective implementation of reparations awards for victims ordered by the ICC and constitutes the last chapter of the Rome Statute to become operational. In fact it started very recently in 2014 following the first conviction of

[21] See The Trust Fund for Victims Newsletter nº 01/2016, 15.2.2016 (http://www.trustfundforvictims.org/sites/default/files/imce/TFV%20NewsletterFeb16%20-%20ENG.pdf,, acceded on 20.7.2016).

the ICC in the case of Thomas Lubanga, convicted to 14 years in prison for war crimes involving the recruitment of child soldiers under 15 years in the Ituri area of Eastern part of the Democratic Republic of Congo (DRC).

The Courts Appeal Chamber awarded collective reparations to victims and set the basic rules for implementation and the related financial liability of the convicted person in March 2015 as mentioned earlier. Following the decision, the TFV has prepared the first draft implementation plan and submitted it to the Court in November 2015[22]. It should be stressed that the ICC reparation paradigm is based on three fundamental principles (i) the perpetrator pays, a manifestation of his/her responsibility to compensate for the harm caused; (ii) collective reparations, as the ICC deals with mass atrocity crimes and mass victimization is a dominant trait; (iii) complementarity, as the Fund ensures effective reparations to complement reparations by the perpetrator which typically tend to be insufficient.

In contrast, the assistance mandate started earlier, in 2008, in Northern Uganda and the DRC and is aimed at providing assistance to victims, direct and indirect including communities, through programmes of physical rehabilitation, psychological rehabilitation, in particular dealing with post-traumatic stress, and material support. These programmes do not follow simply conventional lines but have important innovative distinctive features. First, the programmes are carried out in partnership with victims, families and communities, following a participatory philosophy with a fundamental objective to contribute to the empowerment of victims and their communities.

Second, the focus is on the wider victim population, not on specific individuals, so that the process in itself reduces the risk of stigmatization and promotes the social reintegration of victims. Third, the autonomy in relation to the judicial process so that there is a quicker and prompt response to victims problems which is not dependent and does not have to wait for the conclusion of lengthy judicial processes. Justice and reparation to victims becomes meaningless if it comes too late. However, this has an important limitation because the autonomy principle does not apply to the reparations mandate where the victim is unable to receive reparations before the conclusion of the judicial process.

[22] The Trust Fund for Victims, 2015, Assistance & Reparations Achievements, Lessons Learned, and Transitioning, Programme Progress Report 2015

There are different projects that have achieved positive multimensional results. An interesting example is the Savings and Lending Groups and the Mutuelle de Solidarité (MUSO) model implementation in the DRC where victims survivors and their families participate in the savings and lending groups, alongside non victims, which enables them to have access to loans to support small businesses at the same time this contributes to reduce stigma, restore a sense of dignity to victims and promotes community reconciliation. Another case in point is the project coordinated by the Centre de Jeunes Missionaires d'Afrique in the DRC (Ituri) involving the creation of a School of Peace, to promote a culture of peace among children and young victims of war crimes[23]. The main beneficiaries of these programmes are mainly most vulnerable categories of victims in particular orphans and vulnerable children, former child soldiers, widows, victims of sexual violence and human trafficking and family of victims.

In spite of positive and promising results and the fact that more than 186.000 persons have been direct or indirect beneficiaries of the TFV programmes, there are considerable limitations arising out of the insufficient funding showing that the international community is not yet mobilised to support and protect consistently victims of gross human rights violations, and the scale of impact which clearly contrasts with the very large number of victims affected by mass atrocity crimes in the last two decades. In addition, there is a certain concentration of intervention, mostly in two countries the DRC and Uganda, which might also reflect the insufficiency of funds and human resources.

In sum, the three main innovations introduced by the ICC Statute to promote a victim-oriented criminal judicial process make altogether a positive and relevant potential contribution to protect and enhance the status of victims of international crimes. Although all tend to enforce victims' rights – participation, reparation and rehabilitation/reintegration – there is not a comprehensive approach that ensures consistency and maximizes impact. In addition several limitations identified derive from the practical implementation of rules and the constraints created by limited financial resources. Some of the instruments and the orientation followed in their implementation display some aspects which are in contradiction with human rights standards. The Trust Fund has certainly a great potential and is the less problem-

[23] On different projects see The Trust Fund for Victims Newsletter nº 01/2016, 15.2.2016 http://www.trustfundforvictims.org/sites/default/files/imce/TFV%20NewsletterFeb16%20-%20ENG.pdf,, acceded on 20.7.2016).

atic instrument although the reparation mandate should be improved so that the payment of compensation to victims is not dependent on the conclusion of long lasting judicial processes when their suffering and damages require an urgent and immediate response.

ICC LIMITATIONS IN HUMAN RIGHTS PROMOTION AND PROTECTION

In spite of the transition to a victim-oriented restorative international criminal justice more consistent with human rights standards operated by the ICC model, it still presents considerable limitations and inconsistencies in terms of human rights enforcement and protection. The system can not be seen in isolation but in dialectic interaction with the global human rights framework and has to be looked from the point of view of its contribution to meet the current challenges human rights have to face.

The first limitation regards the absence of corporate criminal responsibility under current international criminal law in general and in the ICC Statute in particular. Both the two ad hoc International Criminal Courts statutes and the Rome Statute only foresee individual criminal responsibility. Taking into account the nature of crimes under the ICC jurisdiction – genocide, crimes against humanity, war crimes, aggression – that require complex organizational capabilities to be committed, it is contradictory not to foresee corporate responsibility. Individuals do not act alone, they are part of complex organizational structures which are behind these international crimes.

This constitutes a serious limitation to human rights protection precisely in a context where powerful Non-State Actors are increasingly responsible for human rights violations, in particular large transnational conglomerates and transnational organized crime groups, in clear contrast with the dominant paradigm in the initial stage of consolidation of international human rights law which regarded States as the main violators of human rights. The impunity of Non-State actors not only creates negative incentives for the continuation of violations but also prevents positive incentives related to the effects of loss of reputation and social pressure to change behaviour from materialising.

The second limitation concerns the restriction to the most grave/gross violations of human rights, in practice with a strong link with armed conflicts, leaving aside other types of human rights violations. Moreover, even the list of gross violations of human rights is incomplete and biased insofar some gross systemic violations such as human trafficking and modern forms of slavery, not

necessarily associated with armed conflicts, are not covered by the ICC. This establishes a logic of hierarchy of different levels of violations and consequently between rights which is inconsistent with the principles of indivisibility and interdependence of human rights.

The third limitation relates to the deficit of priority to prevention of human rights violations, to some extent only marginally present in the work of the TFV. From a human rights perspective prevention is the priority but the international system is still essentially conceived to react to violations and punish perpetrators rather than to prevent. This reflects the predominance of the sovereignty principle clearly asserted in art.2 (7) of the UN Charter. The emergence of the R2P soft law norm challenges precisely this paradigm and constitutes a case of antagonic soft law insofar it tries to partially limit sovereignty in specific situations and change the interpretation of art.2 (7) hard law norm. The R2P concept introduces a major innovation by considering that among the three dimensions of the responsibility to protect (prevent, react, rebuild) against mass atrocity crimes, priority should be attributed to the responsibility to prevent which presupposes closer monitoring of early warning mechanisms and earlier interventions of the international community.

The ICC is by and large influenced by the traditional logic and devotes little attention to prevention. It can be argued that by ensuring the effective punishment of criminals this has a general prevention effect. However this argument runs into two types of difficulties. On the one hand the ICC, for budgetary and other constraints, has clearly focused so far on the punishment of high level criminals, the leaders, leaving unpunished middle level and low level criminals who in many cases executed the acts and remain operational in the organizational structure able to act again under a new leadership. This strongly weakens any general prevention effect and for victims means that justice is still incomplete. On the other hand, punishment is not a sufficient condition to ensure an effective prevention of human rights violations which is a complex process requiring a holistic approach and a diversity of coordinated actions.

To build a robust prevention strategy it is necessary to explore the interlinkages and act simultaneously at 5 different levels: (i) education for human rights since early age, to raise awareness about rights and existing protection mechanisms working with local communities to change attitudes; (ii) building grassroots institutions to defend human rights, NGOs and human rights defenders, with a capacity to protect victims and exercising lobby and advocacy; (iii) training key actors, public officials, private sector managers and third sector institutions; (iv) develop research on human rights violations

and good practices for effective prevention; (v) effective communication through social media, including the digital space, to enhance a human rights contextualization and diffusion of functional positive messages, as well as developing periodic awareness raising campaigns. These dimensions, in particular education for human rights and promoting local NGOs and human rights defenders, could be more intensively explored by the Trust Fund programmes when seeking to promote the reintegration of victims in communities which sometimes constitute a risk factor for human rights.

The fourth crucial limitation derives from the inadequacy of the ICC system to deal with the cyberspace phenomenon which pose new and serious threats to human rights. Some of the international crimes can in certain conditions and in relation to some acts be committed through cyber attacks which produce effects equivalent to those generated by traditional methods of use of force, for instance directed towards civilian targets thus violating IHL and implying the commission of war crimes. This analogy and implications have been analysed in depth in the Tallin Manual process[24] under the auspices of NATO which constitutes a relevant contribution to anticipate and tackle the problem.

CONCLUSIONS

International criminal justice is undergoing a relevant process of transition in the direction of greater convergence with human rights standards. Although initially it was fundamentally structured under the influence of international humanitarian law and with a strong armed conflict bias where the crime of aggression was paramount, more recently it addresses also the crimes committed outside a armed conflict context or in a post-conflict environment and show encouraging signs of moving to a more restorative justice paradigm where the rights and protection of victims of violations of human rights or IHL gain a new priority ceasing to be seen as mere instrumental procedural subjects.

The paper argues that the ICC Statute constitutes a watershed and a turning point in this process and that, despite other contributions, the enhancement of the

[24] The Tallin Manual on the International Law Applicable to Cyber Warfare" 2009, was produced by a series of independent experts and reflects on the applicability of existing norms of international humanitarian law and jus ad bellum to cyber attacks and cyber war- see NATO Co-operative Cyber Defence Centre of Excellence (https://ccdcoe.org/tallinn-manual.html)

status and rights of victims, both in the judicial process and beyond it, is by far the ICC's major innovative contribution to human rights promotion and consolidation. This is pursued through the articulation between three instruments, i.e. the participation of victims in the judicial proceedings, the right to reparations and the Trust Fund for Victims. Furthermore these rules and good practices can have a potential positive demonstration effect on national criminal justice and national courts which remain the primary instance of realization of international criminal justice.

In spite of the far reaching symbolic and conceptual progress, the system and its practical implementation also reveal important limitations which are not consistent with human rights standards and need to be addressed. Firstly, meaningful participation is hard to achieve in a context of large number of victims and limited resources of the ICC which put in question the aim to provide victims a space to have an independent and autonomous voice. Moreover, there is a gap between the victims' own expectations about participation and the ICC rationale all pointing to the need to rethink and improve the system.

Secondly, in terms of reparations the ICC recent practice to grant exclusively collective reparations and the fact that victims can only receive reparations after the completion of the judicial process are not in line with human rights standards insofar they do not ensure individual, prompt and adequate reparation, including compensation, and fail to protect victims from risks of soft re-victimisation. In addition, there is some misconfusion regarding the concept of reparation and the absence of a sufficiently coherent and robust coordination between reparations and other dimensions of protection of victims, namely reintegration and rehabilitation, creating a risk that rehabilitation, which is an obligation of States, might be pursued at the expense of reparation. In that respect although the Trust Fund is a promising instrument its reparations mandate is not in line with human rights requirements and should be changed in order to delink the payment of reparations from the conclusion of the judicial process and further promote prevention of violations.

Finally, a structural problem of under-financing of the ICC poses one of the major threats to the implementation of the restorative justice paradigm. Member States, in particular the EU member States which have so far been the main providers of funds and political support, have a special responsibility but are not investing enough and granting all the support that is required. The allocation of a total amount of 1 million euros to reparations to all victims in the Lubanga case is clearly insufficient and is not a promising sign for the future of victims' rights.

The main challenge ahead is the extent to which the ICC system can become part and parcel of the global system of human rights protection by absorbing and contributing to the main thrust of international jurisprudence on human rights, strengthening ties with regional courts and treaty bodies on human rights and making the adjustments necessary to comply with human rights standards[25]. Member States, in particular EU States, but also NGOs and civil society organisations have an important role to play in terms of providing finance and political support to the work of ICC so that it can meet the high expectations it generated with its creation nearly two decades ago.

[25] On this interaction see the recent article of Annika Jones, 2016, *Insights Into an Emerging Relationship: Use of Human Rights Jurisprudence at the International Criminal Court*, in Human Rights Law Review (2016) 16 (4): 701-729

References

CASSESE, A. ET AL.(2013). *Cassese's International Criminal Law* (3rd ed.). Oxford: Oxford University Press.

CROQUET, N. (2011). "The International Criminal Court and the Treatment of Defence Rights: A Mirror of the European Court of Human Rights' Jurisprudence?" *Human Rights Law Review*. Vol.11 (1), 91-131

HUMAN RIGHTS CENTER (2015). *The Victim' Court? A Study of 622 Victim Participants at the International Criminal Court*. University of California, Berkeley, School of Law

ICC (2006) *Pre-Trial Chamber I Situation in the Democratic Republic of Congo ICC-01/04-101-t, Decision on the Application for Participation in the Proceedings of VPRS1,VPRS2.VPRS3,VPRS4,VPRS5,VPRS6*, 17.1.2006

ICC (2015) "The Trust Fund for Victims, 2015, Assistance & Reparations Achievements, Lessons Learned, and Transitioning" *Programme Progress Report*

JONES, A. (2016). "Insights Into an Emerging Relationship: Use of Human Rights Jurisprudence at the International Criminal Court". *Human Rights Law Review,* 16 (4), 701-729. doi:10.1093/hrlr/ngw026

LEYH, B. M. (2012). "Victim-Oriented Measures at International Criminal Institutions: Participation and Its Pitfalls" *International Criminal Law Review*, 12(3), 407.

MCCRACKEN, K. (2005). "Commentary on the basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law". *Revue internationale de droit pénal*. 76,(1), 77-79

MOFFET, L. (2014). *Justice for Victims at the International Criminal Court*.New York, Routledge

PENA, M. & CARAYON,G. (Nov.2013). "Is the ICC Making the Most of Victim Participation?. *International Journal of Transitional Justice* . 7,(3), 518–35

SCHABAS, W. (2007). *An introduction to the International Criminal Court*.(3ªed.) Cambridge, Cambridge University Press.

VAN BOVEN, T. (1993). *Basic principles and guidelines on the right to reparation for victims of [gross] violations of human rights and international humanitarian law prepared*.(3rd rev) Available at http://legal.un.org/avl/ha/ga_60-147/ga_60-147.html

VAN BOVEN, T. (1993). *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms*. Available at http://hrlibrary.umn.edu/demo/van%20Boven_1993.pdf

VAN BOVEN, T. (2010). *The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of gross violations of International Human Rights and serious violations of International Humanitarian Law*. Available at http://www.un.org/law/avl/

The ICC at the Centre of an International Criminal Justice System: Current Challenges

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The ICC at the Centre of an International Criminal Justice System: Current Challenges

INTRODUCTION

In 2016, the International Criminal Court (ICC) witnessed an unprecedented level of judicial activity. This trend is expected to continue in 2017. Preliminary examinations are being conducted in 10 different situations in all regions of the world (including Afghanistan, Colombia, Iraq/UK, Palestine and Ukraine), there are 10 ongoing investigations (including Georgia) and 3 judgments were concluded in 2016.

At the same time, the ICC is experiencing a delicate moment from a political point of view, with the withdrawal from the Rome Statute of 3 African States (South Africa, Burundi and the Gambia) and antagonistic signals coming both from Russia and the new American administration.

Concurrently, due to the lack of universality of the Rome Statute and deadlock in the Security Council, some situations where serious international crimes are being committed cannot be brought before the ICC and *ad hoc* mechanisms continue to have to be created, in spite of the existence of a permanent criminal court, such as for the cases of South Sudan and possibly Syria.

As to the issue of complementary, the conclusion of the Malabo Protocol in the African Union context has raised the novelty of, besides national jurisdictions, a "regional" complementarity and the question of its compatibility with the Rome Statute.

On the cooperation front, difficulties continue and they affect the capacity of the Court to accomplish its mission given the high level of dependence from cooperation from Member States. This has been especially evident concerning the outstanding arrest and surrender of persons indicted by the Court, in particular of Omar Al-Bashir of Sudan, a sitting Head of State, highlighting the tension between the traditional law on immunities and international criminal justice.

Another element of tension that will resurface in 2017 is related to the crime of aggression, since a decision on the activation of the Court's jurisdiction with regard to this crime can now be taken and the crime of aggression has been a contentious element of the ICC Statute, in particular for the Permanent Members of the Security Council.

These four challenges continue to put on the spot the difficulties of operation of a judicial mechanism in a political environment. If all judicial work is done against this background, in no Court like the ICC this dichotomy of justice vs. politics seems more evident.

CURRENT CHALLENGES

Universality

The quest for universal ratification of the Rome Statute of the ICC has been a constant goal since the adoption of the Rome Statute. In 2016, 124 States were parties to the Statute, including the State of Palestine. Out of them 34 are African States, 19 are Asia-Pacific States, 18 are from Eastern Europe, 28 are from Latin American and Caribbean States, and 25 are from Western European and other States.

In October/November 2016, South Africa, Burundi and the Gambia notified the Secretary-General of the United Nations (UN), who is the depositary of the Rome Statute, of their intention to withdraw from the ICC – a decision that, according the to the Statute, only produces legal effect one year after notification. These countries have acted upon different reasons, including internal political reasons, but these decisions share an open criticism to the Court's functioning.[1]

[1] For South Africa's full arguments see "Declaratory statement by the Republic of South Africa on the decision to withdraw from the Rome Statute of the International Criminal Court" available at https://treaties.un.org/doc/Publication/CN/2016/CN.786.2016-Eng.pdf.

In recent years, many African States developed a growing negative perception of the ICC, especially in view of the fact that the first cases brought before this Court were all concerning African situations, although most of them were sovereign self-referrals from the States themselves. This negative perception and concerns of selectivity were voiced in meetings of the African Union, of the UN General Assembly and Security Council and also at the Assembly of States Parties of the ICC.[2]

Though a mass exodus of the Rome Statute is not to be expected and while it may still be possible that these withdrawal decisions are reversed, they affect the credibility and legitimacy of the Court.

Another aspect that affects the credibility and legitimacy of the ICC and imperils its quest for universality, is the fact that out of the 5 Permanent Members of the UN Security Council (P5), only 2 are parties to the Rome Statute: France and the United Kingdom. The United States, Russia and China are not parties and this has made the ability of the Court to fully perform its functions very much dependent of the attitudes taken especially by the US and Russia in the context of the Security Council and more in general, which have varied over time, but risk at the moment to enter a particularly antagonistic phase.

Moreover, after the Bush years, the US may be headed toward a new showdown with the ICC. The ICC is reportedly launching an investigation into possible war crimes in Afghanistan that could include acts of torture committed by the US military from 2003-2014. Even if this does not materialize, given the signs given by the incoming President on issues of foreign policy, the UN and human rights, a defensive and hostile position towards the ICC could be expected.[3]

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2 Cf. Waddell, N. & Clark, P.(2008)" Courting Conflict? Justice, Peace and the ICC in Africa", *The Royal African Society*; Arieff, A *et al*(2010) *International Criminal Court Cases in Africa: Status and policy issues*, Diane Publishing, Keppler, E(2012) "Managing setbacks for the International Criminal Court in Africa". *Journal of African Law* 56,(1), 1-14; Guerreiro, A(2012) *A resistência dos Estados Africanos à jurisdição do Tribunal Penal Internacional*, Almedina ; and Galvão Teles,P (2014-2015) "The International Criminal Court and the evolution of the idea of combating impunity: an assessment 15 years after the Rome Conference" *Janus.Net* 5(2).

3 Cf. United Nations University Center for Policy Research, "The UN in the Era of Trump", available in https://cpr.unu.edu/the-un-in-the-era-of-trump.html.

Russia, on its part, has in November 2016 formally "withdrawn its signature"[4] from the Statute of the International Criminal Court – as the US[5] had done a few years earlier in 2002 -,[6] after the Court published a report classifying the Russian annexation of Crimea as an occupation. Besides the ongoing investigation into the crimes committed in Georgia in 2008, Russia may also be concerned about a possible criminal investigation in Syria, where its forces have been repeatedly accused of carrying out war crimes in recent months. Russia had signed the Rome Statute in 2000 and cooperated with the court, but had not ratified the Treaty and thus remained outside the ICC's jurisdiction. This means that this move, though highly symbolic, will not change much in practice, but is a sign of a more hostile future attitude towards the Court.

Besides withdrawals and antagonist positions that threaten the universality aspiration of the Rome Statute, the fact that the Statute is not universally ratified entails that the necessity for continuing to create *ad hoc* mechanisms – as it was done in the past for the Former Yugoslavia, Rwanda, Sierra Leone, Cambodia or Lebanon – continues to be present. Although more difficult to implement, due to political and financial difficulties, it is possible that such *ad hoc* mechanisms will come into play in, at least, in two pressing situations: South Sudan and Syria.

Since December 2013, serious violations of international humanitarian law and human rights have been committed in South Sudan, with crimes including extrajudicial killings, ethnically targeted violence, rape and other forms of sexual and violence, and attacks on schools, places of worship, hospitals and United Nations and associated peacekeeping personnel. Calls for account-

[4] In a communication received on 30 November 2016, the Government of the Russian Federation informed the Secretary-General of the following: "I have the honour to inform you about the intention of the Russian Federation not to become a party to the Rome Statute of the International Criminal Court, which was adopted in Rome on 17 July 1998 and signed on behalf of the Russian Federation on 13 September 2000. I would kindly ask you, Mr. Secretary-General, to consider this instrument as an official notification of the Russian Federation in accordance with paragraph (a) of Article 18 of the Vienna Convention on the Law of Treaties of 1969." See https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&clang=_en.

[5] In a communication received on 6 May 2002, the Government of the United States of America informed the Secretary-General of the following: "This is to inform you, in connection with the Rome Statute of the International Criminal Court adopted on July 17, 1998, that the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000. The United States requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary's status lists relating to this treaty." See https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&clang=_en.

[6] Legally, the act of "unsigning" a treaty or "withdrawing the signature" does not exist. What Russia and the US have done is a communication of their intention not to become party to the Rome Statute, so as to avoid the good faith obligations that arise from signature as foreseen in Article 18 of the Vienna Convention on the Law of Treaties of 1969.

ability have been made in numerous fora, including the Security Council, the Human Rights Council and the African Union Peace and Security Council, as well as by civil society. In August 2015 the parties to the conflict adopted an Agreement on the Resolution of the Conflict, in which they agreed to establish a Hybrid Court for South Sudan. The Hybrid Court shall be "an independent hybrid judicial court" and it "shall be established by the African Union Commission to investigate and prosecute individuals bearing the responsibility for violations of international law and/or applicable South Sudanese law" committed after 15 December 2013. In October 2015, the Security Council requested the Secretary-General to make available technical assistance for the establishment of the Hybrid Court. This is the first time the United Nations has been tasked with providing technical assistance to a regional organization in the establishment of a hybrid tribunal. The United Nations has a wealth of expertise in the establishment and operation of international and United Nations-assisted criminal courts and tribunals and is liaising with the African Union Commission to share lessons learned from past experiences.[7]

After a Security Council Resolution to submit the Syrian situation to the ICC was vetoed by Russia and China in 2014, the United Nations General Assembly on 19th December 2016 voted to establish a special team to "collect, consolidate, preserve and analyze evidence" as well as to prepare cases on war crimes and human rights abuses committed during the conflict in Syria. According to General Assembly Resolution A/RES/71/248, the team will work in coordination with the UN Syria Commission of Inquiry, which was established by the Geneva-based UN Human Rights Council in 2011 to investigate possible war crimes. The Commission of Inquiry, which has developed a confidential list of suspects on all sides who have committed war crimes or crimes against humanity, has repeatedly called for the UN Security Council to refer the situation in Syria to the International Criminal Court. The special team will "prepare files in order to facilitate and expedite fair and independent criminal proceedings in accordance with international law standards, in national, regional or international courts or tribunals that have or may in the future have jurisdiction over these crimes." A crackdown by Assad on pro-democracy protesters in 2011 led to civil war and Islamic State/Daesh militants have used the chaos to seize territory in Syria and Iraq. Half of Syria's 22 million people have been uprooted and more than 400,000 killed.[8]

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[7] Cf. http://legal.un.org/ola/media/info_from_lc/mss/speeches/MSS-ILC-statement-17-May-2016-EN-FR.pdf.

[8] See https://www.un.org/press/en/2016/ga11880.doc.htm and http://mobile.reuters.com/article/idUSKBN14A2H7?il=0.

The quest for universality of membership and for making the ICC the effective centre of the global international criminal justice will certainly continue in the future, despite recent setbacks. Nevertheless, it has to continue to be borne in mind that the ICC is only a court of last resort, for the most serious of the most serious international crimes and that it will never have the capacity, nor it was intended to replace national jurisdiction and States' primary responsibility for accountability for atrocity crimes. This is why complementarity – at the national level or eventually at the regional level – continues to be a fundamental feature of the international criminal justice, as it will be discussed at the next section.

Complementarity

The ICC is based on the principle of complementarity according to Article 17 of its Statute. It is a Court of last resort[9] that shall only intervene when the territorial or nationality State is "unable or unwilling" to prosecute the serious international crimes that may have been committed in its territory of by its nationals.

For the complementarity system to work, States have to have adequate national legislation and capable judicial institutions. This is, of course, a challenge on its own.

Central African Republic and Sri Lanka are two countries now developing, with the assistance of the United Nations and other organizations, their ability to promote judicial accountability for the crimes committed during their civil wars.

But if complementarity was initially seen as complementarity between the ICC and national jurisdictions, the possible creation of an African Regional Criminal Court, has raised the issue of "regional" complementarity.[10]

In June 2014, the African Union (AU) Assembly of Heads of State and Government meeting in Malabo, Equatorial Guinea, adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (the Malabo Protocol) and called on AU member states to sign and ratify it.[11]

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[9] Mendes, E.(2010), *Peace and Justice at the International Criminal Court: A Court of last resort*, Elgar.

[10] Jackson, F.M.(2016), "Regional complementarity: The Rome Statute and Public International Law", *Journal of International Criminal Justice 14,(5), 1061-1072.*

[11] On this issue see Amnesty International(2016), *Malabo Protocol – Legal and institutional implications of the merged and expanded African Court*.

The Malabo Protocol extends the jurisdiction of the African Court of Justice and Human Rights (ACJHR) to crimes under international law and transnational crimes. The original plan for the ACJHR was a court with two sections - a general affairs section and a human rights section. The Malabo Protocol introduces a third section: the international criminal law section. Thus, if the Malabo Protocol comes into force, the ACJHR will have jurisdiction to try the following 14 crimes: genocide, crimes against humanity, war crimes, the crime of unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, illicit exploitation of natural resources, and the crime of aggression.

Thus the international criminal law section of the ACJHR could serve as an African regional criminal court, with the same objectives of the International Criminal Court but within a narrowly defined geographical scope, and over an expanded list of crimes.

The adoption of the Malabo Protocol is apparently a step in the right direction. The regional criminal court could potentially play a positive role on a continent persistently afflicted by the scourge of conflict and impunity for international crimes. In recent and ongoing conflicts, thousands of civilians have lost their lives or have been maimed and displaced from their homes. There are many accounts of killings, torture, rape, mutilation of bodies, recruitment of child soldiers, and wanton destruction of property. Armed groups and government forces alike are responsible for the abuses and violations.

Impunity is a common denominator in Africa's conflicts, with those suspected of criminal responsibility for crimes under international law rarely held to account. Often national governments are unwilling or unable to conduct prompt, independent, impartial, and effective investigations into allegations of international crimes and to bring all those suspected of criminal responsibility to justice in fair trials. A regional criminal court, as envisaged under the Malabo Protocol, has the potential to fill this accountability gap.

However, there are concerns about the motivations behind the proposal to establish the criminal chamber of the ACJHR. Some commentators[12] have argued that the proposal is an attempt by the AU to shield African heads of state and senior state officials from being held to account when there are

[12] See, among others, http://kptj.africog.org/wp-content/uploads/2016/11/Malabo-Report.pdf and http://www.ejiltalk.org/a-case-of-negative-regional-complementarity-giving-the-african-court-of-justice-and-human-rights-jurisdiction-over-international-crimes/.

reasonable grounds to believe that they are criminally responsible for crimes under international law. Furthermore, there are doubts as to the compatibility with the Rome Statute on the issue of complementarity, envisaged as a national complementarity, but also given the express provision on immunity of process regarding sitting heads of state, government or other seniors state officials.

An immunity clause is indeed considered to be the most controversial provision in the amended ACJHR Statute. The relevant provision (Article 46Abis) reads as follows: "No charges shall be commenced or continued before the Court against any serving African Union Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office."

So far the Malabo Protocol is not yet in force, having been signed only by 9 States and ratified by none. A possible expansion of the Malabo Protocol of the African Court on Human and People's rights should be achieved in a way that it ensures greater accountability, but does not undercut the ICC's contribution to criminal justice. Such an extension of the African Court must be developed in full respect and in conformity with the Rome Statute that does not foresee immunity from jurisdiction for sitting Heads of State. But it is precisely the issue of the irrelevance of the official capacity for criminal prosecution that is the most problematic aspect of the Rome Statute for African States, as it will be discussed in the next section.

Cooperation

Out of the 23 arrest and surrender requests issued by the ICC, 12 are still to be executed: (a) Ivory Coast: Simone Gbagbo, since 2012; (b) Democratic Republic of Congo: Sylvestre Mudacumura, since 2012; (c) Kenya: Walter Barasa, since 2013; (d) Lybia: Saif Al-Islam Gaddafi, since 2011; (e) Darfur (Sudan): Ahmad Harun and Ali Kushayb, since 2007; Omar Al Bashir, since 2009; Abdel Raheem Muhammad Hussein, since 2012; and Bahar Idriss Abu Garda, since 2014; (f) Uganda: Joseph Kony, Vincent Otti and Okot Odhiambo, since 2005.

The arrest and surrender of indicted persons depends on the cooperation of the States Parties to the ICC, but also on the overall UN Members in the cases submitted under Chapter VII of the UN Charter by the Security Council, as it was the case of Sudan and Libya, that are not State Parties to the ICC. The ICC has asked, without success, the Security Council to act upon the non-cooperation with regard to these two situations.

These outstanding arrests have also significantly affected the credibility of the Court and of the system designed by the Rome Statute.

The Bashir case has been the one where tensions have been more evident. In particular, in June 2015 while attending an African Union Summit in South African, President Bashir's arrest and surrender was object of an ICC request of cooperation to South Africa. The High Court of South Africa issued an order requiring that he should not be permitted to leave the country, but the South African government permitted him to do so before the High Court could consider the request on the merits and the High Court subsequently held that this was unlawful. Under Part IX of the Rome Statute, States Parties – including South Africa – have obligations to cooperate with the Court. This is also so regarding South African nation legislation implementing the Rome Statute.

South Africa's government[13] has argued that there is an unresolved legal question arising from the fact that international law provides that serving heads of state are immune from criminal jurisdiction of other states, including immunity from arrest and personal inviolability. The question that arises is whether this immunity persists in cases in national authorities are asked to arrest a head of State wanted for prosecution by the ICC. The matter is further complicated when the head of state is that of a State not party to the ICC Statute, though the case has been brought by a Security Council Chapter VII Resolution.

According to South Africa, Article 27[14] and Article 98[15] of the Rome Statute represent the intersection of the law on immunities applying to Heads of State and Government, and the cooperation obligation of States Parties to the

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[13] Cf., among others, "Declaratory statement by the Republic of South Africa on the decision to withdraw from the Rome Statute of the International Criminal Court" available at https://treaties.un.org/doc/Publication/CN/2016/CN.786.2016-Eng.pdf.

[14] "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. 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."

[15] "1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity. 2. The 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."

Statute. The relationship between State Parties and non-State parties continues to be governed by customary international law that bestows on a Head of State immunity *ratione personae*. Arrest of such a person by a State Party pursuant to its Rome Statute obligations, may therefore result in a violation of its customary law obligations.

This argument has been rejected by the ICC[16] (though not in a fully consistent way in terms of the legal arguments), many States and scholars, arguing *inter alia* that Article 27 of the Rome Statute, following the Nuremberg precedent, has made irrelevant the official capacity and customary law immunities for the purposes of prosecution by international criminal tribunals for States Parties to the ICC. Moreover, since Sudan's situation was brought to the ICC by the Security Council in a binding Chapter VII Resolution, the obligations of cooperation arising out from this case would also be binding upon all and with regard to all UN Member States and not only ICC States Parties[17].

These different legal views on this question have persisted and it has been suggested by commentators and even by the African Union that this matter should be the object of an advisory opinion of the International Court of Justice.[18] Even if this is not the case, it would be important legally and politically to clarify this question in a definitive and consensual manner in order to alleviate some of the current tensions relating to the ICC.

The Crime of Aggression

In the run-up and during the Rome Diplomatic Conference in 1998 the discussion was rather about the inclusion or not of the crime of aggression along the other 3 core international crimes: genocide, crimes against humanity and war crimes. The dispute was not so much about the possibility of criminally prosecuting aggression at the individual level, since there were post World War II precedents (namely Nuremberg and Tokyo) concerning the then

[16] Cf. Decisions on Malawi (ICC-02/05-01/09-139-Corr of 13 December 2011), Chad (ICC-02/05-01/09-151 of26 March 2013) and South Africa (ICC-02/05-01/09-242 of 13 June 2015).

[17] Cf., among others, the discussions on this issue by Akande, D.(2004), "International Law Immunities and the International Criminal Court", *American Journal of International Law* ,98,(3), 407-433;Gaeta, P (2009)"Does President Al Bashir enjoy immunity from arrest?". *Journal International Criminal Justice* 7,(2), 315-332; and C. Jalloh,C. (2014) "Reflections on the indictment of sitting Heads of State and Government and its consequences for peace and stability and reconciliation in Africa", *African Journal of Legal Studies* 7,(1), 43-59.

[18] Cf. http://www.ejiltalk.org/an-international-court-of-justice-advisory-opinion-on-the-icc-head-of-state-immunity-issue/ and http://au.int/en/sites/default/files/decisions/9651-assembly_au_dec_416-449_xix_e_final.pdf.

called "crimes against peace", but whether to include a more narrow crime covering only "wars of aggression" or a broader one relating to "acts of aggression" contained in the 1974 General Assembly Resolution adopted in the meantime. The other thorny issue was the relationship between the ICC and the Security Council, namely if the ICC should only prosecute crimes of aggression once the Security Council had determined the existence of such act, or not.[19]

During the Rome Conference, proposals were made for the inclusion of the crime of aggression by several delegations. Many States supported the inclusion of this crime in the jurisdiction of the Court, as long as it was possible to agree on a definition and on the conditions for the exercise of such jurisdiction. In order not to jeopardize the overall result and derail the negotiations, a compromise was found in Articles 5/1 and 2, to include the crime of aggression, but leave the definition and the conditions for the exercise of jurisdiction for later consideration, namely at the first Review Conference. A mixed outcome was there the possible compromise: the crime was in the Statute, but the Court could not exercise jurisdiction until further negotiations and agreement on the two tracks of definition and conditions for the exercise of jurisdiction.

Resolution F of the Final Act of the Diplomatic Conference confirmed that this was an issue to be continued and mandated the Preparatory Commission for the ICC, or Preparatory Commission, to further work on the issue of aggression. Resolution F mandated the Preparatory Commission to prepare proposals for a provision on aggression, including the definition and the elements of crimes, and the conditions under which the ICC shall exercise its jurisdiction. It also stated that the Commission should submit such proposals to the Assembly of States Parties at a Review Conference, with a view to arriving at an acceptable provision on the crime of aggression for inclusion in the Statute.

Following the 1998 Rome Conference, the Preparatory Commission for the ICC (PrepComm, 1999–2002) and later the Special Working Group on the Crime of Aggression (SWGCA, 2003–2009) continued negotiations on the outstanding issues regarding the crime of aggression. In February 2009, the SWGCA found a consensus agreement on the definition of the crime of aggression. The 2010 Kampala Review Conference used that definition and could thus focus on other outstanding issues, i.e. the "conditions for the

[19] See Barriga, S. & Kreß, C. (2012) The Travaux Préparatoires of the Crime of Aggression, Cambridge University Press.

exercise of jurisdiction". States Parties seized the historic opportunity and adopted Resolution RC/ Res.6 by consensus. The resolution amended the Rome Statute to include, inter alia, new Article 8bis containing a definition of the crime of aggression and new Articles 15bis and 15ter, containing complex provisions on the conditions for the exercise of jurisdiction. Notably, the compromise included a clause that prevented the Court from exercising jurisdiction over the crime of aggression immediately. Instead, the Assembly of States Parties would have to take a further one-time decision to activate the Court's jurisdiction, no earlier than 2017, by a 2/3 majority of the States Parties. Also, one year must have passed since the 30th ratification, already accomplished in June 2016, before the Court could exercise its jurisdiction over the crime of aggression.[20]

The Assembly of States Parties is thus now in a position to take a decision on the activation of the ICC regarding the crime of aggression. The Permanent Members of the Security Council, including ICC parties France and UK, have always questioned this crime, especially the relationship between the Security Council, who has the political prerogative of declaring that an act of aggression has been committed, and the ICC who will have to do a judicial, and not political, analysis. Although the Kampala Amendments have safeguarded many of the P5 concerns, it is expected that the activation of jurisdiction on the crime of aggression may bring another layer of tension in the ICC realm in the current political context. It is, therefore, of utmost importance that this process continues to be built upon a solid basis at the next Assembly of States Parties and that the Kampala compromise is not reopened.

SOME CONCLUSIONS: JUSTICE VS. POLITICS

The Rome Statute of the ICC was, undoubtedly, one of the most significant international treaties to be signed in the post cold war period, at a moment where international law and international institutions lived a very positive moment. It was at the centre of the political discourse in the reaction against the gravest atrocities committed since World War II, namely in the Former Yugoslavia and in Rwanda.

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[20] See C. Kreß & L. von Holtzendorff(2010) "The Kampala Compromise on the Crime of Aggression", *Journal of International Criminal Justice* 8,(5), 1179-1217 and S. Barriga & L. Grover(2011) "A Historic Breakthrough on the Crime of Aggression" *American Journal of International Law* 105,(3), 517-533.

Today, it would most likely not be possible to repeat this feat and create on the most innovative institutions in the international arena, breaking away from the Westphalian model of sovereignty, but at the same time strongly anchored in that model, given the dependency on State voluntary participation and cooperation.

The ICC, together with States, strives to promote the rule of law, the respect for human rights and sustainable peace, in accordance with international law and the purposes and principles of the Charter of the United Nations.

With the increasing workload of the Court, all cooperation efforts are fundamental for the credibility of the Court and for the ICC to perform the role it was given by the Rome Statute, not only to ensure accountability of the perpetrators of the most serious crimes of concern to the international community as a whole, but also to assure that the rights of the victims prevail.

It also has to be highlighted that the ICC has a complementary nature and was not created to replace States. Bringing those responsible for the most serious crimes to justice is, first and foremost, a responsibility of States and the Court should only act where national authorities fail or are not in a position to take the steps necessary to ensure accountability for such crimes.

However, one cannot forget that the ICC, though a judicial institution, inhabits the world of *realpolitik*. As it has been said: "This is a harsh environment for the delicate plant of international justice. But it is also a world where the demand and need for accountability has never been greater."[21]

As we have briefly seen, the challenges are immense and the political moment a delicate one for the institution. But the ICC is here to stay and is becoming an inherent feature of today's world. Both aspects of justice and politics have to be taken into account in order for such challenges to be overcome, so that the mission of a permanent and central instrument for the fight against impunity, that historically started in Rome in 1998, becomes a definitive part of today's world.

[21] http://blog.oup.com/2015/11/three-challenges-international-criminal-court/.

References

AKANDE, A. (2004) "International Law Immunities and the International Criminal Court", *American Journal of International Law.* 98,(3), 407-433

AMNESTY INTERNATIONAL(2016)- *Malabo Protocol – Legal and institutional implications of the merged and expanded African Court*. [s.l:s.n] **Arieff, A. et al**(2010) *International Criminal Court Cases in Africa: Status and policy issues.* Collingdale, Diane Publishing

BARNES, G. P. (2011)"The International Criminal Court's Ineffective Enforcement Mechanisms: the Indictment of President Omar Al Bashir". *Fordham International Law Journal*. 34, (6), 1584-1619

BARRIGA, S. AND GROVER, L.(2011) "A Historic Breakthrough on the Crime of Aggression" *American Journal of International Law* . 105 (3), 517-533

BARRIGA, S. AND KREB, C.(2012) *The Travaux Préparatoires of the Crime of Aggression*. Cambridge: Cambridge University Press.

BELLELLI, R. (Ed.)(2010) - *International Criminal Justice: law and practice from the Rome Statute to its review*. [s.l.]: Ashgate

BLAISE, N. (2012) "Les interactions entre la Cour Pénale Internationale et le Conseil de Sécurité : justice versus politique ? ". *Revue de la Faculté de Droit de L'Université de Liége,* 57, (1-2), 61-98

BOAS, G., SCHABAS, W. & SCHARF, M. (EDs.)(2012) . *International Criminal Justice: legitimacy and coherence* Cheltenham: Elgar publishing.

CARTER, L. ET AL (2016) *The International Criminal Court in an Effective Global Justice System*.[s.l]:Elgar **We, E. de** (2008) "The relationship between the International Criminal Court and ad hoc criminal tribunals: competition or symbiosis?". *Die Friedens-Warte* . 83,(4), 33-57

CASSESE, A. (2008) *International Criminal Law*. Oxford: Oxford University Press

CRONIN-FURMAN, K. (2013) "Managing expectations: International criminal trials and the prospects for deterrence of mass atrocity". *The International Journal of Transitional Justice* , 1-21

GAETA, P. (2009) "Does President Al Bashir enjoy immunity from arrest?". *Journal International Criminal Justice*. 7,(2), 315-332

GALVAO TELES, P. (2014) "The International Criminal Court and the evolution of the idea of combating impunity: an assessment 15 years after the Rome Conference". *Janus.Net* ,5(2)

GUERREIRO, A. (2012) *A resistência dos Estados Africanos à jurisdição do Tribunal Penal Internacional*. Coimbra: Almedina

JACKSON, M. (2016)"Regional complementarity: The Rome Statute and Public International Law". *Journal of International Criminal Justice.* 14, (5), 1061-1072

JALLOH, C. (2014) "Reflections on the indictment of sitting Heads of State and Government and its consequences for peace and stability and reconciliation in Africa". *African Journal of Legal Studies* . 7,(1), 43-59

KELLER, L. M. "The false dichotomy of Peace versus Justice and the International Criminal Court". *Hague Justice Journal* . 3, (1), 12-47

KELLER, L. M. (2008) "Achieving peace without justice: the International Criminal Court and Ugandan alternative justice mechanisms". *Connecticut Journal of International Law*. 23, 209-279

KEPPLER, E. (2012) "Managing setbacks for the International Criminal Court in Africa". *Journal of African Law* . 56, (1), 1-14

KREB, C. AND VON HOLTZENDORFF, L.(2010) - "The Kampala Compromise on the Crime of Aggression". *Journal of International Criminal Justice* . 8, (5), 1179-1217

MENDES, E. (2010) *Peace and Justice at the International Criminal Court: A Court of last resort. Edward Elgar*

PIRANIO, C. (2011)"Reflections on the Rome Statute". *Cambridge Review of International Affairs*. 24 ,(3), 307-447

ROACH, S. C. (2013)"Legitimising negotiated justice: the International Criminal Court and flexible governance". *International Journal of Human Rights*. 17, (5-6), 619-632

ROTHE, D. ET AL (2013) *The realities of international criminal justice*. [s.l]:Brill

SHABAS, W. (2012) "The International Criminal Court: struggling to find its way". In A. Cassese (ed.) *Realizing Utopia: the future of International Law*. Oxford: Oxford University Press

SIDIKI, A. (2012) "La Cour Pénale Internationale: une justice a double vitesse?". *Revue du Droit Public et de la Science Politique* . 128, (4), 1013-1030

STAHN C. S. (ed.)(2015)- *The Law and Practice of the International Criminal Court*, Oxford : Oxford University Press

STEINBERG, R. (Ed.)(2016).*Contemporary issues facing the International Criminal Court*. [s.l]:Brill

TRAHAN, J. (2013-14)-"The relationship between the International Criminal Court and the UN Security Council: Parameters and best practices". *Criminal Law Forum*. 417-473

WADEEL, N. & CLARCK, P. C. (2008)" *Courting Conflict? Justice, Peace and the ICC in Africa*" London: The Royal African Society