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INTERNATIONAL CRIMINAL COURT A NEW STAGE

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Chapter I

General aspects

The nature of the ICC; relationship with national courts.

The ICC is a permanent international institution established by treaty for the purpose of investigating and prosecuting individuals who commit the most serious crimes of international concern.

It is a treaty based institution which is binding only on its States parties; it is not a supranational body; it is not created by another international organ and its existence does not depend on such an organ.

The ICC is not a substitute for national criminal jurisdiction, and does not replace national criminal justice systems, but is complementary to them.

According to articles 1 and 17 of the Statute, the exercise of its jurisdiction is complementary to that of the national legal system of States parties; national criminal jurisdiction has as a rule priority over the ICC jurisdiction. It is only in two situations that ICC jurisdiction comes into place : a) when a national legal system is not able to investigate and prosecute persons alleged to have committed the crimes under its jurisdiction, for instance when such a system has collapsed; b) when a national legal system refuses or fails to investigate and prosecute such persons.

The standards for determining the intervention of the jurisdiction of the Court in such cases are contained in articles 17 and 18 of the Statute.

The Court is thus different from the ad-hoc tribunals for Yugoslavia and Rwanda, which have also concurrent jurisdiction with national courts, but have primacy over them. They may request that national courts defer any case to their competence, subject to the principle of *non bis in idem*. But the establishment of those ad-hoc tribunals does not affect the right or duty of States to prosecute those who violate international humanitarian law.

Other provisions of the Statute also give expression to the primacy of the national legal systems. Actually, all requests for cooperation, including the arrest and surrender of an accused, and securing evidence, are directed to and executed by national legal systems.

It is the expression of collective action by States parties to a treaty that established an institution to carry out collective justice for certain international crimes.

It is therefore an extension of national criminal jurisdiction, as a part of national law following the ratification of the Statute by national parliaments.

It does not infringe upon national sovereignty as it is not overriding national legal systems which are capable of and willing to carry out the investigation and prosecution of international crimes.

The Statute contains what is named in national systems a general part dealing with principles of legality of the criminal responsibility and concerning exoneration thereof, and a special part defining crimes under the jurisdiction of the Court. It involves many areas of international and of criminal law, such as international humanitarian law, human rights, criminal procedure and extradition.

Applicable law

The Rome Statute follows in general lines the article 38 of the Statute of the International Court of Justice. It requires the ICC to apply first of all the norms contained in the Statute itself, the Elements of Crimes and the Rules of Procedure and Evidence of the Court. The Statute is thus following the rule *lex specialis*, as it represents the special law in this field, in connection with other sources of law.

In the second place, the Court is requested to apply treaties and principles and rules of international law, including the established principles of the international law of armed conflict, when they are applicable and where they are appropriate.

This reminds us of the provisions of article 38 of the Statute of the International Court of Justice, concerning treaties and custom as sources of international law to be applied by that Court. The sphere of such norms is obviously limited to those applicable to crimes under the jurisdiction of the International Criminal Court.

In the absence of the two categories of norms the Court shall apply general principles of law derived by it from national laws of legal systems of the world, including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime. Such

general principles shall be applied only when they are not inconsistent with this Statute, with international law and internationally recognized norms and standards.

Although this text is mentioning general principles, with reference to the national legal systems, one has to note that these principles have to be derived by the ICC itself and the national legal systems to be taken into account should include, as appropriate, the national laws of those States which would normally exercise jurisdiction over the crime. That means, when the ICC finds it necessary to resort to such principles, it will be an ad-hoc operation to deduce them, for every case, and priority should be given to national legal systems of those States having jurisdiction over the crime. Thus, it is different from the concept underlying the article 38 c) of the Statute of the International Court of Justice. Obviously, this is a subsidiary source of law for the ICC, as compared to the Statute, to other treaties and the principles and rules of international law.

According to the Statute of Rome, the ICC may also apply principles and rules of law as interpreted in its previous decisions. This marks also a difference with the Statute of the International Court of Justice, according to which such decisions are a subsidiary source of law, but are compulsory only for the parties in dispute and for the respective dispute.

Taking into account the nature and the competence of the ICC, to prosecute crimes committed by individuals – genocide, crimes against humanity and crimes of war – the Rome Statute indicates that the application and interpretation of law from all mentioned sources has to be consistent with internationally recognized human rights and without any distinction founded on grounds of gender, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

This provision postulates a standard against which all the law which will be applied by the Court has to be evaluated. This seems to be perfectly justified, as most of the crimes under the jurisdiction of the Court are serious violations of human rights and fundamental freedoms; it would be difficult to accept that the Court is applying norms in contradiction with human rights, or is discriminating on grounds of gender, race, colour, or ethnic origin, birth or any other status. Many of the crimes, as defined in the Statute, are closely related

to provisions of international instruments on human rights (the International Covenant on Civil and Political Rights, the International Convention against Torture, Inhuman and Degrading Treatment and Punishment and others). This is also the consequence of the fact that genocide and crimes against humanity are not related to armed conflicts; it would not be acceptable for the Court, prosecuting crimes committed in time of peace, to descend below the standards established by international instruments generally accepted on human rights.

As for the war crimes, it is clear that the two Protocols Additional to the 1949 Geneva Conventions, in particular Protocol II, were strongly influenced by basic human rights standards elaborated in the United Nations.

An authoritative Commentary on the Additional Protocols states:

*"Protocol II contains virtually all the irreducible rights of the Covenant on Civil and Political Rights. These rights are based on rules of universal validity to which States can be held, even in the absence of any treaty obligation or any explicit commitment on their part. It may be accepted that they form part of jus cogens"*⁵.

As it was said, *"Basic human rights standards have to be respected under all circumstances and, with regard to humanitarian law, common Article 3 of the Geneva Conventions constitutes a minimum standard which is to be respected equally under all circumstances by all who are involved in the conflict"*⁶.

It is thus only natural to interpret the law applied by the Court in accordance with human rights standards.

According to article 10 of the Statute, its provisions shall not be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this statute; some scholars see this provisions as having primacy over those of article 21, concerning the law applicable by the ICC⁷. This may be a misunderstanding of the meaning of the texts; the article 10 seems to aim at avoiding adverse consequences of the interpretation of the provisions of the Statute on existing or developing rules of international law in other fora, in other contexts and for other purposes than those of the Statute. It is a clause of compatibility, while the law applicable by the Court is clearly specified by article 21; it is not by mistake indicating expressly, in the first place the Statute and in the

second place applicable treaties and principles and rules of international law. Should the intention of the parties have been different, the drafters could have drafted both texts in a different way.

This means that the *lex fori* for the Court are the provisions of the Statute; this is imperative and binds the Court; this results also from the provision of the Statute according to which a person may be convicted by the Court only in accordance with this Statute.

One notes also that the Elements of Crimes are mentioned in article 21 along with the Statute, as a source of law. This doesn't seem to be consistent with article 9 of the Statute, according to which the Elements of Crimes shall assist the Court in the interpretation and application of the Statute; they shall be consistent with the Statute; they are adopted by the Assembly of States parties, not ratified as is the Statute. Thus, although mentioned along with the Statute, the Elements of Crimes should be considered as an authentic interpretation of the Statute and never taken into account when inconsistent with it.

The Court will function also according to its own rules of evidence and procedure.

It is important that the rules of evidence and procedure were adopted by the Assembly of States parties during its first session, in september 2002. One should recall that ICTY and ICTR have been modifying their rules of evidence and procedure regularly, in order to clarify them and mainly to respond to the difficulties encountered. This created a feeling of procedural insecurity⁸.

The material element of the criminal responsibility (actus reus)

According to article 25 of the Statute, a person is criminally responsible for a crime under the jurisdiction of the Court if that person:

- commits such a crime individually, jointly with other persons or through another person, regardless of whether those other persons are criminally responsible;
- orders, solicits or induces the commission of such a crime, irrespective whether it occurs in fact or is attempted;

- aids, abets or otherwise assists in its commission or in attempting it, including providing the means for its commission, for the purpose of facilitating it;
- contributes intentionally in any other way to the commission or attempted commission of such a crime by a group of persons having a common purpose, with the aim of furthering the criminal activity or criminal purposes of the group and knowing the intention of the group to commit the crime;
- directly and publicly incites others to commit genocide;
- attempts to commit such a crime by taking action that commences its execution, but the crime does not occur because of circumstances independent of that person's will.

Other material specific elements are to be found in the definition of crimes, such as the crimes against humanity, "*widespread or systematic attack directed against any civilian population*" as a course of conduct involving the multiple commission of acts, as well as indicating specifically such acts, for most of the crimes; for war crimes, acts committed as part of a plan or policy or as part of a large-scale commission, and indicating specifically such acts, for most of the crimes. Within the material element of the crimes under the jurisdiction of the Court, one should also consider the indication of the victims of such crimes.

Accordingly, in case of genocide the crime is directed against a national, ethnical, racial or religious group; crimes against humanity are defined as an attack against any civilian population, some against groups or colectivities; for crimes of war, the definition refers to persons or property protected under the Geneva Conventions of 1949, and more precisely to prisoners of war and any other protected persons, civilian population, civilian objects, personnel, instalations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission, natural environment, towns, villages, buildings, cultural goods, medical facilities and others.

It is in some cases an integral part of the material element, without which a crime cannot be defined as such; for instance, if some acts mentioned under "*genocide*" are not committed against a group, or if the group victim is not ethnic, national, racial or religious, we may have to deal with a crime against humanity or a crime of war, or an

offence which does not fall under the jurisdiction of the Court, but such a conduct does not represent an act of genocide.

The material element is also mentioned in connection with the mental element, intent and knowledge, with the meaning that they are combined to form the basis for criminal responsibility. They are also implied in the concepts "conduct" and "consequence", in the definition of the intent and of the knowledge, adding "circumstance" in the same article 30 of the Statute.

Conduct should normally mean an act or omission; consequence means the result of an act or omission; some would consider that conduct includes causation and results. Circumstances could include a lot of questions of fact, sometimes of law; it may be related also to the mistake of fact or mistake of law.

The intentional element (mens rea)

The central element of the criminal responsibility is the intention of the person involved in the conduct described as a crime.

A person shall be criminally responsible for a crime under the jurisdiction of the Court only if the material element, that is the respective acts or omissions, is committed with intent and knowledge.

Accordingly, the Rome Statute develops grounds for excluding responsibility around the intentional element. Therefore, a person is not considered criminally responsible, if at the time of the conduct incriminated that person suffers from a mental disease or defect or is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or the capacity to control his or her conduct to conform to the requirements of law.

Criminal responsibility is also excluded when the conduct which is alleged to constitute a crime has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and when the person allegedly responsible acts necessarily and reasonably to avoid this threat.

Moreover, a person shall not be criminally responsible, if the person acts reasonably to defend himself or herself or another person

against an imminent and unlawful use of force in a manner proportionate to the degree of danger to that person or the other person protected. In the case of war crimes, this includes also defence of property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission.

The applicability of such grounds for excluding criminal responsibility is determined by the Court; the Court may also consider other grounds for that effect, if they are derived from the law by it.

Another ground for excluding criminal responsibility shall also be a mistake of fact, or a mistake of law, if it negates the mental element required.

Special rules are stipulated by the Statute concerning superior orders. If a crime under the jurisdiction of the Court is committed by a person pursuant to an order of a government or of a superior, whether military or civilian, such an order shall not relieve that person of criminal responsibility, unless that person was under a legal obligation to obey such orders, did not know that the orders were unlawful and the orders were not manifestly unlawful. The Statute is adding that orders to commit genocide or crimes against humanity are manifestly unlawful.

As the conditions to accept superior orders as grounds for excluding criminal responsibility are cumulative, that means this concerns only crimes of war, for which superior orders are not always considered manifestly unlawful.

A person is said to have intent in two different situations, as to conduct and as to a consequence. In relation to conduct, there is intent if that person means to engage in the conduct; in relation to a consequence, there is intent where the person means to cause that consequence or is aware that it will occur in the ordinary course of events. Knowledge is defined as awareness that a circumstance exists or a consequence will occur in the ordinary course of events.

In the "*Elements of Crimes*", the knowledge element on "*Crimes against humanity*" is emphasising on proof of positive action, more than on omission, which may be found in exceptional circumstances.

Some authors differentiate between the general intent and the specific intent. While for the crime of genocide a specific intent is also required (to destroy in whole or in part a national, ethnical, racial or

religious group as such), the commission of war crimes would not require a specific intent. They see some confusion in the Elements of Crimes, between the general and the specific intent and would have preferred a lower standard for policy makers, for whom the general intent includes knowledge, because of their ability to know or foresee the consequences of their acts, while for lower executors specific intent or knowledge of the overall policy which they are implementing should be required⁹.

The Statute adds, in defining some crimes, specific qualifications of the mental element, besides intent and knowledge as defined in article 30 of the Statute ; for the crime of genocide "the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such" or "deliberately inflicting", or "measures intended" "to, or "calculated" to; for the crimes against humanity: "intentionally causing great suffering, or serious injury to body or to mental or physical health", for other inhuman acts "infliction of conditions of life.....calculated to bring about the destruction of part of a population, "intentional infliction of severe pain or suffering" for torture;" the intent of affecting the ethnic composition of any population," for forced pregnancy; "intentional and severe deprivation of fundamental rights", for persecution; "refusal to acknowledge deprivation of freedom or to give information about it", for enforced disappearance of persons; for the war crimes:" wilful" killing, "wilfully" causing great suffering or serious injury, or depriving a prisoner of war of the rights of fair and regular trial;" intentionally" launching attacks against civilian population, civilian objects or personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission, or" in the knowledge" that such attack will cause incidental loss of life or injury to civilians, objects or widespread, longterm and severe damage to the natural environment, and others.

Proving that specific intent is thus necessary, besides the general intent and knowledge requested according to article 30, in order to find a person criminally responsible and liable for punishment for such crimes.

Admissibility of a case

The Court has first to decide about admissibility or inadmissibility of the case. A case is inadmissible if: a) it is investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable to genuinely prosecute; b) a State with jurisdiction has investigated the case and has decided not to prosecute unless such a decision is the result of the unwillingness or the inability of the State to prosecute; c) the person has already been tried for the respective conduct; d) the case is not of sufficient gravity to justify action by the Court.

A State is considered to be unwilling to prosecute if : a) it undertakes the proceedings for the purpose of shielding the person from the Court's jurisdiction; b) there is an unjustified delay in the proceedings, inconsistent with the intent to bring the person to justice; c) the proceedings are not conducted independently or impartially. A State is considered to be unable to prosecute when its national judicial system is in a total or substantial collapse that prevents it from acquiring necessary evidence or obtaining the accused, or otherwise unable to carry out the proceedings .

Challenges to the admissibility of a case may be brought by an accused, or a State with jurisdiction over the case, maintaining that it is genuinely investigating and prosecuting, or a State on the territory of which the conduct occurred, or a State of nationality of the accused.

Such a challenge must be made only once by any person or State, and prior or at the commencement of the trial. If the challenge is made by a State, the Prosecutor must suspend the investigation until determination of the Court. However, the Prosecutor may seek from the Court authority to continue the investigation to preserve important evidence at risk, to complete a previously began witness statement or to prevent a disappearance of a person in respect of whom a warrant of arrest has already been requested, and may seek review by the Court, if new facts or evidence arise.

According to the provisions of its article 17, the Rome Statute doesn't give any priority of jurisdiction to the Court as against national courts. It is the same even when the referral is made by the Security Council, which is not fully consistent with the intention behind giving the Security Council the right to referral and the will of the Council to see the case prosecuted by the International Court.

In connection with the question of admissibility, one can consider also that of national amnesties.

According to the Statute, the Court has the possibility to decide whether a domestic amnesty should be a bar for prosecution and whether any other domestic prosecution or conviction is a good-faith effort for the application of the principle *ne bis in idem*. The Statute refers only to conviction or acquittal by a national Court, not to overall amnesties, as a ground to apply this principle.

As for amnesties in internal conflict situations, the 1977 Protocol II Additional to the Geneva Conventions prescribes that, at the end of the hostilities, the parties will give each other a broad and generous amnesty. This norm was not intended and cannot reasonably be interpreted to promote impunity for major war crimes or crimes against humanity committed during a conflict. The International Committee of the Red Cross has taken the position that the amnesty required by Protocol II is for the domestic law offences of rebellion and sedition, and for relatively minor transgressions of humanitarian law, while more serious war crimes should not be subject to an amnesty.

The indictment of Pinochet by the Spanish courts and then by the British House of Lords ignored the self-amnesty decree passed by Pinochet in 1977 as contrary to international law. This was followed by other actions in Senegal (prosecution of Hissène Habré), Mexico (arrest of an Argentine navy officer and initiation of extradition procedure requested from Spain) and Italy (arrest of an Argentine army officer pursuant to a request for extradition from France).

In countries going through transitions from dictatorship to democracy in Latin America, Eastern Europe and Africa in the 80's and 90's, the struggle for truth and justice have resulted in a variety of policy instruments, such as criminal prosecutions, truth commissions, reparation schemes and disqualification of persons from performing important duties in the political organs of the newly democratic states. This shift towards holding leaders and public officials accountable raised the dilemma how to balance it against the need for national reconciliation in a society recently torn by conflict.

The most interesting example is South Africa and its Truth and Reconciliation Commission. The Act of Parliament that created the Commission avoided granting a blanket amnesty; immunity from

prosecution was offered to the perpetrators of abuse from all sides, but on condition of their coming forward, contributing to the knowledge of events and of the fate of victims, on condition of truthfulness and of confessing the facts. The grant of immunity was issued by a special panel of the Commission, only after hearing the victims who chose to object.

This is different from blanket amnesties of the type generally passed in some Latin American countries.

Very different is also the Commission on the Truth established recently by Peru¹⁰, having as task to bring to light the process, events and responsibilities in the terrorist violence and violations of human rights which took place from May 1980 to November 2000, committed both by terrorist organizations and by State agents, and to propose initiatives to strengthen peace and harmony among Peruvians. Among other objectives, the Commission has to help the respective courts, when necessary, to bring to light the crimes and human rights violations committed by terrorist organizations and a few State agents, by attempting to determine the victims whereabouts and identifying the alleged perpetrators, to prepare proposals for compensation and rehabilitation of the victims and to recommend reforms as preventive guarantees to be addressed through legislative, political or administrative initiatives.

The Peruvian Decree contains no provision on amnesty; the purpose of creating the Commission on the Truth is to help identifying the perpetrators and to bring peace and harmony by helping the courts to prosecute and punish the alleged perpetrators.

One can understand the need for reconciliation between factions that have divided a nation; but this does not mean reconciliation or truce between victimizers and victims; reconciliation should not be reached at the expense of the victims' right to see justice done.

The ICC will have to be the judge of its competence, including when this may be contested. The competence of ICTY and ICTR was questioned by contesting the legality of their establishment, that is of the resolutions of the Security Council. The tribunals rejected the submission, on the basis of the powers of the Council under the Charter. The Court will be able to reject such challenges on the basis of its Statute.

General principles of criminal law

The Statute postulates the general principles of criminal law as basic norms to be respected by the Court, including the basis for individual criminal responsibility and for excluding it.

Non bis in idem. The Court shall not try a person with respect to conduct which formed the basis of crimes for which it has already convicted or acquitted that person. Another court shall not try a person for a crime for which that person has already been convicted or acquitted by the ICC. On the other side, when a person has been tried by another court for a crime of genocide, a crime of war or a crime against humanity, such a person shall not be tried by ICC with respect to the same conduct, unless the proceedings of the other court were for the purpose of shielding the person concerned from criminal responsibility, or such proceedings were not conducted independently or impartially and were conducted in a manner which, in the circumstances, was inconsistent with the intent to bring that person to justice.

This implies also the case – retained by the International Law Commission in its Draft Code of Crimes against the Peace and Security of Mankind- when a national court is prosecuting such a crime as an ordinary crime, not as a crime of genocide, or a crime against humanity or a war crime.

Nullum crimen sine lege. A person shall be criminally responsible under the jurisdiction of the Court only if the conduct in question constitutes a crime under the Statute, at the time it takes place.

The Statute stipulates that the definition of a crime shall be strictly construed and not be extended by analogy; in case of ambiguity, such a definition shall be interpreted in favour of the person investigated, prosecuted or convicted.

Nulla poena sine lege. The punishment of a person convicted by the Court may take place only in accordance with the Statute.

Non-retroactivity. No person shall be criminally responsible for conduct prior to the entry into force of the Statute.

The prohibition of retroactive penal measures is a fundamental principle of criminal law and a customary norm of international law that must be observed in all circumstances by national and international tribunals.

Article 15(1) of the International Covenant on Civil and Political Rights of 1966 is prohibiting ex post facto penal measures; article 15(2) stipulates that this shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations; the objective followed by this provision was “to confirm and strengthen” the principles of Nürnberg and Tokyo and “to ensure that if in the future crimes should be perpetrated similar to those punished at Nürnberg, they would be punished in accordance with the same principles”¹¹.

The more favourable law. In case of a change in the law applicable to a given conduct prior to a final judgement, the law more favourable to the person investigated, prosecuted or convicted shall apply.

Procedural due process

Substantive and procedural rights are provided by the Statute, according to international norms and standards. These rights concern the investigation, the appeal and the criminal responsibility. The Rules of Procedure and Evidence, developed by the Preparatory Commission and adopted by the Assembly of States parties, are adding guarantees of fairness for the accused and other persons involved.

As for **the investigation**, the Prosecutor shall initiate it if he or she determines that there is a reasonable basis to proceed, as seen above. The Prosecutor shall submit his or her request to proceed to the Pre-Trial Chamber and shall inform that Chamber when deciding not to proceed. Either the Pre-Trial Chamber, the referring State or the Security Council may request the Prosecutor to reconsider a decision not to proceed.

During the investigation process, the Prosecutor has to take into account equally all facts and evidence, both those incriminating and those exonerating the accused of criminal responsibility. Moreover, the investigation must respect both the interests and personal circumstances of the victims and witnesses and the rights of the accused.

In conducting an investigation, the Prosecutor may collect and examine evidence, request the presence of and question persons

(accused, witnesses, victims), obtain the cooperation of a State, organization or person by agreements to that effect, agree not to disclose information received as confidential, take necessary measures to ensure confidentiality of information, the protection of persons and preservation of evidence. The Prosecutor may also request the Pre-Trial Chamber to authorise a "unique investigative opportunity", that is to take measures to collect evidence that may not be available subsequently for the trial.

Persons under investigation are granted important guarantees and rights: they shall not be compelled to incriminate themselves; they shall not be subjected to any form of duress, coercion, threats or torture; if necessary, they shall be questioned with the assistance of a competent interpreter; they shall be informed about the charges against them and provided with legal assistance; they are granted the right to remain silent.

An arrest warrant may be issued by the Pre-Trial Chamber, at the request of the Prosecutor, when there are reasonable grounds that a person committed a crime under the Court's jurisdiction.

Thus, the Prosecutor must seek the approval of the Pre-Trial Chamber whether there are reasonable grounds to believe that the individual who is being sought has committed a crime within the jurisdiction of the Court. Moreover, upon the individual's surrender to the Court, the charges against him or her must be confirmed by the Pre-Trial Chamber.

The Pre-Trial Chamber itself must hold hearings to confirm charges brought, in the presence of the person charged, although special circumstances may justify to confirm the charges in the absence of the accused (article 61/2 of the Statute).

During the trial, the accused must be present at the trial before the Court and enjoys full recognition of his or her rights, first of all the presumption of innocence. The other guarantees and rights include: being promptly informed of the charges in a language he or she fully understands and speaks; having adequate time and facilities to prepare a defence; examining witnesses against him or her before and during the trial; public and fair hearing conducted impartially and without delay; having the free assistance of a competent interpreter and necessary translation; not being compelled to testify or confess guilt.

According to the Statute, the Court must protect the victims and witnesses participating in the proceedings. For that, the Court can make an exception to the principle of public hearing and allow an *in camera* presentation of evidence or by electronic or other means, particularly to protect children and victims of sexual violence; moreover, the Court may determine that views and concerns of victims may be presented at appropriate stages of the proceedings. With a view to ensure a fair trial, the Court has also to rule on the relevance or the admissibility of any evidence by taking into account its probative value and the damage it might cause to the fairness of the procedure.

Numerous safeguards are also permitting States parties to protect sensitive national security information that is either requested from them or in the possession of a third State; any State may request the Court to protect its national security information from being disclosed. Although the determination of whether the disclosure of an information would prejudice a State's national security is left ultimately to its discretion, the State must attempt to resolve the matter with the Court, either through the use of *in camera* or *ex parte* proceedings, by summaries or redactions of the information or other protective measures.

It is also important that the decisions of the Court must be in writing and must contain a full and reasoned statement of the Court's findings on the evidence and its conclusions.

More than that, **decisions** of the Trial Chamber of acquittal or conviction **may be appealed** by the Prosecutor and by the accused, on grounds like: a procedural error, error of fact or of law, or any other grounds affecting the fairness of the proceedings. A sentence may be appealed by the Prosecutor or the convicted person on the ground of disproportion between the crime and the sentence. If the Court considers that an appeal could lead to the conviction been set aside, wholly or in part, or to reducing the sentence, the Court may invite the Prosecutor and the convicted person to submit grounds to that effect (article 81 of the Statute).

Either party may also appeal decisions with respect to jurisdiction or admissibility, as well as those granting or denying release of the person investigated or prosecuted, or a decision of the Pre-Trial Chamber to act on its own initiative in relation to a unique investigative opportunity, or a decision that involves an issue that

would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

When an appeal is raised only by the person convicted or the Prosecutor on that person's behalf, the sentence cannot be amended to his or her detriment.

The convicted person or after death other persons on his or her behalf may apply to the Appeals Chamber to revise the final judgement of conviction or sentence if new evidence has been discovered, not available at the time of trial and sufficiently important to have been resulted in a different verdict, or if discovered that decisive evidence for the conviction was false, forged or falsified, as well as when one or more judges who participated in the conviction has committed in the case an act of serious misconduct or serious breach of duty (article 84 of the Statute).

Arrested or convicted persons are entitled to compensation, if they are victims of unlawful arrest or detention, and when their conviction has been reversed on the basis of newly discovered facts (article 85 of the Statute).

The Court has also the power to order the payment of appropriate reparation to the victims of the acts committed by the convicted person. The Rules of Procedure and Evidence consider victims as natural persons who have suffered harm and organisations or institutions that have sustained direct harm to any of their property dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and places and objects for humanitarian purposes (Rules 85). The Court may determine the scope and extent of the damage, loss and injury, and may make an order for reparation (compensation, restitution and rehabilitation), but only against the convicted person.

The Statute also foresees the establishment of a Trust Fund for the benefit of victims of crimes within the jurisdiction of the Court, and of their families; the assets of the Trust Fund may come from money or other property collected through fines or forfeitures ordered by the Court.

Interests of the victims are also defended by the Victims and Witnesses Unit, to be set up by the Registrar, for protective measures and security arrangements, counselling and assistance, as well as by inviting them at some stages of the proceedings.

These are judicial guarantees in conformity with the International Covenant on Civil and Political Rights, with the 1950 European

Convention for the Protection of Human Rights and Fundamental Freedoms, the American Convention on Human Rights of 1969, the 1981 African Convention on Human Rights and Peoples Rights, as well as the 1949 Geneva Conventions and Additional Protocols I and II of 1977.

They are minimum guarantees, meaning that internal laws and other international instruments may offer more judicial guarantees to persons allegedly responsible for such crimes.

The provisions of the Statute dealing with general principles of criminal law and rules of procedure are a combination of the common and the civil law. For instance, while the adversarial character of trials is maintained, judges are assigned a broad competence in matters dealing with investigation and the questioning of witnesses.

Notes

1. Robert Charvin, *Relations internationales, droit et mondialisation*, Un monde à sens unique, 2000, p.122.
2. For example, the indictment of Augusto Pinochet of Chile, of Slobodan Milosevic of Serbia, of Hissène Habré of Chad. Cf. Ch. Bassiouni, Explanatory Note on the ICC Statute, in *Revue Internationale de droit penal*, 1^{er} et 2^{ème} trimestre, 2000, p.1 and foll.
3. For the demonstration, see Vesselin Popovski, *The international Criminal Court: A Synthesis of Retributive and Restorative Justice*, in *International Relations*, vol.XV no.3, December 2000, p.3-4.
4. Presented by Philippe Kirsh and John T. Holmes, *The Rome Conference on an International Criminal Court: The Negotiating Process*, in *AJIL* 1999, vol.93, p.2 and foll; the authors accept that the Statute is not a perfect instrument; it includes uneasy technical solutions, awkward formulations and difficult compromises, but it is a balanced instrument. Presented also by Mahnouch H.Arsanjani, *The Rome Statute of the International Criminal Court*, in *AJIL* 1999, vol.93, p.22 and foll.
5. Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, ICRC 1340 (1987).
6. Theo Van Boven, *Reliance on norms of humanitarian law by United Nations organs*, in *Humanitarian Law of Armed Conflict. Challenges Ahead*, 1991, p.512.
7. Cherif Bassiouni, study cited above, p.5-6.
8. Hervé Ascensio et Rafaele Maison, *L'activité des tribunaux pénaux pour l'ex-Yougoslavie (1995- 1997) et pour le Rwanda (1994-1997)*, in *AFDI*, 1997, p.372.
9. Cherif Bassiouni, study cited above, p.13.
10. Supreme Decree No.065- 2001- PCM of the President of the Republic of Peru of 2 June 2001, doc E/CN.4/2002/5 of 14 aout 2001.
11. Marc Bossuyt, *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights*, 1987, p.331-332.

Chapter II

Jurisdiction of the International Criminal Court

Jurisdiction *ratione loci*

The Court is competent for crimes which have been committed on the territory of a State party or by one of its nationals.

The Court is also competent when a State which is not a party consents on the Court's jurisdiction and the crime has been committed on that State's territory or the accused is its national.

The jurisdiction of the Court may also result from the extradition by a State which is not a party of a person who is not its national, but has committed a crime on its territory; the extradition to the Court is similar to the extradition to another State, as an entirely valid exercise of sovereignty.

Such a transfer has to be done, however, in accordance with international law norms on human rights and fundamental freedoms.

Although the jurisdiction of the Court may become universal or close to universal by the ratification of the Rome Statute by more and more States, it is still a territorial criminal jurisdiction. The concept of universality is reflected only in the "*referrals*" from the Security Council which are not linked to the territoriality or to the citizenship of any State. As the principal organ of the UN entrusted with the maintenance of international peace and security, the Security Council has the competence to take any measure, including enforcement action against a State aggressor; it has decided, as we have seen, to create special criminal courts for Yugoslavia and Rwanda to prosecute persons allegedly guilty of crimes of genocide, crimes of war and crimes against humanity; *a fortiori*, it has the competence to defer such persons for prosecution to the ICC, and the Rome Statute only gives expression to this concept.

In connection with the issue of extradition, one has to note that for States parties the obligation established by the Rome Statute is to surrender to the Court individuals alleged to have committed a crime under its jurisdiction.

The Statute distinguishes between surrender, which is "*the delivering up of a person by a State to the Court*", and extradition, which is "*the delivering up of a person by one State to another*", that

is to another equal sovereign State, while the Court is an international body established under international law, with the consent of the State concerned.

This has been the rule for the ad-hoc tribunals. Under the Security Council's resolutions creating the two ad-hoc tribunals for Yugoslavia and Rwanda, indictees are "*transferred*" or *surrendered*, not "*extradited*".

Some observers suggest to consider the ICC an extension of domestic jurisdiction; it should not be seen as a "*foreign court*" or "*foreign jurisdiction*", being set up in accordance with international law, with their participation as States parties.

The problem of the extradition of nationals is thus avoided. Moreover, the objective of the prohibition on the extradition of nationals is not to guarantee impunity for such crimes; it is interesting to note that most of the systems that forbid extradition of nationals enable the States to exercise jurisdiction over their nationals for crimes committed anywhere in the world. Similarly, the ICC has only complementary jurisdiction and the national jurisdictions are able to prosecute and thus are not obliged to surrender the allegedly perpetrators to the Court. That is why there is no real constitutional conflict; the ICC will only prosecute where no State is willing or able to do so. If a country does not want to surrender such a person, it simply has to carry out a genuine investigation on the national level.

While the general obligation to surrender to the Court is the principle, the requested State may benefit of some exceptions under the Rome Statute.

Thus, the requested State will not be obliged to proceed with a request for surrender or assistance which would require it 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 obtain the cooperation of the sending State to consent for the surrender. Similarly, a State party would not be required 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.

This two cases refer, in fact, to citizens of third States; the receiving State is obliged not to surrender them, because they enjoy diplomatic immunities, like personal inviolability (heads of State, diplomatic agents) or because of commitments taken by bilateral

agreements. Such persons may be, and in fact should be, prosecuted by their own State, on the territory of which they don't enjoy diplomatic immunities in the first case; they may be prosecuted by the receiving State, which is committing itself only not to surrender to the Court or not to extradite the respective persons, but may retain the competence to prosecute itself, in the second case.

A State may also choose to extradite a person to a requesting State, instead of surrendering the person to the Court, if it is under an existing international obligation to do that.

Since the jurisdiction of the ICC is complementary to the national one, a surrender by a State to the Court of its national or of another person accused of a crime does not detract from its sovereignty and is not an infringement upon the sovereignty of another State. The Courts jurisdiction also does not violate human rights of the individual, as the Court is obliged to respect these rights in the interpretation and the application of any norm of law applied by it, and first of all to avoid any discrimination founded on grounds such as gender, age, race, colour, religion, national, ethnic or social origin and others.

Jurisdiction ratione temporis

The jurisdiction of the ICC is only prospective; it applies only to crimes committed after the Statute's entry into force, that is after 1 July 2002, for States parties to it at that date.

According to the Statute, no person shall be criminally responsible for conduct prior to its entry into force (article 24.1).

With respect to States that accede to the Statute, the jurisdiction of the Court applies only to crimes that are committed after the entry into force of the Statute for them, that is the first day of the month which follows 60 days from the deposit of the State's instrument of accession.

More than that, a State may, when it ratifies the Statute or accedes to it, choose to delay the application of the Court's jurisdiction with respect to war crimes for a period of seven years. France is, for the time being, the only country which used this option.

But the Court is a permanent organ of jurisdiction; its jurisdiction, once in force, is not limited to crimes committed during a period of time, as in the case of ad-hoc criminal courts, and is not limited in time, extending to all crimes committed thereafter.

Jurisdiction ratione personae

The jurisdiction of the Court applies only to individuals who committed a crime after the age of 18. It has no jurisdiction over States and over other legal entities (moral persons), even if they may be as such involved in preparing or committing a crime which falls under the jurisdiction of the Court.

The solution adopted is in line with the practice of the international tribunals of Nürnberg and Tokyo and the ad-hoc tribunals for Yugoslavia and Rwanda, and is based on the fact that such crimes are, in the last instance, committed by individuals.

According to the Statute, a person shall be criminally responsible for a crime under the jurisdiction of the Court if that person: commits such a crime; orders, solicits or induces such a crime which in fact occurs or is attempted; aids, abets or otherwise assists in its commission; intentionally contributes to its commission by a group of persons, with the aim of furthering the criminal activity or criminal purpose of the group, or knowing the intention of the group to commit the crime; directly and publicly incites others to commit genocide; attempts to commit such a crime, by taking action that commences its execution, but the crime does not occur because of circumstances independent of the person's intentions.

It is well known that the defence tried at the Nürnberg and Tokyo tribunals to exclude individual responsibility, invoking the act of State, that is the State responsibility. Both tribunals rejected such defence.

According to the opinion of the Nürnberg Tribunal, "...*(the principle) that international law imposes duties and liabilities upon individuals as well as upon States has long been recognized*"¹.

The Nürnberg Principles were unanimously affirmed by the General Assembly in its resolution 95 (I) of 1946.

The principle was reaffirmed in the statutes of the ICTY and of the ICTR.

The International Law Commission reaffirmed this principle in its Draft Code of Crimes against the Peace and Security of Mankind adopted in 1954².

It is true that acts for which a person is responsible might also be attributable to a State, if the individual acted as an "*agent of the State*", on behalf of a State, or "*in the name of the State*", or as a *de facto* agent. The responsibility of the State might of course also be engaged,

but it is separate and the criminal responsibility of individuals is without prejudice to any question of responsibility of States under international law³.

At the same time, one has to underline that the jurisdiction of the Court concerns all individuals; no one is exempted from criminal responsibility under the Statute, based on the official capacity as might be known in domestic law.

According to the Statute, in particular, the official capacity as a head of State or government, a member of government or parliament, an elected representative or a government official shall not exempt a person from criminal responsibility under the Statute and shall not be a ground for reducing the sentence. Immunities or special procedural rules related to the official capacity of a person, under national or international law, shall not ban the Court from exercising its jurisdiction over such a person (article 27).

It is obvious that crimes under the Statute may often involve persons in positions of governmental authority, who are capable of formulating plans or policies and giving orders involving acts of such an exceptional gravity. Such officials are not only providing the means and personnel required to commit the crime, but also abuse of the authority and power entrusted to them. They may be considered to be even more culpable than the subordinates who actually commit the criminal acts.

It would be paradoxical to allow the individuals who are the most responsible for the respective crimes to invoke their official position, that is the sovereignty of the State, or to hide behind immunity conferred to them by virtue of their position.

The official position of an individual was excluded as a defence to a crime under international law by the Charter of the Nürnberg Tribunal, as well as by the statutes of the two tribunals for crimes committed in the former Yugoslavia and in Rwanda.

As recognized by the Nürnberg Tribunal in its Judgment, the principle of international law which protects State representatives in certain circumstances does not apply to acts which constitute crimes under international law. Immunity from foreign or international jurisdiction, and even from internal jurisdiction, is not granted to commit such crimes, but for other purposes.

In this connection, the World Criminal Code, elaborated by the International Association of Penal Law in 1938, enumerated among

offences committed by individuals "the fact, by a diplomatic agent, to abuse privileges granted to him in order to commit acts against public international order or acts representing offences against the receiving State".

Without commenting upon this proposal, which may be contested on many accounts, we note that diplomatic privileges and immunities were not considered as obstacles to prosecute perpetrators of the most serious offences⁴.

It is generally accepted that the immunity of jurisdiction granted to a diplomatic agent has mainly a procedural nature; it means there is no immunity of the legal responsibility, but immunity in respect of the local jurisdiction⁵.

The immunity of jurisdiction does not mean immunity from the substantial law; it does not eliminate the obligation and eventually the responsibility – penal, civil, administrative – for violations of internal or international law.

There is also a general opinion that constitutional immunities granted usually to heads of State and parliamentarians should be understood as either explicitly or implicitly limited to the exercise of the functions associated with the office to which they are related.

Moreover, the objective of the immunity is to enable the beneficiary to carry out his or her functions unhindered. It is not granted to facilitate or to guarantee immunity for genocide, crimes against humanity or war crimes. Such crimes should fall outside the scope of the immunity, as they cannot be within the ambit of the official functions of any head of State, government official or parliamentarian. As in the Pinochet case, immunity for a former head of State under the applicable national law extended to the exercise of official functions; torture was not a sovereign function and therefore there was no entitlement to immunity in its respect.

One of the objectives of granting immunity is to prevent frivolous or politically motivated interference with the governance of a country; this is not valid in relation to the ICC Statute, because the crimes under the jurisdiction of the Court are not an object of governance.

In countries where there are extended immunities for officials, for instance parliamentarians, the parliament would be expected to exercise its powers to waive immunity in conformity with the international obligations of the State. A refusal to do so would result in a violation of the State's obligations under the Rome Statute.

In addition, a military commander or a person effectively acting in that capacity shall be criminally responsible for crimes within the jurisdiction of the Court, committed by forces under his command and control, as a result of his or her failure to exercise control properly over such forces, if such a person either knew or should have known that the forces were committing or about to commit such crimes and failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities.

As for the relationships between a superior and subordinates, in general, the Statute stipulates that the superior is criminally responsible for crimes committed by subordinates under his or her authority and control, as a result of his or her failure to exercise control properly, where the superior either knew or consciously disregarded information about such crimes being committed and failed to take all necessary and reasonable measures to prevent, to repress, or to submit such cases to competent authorities.

Jurisdiction ratione materiae

One of the basic principles of the Statute is that the jurisdiction of the Court includes only the most serious crimes, which are of concern to the international community as a whole. This is important for giving the Court a coherent and unified approach in its jurisdiction and not to overload it with cases that could be dealt with more adequately by national courts.

According to article 5 of the Statute, the jurisdiction of the Court extends to genocide, war crimes, crimes against humanity and the crime of aggression. As for the crime of aggression, the jurisdiction of the Court shall be exercised once a definition of that crime is adopted and the conditions under which the Court shall exercise such a jurisdiction are set out through amendments to the Statute or by its revision at a Conference for that purpose, but seven years after the entry into force of the Statute.

As defined in the Statute, it is obvious that the crime of genocide, the crimes of war, the crimes against humanity and the crime of aggression are violations of norms of *jus cogens* which are binding on all States and from which States cannot derogate in their relations inter se⁶.

The International Law Commission considered that defining the crimes under the jurisdiction of the future court would be too complicated a task and would take long time, and was not necessary, because both customary and conventional norms on this subject existed.

But the intergovernmental negotiation which followed proved that States would not accept the creation of a Court without defining the precise types of criminal conduct which the Court will have to prosecute, given the principle *nullum crimen sine lege*.

This was felt even more necessary for war crimes, due to the fact that a selection had to be made from the enormous quantity of norms in this field, developed throughout a whole century.

Instead of codifying first the material law and then the mechanism for its implementation, it was found that the international institution to be created had to be accompanied by a complete review of the substantial law, with a view to identify its competence *ratione materiae*. At the same time, the codification of the procedural criminal law was also undertaken, which is considered to represent the most significant result of the Rome Conference for the progress of the international legal order.

That is why the Rome Statute contains, on some categories of the crimes under its jurisdiction, a genuine codification of the existing norms and in some respects progressive development of international law.

Notes

1. Nazi Conspiracy and Aggression . Opinion and Judgment (Washington, US Government Printing Office 1947), p.52.
2. Draft Code of 1954, Yearbook of the ILC 1954, vol.II, p.151 and following.
3. Draft Code of 1996, Yearbook of the ILC, 1996, vol.II part two, art.4.
4. V.V.Pella, study cited, p.34.
5. Ion Anghel, Dreptul diplomatic si consular, vol I, 2002, p.292; the same argument was used in the case "Oshima Hiroshi" by the Tokyo Tribunal, as presented above, part I, chap.II, p.33 -34.
6. On imperative norms of general international law, supra, part I, chap.II, note 48.

Chapter III

Crimes under the jurisdiction of the Court

The Crime of genocide

The crime of genocide is defined by the Statute in accordance with the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. That means any of the acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, such as: killing members of the group; causing them serious bodily or mental harm; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent birth within the group; forcibly transferring children of the group to another group.

Although the Charter of the International Military Tribunal of Nürmberg didn't expressly refer to genocide, the definition given to crimes against humanity implied this concept. Article 6 c) of the Charter referred to *"killing, exterminating, transforming into slaves, deportation and other inhuman acts committed against any civilian population, before or during the war, or persecution on political, racial or religious grounds in the execution of or in connection with any crime under the jurisdiction of the Tribunal, irrespective if such acts represent violations of the internal law of the country on whose territory they were committed"*¹. The notion of genocide was used in the Act of accusation of 8 October 1945 against the main German war criminals, stating that *"they committed a deliberate and systematic genocide, pursuing the extermination of racial and national groups, as well as against the civilian population of some occupied territories, in order to destroy some human races and classes and national, racial or religious groups, mainly Jews, Poles and Gypsies, but also others"*².

During its first session, the General Assembly of the United Nations adopted, on 11 December 1946, the resolution 96(I), defining genocide as *"a denial of the right to existence of whole human groups"*, and affirming that acts of genocide took place when *"racial, religious, political or other groups were destroyed, in whole or in part"*, that *"genocide is a crime of international law"*, and those who commit it, *"whether private persons, officials or statesmen, shall be punished"*.

The Convention of 1948 has been widely accepted by the international community and ratified by the overwhelming majority of States³. Moreover, the principles underlying the Convention have been recognized by the International Court of Justice as binding for all States, as norms of a paramount importance⁴.

The 1948 Convention on the Prevention and Punishment of the Crime of Genocide lays down the criteria for what acts are to be considered genocide, one of the most heinous crimes which can be committed against a human population. Essentially, the Convention requires both that certain acts have been committed, and that this be done with a particular intent: that of destroying, in whole or in part, a national, ethnic, racial or religious group as such.

The Security Council used the same criteria in outlining the mandates of the International Criminal Tribunal for Yugoslavia (ICTY), through the resolution 808/1993 and of the International Criminal Tribunal for Rwanda, through the resolution 955/1994.

The Convention received an effective implementation only lately, by the ad-hoc tribunals ICTY and ICTR, according to the statutes adopted by the Security Council. Accusations of genocide were formulated for instance against Nigeria, in Biafra in 1967 and against Pakistan in Bangladesh in 1971, as well as against Irak in connection with the Kurdish minority.

The ICTR has determined that the mass killings of Tutsi in Rwanda in 1994 was a crime of genocide, planned and incited by Hutu extremists.

A Report of the Independent Inquiry into the actions of the United Nations during the 1994 genocide in Rwanda, issued on 15 December 1999, recommended to the Secretary general of the UN to initiate an action plan to prevent genocide involving the whole UN system, to make the obligation under the Convention *"to prevent and punish genocide"* a concrete reality in the daily work of the UN, and, among other measures at the level of different UN bodies, to make use of the competence developped within the tribunals for the former Yugoslavia and Rwanda, and to prepare the United Nations, and in particular the Security Council and troop contributing countries to act to prevent acts of genocide or gross violations of human rights, wherever they may take place.

The International Court of Justice also had to pronounce itself on its competence and on conservatory measures concerning the responsibility of the Federal Republic of Yugoslavia (Serbia and Montenegro) for genocide, at the request of Bosnia and Herzegovina. The Court decided that the Convention appeared to afford a basis on which the jurisdiction of the Court might be founded, to the extent that the subject matter of the dispute relates to the interpretation, application or the fulfilment of the Convention, including disputes relating to the responsibility of a State for genocide. The Court decided that the Government of Federal Republic of Yugoslavia should immediately.....take all measures within its power to prevent commission of the crime of genocide and should, in particular, ensure that any military, paramilitary or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control, direction or influence, do not commit any acts of genocide, of conspiracy to commit genocide, or of complicity in genocide.....⁵.

As defined in the Statute and as recognized by the international community, the crime of genocide belongs to the crimes under international law, which may be committed in time of peace and in time of war. Therefore, it is not connected with war, as it was the case in the Charter of the Nürnberg Tribunal, which referred to "*persecutions.....in execution of or in connection with any crime within the jurisdiction of the Tribunal* ".

On this issue, the International Court of Justice declared that "*this means that the Convention is applicable, without reference to the circumstance linked to the domestic or international nature of the conflict* " ⁶.

The definition thus given to the crime of genocide contains two elements, namely the intent (*mens rea*) and the act prohibited (*actus reus*). They are referred to in the first sentence which states": *the crime of genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such* ".

It is obvious that the crime of genocide involves a particular state of mind, a specific intent with respect to the overall consequences of the act which is prohibited, that is to destroy, as such, in whole or in part, a national, ethnic, racial or religious group; a general intent to

commit an act enumerated as *actus reus* would thus not be sufficient for the crime of genocide, although such acts are by their very nature intentional.

Although the victims of the crime of genocide are individuals, the crime is committed against them as members of a particular group, as a step in the overall objective of destroying the group as such, not as any individuals; the General Assembly distinguished between the crimes of genocide and homicide as the "*denial of the right of existence of entire human rights group*", respectively the "*denial of the right to live of individual human beings*" ⁷.

Moreover, the intention must be to destroy the group in whole or in part. Therefore, it is not necessary to intend to annihilate a group in every country where they leave, but the crime requires none the less the intention to destroy a substantial part of the group ⁸.

The definition of the intent includes also the qualification of the group as national, ethnic, racial or religious; political groups are not included in the Convention on Genocide, neither in the definition given by the Statute, because such a group was not considered to be sufficiently stable. Cultural groups also were not included, in spite of some proposals, because of the uncertainty of clearly differentiating them ⁹.

The second element of the definition of the crime of genocide, the *actus reus*, the prohibited acts, is enunciated in an illustrative, rather than an exhaustive list; it means the destruction of the group either by physical or by biological means, that is, it concerns only "*physical* " and "*biological* " genocide, not the "*cultural genocide* ".

According to the provisions of the Statute, it is not necessary to achieve the final result of the destruction of a group; it is enough to have committed any of the acts listed with the clear intention of bringing about the total or partial destruction of a group.

The crime of genocide was placed sometimes in the category of the crimes against humanity. As it was demonstrated, the same act can be qualified as crime against humanity or as genocide, taking into account the intention of persons committing it: if the objective pursued is the elimination of a group as such, it is an act of genocide; if the act is directed against persons, not as members of a group, it is a crime against humanity ¹⁰.

In many instances, it was recognized that the interdiction of the genocide is an imperative norm of international law, from which no derogation is admitted ¹¹. The International Court of Justice declared that "*the rights and obligation enshrined by the Convention are rights and obligations erga omnes*" ¹².

Crimes against humanity

The chapter on crimes against humanity is a more recent development.

Already in 1946 Albert de La Pradelle noted, with reference to the Nürnberg Tribunal Charter and Judgment, that the crimes against humanity are opening new horizons in the field of international criminal law, going beyond what was known until then ¹³.

According to another scholar, "*crimes against humanity consist in confinement (internments), deportations, acts of terrorism, massacres of civilians and cannot be considered as committed in violation of an internal penal code. The perpetration of such a crime was made possible precisely because of suspension of such a code*" ¹⁴.

The need to punish them was expressed by the Congress of the National French Judiciary Movement, adopting a resolution (Paris, October, 1946) according to which "*les auteurs des crimes contre l'humanité doivent actuellement être jugés dans l'Etat sur le territoire ou contre les citoyens duquel les crimes ont été commis. Si la répression ne peut pas être exercée par un tribunal national, les coupables doivent être déférés à une juridiction pénale internationale*" ¹⁵.

The Crimes against humanity are defined by Statute in conformity with the Charter and Judgment of the Nürnberg Tribunal and the provisions of the Security Council resolutions concerning the International Criminal Tribunals for the former Yugoslavia and for Rwanda, but adding some clarifications and details, reflecting the evolution of the respective customary norms.

According to this definition, a crime against humanity means any act committed as part of a widespread or systematic attack directed against any civilian population with knowledge of the attack, such as: murder; extermination; enslavement; deportation or forcible transfer; imprisonment or other severe deprivation of physical liberty in

violation of fundamental rules of international law; torture; rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds in connection with any crime under the jurisdiction of the Court; enforced disappearance of persons; the crime of apartheid; other inhuman acts of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health.

Most of these concepts are specifically defined; by "*attack directed against any civilian population*" the Statute means a course of conduct involving the multiple commission of acts mentioned above, pursuant to or in furtherance of a State or organizational policy to commit such attack.

It follows that, in order for such an act to be a crime against humanity, cumulative conditions have to be met: a) it has to be part of a widespread or systematic attack; b) there has to be a State policy or a policy¹⁶ by an organization or another non-State organized actor. The "policy" element gives such an act a character of an international crime. A policy to that effect must be evidenced by actively encouraging or supporting the commission of such acts. A failure to prevent the crimes to be committed is not automatically the expression of such a policy.

Moreover, crimes against humanity may be committed not only by, or under the direction of State officials, but also by "*organizations*". That should include organized groups such as terrorist organizations but also separatist or other organized movements committing such crimes.

Such a definition excludes individual acts, which are not part of a plan or policy, as well as isolated acts, committed by a perpetrator upon his own initiative. Although the Charter of the Nürnberg Tribunal did not include such requirements, the Tribunal itself emphasized that the inhuman acts it prosecuted were committed as part of the policy of terror and were in many cases organized and systematic, and that such a policy was certainly carried out on a vast scale ¹⁷.

It is important to note that the definition of crimes against humanity does not include as a condition that the act was committed in time of war or in connection with crimes against peace or war crimes,

as in the Charter of the Nürnberg Tribunal. This means recognizing the autonomy of crimes against humanity, which has been already accepted in the Control Council Law No.10 adopted after the Second World War, as well as in the statutes of the ICTY and ICTR. It was also confirmed by the ICTY, stating that *"It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict"* ¹⁸.

According to the definition given to it, **"Extermination"** includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population. It is, by its very nature, directed against a group of individuals; it involves an element of mass destruction which is not required for murder. In a way, extermination is closely related to the crime of genocide, both of them being directed against a large number of persons. However, the crime of genocide would apply to a group of persons sharing the same national, ethnic, racial or religious background, while the extermination covers situations concerning a group of individuals who do not share any common characteristics.

Both murder and extermination were included as crimes against humanity in the Charter of the Nürnberg Tribunal (art.6 c), Control Council Law No.10 (art IIc), the Nürnberg Principles (Principle VI), the 1954 Draft Code of the ILC (art.2, para.11), the statute of the ICTY (art.5) and the statute of the ICTR (art.3).

"Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such powers in the course of trafficking in persons, in particular women and children. This includes slavery, servitude and forced labour and it is contrary to widely and long term recognized standards of international law ¹⁹.

"Deportation or forcible transfer of population" is defined as forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully living, without grounds permitted by international law. This implies both expulsion from the national territory and forcible displacement of population within the frontiers of the same State. The reference to *"grounds permitted by international law"* means to exclude from the definition displacements of populations which are committed for legitimate

reasons, such as public health, emergency measures or well being projects, in accordance with international law. The Charter and the Judgement of the Nürnberg Military Tribunal referred only to deportation, as a crime against humanity.

"Torture" is defined with a broader meaning than in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ²⁰, which is limited to acts committed in an official capacity or with official connivance; as a crime against humanity, torture may be committed not only by officials, but by any organized group; the reference to the *"control of the accused"* gives expression to this more extended conception adopted in the Rome Statute.

Among the **sexual offences**, only *"enforced prostitution"* is defined as the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.

Sexual offences were included as crimes against humanity, after the abuses committed during the last decade of the XX-th century; this includes rape, enforced prostitution and other forms of sexual abuse. In connection with numerous reports of rape committed in a systematic manner or on a large scale in the former Yugoslavia, the General Assembly reaffirmed that rape represents, under certain circumstances, a crime against humanity ²¹. On another continent, the National Commission for Truth and Justice in Haiti concluded, in 1994, that sexual violence committed against women in a systematic manner and for political reasons constitutes a crime against humanity ²². Rape was included as a crime against humanity in Control Council Law No.10 (art.II,c), the Statute of the ICTY (art.5) and the statute of ICTR (art.3). Rape, enforced prostitution and other forms of violence that may be specifically directed against women represent also violations of the Convention on the Elimination of all Forms of Discrimination against Women.

"Persecution" is defined as the intentional and severe deprivation of fundamental human rights contrary to international law by reason of the identity of the group or collectivity. The persecution may take many forms of violation of human rights, on political, racial, religious or ethnic grounds; as a denial of such rights, it is different from the crime of genocide, lacking the specific intent to destroy a group.

One has to note that it is only concerning "*persecution*" that the Rome Statute is requiring it to be directed against a group, by reason of its political, racial, religious or ethnic identity. Comparatively, the ICTY seems to apply such a requirement to a larger sphere of acts. Thus, the ICTY has confirmed, in the cases Nikolic and Tadic, the condition of the intention to discriminate on national, political, ethnic, racial or religious grounds for all crimes against humanity, in accordance with article 5 of the statute of ICTY²³.

As for the "*crime of apartheid*", it means acts enumerated as crimes against humanity, but committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime. It is thus taking up elements of the Apartheid Convention of 1973. "*Enforced disappearance of persons*" is a recent phenomenon. It is defined as the arrest, detention or abduction of persons by, or with the authorisation, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolong period of time. One has to note on this subject the Inter-American Convention on the Forced Disappearance of Persons of 1989 as well as the Declaration of the General Assembly on the Protection of All Persons From Enforced Disappearance, adopted by the resolution 47/133 of October 1992. The Draft Code of Crimes elaborated by the International Law Commission refers to the forced disappearance of persons, as a criminal activity. It was not included as a crime against humanity in previous international documents.

The Rome Statute, as well as other international instruments, include a **last category of inhuman acts of a similar character**, recognizing that it is impossible to set up an exhaustive list of crimes against humanity which would cause great suffering, or serious injury to body or to mental or physical health. It is meant to add other acts which are of a similar gravity.

This provision leaves open-ended the category of such crimes, but contains a high threshold, by the requirement of acts intentionally causing great suffering, or serious injury to body or to mental or physical health.

While the draft Statute of the ICC elaborated by the International Law Commission did not enumerate the crimes against humanity, the Rome Statute includes as crimes against humanity the same acts as in the Draft Code of Crimes against the Peace and Security of Mankind (article 18)²⁴, with some nuances and small differences (institutionalized discrimination on racial ethnic or religious groups instead of apartheid, persecution on political, racial, religious or ethnic grounds, instead of persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds).

With respect to crimes against humanity, the Elements of Crimes emphasize the need to prove the policy of a State or a non-state actor, by showing active promotion or encouragement, including failure or omission to act. According to most legal systems, when there is a preexisting legal duty or obligation to act, an intentional, deliberate or purposeful failure to act is part of the material element of major crimes. That makes it possible to establish a criminal policy by a State or a non-state actor. "*Actively promoting or encouraging*" includes obviously engaging in conduct which results in the commission of crimes against humanity. In both cases, of actual conduct or failure to act, the mental element of intent, at least knowledge, must exist.

It is the first international document negotiated by a multilateral conference which is codifying the crimes against humanity. Moreover, the definition given in article 7 of the Statute is much broader than that given in the statute of the ICTY and the ICTR, both from the point of view of substance and because it is not connected to an armed conflict. It does not require a discriminatory motive, except for the acts of persecution.

It is considered that the Rome Statute "sets forth a modernized and clarified definition of crimes against humanity that should provide a sound basis for international criminal prosecution in the future"²⁵.

War crimes

This category of crimes falls under the jurisdiction of the ICC in particular when committed as part of a plan or policy or as part of a large scale commission of such crimes. They are recognized by international humanitarian law, in different instruments. Some of them

were already included in the Charter of the Nürnberg Tribunal, which referred itself to the Geneva Convention of 1929 for the Amelioration of the Wounded and Sick in Armies in the Field and to the Hague Convention IV of 1907.

The drafting of article 8 of the Rome Statute is mainly based on the Conventions of 1949 and the Protocols of 1977.

The first category includes the grave breaches of the Geneva Conventions, as acts against persons or property protected under those conventions, namely: wilful killing; torture or inhuman treatment, including biological experiments; wilfully causing great suffering or serious injury to body or health; extensive destruction and appropriation of property, not justified by military necessity, carried out unlawfully and wantonly; compelling a prisoner of war or other protected person to serve in the forces of a hostile power, or wilfully depriving such persons of the rights to a fair and regular trial; unlawful deportation, transfer or confinement; taking of hostages.

As we see, this is grouping together the grave breaches of the four Conventions, in a synthetic manner.

The second category of war crimes are those grave breaches of humanitarian law, listed mainly in Protocol I concerning international armed conflicts, but also in the Regulations annexed to the Hague Convention IV, such as acts directed against the civilian population, like intentionally directed attacks against civilian population, against civilian objects which are not military objectives or against personnel, installations, material, units or vehicles involved in a humanitarian assistance or a peacekeeping mission, killing or wounding a combatant who has surrendered, launching an attack in the knowledge that it will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term, and severe damage to the natural environment ²⁶, which would be clearly excessive in relation to the overall military advantage anticipated, and others.

Under the same category, the Statute includes “*outrages upon personal dignity in violation of international humanitarian law, in particular humiliating and degrading treatment, raped, enforced prostitution and any form of indecent assault*”, which constitute grave violations of the four Geneva Conventions of 1949. Incriminating this type of conduct is considered as a fundamental guarantee to which all protected persons are entitled, a minimum standard of humanitarian

treatment of protected persons, applicable to any type of armed conflict, whether international or non-international, as it is recognized in article 3 common to the four Geneva Conventions.

In the same context, utilizing the presence of a civilian or other protected person to render certain points immune from military operations, intentionally using starvation of civilians as method of warfare and conscripting or enlisting children under 15 years into the national armed forces or using them to participate actively in hostilities are defined as war crimes.

This category includes also serious violations of the laws and customs of war on land, as embodied in The Hague Convention IV of 1907 and the Regulations thereto, and partially in Protocol I, and taking into account the Charter of the Nürnberg Tribunal (art.6c) and the Statute of the ICTY (art.3), including attacks or bombardment of localities which are undefended and which are not military objectives, attacks against buildings dedicated to religion, education, art, science, historic monuments which are not military objectives, pillaging towns or places even when taken by assault and others. Other war crimes included in that second category refer to the use of prohibited methods or means of warfare like poison or poisoned weapons, asphyxiating poisonous or other gases and employing bullets which expand or flatten easily in the human body. The Statute enounces the possibility to extend this kind of crimes to employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods are the object of a comprehensive prohibition and are included by amendment in an annex to the Statute.

As it is well known, the use of some of such weapons, projectiles, material or methods of warfare is already forbidden in some international conventions²⁷, but it was probably considered that they are not generally accepted to offer sufficient ground for placing such acts under the jurisdiction of the Court. It would be the case, for instance, for nuclear weapons; their use would be a violation of all humanitarian rules, without exception ²⁸.

It is generally recognized that there is a close relationship between international humanitarian law and arms control, respectively commitments not to use some weapons or categories of weapons.

The effects of the use of some weapons, including nuclear weapons, seem to be covered by other aspects of the definition of war crimes: intentional attacks against the civilian population, civilian objects or other protected targets is a clear provision for this purpose. In certain circumstances the effects of the use of particular weapons will be covered by the definition of crimes against humanity and, in exceptional circumstances, by the definition of genocide.

But the Statute established an inconsistent regime to cover the use of particular weapons, limiting it to asphyxiating, poisonous or other gases and dum dum bullets. The use of any other weapons may be considered a crime only if it is included in an amendment to the Statute, after being the subject of a comprehensive prohibition. Or, chemical weapons, biological weapons, laser blinding weapons and anti-personnel landmines are already the subject of comprehensive prohibitions ²⁹.

The Statute reflects the discrepancy between the norms on the protection of the victims of armed conflicts on one side, and those on the methods and means of warfare; while the scope of the first category of norms extended continuously, the second category remains far away behind.

The third category of crimes of war includes acts committed in armed conflicts not of an international character, representing serious violations of article 3 common to the four Geneva Conventions, namely acts of violence to life, outrages upon personal dignity, taking of hostages or passing of sentences and carrying out of executions without previous judgement pronounced by a regularly constituted court, directed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause.

In the Nicaragua Court's *dictum* ³⁰, the Court said that Article 3 of the 1949 Geneva Conventions contains rules that "constitute a minimum yardstick for all international conflicts".

There was also no opposition in the Security Council to treating violations of common Article 3 and Additional Protocol II as a basis

for the individual criminal responsibility of the perpetrators; objections to the subject matter jurisdiction of the Tribunal based on *ex post facto* character of Article 4 of the statute of ICTR have not been raised.

As it was said, "it has been generally recognized that the substance of Article 3, based on customary law, is part of *jus cogens*, and therefore binding on all States" ³¹. This "minimum standard" of international humanitarian law, contained in article 3, largely corresponds to the body of guarantees from which States cannot derogate, even in emergency situations ³².

One has to note also the decision of the International Court of Justice, which found contrary to Article 3 common to the Geneva Conventions even the encouragement of persons and groups in another country to "neutralize" selected and planned targets, including judges, police officers, State security officials, as a call "to carry out executions without previous judgement pronounced by a regularly constituted court" ³³.

The fourth category of crimes of war enumerates other serious violations of the laws and customs applicable in armed conflicts not of an international character, mostly against civilian population and civilian objects, which are already mentioned above, in the second category.

These provisions are based mainly on the Protocol II of 1977.

In this connection, it has to be noted that in its draft Statute for an International Criminal Court the International Law Commission excluded offences under Protocol II from the subject matter of jurisdiction of the proposed court; the Commission referred to treaties applicable as law in relation to the crime and creating a system of universal jurisdiction, as different from treaties merely regulating conduct, or prohibiting conduct on an inter-State basis ³⁴.

Some national laws also have taken a more courageous approach.

A Belgian law entitled "Crimes de droit international" of 1993 provides for the criminal jurisdiction of Belgian courts over certain breaches not only of the Geneva Conventions and Protocol I, but also of Protocol II, regardless of the nationality of the victim or perpetrator or of where the offence was committed ³⁵. On the basis of this law, the Brussels prosecutor's office, on May 29 1995, issued several international arrest warrants against persons involved in the atrocities

in Rwanda. Other warrants involved the killing of Belgian peacekeepers, among others ³⁶.

In connection with both categories of crimes of war applicable to armed conflicts not of an international character, the Statute points out that they do not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

The Rome Statute contains only modest and indirect **provisions protecting cultural property**, by incriminating as other serious violations of laws and customs applicable both in international and internal armed conflicts attacks intentionally directed against buildings dedicated to religion, education, art, science and to historic monuments, provided they are not military objectives.

Experience has shown that cultural property can be extensively destroyed in non-international armed conflicts. The Hague Convention of 14 1954 for the protection of Cultural Property in the Event of Armed Conflict ³⁷ is primarily addressed to international wars; but the Convention contains a penal clause compelling States parties, within their ordinary criminal jurisdiction, to prosecute and impose penal or disciplinary sanctions on persons of whatever nationality, committing breaches of the Convention; logically, this clause must cover also breaches of obligations pertaining to non-international armed conflicts and the Rome Statute is trying to solve this issue.

Serious violations of laws and customs, applicable in both international armed conflicts and internal armed conflicts, include also intentionally directing attacks against personnel, installations, material, units or vehicles involved in a **humanitarian assistance** or a **peacekeeping mission** in accordance with the Charter of the UN, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict. In this context, it is useful to refer to Convention on the Safety of United Nations and Associated Personnel of 1994, which enumerates acts the intentional commission of which is considered a crime, which should be incriminated as such and punished by States parties ³⁸. According to article 2.2 of this Convention, it shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter in which any of the personnel are

engaged as combatants against organized armed forces and to which the law of international armed conflict applies.

In its draft Code of Crimes against the Peace and Security of Mankind of 1996, the International Law Commission presents such crimes as a special category, along with genocide, crimes against humanity and crimes of war. The Commission pointed out that such attacks are violent crimes of exceptional gravity, having serious consequences not only for the victims, but also for the international community, because they are committed against persons who risk their lives to protect fundamental interests of that community. They are taking part in UN peacekeeping operations in an official capacity, for promoting a common interest of the international community; attacks against the UN personnel are in fact striking at the very heart of the international legal system established for the maintenance of peace and security.

In connection with grave breaches under Protocol I and breaches under Protocol II (the second and the fourth categories of crimes), the opening clauses are qualified by the words " *within the established framework of international law*". This was meant to include implicitly considerations of military necessity and proportionality, which are part of the laws and customs of war since the Hague Conventions. But the established framework of international law may be considered to be much broader, and certainly is in constant evolution.

For the three categories of crimes, the Rome Conference decided the elaboration of **Elements of Crimes**.

The Preparatory Commission established by the Diplomatic Conference provided for the Elements of Crimes, in order to assist the Court in the interpretation and application of articles 6, 7 and 8 concerning crimes under the jurisdiction of the Court; they were adopted by the Assembly of States parties.

The Elements of Crimes do not amend the Statute and do not supplement the definition of crimes as contained in articles 6, 7 and 8; amendments to Elements of Crimes may be proposed by any State party, the judges by an absolute majority and the prosecutor, and have to be adopted by the two-thirds majority. They have to be consistent with the Statute.

The Elements of Crimes, adopted by the first Assembly of States parties, have clarified at varying degrees the tasks of the Court in

dealing with incriminated conduct. While on genocide, Elements of Crimes do not add anything substantive to what is generally understood in the well established definition of genocide, on war crimes they introduce concepts such as military necessity, reasonableness and unlawful conduct. Nevertheless, they don't establish standard criteria or rules by which to assess such concepts in concrete cases, thus leaving to the jurisprudence of the Court to evaluate them on the basis of applicable law.

One has to note that the definitions given to the three categories of crimes contain a number of legal overlaps; thus, murder and extermination, which are crimes against humanity when committed as part of a widespread or systematic attack directed against any civilian population, may also be crimes of genocide if committed against a qualified group, or war crimes when committed as part of a plan or policy or as part of a large scale commission; many sexual crimes may be both crimes against humanity and crimes of war, as well as deportation and torture.

The Statute does not contain provisions on how to deal with such cases or with factual overlaps, neither in respect to penalties when a person may be convicted for several crimes arising out of the same conduct.

The Rome Statute is dealing with the three categories of crimes separately, while in the description of the mandates of ICTY and ICTR violations of international humanitarian law include also genocide and crimes against humanity, thus relating them to an armed conflict. For that reason, the Rome Statute is considered to mark a tremendous normative advance⁴⁰.

The problem of overlaps may also arise in connection to the principle *non bis in idem*, when a person has already been convicted or acquitted for the same conduct; the same problems will have to be solved by the courts of the States parties, if they want to avoid a determination by ICC that they are shielding a person from criminal responsibility.

In the Rome Statute, war crimes are for the first time incorporated in a single document, combining the grave breaches of what was called the "*law of Geneva*" (norms on the protection of the victims of armed conflicts) and the "*law of The Hague*", that is the laws and customs of war.

As for the armed conflicts of a non- international character, the Rome Statute represents a considerable enrichment, cristallizing norms which were for the first time included in the 1977 Protocol II⁴¹.

The Rome Statute represents an important contribution of a diplomatic conference organized by the United Nations to the development and codification of international humanitarian law.

Moreover, by the codification of the general norms of international humanitarian law in a single document, the Rome Statute is giving legal certainty to the law to be applied by the Court.

Significant progress has thus been achieved in developing and codifying laws and customs of war; each war brought out, nevertheless, new and more serious violations; new norms were adopted, but the situation did not improve very much.

It is recognized that little has happened in the past half century to suggest any improvement in the functioning of the other means provided by the Geneva Conventions of 1949 for deterring violations and improving compliance- the scrutiny of performance by protecting powers, that is by States not parties to the conflict that represent the interests of a belligerent in the areas controlled by an opposing belligerent and the offers of assistance by the International Committee of the Red Cross⁴².

The creation of the ICTY, the ICTR and the ICC demonstrates that the punishment of persons who commit crimes of war has finally become an important objective for many States. The establishment of the International Criminal Court will inevitably increase the chances that, in the future, at least some persons who commit war crimes will be prosecuted, either by States or or by international courts. These developments and the publicity attending them should help promote compliance with the humanitarian law.

The crime of aggression, other crimes

The definition of aggression

The crime of aggression falls in principle under the jurisdiction of the Court, but is not defined as such and according to the Statute, the Court will exercise jurisdiction over it once the definition is adopted and conditions are set out for this. Both the definition and these

conditions should be consistent with the relevant provisions of the Charter of the United Nations.

Such a definition may be adopted as an amendment to article 5 of the Statute, following a proposal of any State party, either by the Assembly of States parties, or at a Review Conference, at the expiry of seven years after the entry into force of the Statute. The adoption of such an amendment requires a two-thirds majority of State parties.

The definition of aggression raised the interest of States and the legal community as soon as resorting to war as a means of national policy was limited and forbidden. A definition was adopted in 1933 at the London World Economic Conference (without being directly connected to the subject matter of that Conference), after substantial discussions during the Disarmament Conference in the same year. The definition is based on the principle of anteriority and is characterized by a restrictive list of acts considered to be aggression and the clause of inadmissibility of any justification by political, economic or other considerations ⁴³.

The importance of a definition of aggression was underlined, in the context of this Conference, by Nicolae Titulescu, minister of foreign affairs of Romania, one of the authors of the definition adopted in 1933, in the following terms: "*To accurately define aggression as the notion, as a fact, irrespective of any theoretical considerations; to carefully specify the notion of territory – which aggression cannot encroach; to firmly commit oneself, whatever the internal or international reasons, not to take any aggressive action – all these mean replacing the vague idealistic aspirations which hitherto dominated the efforts of the nations and of their leaders with a practical and firm basis, which represents the starting point of a new life*" ⁴⁴.

After years of efforts by the United Nations, a Definition of aggression was adopted in 1974 by the General Assembly ⁴⁵.

According to this Definition, "any of the following acts, regardless of a declaration of war, shall qualify as an act of aggression:

- a) *The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary resulting from such invasion or attack, or any*

annexation by the use of force of the territory of another State or part thereof;

- b) *Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;*
- c) *The blockade of the ports or coasts of a State by the armed forces of another State;*
- d) *An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;*
- e) *The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;*
- f) *The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;*
- g) *The sending by or on behalf of a State of armed bands, groups, irregular or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein "*

The first use of armed force by a State in contravention of the UN Charter shall constitute *prima facie* evidence of an act of aggression, although the Security Council may conclude that such a determination would not be justified in the light of other relevant circumstances, including that the acts concerned or their consequences are not of sufficient gravity.

According to the Definition de 1974 "*A war of aggression is a crime against international peace. Aggression gives rise to international responsibility*".

As it is known, in its Judgment the Nürnberg Tribunal stated that "*Launching a war of aggression is not only an international crime; it is the supreme international crime, which is not different from other war crimes, except by the fact that it includes all of them*".

The Nürnberg and Tokyo Tribunals prosecuted and decided upon individual criminal responsibility of major war criminals for acts of aggression and aggressive war, for participating in planning, preparation, initiation and waging such wars, and rejected claims of

self-defence, of military necessity, of characterizing acts of aggression as border incidents, as well as defence claims of superior orders, official position, coercion or duress and others ⁴⁶.

The problems of the security system under the "primary responsibility" of the Security Council (article 24 of the Charter) were not overcome by having adopted the resolution on the definition of aggression. Since the Security Council has a broad discretion to determine the existence of any threat to the peace, breach of the peace or act of aggression (article 39) and decide on measures to be taken (articles 41 and 42), a decision to impose sanctions can be taken, subject to the veto, without a determination of an act of aggression.

The definition of aggression would not be decisive, but used as guidance.

The Security Council recognized and condemned acts of aggression of South Rhodesia against Zambia, Mozambique, Botswana and Angola, of South Africa against Angola, Botswana, Seychelles and other States, of Israel against Tunisia, of Iraq against Kuwait (invasion, without using the term aggression), as well as an attack of force of mercenaries against Benin ⁴⁷. The General Assembly also adopted resolutions considering as aggression the occupation of Namibia by South Africa, attacks of South Africa against its neighbours, acts of Portugal in its colonies in the 70-ees, acts of Israel against Irak, Lebanon and the Palestinian people, acts of Serbia/Montenegro against Bosnia and Herzegovina ⁴⁸.

There are many cases in which the Security Council has not been able to decide on the determination of aggression, in spite of the existence of such acts which may fall within article 39 of the Charter.

The difficulties in the process of an effective application of that article are obvious and have, in effect, adversely influenced the efficiency of the United Nations collective security system.

It is also obvious that it is possible for the Security Council, without reference to article 39, to apply any measures as it deems necessary.

The International Court of Justice also expressed itself on cases of aggression in relations among States. In 1986, the Court referred extensively to the 1974 Definition of Aggression and concluded that an armed attack included not only action by regular armed forces

across an international border, but also the sending by a State of armed bands which carry out acts of armed force against another State of such gravity as to amount to an actual attack conducted by regular forces. The Court indicated that the description of such action, as contained in Article 3, g) of the Definition of Aggression "may be taken to reflect customary law" ⁴⁹.

The definition of the crime of aggression

The adoption of the Rome Statute marked a renewal of interest for a definition of the crime of aggression which would offer to the ICC the necessary elements for prosecuting and punishing persons committing that crime.

The International Law Commission defined the crime of aggression, in article 16 of its Draft Code of Crimes against the Peace and Security of Mankind of 1996, ⁵⁰ as follows: "An individual who as leader or organizer, actively participates in or orders the planning, preparation, initiation or waging of aggression committed by a State shall be responsible for a crime of aggression".

According to this definition, individual responsibility is intrinsically and inextricably linked to the commission of an act of aggression by a State, because only a State is capable of committing such an act. It clearly indicates that the aggression committed by a State is a *conditio sine qua non* for the responsibility of an individual for the crime of aggression.

It is generally accepted that an act of aggression is outlawed by the contemporary international law and that this prohibition generates an obligation towards the international community as a whole, an obligation *erga omnes* ⁵¹.

As for the States parties to the Rome Statute, which continued the efforts in this field after the Rome Conference, the main trend prevailing is to avoid the hurdles related to the definition of aggression according to the Charter, that is of the aggression committed by a State or group of States, against another State, which would inevitably refer the whole issue to the Security Council, and to define the crime of aggression from the point of view of the individuals responsible for committing acts of aggression, that is a definition for the purposes of the Statute.

This is raising many difficult questions:

- can a definition of the crime of aggression be given, without relationship to the definition of aggression according to the Charter of the United Nations ?
- what may be the relationship between the aggression committed by a State or a group of States, and the crime of aggression committed by individuals of such States ?
- should the ICC determine itself that a person is responsible for committing a crime of aggression, without a previous decision of a UN body that an act of aggression has taken place?
- if there has to be a previous UN decision, which are the UN bodies that could make the determination to be used by the Court?
- could the Court take the initiative to submit a request to the UN bodies for making such a determination?

It seems that all the proposals submitted to the attention of States parties make a clear reference to the definition given by the resolution 3314 of 1974, considering it as a starting point.

Some of these proposals take as an objective fact the existence of an act of aggression, committed by a State as defined by this resolution, which by its characteristics, gravity and scale amounts to a war of aggression or constitutes a manifest violation of the prohibition of acts against the territorial integrity or the political independence of another State recognized in the Charter of the United Nations.

As in the Rome Statute there is no requirement of a previous determination by a UN body of an act of aggression, that would mean that the Court itself will take note thereafter that such an act of aggression has been committed by a State, and from that basis would proceed to investigate and prosecute a crime of aggression committed by individuals ⁵². This is confirmed by the fact that the resolution 3314/1974 does not require such a previous determination; according to the resolution, any of the facts enumerated are *prima facie* acts of aggression; the Security Council may determine that other forms of use of force represent also acts of aggression.

Starting from such a presumption, it is proposed to build the definition of the crime of aggression around the following elements:

- the person should either intentionally order or actively and knowingly participate in planning, preparation, initiation or

perpetration of an act of aggression, or actively participate in such activities by means of essential acts, knowing that this constitutes an act of aggression, provided that the act of aggression actually takes place;

- the person should be in position to exercise control over or direct effectively the political or military action of State, or to contribute to, or effectively participate in such acts ⁵³.

Other proposals start from the jurisprudence of the Nürnberg Tribunal and the tribunals established after the Second World War, according to which the crime of aggression is a leadership crime which may only be committed by persons who have effective control of the State and military apparatus on a policy level; without enumerating acts of aggression, the crime would consist in intentionally and knowingly ordering or participating actively in the planning, preparation, initiation or waging of such acts ⁵⁴. This proposal is not dealing in any way with the aggression committed by the State of the leadership.

A more elaborated proposal starts from the postulate that, for the purposes of the exercise of jurisdiction by the Court over the crime of aggression under the Statute, aggression committed by a State means the use of armed force to attack the territorial integrity or political independence of another state in violation of the Charter of the United Nations ⁵⁵.

While separating the act of aggression by a State from the crime of aggression for which there is individual criminal responsibility, this proposal starts from the point of view that aggression by a State is a precondition to the prosecution of an individual for the crime, that is the action by the State is triggering individual criminal responsibility, opening the way to the jurisdiction of the Court.

This means recognizing the unique character of the crime of aggression in the sense that the responsibility of an individual for this crime is established by his participation in a sufficiently serious violation of the prohibition of the conduct by States contained in article 2 para.4 of the Charter. The aggression attributed to a State is a *sine qua non* for the responsibility of an individual for his participation in the crime of aggression. Thus, the Court cannot determine the question of individual criminal responsibility for this crime, without considering as a preliminary matter the question of aggression by a State.

Consequently, it is pointed out that Court shall exercise its jurisdiction with respect to the crime of aggression in a manner consistent with the Charter of the United Nations, in particular articles 10, 24 and 39.

For that, the Prosecutor would proceed with a case in accordance with the Statute when:

- a) the Security Council refers to the Court a situation in which the crime of aggression appears to have been committed;
- b) a State party refers to the Prosecutor a situation of that kind;
- c) *proprio motu*, when the Security Council or the International Court of Justice has made a determination according to the Charter that an act of aggression was committed by the State concerned.

According to this proposal, the Court would be also given an active role. Thus, if no determination by the Security Council exists, the Court shall notify the Council of the situation (which means if the situation is referred by a State party or taken up *proprio motu* by the Prosecutor), in order to see if the Security Council takes action, as appropriate, under article 39 of the Charter. Where the Security Council, within 6 months from the date of notification, does not make a determination on the situation or does not suspend the consideration by the Court of the case, in accordance with article 16 of the Rome Statute, the Court may request the General Assembly to seek an advisory opinion from the International Court of Justice on the legal question of whether or not aggression has been committed by the State concerned.

In such a case, the International Criminal Court may proceed to exercise its jurisdiction over the case, if the International Court of Justice gives an advisory opinion that an act of aggression has been committed by the State concerned.

That will also be the case where the International Court of Justice makes a finding, in proceedings brought before it otherwise (disputes between States, submitted in accordance with Chapter II of its Statute), that an act of aggression has been committed by the State concerned. It is obvious that in such a case the Court will not have to request for a determination by the Council or the International Court of Justice, but will be able to use the findings already made.

One has to note that neither the UN Charter, nor the Statute of the International Court of Justice restrict the competence of the

International Court of Justice to consider the legal aspects of a dispute or a juridical problem submitted to it⁵⁶. The Court did not hesitate to consider cases which had important political implications and raised the issue of the legal or illegal use of force⁵⁷, from the point of view of the norms of international law.

All the proposals presented until now attribute the crime of aggression to the leadership, to persons in a position to exercise control over or to direct the political or military action of a State.

As *actus reus*, they all mention types of conduct which are already indicated in the Statute of Rome (article 25) for the other crimes under the jurisdiction of the Court. The same pattern is followed for the mental element, as the acts have to be committed "*intentionally and knowingly*", as for other crimes under the jurisdiction of the Court. As in the case of crimes against humanity, it will not be necessary to prove that the perpetrator had knowledge for all the details of the aggression when the conduct occurred.

All the proposals have in mind that the crime of aggression was already committed or is actually taking place.

The Resolution F of the Rome Conference also decided that the Preparatory Commission for the ICC shall prepare, *inter alia*, proposals for a provision on aggression including the definition and Elements of Crimes of aggression and the conditions under which the Court shall exercise its jurisdiction with regard to this crime. Such proposals should be examined, of course, at a Review Conference⁵⁸.

The Report of the Preparatory Commission for the ICC⁵⁹ includes a Discussion paper proposed by the Coordinator of the Working group, containing options to be followed on different issues (the definition of the crime of aggression, reference to different articles of the UN Charter, relationship to previous decisions of UN organs), as well as proposals for Elements of the Crime of aggression.

It is summarizing the proposals made and will certainly be a starting point for future work on this issue.

The Assembly of States parties to the Rome Statute decided, at its first session in September 2002, to establish a special working group on the crime of aggression, to be open to all States members of the Preparatory Committee, in order to continue to elaborate proposals for a provision on that crime in the Statute, including the definition,

Elements of Crimes and the conditions under which the Court shall exercise jurisdiction with regard to this crime.

The purpose is to submit proposals to the Assembly at a Review Conference, with a view to arriving at an acceptable provision on the crime of aggression for inclusion in the Statute. According to the Rome Statute, such a Conference will be convened by the Secretary General of the United Nations seven years after the entry into force of the Statute, that is in 2009, to consider any amendments to it. It is expressly stipulated that such a review may include, but is not limited to, the list of crimes contained in article 5, among which the crime of aggression.

Other crimes

Other crimes may also be added to the jurisdiction of the Court, in accordance with the mechanism of considering and adopting amendments as provided for in the Statute. It is the case, for instance, for employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate, in violation of the international law of armed conflict, when a comprehensive prohibition of them will be adopted and included in an annex to the Statute, as a crime of war (as expressly mentioned in article 8.2.b.XX). The Rome United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court also recommended that a Review Conference according to the Statute of the ICC consider the crimes of terrorism and drug crimes with a view to arriving at an acceptable definition and their inclusion in the list of crimes within the jurisdiction of the Court.

As for terrorism, it is well known that the two 1997 Protocols refer to "*acts or threats of violence the purpose of which is to spread terror among the civilian population*" (Protocol I) and to "*acts of terrorism, at any time and in any place whatsoever*" (Protocol II). They refer, of course, to acts of terrorism committed in time of armed conflicts, international or non-international.

Proposals were made and discussions have taken place for including crimes such as drug trafficking and terrorism.

One should note the unusually high threshold for adopting such amendments by two-thirds of the States participating in the Assembly

of States parties or in the Review Conference, and for their entry into force after the ratification by 7/8 of the States parties, and the unusual delay for proposing amendments to the Statute- 7 years after its entry into force. It is even more unusual from the point of view of the law of treaties that amendments enter into force for all States parties (one year after their ratification or acceptance by 7/8 of them), but that the Court will have no jurisdiction in respect to persons and territory of States which have not ratified them. Such a State may withdraw from the Statute, but is not obliged to do so; it would result from the legal point of view that such a State may choose to remain a party to the Statute, without the amendment being applied to it, although in force for all States.

It follows that it may be very difficult to adopt amendments to the Statute, that is to add to the Court's jurisdiction new crimes, and to make such new amendments, even when accepted, applicable to all States parties.

Notes

1. Agreement for the Establishment of an International Military Tribunal and Annexed Charter, UNTS, vol.5, p.251.
2. Trial of the Major War Criminals before the International Military Tribunal, Nürnberg, 14 November 1945-1 October 1946, vol.I, p.406, paragr.6.
3. On 31 December 2000, the Genocide Convention was ratified by 132 States. Cf. Multilateral Treaties deposited with the Secretary general as at 31 December 2000, vol.I.
4. In several decisions and advisory opinions, the Court stated that "the principles underlying the Convention are....recognized by civilized nations as mandatory for all states, even in the absence of any conventional obligation"; the Court pointed out "the universal character both of the condemnation of genocide and of the cooperation necessary to free mankind from such an ominous scourge". The Advisory Opinion concerning Reservations to the Convention on Genocide, ICJ Reports 1951, p.15-23; the decision in the Barcelona Traction case. Light and Power Co., ICJ Reports 1970, para.32,33 and 34, where the prohibition of genocide is presented as an obligation erga omnes.
5. Decision on competence in the case "Application of the Genocide Convention", ICJ Reports 1993, p.16, 342-343.
6. Judgement of 11 July 1996, Case concerning application of the Convention on the prevention and punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, ICJ Reports 1996, p.615.
7. Resolution 96(I) of 11 February 1946.
8. Commentary by the ILC to article 17 of its 1996 Draft Code, doc.A/CN.4/Ser.A/1996/Add.1, p.45.

9. The draft Convention on Genocide presented by the Secretary General at the Second session of the General Assembly, as well as the draft convention on the prevention and punishment of the crime of genocide prepared by the Ad-hoc Committee on Genocide created for finalizing the draft, contained provisions on "cultural genocide", covering any deliberate act committed with the intent to destroy the language, religion or culture of a group. Doc. E/447, article III, Commentary by the ILC, p.46.
10. Stefan Glaser, *Droit International Pénal Conventionnel*, vol.I, 1947,p.109.
11. As cited by Stanislaw E.Nahlik, *Jus Cogens and the Codified Law of Treaties*, 1973-1974, p.85-111; Kamil Yasseen, *Reflexion sur la détermination du Jus Cogens*, Société française pour le droit international, Colloque de Toulouse, 1974,p.208 and particularly Lauri Hannikainen, *Peremptory Norms (Jus Cogens) in International Law*, 1988,p.456- 464.
12. Judgement of 11 July 1996, *Bosnia and Herzegovina v.Yugoslavia*, ICJ Reports 1996,p.617.
13. Albert de La Pradelle, *Une révolution dans le droit pénal international*, *Nouvelle Revue de Droit international privé*, no.2,1946,p.12.
14. V.Aroneanu, *Le crime contre l'humanité*, *Nouvelle revue de droit international privé*, 1946,no.2.
15. According to V.V.Pella, study mentioned before,p.40.
16. The policy element is the essential characteristic of "crimes against humanity", according to Cherif Bassiouni, *Crimes against Humanity in International Criminal Law*, 1992,p.244,247.
17. *Nazi Conspiracy and Aggression. Opinion and Judgment*, 1947,op.cit.,p.84.
18. *Prosecutor v.Dusko Tadic aka "Dule"*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY, case No. 1T- 94-1- ART2, Appeal Chamber,decision of 2 October 1995,p.73.
19. The Convention of 1926 and 1946 mentioned supra, p , the International Covenant on Civil and Political Rights of 1966, the ILO Convention No.29 concerning Forced or Compulsory Labour of 28 June 1930, as modified by The Final Articles Revision Convention of 1946; text in UNTS vol.39,p.55 and foll.
20. Supra, part I, chap.I,p.18; for a critical opinion on the restrictive scope of the Convention ,see Ion Diaconu, *Human Rights in the Contemporary International Law*, 2001,p.137- 139 and 236 – 238.
21. Resolution 50/192 of 22 December 1995.
22. Haiti, Commission Nationale de Vérité et de Justice, S I,M,PA, RELE, 29 septembre 1991- 14 octobre 1994(1995).
23. Hervé Ascensio et Rafaëlle Maison, study cited above, p.391.
24. Presented above, part I,chap.II,p.43-45.
25. Darryl Robinson, *Defining "Crimes against Humanity" at the Rome Conference*, in *AJIL* 1999, vol.93,p.57.
26. As for acts of destruction of the environment, one has to note that the Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict, prepared by the International Committee of the Red Cross in 1994 state that "Destruction of the environment not justified by military necessity violates international humanitarian law. Under certain circumstances , such destruction is punishable as a grave breach of international humanitarian law",Doc.A/49/323, annex,para.8.
The provisions adopted by the Statute are definitely weaker than those of Protocol I (articles 35/3 and 55) which considered as grave breach the employment of

- methods or means of warfare, which are intended, or may be expected, to cause widespread, long term and sever damage to the natural environment.
27. Such as the Convention on the Prohibitions or Restriction on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (with Protocols I,II and III), Geneva, 10 October 1980 (text in UNTS vol.1342,p.137 and foll); Additional Protocol to the 1980 Convention (Protocol IV, entitled Protocol on Blinding Laser Weapons), Vienna, 13 October 1995; Protocol on Prohibitions or Restrictions on the Use of Mines, Booby- Trapps and other Devices as amended on 3 May 1996 (Protocol II as amended, annexed to the 1980 Geneva Convention –doc.CCW/CONF.I/16, Part.I); Convention on the Prohibition of the Development, Production , Stockpiling and Use of Chemical Weapons and on their Destruction, Geneva, 3 September 1992 (text in UNTS vol.1974,p.45 and foll.); Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction , Oslo, 18 September 1997 (Conference on Disarmament CD/1478).
28. According to the Advisory Opinion of the International Court of Justice, "the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law". The Court also affirmed that it shared the view that " there can be no doubt as to the applicability of humanitarian law to nuclear weapons", Advisory opinion of 8 July 1996, *Legality of the threat or use of nuclear weapons*, ICJ Reports 1996,p.266 and p.259.
29. R.Mathews and T.McCormack, *The Relationship between International Humanitarian Law and Arms Control*, in *Humanitarian Law of Armed Conflict. Challenges Ahead*, Ed. Delissen and Tanja, 1991,p.88.
30. Decision in the case "Military and Paramilitary Activities ", Merits, ICJ Reports, 1986,p.114.
31. H.P.Gasser, *A Measure of Humanity in Internal Disturbances and Tensions: Proposal for a Code of Conduct*, in *International Review of the Red Cross*,44, 1988,p.262.
32. Theo Van Boven, *Reliance on norms of humanitarian law by United Nations Organs*, in *Humanitarian Law of Armed Conflict. Challenges Ahead*, Ed.Delissen and Tanja, 1991,p.502-503.
33. Decision in the case "Military and Paramilitary Activities", ICJ Reports, 1986,p.129-130.
34. Report of the ILC on the work of its forty- sixth session, General Assembly, 49-th session, Suppl.no.10, UN Doc.A/49/10, 1994,p.76.
35. Loi du 16 juin 1993 relative à la repression des infractions graves aux conventions internationales de Genève du 12 août 1949 et aux protocoles I et II du 8 juin 1977, additionnels à ces conventions; *Moniteur Belge*, August 5, 1993.
36. Th.Meron, art.cit.,p.577.
37. Text in UNTS vol.249,p.358 and foll.
38. Supra, part I, chap.I,p.14.
39. Cf.Mahnoush Arsanjany, study cited above,p.33.
40. Rolf Einar Fife, *The International Criminal Court, Whence it Came, Where it Goes*, *Nordic Journal of International law*, 69,2000,p.68.
41. Luigi Condorelli, *La Cour Pénale Internationale :un pas de géant (pourvu qu'il soit accompli...)*,in *RGDIP*, 1999,t CIII,p.19-21.
42. George Aldrich, *The Laws of war on land* ,in *AJIL*, 2000,vol.94,p.55

43. On 3 July 1933 a Convention for the definition of aggression was signed by the USSR, some Asian countries and some East-European States; on 4 July 1933 an identical Convention was signed by USSR, states members of the Little Entente (Czechoslovakia, Romania and Yugoslavia), and Turkey. Text in Benjamin B.Ferencz, *Defining International Aggression, The Search for World Peace*, I, 1975, p.69 and foll.
44. Nicholas Titulescu, *World's Statesmen*, Paris, 1982, Essays and commentaries, p.132.
45. Resolution 3314 (XXIX) of 14 December 1974.
46. Extensive presentation in Doc.PCNICC/2002/WGCA/L.1, p.13-115 and Add.1, p.3-98.
47. Ibidem, p.115-121.
48. Ibid. p.121-128.
49. *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua vs. United States of America), ICJ Reports, 1986, p.103.
50. Doc.A/CN.4/Ser.A/1996, Add.1, p.42-43.
51. The Decision of the International Court of Justice, *Barcelona Traction case*, ICJ Reports 1970, p.32.
52. Proposal submitted by the delegation of Columbia, doc.PCNICC/2002/WGCA/DP.3 of 1 July 2002.
53. Ibidem.
54. Proposal submitted by Belgium, Cambodia, Sierra Leone and Thailand, doc PCB/CC/2002 WGCA/DP.5 of 8 July 2002.
55. Proposal submitted by Bosnia and Herzegovina, New Zealand and Romania, doc.PCN/CC 2001/WGCA/DP.2 and Add 1 of 27 August 2001.
56. Decision of the Court, *US Diplomatic and Consular Personnel in Tehran case*, ICJ Reports 1980, p.21.
57. *Corfu Channel case*, ICJ Reports, 1949, p.18 ; *Advisory Opinion of May 28, 1948 on Conditions of admission of a State to membership in the UN*, ICJ Reports, 1948, p.61-63. The Court decided that it was competent to consider any question having a political character, from the point of view of its judicial tasks, on the basis of international law, because "the Court may give an advisory opinion on any legal question, abstract or otherwise". Also decision in the case "Military and paramilitary activities...", ICJ Reports 1986, p.123, where the Court pronounced itself on the fact if there was a violation of the principle of non-use of force and on the exception of a collective self-defence in connection with military activities. The International Court of Justice justified its competence to consider legal aspects of any issue, even simultaneously with the consideration of situations by the Security Council (the United States Diplomatic and Consular Staff in Tehran, ICJ Reports 1980, p.21; *Military and Paramilitary Activities...*, ICJ Reports 1987, p.434), "both organs performing their separate but complementary functions with respect to the same events". (Ibid, p.435). Cases presented extensively in doc. PCNICC/2002/WGCA/L.1 of 24 January 2002.
58. Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the establishment of an International Criminal Court, done at Rome on 17 July 1998, doc.A/CONF.183/10 of 17 July 1998.
59. Doc.PCNICC/2002/2/Add.2 of 24 July 2002.

Chapter IV

The functioning of the International Criminal Court

We shall consider under this chapter the organization of the Court, the way its jurisdiction is initiated, conducted and finalized, as well as different aspects of its cooperation with States parties and with the United Nations organs. This is important to understand the place of the ICC in the world, the environment in which it has to perform and the difficulties it has to overcome.

The organization of the Court

The Court is a permanent institution, composed of four principal organs: the Presidency; an Appeal Division, a Trial Division and a Pre-Trial Division, forming the judicial body of the Court; the Office of the Prosecutor; the Registry. Some important policy functions are carried out by the Assembly of States parties, in accordance with the Statute, although it is not an organ of the Court.

The President, a First Vice-president and a Second Vice-president, elected by an absolute majority of the judges, for three years, form the Presidency, which is responsible for the proper administration of the Court (with the exception of the Office of the Prosecutor) and other functions conferred upon it in accordance with the Statute. Among those other functions, the Statute mentions expressly excusing judges from the exercise of their function in cases where their impartiality might reasonably be doubted and designating on a case-by-case basis alternate judges to be present at each stage of the trial and to replace a member of the Trial Chamber, unable to continue attending; others are implicit in the Statute.

The Court itself will be formed of 18 judges, elected by the Assembly of States parties, with carefully required qualifications. At least nine of them have to have an established competence in criminal law and procedure, and the necessary experience as judge, prosecutor or advocate in criminal proceedings, and at least five to have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the

judicial work of the Court. Moreover, they have to represent the world's major legal systems, and an equitable geographic distribution, including a fair representation of female and male judges.

They will form one division of at least six judges, dealing exclusively with indictments and pre-trial matters. This is the Pre-Trial Division. Other not less than six judges will constitute the Trial Division, from which trial chambers are formed. The Appeals Division is formed by the President and four judges and will deal with appeals in its full composition. The trial and pre-trial divisions shall be composed predominantly of judges with criminal trial experience. Otherwise, each division shall contain an adequate combination of expertise in criminal law and procedure and in international law.

In the pre-trial and trial divisions, the judicial functions shall be carried out by chambers; three judges will form a Trial Chamber, while the function of the Pre-Trial Chambers shall be carried out by three judges or by a single judge of that division. In order to maintain a separation between trial and appeals chambers, the judges assigned to the Appeals Division shall serve only in that division for their entire term or may be temporary attached to the other division, provided that a judge who has participated in the pre-trial phase of a case will not sit in the trial chamber on that case.

The Statute contains provisions on the privileges and immunities of the judges, as are necessary for the fulfilment of their functions, as well as on their independence and impartiality. Where the impartiality of a judge may be doubted, a judge may request to be excused or may be disqualified from participation upon request by the Prosecutor or the investigated person.

The Office of the Prosecutor is a separate organ of the Court. It shall be responsible for receiving referrals on crimes within the jurisdiction of the Court from States parties and from the Security Council and any substantiated information for consideration and for conducting investigations and prosecutions before the Court.

The Office will be headed by the Prosecutor, who has full authority over the management and administration of the office. He or she will be assisted by one or more Deputy Prosecutors, all of the being of different nationalities. The Prosecutor and Deputy Prosecutors must be of high moral character, highly competent and have extensive practical experience. The Prosecutor is elected by

secret ballot by an absolute majority of the Assembly of States parties; the Deputy Prosecutors are elected in the same way, from a list of candidates proposed by the Prosecutor. The Statute contains also provisions for the protection of their impartiality and their disqualification at their request or at the request of an accused in situations where their impartiality might be reasonably doubted.

Judges and prosecutors of the Court shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence.

The Registry is responsible for the non-judicial aspects of the administration and servicing of the Court. The Registry shall be headed by a Registrar, who is the principal administrative officer of the Court, exercising his or her functions under the authority of the President of the Court. The Registrar is elected by the judges by an absolute majority by secret ballot, taking into account any recommendation by the Assembly of States parties. A Deputy Registrar may also be elected, upon the recommendation of the Registrar.

The Registrar has to fulfil functions in connection with the protection of witnesses and victims.

The Prosecutor and the Registrar shall appoint such staff as necessary as may be required to their respective offices; they have to ensure the highest standards of efficiency, competency and integrity.

The Assembly of States parties, without being an organ of the Court, has specific prerogatives, including the adoption of rules of procedure and evidence in conformity with the Statute, as well as rules for the internal activity of the Court and management oversight to the organs of the Court regarding the administration. It is electing the judges, the Prosecutor and the Registrar. It is competent to adopt and review the budget. It has also competences to consider cases of non-cooperation by States parties contrary to the provisions of the Statute.

The Assembly is formed of one representative from each State party, accompanied by alternates and advisors. Each State party has one vote, but consensus will be attempted to be reached. If this is not possible, decisions on matters of substance, including elections, are taken by a two-thirds majority of those present and voting, while

decisions on procedure issues are taken by a simple majority of those present and voting.

Initiation of the Court's jurisdiction

For the Court to exercise its jurisdiction with respect to a crime under the Statute, the procedure for investigation and prosecution may be initiated as follows;

- when a State party is referring to the Prosecutor a situation in which one or more of such crimes appear to have been committed; - when the Security Council acting under Chapter VII of the Charter of the United Nations is referring to the Prosecutor such a situation; or
- when the Prosecutor has initiated an investigation *proprio motu*.

The Court may also exercise jurisdiction if a State which is not a party to the Statute accepts, by a declaration lodged with the Registrar, the exercise of the Court's jurisdiction with respect to the situation¹ in question. The way the text is drafted (article 12.2, with reference to article 13 a and c), it could be understood that the State which is not a party cannot initiate itself a procedure, but will be reacting to a referral by a State party or to the initiation of the investigation by the Prosecutor *proprio motu*; one cannot exclude, nevertheless, an initiative by a State which is not a party, in the exercise of its sovereign rights, to submit to the Prosecutor a situation in which a crime appears to have been committed, while lodging the declaration requested and accepting the jurisdiction of the Court.

When a State party refers to the Prosecutor a situation of that kind, requesting the Prosecutor to investigate in order to determine whether one or more specific persons should be charged with the commission of such crimes, the referral shall specify as far as possible the circumstances and contain the supporting documentation which is available to that State.

In order to refer to the Prosecutor a situation according to the Statute, the Security Council has to act pursuant to Chapter VII of the Charter, that is in cases of a threat or violation of peace and security. It is expected that the Security Council adopts a resolution or a decision to that effect. In such a case, the Court may exercise its jurisdiction irrespective whether the crime was committed by a national

of a State party or on its territory, or if a State which is not a party accepts or not the Court's jurisdiction. The competence of the Court derives in such a case from that of the Security Council, as a principal organ of the United Nations entrusted with the responsibility for maintaining international peace and security.

The Prosecutor may also initiate himself investigations on crimes within the jurisdiction of the Court, on the basis of information at his disposal.

A situation has to be understood as the overall factual context in which a crime under the jurisdiction of the Court may have been committed. It cannot be limited to a person or a party involved in a conflict and cannot isolate a specific occurrence from all the circumstances related to. When the Prosecutor initiates an investigation *proprio motu* or a situation is referred to him or to her by a State and if the Prosecutor determines that there would be a reasonable basis to commence an investigation, the Prosecutor shall notify all States parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned. Within one month of receipt of that notification, a State may inform the Court that it is investigating or has investigated with respect to criminal acts to which relate the information provided in the notification. At the request of that State, the Prosecutor shall defer to the State the investigation, unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorise the investigation. Such a decision may be appealed to the Appeals Chamber.

In all cases, of referral of a situation to the Prosecutor by the Security Council, by a State party, by another State, or of an initiative of investigation *proprio motu*, the Prosecutor shall examine the information received; he or she may seek additional information from States, UN bodies, intergovernmental or non-governmental organizations, or other reliable sources deemed appropriate, and may take written or oral testimony at the seat of the Court.

Therefore, a referral by the Security Council has the same status as that by a State party; it does not create an obligation to the Prosecutor to proceed with the investigation, irrespective of the evidence. The only difference, and that is important as a step towards universal jurisdiction, is that a referral by the Security Council

is not limited to States parties and may concern any State and any situation.

If the Prosecutor considers that there are reasonable grounds to proceed with an investigation, he or she submits to the Pre-Trial Chamber a request for authorizing the investigation, together with any supporting evidence.

The Pre-Trial Chamber may consider, after examining the request and the supporting material, that the case appears to fall within the jurisdiction of the Court and that there is a reasonable basis to proceed with an investigation; the Chamber will then authorize the commencement of the investigation, without prejudice to future decisions on the admissibility of the case or on substance.

The Pre-Trial Chamber may also refuse to authorise the investigation. The Prosecutor himself may conclude that the information received does not offer reasonable grounds for an investigation. In both cases, the Prosecutor is not precluded from considering further information on the same situation and presenting a subsequent request, based on new facts or evidence.

An investigation or a prosecution may not begin or may be suspended for a period of 12 months when the Security Council requests the Court to do so, in a resolution adopted under Chapter VII of the Charter of the United Nations, that is in cases of threat or violation of international peace and security; the request may be renewed by the Council under the same conditions. That may be justified by the responsibilities of the Council under the Charter; the Council may be itself examining whether there is a situation of threat or violation of peace and security, and thus considers it necessary to avoid proceedings before the Court which might undermine its own decision on the situation.

Judgement and Sentencing by the Court

According to the Rome Statute, when the Prosecutor conducted the thorough investigation and submitted its determination to the Court, the Pre-Trial Chamber holds a hearing and determines whether there is sufficient evidence to establish substantial grounds to believe that the person committed the crimes charged with. If the charges are confirmed, the Presidency shall constitute a Trial Chamber, which is

responsible for the subsequent proceedings, while being able to exercise any function of the Pre-Trial Chamber.

The Trial takes place in the presence of the accused and, except for special circumstances, in public. The trial proceedings have to observe all procedural guarantees for a fair and expeditious trial, with full respect for the rights of the accused and due regard for the protection of victims and witnesses, as described above².

The Trial Chamber adopts a decision on the basis of its evaluation of the evidence submitted and discussed before it at the trial and of the entire proceedings, without exceeding the facts and circumstances described in the charge.

The deliberations of the Chamber shall remain secret, but the decision shall be in writing, containing a full and reasoned statement on its findings on the evidence and conclusions. The decision or a summary thereof shall be delivered in open court. When there is no unanimity of the judges, the views of the majority and the minority shall be reflected.

In case of a conviction, the Trial Chamber shall consider the appropriate sentence to be imposed, taking into account the evidence presented and the submissions made during the trial. Except when the accused makes an admission of guilt, the Chamber shall hold a further hearing on any additional evidence or submission relevant to the sentence. The sentence shall be pronounced in public and, whenever possible, in the presence of the accused.

The Court may impose, on persons convicted of a crime under its jurisdiction, the following penalties: imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or a term of life imprisonment, when justified by the extreme gravity of the crime and the individual circumstances of the convicted person. In addition to imprisonment, the Court may order fines and a forfeiture of proceeds, property and assets derived directly or indirectly from the crime, without prejudice to the rights of *bona fide* third parties.

The Court may also order directly against a convicted person appropriate reparations to victims, including restitution, compensation and rehabilitation.

Two positions, completely opposed, were expressed in connection to these provisions of the Statute: some States were not prepared to accept the sentencing to life imprisonment, even to a maximum of

30 years, because their criminal legislation provides for a maximum of 25 years imprisonment; others maintained that capital punishment, as provided for in their criminal legislation, should be maintained.

The compromise adopted was accompanied by a statement of the President of the Rome Conference, according to which *"The debate at this Conference on the issue of which penalties should be applied by the Court has shown that there is no international consensus on the inclusion or non-inclusion of the death penalty. However, in accordance with the principle of complementarity between the Court and national jurisdictions, national justice systems have the primary responsibility for investigating, prosecuting and punishing individuals in accordance with their national laws, for crimes falling under the jurisdiction of the International Criminal Court. In this regard, the Court would clearly not be able to affect national policies in this field. It should be noted that not including the death penalty in the Statute would not in any way have a legal bearing on national legislation and practices with regard to the death penalty. Nor shall it be considered as influencing the development of customary international law or in any other way the legality of penalties imposed by national systems for serious crimes"* ³.

This means that, for the same crime under the jurisdiction of the Court, a person may be sentenced to death by a national court, according to its criminal legislation, but not by the ICC, according to the Rome Statute.

The Rome Statute expressly states that its provisions on this subject do not affect the application by States of penalties prescribed by their national law, nor the laws which do not provide for penalties prescribed by the Statute. This non-prejudice clause refers to all penalties and to the criminal legislation as a whole, not only to death penalty.

Decisions of the Court may be appealed by the Prosecutor and by the convicted person, on grounds of procedural errors, errors of fact or errors of law, or on any other ground that affects the fairness or reliability of the proceedings or decision. A sentence may be appealed on the ground of disproportion between the crime and the sentence.

For the purposes of the appeal, the Appeals Chamber shall have all the powers of the Trial Chamber. It may reverse or amend the

decision or sentence or order a new trial before a different Trial Chamber.

The convicted person, or, after death, spouses, children, parents or one person alive who has been given express written instructions from the accused to bring such a claim, or the Prosecutor on that person's behalf, may apply to the Appeals Chamber to revise the final judgement or sentence, on grounds of new evidence discovered, or discovering that decisive evidence upon which the conviction depends was false, forged or falsified, or that one or more judges who participated in conviction or confirmation of charges has committed an act of serious misconduct or serious breach of duty.

The Appeals Chamber may reject the application, if considered to be unfounded, reconvene the original Trial Chamber, constitute a new Trial Chamber or retain jurisdiction over the matter, with a view to determining whether the judgement should be revised.

Sentences of imprisonment shall be served in States designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons. A State may attach conditions to its acceptance as agreed by the Court and may not accept a designation in a particular case. Such conditions are negotiated with the Court, which may at any time decide to transfer a sentenced person to another State.

The Court shall supervise the enforcement of sentences. The Court alone can reduce a sentence, according to the rules and procedure established by the Statute (article 110).

Cooperation with States parties

1. The world remains plagued by all too frequent occurrences of serious crimes that are of concern to the international community as a whole.

Since the Second World War, States have adopted a number of multilateral conventions in an effort to respond to these particularly serious crimes.

These conventions rely at least in part on national jurisdiction for the prosecution and punishment of offenders (the Genocide Convention, article VI; the Geneva Conventions of 1949; the International Convention on the Suppression and Punishment of

the Crime of Apartheid , article V; the Convention on the Safety of United Nations and Associated Personnel, article 14.

The possibility of the prosecution and punishment of offenders by an international criminal court was mentioned only in the Genocide Convention (art.VI) and the Apartheid Convention (art.V). Nevertheless, the two conventions are providing for the concurrent jurisdiction of the national courts. In its Draft for an international criminal court of 1994, the International Law Commission also opted for an international court with concurrent jurisdiction, that would complement, and not replace, the jurisdiction of national courts. The statute of the ICTY and the statute of the ICTR provide for the concurrent jurisdiction of the international tribunals and national courts. It is true that the two tribunals prevail over the national jurisdictions, when they decide to prosecute. But the international community has recognized the continuing importance of the role to be played by national courts in the implementation of international criminal law, while at the same time seeking to create an international criminal court. It was recognized that it would be impossible for an international court to prosecute and punish all individuals who are responsible for crimes under international law, because of the frequency of such crimes and because they are often committed as part of a general plan or policy and involve the participation of a substantial number of individuals.

For that, it was considered that the most effective solution required a combined approach to jurisdiction based on the broadest jurisdiction of the national courts together with the complementary jurisdiction of an international criminal court for the most serious crimes.

2. The International Criminal Court is not a supranational jurisdiction , but a complementary one to national criminal jurisdiction.

The preamble of the Statute refers to the crimes under the jurisdiction of the Court as "*the most serious crimes of concern to the international community as a whole*"; the preamble continues providing that "*it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes*".

Specific instruments , such as the Convention against Torture, the Genocide Convention and the Geneva Conventions include this duty in

an explicit way; it is the same for piracy according to the 1982 Convention on the Law of the Sea.

There is complementarity not only from the point of view of the admissibility of a case which is being investigated or prosecuted by a State which has jurisdiction over it, but also from many other points of view.

First of all, the jurisdiction of the Court is not a foreign jurisdiction, as that of another sovereign State, because it is accepted by States parties as an extension of their national criminal jurisdiction, established by a treaty.

The States parties accept a general obligation to fully cooperate with the Court in its investigation and prosecution of crimes within its jurisdiction (article 86 of the Statute).

Requests for cooperation are usually sent to States by diplomatic channels or other channel which is designated by the State party upon ratification. The requested State is bound to keep confidential a request for cooperation and any documents supporting the request .

The Court may seek the cooperation of any State not party to the Statute, on the basis of an ad-hoc arrangement, or an agreement, or any other appropriate basis.

When a State party fails to cooperate with the Court, contrary to the provisions of the Statute, or a State not party does not fulfil commitments taken through an ad-hoc arrangement or an agreement, the Court may refer the matter to the Assembly of States parties or, where the Security Council referred the matter to the Court, to the Security Council.

As cooperation with the Court involves the participation of a number of national institutions and activities to be fulfilled in accordance with definite rules, States parties commit themselves through the Statute to ensure that there are procedures available under their national law for all the forms of cooperation. This may involve legislation, but also institutions and procedures which should function according to the provisions of the Statute.

The most important feature of cooperation with the Court is surrendering of persons. The Court may transmit a request for the arrest and surrender of a person, together with the material supporting the request, to any State party on the territory of which that person may

be found. States parties shall comply with the request. An individual is surrendered to the Court, not "extradited". This has many consequences; the first is that States parties cannot oppose to that request their domestic laws that prohibit extradition of nationals; other requirements of the national law for extradition, like for instance the double incrimination, also cannot be invoked; the long and complicated procedure of extradition is avoided, the State party being satisfied if there has been a ruling on admissibility of the case.

A State party shall also authorise transportation through its territory of a person surrendered by another State to the Court.

In the case of competing requests, for surrender from the Court and for extradition from a State, the Court's request will have priority if the Court has made a determination that the case in respect of which surrender is sought is admissible and that determination takes into account the investigation conducted by the State requesting extradition.

The Court may also request a provisional arrest of the person sought, pending presentation of the request for surrender.

States parties shall also comply with other requests of cooperation and assistance in relation to investigations or prosecution, such as the identification and whereabouts of persons or the location of items, the taking of evidence, the questioning of any person being investigated or prosecuted, the service of documents, facilitating the voluntary appearance of persons as witnesses or experts before the Court, the execution of searches and seizures, the provision of records and documents, the protection of victims and witnesses, the identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities. A State party may deny a request for assistance, in whole or in part, only if it concerns the production of any documents or disclosure of evidence which relates to its national security. In such a situation, it has to consult with the Court; partial solutions may be found but the final decision on disclosing such information is left to the State.

The Court may also request the temporary transfer of a person in custody for purposes of identification or for obtaining testimony or other assistance; the request may be granted if the person freely agrees and if the State agrees, subject to such conditions agreed by the Court and the State.

The basic rule contained in the Statute is that compliance with Court's requests of cooperation should be in accordance with domestic procedural law.

In turn, the Court may, upon request, cooperate and provide assistance to a State party conducting an investigation or a trial in respect of acts which constitute a crime within the jurisdiction of the Court or a serious crime under the national law of that State.

If a State party receives a request for assistance in relation to which it identifies problems which may impede or prevent the execution of the request, that State shall consult with the Court without delay in order to resolve the matter, for instance in the case of a request for surrender, the fact that despite best efforts the person sought cannot be located or that the person identified is not the person named in the warrant, or in the case when the execution of the request would require the State to breach a pre-existent treaty obligation undertaken with respect to another State.

According to the Statute, the Court may also cooperate with respect to waiver of immunity and consent to surrender. For that, the Court may not proceed with a request for surrender or assistance which would compel 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, or with its obligations under international agreements not to surrender a person of a third State to the Court without the consent of that State, unless the Court can first obtain the cooperation of that third State for the waiver of immunity, or in the second case, its cooperation by giving the consent for the surrender.

A State party may also deny assistance based on the existence of a fundamental legal principle of general application in the requested State, and may postpone granting such assistance, when it would interfere with an ongoing investigation or prosecution of a different case or until the Court is considering the admissibility of the case or an admissibility challenge.

In special circumstances, when the State party requested is a State on the territory of which the crime is alleged to have been committed and there has been a determination of admissibility, and when a request can be executed without compulsory measures, including the interview of, or taking evidence from a person on a voluntary basis

without the presence of the authority of that State party, the Prosecutor may execute such a request directly on the territory of the State following possible consultation with it. In other cases, the Prosecutor may execute such requests only following consultation with the State party and subject to any reasonable conditions or concern raised by it.

States may also cooperate with the Court by accepting persons sentenced to imprisonment to serve on their territory, if they are declaring their willingness for that and are designated by the Court in a particular case. The sentence of imprisonment remains binding on the States parties and it is only the Court which shall have the right to decide on any application for appeal and revision or to reduce the sentence. The conditions of imprisonment shall be governed by the law of the State, but consistent with widely accepted international standards governing treatment of prisoners and shall be subject to the supervision of the Court.

States parties shall also assist the Court by giving effect to fines or forfeiture ordered by the Court, or by recovering the value of the proceeds, property or assets ordered by the Court, without prejudice to the rights of bona fide third parties, and transfer them to the Court.

Thus, ensuring States parties cooperation is crucial, with regard to the enforcement provisions of the Statute which can be implemented only by States on their territories.

The principle of complementarity implies for the States parties the primary responsibility for bringing to justice those responsible for genocide, crimes against humanity and war crimes.

That means that they have to adopt the criminal legislation, as a basis to investigate and prosecute persons guilty of such crimes, and create the institutions necessary for that, in accordance to the Statute.

The Statute presupposes that national jurisdictions do exist, are competent and are investigating and prosecuting such crimes, and give them precedence, except when they are unable or unwilling to prosecute. That will certainly stimulate States parties to avoid such a determination by the Court.

The Statute adapts itself to the reality of sovereign States and of the existing international system; it takes into account situations when a State is not able to cooperate, because of substantial internal difficulties (article 17.3) or international obligations towards other States.

The Court represents a new form of international cooperation in the field of the criminal jurisdiction, which is fully preserving the judicial sovereignty of States, offering a complementary way to fighting against impunity for the most serious crimes.⁴

Relationship between the Court and the United Nations

The Statute of the Court was elaborated, in a first version, by the International Law Commission, then was completed by a Preparatory Committee of the General Assembly of the United Nations and finalized by the Rome Conference, convened by the General Assembly.

The Court will be an independent judicial body, but the purposes for which it was created are closely connected to those of the United Nations.

The Preamble of the Rome Statute expresses the determination of the States parties "to establish an independent permanent International Criminal Court in relationship with the United Nations System".

The exercise of jurisdiction over persons for the most serious crimes of international concern- aggression, genocide, crimes against humanity, crimes of war – is but another facet, which was obviously missing until now, of the activity of the United Nations.

The relationship will be similar to that of other treaty created bodies, whose purposes are also related to those of the United Nations and therefore the United Nations consider them fit to operate as part of the system. That includes some human rights treaty bodies: the Human Rights Committee, the Committee for the Elimination of Racial Discrimination, the Committee against Torture, the Committee for the Elimination of Discrimination against Women, the Committee for the Rights of the Child, but also intergovernmental organizations like the Organization for the Prohibition and the Destruction of Chemical Weapons.

The relationship with the United Nations will be established through an agreement to be approved by the Assembly of the States parties and thereafter signed by the President of the Court on its behalf.

As the Rome Statute was born within the United Nations and the Secretary general is the depositary, the Secretary general maintains

several competences, like convening a Review Conference seven years after the entry into force of the Statute to consider amendments to it, and at any time thereafter, upon approval by a majority of States parties. He is circulating amendments submitted by States parties and fulfils functions of depositary in connection with them.

Moreover, the UN Secretariat continued to service meetings of the Assembly of States parties during the initial period and funding of the Preparatory Committee was covered by the United Nations.

A special, substantial relationship is foreseen between the Court and the Security Council, as a consequence of the fact that, under the Chapter VII of the Charter of the United Nations, the Security Council has the main responsibility for the preservation and the restoration of peace and for taking measures in case of threat to peace, breach of peace or aggression.

Having in mind that the crimes under the jurisdiction of the Court are also, on different degrees, related to peace and security in the world, the Statute provided for the possibility of the Security Council to refer to the Court, acting under Chapter VII of the Charter, a situation in which one or more of such crimes appear to have been committed. The Council may refer such a case, irrespective if the State concerned (on the territory of which the crime was committed, against whom the crime was committed or whose national is accused) is a party to the Statute.

At the same time, in recognition of the Council's powers under Chapter VII of the UN Charter, the Statute recognizes that the Security Council may ask for a suspension of proceedings for 12 months, if the Council adopts a resolution to that effect, under the Chapter VII. The request to the Court can be renewed by the Council, under the same conditions.

That is a consequence of the powers of the Security Council, which, under the Charter, can take measures that are binding upon all United Nations member States.

As the text refers to "*an investigation or prosecution*", which cannot commence or be proceeded with if the Council so requests, it should be understood as meaning a specific case or situation, and not an abstract or general one; moreover, it is and should remain temporary.

The Security Council may thus have an important role to support the efficiency and the activity of the Court. The Council can oblige a State which is not a party to the Statute, and even a State which is not a member of the United Nations, to accept the jurisdiction of the Court. It can oblige a State to renounce to its national jurisdiction on a case, submitting it to the Court. It can confirm to States parties their obligation to cooperate with the Court, when they fail to do it.

The Council may also suspend any investigation by the Court.

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Thus, a number of provisions of the Statute are placing the Court in close connection with States parties and within the existing system of bodies acting for peace and security in the world.

The results and the efficiency of the Court will depend on the will of the States to cooperate with it both individually and as members of the United Nations, as decisive elements of the proceedings, like collecting evidence and surrendering persons to be investigated, cannot be achieved without their assistance, and the cooperation with the United Nations bodies remains necessary from many points of view.

The Court has to become an integral, organic part of the existing framework of international relations. It should not be an institution disconnected from the realities, a forum contesting States practices and without the possibility to promoting a real progress in the struggle against impunity for the most serious crimes. For that, it should have the support of the international community of States.

Notes

1. The Statute refers to the "*crime*" in question; some scholars believe that this is an error and the Statute should have referred to "*the situation*"; Ch. Bassiouni, study cited, p.17-18; this may be right from the point of view of criminal law, because at that initial stage the crime is not yet established.
2. Supra, part II, chap.I, p.62- 65.
3. Text cited by M.Arsanjani, art.cit.,p.39-40.
4. Philippe Weckel, La Cour Pénale Internationale- présentation générale, in "Le droit international, Bilan et perspectives, éd.Bedjaoui, 1991, p.986.

Conclusions

1. The norms prohibiting most of the crimes under the jurisdiction of the Court are not new: they can be found in major human rights

the elimination of impunity it is not only the objective of justice which is pursued, but also promoting the ideals of peace and security in the world.

emphasized that many of the provisions of the Hague and Geneva Conventions were already binding, as an expression of international law².

The Statute is thus dealing with international crimes, considering them the most serious crimes of concern to the international humanity as a whole. They are universally recognized as such, as violations of norms generally accepted as belonging to *jus cogens*. It is setting out clear definitions of crimes and principals of criminal law; it reflects universally recognized principles of international law and criminal procedure; the Court is integrated in the UN architecture for the maintenance of peace and security. On the other side, the Statute is trying to create convergence between the Court and national jurisdictions systems and to bring them to work together.

The Statute contains doubtless elements of codification and progressive development of international law, like for instance in the definition of crimes against humanity, as compared with previous projects on this issue by the International Law Commission.

2. If in 1945 the principles of Nürnberg proclaimed that individual political and military leaders, including heads of State, were no more immune from prosecution for their conduct in time of war, the Rome Statute extended the principle of individual responsibility to a comprehensive sphere of international crimes, committed in time of war and in time of peace.

Events in different parts of the world show that impunity became a source of developing the armed conflicts, of their repetition and increasing scale, an obstacle to re-establishing peace. That is why, by

for humanitarian law.

The ad-hoc tribunals were created to respond to specific events in those specific regions. It was argued that they have acted on the decision to establish them.

Ad hoc bodies with limited subject matter jurisdiction, do not have the opportunity to develop jurisprudence in relation to multiple conflicts of time. A permanent court could foster consistency in matters such as general principles of procedure and punishment. The main concern is that perpetrators in the former Yugoslavia and Rwanda, before international tribunals, while equally responsible in other conflicts will not.

According to the Rome Statute, the court's jurisdiction is also limited: *ratione temporis* – only to situations occurring after the Statute entered in force; *ratione personae*, as limited to the 4 categories of crimes, one of which may become a subject of its jurisdiction only after a conference to be convened after seven years after the Statute is ratified by 7/8 of States parties. Terrorism, trafficking and terrorism are not within its competence.

But the Rome Statute tends to respond to the need for effective justice and to correct the weaknesses of the ad-hoc tribunals. Some uncertainties have been eliminated; a preoccupation for previsibility

the protection of the rights and interests of all persons involved is a constant feature of the Statute. This is accompanied by the codification of the substantial applicable law, concerning the three categories of crimes under the jurisdiction of the Court. The Trial Chamber is also guaranteeing that the decisions to prosecute and indict will be well weighted and sound.

The authority of the Court is not vested in the hands of one person, which prevents its use for purposes others than the administration of justice.

The remedies against any decision are better emphasized, at all stages of the prosecution.

The Rome Statute marks also a decisive progress in improving the condition of the victims; they have the possibility to intervene during the instruction and the proceedings. The Court is competent to decide upon the civil consequences of the criminal sanction applied.

The Rome Statute is a balanced text which is opening the prospect of a positive and substantial evolution of this new jurisdiction.

The confrontation between moralists and realists, which was always at the origins of the development of humanitarian law, led to this result.

3. The establishment of this universal Court which will judge not States, but individuals, is an expression of the concept of a public international order, which is the result of the multilateral inter-state cooperation, introducing an element of jurisdiction which is complementing national jurisdiction and can replace them when they are not able or not willing to act according to international standards for prosecuting crimes under the jurisdiction of the Court.

As we have seen, initially States organized, as a rule bilaterally, their cooperation for prosecuting and punishing perpetrators, having as an important chapter the extradition.

In a second stage, a substantial international criminal law developed by the conclusion of international conventions qualifying individual conduct of persons as offences which States parties undertook to incriminate and to punish.

The third stage, we are reaching now, is the creation of an International Criminal Court, a permanent institution independent

from the States creating it, having the competence to prosecute and punish individuals for offences internationally defined.

V.V.Pella distinguished between Interstate Criminal Law, aiming at protecting international peace, and International Criminal Law, establishing the applicable criminal law, its legal consequences and rules of cooperation among States for achieving punishment for offences according to their laws³.

The Statute of the ICC is neither one, nor the other; it is not directly considering aggression or other violations of international law by States, but by individuals, even if they are exercising political or military leadership; the Rome Statute is largely defining itself the applicable law; although the crimes under the jurisdiction of the ICC are directed against human groups and persons, they are also the most serious crimes putting very often in danger international peace and security.

The evolution of international law in this field runs parallel with preoccupations in other disciplines (military studies, political science, international relations, ethics) for theoretical and practical justification of the obligation to punish the most serious violations of human rights, both in time of war and peace. A school of thought is taking shape promoting justice and a rejection of impunity.

Justice Robert H. Jackson, in defending prosecution at Nürnberg, said that "*personal punishment to be suffered only in the event the war is lost, is probably not to be a sufficient deterrent to prevent a war where the war-makers feel the chance of defeat to be negligible*"⁴.

It is true that both after the First World War and after the Second World War only leaders and military from the defeated powers were prosecuted and punished by the tribunals of Leipzig, Nürnberg and Tokyo.

The ICTY, ICTR and mainly the ICC made a tremendous progress in this respect, extending jurisdiction to peacetime and to all persons from the respective States.

The recent developments show a trend, still slow may be, but growing, against impunity for perpetrators of the worst atrocities. There are more cases where national jurisdiction commence investigations or prosecute foreigners for international crimes committed abroad. The Pinochet case is an illustration, where a Spanish magistrate took the initiative to investigate and prosecute the

former Chilean head of State, setting in motion a worldwide debate on the limits of the immunities of current and former heads of State.

The House of Lords, the Highest British Court ruled twice (in 1998 and 1999) that former Chilean leader Augusto Pinochet was not immune from prosecution. Such decisions, adopted after the Rome Conference, conformed to the provisions of the Statute.

Other national initiatives include the arrest in 2000 in Senegal of the Tchadian former head of State Hissène Habré and the arrest and prosecution of former Rwandan leaders in Belgium.

A prospective judicial institution is by far more effective than retrospective criminal tribunals for particular cases, after the occurrence of the facts.

4. The adoption of the Rome Statute with the support of 120 States, the entry into force on 1 July 2002 and the growing number of States parties prove that there is a broad basis of support for such an institution.

It is to be expected that more and more States will become parties to the Rome Statute; thus "*the territory over which the Court may exercise its jurisdiction*", complementary as it is, will expand.

It is also to be expected that the United States of America will gradually become more Court-friendly, will understand its usefulness and will join the States parties. The important role played by the United States in establishing the two ad-hoc tribunals for the former Yugoslavia and for Rwanda shows that the United States share the same values as the parties to the Rome Statute.

As it was said, the United States had and will have a compelling interest in the establishment of a permanent international court.

A permanent court would be more cost effective and ensure uniformity in the evolution of the case law; it would also serve as a more effective deterrent than the uncertain prospect of costly new ad-hoc tribunals.

Many of the provisions of the Statute are a result of compromises requested and promoted by the delegation of the United States (the definition of war crimes, respect for national judicial procedures in complying with Court's orders of assistance, the definition of crimes against humanity without connection to a war, and others⁵.

The most difficult problem seems to be to achieve the insertion of the new Court in a judicial environment which is not necessarily ready to accept it, in spite of the ratification of the Statute by an important number of medium size and small States and of the active support of the non-governmental organizations.

The Statute has already started making a difference, by a significant normative contribution to the development of internal legislations and bringing them in conformity with norms of international law on crimes under the jurisdiction of the Court. It is also expected to highly contribute to crystallizing criminal international law as a more coherent chapter of international law.

5. Of course, the Rome Statute is a treaty; its implementation will depend upon the political will of States parties; therefore the problems ICC will face are political, rather than legal; for the legal lacunae or loopholes, amendments are possible and the Statute opens a procedure, it is true very elaborate, for modifying it.

When analyzing the Rome Statute, one may find *lacunae* (some of them well admitted, like the definition of the crime of aggression) and overlappings; the Statute is a text of compromise, and certainly not a perfect document.

Other problems may also be solved by interpretation and practice, and of course, by customary norms of international law.

Creating a permanent institution for investigating and prosecuting crimes of aggression, genocide, crimes against humanity and crimes of war is an important step towards achieving both justice and peace. International prosecution of such crimes, as complementary to national jurisdictions, can contribute to maintaining peace and security in the world.

On the other side, a judicial system which is politically independent and impartial, fair to the accused and the victims, effective and transparent, should have a deterring effect on potential violators.

By its very establishment, the ratification of the Statute and the measures States parties have to take for implementing its provisions, the Court is contributing to raising the preparedness and the will of national jurisdictions to investigate and prosecute such crimes, which is already a deterrent and a contribution to peace.

There is no doubt that the adoption of the Statute and its ratification by a large number of States in all parts of the world, and a proper functioning of the Court will strongly contribute to raising the level of respect for human rights and fundamental freedoms in the world. Even if the Court is not a human rights institution, its work will lead to increased protection of human rights, at least against the most serious violations.

The International Criminal Court may also eliminate the need for establishing more ad-hoc tribunals.

5. International criminal law is just one element in the life of the society; addressed in isolation, it will not eliminate abuses. A broader approach to the prosecution of perpetrators of atrocities committed in civil wars or in non-international armed conflicts is necessary, including both the role of the national courts and of the International Criminal Court.

Moreover, the evolution of individual criminal responsibility must not erode the vital concepts of State responsibility for the violation of international norms.

Maybe, the greater hope in the establishment of the ICC resides in its potential to deter war crimes and crimes against humanity; it is also trying to reach a balance between punishment of those who commit crimes and justice for the victims of such crimes. It is a step forward towards reconciling the apparent traditional dilemma between the needs of peace and those of justice, in the aftermath of conflicts characterized by violations of the laws of war and by crimes against humanity.

These developments reflect the emergence of accountability and justice as internationally recognized values or policies that are necessary for the maintenance and the restoration of peace.

If we consider international humanitarian law and international criminal justice as specialized chapters of international law, the Statute is trying to ensure integrating them into a subsystem and to ensure its coherence with other chapters of international law, like human rights and fundamental freedoms, law of treaties, principles of international law and others.

The implementation of the Statute and the activity of the Court should also lead to more coherence between international law and internal law, in the field of criminal law and criminal proceedings. It

has thus the potential of promoting the internalization of its norms, as a consequence of their adoption in the international sphere.

If, as Anthony Giddens⁶ says, the contemporary world is characterized by a "globalisation of risks", the Court may prove to be a partial answer to those risks.

It is not only the efficiency of the Court which will be tested, but also the determination of the States parties to act for fulfilling the objective of the Statute.

The Rome Statute shows the recognition of a set of common values all States agree to see protected by prosecuting and punishing perpetrators, either by their own courts or by the International Criminal Court.

It is the expression of the multiplication of international organizations, of a progressive substitution of the classical law of coexistence by an international law of cooperation, the emergence of the concept of the international community, the recognition of norms of *jus cogens* and of obligations *erga omnes*.

Perhaps even more significant is the fact that the two ad-hoc tribunals and the adoption and ratification of the Rome Statute may reflect a dramatic development in the conceptions of the international community regarding the punishment of grave international crimes. There may be the emergence of a consensus in international community to accept the responsibility to prosecute and punish persons who commit such crimes, be it through international or domestic tribunals.

The debates about whether such a court is a "good idea" are no longer relevant. The issues now on the table are how to make the court an effective instrument that will contribute to the maintenance and improvement of peace, more justice, more security and less suffering in the world.

States have thus created a new instrument to complement their action against the most serious crimes. It will largely depend on them how it will be used and with what results.

Notes

1. Human Rights Committee, Consideration of Reports Submitted by States parties under Article 40 of the Covenant, UN Doc.CCPR/C/79/Add.46(1995) and CCPR

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