

CRIMINAL INTERNATIONAL LAW
(With Special Reference to Islamic Criminal
International Law)

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Introduction

In various parts of the world, international offences were, have been or will be committed. They have increased quantitatively and qualitatively all over the world in time of war or in time of peace. Accordingly, one can say that criminality is a normal phenomenon, in international as well as domestic legal systems. Perpetrators of international crimes (*Crimina juris gentium*) are *hostis humani generis* (enemies of all mankind). They are criminals of the worst type.

The international community has paid a great attention to rules of CIL as well as international crimes, immediately after world war II. Thus, resolution 177 (II) of 21 November 1947, adopted by the General Assembly of the UN, entrusted the ILC with a double mission, namely:

- On the one hand, to formulate the principles of international law recognized in the charter of the Nuremberg tribunal and in the Judgment of the tribunal⁽¹⁾.

- On the other hand, to prepare a draft code of offences against the peace and security of mankind⁽²⁾.

Prima facie, frequent violations of human rights, particularly the commission of international crimes, cause outrage to mankind. In fact, these violations and other mistreatment of human beings, are unjustifiable and unacceptable, by whomsoever committed.

Criminal acts and omissions have not come to an end in any part of the world. One cannot overlook that these violations are occurring with frightening regularity. In all corners of the earth we are witnessing an unprecedented violations of human dignity. This is done notwithstanding the principles of the rule of law, the indivisibility as well as the interdependence of human rights and the fact that, *grosso modo*, there is intimate relationship between peace and elimination of international crimes.

The various violations and atrocities perpetrated on our globe,

(1) The ILC achieved the above – mentioned mission in 1950. (cf, YILC, 1950, vol. 2).

(2) The ILC adopted two draft codes in 1954 and 1996 (See: The work of the International Law Commission, UN, New York, 2004, vol. I, pp. 265 – 276).

in defiance of elementary rules and considerations of humanity, include, *inter alia*, massacres, rapes, abductions, murders, arrests, arbitrary detentions, inhuman and degrading treatment, seizure of property of individuals, violations of rights of minorities, war crimes, crimes against humanity, aggression, genocide, terrorism ... etc.

These violations have generated a number of dilemmas. This is itself indicative of a global crisis of public welfare. It constitutes the greatest challenge facing both national and international communities. Even, such violations may, in certain cases, bring civilization to an end, contribute to the eventual demise or liquidation of the societal structure and annihilate mankind. This may send humanity back to the stone age. This has been and still is an extremely painful process or a *vexata quaestio*.

As international law stands at the threshold of another century, one can hope that international criminal acts will come to an end. For they dehumanize man and make him a destroyer of his fellow men. The resulting human suffering is inexcusable and inadmissible.

International crimes constitute a problem of global⁽³⁾ proportions that is addressed on a global scale. It is no surprise that much analysis has focused thereon. There is a great importance for securing appropriate and effective measures for the prevention and punishment of those crimes. In fact, the commission of such crimes is a matter of grave concern to the international community⁽⁴⁾.

- **Scheme of research:**

In view of the importance of the subject and the novel character of its problems, this study is conducted on many levels, namely:

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- (3) In the age of globalization, the latter should be a fair one, creating opportunities for all (See Res. 59/57, 2004 adopted by the G.A. of the UN). This implies, *inter alia*, promoting development in the context of globalization and interdependence (Ibid, Res. 59/240).
 - (4) Thus, para. 4 of the 1979 International convention against the taking of hostages provides that "the taking of hostages is an offence of grave concern to the international community" see as well para.5 of the preamble of the 1988 convention for the suppression of unlawful acts against the safety of maritime navigation.

- Public international law, conventional and customary.
- Law of international protection of human rights.
- Criminal international law.
- Judgment of international and domestic courts.
- Domestic relevant legislations.

That being so, this work will be divided as follows:

- Basics of CIL (Preliminary chapter).
- The *ratione decidendi* aspect of CIL: The sources (Chapter I).
- The *ratione materiae* aspect of CIL: The crimes (Chapter II).
- The *ratione personae* aspect of CIL: The persons (Chapter III).
- The *modus operandi* aspect of CIL: Measures, prosecution and penalties (Chapter IV).
- Islam and CIL (Chapter V).

All these topics will be examined, *seriatim*, as follows.

Preliminary Chapter

Basics of Criminal International Law

In this chapter, it is necessary to study in general, some points concerning CIL, before proceeding to the in-depth study of its main issues. In fact, at the outset, CIL presupposes that we refer to its definition, evolution and development, *ratio legis*, *ratio existendi* and difficulties facing its efficiency *in concreto*.

§I- Definition⁽⁵⁾:

It is difficult to propose an inclusive and exclusive definition

(5) Authors have put forward some definitions, some of them are these:

- Thus, an author says that ICL is:

“La science qui détermine la compétence des juridictions pénales de l’Etat vis-à-vis des juridictions étrangères, l’application de ses lois criminelles-lois de fond et lois de forme-par rapport aux lieux et aux personnes qu’elles régissent, l’autorité, sur son territoire, des jugements répressifs” (Donnedieu de Vabres: Introduction à l’étude du droit pénal international, Sirey, Paris, 1922, p. 6).

- Another scholar says:

“Le droit international pénal est constitué par l’ensemble de règles juridiques concernant la répression des infractions internationales constituant les violations du droit international” S. Plawski: Etude des principes fondamentaux du droit international pénal, LGDJ, Paris, 1972, p. 9.

- Late professor Mahmoud Naguib Hosny points out that ICL:

“is a set of legal rules which indicates acts considered as international crimes and determines penalties, as well as procedures to be followed after the commission of one of those crimes, in order to punish the responsible”, Mahmoud Naguib Hosny: Lessons on international criminal law, Dar Al-Nahda Al-Arabia, Cairo, 1959-1960, p. 7 (in Arabic).

- Moreover, an author says that ICL concerns:

“those aspects of public international law and domestic law that are concerned with crimes having an international aspect or dimension”.

A. Aust: The security council and international criminal law, NYIL, 2002, p. 24.

- Additionally, a scholar says that rules of ICL:

“are norms of international law prohibiting a certain conduct and directly providing for individual criminal responsibility”.

W. Von Meining: Criminal international law and customary international law, in international criminal law and the current development of public international law, ed. By A. Zimmermann, Duncker & Humblot, Berlin, 2002, p. 43.

- Finally, a scholar points out that ICL may be defined as “a branch of international law consisting of a set of rules establishing individual criminal responsibility for acts that the international community recognizes as crimes” S. Glaser: Introduction à l’étude du droit pénal international, Sirey, Paris, 1954, p. 7.

See as well A.M La Rosa: Dictionnaire de droit international pénal, PUF, Geneva, 1998, pp. 36-37.

of CIL. In this regard, there is no agreed definition.

That being so, one can say that CIL is that branch of public international law which deals with crimes and punishments having an international character.

Accordingly,

* CIL is a branch of public international law, i.e., it is an integral part of the *corpus juris gentium*⁽⁶⁾. In fact, the later after having been, traditionally, divided only into two branches, i.e., the law of peace and the law of war, is now divided into a multiplicity of branches, e.g., the international law of human rights, the international law of armed conflicts, the international humanitarian law, the international economic law, the international law of the environment, the international law of air and outer space, the international criminal law,...etc.. Evidently, this "specialized" classification of public international law has permitted the appearance of CIL as a distinct discipline.

* CIL is, wholly, concerned with crimes and punishments. This means that it determines the elements of the crime, the defenses, the proceedings leading to a penal judgment (e.g., the trial, investigations, prosecutions, penalties, enforcement of the later, amnesty etc).

* CIL is mainly interested in those crimes and punishments having an international character. This distinguishes CIL from "pure" domestic criminal law. In reality, CIL deals with a certain conduct incriminated under international law or under national law but having an international character⁽⁷⁾. This means that, *ratione*

(6) Some authors admit this character of CIL, e.g., late professor M.N. Hosny: Lessons on international criminal law, op. cit., p. 7, 171, S. Glaser: Introduction à l'étude du droit pénal international, op. cit., p. 7; A. Aust: The Security council and international criminal law, op. cit., p. 24.

(7) Some authors distinguish criminal international law (droit international pénal) and international criminal law (droit pénal international): The former is a branch of public international law and the later is a branch of domestic criminal law (S. Glaser: Introduction à ..., op. cit., p. 8). Thus, an author says:

"l'objet du droit pénal international est l'infraction internationale, alors que l'objet du droit international pénal est l'infraction internationale lorsqu'il est nécessaire pour arrêter son auteur et le juger selon le droit national, qu'un ou plusieurs Etats collaborent avec l'Etat où l'infraction a été =

materiae, CIL is composed of two elements, namely:

- "Public" CIL which deals with crimes incriminated under international law, and

- "Private" CIL which is concerned with offenses incriminated under national law, but having an international character (e.g., the source of incrimination is customary rules or general principles of international law or an international convention to which the state is a party, the prosecution of the criminal necessitates the cooperation of more than one state, ... etc).

§II- Evolution and development of CIL:

It goes without saying that the existence of legal rules concerning CIL is justifiable: *ubi societa ibi jus*. This is true for the international order as well as for the domestic system. For «Le droit, comme tout système normatif, est le produit d'un certain

* commise, comme dans l'extradition" R. Behnam: Egypte Rapport national, in "les crimes internationaux et le droit pénal interne", colloque, R. Internationale de Droit Pénal, 1989, p. 236.

Other scholars do not approve the above mentioned distinction:

«Dans le domaine du droit international pénal la distinction entre la sphère internationale et la sphère interne soulève beaucoup de difficultés. A notre avis, dans ce domaine l'unité entre le droit international et le droit interne s'impose d'une manière évidente. Les dispositions des conventions internationales incorporées dans les lois nationales ont leur source initiale dans le domaine du droit international (la convention).

Elles deviennent des règles juridiques par la volonté de l'Etat concerté par d'autres Etats signataires de la Convention et non par l'acte unilatéral d'un seul Etat.

Le droit international pénal a le caractère mixte; c'est-à-dire qu'il se rapporte au droit international public ainsi qu'au droit pénal interne. C'est pourquoi la fixation de la limite entre le droit international pénal et le droit pénal international n'est pas très nette et d'autant plus l'évolution du droit démontre le rapprochement de ces deux branches de droit. Ce rapprochement était marqué d'une façon évidente dans le domaine de la juridiction concernant les criminels de guerre et contre l'humanité. Ceux-ci étaient jugés soit par les Tribunaux internationaux, soit par les tribunaux internes».

S. Plawski: Etude des principes fondamentaux du droit international pénal, op. cit., p. 12-13.

See as well B. Zlataric: Droit pénal international, Revue Al-Qanoun wal Iqtisad, Faculté de droit, université du taire, vol. xxviii, pp. 24-30.

ordre social»⁽⁸⁾. It mirrors the values, concerns and needs of its addressees as well as the society in which it operates.

CIL has a brief but eventful history, it cannot be studied divorced from historical perspective. It has evolved in the course of history till it reached its present stage. It has proved its importance from the early days of its existence, being a regular channel for changing the face of the world. This also paved the way to a new era wherein the prevention and punishment of international crimes occupy a prominent place. From crisis to crisis CIL lives on and, as any living organism, it grows and changes. It has left the stage of children and entered that of grown-ups.

In other words, CIL has not reached its peak or complete maturity. It is now, and will be for some time to come, a law in process of development and formation. i.e., in *statu nascendi*. It is built gradually and, as any branch of international law, has enormously and continuously developed.

CIL has become an important topic, especially after the establishment of international criminal courts. Thus, after having been neglected⁽⁹⁾ as a field of interest and concern, CIL attracts now the attention of publicists. It is a branch of international law which sets forth clear and immediate obligations. Accordingly, many of its rules are of "hard law", as opposed to "soft" law.

In modern times, CIL has developed considerably over the last sixty years and it will as well greatly grow. It has been influenced by a multitude of factors which led to making it one of the most important branches of international law.

Those factors are:

1- The trials of major war criminals held in the wake of world war II in Nuremberg and Tokyo, which crystallized the principle of

(8) Ahmed Abou-el-Wafa: *Le devoir de respecter le droit à la vie en droit international*, R. Egyp. D.I., 1984, p. 64.

(9) In fact «the extension of pénal policy to international dimensions provides international criminal law with a vast field of action which has as yet largely been neglected» T. Vogler: *The philosophy of criminal justice in international criminal law*, R. Internationale de droit pénal, 1982, p. 923. Even an author says that criminal international law is a «nouvelle discipline du droit» S. Glaser: *Introduction à l'étude du droit international pénal*, op. cit., p. 3.

individual criminal responsibility for the commission of serious violations of international law applicable in armed conflicts, especially war crimes, crimes against humanity and crimes against peace.

2- The codification of rules of CIL, particularly the adoption and entry into force of the 4 Geneva conventions of 1949, which highlighted the importance of the prosecution of criminals committing "grave breaches" of rules of international humanitarian law, the genocide convention, ... etc ..

3- The development of a great concern about the necessity to ensure respect for and observance of human rights in time of peace and in time of war.

4- The existence of international criminal gangs.

5- The increase in number of international criminal acts and the appearance of new kinds of international crimes, due to improved travel facilities and means of communications, the development of modern technology ... etc ..

6- The establishment of modern international criminal courts (e.g., the ICTY, ICTR, ICC and the special court for Sierra Leone).

7- The development of regional cooperation and rules⁽¹⁰⁾.

Given the fast developing character and nature of CIL, the study of that branch of law is very important. It is a forerunner as well as a symbol for more far reaching developments in the contemporary international criminal system.

§III- The *ratio legis* of CIL:

Objectives of CIL may be highlighted as follows:

A) CIL, as is the case of criminal law in general, aims at realizing a balance between three matters, namely:

1- The protection of society through the efficient operation of the criminal justice system.

(10) It is worth recalling that CIL may have a regional dimension through, e.g., conclusion of treaties on a regional basis concerning penal matters.

See, e.g., the resolution adopted by the XVth international congress on penal law, "The regionalization of international criminal law and the protection of human rights in international cooperative procedures in criminal matters, IRPL, 1995, pp. 67-70.

2- The protection of the rights of the individual (defendant and victim)⁽¹¹⁾.

3- The maintenance of the principle of rule of law⁽¹²⁾.

B) The prevention and suppression, or at least the reduction, of international crimes. In fact, prevention of international crimes is the *primum mobile* and the *primus inter pares* of present CIL. For

«Prevent is better than cure» (Mieux vaut prévenir que guérir). Thus, taking all necessary measures to prevent the commission of serious international crimes should constitute the primary goal and *ultima ratio* of the international community. This leads to the avoidance of unnecessary sufferings and superfluous injuries⁽¹³⁾.

C) Enhancing international criminal responsibility.

D) Securing the effective observance and realization of human rights on the international level. CIL prevents causing harm, especially to protected persons or targets. The primary function of CIL lies in the necessity to respect the inherent dignity of human beings as well as their belongings. In fact, the respect for and observance of this dignity is the foundation of freedom and justice. For, of all entities in the world, man is, obviously, the most precious. He is at the centre of concerns of all systems, including the international legal system. This particularly concerns man's rights and fundamental freedoms. These rights and freedoms have always existed with the human being before and independently of the state. For that reason constitutions of states characterize them as "inalienable", "sacred", and "eternal"⁽¹⁴⁾.

(11) An author maintains:

«an international victimology must be encouraged as an essential part of international criminal justice» L. Sebba: *Observations on international criminal law*, R. Internationale de Droit Pénal, 1982, p. 926.

(12) «The regionalization of international criminal law and the protection of human rights in international cooperative procedures in criminal matters», a resolution adopted by the CVth international congress of penal law, IRPL, 1995, p. 67.

(13) See as well G.K. McDonald: *Genocide and crimes against humanity:*

Early warning and prevention, yearbook, International criminal tribunal for the former Yugoslavia, 1998, p. 423 ss.

(14) Ahmed Abou-el-Wafa: *The Zionist massacres before 1948, whose responsibility?*, R. Eyp. D.I., 2003, p. 24.

E) Maintenance and preservation of world order.

In fact, the escalation of crime, both national and transnational, inevitably leads to grave concerns to all states and to the international community in its entirety. For they undermine the international constitutional order and endanger international peace and security.

In conclusion, the nature and province of CIL lies in the prevention of harm to:

(a) Internationally protected persons and private particulars as well as assets; and

(b) The international community in its entirety.

§IV- The *ratio existendi* of CIL:

Combating international crimes constitutes an «urgency»⁽¹⁵⁾. For in all their forms, dimensions and manifestations, and by their growing number, they have caused death and serious injury to property and assets.

Prima facie, the arrest and punishment of persons guilty of such crimes, are important factors in the prevention of these acts now and *in futuro*. Otherwise, it would be paradoxical for international law to protect conduct which at the same time it seriously condemns.

The rationale for the punishment of international crimes lies in the following:

1- The gravity of crimes and injuries arising therefrom⁽¹⁶⁾; in fact, international crimes consist in the commission of atrocities that deeply shock the conscience of humanity. The anguish and sorrows caused by those crimes are unimaginable.

(15) Thus, the preamble of the convention on the safety of UN and associated personnel states that:

«there is an urgent need to adopt appropriate and effective measures for the prevention of attacks committed against United Nations and associated personnel and for the punishment of those who have committed such attacks».

(16) It is estimated that more than 170 million people have been killed in more than 250 conflicts since world war II, Ch. Bassiouni: The normative framework of international humanitarian law: Overlaps, gaps and ambiguities, Transnational law and contemporary problems, 8, 1998, p. 203.

2- The international character of criminal acts committed, and the fact that they threaten international peace and security.

3- The reprobation of these crimes by the international public opinion.

4- Moreover, the punishment of these crimes has four objectives, namely:

- * to prosecute and punish criminals. The later are considered as "*violator juris gentium*"
- * to ensure that serious international crimes must not go unpunished. There is a growing determination, within the international community, to see all perpetrators of international crimes held responsible and punished for their acts⁽¹⁷⁾.
- * to deter those who would proceed, in the future, to commit such crimes. For to put an end to the impunity of perpetrators of these crimes would contribute to their prevention. A well-known saying says: "Respect for law starts with fear of the policeman and inflicting punishment by judges".
- * to prevent revenge: In fact, the impunity of perpetrators of serious international crimes has fuelled the spiral circle of violence by inciting or encouraging victims to seek revenge, by themselves or through their states.

5- The negative and adverse impact on the political, economic, social and culture stability and development of societies, owing to the increase in the practice of international and illegal operations all over the world and the horrors related to the appearance of new means of destruction of property and killing of persons.

6- The harmful effects of those crimes on victims, families, states and the international community in its entirety. In a word, international crimes constitute serious acts and violations of individual and collective human rights.

7- States usually undertake to respect and ensure respect for

(17) There is a great consciousness and awareness of an international community refusing to tolerate such crimes, even when they are conducted against the state's own citizens or aliens residing in its territory or under its jurisdiction.

rules of CIL⁽¹⁸⁾. This is, *Prima facie*, achieved primarily through prosecution of perpetrators of international crimes.

§V- Difficulties facing the *in concreto* efficiency of CIL:

A) Efficiency of CIL:

It goes without saying that maximizing the efficiency of CIL is a goal and a challenge which must be primarily met by states and competent international organizations⁽¹⁹⁾. In this regard, actions should be more than words, i.e. what is done is more than what is said⁽²⁰⁾. For being successful means not only thinking ahead, but acting as well.

This presupposes that obstacles to the satisfactory functioning of CIL as well as means of removing them should be undertaken, in order to enhance and thus promote a fuller observance of purposes to be attained.

Prima facie, this necessitates, *inter alia*, that states must:

- Review their laws and regulations in order to take stronger

(18) Article 1/1 Additional Protocol (I) 1977 reads:

«The High contracting parties undertake to respect and to ensure respect for this protocol in all circumstances».

Moreover, article 86/1 of the same protocol states that the contracting parties:

«shall repress grave breaches, and take measures necessary to suppress all other breaches».

(19) This means that states and competent international organizations must adopt concrete practical measures to combat international crimes and mobilize all their efforts to reduce the serious problems caused by those crimes in various regions of and all over the world.

In this context, e.g., Res. 59/162 (2004) adopted by the General Assembly of the UN affirms «that countering world drug problem is a common and shared responsibility that must be addressed in a multilateral setting, requires an integrated and balanced approach, and must be carried out in full conformity with the purposes and principles of the Charter of the United Nations and international law, and in particular with full respect for the sovereignty and territorial integrity of States, the principle of non-intervention in the internal affairs of States and all human rights and fundamental freedoms, and on the basis of the principles of equal rights and mutual respect».

(20) It is worth recalling that the attitude of a state vis-à-vis CIL may differ from one time to another. Thus, after having rejected CIL, Germany is now «one of the leading proponents of international criminal law» A. Zimmermann: Role and function of international criminal law in the international system after the entry into force of the Rome Statute of the international criminal court, GYIL, vol. 45, 2002, pp. 49-54.

preventive measures against the violations of rules of CIL.

- Review trial procedures to ensure that there are proper safeguards for the rights of the accused.

- Not interfere in the functioning of the judiciary.

- Respect judgments and decisions of courts, be they national or international.

- Strengthen the principle of the rule of law, in order to improve their record in this field.

- Accept to be sued before national and international tribunals as regards disputes concerning violations of rules of CIL⁽²¹⁾.

- Admit that the protection of human rights is a matter of international concern⁽²²⁾. In fact, the evolution of the law of human rights in general, and CIL in particular has emphasized that the classical rule according to which: "whatever occurs within other states is the concern of no other state or person", is no longer applicable with regard to the protection of human rights and fundamental freedoms.

B) Impediments to the efficiency of CIL:

There are some barriers to make CIL efficient, the most important of which are these:

1- Some states make their international obligations dependent upon their conformity to domestic laws and constitution.

Thus, concerning the international convention for the suppression of the financing of terrorism (1999), El-Salvador declares that its accession to the convention:

«is without prejudice to any provisions thereof which may conflict with the principles expressed in its constitution and domestic legal system»⁽²³⁾.

(21) Ahmed ABOU-EL-WAFA: The protection of human rights by international courts and tribunals, R. Egyp. D.I., 1996, p. 83-84.

(22) In its resolution of 1989, the IDI affirmed:
«human rights, having been given international protection, are no longer matters within the domestic jurisdiction of states».

(23) Multilateral treaties deposited with the Secretary General, UN, New York, 2005, vol. II, p. 161.

2- Some criminal acts or omissions, e.g., those committed or omitted during an international or non-international armed conflict, are unproven or unprovable.

Prima facie, the obligation imposed on a state to search for persons accused of committing international crimes, necessarily implies a certain activity on its part. This means that, as soon as a party knows that an accused exists on its territory or under its jurisdiction, it is its duty to see that the later is arrested and prosecuted without delay before international or national courts.

3- In certain states some international crimes are not justiciable:

Thus, during the last 35 years, the Israel supreme court “resorted to the argument that specific questions – like, for example, the legality of Jewish settlements, or the “Targeted killings” – were not justiciable” (24).

4- Difficulties related the penalty applicable within the host state:

In fact, some states make their acceptance to host a sentenced person by the international court dependent on the condition that

= Moreover in its reservation on the 1988 convention against illicit traffic in narcotic drugs and psychotropic substances, Belize says:

“Article 8 of the Convention requires the Parties to give consideration to the possibility of transferring to one another proceedings for criminal prosecution of certain offences where such transfer is considered to be in the interests of a proper administration of justice.

“The courts of Belize have no extra-territorial jurisdiction, with the result that they will have no jurisdiction to prosecute offences committed abroad unless such offences are committed partly within and partly without the jurisdiction, by a person who is within the jurisdiction. Moreover, under the Constitution of Belize the control of public prosecutions is vested in the Director of Public Prosecutions, who is an independent functionary and not under Government control.

“Accordingly, Belize will be able to implement article 8 of the Convention only to a limited extent insofar as its Constitution and the law allows”. (Ibid, vol. I, p. 443).

(24) E. Benvenisti, intervention published in *international criminal law and the current development of public International law*, ed. By A. Zimmermann, Duncker & Humblot, Berlin, 2002, p. 88.

the penalty inflicted does not exceed what is set forth in their domestic laws⁽²⁵⁾.

5- The existence of a treaty providing otherwise:

A state may be bound, at the same time, by a treaty in conflict with that treating with CIL. This may hamper the execution of the later. Thus, article 12 of the convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents (1973) reads "«The provisions of this convention shall not affect the application of the treaties on asylum, in force at the date of the adoption of this convention, as between the states which are parties to those treaties, but a state party to this convention may not invoke those treaties with respect to another state party to this convention which is not a party to those treaties».

Moreover, article 98/1 statute of the ICC provides.

«The court may not proceed with a request for surrender or assistance which would require the requested state to act inconsistently with its obligations under international law with respect to the state or diplomatic immunity of a person or property of a third state, unless the court can first obtain the cooperation of that third state for the waiver of immunity»⁽²⁶⁾.

The United States of America concluded several agreements with states to prevent the surrender of American nationals to the ICC, in accordance with this article 98 ICC⁽²⁷⁾.

(25) In this regard, e.g., Spain declares: «its willingness to accept at appropriate time, persons sentenced by the International criminal court, provided that the duration of the sentence does not exceed the maximum stipulated for any crime under Spanish law» cf, *Multilateral treaties deposited with the secretary General*, op. cit., vol. II, p. 149.

(26) See as well, in the same sense, art. 98/2.

(27) This was strongly criticized by an author, in the following terms:
«U.S. reliance on Article 98 is misplaced, as that article was intended to apply to such agreements as Status of Forces Agreements (SOFA). Any other interpretation would be tantamount to establishing a significant loophole in the jurisdiction of the ICC, allowing both state-and non-state-parties to work out bilateral agreements which are contrary to both the spirit and the letter of the statute. Article 98 and other provisions of the statute must be interpreted in accordance to the Vienna Convention on the Law of Treaties. The plain meaning of the words, as well as the intent of the parties, does not justify a bilateral agreement between a state-party =

6- Political considerations (Realpolitik): In fact, expediency, political pressure, political background or motivation are widely and constantly in play in present international relations. Political considerations cast some doubts on the efficiency and impartiality of measures taken⁽²⁸⁾. They are a bar to the implementation of ideals of justice, rule of law and equality among offenders. This constitutes a clear manifestation of the policy of double standard and double language (French: *deux poids et deux mesures*), now prevalent in relations of states and acts of international organizations.

Evidently, this may lead to the impunity⁽²⁹⁾ of some criminals,

= and a non-state-party which would provide impunity for the perpetrators of the crimes within the jurisdiction of the court. To allow that would be an obvious contradiction of the purposes of the treaty.

If the purpose of the U.S. requested bilateral treaties is for that state to exercise its national criminal jurisdiction, then it is valid in accordance with the ICC's principle of complementarity. A bilateral agreement based on complementarity would be valid, but it would obligate the U.S. to investigate and to prosecute, if the investigation showed that there are grounds to believe that a crime has been committed. However, the U.S. does not want to be bound by any obligation to investigate or prosecute, even though such is required by U.S. law» Ch. Bassiouni: Introduction to international criminal law, transnational publishers, Ardsley - New York, 2003, pp. 534-535.

See as well:

- H.V.D. Wilt: Bilateral agreements between the United States and States parties to the Rome Statute: Are they compatible with the object and purpose of the statute? *Leiden J. I.L.*, vol. 18, 2005, pp. 93-111.

- Council of the European Union: Council conclusions and EU guidelines principles concerning arrangements between a state party to the Rome statute of the ICC and the US regarding the conditions to surrender of persons to the court, *ILM*, 2003, p. 240-241.

(28) An author says:

«Societies in transition and international negotiators are often tempted to suggest that justice should be traded, or at least, postponed, in exchange for peace» L.N. Sadat *International criminal law and alternative modes of redress, in International criminal law and the current development of public international law*, ed. By A. Zimmermann, Dunckerl & Humblot, Berlin, 2002, p. 193.

(29) Impunity may be defined as: «the impossibility, *de jure* or *de facto*, of bringing the perpetrators of human rights violations to account-whether in criminal, civil, administrative or disciplinary proceedings-since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, convicted, and to reparations being made to their victims» (See" Question of the impunity of perpetrators of human rights violations (civil and political), UN, Doc. E/CN.4/sub.2/1997/20, Annex II, Definitions).

even the most wanted ones⁽³⁰⁾, whereas combating international crimes necessitates: «une lutte efficace contre l'impunité»⁽³¹⁾. For impunity encourages the commission of atrocities and violent acts⁽³²⁾.

This prevents the maximum possible of transparency and the quest for reasonableness in international criminal justice.

7- Obstacles related to extradition of criminals:

Prima facie, extradition of offenders constitutes, in certain cases, a *sine qua non conditio* for the proper implementation of rules of CIL. Nevertheless, there are some circumstances which may impede extradition, the most important of which are the following:

* **Dual criminality**⁽³³⁾: some states make their obligation to extradite dependent on the fact that the crime should be considered as such in the laws of the requesting and requested states⁽³⁴⁾.

* **Refusal to extradite citizens**: This, *Prima facie*, constitutes a

(30) An author says:

«the practice of impunity has become the political price paid to secure an end to the violence of ongoing conflicts, or as a means to ensure tyrannical regime changes» ch. Bassiouni: The need for international accountability, in «national measures to repress violations of international humanitarian law – Report on the meeting of experts, ICRC, Geneva, 2000, p. 31.

(31) W. Bourdon et E. Duverger: La cour pénale internationale, éditions du Seuil, Paris, 2000, p. 306.

(32) For that reason states are urged:

«To end impunity and prosecute those responsible for crimes against humanity and war crimes, including crimes related to sexual and other genderbased violence against women and girls, as well as to ensure that persons in authority who are responsible for such crimes, including by committing, ordering, soliciting, inducing, aiding in, abetting, assisting or in any other way contributing to their commission or attempted commission, are identified, investigated, prosecuted and punished» (The program of action of the world conference against racism, racial discrimination, xenophobia and related intolerance, UN, New York, 2002, pp. 64-65).

(33) Dual criminality «is a standard condition in extradition treaties» (W. Dunlap: Dual criminality in penal transfer treaties, Virginia J.L., vol. 29, 1989, p. 815).

(34) Thus, in a declaration on the UN convention against transnational organized crime, Panama says that:

«it shall not be obliged to carry out extraditions or to render mutual legal assistance in cases where the events giving rise to a request for extradition or mutual legal assistance are not offences under the criminal legislation of the Republic of Panama», Multilateral treaties deposited with the Secretary General, op. cit., vol. II, p. 179.

hindrance to the implementation of rules of CIL. Thus, with regard to the UN convention against illicit traffic in narcotic drugs and psychotropic substances (1988), the United States of America says⁽³⁵⁾:

«The United States shall not consider this convention as the legal basis for extradition of citizens to any country with which the United States has no bilateral extradition treaty in force»⁽³⁶⁾.

8- Reservations:

A reservation is a unilateral declaration made by a state when signing, ratifying, accepting, approving or acceding to a treaty, with a view to excluding or modifying the legal effects of some of its provisions in their application to that state⁽³⁷⁾.

Evidently, a reservation constitutes a derogation from the provisions of the treaty, by allowing the contracting party to escape from the application of a particular provision⁽³⁸⁾. Consequently, it may constitute a bar to the application of some conventional provisions of CIL.

Thus, in its declaration on the 1997 international convention on the suppression of terrorist bombings, the Netherlands says:

«The kingdom of the Netherlands understands Article 8 paragraph 1, of the International Convention for the Suppression of Terrorist Bombings to include the right of the competent judicial authorities to decide not to prosecute a person alleged to have committed such an offence, if, in the opinion of the competent

(35) Multilateral treaties deposited with the Secretary General, op. cit., vol. I, p. 447. Moreover, in a declaration on the 1979 international convention against the taking of hostages, France says:

“3. Extradition will not be granted if the person whose extradition is requested was a French national at the time of the events or, in the case of a foreign national, if the offence is punishable by the death penalty under the laws of the requesting State, unless that State gives what are deemed to be adequate assurances that the death penalty will not be imposed or, if a death sentence is passed, that it will not be carried out”. Ibid, vol. II, p. 111.

(36) Whereas some states, e.g. Austria, France, Germany, Sweden made objections to a reservation formulated by Viet Nam to article 6 on extradition for the said reservation is incompatible with the object and purpose of the convention (Ibid, vol. I, p. 448).

(37) Article 2/1/d Vienna conventions on the law of treaties of 1969 and 1986.

(38) Ahmed Abou-El-Wafa: Public international, Dar Al-Nahda Al-Arabia, Cairo, 1422-2002, p. 123.

judicial authorities grave considerations of procedural law indicate that effective prosecution will be impossible»⁽³⁹⁾.

It is worth recalling that, to avoid negative effects of reservations, some treaties of CIL adopt the rule of «non permission of reservations»⁽⁴⁰⁾, i.e., policy of the package deal: take it or leave it.

9- Decisions of some international organs:

An international organ may give a blanket license for impunity!!

In this regard, in resolutions 1422 (2002), 1487 (2003) and 1497 (2004), the security council excluded the jurisdiction of the ICC over peace-keepers⁽⁴¹⁾. This inevitably has four principal drawbacks, namely:

1- It erodes the authority of the ICC and undermines its legitimacy.

2- It enables perpetrators of international crimes to hide behind a legitimate basis to commit illegitimate actions or omissions.

3- It consecrates a double standard on international criminal justice and contravenes the rule under which no immunity for anyone, under any circumstances, and for any reason, for war crimes, crimes against humanity, genocide or any other international crime.

(39) Multilateral treaties deposited with the Secretary General, op. cit., vol. II, p. 132.

(40) See, e.g., article 120 of the Statute of the ICC.

(41) Thus, e.g., the Security Council, acting under Chapter VII of the Charter of the United Nations, adopted resolution 1487 (12 June 2003), in which it:

1- Requests, consistent with the provisions of Article 16 of the Rome Statute, the ICC, if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a 12 month period starting 1 July 2003 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise;

2- Expresses the intention to renew the request in paragraph 1 under the same conditions each 1 July for further 12-month periods for as long as may be necessary;

3- Decides that Member States shall take no action inconsistent with paragraph 1 and with their international obligations.

See as well N. Jain: A separate law for peacekeepers: The clash between the security council and the International criminal court, EJIL, vol. 16, 2005, pp. 239-254.

4- It sets up a legal impediment for the application of penalties on perpetrators of international crimes.

10- The adoption by some states of domestic legislations hampering *expressis verbis* the operation of international criminal justice:

The leading example in this regard, is the American service-members protection Act of 2002, which provides:

- Prohibition on cooperation with the ICC (Sect. 2004).
- Prohibition on direct or indirect transfer of classified national security information and law enforcement information to the ICC (Sect. 2006).
- Authority bestowed on the President of the US to use all means necessary to bring about the release of any person of the armed forces of the US detained or imprisoned by or on behalf of the ICC (Sect. 2008)⁽⁴²⁾.

11- Amnesty, may as well be a factor impeding the effective implementation of rules of CIL⁽⁴³⁾.

12- The “mala fides” of some states: Bona fides is one of the corner stones of contemporary international relations⁽⁴⁴⁾. However, it seems that it is at present lacking in some aspects of international life, and particularly with regard to criminal international law.

In this context, it has been noticed that during negotiations concerning the statute of the ICC:

«les Etats-Unis ont adopté une attitude de mauvaise foi pendant les négociations de Rome: Précisément, ils affirmaient publiquement leur soutien général au projet, mais en réalité ils oeuvraient contre la CPI dans les coulisses»⁽⁴⁵⁾.

13- The policy of «contracting out»: International instruments may permit states to contract out, instead of «contracting in». In this

(42) The Act was signed by president G.W. Bush on August 2, 2002. It is available on <http://thomas.local.gov>.

(43) Vide infra.

(44) Ahmed Abou-el-Wafa: A manual on the law of international organizations, Dar Al-Nahda Al-Arabia, Cairo, Fourth edition, 1426 – 2006, pp. 258 – 259.

(45) G. Nolte: Le droit international face au défi américain, A. Pedone, Paris, 2005, p. 79.

context, art. 124 ICC provides that a state may declare that, for a period of seven years after the entry into force of the statute, it does not «accept the jurisdiction of the court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory».

Effectively, e.g., France has made such a declaration⁽⁴⁶⁾. Prima facie, the policy of contracting out weakens the efficiency of CIL. For it means that all states are not bound by the same text.

(46) Multilateral treaties deposited with the Secretary General, UN, New York, 2004, vol. 2.

It is worth recalling that article 8 deals with "war Crimes".

CHAPTER I
THE RATIONE DECIDENDI ASPECT
OF CIL
(THE SOURCES)

The work of the international community, and that of national legal orders of states, have led, in the legal field, to the adoption of many instruments particularly over the past five decades covering various aspects of international crimes, including universal, regional and bilateral international treaties, declarations, international decisions and domestic legislations.

Evidently, the "sources of law" involve where the law can be found, what are the rules which govern the problem in question, what is the *fons et origo* of the rule of law.

The concept "sources of law" has, essentially, three meanings in the general theory of international law, namely:

- It may refer to the rationale (the *ratio legis*) of the rule of law, its binding force or efficiency;

- It may concern the material sources of law, i.e., the components, factors and principles which have taken part in the formation and formulation of legal rules (such as the effect of Roman law, Islamic law, natural law, sense of justice or common law on the composition of legal rules); and

- Finally, it may relate to the formal sources. i.e., the formal instruments whereby rules are formulated and in which they are incorporated.

The later meaning will be used in the present study. In this connection, there is a text which is considered as a statement or which enumerates the different sources of international law, i.e., art. 38 of the statute of the ICJ. This text concerns, in our view, two categories of sources, namely: original sources (treaties, international custom and general principles of law) and subsidiary sources (judicial decisions and teachings of publicists)⁽⁴⁷⁾.

Moreover, national legislations and laws as well as decisions

(47) *Ahmed Abou-el-Wafa: Public international law, op. cit.*, p. 74..

of international organizations constitute an additional source of legal rules of CIL.

Those norms are well – established ones of the international legal order, some of them are non-derogable norms (i.e., rules of *jus cogens*).

In the following developments, reference will be made to international treaties, custom, general principles of law, decisions of IOS, Judicial precedents and national legislations as leading sources of CIL.

Section I

International Treaties

A treaty constitutes the principal instrument by which subjects of international law set up relations with each other. For a treaty is by far the most commonly used instrument for creating binding legal rights and obligations. It enumerates commitments and undertakings to which parties have agreed. The expansion of intercourse among states, especially in criminal matters led to an ever – increasing use of international legal instruments, amongst which international treaties. A treaty is, par excellence, *a jus inter partes*, i.e., *a clausula si omnes*.

The study of international treaties concerning CIL requires that we refer to the two following points.

§I- Codification of rules of CIL:

In international law, codification has two aspects, namely⁽⁴⁸⁾:

* The codification of existing rules: This aspect is of a “*de lege lata*” nature. It aims at the more precise formulation and systematization of rules which have already been generally accepted by the international community, i.e., it mirrors previously established rules.

* The progressive development of international law. This is an aspect “*de lege ferendae*”, i.e., the preparation of draft conventions on which rules of international law have not yet been sufficiently developed in the practice of states.

(48) *Ahmed Abou-el-Wafa: Public international law, op. cit.*, p. 209.

Prima facie, since CIL is essentially based on the principle of legality of crimes and punishments, the *de lege lata* aspect, rather than the *de lege ferendae* one, is that which is closely in conformity with the essence of CIL⁽⁴⁹⁾.

The international treaties which have codified rules of CIL may be classified into three categories, namely:

A- Bilateral treaties:

There are various bilateral treaties concluded between subjects of international law. In this regard, e.g., Egypt has concluded a multitude of bilateral agreements concerning criminal matters and, particularly, the question of terrorism⁽⁵⁰⁾.

(49) In fact, codification of criminal acts "a augmenté la gamme des crimes internationaux".

Ahmed Abou-el-Wafa: Le devoir de respecter le droit à la vie en droit international, R. Egyp. D.I., 1984, p. 45; concerning the right to life, this author as well said: "la codification des crimes portant atteinte au droit à la vie dans des instruments internationaux constitue un moyen idéal ... En effet, ces instruments constituent le moyen type de production et de développement d'un ordre juridique international Ibid, p. 43.

(50) The most important of which are the following: (1) agreement relating to judicial cooperation in criminal matters and extradition between Egypt and Turkey (*Official Journal*, 1991, pp. 3304-3321, in Arabic); (2) agreement relating to cooperation in criminal matters between Egypt and Greece (*ibid.*, 1992, pp. 579-589, in Arabic); (3) agreement relating to judicial cooperation in criminal matters, the transfer of convicted persons and extradition between Egypt and Poland (*ibid.*, 1993, pp. 501-524, in Arabic); (4) agreement relating to judicial cooperation in civil and criminal matters between Egypt and Libya (*ibid.*, 1993, p 1779et ss, in Arabic); (5) agreement relating to judicial and legal cooperation in civil and criminal matters between Egypt and Cyprus (*ibid.*, 1994, pp. 3056-3076, in Arabic), (6) agreement relating to judicial cooperation in civil, commercial and criminal matters between Egypt and China (*ibid.*, 1995, pp. 1972-1889, in Arabic); (7) agreement relating to cooperation in criminal matters between Egypt and Morocco (*ibid.*, 1997, pp. 2833-2849, in Arabic); (8) agreement relating to the transfer of convicted persons between Egypt and Spain (*ibid.*, 1995, pp. 2474-2481, in Arabic); (9) agreement relating to drugs and organized crime between Egypt and Malta (*ibid.*, 1998, pp. 969-976, in Arabic); (10) agreement relating to security cooperation concluded between Egypt and Cyprus (*ibid.*, 1995, pp. 952-956, in Arabic); (11) agreement relating to the transfer of convicted persons concluded between Egypt and Great Britain (*ibid.*, 1996, pp. 520-531, in Arabic); (12) agreement relating to security cooperation between =

B- Multilateral general treaties:

Many multilateral treaties have been concluded to regulate one or more aspects of CIL. It suffices to mention, e.g., the following:

- The genocide convention 1948.
- The prohibition of piracy (Conventions of the law of the sea of 1958 and 1982).
- Convention on the prevention and punishment of internationally protected persons, including diplomatic agents (1973).
- International convention against the taking of hostages (1979).
- Protocol for the suppression of unlawful acts against the safety of fixed platforms located on the continental Shelf (1988).
- International convention on the suppression and punishment of the crime of apartheid (1973).
- Convention for the suppression of unlawful acts against the safety of maritime navigation (Rome 1988).
- The convention against illicit traffic in Narcotic drugs and psychotropic substances (1988).
- Convention on the safety of United Nations and Associated Personnel (1994).
- UN convention against transnational organized crimes (2000).

= Egypt and Yemen (ibid., 1997, pp. 274-277, in Arabic); (13) an understanding for security cooperation between Egypt and Sri Lanka (ibid., 1998, pp. 846-851, in Arabic); (14) agreement relating to security cooperation between Egypt and Pakistan (ibid., 1998, pp. 2806-2811, in Arabic); (15) agreement relating to cooperation in the suppression of organized crime concluded between Egypt and Hungary (ibid., 1999, pp. 554-562, in Arabic); (16) agreement relating to judicial cooperation between Egypt and Lebanon (ibid., 1999, pp. 1276-1279, in Arabic); (17) agreement relating to cooperation in the field of the suppression of crime between Egypt and Russia (ibid., 1999, pp. 1736-1741, in Arabic); (18) agreement between Egypt and Panama for the cooperation in combating crime (ibid., April 2000, No. 14); (19) the extradition agreement concluded between Egypt and South Africa (ibid., No. 1, January 2004, p. 6); (20) agreement between Egypt and Slovakia concerning cooperation in the suppression of crime (ibid., No. 34, August 25, 2004, in Arabic).

- International conventions concerning international terrorism⁽⁵¹⁾.

C- Statutes of international criminal courts:

In fact, statutes establishing international criminal courts, e.g., those of the IMT of Nuremberg, of ICTY, of ICTR and of ICC have codified, as indicated below, the most important rules and principles concerning CIL.

§II- Principle of compliance by international conventions related to CIL to which states are parties:

Prima facie, it is in the common interest of states that treaties to which they are contracting parties are respected and implemented⁽⁵²⁾ as to their object and purpose, by all the contracting parties, particularly the carrying out of their obligations under those treaties.

This may be justified by three rules, namely:

- * The rule *Pacta Sunt Servanda*.
- * The rule *ex consensu advenit vinculum*.
- * The *bona fides* rule.

This, inevitably, means that a state has the obligation to prevent and punish violations of serious international crimes embodied in treaties to which it is a party⁽⁵³⁾.

Prima facie, states should participate in international treaties concerning international crimes⁽⁵⁴⁾.

(51) *Vide infra*. See: S. Glaser: *Droit international pénal conventionnel*, Bruylant, Bruxelles, 1970, 649 pp.; ch. Van den Wyngaert *et al*: *International criminal law – A collection of international and European instruments*, Third revised edition, Martinus Nijhoff publishers, Leiden, 2004, 1542 pp; *International instruments related to the prevention and suppression of international terrorism*, UN, New York, 2004, 323 pp.; See as well a comprehensive list of 281 conventions related to 28 categories of crime, in ch. Bassiouni: *Introduction to international criminal law*, *op. cit.*, pp. 227-258.

(52) For instance in Resolution 59/151 (2004). The G.A. of the UN called upon states to ensure “effective implementation of the international legal instruments pertaining to transnational organized crime, terrorism and corruption”.

(53) *Vide infra*.

(54) *Multilateral treaty framework: An invitation to universal participation– Focus 2003: Treaties against transnational organized crime and terrorism*, UN, New York, 2003, 81 pp.

Section II

Custom

After some general remarks, this study will focus on the role of custom in CIL.

§I- In General:

International agreements and custom constitute the essence and fabric of international law⁽⁵⁵⁾. From time immemorial custom or unwritten law constitutes one of the leading sources of legal rules in all legal systems, be they national or international.

Custom is today, as never before, part of the common heritage of mankind (*patrimoine commun de l'humanité tout entière*), i.e., it is the core of the *corpus juris gentium* applicable in this field⁽⁵⁶⁾.

(55) See: Ahmed Abou-El-Wafa: Public International Law, op. cit., p. 201- et ss,

M. Mendelson: The formation of Customary International Law, RCADI, vol. 272, 1998, P. 229 et Seqq, F. Kirgis: Custom on a sliding scale, AJIL, vol. 81, 1987, P. 144 et ss, R. Kolb: Selected problems in the theory of Customary International Law, Netherlands ILR, 2003, p. 119-150.

(56) See as well: GREENWOOD.C. "Customary Law Status of the 1977 Additional Protocols" in DELISSEN, J.M. & TANJA G.J. (eds.), *Humanitarian Law of Armed Conflicts, Challenges Ahead, Essays in HONOUR of FRITS KALSHOVEN*, Dordrecht, Martinus, Nijhoff Publishers, 1991, pp. 119-126, MERON, T., *Human Rights and Humanitarian Norms as Customary Law*, Oxford, Clarendon Press, 1989, 263 pp., BELLO, E., *African Customary Humanitarian Law*, Geneva, Oyez Publishing, ICRC, 1980, 158 pp., BRUDERLEIN, C., "Customs in International Humanitarian Law", in *IRRC*. No. 285, pp. 579-595, CASSESE, A., "The Spanish Civil War and the Development of Customary Law Concerning Internal Armed Conflicts" in CASSESE, A. (ed.), *Current Problems of International Law*, Milan, Giuffrè, 1975, pp. 287-318, MERON, T., "The Continuing Role of Custom in the Formation of International Humanitarian Law" in *AJIL*, vol. 90 (2), 1996, pp. 238-249, CASSESE, A., "The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law" in *UCLA Pacific Basin Law Journal*, vol. 3 (1 & 2), 1984, pp. 55-118, GREENWOOD, C., "Customary Law Status of the 1977 Geneva Protocols" in *Humanitarian Law of Armed Conflicts-Challenges Ahead, Essays in HONOUR of Frits Kalshoven*, Dordrecht, Martinus Nijhoff Publishers, 1991, pp. 93-114, MERON, T., "The Geneva Conventions as Customary Law" in *AJIL*, vol. 81 (2), 1987, pp. 348-370, ABI-SAAB, G., "The 1977 Additional Protocols and General International Law, Preliminary Reflexions" in *Humanitarian =*

The importance of custom may be outlined as follows:

A- Historically, custom preceded international treaties. It has exercised, because of the absence of an international legislature, an influential impact on the formation of International Law and, accordingly, the settlement of international disputes. Moreover, custom plays an essential role in the renewal, improvement, and development of rules of International Law.

B- Customary rules of International Law operate vis-à-vis subjects of International Law, even in case of absence of a written or conventional instrument⁽⁵⁷⁾.

C- A state, making a reservation to an international instrument, may nevertheless be bound by that instrument if a customary rule emerges⁽⁵⁸⁾. Hence, in case of an incompatibility between a reservation and an emerging customary international rule, the later shall, in principle, prevail.

Custom is a practice or a behavior followed by subjects of International Law, because they feel legally bound to behave or act in such a way. This is properly highlighted by art. 38 of the statute of the ICJ, which refers to international custom:

"as evidence of a general practice accepted as law".

Accordingly, custom has two elements, namely:

A- The material element:

The material element of custom raises two points:

= *Law of Armed Conflict-Challenges Ahead-Essays in HONOUR of Frits Kalshoven*, Dordrecht, Martinus Nijhoff Publishers, 1991, pp. 115-120, KASTO. J., "Jus Cogens and Humanitarian Law" in *International Law Series*, vol. 2 London, Kasto J., 1994, 95 pp.

(57) The ICJ stated that:

"Principles such as those of the non-use of force, non intervention, respect for the independence and territorial integrity of states, and the freedom of navigation, continue to be binding as part of customary international law, despite the operation of provisions of conventional law in which they have been incorporated" ICJ, Rep., 1984, p. 424, para. 73.

(58) Thus, five states made reservations to the Fourth Hague convention of 1907. Yet, the principles and rules incorporated therein have, with the passage of time, become part of customary International Law, binding upon all states, including those reserving states.

a- Essentials of the material element:

The material element of custom involves the existence of a consistent, uniform⁽⁵⁹⁾ and undeviating behaviour which had been consolidated by a constant and sufficiently long practice⁽⁶⁰⁾. *Prima facie*, an isolated precedent may be a starting point which, if not challenged, may ripen into a constant and general rule.

This is not the case if the facts disclose uncertainty, fluctuation, contradiction and discrepancy in the application of the usage or behaviour under consideration.

Accordingly:

- If the practice is scattered and far from uniform, it will be impossible to say that an international custom exists in regard to it⁽⁶¹⁾.
- Contradiction or inconsistent conduct in the practice of states would prevent the emergence of an international customary rule.
- Where practice is embryonic, partial, not clearly universal and evidently controversial, custom cannot be materialized.

It is worth recalling that treaty practice, international jurisprudence, international arbitration, practice of states (be it unilateral, bilateral or multilateral), legal writings, decisions of

(59) As for uniformity:

"too much importance need not be attached to a few uncertainties or contradictions, real or apparent" ICJ, Rep., 1951, p. 138.

(60) The ICJ said:

"the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of states, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them" ICJ, Rep. 1985, p. 29-30, para. 27.

The court added:

"to deduce the existence of customary rules ..., the conduct of states should be, in general, consistent with such rules, and that if there are violations of those rules, they should generally have been treated as breaches of the rules, not as indications of the recognition of a new rule" ICJ, Rep. 1986, p. 98, para. 186.

(61) See as well:

ILA, Final Report of the Committee on the Formation of Customary (General) International Law, Statement of Principles Applicable to the Formation of General Customary International Law, Report of the Sixty-Ninth Conference, London, 2000.

international organizations and conferences ... etc. are the principal indicators or constitutive factors of international custom⁽⁶²⁾.

As regards the time factor, the formation of a customary rule has in the past been frequently characterized by the passage of a long period of time. This is not the case today, due to the acceleration of international relations and the development of science and technology. In certain fields, customary rules are formed without having to undergo a long period of gestation.

Thus, the speedy tempo of contemporary international life, promoted by the highly developed communication and transportation have accelerated the generation and formation of customary International Law. In fact, what required a hundred years in former days may need now less than five years⁽⁶³⁾. For example, the rules relating to air space and outer space, those relating to the continental shelf, to the condemnation of international terrorism and to the protection of environment have emerged from fairly quick maturing of practice.

b- The method of persistent objector:

A state may contract out (or opt out) of a custom in the process of formation (i.e. in *statu nascendi*), provided that objection

(62) The ICJ affirmed:

"State practice, including that of states whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked, and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved" ICJ, Rep., 1969, p. 43-45.

Judge Lachs said:

"For to become binding, a rule or principle of international law need not pass the test of universal acceptance. The evidence should be sought in the behavior of a great number of States, possibly the majority of States, in any case the great majority of interested States" Ibid, p. 230.

See as well:

"International custom before the French Council of state", RGDIP, 1997, p. 1053-1059.

(63) The ICJ affirmed:

"Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law ... an indispensable requirement would be that within the period in question, short though it might be, state practice ... should have been extensive and virtually uniform in the sense of the provision invoked, and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved" ICJ, Rep., 1969, p. 43.

is manifest, clear and constant. Accordingly, in certain cases, if a state opposes a rule of customary International Law *ab initio*, i.e., from the time of the rule's inception, the rule will be *inapplicable* to it⁽⁶⁴⁾. Clearly, persistent objection is not valid as regards rules of *jus cogens*, including those of international humanitarian law or of CIL which bind a state even notwithstanding its objection.

B- The psychological or subjective element (the *opinio juris sive necessitates*):

This is an indispensable condition for the existence of customary international rules. In fact, states must feel or have the conviction and belief that, by acting under the rule in question, they must abide themselves by it or are bound by a legal obligation (*opinio juris sive necessitates*) and not merely for reasons of political expediency, friendship, *comitas gentium* (courtesy)⁽⁶⁵⁾, convenience, usage, tradition, opportunism ... etc. Hence, this element distinguishes rules which are considered as legally obligatory from those which are not.

In a word, rules of CIL include:

(64) The ICJ said that if the particular rule in question was one of International Law, it would be:

"inapplicable as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian coast"

ICJ, Rep., 1951, p. 131, Ibid, 1969, p. 26-27, 131, 235, 238.

The restatement of the foreign relations of the United States (1987) said as well:

".. in practice a dissenting State which indicates its dissent from a practice while the law is still in the process of development is not bound by that rule of law even after it matures".

See also: P.M. Dupuy "A propos de l'opposabilité de la coutume générale enquête brève sur l'objecteur persistant, Mélanges M. Virally, Pedone, Paris, 1991, p. 257-279, Charney: The persistent objector rule and the development of customary international law, BYIL, 1985, p. 1-24, Conforti: Cours générale de droit international public, RCADI, 1988, t. 212, p. 74-77, G. Abi-Saab: Cours général de droit international public, RCADI, t. 207, 1987, the Hague, 1996.

Moreover, it had been maintained:

"a state may contract out of a custom in the process of formation' (ICJ, Rep., 1974, p. 286-289, sep. op. Gross).

(65) See as well: J. Paul: Comity in international law, Harvard ILJ, vol. 32, p. 1-79.

In fact, rules of International Law must be distinguished from those of International comity (*comitas gentium*), e.g. saluting the flags of foreign ships at sea, which are practiced solely as a matter of courtesy, not as legally binding.

(a) Written rules, i.e., those set forth by international conventions, regulations and decisions as well as judicial judgments and national legislations.

(b) Unwritten rules or customary ones.

It suffices to mention, here, article 2/b Protocol I (1977) which provides that the expression "rules of international law applicable in armed conflict"⁽⁶⁶⁾ means: "the rules applicable in armed conflict set forth in international agreement to which the Parties to the conflict are parties and the generally recognized principles and rules of international law which are applicable to armed conflict".

Another example is Martens Clause (the substitute principle):

The famous clause, Martens Clause (after the Russian diplomat who has proposed it) was unanimously included in the preambles of the Hague Conventions of 1899 and 1907 concerning laws and customs of war on land. It has been set forth as well in article 1 par. 2 of Protocol no. 1 (1977), which provides:

"In cases not covered by this protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity⁽⁶⁷⁾ and from the dictates of public conscience".

Moreover, article 63 par. 1 of the first Geneva Conventions 1949⁽⁶⁸⁾ provides that each contracting party is at liberty to denounce the convention. However, para. 2 of the said article adds:

"The denunciation shall have effect only in respect of the denouncing power. It shall in no way impair the obligations which the parties to the conflict shall remain bound to fulfill by virtue of

(66) The aforesaid expression is used, by the protocol, in articles 31,37, 43-44, 57, 59 and 60. Thus, e.g., article 44 par. 2 says: "... all combatants are obliged to comply with the rules of international law applicable in armed conflict".

(67) It is to be noted that in one of its first judgments, the ICJ referred, in 1949, to "elementary considerations of humanity" (ICJ, Reports, Corfu channel case, 1949, p.22).

(68) Article common to all four Conventions: cf, second convention (article 62), third convention (article 143), fourth convention (article 159).

the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of public conscience". In its commentary, the ICRC says:

"Vague and self-evident as it undoubtedly is, such a clause is nevertheless useful, as it reaffirms the value and permanence of the lofty principles underlying the convention. These principles exist independently of the convention and are not limited to the field covered by it. The clause shows clearly ... that a power which denounced the convention would nevertheless remain bound by the principles contained in it insofar as they are the expression of inalienable and universal rules of customary international law⁽⁶⁹⁾.

Accordingly, one can state that the denunciation of a treaty does not relieve the party concerned from obligations provided for in customary international law.

Evidently, an international tribunal may confirm the existence of customary rules. Thus, the ICJ affirmed that the great majority of the provisions of the 1949 Geneva Conventions represent "customary international law"⁽⁷⁰⁾.

§II- Role of custom in CIL:

Within CIL, one can put forward the following remarks with regard to customary rules:

A) Since one of the leading principles of CIL is the principle of legality "*nullum crime nulla poena sine lege*", it is inevitable to point out that custom does not play today great role, particularly with regard to the determination of crimes and punishments to be imposed on natural persons⁽⁷¹⁾, mainly because of the codification of a great number of customary rules of CIL.

B) However, customary rules of CIL are applicable in the field of the responsibility of states for breaches of those rules. In fact, in international fora, a political, a judicial or an arbitral organ,

(69) Commentary I Geneva Conventions, ICRC, Geneva, 1995, p.413.

(70) ICJ, Reports, 1996, Nuclear weapons, p. 257-258, paras, 79, 82.

(71) An author says: "Customary law is not a major source of international criminal law as it stands today" J. Vogel: intervention, in an international symposium organized in Kiel (Germany), cf "International criminal law and the current development of public international law", Dunck & Humblot, Berlin, 2003, ed. by A. Zimmermann, p. 221

may condemn a state for its violations related to customary rules of CIL⁽⁷²⁾. Moreover, a natural person may be condemned on the basis of a customary rule embodied in a convention to which his state is not a party.

C) Customary rules of CIL may be a source of inspiration to national laws and legislations:

In this regard, the constitutional court of Colombia says:

(72) *Vide infra*. Moreover, a court in South Africa said:

“in the evidence, reference was made to the fact that there is a tendency in international law to accord prisoner of war status to captives who have openly participated, in a characteristic uniform, in an armed conflict against a colonial racist or foreign regime. However, professor Dugard, who testified on this point made it clear that such recognition rests on a contractual basis. Governments such as those of South Africa and Great Britain, which do not accept the relevant Protocol, are not bound by it. In my opinion, Professor Dugard was right in his opinion that this Court cannot simply declare that the accused must be treated as prisoners of war, but that the tendency in international law must be taken into consideration when deciding whether the death sentence must be imposed.

In this connection, I would refer you to the following passage from his testimony: South Africa did not sign the text of the First Protocol, nor had it ratified or acceded to the 1977 protocols. Consequently, it was quite clear that South Africa is not bound by Protocol 1 and therefore, in terms of the treaty, is not obliged to confer prisoner of war status upon members of SWAPO.

Although South Africa is not bound in terms of this treaty, I suggested that there is support for the view that this position has now become part of customary international law, part of the common law of international law. In my judgment this argument is premature, in that Protocol 1 has not yet received that support to argue that it is a part of international law, binding upon States that have not ratified the convention.

Yes, I have already expressed the view that in my judgment a South Africa Court has no option but to exercise criminal jurisdiction over SWAPO, that a Court cannot simply direct that members of SWAPO be treated as prisoners of war. Nevertheless, it is my view, having regard to new developments in international humanitarian law as reflected in Protocol 1 of the 1977 Geneva Conventions and having regard to the special status of a Namibian, that such factors should be taken into account when it comes to the imposition of a sentence and, in particular, it is my view that a Court might have regard to these developments when it comes to the question of the death penalty because the Convention on prisoners of War of 1949 makes it clear that a prisoner of war may not be executed by the detaining power for military activities prior to his arrest unless they amounted to war crimes”. (Text of the judgment, in M. Sassoli *et al.*: How does law protect in war, ICRC, Geneva, 1999, p. 965).

“In the case of Colombia, the humanitarian provisions are especially binding due to the fact that Article 214, para. 2, of the Constitution provides that “the rules of international humanitarian law shall be respected in all cases”. As already stated by this Body, this means not only that international humanitarian law is valid at all times in Colombia, but also that it is automatically incorporated in the “national legal order, which is, moreover, consistent with the mandatory nature (as already explained) of the axioms which make this body of law an integral part of *jus cogens*”. Consequently, both the members of irregular armed forces and all State officials, particularly all members of the police force whose duty it is to apply the humanitarian rules, are under the obligation to respect the provisions of international humanitarian law at all times and in all places”⁽⁷³⁾.

Moreover, the explanatory memorandum of the Egyptian Law no. 25 of 1966 related to military judgments affirms that articles 137 and 138 (which protects the dead or wounded soldier or the soldier who cannot defend himself even if it is an enemy, against theft and acts of violence) contain a principle which is “in conformity with principles of international law and principles of humanity”⁽⁷⁴⁾.

D) A state may not accept a reservation made by another state if it is contrary to what is well established in customary rules of CIL⁽⁷⁵⁾.

(73) C.f., text in *M. Sassoli et al.* “How does law protect in war”. Op. cit., p. 604-605.

(74) Moreover, in a report presented to the people’s assembly (the Parliament) Egypt affirms that protection of civilians is a principle imposed by “dictates of humanity as well as the cultural and civilizational heritage of all nations and peoples”, Procès-verbal, addendum to the 107th session, 19 July 1992, p. 37 (in Arabic), see as well:

Ahmed-Abou El-Wafa: A report on Egypt practice relating to customary rules of international humanitarian law, *Revue Egyptienne de droit international*, 1997, vol. 53, p. 1 et ss.

Additionally, Egypt affirms: “our own contribution was inspired by our old-age civilization, by our system of Islamic law and by the traditions of Arab chivalry” (off. Rec. of the diplomatic conference on the reaffirmation and development of international humanitarian law applicable in armed conflicts, Geneva, 1974-1977, vol. XIV, p. 192).

(75) It suffices to mention, here, what has been said by Sweden:

“The Government of Sweden has examined the declaration made by Israel regarding article 21 of the International Convention for the Suppression of =

Section III

General Principles of Law

Clearly, general principles of law are of cardinal importance for the whole structure of international law. They constitute the measure and the extent of some respective obligations of subjects of international law. They may as well play a role in filling gaps (*lacunae*) in positive sources of international law. The later has borrowed and continues to borrow some of its rules, systems and institutions from national systems of law. In order to avoid *non liquet* decisions⁽⁷⁶⁾. These principles originally belong to private law and are incorporated in international law so as to be applied to matters of an international character, by way of analogy.

§I- Conditions governing the application of general principles of law within CIL:

It is worth recalling that recourse to general principles of law, supposes:

= the Financing of Terrorism, whereby Israel intends to exclude the Protocols Additional to the Geneva Conventions from the term international humanitarian law.

The Government of Sweden recalls that the designation assigned to a statement whereby the legal effect of certain provisions of a treaty is excluded or modified does not determine its status as a reservation to the treaty. The Government of Sweden considers that the declaration made by Israel in substance constitutes a reservation.

It is the view of the Government of Sweden that the majority of the provisions of the Protocols Additional to the Geneva Conventions constitute customary international law, by which Israel is bound. In the absence of further clarification, Sweden therefore objects to the aforesaid reservation by Israel to the International Convention for the Suppression of the Financing of Terrorism". Multilateral treaties deposited with the secretary general, *op. cit.*, vol. II, p. 170.

(76) See as well:

Ahmed Abou-El-Wafa: Public international law, *op. cit.*, p. 212.

- Verdross: Les principes généraux du droit dans la jurisprudence internationale, RCADI, 1933 (II).

- Rousseau: Droit international public, sirey, paris, 1980, p. 379 ss.

- P.M. Dupuy: Le juge et la règle générale, RGDIP, 1989, p. 569-598.

- Bin Cheng: General principles of law as applied by international courts and tribunals, Stevens & Sons, London, 1953, 490 pp.

- Morin: L'Etat de droit: emergence d'un principe du droit international, RCADI, t. 254, 1995, 462 pp.

A- That the principle is not in conflict with any rule of international law.

For that reason article 31 statute of the ICC provides that application of general principles of law is a source to be applied by the court, provided that "those principles are not incompatible with this statute and with international law".

B- That the principle is accepted by the main legal systems, and not only the internal law of a state or some states⁽⁷⁷⁾.

C- That it should as well take into account the nature of the international legal system. In fact, general principles of law recognized by civilized nations, as a source of rules of international law, are those which are susceptible of being applied to CIL. An automatic or a mechanical borrowing from domestic laws of states is impermissible.

Accordingly, one can safely say that there are some general principles of law applied by all nations that are not admitted by the international legal system, for they are in conflict with the very nature and fundamental characteristics of CIL. It suffices to mention the following examples:

1- One of the general principles applicable in states is that which permits some persons, e.g., diplomatic agents, heads of state and government ... etc., to benefit from their immunity before courts. This principle is not applicable before international criminal courts⁽⁷⁸⁾.

2- Principle of legality, applicable within domestic legal orders, may not be applied in its entirety on the international level:

* Thus, the preamble of the International convention against the recruitment, use, financing and training of mercenaries (adopted by the General Assembly of the UN by its resolution 44/34 in 1989) says that matters not regulated by the convention:

(77) The PCIJ said that:

"If the court were to decide the case in disregard of the relevant institutions of municipal law, it would without justification, invite serious legal difficulties. It would lose touch with reality, for there are no corresponding institutions of international law to which the court could resort... It is to rules generally accepted by municipal legal systems..., and not to the municipal law of a particular state, that international law refers" ICJ, Rep. 1970, p. 37.

(78) Vide infra.

“Continue to be governed by the rules and principles of international law”.

* Moreover, article 15 of the covenant on civil and political rights (1966) states:

“1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2- Nothing in this article shall 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”⁽⁷⁹⁾.

The principle “No crime nor penalty without law” has not the same status on the international level as it is on the domestic level, due to the fact that a number of international rules are not *written ones, but rather are* customary rules⁽⁸⁰⁾.

(79) Article 7 of the European convention of human rights reproduces the same text, with two differences, namely:

- In paragraph 1, it omits the possibility for the offender to benefit from the imposition of the lighter penalty.
- In paragraph 2 it refers to the general principles of law recognized by civilized nations.

(80) M. Naguib Hosny: Lessons on international criminal law, op. cit., p. 66(in Arabic). Moreover, a scholar says:

“Or, en ce qui concerne le droit international pénal, il faut constater que l’interprétation du principe de la légalité des délits ainsi que des manifestations qu’il entraîne, s’écarte de l’interprétation qu’on admet en droit pénal interne.

Il est évident que le principe de la légalité des délits qui enseigne qu’il n’y a pas d’infraction sans loi, ne peut pas être appliqué, au sens strict de ces termes, en droit international pénal, car celui-ci en tant que droit coutumier, est dépourvu de lois.

En effet, on sait que le droit international pénal, de même que le droit international public en général, n’est pas jusqu’à présent un droit écrit, c’est-à-dire codifié.

Il en résulte que le droit international pénal, contrairement au droit pénal interne, n’est pas un Tatbestandsrecht, c’est-à-dire un droit des états de fait précis et codifiés. Provenant de la coutume – qui constitue aussi sa source principale – il n’est pas une oeuvre ou une création juridico-technique. Il en est ainsi également dans le cas où ses règles ou ses notions se trouvent =

3- Conversely, a principle applicable within CIL⁽⁸¹⁾ may not be automatically valid in other branches of international law. In this regard, article 10 of the statute of the ICC stipulates:

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

§II- Study of some general principles of CIL:

Rules of CIL contain a multiplicity of general principles. We will limit ourselves to the study of the following seven principles:

(A) The principle *Nullum crimen nulla poena sine lege*:

The principle of legality⁽⁸²⁾ (*nullum crimen nulla poena sine lege*: No crime nor penalty without law), is a leading principle of CIL. It raises two points, namely: content and effects.

= incorporées dans le droit conventionnel (conventions, traités), donc où elles sont formulées par écrit.

Le droit conventionnel a donc, dans une certaine mesure, un caractère derivative: son bien-fondé et sa force obligatoire dépendent de sa conformité avec la coutume” S. Glaser: La méthode d’interprétation en droit international pénal, Rivista Italiano di diritto e procedura penale, 1966, pp. 762 et seq.

(81) As examples of principles of CIL, one can mention:

- Principles of international law recognized in the charter of the Nuremberg tribunal and in the judgement of the tribunal adopted by the ILC and the GA of the UN in 1950.
- Draft code of offences against the peace and security of mankind adopted by the ILC in 1954 and 1996, (See” The work of the international law commission, UN, New York, 2004, pp. 264-276, 321 et ss).

See as well:

- M. Delmas-Marty: The contribution of comparative law to a pluralist conception of international criminal law, JICJ, vol. I, 2003, pp. 13-25.
- F. Mantovani: The general principles of international criminal law: The viewpoint of a national criminal lawyer, JICJ, vol. I, 2003, pp. 26-38.
- H.H. Jescheck: The general principles of international criminal law set out in Nuremberg, as mirrored in the ICC statute, JICJ, vol. 2, 2004, pp. 52 et ss.

(82) See as well: Ahmed Abou El-Wafa: The international protection of human rights, Dar Al-Nahda Al-Arabia, Cairo, 2005, p. 137.

J. Carter: The rule of law and the state of human rights, Harvard human rights journal, vol. 4, 1991, p. 1-10; B.G. Ramcharan: the principle of legality in international human rights institutions, M. Nijhoff publishers, the Hague, 1997, 393 pp; G. Christenson: World civil society and the international rule of law, human rights quarterly, vol. 19, 1997, p. 724-737. Article 3 statute of the council of Europe says: =

1- Content of the principle:

CIL aims at ensuring the *in concreto* application of the principle of the rule of law on the international plane⁽⁸³⁾. This means that a judge should decide a case “*Secundum legem*” and “*Secundum allegata et probata*”, not “*Contra legem*” or “*Praeter legem*”.

In this regard, article 11/2 of the Universal declaration of human rights stipulates:

«No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed».

Moreover, Article 99 of the third Geneva Convention (1949) states⁽⁸⁴⁾:

«No prisoner of war may be tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by International law in force at the time the said act was committed».

Additionally, international courts highlighted the importance of the principle of legality⁽⁸⁵⁾.

= “every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment of all persons within its jurisdiction of human rights and fundamental freedoms” Cf “Rules of procedure of the Assembly and statute of the Council of Europe”, Council of Europe, Strasbourg, 2002, p. 228.

(83) The *ratio legis* of CIL lies in the fact that there is no real application of the principle of the rule of law without prosecution and punishment, or there is no effective peace with impunity.

An author puts it in different terms, namely: “The quest for accountability rests on the premise that there can be no real peace without justice “L.N. Sadat: International criminal law and alternative modes of redress, in international criminal law and the current development of public international law, op. cit., p. 165.

(84) See as well, article 15 international covenant on civil and political rights (1966), articles 2/c, 6/c of the two Additional protocols (1977) to the Geneva Conventions of 1949.

(85) In 1897 an arbitral award affirmed:

«la souveraineté de l’Etat et l’indépendance de ses autorités judiciaires ou administratives ne sauraient prévaloir jusqu’à supprimer arbitrairement la sécurité légale qui doit être garantie tant aux étrangers qu’aux rgnicoles =

- = sur le territoire de tout pays civilisé» Cf, V. Coussirat-Coustère et P. Eisemann: *Répertoire de la jurisprudence arbitrale internationale*, Nijhoff, Dordrecht, vol. 1, 1989, p. 196-197.

In the Advisory Opinion on the Consistency of Certain Danzig Legislative decrees with the Constitution of the Free City, December 4, 1935, the PCIJ said:

«The Penal Code in force in Danzig prior to the promulgation of the decrees, in its Article 2, paragraph I, provided: “An act is only punishable if the penalty applicable to it was already prescribed by a law in force before the commission of the act.” This provision gives expression to the well-known two-fold maxim: *Nullum crimen sine lege*, and *Nulla poena sine lege*. The law alone determines and defines an offence. The law alone decrees the penalty. A penalty cannot be inflicted in a given case if it is not decreed by the law in respect of that case. A penalty decreed by the law for a particular case cannot be inflicted in another case. In other words, criminal laws may not be applied by analogy».

The court added:

«The problem of the repression of crime may be approached from two different standpoints, that of the individual and that of the community. From the former standpoint, the object is to protect the individual against the State: this object finds its expression in the maxim *Nulla poena sine lege*. From the second standpoint, the object is to protect the community against the criminal, the basic principle being the maxim *Nullum crimen sine poena*. The decrees of August 29th, 1935, are based on the second of these conceptions; the Danzig Constitution is based upon the former. For this Constitution takes as its starting-point the fundamental rights of the individual; these rights may indeed be restricted, as already pointed out, in the general public interest, but only in virtue of a law which must itself specify the conditions of such restriction, and, in particular, determine the limit beyond which an act can no longer be justified as an exercise of a fundamental liberty and becomes a punishable offense. It must be possible for the individual to know, beforehand, whether his acts are lawful or liable to punishment». (PCIJ, Ser. A/B, No. 65, pp. 514, 524 – 525). Moreover, the ILC highlighted that:

«It is to be observed that the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring States without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished. Occupying the positions they did in the government of Germany, the defendants, or at least some of them must have known of the treaties signed by Germany, outlawing recourse to war for the settlement of international disputes; they must have known that they were acting in defiance of all international law when in complete deliberation they carried out their designs of invasion and aggression. =

2- Effects of the principle:

The principle of legality entails some consequences, namely:

a- Impossibility to apply *ex post facto* criminal laws; this means that the later are non-retroactive, i.e., they have only an immediate application. Non-retroactivity of criminal texts is indispensable for the principle of legality.

b- A legal provision should not be too complex, too vague. It must be a *lex certa* (legal certainty)⁽⁸⁶⁾.

c- In the absence of a text, the person may not be prosecuted or convicted⁽⁸⁷⁾.

= On this view of the case alone, it would appear that the maxim has no application to the present facts.

As already stated, a considerable part of the findings consists of comments on the interpretation and application of Articles 6 to 8 of the Charter, which contain the substantive principles of international law of the Charter. The ideas expressed in the comments which have particular importance for the formulation of the principles of international law recognized by the Charter and the judgment, are mentioned in Part IV of the present report since they may serve as an analysis of the principles enumerated therein». YILC, 1950, II, p. 187-188.

(86) In fact, «To satisfy the principles of legality, a crime must be sufficiently defined to put people on notice that a particular conduct has been characterized as criminal. The principles of legality thus require a clear and unambiguous identification of the prohibited conduct. These principles are deemed part of fundamental justice because they protect against potential judicial abuse and arbitrary application of the law. But they also have policy content, in that they are believed to enhance deterrence and thus increase compliance, which prevents disruptions of public order. The same fundamental concerns for justice and the same policy considerations also apply to ICL». Ch. Bassiouni: Introduction to international criminal law, op. cit., p. 218.

(87) In 1950 a case arose involving charges of assault on board an aircraft owned by United States corporation which was at the time in flight over the high seas between San Juan, Puerto Rico and New York City.

The District Court for the Eastern District of New York noted that the assault had been proved beyond any doubt but went on to say that the statute condemning assault within the admiralty and maritime jurisdiction of the United States does not become operative unless the acts complained of (i) were committed on the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State or (ii) were committed within the =

d- In case of ambiguity, the text shall be interpreted in favor of the accused person. In this connection, article 22/2 statute of the ICC states that in case of ambiguity, the definition of a crime «shall be interpreted in favor be of the person being investigated, prosecuted or convicted».

= admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State on board a United States vessel. The Court concluded:

«The acts for which Cordova stands charged were vicious in the extreme. He jeopardized the lives of others on the plane, including a considerable number of infants. But it seems to me clear that those acts have not been denounced by a statute which forbids them when committed on board an American 'vessel', or when committed on the 'high seas'.

«The situation may call for correction. There has been for some years discussion by experts in the field of aeronautic law of how the problem can be solved. For example, the so-called de Wisscher Draft Convention of 1937 suggests that crimes of this character ought to be punishable under the laws of the state of which the victim is a national, or of which the accused is a national, or of the state where the airplane arrives, if, in the latter case, what was done affects its security interests. The British Air Navigation Act of 1920 provides that any offense committed on a British aircraft shall be deemed committed in any place where the offender may for the time be. It is my understanding that French criminal law applies to French aircraft in flight any place in the world. Air Nav. Law 1924, Title V, Art. 20. Italian law, I have been told, also applies to Italian planes in flight anywhere, although this may be merely a civil code.

«What I gather is there is little likelihood, if any, of an international agreement involving, as it necessarily would, difficult and delicate questions of sovereignty. However that may be, as the law now stands, acts like those committed by Cordova will go unpunished, unless the law of the domicile of the corporation can be considered to cover them.

«I therefore, find Cordova guilty of the acts charged. But I must arrest judgment of conviction since there is no federal jurisdiction to punish those acts.»

Following the decision in *United States v. Cordova*, the United States Code was amended by adding a new subsection (5), so that section 7 includes the following:

«The term 'special maritime and territorial jurisdiction of the United States', as used in this title, includes:

"(5) Any aircraft belonging in whole or in part to the United States, or any citizen thereof, or to any corporation created by or under the laws of the United States, or any State, Territory, district, or possession thereof, while such aircraft is in flight over the high seas, or over any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular". (Whiteman: Digest of international law, vol. 9, pp. 427-429).

e- The penal text must be strictly interpreted. In fact, penal texts «*sunt strictissimae interpretationis*».

f- Analogy is prohibited in penal matters. Accordingly, a text must not be extended by analogy.

g- In the event of a change in the law, prior to final judgment, the law more favorable or more lenient to the accused shall apply.

h- The rationale of the principle of legality lies in the principle of culpability. In fact, a potential criminal must know in advance what is required from him to do or not to do and whether a person in breach of the law will be punished or not. Accordingly, criminal texts should be fixed and knowable.

In conclusion, the principle *Nullum crimen nulla poena sine lege* is a *sine qua non conditio* for any criminal international justice⁽⁸⁸⁾.

B) The principle “*non bis in idem*” (Right not to be tried or punished twice):

A person may not be tried or punished for an act for which he has been finally convicted or acquitted by a national or an international court⁽⁸⁹⁾, i.e. the person may plead *autrefois acquit*, *autrefois convict*.

(88) In the *Prosecutor v. Tadic*, the test for determining whether a violation of humanitarian law is subject to prosecution and punishment is set out as follows: The following requirements must be met for an offence to be subject to prosecution before the international Tribunal under Article 3 [of the ICTY Statute];

(i) the violation must constitute an infringement of a rule of international humanitarian law;

(ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met;

(iii) the violation must be “serious”, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim [...];

(iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.

See as well,

M. Shahabuddeen: Does the principle of legality stand in the way of progressive development of law?, JICJ, vol. 2, 2004, pp. 1007-1017.

(89) See as well: Ch. Van den: The international non bis in idem principle: Resolving some of the unanswered questions, ICLQ, 1999, pp. 757-778; =

This principle is justifiable by reasons of justice, legal security and due respect for the authority and force of judgments. Moreover, it constitutes a mere application of the well established principle *cessante cause, cessat effectus or cessante ratione legis, cessat ejus dispositio* (the *raison d'être* of the law terminated, the law itself will not operate). Finally, it prevents revenge in international and domestic criminal justice.

In this regard protocol No. 7 of the European convention of human rights. States⁽⁹⁰⁾:

- «1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.
2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case,
3. No derogation from this Article shall be made under Article 15 of the Convention»⁽⁹¹⁾.

= D. Spinellis: the *ne bis in idem* principle in global instruments, IRPL, 2002, pp. 1149-1162; H. Bartsch: *Ne bis in idem*: the European perspective, *idem*, pp. 1163-1184; *idem*. 2001, pp. 753-764.

(90) See as well, article 14/7 of the international covenant on civil and political rights (1966).

(91) In its resolution "concurrent national and international criminal jurisdiction and the principle *ne bis in idem*", the XVIIth congress of penal law highlights:

«2. No person shall be tried before a national court for acts constituting serious violations of international law under the statute of an international court for which he or she has already been tried by an international court.

2.1 Due to the specialized jurisdiction of the international courts, "downwards" an *idem* has to be determined primarily on the basis of substantially the same facts, thus barring domestic prosecution if the conduct of the accused qualifies both as an ordinary crime and, according to the judgement, as a serious violation of international humanitarian law or international human rights law for which the defendant has already been convicted or, due solely to reasons other than the lack of jurisdiction of the international court, acquitted.

Nevertheless, a person who has been tried before a court may be subsequently tried and the case be reopened for the same conduct in the following circumstances:

* The discovery of a decisive fact, which was, when the first judgment was given unknown to the court and to parties to the case

* The act for which the person was tried was characterized as an ordinary crime, whereas it is as to its substance an international one⁽⁹²⁾.

* The proceedings in the other court were solely conducted for the purpose of shielding the person concerned from international criminal responsibility⁽⁹³⁾.

* The proceedings before the other court were not impartial or independent or the case was not diligently prosecuted or conducted in a manner manifestly inconsistent with an intent to bring the person concerned to justice⁽⁹⁴⁾.

* A person who has been finally acquitted or convicted by a national court may be tried by a national court of another state, if: (i) the act which was the subject of the previous judgment took place in the territory of that state; or (ii) the State was the main victim of the crime⁽⁹⁵⁾.

= 2.2 Sentences already imposed have to be taken into account.

3. "Upwards," the application of *ne bis in idem* should be guided by the principle that the special character of serious violations of international humanitarian law should receive full consideration and should not be disregarded as a result of domestic proceedings in which this character is not duly recognized.

4. Domestic jurisdictions should identify possible *ne bis in idem* conflicts in the vertical international concurrence and regulate them following the principles approved by this Resolution». IRPL, 2004, P. 806.

(92) Article 10/2/a statute of the ICTY.

(93) Article 20/3/a statute of the ICC; article 10/2/b statute of ICTY.

(94) Article 10/2/b statute of the ICTY; article 9/2 statute of the special court for Sierra Leone.

(95) Article 12 Draft code of crimes against the peace and security of mankind (1996), text in the work of the international law commission, UN, New York, 2004, vol. 1, p. 271. Paragraph 3 of the same article adds:

«In case of a subsequent conviction under the present code, the court, in passing sentence, shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served».

C) The principle of Non-applicability of Statutory limitations on certain international crimes⁽⁹⁶⁾ (French: Imprescriptibilité des crimes de guerre et des crimes contre l'humanité):

Prima facie, the application of a period of limitation may frustrate any effort to suppress the gravest international crimes. It prevents the prosecution and punishment of perpetrators of the later. This is a matter of serious concern to victims and world public opinion, since it prevents the prosecution and punishment of perpetrators of those crimes.

Since war crimes are among the gravest international crimes and because the application of period of limitation prevents the prosecution and punishment of criminals responsible for these crimes, it is now well established that "no statutory limitation shall apply to war crimes and crimes against humanity, irrespective of the date of their commission"⁽⁹⁷⁾.

(96) In Resolution 3 (XXI), the commission on human rights requested the Secretary-General of the UN to "undertake a study on the problems raised in international law by war crimes and crimes against humanity, and by priority a study of legal procedures to ensure that no period of limitation shall apply to such crimes". This led to the adoption, in 1968, of the convention on the non-applicability of statutory limitations to war crimes and crimes against humanity. Review of the multilateral treaty-making process, UN legislative series, ST/LEG/SER.B/21. UN, New York, 1985, p. 185.

(97) Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity (Res., 2391 adopted by the GA in 1968; European convention on the non-applicability of statutory limitations to war crimes and crimes against humanity, Council of Europe, Strasbourg, 1974; art. 29 statute of the international criminal court (1998). The former convention (i.e. that of 1968) states:

«The States Parties to the present Convention undertake to adopt, in accordance with their respective constitutional processes, any legislative or other measures necessary to ensure that statutory or other limitations shall not apply to the prosecution and punishment of the crimes referred to in articles I and II of this Convention».

Really, some domestic legislations have been adopted in order to prevent the application of statutory limitations on some international crimes:

- Thus the Jordanian penal military code No. 30 of 2002 provides that statutes of limitation do not apply to war crimes nor to punishments judged thereunder, off. J. No. 4551, 16/1/2002, p. 2728 et ss (in Arabic).

- Moreover, article 75 bis of the Swiss Penal Code stipulates: =

It is worth recalling that article 29 statute of the ICC provides:

«The crimes within the jurisdiction of the court shall not be subject to any statute of limitations».

Evidently, this text has broadened the scope of crimes, embodied in the 1968 convention, to which statutes of limitations are not applicable. For besides crimes of war and crimes against humanity⁽⁹⁸⁾, the jurisdiction of the ICC includes the crimes of genocide and aggression.

= «Imprescriptibilité: Sont imprescriptibles:

1. Les crimes tendant à exterminer ou à opprimer un groupe de population en raison de sa nationalité, de sa race, de sa confession ou de son appartenance ethnique, sociale ou politique ;
2. Les crime grave prévus par les Conventions de Genève du 12 août 1949 et par les autres accords internationaux concernant la protection des victimes de la guerre, auxquels la Suisse est partie, lorsque l'infraction considérée en l'espèce présente une gravité particulière à cause des conditions dans lesquelles elle a été commise ;
3. Les crime perpétrés en vue d'exercer une contrainte ou une extorsion et qui mettent en danger ou menacent de mettre en danger la vie et l'intégrité corporelle de personnes, notamment par l'utilisation de moyens d'extermination massifs, par le déclenchement d'une catastrophe ou par une prise d'otage.

Le juge peut atténuer librement la peine dans le cas où l'action pénale serait prescrite en application des articles 70 à 72».

Text in : National laws and regulations on the prevention and suppression of international terrorism, UN, New York, 2004, Part II (M-Z), p. 294.

- Finally, in France, crimes against humanity «sont imprescriptibles par leur nature» code de procédure pénale, Dalloz, 2005, p. 1809 (Loi No. 64-1326 du 26 decembre 1964).

(98) Domestic courts, as well, decided the non-applicability of statutory limitations on crimes against humanity. In this context, e.g., in the case of Klaus Barbie, the German head of the Gestapo in Lyon, the French Court of Cassation ruled that crimes against humanity were imprescriptible and could be prosecuted in France "whatever the date and place of their commission:

«Whereas, what constitutes crimes imprescriptible against humanity, within the sense of Article 6 (c) of the Charter of the International Military Tribunal of Nuremberg annexed to the London Accord of August 8, 1945 — even though they could also be characterised as war crimes according to Article 6(b) of the same text — are the inhumane acts and persecutions which, in the name of a State practising a hegemonic political ideology, have been committed in a systematic fashion, not only against persons because they belong to a racial =

It is worth recalling that for other serious international crimes, a long statute of limitations period may be set forth⁽⁹⁹⁾.

D) The principle of universality:

Before developing the principle of universality, it is necessary to mention that of territoriality.

1- Principle of territoriality:

The principle of territoriality means that a person who commits an offence on the territory of a state is prosecuted by the competent authorities of that state, i.e., is sentenced by the courts of the later in accordance with laws applicable in it, and serves his sentence there. Accordingly, under this principle the competent courts are those of the «*forum delicti commissi*»⁽¹⁰⁰⁾.

The state may as well exercise jurisdiction over things having its nationality (e.g., an aircraft, a vessel... etc.) or affecting its interests⁽¹⁰¹⁾.

=or religious group, but also against the adversaries of this [State] policy, whatever the form of their opposition».

Judgement of 20 December 1985, See: *Journal de droit international*, 1986, pp. 129-142, cited in L.S. Wexler, "The interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and back again", *Colombia Journal of International Law*, vol. 32, 1994, p. 342.

(99) Thus, UN convention against transnational organized crime (2000) provides that: «Each state party shall, where appropriate, establish under its domestic law a long statute of limitations period in which to commence proceedings for any offence covered by this convention and a longer period where the alleged offender has evaded the administration of justice».

(100) See, e.g., art. 4 of the 1972 biological weapons convention; art. 4 of the 1976 environmental modification techniques convention, art. 9 of the 1997 Ottawa convention see as well, «Punishing Violations of international humanitarian law on the national level – a guide for common law states», ICRC, Geneva, 2001, 199 pp.

(101) Thus, article 3 of the convention on offences and certain other acts committed on board aircraft (Tokyo, 1963) reads:

«1. The State of registration of the aircraft is competent to exercise jurisdiction over offences and acts committed on board.

2. Each Contracting State shall take such measures as may be necessary to establish its jurisdiction as the State of registration over offences committed on board aircraft registered in such State.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law».

=

2- Principle of universality:

Penal jurisdiction is, as mentioned above, generally territorial in character, universality principle is, accordingly, a leading exception thereto. In fact, nowadays, there are some crimes that are universally "prosecutable" and over which domestic state courts have international jurisdiction under any circumstances and irrespective of where they occur and of who carries them out. Universal jurisdiction, thus, applies regardless of the *locus delicti*. In other words, the principle means that the courts have the competence, e.g., to judge any war crime, any crime against humanity, regardless of:

- 1- the place of perpetration of the crime; and/or
- 2- the nationality of the perpetrator or the victim.

The rationale of the principle of universality lies in two arguments, namely:

a- Perpetrators of serious international crimes should no longer enjoy impunity and a peaceful existence, anywhere in the world, without the threat of prosecution. Accordingly, they must know that there is no safe haven for them. To put it differently, the principle of universality aims at preventing perpetrators of serious international crimes affecting the existence of the international community (e.g., war crimes, crimes against humanity) from remaining unpunished. Thus it leads to the cancellation of the impunity of criminals.

b- Accountability should be considered as a rule, non-accountability is the exception and only for legal reasons.

= Article 4 adds: A state which is not the State of registration may not interfere with an aircraft in flight in order to exercise its criminal jurisdiction over an offence committed on board except in the following cases:

- a) the offence has effect on the territory of such State;
- b) the offence has been committed by or against a national or permanent resident of such State;
- c) the offence is against the security of such State;
- d) the offence consists of a breach of any rules or regulations relating to the flight or manoeuvre of aircraft in force in such State;
- e) the exercise of jurisdiction is necessary to ensure the observance of any obligation of such State under a multilateral international agreement».

Consequently, universal jurisdiction has to be exercised not only by international courts, but also by national tribunals⁽¹⁰²⁾.

The principle of universality has two forms:

1- Mandatory, obligatory or compulsory universal jurisdiction, under which a state is obliged to assert universal jurisdiction. This occurs when a treaty so provides. As examples, one can mention grave breaches of IHL set forth by the Geneva conventions of 1949, and Additional protocol I, torture⁽¹⁰³⁾, hijacking, attacks on shipping

(102) 'In Belgium under the «Law on Universal Jurisdiction» (2003)" a foreigner may be tried in Belgium who, outside the later has committed a serious breach of international humanitarian law against a person who, at the time of the occurrence, is a Belgian national or a person whose actual place of normal and legal residence has been in Belgium for at least three years (art. 10/1/a).

Art. 12/a adds that Belgian courts are also authorized to take cognizance of breaches committed outside the territory of Belgium and stipulated in international treaty or customary law which is binding on Belgium, when that rule requires it, in whatever manner, to submit the matter to its competent authorities to take legal action.

Moreover, Swedish penal code applies to crimes such as hijacking, maritime or aircraft sabotage, airport sabotage, counterfeiting currency, an attempt to commit such crimes, a crime against international law, unlawful dealings with chemical weapons, unlawful dealings with mines or false or careless statement before an international court. (See text in Multilateral treaties deposited with the Secretary General, op. cit., vol. II, p. 142).

In the Netherlands, the International crimes Act 2003, restricts the application of universal jurisdiction to suspects who are present in the Netherlands «at the time of their arrest».

This means that investigative powers such like wiretapping, searches and interrogation of anonymous witnesses, are unavailable up until there are serious reasons to assume that a suspect is in fact present in the Netherlands. This Violates the obligation imposed by the four Geneva conventions to «search for» suspected war criminals which obligation is not limited to suspects who are suspected to be present in the territory of the contracting state concerned». M.B. Matthijssen and R. Elst: Key provisions of the International Crimes Act 2003, NYIL, 2004, p. 284.

However, it had been maintained:

«There is no rule of conventional international law to the effect that universal jurisdiction in absentia is prohibited» ICJ, Rep., 2002, diss. Op. V.D. Wyngaert, para. 54.

(103) See, e.g., S. Sivakumaran: Torture in international human rights and international humanitarian law: The actor and the ad hoc tribunals, Leiden J.I.L., vol. 18, 2005, pp. 541-556.

apartheid, attacks on UN and related personnel and hostage-taking⁽¹⁰⁴⁾.

2- Permissive, voluntary or optional universal jurisdiction according to which a state may, if it so decides, assert its jurisdiction over offences which are regarded subject to universal jurisdiction as a matter of customary international law. These include, e.g., slavery, piracy,etc.

In the final analysis, one can safely say that the universality principle is applicable to crimes whose repression by all states is required, as a matter of international *ordre public*⁽¹⁰⁵⁾. However, the principle has not been de facto implemented satisfactorily⁽¹⁰⁶⁾.

(104) See: Geneva conventions I-IV, Arts 49/50/129/146; PI, Art. 85(1); 1984 Torture Convention, Art. 5; Convention for the Suppression of Unlawful Seizure of Aircrafts (Hijacking), The Hague 1970, Art. 4 (2); Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Sabotage), Montreal 1971, Art. 5, as amended by the Protocol for the Suppression of Unlawful Acts of Violence at Airports serving International Civil Aviation, Montreal, 1988; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Rome 1988, Art. 6 (4); 1973 Apartheid Convention, Art. 5; Convention on the Safety of United Nations and Associated Personnel 1994, Arts 10 (4), 14; International Convention against the Taking of Hostages 1979, Art. 5 (2).

(105) An author points out that:
«exercised universal jurisdiction would be preferable to the absence of prosecutions». M. Morris: Atrocity and the dilemma of jurisdiction: The Yerodia decision of the ICJ, R. Egypt. D.I., 2002, p. 86.

(106) See as well:
- S. Lubet: International criminal law and the "Ice-Nine error": A discourse on the fallacy of universal solutions, Virginia J.I.L., vol. 28, 1988, pp. 963-984.
- «The extraterritorial jurisdiction of states», Ann. IDJ, vol. 69, 2001, pp. 87-118.
- M. Henzelin: Le principe de l'universalité en droit pénal international, Helbing & Lichtenhahn, Basel, 2001.
- M. Henzelin: La compétence pénale universelle, RGDI, 2002, pp. 819-845.
- V. Sharma: International crimes and universal jurisdiction, IJIL, 2002, pp. 139-155.
- Some articles on universality, in JICJ vol. 1, 2003, pp. 579-602.
- R. O'keffe: Universal jurisdiction: clarifying the basic concept, JICJ, vol. 2, 2004, pp. 735-760.
- N. Roht-Arriza: Universal jurisdiction: steps forward, steps back, Leiden J.I.L., vol. 17, 2004, pp. 375-389.
- Symposium «The scilingo case and its implications», JICJ, 2005, vol. 3, pp. 1074-1105.

E) The principle «*aut dedere aut judicare*»: Obligation to try or extradite:

We will refer, firstly, to the principle and, then to one of its leading aspects, i.e., extradition.

1- The principle:

Under the principle *aut dedere aut judicare*, a state has two choices, namely:

* either to extradite or hand over, to another state (that has an interest in instituting criminal proceedings) or to an international court, perpetrators of grave international crimes;

* or to prosecute and sentence them itself.

In this respect, art. 7 of the 1973 convention on prevention and punishment of crimes against internationally protected persons, including diplomatic agents, states:

«The state party in whose territory the alleged offender is present shall, if it does not extradite him, submit, without exception whatsoever and without undue delay, the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that state»⁽¹⁰⁷⁾.

(107) Article 10 of the convention for the suppression of unlawful acts against the safety of maritime navigation provides:

«1. The State Party in the territory of which the offender or the alleged offender is found shall, in cases to which Article 6 applies, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that States».

See, as well, the four Geneva conventions of 1949, articles 49, 50, 129, 146, respectively; Additional protocol I of 1977, article 85/1; art. 9 Draft code of crimes against the peace and security of mankind (1996).

In the resolution 1378, the security council said that all states had the duty to try or extradite those accused of international crimes, at least those who have committed terrorist acts.

See as well, P. Verri: *Dictionary of the international law of armed conflict*, ICRC, Geneva, 1992, p. 63.

Prima facie, this principle means that there is “no safe haven” for perpetrators of international crimes⁽¹⁰⁸⁾.

2- Extradition⁽¹⁰⁹⁾ of perpetrators of international crimes:

a- Conditions of extradition of criminals:

Extradition means the delivering up of a person by one state to another in accordance with a treaty, a domestic law or an international decision adopted in conformity with rules of international law. It concerns, evidently, the handing over of an alleged criminal or a convicted person who has not carried out his penalty, by one state to another.

To put it differently, extradition is a process by which a state (the requested state) extradite, upon request of another state (the requesting state), a person who is wanted in the requesting state for prosecution for an offence or for the imposition or enforcement of a sentence in respect of such an offence.

In principle, and unless provided or agreed otherwise, extradition is governed by the following rules:

- the act charged must be criminal under the law of the requested and requesting states (principle of double criminality).
- the person surrendered must be exclusively tried and punished for crimes for which extradition had been requested and

(108) In France, since 2004, the author of a political offense «qui n'est pas extradé peut être jugé d'après la loi française» B. Bouloc: Droit pénal général, Dalloz, Paris, 2005, p. 186.

(109) It is worth recalling that art. 102 Statute of the ICC distinguishes «surrender» from «extradition»: The former means «the delivering up of a person by a state to the court pursuant to this statute», whereas the latter means «the delivering up of a person by one state to another as provided by a treaty, convention or national legislation».

However, some states may use the term «surrender» to cover the two terms. For example article 16 para. 2 of the German constitution now provides that law may stipulate for the possibility of the surrender of German nationals to both member states of the European Union and international criminal tribunals, A. Zimmermann: Role and function of international criminal law in the international system after the entry into force of the Rome Statute of the international criminal court, GYIL, 2002, p. 53.

granted (principle of specialty). Accordingly, a person extradited shall not be prosecuted or sentenced for any offence other than that for which extradition has been granted or in respect of which the requested state has consented.

- the requesting state shall transmit, through diplomatic channels, the request of extradition, in writing with the supporting documents.

- the requested state must deal with the request pursuant to the provisions set forth in its domestic law or treaties in force.

- a state is bound to extradite a person if it is a party to a treaty, in force, providing so⁽¹¹⁰⁾. Otherwise, it shall incur international responsibility for having not executed an international obligation.

(110) See as well: Ahmed ABOU-EL-WAFA: A commentary on the case-law of the ICJ, R. Egyp. DI, 1992, p.182-185(in Arabic); I. Zanotti: Extradition in multilateral treaties and conventions, M. Nijhoff publishers, Leiden, 2006, 400 pp.

In this context, it should be recalled that:

"The Egyptian government has historically adopted cautious approach towards extradition agreements with other countries . The only extradition agreement concluded by Egypt was with the Sudan on 7 may 1902. A temporary agreement was also concluded with the government of Palestine in 1921 and with Iraq in 1931" Cf, Arab-Republic of Egypt national report, Ninth UN congress on the prevention of crime and the treatment of offenders, Cairo 1995, p 17. See also limitations and conditions of extradition of offenders in Egyptian law , in Ibid , p 18-24. However, the policy of the Egyptian Government is now to conclude agreements providing for the possibility of extraditing criminals.

As example of the above-mentioned agreements , one can mention that concluded with Lebanon . Under that agreement , there are three Kinds of extradition, namely:

A) obligatory extradition(article 25):extradition is mandatory if the following conditions are satisfied: 1- if the requested person is charged of a crime punishable for a period not less than one year, or convicted of prison for a period not less than two months; 2- if the crime was committed in the territory of the requesting state, or outside the two contracting states provided that their laws would have punished it if it had been committed therein;3- in any case, the crime should be punishable under the laws of the requesting and requested states.

B) Voluntary extradition (article 26): the requested state may refuse extradition: 1- If the requested person is a national; 2- if the offence occurred on the territory of the requesting state and the requested person is not one of its nationals and for acts not punishable under the law of =

- In the absence of a treaty, a state is under no obligation to extradite a person, and particularly its own nationals⁽¹¹¹⁾. However,

= the requested state; 3- if the offence was committed outside the territories of the two contracting states and is not punishable under the laws of the requested state and the requested person is not a national of the requesting state; 4- if the offence or punishment lapsed according to the laws of the requested state, unless the requested person is a national of the requesting state.

C) prohibited extradition (article 27): extradition is prohibited in the following cases: 1- if the offence is a political one; 2- if the offence was committed in the requested state; 3- if the requested person enjoys diplomatic immunity; 4- if the requested person is one of the officials charged with an official mission abroad and the crime occurred during or because of the exercise of that mission; 5- if the kinds of penalties set forth in the laws of the requesting state are not determined, as to their kinds, by the laws of the requested state; 6- if the requested person had been tried or is under trial or investigation; 7- if the offence or punishment lapsed according to the laws of the requesting state and those of the state on whose territory the offence occurred (Cf, Official Journal, 1999, p. 1276-1279).

(111) In a reservation relating to the international convention against the recruitment, use, financing and training of mercenaries, Belgium says: «No provision of the convention should be interpreted as implying, for Belgium, an obligation to extradite Belgian nationals». Multilateral treaties deposited with the Secretary General, op. cit., vol. II, p. 115. See, in the same sense, the declaration of Mozambique concerning the international convention for the suppression of the financing of terrorism (1999), in Ibid, p. 163.

Moreover, in a declaration related to the international convention for the suppression of terrorist bombings, Portugal declares that «the extradition of Portuguese nationals from its territory will be authorized only if the following conditions, as stated in the Constitution of the Portuguese Republic, are met:

- a) In case of terrorism and organized criminality; and
- b) For purposes of criminal proceedings and, being so, subject to a guarantee given by the state seeking the extradition that the concerned person will be surrendered to Portugal to serve the sentence or measure imposed on him or her, unless such person does not consent thereto by means of expressed declaration». Ibid, p. 132.

Finally, article VII of the resolution on «New problems of extradition» adopted by the IDI in 1983 states:

«While every state should in principle remain free to refuse the extradition of its nationals, it should in that event try the offence under its law, the extradition of nationals, on a reciprocal basis, may serve to reduce crime».

to refuse extradition, without making investigations and trying the suspect, would constitute an abuse of right⁽¹¹²⁾.

- The requesting state must have a strict interest in the extradition of the person concerned⁽¹¹³⁾.

b- No extradition for political crimes:

*** The exception:**

The extradition of offenders suffers an exception, i.e., the impossibility to extradite for political offenses⁽¹¹⁴⁾.

(112) Under the model treaty on extradition, adopted by the GA (Res. 45/116, 1990), mandatory grounds for refusal of extradition, include, inter alia, political offences, offences under military law which are not offences under ordinary criminal law, if the wanted person becomes immune from prosecution or punishment... etc.... Whereas optional grounds for refusal include, among other things, the case where the requested person is a national of the requested state or where a prosecution is pending against him in the requested state.

(113) Thus, under the 1949 Geneva Conventions each Contracting Party may, however, also "if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case». (Common Article 49, 50, 129, 146).
The requirement of a *prima facie* case «being made against the defendant by the requesting country is not only to protect individuals against excessive or unjustified requests, but also to ensure that penal proceedings as envisaged will not be frustrated or reduced in scope as a result of the transfer to another Contracting Party».
Commentary on the Additional protocols of 8 June 1977, ICRC, Geneva, 1987, p. 1027.

(114) Article 14 universal declaration of human rights provides that the right of asylum: «may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations».

Moreover, in a reservation concerning the international convention for the suppression of the financing of terrorism (1999), Belgium says:
«In exceptional circumstances, the Government of Belgium reserves the right to refuse extradition or mutual legal assistance in respect of any offence set forth in article 2 which it considers to be a political offence or as an offence connected with a political offence or as an offence inspired by political motives».

Multilateral treaties deposited with the Secretary General, op. cit., vol. II, p. 160.
Article 16 of the European convention on the suppression of terrorism, as amended by its protocol 2003 provides:

«1. Any State Party to the Convention on 15 may 2003 may, at the time of signature or when depositing its instrument of ratification, acceptance =

*** Exceptions to the exception:**

There are, nevertheless, some crimes which are not to be considered as political ones, for the purpose of extradition even when they are committed for political reasons. Accordingly, they constitute exceptions to the exception. Those crimes are the following:

- Genocide (article VII of the 1948 convention on Genocide).

- Crimes against peace, war crimes or crimes against humanity⁽¹¹⁵⁾. Thus, para. 7 of the principles of international cooperation in the detection, arrests, extradition and punishment of persons guilty of war crimes and crimes against humanity stipulates that:

«In accordance with article I of the Declaration on Territorial Asylum of 14 December 1967, States shall not grant asylum to any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime or a crime against humanity».

- Terrorist crimes⁽¹¹⁶⁾: Extradition aims at ensuring an effective suppression of crime. Particularly, it is an effective way of

= or approval of the Protocol amending the Convention, declare that it reserves the right to refuse extradition in respect of any offence mentioned in Article 1 which it considers to be a political offence, an offence connected with a political offence or an offence inspired by political motives. The Contracting State undertakes to apply this reservation on a case-by-case basis, through a duly reasoned decision and taking into due consideration, when evaluating the character of the offence, any particularly serious aspects of the offence, including:

- a. that it created a collective danger to the life, physical integrity or liberty of persons; or
- b. that it affected persons foreign to the motives behind it; or
- c. that cruel or vicious means have been used in the commission of the offence.

2. When applying paragraph 1 of this article, a Contracting State shall indicate the offences to which its reservation applies». International instruments related to the prevention and suppression of international terrorism, UN, New York, 2004, pp. 148-149.

(115) See as well article 1 of the declaration on Territorial asylum adopted by the General Assembly of the UN on December 14, 1967.

(116) In its 1983 resolution on «New problems of extradition», the Institute of international law affirmed that:

dealing with the serious aspects and consequences of crime in its new forms and manifestations (e.g., organized crime, terrorist and transboundary crimes).

States conclude at present more treaties stating the extradition of perpetrators of violent and terrorist crimes. The later are not considered as political crimes, even, as mentioned above, when they are committed for political reasons

It goes without saying that terrorism is in conflict with the principle of the "bodily integrity of persons" and the rule according to which "each people has an inherent right to the integrity of its members and their belongings"⁽¹¹⁷⁾. Terrorist acts have been activated worldwide *ad infinitum*, by internal or external stimuli⁽¹¹⁸⁾.

= «Acts of a particularly heinous character, such as acts of terrorism, should not be considered political crimes» (art. II, para. 3), See: Ann. IDI, 1983. Article 11 of the Inter-American convention against terrorism (2002) provides:

«For the purposes of extradition or mutual legal assistance, none of the offenses established in the international instruments listed in Article 2 shall be regarded as a political offense or an offense connected with a political offense or an offense inspired by political motives. Accordingly, a request for extradition or mutual legal assistance may not be refused on the sole ground that it concerns a political offense or an offense connected with a political offense or an offense inspired by political motives».

It is worth recalling that article 53 of the Egyptian constitution of 1971 states that: "the state shall grant the right of asylum to any foreign person prosecuted on account of his defense of the rights of peoples or of human rights, or for the cause of peace or justice. The extradition of political asylum seekers is prohibited" .

However, Egypt maintains that : "an important development in the legal meaning of a political offence was precipitated by the mounting tide of terrorist action . Violence and terrorism targeted international civil aviation *in particular*. As a result of the high incidence of hijacking, the capture of hostages and other such crimes, which result in virtual disasters, the 'international community decided to strip such crimes of the protection accorded to political offences , even if they be perpetrated for obvious political objectives. Egypt adopted this understanding, and joined several agreements for judicial cooperation in this area" (Cf, Arab Republic of Egypt national report, Ninth UN congress on the prevention of crime and the treatment of offenders, op. cit., p 19).

(117) Cf, Ahmed ABOU-EL-WAFA: A study of some aspects of the phenomenon of international terrorism, Journal of diplomatic studies, Institute of diplomatic studies , Ministry for Foreign Affairs , Riyadh, No.6, 1410A.H.- 1990 A.D., p. 89 (in Arabic).

(118) Ahmed Abou-El-Wafa: Public international law, op. cit., p. 353.

Acts of terrorism have existed *ab intiquo*. They have developed to the extent of constituting a severe menace to the life and safety of persons as well as the security of property .Such acts are increasing on an alarming scale⁽¹¹⁹⁾.

In conclusion, it is in the interest of states and the international community as a whole to prosecute or to extradite those persons who commit international crimes⁽¹²⁰⁾.

(119) Egypt's strategy to address violent crimes has been outlined as follows:

"1- Addressing the phenomenon of violence:

The policy adopted by the government... focuses on the improvement of conditions

of life to foster social stability. Social and housing projects , services to deprived and overcrowded areas are ongoing efforts. New housing agglomerations are replacing squatters, industrial centers are providing employment and alleviating overcrowdedness. Economic plans are envisaged to improve effective exercise of democracy in an environment of plurality are means adopted to relax tensions which generate political strife and violence in society .

Efforts of the Ministry of Interior to restrict the possession of weapons and to tighten security to deter drug smuggling are of paramount importance in the prevention of crime.

2- Addressing terrorism: Egypt's policy to address terrorist crime revolves around a number of axes. On the preventive axis, it strives to involve the population in detecting terrorist elements ,and on another axis mobilizes religious teachers to propagate sound religious doctrine . On the legislative axis, penalties for terrorist crimes have been stiffened ,and penitent terrorists are given a chance to repent. The security policy and international cooperation are effective factors in curbing terrorist crime" Cf, Arab Republic of Egypt national report. Ninth UN Congress on the prevention of crime and the treatment of offenders, op. cit., p 79.

(120) In this respect, Saudi Arabia Says:

«The Kingdom has not refused to extradite persons accused of committing terrorist acts, particularly since it is party to the Arab Convention for the Suppression of Terrorism, the Convention of the Organization of the Islamic Conference on Combating International Terrorism and the Arab Convention on Judicial Cooperation. It is also party to a number of bilateral agreements. However, it might refuse extradition if the case is under investigation, a judicial sentence has been rendered in respect of it or there is a conflict with the principle of sovereignty».

National laws and regulations on the prevention and suppression of international terrorism, op. cit., Part II (M-Z), p. 264.

Samoa, as well, points out:

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F) Principle of responsibility for the commission of international crimes:

This principle raises so many questions which may be grouped in four issues, namely: prefatory remarks, the *ratione materiae* and *ratione personae* aspects of the principle and, finally, defenses or justifications.

1- Prefatory remarks:

The question of responsibility is increasingly put on the international as well as domestic level, mainly because of the proliferation of international crimes.

Prima facie, imposing upon individuals, states and international organizations liability for acts, causing illegal injuries, attributed to them, will have some major consequences, namely:

1. It encourages each state and international organization to exercise greater control and supervision over its representatives, agents and officials and even simple individuals.
2. It incites every state and international organization to comply with principles and rules of international law.
3. It reduces disputes and conflicts on the international plane.
4. It affirms the rule under which illegal acts should not go unpunished.
5. It emphasizes the principle of the rule of law⁽¹²¹⁾.

= «In respect of providing assistance with criminal investigations or proceedings relating to the financing or supporting terrorist acts, the Extradition Act 1974 provides for the arrest and return of any person in Samoa who is accused of an extradition offence to an extradition country, or of any person who is alleged to be unlawfully at large after conviction of an extradition offence. The authorities in Samoa may arrest and return the offender should the act of terrorism be an "extradition offence" of the requesting State». Ibid, p. 262.

Finally, an author affirms:

«The United States has chosen to address the presence of war criminals within its borders through extradition or deportation» M. Wagner: U.S. Prosecution of past and future war criminals and criminals against humanity, Virginia J.I.L., vol. 29, 1989, p. 889.

(121) Ahmed Abou-El-Wafa: Public international law, op. cit., p. 664.

Accountability goes without saying. In fact, it is the antithesis of impunity. Accountability measures fall into three categories: truth, justice and redress. Accountability options include, inter alia, the following: International prosecutions, international and national investigatory commissions, national prosecution, national lustration mechanisms (i.e., removal of criminals from positions of authority or elective positions), national civil remedies, international mechanism for the compensation of victims ... etc)⁽¹²²⁾.

Prima facie, responsibility, falls on all those who individually or together have contributed to the commission of the crime.

In certain circumstances, the responsibility for the commission of an international crime, is double or multiple. For instance, war crimes may, under some conditions⁽¹²³⁾, entail the responsibility:

- Of the individual,
- Of the commander,
- Of the state (or of the international organization). However, the responsibility of a state or an international organization is usually limited to the obligation to compensate.

2- The *ratione materiae* aspect of responsibility: Acts of *in faciundo* and of *in non faciundo*:

This author said:

«il ne faut pas oublier que tout devoir (comme d'ailleurs tout droit) implique nécessairement la responsabilité des actions ou commissions qui le violent»⁽¹²⁴⁾.

Accordingly, responsibility may result either from acts or omissions, i.e. from acts of *in faciundo* or of *in non faciundo*⁽¹²⁵⁾:

(122) Ch. Bassiouni: The need for international accountability, in «National measures to repress violations of international humanitarian law, ICRC, Geneva, 2000, p. 42, 43-48.

(123) Vide infra.

(124) Ahmed Abou-El-Wafa: Le devoir de respecter le droit à la vie en droit international public, op. cit., p. 45. With regard to the *delicta commissiva* and the *delicta omissiva*, see: M.M. Awad: Studies in criminal international law, Revue Al-Quanoun wal-Iqtisad, March 1965, pp. 517-682 ; September 1965, pp. 847-972 (In Arabic), at pp. 855-866.

(125) Thus, in the Corfu Channel case, the ICJ affirmed that: =

(a) **Liability for commission:** This goes without saying. In fact, a person who commits, participates, assists or aids in the commission of the act is responsible for his own acts.

(b) **Liability for omissions:** States, international organizations and individuals are duty bound to carry out without delay the obligations incumbent upon them under international law. In certain cases a passive act or a failure to act may entail the liability of the person concerned. In this regard, art. 86 para. 1 of Additional Protocol I (1977) provides that states are under an obligation to suppress grave breaches and all other breaches of the 1949 four Geneva conventions and the Protocol, which:

«result from a failure to act when under a duty to do so»⁽¹²⁶⁾.

= «In fact, nothing was attempted by the Albanian authorities to prevent the disaster. These grave omissions involve the international responsibility of Albania».

Accordingly, the court added that:

«There is a duty on Albania to pay compensation to the United Kingdom», ICJ, Rep., 1949, p. 23.

Moreover, the ICJ held Iran responsible for breaches of the law of diplomatic and consular relations, because of the failure of Iranian authorities to control the militants (in the early phase) and the approval of the acts of militants (in the later phase), cf, ICJ, Rep., 1980, p. 29-30, 33-36.

(126) In the commentary of the above-mentioned text, it had been maintained: «Yet, responsibility for a breach consisting of a failure to act can only be established if the person failed to act when he had a duty to do so. The text of this paragraph should certainly be understood in this way since it prescribes Contracting Parties or Parties to the conflict to deal with any "failure to act when under a duty to do so". This concept includes lack of due diligence having regard to the circumstances and amounting to a violation of the requirements indicated above. This concept of a "duty to act" raises the complex problem of the attribution of powers and duties which is not a matter of international law but is governed by the national law of the Parties to the Protocol. However, once national law has attributed powers and duties, the duty resulting therefrom with regard to international humanitarian law has to be interpreted in the light of treaty instruments. In other words, the national law of a State establishes the powers and duties of civilian or military representatives of that State, but international law lays down the way in which they may be exercised within the area governed by it. In the provision under consideration here the Contracting Parties and the Parties to the conflict undertake to ensure that this will indeed occur and that the powers and duties that have been =

Accordingly, with regard to international crimes, there are certain circumstances in which an *actus reus* may result from an omission to act.

One can mention, e.g., the following examples:

* Responsibility of superiors who do not take all feasible measures within their power to prevent or repress the breach committed by a subordinate (e.g., article 86 Additional Protocol I of 1977).

* Unjustified delay in the release or repatriation of prisoners of war after the cessation of hostilities (article 118 of the third Geneva convention of 1949; article 85/4/b Additional Protocol I of 1977).

* The willful killing by deprivation of food, water or sanitary care.

* In the Nicaragua Case, the ICJ said that the United States of America, by failing to make known the existence and location of the mines laid by it «has acted in breach of its obligations under customary international law in this respect»⁽¹²⁷⁾.

= attributed will actually be exercised in accordance with the requirements imposed by treaty rules.

3538 As regards the measures of application to be taken to prevent or repress breaches resulting from a failure to act when there is a duty to do so, the Protocol adopts a solution similar to that laid down by the Conventions in cases where a breach is caused by an act committed or ordered to be committed. It distinguishes breaches from grave breaches. Grave breaches must be repressed, which implies the obligation to enact legislation laying down effective penal sanctions for perpetrators of such breaches. According to Article 85 (Repression of breaches of this Protocol), paragraph 1, the provisions of the Conventions also apply to grave breaches of the Protocol. On the other hand, the text of the present paragraph is silent on the other requirements of the Conventions, the application of which ensues from the same Article 85 (Repression of breaches of this Protocol), i.e., the search for the perpetrators, regardless of their nationality, and the obligation either to bring them before the courts of the Detaining Power or to hand them over to another contracting Party concerned in order that it may try them. It is self-evident, when a Detaining Power tries a prisoner belonging to the adverse Party, that the "duty to act" of the accused must be interpreted in the light of the powers and duties attributed to him under his own national legislation». Commentary on the Additional Protocols of 8 June 1977, ICRC, Geneva, 1987, p. 1010.

(127) ICJ, Reports, 1986, para. 292/8.

* In the case concerning armed activities on the territory of Congo, the ICJ held as well Uganda responsible for not taking «adequate measures to ensure that its armed forces did not engage in looting, plundering and exploitation of DRC's natural resources»⁽¹²⁸⁾.

3- The *ratione personae* aspect of responsibility: The persons.

The *ratione personae* aspect of criminal responsibility concerns the individual's criminal responsibility, responsibility of superiors, responsibility of the state, responsibility of an international organization, criminal responsibility of minors and criminal responsibility of non-state actors.

a- The individual as responsible for international criminal acts (principle of criminal individual responsibility):

It is no longer valid that only states are considered as the exclusive perpetrators of breaches of CIL. Individuals are as well responsible for international criminal acts.

As the Nuremberg Tribunal put it:

«Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced»⁽¹²⁹⁾.

Moreover, art. 4 of the Genocide Convention of 1948 says that genocide is punishable irrespective of whether those committing it:

«are constitutionally responsible rulers, public officials or private individuals».

Accordingly, one can affirm that individual criminal responsibility⁽¹³⁰⁾ is not an empty concept. In fact, a person who commits an international crime, orders, incites, solicits, attempts or, in any way, contributes to its commission shall be individually responsible and liable for punishment.

(128) ICJ, Rep., 2005, para. 246 (Vide infra).

(129) Nazy conspiracy and aggression, Judgment of the IMT, 1947, p. 66.

(130) See as well:

- E. Greppi: The evolution of individual criminal responsibility under international law, IRRC, 1999, No. 835, p. 531-553.

- J.L. Flores: Repression of breaches of the law of war committed by individuals, IRRC, 1991, pp. 247-293.

In prosecutor V. Akeyesu, the trial chamber said that it did not suffice to cite common article 3 Geneva Conventions 1949, article 4 Additional protocol (2) of 1977 and article 6 Statute ICTR, it must also «be shown that an individual committing serious violations of these customary norms incurs, as a matter of custom, individual criminal responsibility thereby. Otherwise, it might be argued that these instruments only state norms applicable to states and parties to a conflict, and that they do not create crimes for which individuals may be tried»⁽¹³¹⁾.

The principle of individual criminal responsibility is now considered as a general principle of law in the meaning of article 38 statute of the ICJ. It is as well established in the practice of states «as a norm of customary international law»⁽¹³²⁾.

The international criminal responsibility of individuals must be reinforced, due to the gravity of crimes committed and in order to reduce their number.

Criminal liability may be imposed upon:

- * The direct perpetrator of the crime, i.e., the principal.
- * The persons who have counselled, aided or abetted the commission of the crime, i.e., the secondary parties (the accomplices or accessories)⁽¹³³⁾. In other words, for international

(131) ICTR-96-4-T, 1-2 Sept. 1998, para. 611.

(132) Henckaerts and Doswaldbeck: Customary international humanitarian law, ICRC-Cambridge, 2005, vol. I, p. 551.

(133) In Sivakumar V. Canada, the court said:

«It is clear that if someone personally commits physical acts that amount to a war crime or a crime against humanity, that person is responsible. However, it is also possible to be liable for such crimes "to "commit" them" as an accomplice, even though one has not personally done the acts amounting to the crime [...] the starting point for complicity in an international crime was "personal and knowing participation».

This is essentially a factual question that can be answered only on a case-by-case basis, but certain general principles are accepted. It is evident that mere by-standers or on-lookers are not accomplices. [...]

However, a person who aids in or encourages the commission of a crime, or a person who willingly stands guard while it is being committed, is usually responsible. Again, this will depend on the facts in each case. [...] Moreover, those involved in planning or conspiring to commit a crime, even though not personally present at the scene, might also be =

crimes, criminal responsibility shall be extended to persons other than those who directly commit or order the commission of the crime, e.g., those who aid, attempt, participate or assist in the commission of the act⁽¹³⁴⁾.

= accomplices, depending on the facts of the case. Additionally, a commander may be responsible for international crimes committed by those under his command, only if there is knowledge or reason to know about them. [...]

Another type of complicity, particularly relevant to this case is complicity through association. In other words, individuals may be rendered responsible for the acts of others because of their close association with the principal actors. This is not a case merely of being "known by the company one keeps." Nor is it a case of mere membership in an organization making one responsible for all the international crimes that organization commits (). Neither of these by themselves is normally enough, unless the particular goal of the organization is the commission of international crimes. It should be noted, however, as MacGuigan J.A. observed "someone who is an associate of the principal offenders can never, in my view be said to be a mere on-looker. Members of a participating group may be rightly considered to be personal and knowing participants, depending on the facts» [...]

In my view, the case for an individual's complicity in international crimes committed by his or her organization is stronger if the individual member in question holds a position of importance within the organization. Bearing in mind that each case must be decided on its facts, the closer one is to being a leader rather than an ordinary member, the more likely it is that an inference will be drawn that one knew of the crime and shared the organization's purpose in committing that crime. Thus, remaining in an organization in a leadership position with knowledge that the organization was responsible for crimes against humanity may constitute complicity». Cf. text in M. Sassoli *et al.*: How does law protect in war, ICRC, Geneva, 2006, vol. II, pp. 1687-1688.

(134) In this connection, art. 25 statute of the ICC provides that the following persons assume criminal responsibility:

Article 25, Individual criminal responsibility.

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.

2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.

3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

=

- =
- (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
 - (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
 - (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
 - (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
 - (ii) Be made in the knowledge of the intention of the group to commit the crime;
 - (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;
 - (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.
4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.
- See as well: art. 7 ICTY, art. 6 ICTR and art. 6 statute of the special court for Sierra Leone.
- Furthermore, the ILC's 1996 Draft Code of Crimes Against the Peace and Security of Mankind provides in Article 2:
1. A crime against the peace and security of mankind entails individual responsibility.
 2. An individual shall be responsible for the crime of aggression in accordance with article 16.
 3. An individual shall be responsible for a crime set out in article 17, 18, 19 or 20 if that individual:
 - (a) intentionally commits such a crime;
 - (b) orders the commission of such a crime which in fact occurs or is attempted;
 - (c) fails to prevent or repress the commission of such a crime in the circumstances set out in article 6;
 - (d) knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime, including providing the means for its commission;
 - (e) directly participates in planning or conspiring to commit such a crime which in fact occurs;
- =

This means that, in case the person has not taken any action in connection with the crime, e.g., he is the "object" of the later, he will not be held responsible⁽¹³⁵⁾.

= (f) directly and publicly incites another individual to commit such a crime which in fact occurs;

(g) attempts to commit such a crime by taking action commencing the execution of a crime which does not in fact occur because of circumstances independent of his intentions.

In Tadic case the trial chamber of the ICTY highlighted the meaning of complicity and participation of an international crime, as follows:

«689. The Trial Chamber finds that aiding and abetting includes all acts of assistance by words or acts that lend encouragement or support, as long as the requisite intent is present. Under this theory, presence alone is not sufficient if it is an ignorant or unwilling presence. However, if the presence can be shown or inferred, by circumstantial or other evidence, to be knowing and to have a direct and substantial effect on the commission of the illegal act, then it is sufficient on which to base a finding of participation and the criminal culpability that accompanies it.

690. Moreover, when an accused is present and participates in the beating of one person and remains with the group when it moves on to beat another person, his presence would have an encouraging effect, even if he does not physically take part in this second beating, and he should be viewed as participating in this second beating as well. This is assuming that the accused has not actively withdrawn from the group or spoken out against the conduct of the group.

691. However, actual physical presence when the crime is committed is not necessary; just as with the defendants who only drove victims to the woods to be killed, an accused can be considered to have participated in the commission of a crime based on the precedent of the Nurmberg war crimes trials if he is found to be "concerned with the killing". However, the acts of the accused must be direct and substantial.

692. In sum, the accused will be found criminally culpable for any conduct where it is determined that he knowingly participated in the commission of an offence that violates international humanitarian law and his participation directly and substantially affected the commission of that offence through supporting the actual commission before, during, or after the incident. He will also be responsible for all that naturally results from the commission of the act in question.» (Tadic case, Paragraphs 689-692).

(135) It suffices to cite, e.g., art.5 Protocol against the smuggling of migrants by land, sea and air annexed to UN convention against transnational organized crime (2000), which provides: «Migrants shall not become liable to criminal prosecution under this Protocol, for the fact of having been the object of conduct set forth in article 6 of this Protocol» (art. 6 deals with criminalization).

Accordingly, individual responsibility may result from «participation in a joint criminal enterprise» or a «common purpose liability» to commit a crime⁽¹³⁶⁾.

It is worth recalling that individuals assume individual criminal responsibility for acts or omissions committed during an international or non-international armed conflict⁽¹³⁷⁾.

b- Criminal responsibility of superiors for acts committed by their subordinates⁽¹³⁸⁾:

Superiors may be held responsible for acts or omissions of

(136) See especially Tadic Appeal Judgement, paras. 185-229; Prosecutor V. Radoslaw Brdanin and M. Talic, case No. IT-99-36-PT, 26 June 2001 (the "Talic decision"); The Krstic decision, case No. IT-98-33-T, 2 August 2001, Para. 601. Thus, in Tadic case, the ICTY affirmed that co-perpetrators of international crimes are responsible if it was foreseeable that they might be committed and the accused willingly took that risk (see as well M. Sassoli and L. Olson. The judgement of the ICTY appeals chamber on the merits in the Tadic case, IRRIC, No. 839, 2000, pp. 5 et ss).

(137) In the Tadic case (Jurisdiction), the ICTY affirmed the individual criminal responsibility in internal armed conflicts (case No.: IT-94-1-AR 72, October 2, 1995, paras. 128-136). The ICTR uphold the same position in J.P. Akayesu case, case No. ICTR-96-4-T, September 2, 1998, paras. 611-617. This has been as well provided in the Amended Protocol II to the Convention on Certain Conventional Weapons (art. 14), the Statute of the ICC (art. 8, 25), the Second Protocol to the Hague Convention for the protection of Cultural property, (articles 15, 22), the Ottawa Convention banning anti-personnel landmines (art. 9) and the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (art. 4).

(138) Vicarious liability means «the legal responsibility of one person for the wrongful acts of another as, for example, when the acts are done within the scope of employment» L.B. Curzon: Criminal law, ME, London, 1994, p. 57.

See as well:

- H. McCoubery: From Nuremberg to Rome: Restoring the defence of superior orders, ICL Q, 2001, pp. 386-393.

- N. Zakr: la responsabilité du supérieur hiérarchique devant les tribunaux pénaux internationaux, R. Internationale de droit pénal, 2002, pp. 59-80.

- T. Henquet : Convictions for command responsibility under articles 7/1 and 7/3 of the Statute of the ICTY, Leiden J.I.L., vol. 15, 2002, pp. 805-834.

- N. Reid: Bridging the conceptual chasm: Superior responsibility as the missing link between state and individual responsibility under international law, Leiden J.I.L., vol. 18, 2005, pp. 795-828.

- A Sow: La responsabilité pénale internationale du supérieur hiérarchique dans la jurisprudence du Tribunal pénal international pour le Rwanda, Revue de DI de sciences diplomatiques et politiques, 2005, pp. 209-230.

their subordinates. International instruments provide this kind of responsibility, particularly in two cases:

*** Responsibility for violation of human rights and fundamental freedoms:**

In fact, superiors are responsible, in certain circumstances, for crimes of their subordinates which constitute breaches of human rights and fundamental freedoms⁽¹³⁹⁾.

In this connection, para. 19 of the principles on the effective prevention and investigation of extra-legal, arbitrary and summary executions⁽¹⁴⁰⁾ stipulates:

«Superiors, officers or other public officials may be held responsible for acts committed by officials under their authority if they had a reasonable opportunity to prevent such acts. In no circumstances, including a state of war, siege or other public emergency, shall blanket immunity from prosecution be granted to any person allegedly involved in extra-legal, arbitrary or summary executions».

Moreover, para. 26 of the basic principles on the use of force and firearms by law enforcement officials provides⁽¹⁴¹⁾:

«Obedience to superior orders shall be no defense In any case, responsibility rests on the superiors who gave the unlawful orders».

*** Responsibility of commanders for war crimes committed by their subordinates⁽¹⁴²⁾:**

Military commanders, whatever their rank, are wholly responsible for ensuring that members of their units do not violate rules of the law of armed conflict. In fact in armed forces, the

(139) Ahmed Abou-El-Wafa: *The international protection of human rights*, op. cit., p. 165 (in Arabic).

(140) Recommended by Ecosoc Res. 1989/65 of 24 May 1989.

(141) Adopted by the 8th UN congress on the prevention of crime and the treatment of offenders, Havana – Cuba (1990).

(142) The German code of crimes against international law (26 June 2002) provides that a military commander or a civil superior who omits immediately to report a crime «shall be punished with imprisonment for not more than five years».

command is responsible for the conduct of his subordinates⁽¹⁴³⁾. This constitutes now «a norm of customary international law»⁽¹⁴⁴⁾, which has been, as well, provided by international instruments⁽¹⁴⁵⁾.

(143) Thus, article 1 of the 1907 Hague regulations provides that armed forces must «be commanded by a person responsible for his subordinates». Article 43 of the Additional Protocol I (1977) states that armed forces must be placed «under a command responsible ... for the conduct of its subordinates». Article 87 of the same Protocol says:

«1- The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol.

2. In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol.

3. The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or their Protocol, and where appropriate, to initiate disciplinary or penal actions against violators thereof».

(144) Henckaerts and Doswaldbeck: Customary international humanitarian law, op. cit., vol. 1, p. 556 et ss.

(145) Article 86, paragraph 2 of protocol I (1977) provides:

«The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled him to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.

Article 11 of the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity States:

If any of the crimes mentioned in article 1 is committed [i.e., "war crimes" and "crimes against humanity"], the provisions of this Convention shall apply to representatives of the State authority and private individuals who, as principals or accomplices, participate in or who directly incite others to the commission of any of those crimes, or who conspire to commit them, irrespective of the degree of completion, and to representatives of the State authority who tolerate their commission». See as well article 7 ICTY; article 6 of the draft code of crimes against the peace and security of mankind (1996). Moreover, art. 28 statute of the ICC provides: =

Superiors are held responsible for war crimes committed by their subordinates, particularly, in two cases:

- in case they have ordered to commit a war crime (even if the order had not had any effect)⁽¹⁴⁶⁾; and

- in case they have not prevented a war crime their subordinates planned to commit, were going to commit or were committing, whereas they had the necessary information, and means to prevent those actions, i.e., they failed to take all necessary and reasonable measures to prevent or repress their commission⁽¹⁴⁷⁾.

= «(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) That military commander or person 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 for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and

The superior 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 for investigation and prosecution».

(146) article 136 (F) Belgium law on Universal Jurisdiction (2003) provides that the sentence stipulated for a breach that has been committed shall be applied to «orders, even if they are without effect, to commit one of the breaches stipulated in articles 136 (a), 136 (b) and 136 (c)».

(147) It is well known that:

«The recognition of the responsibility of superiors who, without any excuse, fail to prevent their subordinates from committing breaches of the law of armed conflict is therefore by no means new in treaty law» commentary on the Additional Protocol of 8 June 1977, op. cit., p. 1011.=

This means that the commander is held responsible for war

= With regard to article 7/3 ICTY which provides:

«The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof», the case law, of the court is that the following three conditions must be met:

- The existence of a superior-subordinate relationship;
- The superior knew or had reason to know that the criminal act was about to be or had been committed; and
- The superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.

The ICTY says:

«The facts pertaining to the commission of a crime may establish that the requirements for criminal responsibility under both Article 7(1) and Article 7(3) are met. However, the Trial Chamber adheres to the belief that where a commander participates in the commission of a crime through his subordinates, by "planning", "instigating" or "ordering" the commission of the crime, any responsibility under Article 7(3) is subsumed under Article 7(1). The same applies to the commander who incurs criminal responsibility under the joint criminal enterprise doctrine through the physical acts of his subordinates».

Case No.: IT-98-33-T, August 2, 2001, p. 214-215; (Krstic case), para. 605. The above mentioned three conditions are developed as well in «commentary of the Additional Protocols of 8 June 1977», op. cit., pp. 1012-1013.

Another notorious case of command responsibility is that of the Japanese General Yamashita who has been accused, during II world war, of having «unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against people of the United States and its allies and dependencies, particularly, the Philippines; and he, General Tomoyuki Yamashita, thereby violated the law of war».

See more details about that case, in Ch. Bassiouni: Introduction to international criminal law, op. cit., pp. 298-307.

It is worth recalling that in practice and in the case-law of international criminal tribunals, the responsibility of a commander for crimes of his subordinates includes five aspects, namely: 1- civilian command authority; 2- commander/subordinate relationship; 3- the commander/superior know, or had reason to know; 4- investigation and reporting; 5- necessary and reasonable measures, cf Henckaerts and Doswaldbeck: customary international humanitarian law, op. cit., vol. 1, pp. 561-563.

crimes of his subordinate⁽¹⁴⁸⁾, in case the execution takes place with his express or tacit consent, or if he «know or had reason to know»⁽¹⁴⁹⁾ that such crimes would be committed.

(148) See as well para. 5 «crimes against humanity and war crimes Act» (Canada, 2000).

(149) In prosecutor V. Stugar, the Appeals Chamber of the ICTY said:

«In the Chamber's assessment of what was known to the Accused at or before the commencement of the attack on Srdj, there has been shown to be a real and obvious prospect, a clear possibility, that in the heat and emotion of the attack on Srdj, the artillery under his command might well get out of hand once again and commit offences of the type charged. It has not been established, however, that the Accused had reason to know that this would occur. This is not shown to be a case, for example, where the Accused had information that before the attack his forces planned or intended to shell the Old Town unlawfully, or the like. It is not apparent that additional investigation before the attack could have put the Accused in any better position. Hence, the factual circumstances known to the Accused at the time are such that the issue of "reason to know" calls for a finely balanced assessment by the Chamber. In the final analysis, and giving due weight to the standard of proof required, the Chamber is not persuaded that it has been established that the Accused had reasonable grounds to suspect, before the attack on Srdj, that his forces were about to commit offences such as those charged. Rather, he knew only of a risk of them getting out of hand and offending in this way, a risk that was not slight or remote, but nevertheless, in the Chamber's assessment, is not shown to have been so strong as to give rise, in the circumstances, to knowledge that his forces were about to commit an offence, as that notion is understood in the jurisprudence. It has not been established, therefore, that, before the commencement of the attack on Srdj, the Accused knew or had reason to know that during the attack his forces would shell the Old Town in a manner constituting an offence»

«61 «The Appeals Chamber notes that the Trial Chamber concluded that: if a commander has exercised due diligence in the fulfillment of his duties yet lacks knowledge that crimes are about to be or have been committed, such lack of knowledge cannot be held against him. However, taking into account his particular position of command and the circumstances prevailing at the time, such ignorance cannot be a defence where the absence of knowledge is the result of negligence in the discharge of his duties; this commander had reason to know within the meaning of the Statute.

At another place in the Trial Judgement, the Trial Chamber "holds, again in the words of the Commentary, that "[t]heir role obliges them to be constantly informed of the way in which their subordinates carry out the tasks entrusted them, and to take the necessary measures for this purpose." One of the duties of a commander is therefore to be informed of the behavior of his subordinates.

Prima facie the responsibility of commanders is to be decided *ratione temporis* at the time of the commission of the act or omission, not, *a posteriori*, i.e., in light of subsequent information⁽¹⁵⁰⁾.

C- Responsibility of a state for international crimes:

This topic presupposes that we deal with three points, namely: The concept of international responsibility of a state, the criminal responsibility of a state, and its forms.

= 62. The Appeals Chamber considers that the Celebici Appeal Judgement has settled the issue of the interpretation of the standard of "had reason to know." In that judgement, the Appeals Chamber stated that "a superior will be criminally responsible through the principles of superior responsibility only if information was available to him which would have put him on notice of offences committed by subordinates." Further, the Appeals Chamber stated that "[n]eglect of a duty to acquire such knowledge, however, does not feature in the provision (Article 7(3) (as a separate offence, and a superior is not therefore liable under the provision for such failures but only for failing to take necessary and reasonable measures to prevent or to punish." There is no reason for the Appeals Chamber to depart from that position. The Trial Judgement's interpretation of the standard is not consistent with the jurisprudence of the Appeals Chamber in this regard and must be corrected accordingly.

As to the argument of the Appellant that the Trial Chamber based command responsibility on a theory of negligence, the Appeals Chamber recalls that the ICTR Appeals Chamber has on a previous occasion rejected criminal negligence as a basis of liability in the context of command responsibility, and that it stated that "it would be both unnecessary and unfair to hold an accused responsible under a head of responsibility which has not clearly been defined in international criminal law." It expressed that "[r]eferences to 'negligence' in the context of superior responsibility are likely to lead to confusion of thought...». The Appeals Chamber expressly endorses this view». Case No. IT-95-14-A, 29 July 2004, paras. 61-63.

(150) In this regard, Canada declares with regard to the Geneva convention on prohibition or restriction on the use of certain conventional weapons which may be deemed to be excessively injurious or to have indiscriminate effects (1980), that:

«The compliance of commanders and others responsible for planning, deciding upon or executing attacks to which the convention and its protocols apply cannot be judged on the basis of information which subsequently come to light but must be assessed on the basis of information available to them at the time that such actions were taken» (Multilateral treaties deposited with the secretary general, UN, New York, 2005, vol. II., p. 392; in the same sense see the position of Israel (p. 394) and United Kingdom (p. 395).

***Concept of international responsibility of a state:**

The concept of international responsibility of a state raises five points, namely:

- Some general remarks:

A- A state may formulate a claim against another state in the following cases:

a- if its rights have been violated by that state.

b- if the rights of one of its nationals abroad have been disregarded by that state and he has not been able to obtain satisfaction through ordinary channels.

c- if the rights of a third state have been violated and the later has entrusted it with the defense of these rights, because it cannot directly defend them (e.g., if it has broken off diplomatic relations or is in a state of war with the state which has violated these rights).

In the first two cases, the state acts on its own behalf, whereas in the last one, it acts as an agent of the third state (through agency or representation).

B- The injured state should give notice of its claim to the responsible state. In fact, some consequences result from not giving a notice over a long period of time, e.g., the injured state may be considered as having waived the claim. In fact, undue or unreasonable delay is a ground for the loss of the right to invoke international responsibility.

C- Joint and several (Solidary) responsibility: Several states may be responsible "*in solidum*" at the same time for the same act causing the same damage. Each of these states had to repair the damage done as a whole, and it can then turn against the other responsible states⁽¹⁵¹⁾.

- Elements of international responsibility:

Since states have capacities and functions of their own, it is normal to impute responsibility to them for damage resulting therefrom. International responsibility results from the breach of an

(151) See as well:

Report of ILC, 2000, op. cit., p.136; Ahmed ABOU-EL-WAFA: A commentary on the case law of the ICJ, R. Egypt, D.I., 1993 (in Arabic).

international obligation. It may be incurred from internationally wrongful acts and from injurious consequences arising out of certain acts not prohibited by international law.

In other words, there are, in this regard, two theories, namely:

* The theory of "fault" or of "subjective responsibility", according to which, to become liable for any injury caused, an intentional (*dolus*) or negligent (*culpa*) conduct must be attributed to the state.

* The theory of "risk" or of "objective responsibility", under which a state is liable for any damage suffered by another state, notwithstanding the *mala fides* or *bona fides* of the wrongdoing state.

- **International responsibility arising from internationally wrongful acts:**

Evidently, every internationally wrongful act entails the international responsibility of the wrongdoer.

There are two elements which determine the existence of an internationally wrongful act, namely:

a- A conduct consisting of an action or omission which is attributable to the international person concerned. This is the determining factor of responsibility. To put it differently, international responsibility arises when the act or omission is imputable to a state. Imputability is, on its face, a fundamental notion in the concept of state responsibility. In general, a sufficient causal link between the conduct and the harm should exist: the chain of causality (or transitivity) must be direct and uninterrupted. One cannot condemn states on the basis of probabilities or uncertainties: clear, conclusive, decisive and undisputed facts or acts must be proved.

A state is only responsible for its own acts or those of its agents or organs (principle of individual responsibility of states). The conduct of an agent or an organ, acting in its official capacity, is considered an act of the state⁽¹⁵²⁾.

(152) In many occasions, the ICJ referred to imputability as a *conditio sine qua non* of international responsibility.

Thus, the court said:

1- Whatever the position it holds in the hierarchy of the organization of the state. Accordingly, a state is not liable for acts of private individuals, since they are not, as such, considered as state officials, except in case it failed to apply the necessary measures to prevent the wrongful act.

2- Whatever its character as an organ of the central government or of a territorial unit of the state (e.g., a federal state)⁽¹⁵³⁾.

b- The conduct must constitute a breach of an international obligation incumbent on the state⁽¹⁵⁴⁾. It is so:

= "it cannot be concluded from the mere fact of the control exercised by a state over its territory and waters that that state necessarily knew, or ought to have known, of any unlawful act perpetrated therein... This fact, by itself and apart from other circumstances, neither involves prima facie responsibility nor shifts the burden of proof.

The court hold Albania responsible because of its knowledge of the presence of mines in its territorial waters, albeit it was possible that a third state was involved (Corfu Channel case, ICJ, Rep., 1949, p. 18).

Moreover, the court maintained:

"The court cannot consider that the assistance given by the United States to the contras warrants the conclusion that these forces are subject to the United States to such an extent that any acts they have committed are imputable to that state. It takes the view that the contras remain responsible for their acts, and that the United States is not responsible for the acts of the contras, but for its own conduct vis-à-vis Nicaragua, including conduct related to the acts of the contras" ICJ, Rep., 1986, p.65, para. 116.

(153) In the draft of 1929, the IDI affirmed :

"A federal state is responsible for the conduct of the individual states... It cannot escape this responsibility by invoking the fact that its constitution does not give it the right to control the particular states nor the right to require them to discharge their obligations".

Moreover, the ICJ emphasized:

"the conduct of an organ of a state - even an organ independent of the executive power - must be regarded as an act of that state" Cf, ICJ, Rep., 1999, advisory op., para,63.

See as well:

Kress: *L'organe de facto en droit international public- réflexions sur l'imputation à l'Etat de l'acte d'un particulier à la lumière des développements récents*, RGDIP, 2001, p. 93 - 144.

(154) in fact, as the ICJ put it;

"Responsibility is the corollary of a right" ICJ, Rep., 1970, p.34, para. 36.

- If it is not in conformity with what is required of the state by that obligation;

- Regardless of the origin (whether customary or conventional) of that obligation. Consequently, the act or the omission gives rise to international responsibility whether it rests on a treaty, custom or general principles of law; and

- Only if the act was performed at the time when the obligation was in force vis-à-vis that state⁽¹⁵⁵⁾.

Prima facie, there can be no question of a breach of an international rule or obligation, save in so far as that rule or obligation exists. i.e., an unlawful act is that which violates or disregards an international obligation in force: e.g., the violation of frontiers, the non-execution of an agreement, the nationalization without just indemnity..etc.. Naturally, acts and omissions are considered as illegal by reference to the rules concerning rights and obligations.

It is worth recalling that international obligations are of two kinds:

1- Obligations owed by one subject of international law to another; and

2- Obligations owed by each subject of international law to the international community as a whole and not just to one and a

= The court as well added that: "It is quite another matter to seek to determine whether a specific act falling within the scope of a concept known to a system of law violates the normative rules of that system: the question of the conformity of the act with the system is a question of legality" ICJ,Rep.,1998,p.460.para.68.

(155) he ICJ said:

"when a state has committed an internationally wrongful act, its international responsibility is likely to be involved whatever the nature of the obligation it has failed to respect" ICJ,Rep.,1997,p.32,para,47.

The court as well affirmed that:

"the fact that an act of a public authority may have been unlawful in municipal law does not necessarily mean that that act was unlawful in international law, as a breach of a treaty or otherwise" ICJ,Rep.,1989,p.47,para.124.

In fact, the characterization of an act as internationally wrongful is governed by international law and is not affected by the characterization of the same act as lawful by internal law, Cf, Report of the ILC,2000, p.124,

particular state⁽¹⁵⁶⁾. In fact, in face of major wrongful acts, such as genocide, war crimes, invasion of a state or the systematic violation of human rights and fundamental freedoms, a variety of means may be applied or resorted to, e.g., the international responsibility of the wrongdoer, an organizational response or a coordinated action by the international community. The combination of some or all of these means is also, in certain cases, necessary⁽¹⁵⁷⁾. This is mainly because the obligations involved are, owing to their *erga omnes*⁽¹⁵⁸⁾ nature, of paramount importance for the international community as a whole.

(156) See also:

M. Raggazi: *The concept of international obligations erga omnes*, Oxford Univ. press, 1997, 264pp.

Evidently, that violation of fundamental obligations vis-à-vis the international community, consisting in a gross or systematic failure of those obligations, entails the responsibility of that state (Report of the ILC, Supp. 10 (A/55/10), 2000, 134).

(157) See as well:

Report of the ILC, 2000, op. cit., p, 134.

(158) The ICJ affirmed:

"an essential distinction should be drawn between the obligations of a state towards the international community as a whole, and those arising vis-à-vis another state in the field of diplomatic protection. By their very nature the former are the concern of all states. In view of the importance of the rights involved, all states can be held to have a legal interest in their protection; they are obligations *erga omnes* .

Such obligations derive, for example, ... from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination" ICJ, Rep., 1970, p.33, para.34; Ibid, 1951, p.23.

The distinction made by the court has inspired the proposal made by the ILC to distinguish between international crimes and international delicts: the former concern those recognized as crimes by the international community as a whole, whereas the latter affect only the interests of a single state or group of states, Cf YILC, 1978, II, part 2, p. 80.

Moreover, speaking of the genocide convention (1948), the court said that:

"in such a convention, the contracting states do not have any interests of their own; they merely have, one and all, a common interest, namely the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type, one cannot speak of individual advantages or disadvantages to states, or of the maintenance of a perfect contractual balance between rights and duties" ICJ, Rep., 1951, p. 23.

- International responsibility arising out of acts not prohibited by international law:

A great majority of domestic systems of law contains rules and principles relating to liability for lawful acts or omissions which create or cause a serious risk of harm to others. In the international legal system, this kind of responsibility is as well accepted. One can mention, for instance, responsibility for nuclear explosions which cause radioactive debris outside the territorial limits of the state under whose jurisdiction or control such explosion is conducted⁽¹⁵⁹⁾.

- Rules governing international responsibility:

There are some essential rules which apply to international responsibility, namely:

a- A state may even be held responsible for "error in judgment"⁽¹⁶⁰⁾ on the part of its officials or organs. Thus, the UN convention on the law of the sea(1982) authorizes warships to board foreign merchant ships where there is a reasonable ground for suspecting piracy and certain other activities. However, art. 106 provides that:

«where the seizure of a ship or aircraft on suspicion of piracy has been effected without adequate grounds, the state making the seizure shall be liable to the state the nationality of which is possessed by the ship or aircraft for any loss or damage caused by the seizure».

= See as well: ch. Tomuschat and J-M. Thouvenin: The fundamental rules of the international legal order: *Jus cogens* and obligations *erga omnes*, M. Nijhoff, Leiden, 2005, 474 pp.

(159) International liability for the injurious consequences of acts not prohibited by IL" is a topic which has been examined by the ILC since 1978.

See as well: the 1993 Lugano convention on civil liability for damage resulting from activities dangerous to the environment (adopted by the Council of Europe), ILM, 1993, p. 1228 ss.

However, in 1949, Judge Badawi Pacha maintained that international law:

"does not recognize objective responsibility based upon the notion of risk" ICJ, Rep., 1949, p.65.

(160) For example. the mistaken action by units of the Soviet army in shooting down a Korean aircraft in 1983, Cf, ILM, 1983, p. 1 190, 1419.

b- International responsibility may result, as mentioned above, either from acts or omissions, i.e., from acts of *in fasciendo* or of *in non fasciendo*⁽¹⁶¹⁾.

c- A state is responsible for the direct or proximate consequences of its conduct. As for indirect or remote damage, it may be resolved by recourse to particular rules suitable for the particular facts.

d- A state is not responsible for acts of its nationals, unless, e.g., it fails to discharge the duty of diligently prosecuting and properly punishing⁽¹⁶²⁾.

(161) Vide supra.

(162) RIAA, vol. 6, p. 160 (1925), p. 311 (1933).

Art. 8 of draft articles on state responsibility (2002) provides:

«The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct».

In the commentary, the ILC states:

«The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia has also addressed these issues. In *Prosecutor v. Tadic*, the Chamber stressed that: "The requirement of international law for the attribution to States of acts performed by private individuals is that the State exercises control over the individuals. The *degree of control may*, however, vary according to the factual circumstances of each case. The Appeals Chamber fails to see why in each and every circumstance international law should require a high threshold for the test of Control". Case IT-94-1, *Prosecutors Tadic*. (1999) *ILM*, vol. 38, p. 1518, at p. 1541, para 117 (emphasis in original).

The Appeals Chamber held that the requisite degree of control by the Yugoslavian authorities over these armed forces required by international law for considering the armed conflict to be international was "*overall control going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations*", *Ibid*, at p. 1546, para. 14 (emphasis in original).»

In the Commentary to Article 10 adopted on first reading, the ILC said:

«On the other hand, with regard to actions or omissions which persons with the status of State organs may have committed in their capacity as private individuals, the Commission considered that they had no connection whatsoever with the fact that the persons in question were part of the machinery of the State and accordingly could not be attributed to the State under international law. [...] That naturally does not prevent States from sometimes assuming responsibility for such actions by treaty, as is the case =

e- If a state is not, by reason of the independence of the judiciary, responsible for the acts of judicial tribunals, however this is not an absolute rule. In fact, in certain cases, e.g., a charge of denial of justice, it may be held responsible for these acts.

f- International responsibility arises as well for a breach of an international obligation, albeit there is no proof of financial loss, as for example, the violation of diplomatic or consular privileges and immunities, a trespass in the air space, internal waters or the territorial sea, an affront to the honour of a head of state or government or a diplomat, an unlawful intrusion into the land territory of a state.

g- A state is held internationally responsible for *ultra vires* acts of its officials or organs acting in their official capacity, e.g., if they exceeded their official competence, acted in defiance of orders⁽¹⁶³⁾, did not observe instructions given to them or did not follow the rules or proceedings set forth in the national law.

h- The injured state, in principle, loses its right to invoke responsibility, if:

= for instance, of the Convention IV respecting the laws and customs of war on land (The Hague, 1907), article 3 of which attributes to the State responsibility for "all acts committed by persons forming part of its armed forces" in violation of the regulations annexed to the Convention, whether they acted as organs or as individuals». (YILC, 1975, II, p. 69, para. 26).

(163) The ICJ points out:

«The Court considers that regardless of whether or not General Kazini, commander of Ugandan forces in the DRC, acted in violation of orders and was punished as a result, his conduct is clear evidence of the fact that Uganda established and exercised authority in Ituri as an occupying Power». ICJ, Rep., Armed activities on the territory of Congo (Congo V. Uganda), 2005, para. 176. Moreover, article 7 of the articles adopted in 2001 of the ILC provides that act in attributed to the state even if it has been taken in excess of authority or contravention of instructions.

In the commentary, the ILC says:

«The modern rule is now firmly established in this sense by international jurisprudence, State practice and the writings of jurists. It is confirmed, for example, in article 91 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, which provides that: "A Party to the conflict ... shall be responsible for persons forming part of its armed forces "this clearly covers acts committed contrary to order or instructions». Report of the ILC, General Assembly, off. Doc., Supp. No. 10 (A/56/10), 2001.

1- it has validly and expressly waived the claim, or

2- it has, by reason of its conduct, acquiesced in the *in omittendo* or *in committendo* acts of its agents or organs, if it is *culpa in eligendo, culpa in custodiendo, culpa in instruendo, culpa in vigilando, culpa in negligendo*. In fact, every internationally wrongful act of a state entails the international responsibility of that state⁽¹⁶⁴⁾.

*** Criminal responsibility of a state:**

There are two fundamental objections against the criminal responsibility of a state, namely⁽¹⁶⁵⁾:

- The rule under which states enjoy immunity from jurisdiction against their *jure imperii acts* (i.e., the public acts of a state or acts in which it acts *à titre de souverain*) in the courts of another state. This is an application of the well established principle «*par in parem non habet imperium*» (*no one can exercise jurisdiction over an equal*)⁽¹⁶⁶⁾.

- Criminal responsibility of legal abstractions⁽¹⁶⁷⁾, such as corporations, *les personnes morales* is not, till now, practically applicable, due to the fact that, inter alia, they can neither think nor act as human beings, and they cannot be put in prison. In a word, legal abstractions cannot be subjected to criminal responsibility in

(164) Art. 1 of articles on «Responsibility of states for international wrongful acts» adopted by the ILC in 2001.

(165) Many other objections have been put forward against the criminal responsibility of states, namely:

- incompatibility with the principle of sovereignty;
- incompatibility with the conventional concept of criminal responsibility;
- inadequacy of conventional penal sanctions;
- inadequacy of the international institutional framework (O. Triffterer: Prosecution of states for crimes of state, IRPL, 1996, pp. 356-363).

(166) Ahmed Abou-El-Wafa: Public international law, op. cit., p. 448.

(167) Or «abstract entities», an expression used by the ILC and the Tribunal of Nuremberg. The later said that international crimes are committed by men not by abstract entities (See, the work of the ILC, UN, New York, 2004, vol. I, p. 85).

It is worth recalling that UN convention against transnational organized crimes provides (art. 10) that the liability of legal persons may be criminal, civil or administrative. Those legal persons shall be subject to criminal or non-criminal sanctions, including monetary sanctions.

the same way as individuals, they cannot be subject to criminal sanctions akin to those imposed on the later.

The 2001 approved text on state responsibility, prepared by the ILC adopted by the general Assembly (2001), does not contain reference to criminal responsibility of states⁽¹⁶⁸⁾.

Moreover, statutes of international criminal courts, e.g. article 6 statute of the ICTY and article 5 statute of the ICTR provide:

«The international Tribunal shall have jurisdiction over natural persons».

However, this does not mean that a state to which is attributed an internationally criminal wrongful act is relieved from responsibility. In fact, there is a great difference between jurisdiction and responsibility⁽¹⁶⁹⁾.

(168) Though draft article 19 (1980), which has been abandoned (in 2001) provided the criminal responsibility of states. It was drafted as follows:

«1. An Act of a State which constitutes a breach of an international obligation is an internationally wrongful act, regardless of the subject-matter of the obligation breached.

2. An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole, constitutes an international crime.

3. Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, *inter alia*, from:

(a) a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;

(b) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;

(c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere of the seas.

4. Any internationally wrongful act which is not an international crime in accordance with paragraph 2, constitutes an international delict». YILC, 1980, II, part II, p. 32.

(169) In this context, art. 4 Draft code of crimes against the peace and security of mankind (1996) stipulates:

«The fact that the present code provides for the responsibility of individuals for crimes against the peace and security of mankind =

However, the necessity to hold the state responsible for criminal matters is justifiable by the following arguments, namely:

- to strengthen international peace and security.
- to supplement individual accountability and not to replace it.
- to deter other international entities from committing international crimes⁽¹⁷⁰⁾.
- to ensure that the state should behave in conformity with rules of international law⁽¹⁷¹⁾.

= is without prejudice to any question of the responsibility of states under international law» (text in: «The work of the international law commission, op. cit., vol. I, p. 269).

Moreover, the ICJ said:

«There is a fundamental distinction between the acceptance by a state of the court's jurisdiction and the compatibility of particular acts with international law... Whether or not states accept the jurisdiction of the court, they remain in all cases responsible for acts attributable to them that violate the rights of other states» ICJ, Rep., 1998, p. 456, paras. 55-56.

The court as well affirmed that;

«whereas, whether or not states accept the jurisdiction of the court, they remain in any event responsible for acts attributable to them that violate international law, including humanitarian law» ICJ, Rep., 1999, legality of the use of force, Yugoslavia v. Belgium, para. 48.

Accordingly, the fact that the court is or is not competent to settle a dispute, does not affect the responsibility of a state resulting from acts causing prejudice to another state or to individuals, cf, ICJ, Rep., 2000, p. 33, para. 51; 2004, para. 128.

(170) However, Ch. Bassiouni says: «The invocation of the concept of state responsibility is, however, a symbolic act by the international community to stigmatize regimes that engage in internationally proscribed policies and conduct, irrespective of the efficacy of the stigmatization in altering the internationally proscribed behavior. There is no evidence that such an approach deters other regimes from similar or other transgressions. But prevention is never easy to assess, and therefore the assumption of deterrence is deemed logically valid, even though its effect remains questionable» Ch. Bassiouni: Introduction to international criminal law, op. cit., p. 86.

(171) Thus, article 4 International covenant on civil and political rights (1966) stipulates:

«1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their =

- to prevent organs, representatives and agents of the state from committing international crimes. In fact, the conduct of each organ of a state is considered as an act of that state. This rule is well established in international law. It is of a customary nature⁽¹⁷²⁾.

Accordingly, acts of all states organs or representatives, be they civilian or military, are attributable to the state⁽¹⁷³⁾.

Prima facie, the criminal responsibility of a state is not as wide as that of an individual, mainly because its responsibility is limited to such sanctions as fines, financial compensation, seizure and forfeiture⁽¹⁷⁴⁾.

*** Forms of criminal responsibility of a state:**

Criminal responsibility of a state may have three forms, namely:

= obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin».

(172) ICJ, Rep., 1999, p. 87, para. 62.

(173) In international crimes there is an inextricable linkage or connection between the perpetrator of the crime (the individual) and the state to which he appertains or under whose authority he acts. This is an essential characteristic of an international crime. Accordingly, common criminals, e.g., the average murderer, the average rapist: they do not act in the exercise of public authority.

(174) See as well: Ahmed Abou-El-Wafa: International protection of human rights, op. cit., p. 164; K. Marck: Criminalizing state responsibility, RBDI, 1978-9, p. 460 ss; G. Gilbert: The criminal responsibility of states, ICLQ, 1990, p. 345; E.J. de Aréchaga: International law in the past third of the century, RCADI, t. 159, P. 1 ss;

H. Dipla : La responsabilité de l'Etat pour violation des droits de l'homme , A . Pedone , Paris , 1994; R. Cook: State responsibility for violations of women's human rights, Harvard H.R. Journal, vol.7,1994,p. 25-176;A. Ewing: Establishing state responsibility for private acts of violence against women under the American convention on human rights, Columbia H.R. review, vol. 26, 1995, p. 751-800; J. Mendez: Accountability for past abuses., Human rights quarterly, vol. 9, 1997, p. 255-282; J. Brohmer :State immunity and human rights, M.Nijhoff, The Hague , 1997, 243 p; N.H. Jorgensen: The responsibility of states for international crimes. Oxford, 2000, 325, pp.; A. Nollkaemper: Concurrence between individual responsibility and state responsibility in international law, ICLQ, 2003, pp. 615-640.

responsibility for acts and omissions, for acts of its armed forces and for crimes committed by entities in territories under its jurisdiction.

- Responsibility for acts or omissions:

A state may be held responsible for positive or negative acts, i.e., for the commissions or omissions. The latter concern the fact for a state failing to take measures necessary for the prevention of international crimes committed by persons or groups operating within its territory or jurisdiction.

This has been recently highlighted by the ICJ in the case «armed activities over the territory of Congo (Congo V. Uganda). The court says:

«The acts and omissions of members of Uganda's military forces in the DRC engage Uganda's international responsibility in all circumstances, whether it was an occupying Power in particular regions or not».

The court adds:

«The Court finds that there is sufficient evidence to support the DRC's claim that Uganda violated its duty of vigilance by not taking adequate measures to ensure that its military forces did not engage in the looting, plundering and exploitation of the DRC's natural resources»⁽¹⁷⁵⁾.

- Responsibility of a state for the acts of its armed forces⁽¹⁷⁶⁾:

(175) ICJ, Rep., 2005, paras, 245-246.

(176) Cf, art. 3 of the IV Hague convention 1907; art. 91 of the 1977 Additional Protocol 1. See as well : Ahmed Abou-El-Wafa: Public international law, op. cit., pp. 645-647; G. Jèze: La réparation intégrale des dommages de guerre, 1915; C. Hons: La réparation des dommages de guerre dans le traité de Versailles, thèse, Paris, 1921; P. Noel: L'Allemagne et les réparations, thèse, Paris, 1924; Luce Camuzett: L'indemnité de guerre en droit international, thèse, Paris, 1928; J. Fischer Williams: A footnote to the story of German reparations, BYIL, 1932, p. 9-38; Bosly; Responsabilité des Etats parties à un conflit et des individus quant à l'application des règles du droit international humanitaire, Revue de droit pénal militaire et de droit de la guerre, 1973, 1, p 179 ss; T.V. Minh: Les réparations de guerre au Vietnam et le droit international, RGDIP, 1977, p 1047-102; Foscanneau: Les traités de paix du Japon, AFDI, 1960, p 256 ss; A/CN.4/169 (1964); A/ CN. 4/ 208 (1969); Kalshoven : State responsibility for warlike acts of the armed forces , ICLQ , 1991 , p 827 -858; Cottureau: Responsabilité de l'Iraq - aperçu =

This constitutes one of the leading principles of modern international law. In fact, a state may be responsible for wrongful acts committed by its organs or agents. Clearly, armed forces constitute an organ of any state. Accordingly, a belligerent party is responsible for all acts committed by persons forming part of its armed forces. It shall, if it deems necessary, be liable to proceed to the restoration of *status quo ante* (*restitutio in integrum*), to pay adequate compensation or to give an appropriate satisfaction.

Moreover, no state is allowed to absolve itself or any other state of any liability incurred by itself or by another state in respect of grave breaches committed by its armed forces (e.g., wilful killing, taking of hostages, torture or inhuman treatment ... etc.)⁽¹⁷⁷⁾.

= sur les indemnités urgentes des personnes physiques. AFDI, 1995 ; Di Rattalma: Le régime de responsabilité internationale institué par le conseil d'administration de la commission de compensation des NU, RGDI, 1997, p 45-90; Gavouneli : War réparation claims and state immunity, R. Hell. D.I., 1997, p. 595-608.

(177) See articles 51, 52, 131, 148 of the Four Geneva conventions of 1949, respectively.

The article reads: «No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article». *Prima facie*, the purpose of Article 51 is «to prevent the defeated party from being compelled in an armistice agreement or peace treaty to abandon all claims due for infractions committed by persons in the service of the victor. In this matter of material reparation for infractions of the Convention it is not possible, at any rate as the law at present stands, to imagine an injured party being able to bring an action individually against the State in whose service the author of the infraction was. Only a State can put forward such claims against another State. These claims fall in the ordinary way into the category of what are called "war reparations". It would seem unfair that individuals should be punished, if the State in whose behalf - and often on the instructions of which - they have acted were absolved of all responsibility» Geneva Conventions of 12 August 1949, commentary I, ICRC, Geneva, 1995, p. 373.

In this context, e.g., the security council affirmed, in its resolution 687(1991) that Iraq:

"is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait".

However, the Japanese courts said:

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The principle of the responsibility of states for the acts of their armed forces is, thus, well established in theory as well as in practice⁽¹⁷⁸⁾.

= " ... neither the general practice nor the conviction (*opinio juris*) that the State has a duty to pay damages to each individual when that state infringes its obligations under international humanitarian law can be said to exist" cf, the Japanese Annual of IL, vol. 39, 1 996, p 266.

(178) It had been maintained that:

"... a state which bears responsibility for a violation of the convention is in duty bound to make good the damage caused, either by restoring everything to the former condition (*restitutio in integrum*) or by paying damages, the choice resting, as a general rule, with the injured party" Cf, The Geneva conventions of 12 August 1949, Commentary III, ICRC, Geneva, 1994, p.130.

Additionally,:

"responsibility covers "all" acts committed by members of the armed forces of a party to the conflict, and not only unlawful acts (or omissions conflicting with a duty to act) in the sense of the conventions and the protocol In this sense it therefore seems possible that a party to the conflict could be liable to pay compensation even in a case where no particular violation of the rules of the conventions and the protocol, or of another rule of the law of armed conflict, can be imputed to it" CF, Commentary on the additional protocols of 8 June 1977, ICRC, Geneva, 1992, p.1058.

Moreover, in the Spanish zone of Morocco (1925) Max Huber said that:

"a State is bound to exercise special supervision to prevent its troops from committing acts in violation of military law and discipline "Cf, RIAA, Vol. II, p. 645.

He as well added:

"international jurisdiction may be invoked in a case of manifest abuse of the exercise of military powers"(loc.cit.).

Finally, one of the customary rules of international law is that:

«A State is responsible for violations of international humanitarian law attributable to it, including:

- (a) violations committed by its organs, including its armed forces;
- (b) violations committed by persons or entities it empowered to exercise elements of governmental authority;
- (c) violations committed by persons or groups acting in fact on its instructions, or under its direction or control; and
- (d) violations committed by private persons or groups which it acknowledges and adopts as its own conduct» (Henckaerts and Doswaldbeck: Customary international humanitarian law, op. cit., vol. I., p. 530).

This has been precisely highlighted by the ICJ as follows:

«The Court thus concludes that Uganda is internationally responsible for violations of international human rights law and international humanitarian law committed by the UPDF and by its members in the territory of the DRC and for failing to comply with its obligations as an occupying Power in Ituri in respect of violations of international human rights law and international humanitarian law in the occupied territory»⁽¹⁷⁹⁾.

- Responsibility of a state for crimes committed by entities in territories under its jurisdiction.

This kind of responsibility may occur, on the international level, particularly in two situations, namely:

. Responsibility of the mandatory for international crimes committed in the mandated territory:

The striking example, in this context, is the Zionist massacres committed in Palestine before 1948⁽¹⁸⁰⁾:

Prima facie, Great Britain had not sovereignty over the mandated territory of Palestine. However, this does not mean that it is not responsible for its failure to observe its authorities as a Mandatory.

In this connection, the ICJ affirmed:

«C'est l'autorité effective sur un territoire, et non la souveraineté ou la légitimité du titre, qui constitue le fondement de la responsabilité de l'Etat en raison d'actes concernant d'autres Etats».

(179) ICJ, Rep., 2005, military activities on the territory of Congo (Congo V. Uganda), para. 220.

(180) It is well known that Palestine was an area or a territory under Ottoman dominion.

The great powers, by the turn of the last century, decided to establish control over the territories of the then declining Ottoman empire. In 1916, negotiations between France, Britain, Russia and later on Italy, led to the secret Sykes-Picot agreement on the allocation of spheres of influence among the European powers.

Though formally still integral part of the Ottoman empire Palestine was under British military occupation since December 1917, ending, by that, four hundred years of Ottoman rule. The British mandate over Palestine commenced in September 1923 following conclusion with Turkey of the treaty of Lausanne, concluded on July 24, 1923, by which Turkey relinquished any claim to sovereignty over the territory it was ceding, including Palestine. The Mandate over Palestine lasted for 25 years from 1923 to 1947.

As a Mandatory, Great Britain incurs a certain responsibility for Zionist massacres before 1948. It suffices to point out the following arguments⁽¹⁸¹⁾:

1- Until 15 May, 1948 the British were still, under rules of international law, in charge of law and order in Palestine.

In this regard, Ilan Pappé says:

«In practice, the British confined their activity and concern in Palestine exclusively to those areas where Britons still lived or held property. The main priority of the High Commissioner was to ensure the well-being of British soldiers and the safety of British installations until the final date of withdrawal. According to Britain's understanding, and probably in accord with international norms of behaviour as well Britain was responsible for law and order in Palestine until 15 May 1948. By limiting its responsibility to areas under Britain's immediate control, London clearly shirked its duty.»

He adds:

«Yet, most of the time the British let the local actors run the show "To move from alternative history to firmer ground, let us conclude this assessment of the British role by commenting that the local British initiatives, all in all, had very little effect on the consequences of the civil war. In places like Jaffa and Haifa British involvement delayed the final outcome but could not prevent it. Elsewhere it was only the balance of power between the two sides that determined the course of the struggle and its issue.⁽¹⁸²⁾».

Moreover, an author says:

«even when appeals were raised for help, especially in Dayr Yassin, the British mandatory refused to protect the Palestinians from Zionist attacks, except briefly in Jaffa»⁽¹⁸³⁾.

To the foregoing, one can add that the British policy in Palestine was characterized by the following:

(181) Ahmed Abou-El-Wafa: *Zionist massacres before 1948: Whose responsibility?* R. Egypt. D.I., 2003, pp. 48-51.

(182) Ilan Pappé: *The making of the Arab-Israeli conflict 1947-1951*, I.B. Tauris, London, 2001, 100-101.

(183) S.M. Abou-Sitta: *The Palestine Nakba 1948, The Palestinian return* Centre, London, 2000, p. 5.

«active and aggressive policies towards Arab military organizations and passive (sometimes direct) support of Jewish armament and military organizations»⁽¹⁸⁴⁾.

2- Under rules of international law, the state on whose territory or on the territory of which it exercises its jurisdiction, a civil war, a rebellion or an insurrection occurs, may be held responsible if there is a fault or want of due diligence on the part of state authorities⁽¹⁸⁵⁾, or a general failure to maintain order, to prevent crimes or to prosecute and punish criminals⁽¹⁸⁶⁾, or failure to take adequate steps to suppress mutinies or riots⁽¹⁸⁷⁾, or where it is itself guilty of breach of good faith or of negligence in suppressing insurrection⁽¹⁸⁸⁾.

Accordingly, A state incurs the responsibility for acts of insurgents in a civil war, especially if it had not employed the due diligence and appropriate measures which ought to be normally taken in such conditions. In other words, because a major strife is tantamount to a *vis major*, there is a presumption against the responsibility of the state for acts of insurgents, unless it had clearly failed, in light of the circumstances of the case, to adopt measures dictated by "due diligence"⁽¹⁸⁹⁾.

3- In its decision No. 151, March 3, 1947, the Council of the League of Arab States informed the British and American Governments that they were responsible for the consequences of the critical situation in Palestine and the threats to security and peace resulting therefrom in the region⁽¹⁹⁰⁾.

The League of Arab States considered the British Government, as it was, *de facto*, the mandatory over Palestine

(184) Mohsen Saleh: British-Zionist military cooperation during the mandate and the suppression of the national movements, Palestinian return center, London 23rd April 2002, p. 2.

(185) Cf, Aroa Mines case (1903), R.I.A.A., Vol. IX, p. 402.

(186) Ibid, Vol. VI, p. 311, Noyes case (1913).

(187) Ibid, V. 5, p. 352-354, Georges Pinson Case (1928).

(188) Home frontier and foreign Missionary society case (1920), Ibid, Vol. VI, p. 42.

(189) AHMED ABOU-EL-WAFA: Public international law, op. cit., p. 604-605.

(190) Decisions of the Council of League of Arab States, p. 178.

responsible for the non observance of the political and civil rights of Arabs of Palestine.

The League added that the application of recommendations of the enquiry commission which led to disturbances in Palestine and the failure to maintain peace and security "was the responsibility of those who supported the report of the commission and put it into effect"⁽¹⁹¹⁾.

In its decision No. 140 (12.12.1946), the council of the League of Arab States asked the British Government to put an end to Jewish terrorism in Palestine. The council added that, since the Palestinian government failed to suppress such terrorism, the British government had to arm Arabs in order to enable them to defend themselves⁽¹⁹²⁾.

4- In conformity with the mandate for Palestine, 24 July 1922, the Mandatory shall "have powers of legislation and administration" (article 1); shall "be responsible for safeguarding the civil and religious rights of all the inhabitants of Palestine, irrespective of race and religion" (article 2); shall "be responsible for exercising such supervision over religious bodies of all faiths in Palestine as may be required for the maintenance of public order and good government" (article 16).

Moreover, the Institut de droit international pointed out in 1931 (Cambridge session) that:

"L'acte de mandat définit les obligations de l'Etat mandataire et les modalités suivant lesquelles il doit prêter son assistance.

Les pouvoirs conférés à l'Etat mandataire le sont dans l'intérêt exclusif des populations sous mandat"⁽¹⁹³⁾.

From the foregoing, it is evident that the mandatory incurs responsibility in case of failure to observe the obligations bestowed on it.

5- In the *Mavromatis Case*, the PCIJ recognized the responsibility of the Mandatory. The court affirmed (p. 23-24):

"Puisque l'article 11 du mandat reconnaît à l'Administration de la Palestine une large autonomie, il fallait mettre hors de doute que les

(191) Ibid, p. 117-118.

(192) Ibid, p. 132-133.

(193) Ann. IDI, 1931, vol. 36, II, p. 233-234.

pouvoirs accordés ne doivent pas être exercés d'une manière qui serait incompatible avec certains engagements internationaux du Mandataire, les obligations résultant de ces engagements sont ainsi des obligations que l'Administration de la Palestine est tenue de respecter: leur violation engage la responsabilité Internationale du Mandataire, car, conformément à l'article 12 du Mandat, les relations extérieures de la Palestine sont de son ressort"⁽¹⁹⁴⁾.

In the same case Sir Douglas-Hogg (Great Britain) admitted the responsibility of the later for acts committed in Palestine. He said:

"It is Palestine which is the country which has within article 9 of the Protocol acquired the territory of Palestine; but of course by the mandate the British Government is charged as Agent for the League of Nations with the tutelage of the Palestine Administration, and no doubt it is to be held responsible for any breach by that country of that article"⁽¹⁹⁵⁾.

Sir Cecil Hurst (Great Britain) as well maintained:

"The mandatory' of Palestine, who is the sovereign of Great Britain, acting through his Government is, of course, bound, by his legal obligations and was so bound from the moment when he took over responsibility for the administration of the country. Of course, he is bound by all the international obligations which he has accepted"⁽¹⁹⁶⁾.

- Responsibility of the occupying power for crimes committed in the occupied territory⁽¹⁹⁷⁾:

Evidently, the occupying power may be held responsible for crimes in the occupied territory, in two cases:

(194) Répertoire des documents de la cour de la Haye, serie 1, 1922-1945, publications de l'IHEI, Genève, vol. 4, p. 1587.

(195) Ibid, Vol. 3, 639.

(196) Ibid, Vol. 4, p. 1583.

(197) Under customary international law, as reflected in Article 42 of the Hague Regulations of 1907 a «territory is considered to be occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised» (See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 167, 78 and p. 172, para. 89); Rep., 2005 (Congo V. Uganda, para. 172).

- Crimes committed by its armed forces against persons and belongings in the occupied territory.

- Crimes committed by other persons under its jurisdiction, if it fails to ensure security and safety in the occupied territory⁽¹⁹⁸⁾.

d- Responsibility of an international organization for crimes committed by its armed forces:

International organizations (e.g., UN, LAS, NATO), on various occasions, have made use of armed forces. Such forces might become, involved in many types of hostilities, be they of an international or non-international character.

Prima facie, it is well established that rules of international responsibility must be characterized by the equality of their application to parties to an armed conflict, be they states, IOS, movements of national liberation, insurgents... etc.. Accordingly, when forces appertaining to IOS are involved in armed hostilities, rules of international humanitarian law must apply to them. Moreover, rules of armed conflict are applied to hostilities in which IOS are engaged, even if these rules are not of a humanitarian

(198) In this context, the ICJ says:

«178. The Court thus concludes that Uganda was the occupying Power in Ituri at the relevant time. As such it was under an obligation, according to Article 43 of the Hague Regulations of 1907, to take all the measures in its power to restore, and ensure, as far as possible, public order and safety in the occupied area, while respecting, unless absolutely prevented, the laws in force in the DRC. This obligation comprised the duty to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party.

179. The Court, having concluded that Uganda was an occupying Power in Ituri at the relevant time, finds that Uganda's responsibility is engaged both for any acts of its military that violated its international obligations and for any lack of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory, including rebel groups acting on their own account.

180. The Court notes that Uganda at all times has responsibility for all actions and omissions of its own military forces in the territory of the DRC in breach of its obligations under the rules of international human rights law and international humanitarian law which are relevant and applicable in the specific situation». ICJ, Rep., 2005, armed activities in the territory of Congo (Congo V. Uganda), paras. 178-180.

nature, e.g., rules concerning neutrality, the prohibition of the threat or use of force .. etc..⁽¹⁹⁹⁾

This means that the international organization concerned may be held responsible for crimes committed by its armed forces.

In this regard, in its resolution related to «conditions of application of humanitarian rules of armed conflicts to hostilities to which UN forces may be engaged, the Institute of international law states (art. 8):

«The United Nations is liable for damage which may be caused by its Forces in violation of the humanitarian rules of armed conflict, without prejudice to any possible recourse against the State whose contingent has caused the damage.

It is desirable that claims presented by persons thus injured be submitted to bodies composed of independent and impartial persons. Such bodies should be designated or set up either by the regulations issued by the United Nations or by the agreements concluded by the Organization with the States which put contingents at its disposal and, possibly, with any other interested State.

(199) In 1999, the UN secretary general issued a bulletin related to the "observance by UN forces of international humanitarian law, in which he affirmed that:

- Rules of international humanitarian law are applicable to UN forces when in situations of armed conflict they are actively engaged therein as combatants.

- In the status-of- forces agreement concluded between the UN and a state in whose territory a UN force is deployed, the UN undertakes to ensure that the force shall conduct its operations with full respect for the rules of general conventions applicable to the conduct of military personnel.

- In case of violation of international humanitarian law, members of the military personnel of a UN force are subject to prosecution in their national courts.

- All the essential principles mentioned above are *grasso modo* applicable to UN forces (Cf, ST/SGB/1999/I3, 6 August 1999).

As for Arab security forces which were established in Kuwait (1961) and Lebanon (1976), the secretary general of the LAS issued regulations concerning the observance, by these forces, of rules of international humanitarian law, especially those set forth in international conventions and "inherited Arab traditions", Cf Ahmed ABOU-EL-WAFA: The League of Arab States, Dar Al-Nahda Al-Arabia, Cairo, 1999, p. 618-623 (in Arabic).

It is equally desirable that if such bodies have been designated or set up by a binding decision of the United Nations, or if the jurisdiction of similar bodies has been accepted by the State of which the injured person is a national, no claims may be presented to the United Nations by that State unless the injured person has exhausted the remedy thus made available to it». ⁽²⁰⁰⁾

Moreover, article 1 of the statute of the special court for Sierra Leone states the prosecution of peacekeepers, either before the courts of the sending state or before the special court:

Thus, para. 2 states:

«Any transgressions by peacekeepers and related personnel present in Sierra Leone pursuant to the status of Mission Agreement in force between the United Nations and the Government of Sierra Leone or agreements between Sierra Leone and other Governments or regional organizations ... shall be within the primary jurisdiction of the sending state».

Whereas para. 3 adds:

«In the event the sending state is unwilling or unable to carry out an investigation or prosecution, the court may, if authorized by the security council on the proposal of any state, exercise jurisdiction over such persons».

e- Criminal responsibility of minors for international crimes:

The criminal responsibility of minors requires that we study: the definition of a minor, the recruitment of a minor is a war crime, limits to the criminal responsibility of a minor, and the treatment of the later.

(200) Ann. IDI, 1971 (Zagreb session).

In its resolution concerning «conditions of application of rules, other than humanitarian rules, of armed conflicts to hostilities in which United Nations forces may be engaged», the Institute of international law reserved «the study of the problems of individual criminal responsibility» (Ann. IDI, 1975).

See as well,

M. Zwanenburg: *Accountability of peace support operations*, M. Nijhoff publishers, Leiden, 2005, 346 pp.

*** Definition:**

UN standard minimum rules for the administration of Juvenile justice («The Beijing Rules») provides⁽²⁰¹⁾:

«A juvenile is a child or young person who, under the respective legal systems, may be dealt with for an offence in a manner which is different from an adult».

Moreover, under the UN rules for the protection of juveniles deprived of their liberty⁽²⁰²⁾:

«A juvenile is every person under the age of 18. The age limit below which it should not be permitted to deprive a child of his or her liberty should be determined by law».

Article 26 ICC stipulates that the court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.

Whereas art. 7 statute of the special court for Sierra Leone provides that the court shall have no jurisdiction over any person who was under the age of 15 at the time of the alleged commission of the crime.

*** Recruitment of minors in armed conflicts is a war crime:**

To reduce the possibility for minors to commit international crimes, the international instruments prohibit their recruitment and participation in armed conflicts:

(a) Thus, Rome statute of the ICC considers as a war crime, conscripting or enlisting children under the age of 15 years or using them to actively participate in hostilities in both international and non-international armed conflicts.

(b) Moreover, articles 1 and 2 «optional protocol to the convention on the rights on the child, on the involvement of children in armed conflicts» (25 May, 2000)⁽²⁰³⁾ provides that states

(201) Adopted by the UN General Assembly resolution 40/33 (29 November 1985), cf Human rights – A compilation of international instruments, UN, New York, 2002, vol. I, 1st part, p. 366.

(202) Adopted by the General Assembly of the UN in 1990 (Res. 45/113).

(203) The Protocol, in conformity with art. 10, entered into force on 12 of February 2002.

parties shall take all feasible measures to ensure that persons who have not attained the age of 18 years:

- do not take a direct part in hostilities.
- are not compulsorily recruited into their armed forces.

- Finally, the 1999 ILO convention No. 182 concerning the prohibition and immediate action for the elimination of the worst form of child labour provides:

Article 1: "Each member which ratifies this Convention shall take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency".

Article 2: "For the purposes of this Convention, the term "the worst forms of child labour comprises:

(a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict"⁽²⁰⁴⁾.

The special court of Sierra Leone recently addressed the status of child recruitment as a war crime⁽²⁰⁵⁾.

***Limits to the criminal responsibility of minors:**

It is well known that, due to the increasing interest in questions of childhood, demographic issues, the rise in juvenile

(204) Emphasis added.

(205) See, M. Happold: International humanitarian law, war criminal and child recruitment: The special court for Sierra Leone's decision in Prosecutor V. Samuel Hinga Norman, Leiden J.I.L., vol. 18, 2005, pp. 283-297.

In fact the special court of Sierra Leone refused a preliminary motion based on lack of jurisdiction since the crime of child recruitment was not part of customary international law at the times relevant to the indictments and consequently art. 4/c of the special court's statute violates the principle of *nullum crimen sine lege*. In fact, the special court, citing many conventional provisions as well as customary rules of international law, concluded that child recruitment constituted a violation of rules of international humanitarian law (special court of Sierra Leone, prosecutor against S.H. Norman, 31 May 2004, paras. 9-54).

delinquency⁽²⁰⁶⁾ ... etc., the famous saying: «the law for minors, minor law» is today outdated⁽²⁰⁷⁾.

There are, inter alia, two concepts concerning minors criminal responsibility:

1- The concept of criminal responsibility, i.e., criminal responsibility corresponds to the age of criminal majority. Below this age, the minor is considered as irresponsible (this is known as the «presumption of irresponsibility»).

2- The concept of criminal ability, i.e., the fact that the minor is dangerous⁽²⁰⁸⁾.

In its resolution, the international congress of penal law affirmed two rules namely:

- In dealing with minors, legislators, courts, prosecutors and all other institutions should act in accordance with international instruments on the rights of the child.

- The application of instruments on international co-operation in criminal matters must have special regard for the predominant interests of the child⁽²⁰⁹⁾.

*** Treatment of minors:**

Due to their age, minors need a «special care or treatment». Accordingly, a minor should be treated in a stricter different manner than that applicable to an adult. For this reason, it seems, UN standard minimum rules for the administration of juvenile justice (the «Beijing rules») provide that:

(206) See as well UN guidelines for the prevention of juvenile delinquency (The Riyadh guidelines), adopted by UN General Assembly resolution 45/112 (14 December 1990).

(207) R. Ottenhof: criminal responsibility of minors in national and international legal order, IRPL, 2004, p. 51.

(208) Ibid, pp. 54 – 55. See as well:
N. Arzoumanian et F. Pizzutelli: Victimes et bourreaux: questions de responsabilité liées à la problématique des enfants-soldats en Afrique, IRRC, vol. 85. No. 852, 2003, pp. 827-856.

(209) XVIIth international congress of penal law preparatory colloquium section I: criminal responsibility of minors in national and international legal order, IRPL, 2004, pp. 584 - 585, 786 – 787.

* The disposition of the competent authority shall be guided by the following principles:

(a) The reaction taken shall always be in proportion not only to the circumstances and the gravity of the offence but also to the circumstances and the needs of the juvenile as well as to the needs of the society;

(b) Restrictions on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible minimum;

(c) Deprivation of personal liberty shall not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response;

(d) The well-being of the juvenile shall be the guiding factor in the consideration of her or his case.

* Capital punishment shall not be imposed for any crime committed by juveniles.

* Juveniles shall not be subject to corporal punishment.

* The competent authority shall have the power to discontinue the proceedings at any time⁽²¹⁰⁾.

(210) In the commentary, it is mentioned:

«The main difficulty in formulating guidelines for the adjudication of young persons stems from the fact that there are unresolved conflicts of a philosophical nature, such as the following:

(a) Rehabilitation versus just desert;

(b) Assistance versus repression and punishment;

(c) Reaction according to the singular merits of an individual case versus reaction according to the protection of society in general;

(d) General deterrence versus individual incapacitation.

The conflict between these approaches is more pronounced in juvenile cases than in adult cases. With the variety of causes and reactions characterizing juvenile cases, these alternatives become intricately interwoven».

See: General Assembly resolution 40/33 (1985).

Moreover art. 7/2 special court for Sierra Leone provides that in the disposition of a case against a juvenile offender, the court shall order any of the following: care guidance and supervision orders, community service orders, counselling, foster care, correctional, educational and vocational training programs, approved schools... etc.

Moreover, the Guidelines for action of children in the criminal justice system (Ecosoc Res. 1997/30 of 21 July 1997) stipulate:

«In the use of the Guidelines for Action at both the international and national levels, consideration should be given to the following:

(a) Respect for human dignity, compatible with the four general principles underlying the Convention, namely: non-discrimination, including gender-sensitivity; upholding the best interests of the child; the right to life, survival and development; and respect for the views of the child;

(b) A rights-based orientation;

(c) A holistic approach to implementation through maximization of resources and efforts;

(d) The integration of services on an interdisciplinary basis;

(e) Participation of children and concerned sectors of society;

(f) Empowerment of partners through a developmental process;

(g) Sustainability without continuing dependency on external bodies;

(h) Equitable application and accessibility to those in greatest need;

(i) Accountability and transparency of operations;

(j) Proactive responses based on effective preventive and remedial measures⁽²¹¹⁾.

F- Criminal responsibility of non-state actors⁽²¹²⁾:

«Non-state actors», such as paramilitary units and armed

(211) Human rights: A compilation of international instruments, op. cit., vol. I, p. 387.

(212) In a resolution adopted in 1999, the Institute of international law pointed out: «the expression “non State entities” means the parties to internal armed conflicts who oppose the government’s armed forces or are fighting entities of similar nature and who fulfill the conditions set forth in Article 3 common to the Geneva Conventions of 1949 on the Protection of Victims of War or in Article 1 of the 1977 Protocol Additional to the Geneva Conventions and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)».

See the resolution concerning “The application of international humanitarian law and fundamental human rights in armed conflicts in which non-state entities are parties», Ann. IDI, 1999.

civilian bands have committed massive violations related to the life and bodily integrity of persons, especially in non-international armed conflicts, which constitute, in one way or another, crimes against humanity⁽²¹³⁾.

In this context, art. 7 ICC provides that crimes against humanity can be committed by persons acting for states or for non-state actors. This means that combating international crimes committed by non-state actors is essential for the survival of the international community.

Crimes committed by non-state actors have become more and more motivated by religious, ethnic, racial or linguistic causes. They have a multiplicity of forms and manifestations.

Prima facie, non-state actors, like state and individuals, should abide by rules of CIL⁽²¹⁴⁾ and, consequently, must not commit international crimes. In case serious, systematic and massive violations of rules of international humanitarian law and human rights law, i.e., if international crimes have been committed, the Resolution of 1999, adopted by the institute of international law, concerning «The application of international humanitarian law

(213) See, e.g., concerning the conflict in the former Yugoslavia, final report of the commission of experts established pursuant to security council resolution 780 (1992) Doc. S/1994/674 (1994), S/1994/674/Add.2 (1994).

(214) The resolution adopted by the Institute of international in 1999 (vide supra) stipulates:

International law applicable to armed conflicts in which non-state entities are parties includes.

- Article 3 common to the Geneva Conventions of 1949 as basic principles of international humanitarian law:

- Protocol II and all other conventions applicable to non international armed conflicts;

- Customary principles and rules of international humanitarian law on the conduct of hostilities and the protection of victim applicable to internal armed conflicts;

- The principles and rules of international law guaranteeing fundamental human rights;

- The principles and rules of international law applicable in internal armed conflicts, relating to war crimes, crimes against humanity, genocide and other international crimes;

- The principles of international law «derived from established custom, from the principles of humanity and from dictates of public conscience.

and fundamental human rights in armed conflicts in which non-state entities are parties», provides that⁽²¹⁵⁾:

* the UN and competent international organizations have the right to adopt appropriate measures, including diplomatic, economic and other measures towards any party to the armed conflict which has violated its obligations.

* the persons involved incur individual responsibility, regardless of their status or official position, in accordance with international instruments that entrust the repression of these acts to national or international jurisdictions.

* the competent authorities of a state are entitled to prosecute and try the persons involved before their courts⁽²¹⁶⁾.

4- Defenses or grounds of justification or excuse:

(a) In General:

Perpetrators of crimes may have defenses. A defense is, *stricto sensu*, based upon an evidence offered by the accused with a view to defeating a criminal charge. In other words, the *ultima ratio* of a defence is to relieve the accused of criminal responsibility.

In the general theory of criminal law, the most important defenses are the following:

- mistake.
- compulsion.
- intoxication.

(215) Ann. IDI, vol. II, 1999.

(216) It is worth recalling that articles 9 and 10 charter of the IMT provided a leading basis for international criminal responsibility of groups and organizations.

Thus, in Article 9, the Charter provided that: "the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization." In Article 10, it stated that: "In cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national, military, or occupation courts. In any such case the criminal nature of the group or organization is considered proved and shall not be questioned».

- self-defense.
- automatism⁽²¹⁷⁾.

Moreover, in international law one must recognize the existence of circumstances which exonerate from responsibility⁽²¹⁸⁾.

They are:

- Consent:

Consent precludes the wrongfulness of an act, provided that:

a- It is a valid consent, i.e., devoid of any defect.

b- It has been given prior to the commission of the act. If given *a posteriori*, this will constitute a confirmation or a validation of an unauthorized act.

c- The act has been taken within the limits of the consent.

- Self-defense:

When the act constitutes a lawful measure of self-defence according to the charter of the UN, it must not be considered a wrongful one.

- **Countermeasures:** When the act, taken by a state, constitutes a lawful countermeasure, its wrongfulness will be precluded.

- *Vis major* :

Clearly, the occurrence of *force majeure*, e.g., a natural disaster, a foreign invasion, a civil strife, precludes the wrongfulness of an act not in conformity with an international obligation, if :

a- The act has been taken due to *force majeure*.

b- The following conditions are met in *vis major*, namely: the occurrence of an irresistible force or of an unforeseen event, beyond the control of the state, making it materially impossible in the circumstances to perform the obligation.

c- The occurrence of *force majeure* does not result from the state invoking it, or the later has assumed the risk of that occurrence.

(217) See details, in L.B. Curzon: Criminal law, op. cit., p. 75-103.

(218) Cf, Report of the ILC, 2000, op. cit., p. 129 et ss.

- Distress:

Situations of distress (e.g., of a ship or an aircraft) preclude the wrongfulness of an act not in conformity with an international obligation, if the author of that act had no other reasonable way of saving his life or the lives of other persons entrusted to his care, provided that:

a- Distress does not result from the conduct of the state invoking it.

b- The act was not likely to create a comparable or greater peril.

- " *jus necessitates* " (State of necessity) :

"*Necessity fait loi* ". In fact, necessity may be invoked to preclude the wrongfulness of an act, if the act⁽²¹⁹⁾:

a-Is the only means to safeguard an essential interest against a grave and imminent peril. In other words, measures must be taken *ex necessitate*, i.e., according to the exigencies of the situation.

b- Does not seriously impair an essential interest of other states or the international community as a whole.

c- Is not contrary to a peremptory norm of international law; moreover, state of necessity may not be invoked when the international obligation in question excludes the possibility of invoking it, or the state has contributed to the occurrence of necessity.

(b) In CIL:

There are numerous defenses which may be raised in proceedings for international crimes, the most important of which are these⁽²²⁰⁾:

(219) The ICJ said that the state of necessity as a ground for precluding wrongfulness:

"can only be accepted on an exceptional basis" ICJ, Rep., 1997, p. 34, para. 51.

(220) It is worth recalling that art. 14 Draft code of crimes against the peace and security of mankind (1996) does not contain an enumeration of defenses. The said text provides: «The competent court shall determine the admissibility of defenses in accordance with the general principles of law, in the light of the character of each crime».

*** Defenses accepted before international criminal courts:**

There are some justifications which may be accepted before international criminal courts. They are:

- Self – defense:

Self-defense is, if its conditions are met (particularly the existence of an immediate attack and proportionality) an inherent right for every person⁽²²¹⁾. It is a rule of customary international law and, thus, is accepted to exonerate from responsibility. In this regard, article 31/c statute of the ICC provides that a person shall not be criminally responsible if, at the time of that person's conduct, he:

«acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph»⁽²²²⁾.

(221) A legal opinion of the UN says:

«The right of self defense is not limited to states and applies as an inherent right also to the United Nations. United Nations forces have, accordingly, always been regarded as entitled to the right of self defence and, expressly for this purpose, have been provided with light infantry weapons».

This right may be exercised «to preserve a collective and individual defense» UNJY, 1993, UN, New-York, 2001, p. 371-372.

(222) Article 21 Draft articles on state responsibility (2001) provides:

«The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defense taken in conformity with the Charter of the United Nations».

In the commentary, the ILC says:

«3) This is not to say that self-defense precludes the wrongfulness of conduct in all cases or with respect to all obligations. Examples relate to international humanitarian law and human rights obligations. The Geneva Conventions of 1949 and Protocol I of 1977 apply equally to all the parties in an international armed conflict, and the same is true of customary international humanitarian law. Human rights treaties contain derogation =

-Military necessity and duress⁽²²³⁾:

. **Military necessity:** During war «military necessity» or «military exigencies» may be invoked by a party to justify a certain act. In fact, the essential purpose of international humanitarian law is to strike a balance between military necessity and humanitarian exigencies⁽²²⁴⁾.

In this regard, art. 6/b IMT (Nuremberg) and article 8/2/a/v ICC mention devastation not justified by military necessity.

Military objectives are defined in Article 52 of additional Protocol I as «those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage».

Accordingly, any objective which does not constitute a «military objective» may not constitute a defense⁽²²⁵⁾.

= provisions for times of public emergency, including actions taken in self defense. As to obligations under international humanitarian law and in relation to non-derogable human rights provisions, self-defense does not preclude the wrongfulness of conduct».
(Report of the ILC, 2001, para. 3).

(223) In had been maintained”

«The fact that a person acted pursuant to duress or necessity may be a defense if the person acted necessarily and reasonably to avoid the threat and not intended to cause harm greater than the one sought to be avoided. The term «duress» applies to threats from another person; the term «necessity» applies where the threat is constituted by other circumstances beyond the person’s control. In both cases the threat must be an immediate threat to life or physical well-being».

Punishing violations of international humanitarian law at the national level, ICRC, Geneva, 2001, p. 55.

(224) Ahmed Abou-El-Wafa: The general theory of international humanitarian law, Dar Al-Nahda Al-Arabia, Cairo, 2006, pp. 4-5, 120-121 (in Arabic).

(225) In this connection, the ICTY issued two important sentences, namely:

- In Prosecutor V. Strugar, the Appeals chamber said:

Whether a military advantage can be achieved must be decided, as the Trial Chamber in the *Galic* case held, from the perspective of the "person contemplating the attack, including the information available to the latter, that the object is being used to make an effective contribution to military =

Accordingly, military necessity is, in certain circumstances, a

= action. Recalling its earlier finding that there were no military objectives in the Old Town on 6 December 1991, the Chamber is of the view that the question of proportionality in determining military necessity does not arise on the facts of this case» case No. IT-01-42-AR72, 11 Nov. 2002, para. 295.

- In Prosecutor V. Blaskic, the Trial Chamber ruled that attacks against Muslims were not justified. For:

«409, Lieutenant-Colonel Thomas, UNPROFOR commander at the material time, went to Ahmici on 17 April 1993 and stated that he saw no evidence suggesting that there had been a conflict between two separate military entities, nor any evidence of resistance such as trenches, sandbags or barbed wire indicating the presence in the village of an armed force ready for combat. Furthermore, the bodies he saw were not in uniform and not a single weapon was found in the destroyed buildings. On the contrary, there were Women and children amongst the bodies strewn on the ground, [...] In its second periodical report on the human rights situation on the territory of the former Yugoslavia, the Commission on Human Rights even found that "by all accounts, including those of the local Croat HVO commander and international observers, this village contained no legitimate military targets and there was no organized resistance to the attack". The accused himself admitted before the Trial Chamber that the "villagers of Ahmici, that is Bosniak Muslims, "had been the victims of the attack without there having been any attempt to distinguish between the civilian population and combatants.

410. The Trial Chamber is therefore convinced beyond any reasonable doubt that no military objective justified these attacks». Case No. IT-95-14, 3 March 2000, paras. 409-410.

The Chamber added:

«425 The methods of attack and the scale of the crimes committed against the 'Muslim population or the edifices symbolizing their culture sufficed to establish beyond reasonable doubt that the attack was aimed at the Muslim civilian population. [...]

426 Witness Baggesen said of the attack on Ahmici: "We think that this operation, military operation against the civilian population was to scare them and to show what would happen to other villages and the Muslim inhabitants in other villages if they did not move out. So I think this was an example to show", especially given what Ahmici symbolized for the Muslim community». Ibid, paras. 425-426.

Finally, the chamber said:

«The scale and uniformity of the crimes committed against the Muslim population over such a short period of time has enabled the conclusion that the operation was, beyond all reasonable doubt, planned and that its objective was to make the Muslim population take flight» (para. 750).

defense⁽²²⁶⁾.

(226) The ILC says:

«Having clarified this point, the Commission must, however, note that some writers have referred to the concept of "military necessity" with a purpose which is really the same as that pursued by the Commission in the present article, namely, to determine whether there are circumstances connected with the idea of necessity which are capable as such of precluding, exceptionally, the wrongfulness of conduct not in conformity with an international obligation. What these writers were studying is the question whether this particular kind of necessity, the object of which is to safeguard the vital interest of the success of military operations against the enemy and, in the last resort, of victory over the enemy, can have the effect of precluding the wrongfulness of State conduct not in conformity with one of the rules of the law of war, which impose limitations on the belligerents regarding the means and methods of conducting hostilities between them, the general purpose being to attenuate the rigours of war. These are what are called the rules of humanitarian law applicable to armed conflicts; most of them, moreover, are codified rules. The Commission does not believe that the existence of a situation of necessity of the kind indicated can permit a State to disobey one of the above mentioned rules of humanitarian law. In the first place, some of these rules are, in the opinion of the Commission, rules which impose obligations of *jus cogens*, and as stated below, a state of necessity cannot be invoked to justify non-fulfillment of one of these obligations. In the second place, even in regard to obligations of humanitarian law which are not obligations of *jus cogens*, it must be borne in mind that to admit the possibility of not fulfilling the obligations imposing limitations on the method of conducting hostilities whenever a belligerent found it necessary to resort to such means in order to ensure the success of a military operation would be tantamount to accepting a principle which is in absolute contradiction with the purposes of the legal instruments drawn up. The rules of humanitarian law relating to the conduct of military operations were adopted in full awareness of the fact that "military necessity" was the very criterion of that conduct. The representatives of States who formulated those rules intended, by so doing, to impose certain limits on States and to provide for some restrictions on the almost total freedom of action of which belligerents take advantage in their reciprocal relations by virtue of this criterion. And they surely did not intend to allow necessity of war to destroy retrospectively what they had achieved with such difficulty. They were also fully aware that compliance with the restrictions they were providing for might hinder the success of a military operation, but if they had wished to allow those restrictions only in cases where they would not hinder the success of a military operation, they would have said so expressly - or, more probably would have abandoned their task as being of relatively little value. The purpose of =

. **Duress:** Article 31/d statute of the ICC stipulates that a person shall not be criminally responsible if, at the time of that person's conduct, the «conduct which is alleged to constitute a crime within the jurisdiction of the Court 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 the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

- (i) Made by other person; or
- (ii) Constituted by other circumstances beyond that person's control».

- Mental disease and intoxication:

These two reasons mean that, in certain circumstances, the *mens rea* element does not exist. Accordingly, the person concerned is to be exonerated from criminal responsibility.

In this context, article 31 paras 1/a-b statute of the ICC states: «a person shall not be criminally responsible if, at the time of that person's conduct:

= the humanitarian law conventions was to subordinate, in some fields, the interests of a belligerent to a higher interest: States signing the Conventions undertook to accept that subordination and not to find pretexts for evading it. It would be absurd to invoke the idea of military necessity or necessity of war in order to evade the duty to comply with obligations designed, precisely, to prevent the necessities of war from causing suffering which it was desired to prescribe once and for all. It is true that some of these conventions on the humanitarian law of war contain clauses providing an explicit exception to the duty to fulfill the obligation they impose: this is in the case of "urgent military necessity". But these are provisions which apply only to the cases, it follows implicitly from the text of the conventions that they do not admit the possibility of invoking military necessity as a justification for State conduct not in conformity with the obligations they impose. [...] [T]he Commission took the view that a State cannot invoke a state of necessity if that is expressly or implicitly prohibited by a conventional instrument». YILC, 1980, II, part II, pp. 32 et ss. See as well commentary of the ILC on art. 25 Draft articles on state responsibility (2001), in Report of the ILC, 2001, op. cit., paras 19 and 21.

(a) The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law;

(b) The person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court».

*** Defenses not valid before international criminal courts:**

There are some defenses which are inadmissible before international criminal courts, though some of them are valid before domestic criminal courts. They are:

- **Domestic law:** The fact that a criminal conduct was legal under domestic law or the later does not contain a text criminalizing it, is no defence. In this regard, Principle 2 of the principles of international law recognized in the charter of Nuremberg Tribunal and in the Judgment of the Tribunal states: The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.

Accordingly, as far as there is a text or an established customary rule of international law⁽²²⁷⁾ indicating an intention to criminalize the act as well as to punish the violations, the individual could be held criminally responsible.

- **Statutes of limitation:** Statutory limitations are no defense. In fact, as mentioned above, they do not apply to some international crimes. In this context, article 29 statute of the ICC provides:

«The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations».

(227) In fact, in this context, official pronouncements of states, military manuals, courts decisions constitute elements for the purpose of establishing the existence of customary norms of CIL.

- **Official position or capacity:** With regard to this defense, there are three possibilities, namely:

* **Before national courts of states other than the state of nationality of the person claiming immunity:**

It is well known that, in domestic law, some persons, e.g., diplomatic agents, Heads of state and government, ministers of foreign affairs ... etc., enjoy immunity from jurisdiction. This is valid as well for international crimes. Thus, in the Arrest warrant case (Congo V. Belgium), the ICJ maintained (in 2002) that a Belgium's arrest warrant against an incumbent minister for foreign affairs of Congo, concerning alleged grave breaches of the Geneva Conventions of 1949 and the Additional protocols thereto and crimes against humanity, violated international law by failing to respect his immunity from jurisdiction before the courts of Belgium»⁽²²⁸⁾.

Moreover, article 16 of the International crimes Act 2003 in the Netherlands stipulates:

«Criminal prosecution for one of the crimes referred to in this Act is excluded with respect to:

a) Foreign heads of state, heads of government and ministers for foreign affairs, as long as they are in office, and other persons in so far as their immunity is recognized under customary international law;

b) Persons who have immunity under any convention applicable within the kingdom of Netherlands»⁽²²⁹⁾.

(228) See, Ahmed Abou-El-Wafa: Commentary on the case – law of the ICJ 2001 – 2005, R. Egyp. D.I., 2005.

(229) Article 1 (a) Code of criminal procedure (2003) in Belgium provides that the legal action shall not be taken against:

- 1- Foreign heads of state or government during their term of office as well as other persons whose immunity is recognized by international law.
- 2- Persons with a total or partial immunity based on a treaty that is binding on Belgium.

Para. 2 Adds that, for the duration of their stay no pressure to initiate legal action may be exerted with regard to anyone who has been officially invited to reside in the territory of the kingdom by the Belgian authorities or by an international organization established in Belgium and with which Belgium has concluded a headquarters agreement.

* Before national courts of the state of nationality of the person claiming immunity: *Prima facie*, a person cannot invoke immunity vis-à-vis his own state. The latter has, even, the right to waive his immunity before foreign national courts.

* Before international courts: Irrelevance of official capacity: The official capacity of a person, e.g., a head of state or government, a minister, a member of parliament, a diplomatic or consular agent, does not constitute a bar for the exercise of jurisdiction over some international crimes, i.e., immunities attaching to the official capacity of a person are irrelevant.

In this connection, article 6/2 statute of the ICTR states:

«The official position of any accused person, whether as Head of state or Government or as a responsible government official, shall not relieve such a person of criminal responsibility or mitigate punishment»⁽²³⁰⁾.

There are many examples in which international criminal courts prosecuted persons despite their official capacity. Thus, after the II world war, the IMT prosecuted Admiral Rader, who was appointed Germany's named successor Chancellor by Adolph Hitler before the latter committed suicide in Berlin, Fritz von Pappen, who was Germany's Vice-Chancellor and foreign minister during the Third Reich and Hermann Goering, Deputy Chancellor of Germany's Third Reich. Moreover, after the establishment by the security council of the ICTY and ICTR, in 1993 and 1994 respectively, the two tribunals prosecuted two former heads of states: Slobodan Milosevic of the

(230) See as well, principle III of principles of international law recognized in the charter of the Nuremberg tribunal and in the judgment of the tribunal, adopted in 1950 by the ILC; art. 7 Draft code of crimes against the peace and security of mankind (1996). Moreover, art. 27 statute of the ICC provides:

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

2- Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the court from exercising its jurisdiction over such a person».

Former republic of Yugoslavia, and Jean Kambanda of Rwanda. The latter was convicted and sentenced to prison while the former was tried before the ICTY, but died in March 2006, before the issuance of a sentence by the court.

Moreover, in Prosecutor V. Taylor, the special court of Sierra Leone ruled that it had jurisdiction over Charles Taylor, president of Liberia at the time of his indictment and of the application presented to the court to annul it (23 July 2003)⁽²³¹⁾.

(231) The special court said: «It is not difficult to accept and gratefully adopt the conclusions reached by Professor Sands who assisted the court as *amicus curiae* as follows:

a) The Special Court is not part of the judiciary of Sierra Leone and is not a national court.

b) The Special Court is established by treaty and has the characteristics associated with classical international organizations (including legal personality; the capacity to enter into agreements with other international persons governed by international law; privileges and immunities; and an autonomous will distinct from that of its members).

c) The competence and jurisdiction *ratione materiae* and *ratione personae* are broadly similar to that of ICTY and the ICTR and the ICC, including in relation to the provisions confirming the absence of entitlement of any person to claim of immunity.

d) Accordingly, there is no reason to conclude that the Special Court should be treated as anything other than an international tribunal or court, with all that implies for the question of immunity for a serving Head of State». Special court for Sierra Leone, Prosecutor V. Taylor, case No. SCSL-2003-01-1, 31 May, 2004, para. 41.

See as well Z. D-Racsmany: Prosecutor V. Taylor: The status of the special court for Sierra Leone and its implications for immunity, Leiden J.I.L., vol. 18, 2005, pp. 299-322; M. Henzelin: L'immunité pénal des ministres selon la cour internationale de Justice, RPS, 2002, pp. 249-264. See also:

P. Gaeta: Ratione materiae immunities of former heads of state and international crimes: The Hisséne Habré case, JICJ, vol. I, 2003, pp. 186-196.

The Institut de Droit International in its resolution concerning «Immunities from jurisdiction and execution of heads of state and of government in international law» stated (art. 2).

«In criminal matters, the Head of state shall enjoy immunity from jurisdiction before the courts of a foreign state for any crime he or she may have committed, regardless of its gravity».

However, the same resolution adds that it may not be understood to detract from «obligations under the statutes of the international criminal =

- *Nemo jus ignorare censetur or ignorantia non (or neminem) scusat: Ignorance of the law excuses no one:*

The principle is that «ignorance of the fact excuses; ignorance of the law does not excuse» (the maxim: «*ignorantia facti excusat; ignorantia juris non excusat*»).

Accordingly, when mistake is pleaded, it must be one of fact, not of law. However, ignorance of law is accepted as a defense in case it negates the mental element required for the crime.

In this regard, article 32 statute of the ICC stipulates:

«1. A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.

2. A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in article 33»⁽²³²⁾.

Thus, the presumption of knowledge of CIL⁽²³³⁾ is not, in all circumstances, irrefutable⁽²³⁴⁾.

= tribunals» nor can it be taken to mean that a Head of State «enjoys immunity before an international tribunal» (art. 11).

It is worth recalling that a former Head of state may be prosecuted and tried before the courts of a foreign court of a foreign country «when the acts alleged constitute a crime under international law» (art. 13), Ann.IDI,2001,pp745-651(emphasis added).

(232) Art. 33 concerns «superior order and prescription of law».

(233) Knowledge of criminal law is made, in principle, in domestic law through promulgation, or ratification of the international treaty. On the international level, this occurs by accession, expression of consent to be bound by a treaty, registration or deposit of a treaty, adoption of resolutions of international organizations, judgements of international tribunals etc.

See as well more details about the problem of ignorance of law, in M.M. Awad: Studies in criminal international law, op. cit., pp. 921-935.

(234) Ch. Bassiouni says: «There are two doctrinal approaches as to the presumption of knowledge and ignorance of international criminal law. One approach is to treat the question as part of the mental element of =

- Obedience to superior orders:

In certain circumstances, e.g., during war, a crime may be committed following an authoritative command. The question is: Does execution of orders amount to negating the *mens rea* of an international crime?

The rule is that execution of superior orders is no defense⁽²³⁵⁾. This flows from a twofold reason, namely:

= criminal responsibility; the other is to treat it as an evidentiary question needed to prove the mental element. The consequence of the first hypothesis is that absence of knowledge or culpability negates responsibility altogether, and with respect to the second, it becomes an exonerating factor in the nature of a legal excuse or non-punishability».

He adds:

(1) The presumption of knowledge of international criminal law should exist as a policy choice for the same reasons recognized in the world's major criminal justice systems.

(2) Ignorance of the existence of international criminal law is in principle no defense, but ignorance of a specific crime would be a legal excuse if it negates the mental element of the crime.

(3) If the international crime also exists in the national criminal law of the individual's state of nationality or residence, ignorance of the international criminal law should not be deemed as negating the mental element.

(4) Ignorance of a specific violation of international criminal law should, however, be taken into account in mitigation of punishment.

(5) International criminal law should not recognize the principle of strict criminal responsibility, that is responsibility without intent, and intent presupposes actual knowledge of the law.

(6) None of the above should affect other bases of criminal responsibility such as those pertaining to omissions, or responsibility for the conduct of other, except that none of these and other principles of imputed responsibility should be based on strict responsibility.

Ch. Bassiouni: Introduction to international criminal law, *op. cit.*, p. 285.

(235) This applies as well to domestic crimes:

- Thus, article 2 para. 3 of the convention against torture and other cruel, inhuman or degrading treatment or punishment provides that:

«An order from a superior officer or a public authority may not be invoked as a justification of torture».

- Moreover, principles of effective prevention and investigation of extra-legal, arbitrary and summary executions stipulate:

«Governments shall prohibit orders from superior officers or public authorities authorizing or inciting other persons to carry out any such =

1- the duty incumbent upon states, international organizations and even simple individuals to respect rules of CIL and, accordingly, not to carry out superior orders related to the commission of international crimes;

2- the obligation to give priority of consciousness over exigencies of the discipline (French: *Priorité de la conscience par rapport aux exigences de la discipline*). *Prima facie*, this is valid in case the person concerned has «a moral choice»⁽²³⁶⁾, i.e., it is «possible for him not to comply with the order»⁽²³⁷⁾.

Thus, e.g., concerning war crimes, State practice establishes two rules as norms of customary international law applicable to orders given in both international and non-international armed conflicts, namely:

- Every combatant has a duty to disobey a manifestly unlawful order.

- Obeying a superior order does not relieve a subordinate of criminal responsibility if the subordinate knew that the act ordered was unlawful or should have known because of the manifestly unlawful nature of the act ordered⁽²³⁸⁾.

However, obedience to superior orders may have two effects, namely:

- Mitigation of punishment if justice so requires⁽²³⁹⁾.

= extra legal, arbitrary or summary executions. All persons shall have the right and duty to defy such orders» (para. 3).
Adopted by ECOSOC Res. 1989/65.

(236) principle IV of the principles of international law recognized in the charter of Nuremberg Tribunal and in the judgment of the Tribunal says: «The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him».

(237) Article 4 Draft code of offences against the peace and security of mankind (1954) provides: «The fact that a person ... acted pursuant to an order of his Government or of a superior does not relieve him of responsibility in international law if, in the circumstances at the time, it was possible for him to comply with that order».

(238) Henckaerts and Doswaldbeck: Customary international humanitarian law, op. cit., vol. I, pp. 563-565.

(239) Thus, art. 5 Draft code of crimes against the peace and security of =

- Under the statute of the international criminal tribunal (art. 33), the perpetrator may be relieved from criminal responsibility, if:

- . he was under a legal obligation to obey the orders in question.
- . he did not know that the order was unlawful.

. the order was not manifestly unlawful. It is worth recalling that orders to commit genocide or crimes against humanity are manifestly unlawful⁽²⁴⁰⁾.

- The *Tu Quoque* defense:

The defense *Tu Quoque* means that a defendant argues that his actions are justified and, accordingly, he cannot be punished for a war crime on the ground that the other party had regularly committed comparable acts under similar circumstances⁽²⁴¹⁾.

The *Tu Quoque* principle is not valid before international courts⁽²⁴²⁾, particularly in case of breaches of human rights and

= mankind (1996) provides: «The fact that an individual charged with a crime ... acted pursuant to an order of a Government or a superior does not relieve him of criminal responsibility, but may be considered in mitigation of punishment if justice so requires», See as well art. 6/4 ICTR and art. 7/3 ICTY.

(240) It is worth recalling that the «crimes against humanity and war crimes Act» in Canada (2000) reproduces the same three conditions (See para. 14/1). See as well section 3 German International criminal code (2002).

(241) An author says that that defense «cannot be a justification. It should rather be considered a procedural impediment».

H-H. Jescheck: The general principles of international criminal law set out in Nuremberg, as mirrored in the ICC statute, JICJ vol. 2, 2004, p. 52. See as well:

R. Provost: Reciprocity in human rights and humanitarian law, BYIL, 1994.

(242) In this regard, the ICJ: «a right of termination on account of breach must be presumed to exist in respect of all treaties, except as regards provisions relating to the protection of the human person contained in treaties of a humanitarian character» ICJ, Rep., 1971, p. 47, para. 96. See as well art. 60/5 Vienna conventions on the law of treaties 1969 and 1986.

Moreover, the ILC said: «Human rights obligations could not be suspended by way of countermeasures, since such measures were, by definition, taken against a state and not individuals» Report of the ILC, A/55/10. 2000, p. 92, para. 299. See as well:

Ahmed Abou-El-Wafa: Public international law, op. cit., pp. 192-194.

rules of international humanitarian law⁽²⁴³⁾. Accordingly, it cannot constitute a justification for the commission of international crimes.

(243) In Prosecutor V. Kupreskic, the Trial chamber refused the *Tu quoque* defence and considered it as fallacious and inapplicable. In fact, the defence of the accused said that the attacks committed against the Muslim population of the Lasva Valley were somehow justifiable because, in the Defense's allegation, similar attacks were allegedly being perpetrated by the Muslims against the Croat population. The Trial Chamber of the ICTY pointed out that that justification has no place in contemporary international humanitarian law. It added:

«517. [I] The *tu quoque* argument is flawed in principle. It envisages humanitarian law as based upon a narrow bilateral exchange of rights and obligations. Instead, the bulk of this body of law lays down absolute obligations, namely obligations that are unconditional or in other words not based on reciprocity. This concept is already encapsulated in Common Article 1 of the 1949 Geneva Conventions, which provides that "The High Contracting Parties undertake to respect ... the present Convention *in all circumstances*" (emphasis added). Furthermore, attention must be drawn to a common provision (respectively Articles 51, 52, 131 and 148) which provides that "No High Contracting party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article (i.e. grave breaches)".

519. As a consequence of their absolute character, these norms of international

humanitarian law do not pose synallagmatic obligations, i.e. obligations of a State *vis-a-vis* another State. Rather - as was stated by the International Court of Justice in the *Barcelona Traction* case (which specifically referred to obligations concerning fundamental human rights) =

= - they lay down obligations towards the international community as a whole, with the consequence that each and every member of the international community has a "legal interest" in their observance and consequently a legal entitlement to demand respect for such obligations.

Furthermore, most norms of international humanitarian law, in particular those prohibiting war crimes, crimes against humanity and genocide, are also peremptory norms of international law or *Jus cogens*, i.e. of a non-derogable and overriding character. One illustration of the consequences which follow from this classification is that if the norms in question are contained in treaties, contrary to the general rule set out in Article 60 of the Vienna Convention on the Law of Treaties a material breach of that treaty obligation by one of the parties would not entitle the other to invoke that breach in order to terminate or suspend the operation of the treaty. Article 60(5) provides that such reciprocity or in other words the principle *in adimplenti non est adimplendum* does not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular the provisions prohibiting any =

This is mainly because reciprocity should not be a general rule or play a leading role in the protection of human rights⁽²⁴⁴⁾.

G) The principle of international cooperation in criminal matters:

This principle raises seven issues, namely:

1- The essence and necessity of the principle:

Evidently, if each state has, individually, the obligation to repress international crimes, all states have, a fortiori, collectively, the same obligation. This is primarily made through international cooperation⁽²⁴⁵⁾.

Accordingly, the prevention, combating and suppression of international crimes is a common and shared responsibility⁽²⁴⁶⁾ of the international community, at the bilateral, regional, multilateral and universal levels⁽²⁴⁷⁾.

The necessity of international cooperation in criminal justice is justified by a threefold reason, namely:

a- Combating international crimes, in all its forms and manifestations, requires cooperation, coordination and collaboration among states and competent international organizations, for those crimes have transnational dimensions, which cannot be dealt with adequately by national action alone. In fact, investigatory and

= form of reprisals against persons protected by such treaties». Case No. IT-95-16, 14 January 2000, paras. 517-520.

(244) Ahmed Abou-El-Wafa: *Public international law*, op. cit., p. 504, footnote 641.

(245) See as well:

«Structure et méthodes de la coopération répressive internationale et régionale» colloque, *R. Internationale de Droit Pénal*, 1984, pp. 1 – 416.

(246) In fact, combating international crimes is a «shared responsibility». For responsibility for managing worldwide threats to international peace and security «must be shared among the nations of the world and should be exercised multilaterally», UN millennium declaration, GA of the UN, Res., 55/2 (2000), para. 6.

(247) International cooperation may concern a state and an international organization. Thus, article 89 of Additional protocol I of 1977 reads” «In situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter».

prosecutorial matters, on the international level and with regard to international crimes, cannot be done without the cooperation of states concerned, due to the fact that those crimes are global in scope and, accordingly, require global cooperation.

b- Unlike national courts (which depend on investigative mechanisms and personnel, essentially by national police), there is no international police for the collection of evidence for international tribunals. They later rely primarily, in this context, on the cooperation of the states concerned.

c- Promoting stability and security of international relations. In fact, world interdependence «requires global solutions»⁽²⁴⁸⁾. International crimes are a global challenge which requires a global response. If they cross borders, so must law enforcement.

2- Objectives of international cooperation in international criminal matters:

International cooperation in criminal justice has its *fons et origo* in a double purpose, namely:

- a- To reinforce tracing of perpetrators of international crimes.
- b- To liberate mankind from the odious scourge of international crimes, cooperation among subjects of international law is required. Consequently, international cooperation would contribute to the eradication of nefarious activities which jeopardize the safety of the world through prosecution and punishment of those who are convicted of international criminal acts⁽²⁴⁹⁾.

3- Forms of international cooperation in international criminal justice⁽²⁵⁰⁾:

States should strengthen international cooperation among judicial, executive and law enforcement authorities at all levels in

(248) Ahmed Abou-El-Wafa: Public international law, op. cit., p. 217.

(249) It is worth recalling that: States may adopt domestic legislation concerning cooperation with international criminal tribunals see, e.g., Luxembourg law of 18 May 1999 concerning cooperation with ICTR and ICTY, in M. Sassoli: How does law protect in war, op. cit., (2006), vol. II, pp. 2165-2179.

(250) The Model treaty on extradition: «Urges all states to strengthen further international cooperation in criminal justice», General Assembly of the UN, Res. 45/116 of 1991.

order to prevent and combat international crimes.

This requires that states have:

- To take all necessary measures in order to prevent preparations in its territory of an international crime.
- To exchange information and all the pertinent facts regarding the crime committed.
- To coordinate the taking of administrative, executive and other appropriate measures to prevent the commission of an international crime.
- To supply all evidence at its disposal necessary for the proceedings.
- To strictly apply the principle «*aut dedere aut judicare*».
- To faithfully execute foreign penal sentences.
- To proceed to the forfeiture and freezing of assets used in or resulting from international offenses⁽²⁵¹⁾.

(251) See as well the numerous modalities of cooperation in penal matters, e.g.,: extradition, legal assistance, execution of foreign penal sentences, recognition of foreign penal judgments, transfer of criminal proceedings, freezing and seizing of assets deriving from criminal conduct, intelligence and law enforcement information – sharing, and regional and sub-regional judicial spaces in: Ch. Bassiouni: *Introduction to international criminal law*, op. cit., p. 347-378; the *Model treaty on mutual assistance in criminal matters* as well as elements recommended for inclusion in model legislation on mutual assistance in criminal matters, in UNJY, 1998, New York, 2005, pp. 180-182. See as well forms of cooperation under the Statute of ICC articles 87-93; article 28 ICTR; article 29 ICTY.

Moreover, as example of an international resolution inciting states to cooperate on the international level, one can mention resolution 59/163 adopted by the General Assembly of the UN in 2004 concerning: «international cooperation against the world drug problem». The Resolution called upon states:

- (a) To enhance support, including, where appropriate, through the provision of new and additional financial resources, for alternative development, environmental protection and eradication programs undertaken by countries affected by the illicit cultivation of cannabis, of opium poppy and of coca bush;
- (b) To enhance joint strategies, with the aim of eliminating illicit crop cultivation and fostering economic and social development;
- (c) To encourage international cooperation to prevent illicit crop cultivation from emerging in or being relocated to other areas;

=

- To apply any form of mutual cooperation provided by international treaties or established in customary rules of international law⁽²⁵²⁾.

- To take evidence or statements from persons.

- To effect service of judicial documents.

- To examine objects and sites.

- To provide originals or certified copies of documents, e.g., bank, financial or business records⁽²⁵³⁾.

In the final analysis, one should recognize, however, that existing measures of international cooperation are inadequate in criminal matters⁽²⁵⁴⁾.

= (d) To provide, in accordance with the principle of shared responsibility, greater access to their markets for products of alternative development programs, which are necessary for the creation of employment and the eradication of poverty;

(e) To establish or reinforce where appropriate, national mechanisms to monitor and verify illicit crops;

(f) To continue to contribute to the maintenance of a balance between the licit supply of and demand for opiate raw materials used for medical and scientific purposes;

(g) To share their experience, expertise and best practices in the eradication of illicit drug crops.

(252) In this respect, e.g., Additional Protocol I of 1977 stipulates (articles 88, 89) that the belligerent Parties shall afford one another the greatest measure of assistance with penal proceedings relative to grave breaches of the law of war.

The belligerent Parties shall benefit by the same assistance from neutral States. Cooperation shall also take place with the United Nations and in conformity with the United Nations Charter.

Moreover, under articles 52, 53, 132 and 149 of the four Geneva conventions of 1949 and article 90 of the Additional Protocol I of 1977:

At the request of a belligerent Party, an inquiry shall be instituted, in a manner to be decided between the interested Parties, concerning any alleged breach of the law of war (e.g. by the International Fact-Finding Commission).

(253) See as well art. 18 UN convention against transnational organized crime (2000).

(254) Thus, this author has said that with regard to cooperation among states «le droit international est peu développé». Ahmed Abou-El-Wafa: le devoir de respecter le droit à la vie en droit international public, op. cit., p. 47.

4- International cooperation in the detention, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity:

In this context, there is an important resolution adopted by the General Assembly of the UN, i.e., Resolution 3074 of 1973 related to «Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity».⁽²⁵⁵⁾

(255) The principles set forth in the Resolution are these:

1. War crimes and crimes against humanity, wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment.
2. Every State has the right to try its own nationals for war crimes against humanity.
3. States shall co-operate with each other on a bilateral and multilateral basis with a view to halting and preventing war crimes and crimes against humanity.
4. States shall assist each other in detecting, arresting and bringing to trial persons suspected of having committed such crimes and, if they are found guilty, in punishing them.
5. Persons against whom there is evidence that they have committed war crimes and crimes against humanity shall be subject to trial and, if found guilty, to punishment, as a general rule in the countries in which they committed those crimes. In that connection, States shall co-operate on questions of extraditing such persons.
6. States shall co-operate with each other in the collection of information and evidence which would help to bring to trial the persons indicated in paragraph 5 above and shall exchange such information.
7. States shall not grant asylum to any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime or a crime against humanity.
8. States shall not take any legislative or other measures which may be prejudicial to the international obligations they have assumed in regard to the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity.
9. In co-operating with a view to the detection, arrest and extradition of persons against whom there is evidence that they have committed war crimes and crimes against humanity and, if found guilty, their punishment, States shall act in conformity with the provisions of the Charter of the United Nations and of the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.

These principles means that each state is required to search for any person alleged to have committed or ordered the commission of the crime, regardless of the person's or victim's nationality or the place where the crime was committed.

5- Consequences of failure to cooperate in international criminal matters:

Undoubtedly, a state which refuses to carry out an international obligation bears the international legal responsibility before the other state and, for serious and grave international crimes, before the international community⁽²⁵⁶⁾.

In this regard, the ICTY, in one of its decisions, highlighted the consequences resulting for states from «Failure to cooperate with the international tribunal»⁽²⁵⁷⁾.

(256) In a resolution adopted in 1971, concerning war criminals, the general Assembly of the UN affirmed that a state's refusal «to cooperate in the arrest, extradition, trial and punishment» of persons accused of war crimes or crimes against humanity «is contrary to the United Nations charter and generally recognized norms of international law» (Res. 2840).

(257) The importance of the decision requires that it be cited *in extenso*:

«The Trial Chamber believes that Ivica Rajic has been present in Croatia and in the territory of the Federation of Bosnia and Herzegovina on several occasions since his release. The prosecutor has produced reliable information indicating that Ivica Rajic resides or has been residing in Split in the Republic of Croatia and that he visits Kiseljak, in the Federation of Bosnia and Herzegovina for short periods. [...] In addition, the Trial Chamber has received a power of attorney, signed by Ivica Rajic while in Kiseljak, appointing a Croatian lawyer, Mr. Hodak, as his representative in the proceedings in this case.

The Republic of Croatia is bound to cooperate with the International Tribunal pursuant to Article 29 of the Statute. Despite the presence of Ivica Rajic on its territory, the Republic of Croatia has neither served the indictment nor executed the warrant of arrest addressed to it.

The Federation of Bosnia and Herzegovina is also bound to cooperate with the International Tribunal, following the signing of the Dayton Peace Agreement. Pursuant to Article X of annex 1-A of the Dayton Peace Agreement, the Federation of Bosnia and Herzegovina has undertaken to "cooperate fully with all entities involved in implementation of this peace agreement... including the International Tribunal for the Former Yugoslavia". Again, despite the presence of Ivica Rajic on its territory, the Federation of Bosnia and Herzegovina has neither served the indictment nor executed the warrant of arrest addressed to it.

6- Exceptions to the principle of cooperation in international criminal matters:

The obligation to cooperate derives from rules of international law, i.e., from international treaties or custom. Consequently, any exceptions to that obligation should be as well in conformity with international law. This means that, in certain circumstances, a state may be relieved from cooperating with regard to a certain international crime in accordance with, e.g., a text in an international treaty⁽²⁵⁸⁾.

= In a side letter to the Dayton Peace Agreement, on 21 November 1995, the Republic of Croatia undertook to ensure that personnel or organizations in Bosnia and Herzegovina which are under its control or with which it has influence fully respects and comply with the provisions of the aforementioned Annexes [i.e. annexes 1-A and 2 of the Dayton Peace Agreement].

Dayton Peace Agreement at 126-30. Both the Security Council of the United Nations and the Presidency of the European Union have recently called upon the Republic of Croatia to use its influence on the Bosnian Croat leadership to ensure full compliance by the Federation of Bosnia and Herzegovina with its international obligations. The failure of the Federation of Bosnia and Herzegovina to comply also implies the failure of the Republic of Croatia.

In light of the above, the Trial Chamber considers that the failure to effect personal service of the indictment and to execute the warrants of arrest against Ivica Rajic may be ascribed to the refusal of the Republic of Croatia and the Federation of Bosnia and Herzegovina to cooperate with the International Tribunal. Accordingly, the Trial Chamber so certifies for the purpose of notifying the Security Council». (Ivica Rajic case, No. IT-95-12-R 61, September 13, 1996, paras. 66-70).

It is worth recalling that article 29 para. 2 statute of the ICTY, provides:

«States shall comply without undue delay with any request for assistance or an order issued by a trial chamber».

See as well Rules 176-197 of the Rules of procedure and evidence of the ICC.

(258) Thus, the statute of the ICC enumerates four exceptions to the obligation to cooperate: «The first is where a state-party is acting pursuant to its general obligations to investigate and prosecute. In that case, the ICC Prosecutor would have to prove to a chamber of the Court that the state-party in question is "unable" or "unwilling" to carry out its obligations. This presupposes showing ineffectiveness and bad faith. The second is where the state-party can show that the person in question has been investigated, prosecuted, and acquitted or convicted—in other words, *ne bis in idem* [Articles 17 and 20]. The third is where the S.C. requests the withholding of investigation and prosecution [Article 16]. The fourth is what is called article 98 exception. Article 98 (2) sets forth an exception to the general duty to cooperate with the ICC under Article 86. Accordingly, a requested state-party cannot =

Prima facie, exceptions to the obligation to cooperate should be interpreted restrictively: *exceptionis sunt strictissimae interpretatio*.

7- Necessity to cooperate in case of serious breaches of obligations under peremptory norms of general international law⁽²⁵⁹⁾:

In fact, rules of *jus cogens* should be, at all times, respected. For they concern the international community as a whole. Accordingly, in case of breaches of those norms, cooperation of all states is indispensable. This, inevitably, applies to serious international crimes, such as genocide, crimes of war or crimes against humanity.

- = be compelled to act inconsistently with its obligations under an international agreement necessitating its consent for the surrender of a national of another state, unless the Court can obtain such consent. Certain agreements may also be allowed to take priority over requests from the ICC such that an individual is returned to the state of nationality instead of the ICC». Ch. Bassiouni: Introduction to international criminal law, op. cit., pp. 532-533.
- (259) In the Draft articles on state responsibility (2001), art. 40 says that a breach is serious «if it involves a gross or systematic failure by the responsible state to fulfil the obligation». As for consequences resulting from such a breach, art. 41 states that they, inter alia, include the following «States shall cooperate bring to an end through lawful means any serious breach». In the commentary, the ILC says:
- « 2) Pursuant to paragraph 1 of article 41, States are under a positive duty to cooperate in order to bring to an end serious breaches in the sense of article 40. Because of the diversity of circumstances which could possibly be involved, the provision does not prescribe in detail what form this cooperation should take. Cooperation could be organized in the framework of a competent international organization, in particular the United Nations. However, paragraph 1 also envisages the possibility of non-institutionalized cooperation.
- 3) Neither does paragraph 1 prescribe what measures States should take in order to bring an end to serious breaches in the sense of article 40. Such cooperation must be through lawful means, the choice of which will =
- = depend on the circumstances of the given situation. It is, however, made clear that the obligation to cooperate applies to States whether or not they are individually affected by the serious breach. What is called for in the face of serious breaches is a joint and coordinated effort by all States to counteract the effects of these breaches. It may be open to question whether general international law at present prescribes a positive duty of cooperation, and paragraph 1 in that respect may reflect the progressive development of international law.». Report of the ILC, 2001, op. cit., paras.2-3.

Section IV

Decisions of International Organizations

International organizations play an important role in the formulation and development of rules of CIL. They can initiate steps and studies in the direction of codification and progressive development of CIL. In fact, the legislative or extra-legislative action of those organizations (particularly the legal acts taken by them, e.g., resolutions, decisions, recommendations and treaties) are signs of their influence upon the formation and evolution of CIL⁽²⁶⁰⁾.

International organizations may play a great role in fighting international crimes. It suffices to mention, here, the following examples:

1- The security council of the UN, acting under chapter VII of the UN charter has established two ad hoc international penal tribunals, i.e., that of the former Yugoslavia and that of Rwanda⁽²⁶¹⁾.

2- The organization of American States provides its member states and other interested governments with a unique instrument to fight international narcotics trafficking and money laundering⁽²⁶²⁾.

3- The General Assembly of the UN adopts, annually, various decisions concerning⁽²⁶³⁾ international crimes. It adopted, as well,

(260) Ahmed Abou-El-Wafa: *A manual on the law of international organizations*, Dar Al-Nahda Al-Arabia, Cairo, 1426-2006, p. 34.

(261) *Vide infra*, See as well, A. Aust: *The security council and the international criminal law*, NYIL, 2002, pp. 23 et ss.

(262) Zagaris and Papavizas: *Using the organization of American states to control international narcotics trafficking and money laundering*, IRPL, 1986, pp. 119-132.

(263) Thus, e.g., in 2004, the General Assembly of the UN adopted the following resolutions:

- Strengthening international cooperation and assistance in promoting the implementation of the universal conventions and protocols related to terrorism (Res. 59/153).

- International cooperation in the prevention, combating and elimination of kidnapping (Res. 59/154).

- Preventing, combating and punishing trafficking in human organs (Res. 59/156).

- International cooperation in the fight against transnational organized crime (Res. 59/157).

- Trafficking in women and girls (Res. 59/166).

many rules concerning the administration of justice⁽²⁶⁴⁾, extradition⁽²⁶⁵⁾ ... etc.

(264) It suffices to mention the following:

- Standard Minimum Rules for the Treatment of Prisoners .
- Basic Principles for the Treatment of Prisoners.
- Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment .
- United Nations Rules for the Protection of Juveniles Deprived of their Liberty .
- Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
- Optional Protocol to the Convention against Torture ,and Other Cruel, Inhuman or Degrading Treatment or Punishment.
- Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
- Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
- Safeguards guaranteeing protection of the rights of those facing the death penalty.
- Code of Conduct for Law Enforcement Officials
- Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.
- United Nations Standard Minimum Rules for Non-custodial measures (The Tokyo Rules).
- United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules).
- Guidelines for Action on Children in the Criminal Justice System.
- United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines).
- Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.
- Basic Principles on the Independence of the Judiciary.
- Basic Principles on the Role of Lawyers .
- Guidelines on the Role of Prosecutors.
- Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions.
- Declaration on the Protection of All Persons from Enforced Disappearance.

See: Human rights: A compilation of international instruments, vol. I, UN, New York, 2002, pp. 273-434.

(265) See, e.g., Model treaty on extradition (Res. 45/116 of 1991 adopted by the GA of the UN).

4- Organs of international organizations prepared and adopted many treaties concerning CIL, in the fields of organized crime, taking of hostages, ... etc⁽²⁶⁶⁾.

Section V

Stare decisis (Judicial precedents)

This source has no great place before international courts. In fact, there is a legal adage according to which the decision has no binding force except between the parties and in respect of that particular case, i.e., the *res judicate* principle (e.g., art. 59 statute of the ICJ)⁽²⁶⁷⁾.

This is valid, *mutatis mutandis*, to international criminal courts. The rule of precedent or *Stare decisis* (whereby the rulings of certain courts must be followed and applied by some other courts) is not applicable before international criminal courts⁽²⁶⁸⁾.

(266) Vide supra.

(267) Ahmed Abou-El-Wafa: Public international law, op. cit., p. 222.

(268) In prosecutor V. Kuperskic the ICTY referred to the doctrine of *stare decisis* as follows:

«Being international in nature and applying international law *principaliter*, the Tribunal cannot but rely upon the well-established sources of international law and, within this framework, upon judicial decisions. What value should be given to such decisions? The Trial Chamber holds the view that they should only be used as a "subsidiary means for the determination of rules of law" (to use the expression in Article 38(1)(d) of the Statute of the International Court of Justice, which must be regarded as declaratory of customary international law). Hence, generally speaking, and subject to the binding force of decisions of the Tribunal's Appeals Chamber upon the Trial Chambers, the International Tribunal cannot uphold the doctrine of binding precedent (*stare decisis*) adhered to in common law countries. Indeed, this doctrine among other things presupposes to a certain degree a hierarchical judicial system. Such a hierarchical system is lacking in the international community. Clearly, judicial precedent is not a distinct source of law in international criminal adjudication. The Tribunal is not bound by precedents established by other international criminal courts such as the Nuremberg or Tokyo Tribunals, let alone by cases brought before national courts adjudicating international crimes. Similarly, the Tribunal cannot rely on a set of cases, let alone on a single precedent, as sufficient to establish a principle of law: the authority of precedents (*auctoritas rerum similiter judicatarum*) can only consist in evincing the possible existence of an international rule. More specifically, =

However, in certain cases, these courts, voluntarily referred to previous judicial decisions when seeking to settle a subsequent similar case⁽²⁶⁹⁾.

Section VI

National Legislations

The study of national legislations necessitates that we refer to their importance, the applicable principles and some examples .

§I- Importance of domestic legislations for CIL:

Prima facie, owing to the gravity and the increasing number of international crimes, states should pay a scant attention for criminal international law in their domestic legal systems⁽²⁷⁰⁾:

International law requires states to fulfil their international obligations, particularly by inserting the prohibitions of CIL in

= precedents may constitute evidence of a customary rule in that they are indicative of the existence of *opinio iuris sive necessitatis* and international practice on a certain matter, or else they may be indicative of the emergence of a general principle of international law. Alternatively, precedents may bear persuasive authority concerning the existence of a rule or principle, i.e. they may persuade the Tribunal that the decision taken on a prior occasion propounded the correct interpretation of existing law. Plainly, in this case prior judicial decisions may persuade the court that they took the correct approach, but they do not compel this conclusion by the sheer force of their precedential weight. Thus, it can be said that the Justinian maxim whereby courts must adjudicate on the 'strength of the law, not of cases (*non exemplis, sed legibus iudicandum est*) also applies to the Tribunal as to other international criminal courts» case No. IT-95-16, 14 January 2000, para. 450.

(269) See. E.g., Prosecutor V. Strugar where the appeals chamber referred to the Kordic case (Case No. IT-01-42-AR 72, 22 No. 2002).

(270) In fact, the interest of the *bona fides* principle lies particularly in the fact that «l'obligation internationale en question implique de la part des Etats qu'ils prennent, sur le plan du droit interne, les mesures nécessaires pour s'acquitter des devoirs qui leur incombent au regard du droit international «Examen d'ensemble du droit international, Doc. A/CN.4/245, Ann. CDI, 1971, vol. II (deuxième partie), p. 11.

Moreover, it has been maintained that «The principle of complementarity means that it is in the states parties' own interest to pass national legislation dealing with international criminal law» Ch. Grammer: The Rome Statute regime as a mainspring of international criminal law, ZaöRV, 2004, p. 1059.

their domestic penal laws⁽²⁷¹⁾, thereby transforming international crimes into domestic ones.

Moreover, it is well established that:

«International and national norms applicable to ICL are, however, to some extent complementary, in the sense that the two Sources of law cross-fertilize one another»⁽²⁷²⁾.

The existence of national laws and legislations concerning CIL has many advantages, namely:

* to give competent legal authorities (especially, armed forces, the judiciary and the executive) a national legal basis for the application, *in concreto*, of rules of CIL.

* to put the legal status of rules of CIL, beyond any doubt, on the national level.

* to determine precisely the content and extent of such rules.

* to put the rules of CIL in force within the national legal order of the state concerned. In fact, the importance of domestic law for CIL lies as well in the fact that, by that law, the state puts into effect the international obligations set forth in international treaties⁽²⁷³⁾.

(271) See as well:

«Les crimes internationaux et le droit pénal interne», R. Internationale de Droit Pénal, 1989, pp. 1-589.

Even it has been maintained that the aim of compilation of national laws and regulations related to terrorism is to «Provide resource material and thereby contribute to enhancing international cooperation in the struggle against terrorism» (National laws and regulations on the prevention and suppression of international terrorism, UN Legislative Series, ST/LEG/SER.B/23, UN, New York, 2005, Part II (A-L), p. vii).

(272) Ch. Bassiouni: Introduction to international criminal law, op.cit. p. 15.

(273) Thus, in Monaco the sovereign order No. 15. 655 (of 2003) concerning application of various international treaties related to the suppression against terrorism, stipulates (article 3):

«Pour l'application exclusive des traités internationaux ci-dessus visés, la Principauté de Monaco accorde l'entraide judiciaire-la plus large possible pour enquête ou procédure pénale d'extradition relatives aux infractions visées à l'article premier, y compris pour l'obtention des éléments de preuve en sa possession qui sont nécessaires aux fins de la procédure».

National laws and regulations on the prevention and suppression of international terrorism, UN legislative series, ST/LEG/SER.B/24, New York, 2005, part II (M-Z), p. 36.

* to adhere *expressis verbis* to the principle of legality, i.e. *nullum crimen nulla poena sine lege*, on the domestic level.

* Finally, Criminalization of international crimes in domestic law is a necessity in order to make CIL as effective as possible⁽²⁷⁴⁾.

§II- Principles applicable to national legislations related to CIL:

There are some principles related to national legislations concerning CIL, the most important of which are these:

A) The enactment of criminal legislations⁽²⁷⁵⁾ necessary for honouring the state's international obligations. The *fons et origo* of this obligation to legislate is:

1- to punish violations of CIL, i.e., to prosecute and impose penal or disciplinary sanctions.

2- to make these violations criminal offences under domestic law.

3- to take measures necessary to prohibit and prevent violations.

B) The impossibility to justify international crimes on the domestic level. In reality, «Neither the interest of a state nor any

= See as well part VII of the Anti-Terrorism Act, 2002, of Gambia related to: «implementation of United Nations anti-terrorism measures» Ibid, pp. 258-26; the United Nations Act of Sri Lanka, Ibid, p. 281. With regard to national texts applicable in non-international armed conflicts, see T. Graditzky: Individual criminal responsibility for Violations of international humanitarian law committed in non-international armed conflicts, IRRC, No. 322, 1998, pp. 38-44.

(274) See the resolution adopted by the XIVth international congress on penal law: «International crimes and domestic criminal law», in IRPL, 1990, pp. 131-134.

See as well: Symposium: «National implementation of the ICC Statute», JICJ, vol. 2, 2004, pp. 133-210.

(275) As examples of treaty provisions requiring enactment of criminal legislations, one can refer to the common article 49/50/129/146 of the four Geneva conventions 1949, article 28 of the Hague convention for the protection of cultural property in the event of armed conflict and articles, 9, 15, 21 of the second Protocol (1999) to the same convention, article IV of the 1972 biological weapons convention, article IV of the 1976 environmental modification techniques convention, article VII of the 1993 chemical weapons convention, article 9 of the 1997 Ottawa convention banning anti-personnel landmines.

domestic legislation can justify international crimes *stricto sensu*»⁽²⁷⁶⁾.

C) Irrelevance of internal law: The characterization of an international crime is governed by international law and is not affected by the characterization of the same act as lawful under national law. Accordingly, a state or an individual may not invoke or rely on the provisions of internal law as justification for failure to comply with those of CIL. This is a mere application of the principle of the supremacy or prevalence of international law over internal law⁽²⁷⁷⁾.

In this regard, principle II of «Principles of international law recognized in the charter of the Nuremberg tribunal and in the judgment of the tribunal» adopted by the ILC (1950) states:

«The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law»⁽²⁷⁸⁾.

Moreover, article 1 para. 2 Draft code of crimes against the peace and security of mankind adopted by the ILC in 1996 stipulates that those crimes:

«are crimes under international law and punishable as such, whether or not they are punishable under national law»⁽²⁷⁹⁾.

Prima facie, this is an application of a general principle set forth in article 27 of the Vienna conventions on the law of treaties of 1969 and 1986 under which:

«A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty».

Accordingly, a state «is not entitled to cut down its treaty obligations by enacting provisions whose effect is such as to frustrate the operation of the treaty». For. In such a case, the party

(276) International crimes and domestic criminal law, a resolution adopted by the XIVth international congress on penal law, IRPL, 1990, p. 132.

(277) Ahmed Abou-El-Wafa: Egypt's international obligations in the Egyptian legal order, R. Egyp. D.I., 2004, pp. 1-55 (in Arabic).

(278) Work of the international law commission, UN, New York, vol. I, 2004, p. 264.

(279) *Ibid*, p. 268.

concerned «must bring its internal law into conformity with the situation resulting from the treaty»⁽²⁸⁰⁾.

To apply and ensure application of the above mentioned principle, many factors have been set forth by CIL⁽²⁸¹⁾, the most important of which are the following:

- Non permission of reservations (e.g., article 120 statute of the international criminal court).

- Necessity for each state to take all necessary measures, be they executive, judicial, legislative or administrative, to implement its international obligations (e.g., article 5 of the 1948 convention concerning Genocide).

§III- Examples of domestic legislations related to CIL:

To implement their international obligations related to CIL, on the domestic level many states have enacted national legislations and Acts. It suffices to mention the following examples⁽²⁸²⁾:

- * Military penal code of Switzerland (1927).
- * Egyptian penal code.
- * USA war crimes Act of 1996 as amended in 1997.
- * Danish criminal code.
- * Canadian crimes against humanity and war crimes Act (2000).
- * Belgian law on universal jurisdiction (2002).
- * Swedish Penal code.
- * German international crimes Act (2002).

(280) Ahmed Abou-El-Wafa: Public international law, op. cit., pp. 148-149.

(281) It is worth recalling that article 5 of the statute of the special court for Sierra Leone provides that the court shall have the power to prosecute the persons who committed some crimes under Sierra Leonean law such as those concerning abusing or abduction of a girl, wanton destruction of property, setting fire to public or other buildings.

(282) It is worth noting that in many other states there are provisions or even Acts concerning the repression of Serious international crimes, especially those constituting breaches of IHL, see e.g., the cases of Germany, Belgium and Spain, in National measures to repress violations of IHL, ICRC, Geneva, 2000, p. 74-317.

CHAPTER II
THE *RATIONE MATERIAE* ASPECT OF CIL
(THE CRIMES)

International crimes constitute, evidently, the *ratione materiae* aspect of CIL. Their study necessitates that we refer to rules that govern them, and some of their leading examples.

Section I

Rules Governing International Crimes

After some general considerations, reference will be made to obligations of states with regard to international crimes and elements of the later.

§I- In General:

International crimes are barbarous acts which outrage the conscience of mankind. They constitute a serious breach of the fundamental right of man, i.e., the right to life, liberty and security of person and property and the principle of bodily integrity of humanity and its belongings.

Thus, international crimes are not only offenses against those whom they injure physically, they are offenses against all of humanity. In this regard, all human beings are one and all.

After some general remarks, we will proceed to the study of obligations of states with regard to international crimes, elements of an international crime, and object of international crimes.

In fact, at all periods of history international crimes:

- Have inflicted great losses on humanity.
- Have resulted in the gravest consequences.
- Have caused unimaginable atrocities that have deeply shocked the conscience of humanity in its entirety and which are more worrying than ordinary criminality.

§II- Obligations of states with regard to international crimes:

States are under some obligations concerning international crimes, namely:

A) To make the prohibited act or omission a crime under its internal law⁽²⁸³⁾.

B) To make the prohibited act and omission punishable by appropriate penalties which take into account and be commensurate with the character and gravity of the crime⁽²⁸⁴⁾.

C) To take all other necessary measures for the prevention and prosecution of such crimes⁽²⁸⁵⁾. This is mainly because of the gravity of the acts at issue and the interest of the international community in their prohibition and punishment⁽²⁸⁶⁾.

(283) Article 2 para 1 of the convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents (1973) provides: «The intentional commission of: a) A murder, kidnapping or other attack upon the person or liberty of an internationally protected person;

b) A violent attack upon the official premises, the private accommodation or the means of transport of an internationally protected person likely to endanger his person or liberty; c) A threat to commit any such attack; d) Any attempt to commit any such attack; and an act constituting participation as an accomplice in any such attack shall be made by each state party a crime under its internal law».

(284) Article 2 para. 2 of the same convention stipulates: "each state party shall make these crimes punishable by appropriate penalties which take into account their grave nature".

(285) Thus, e.g., in its Res. 59/197 (2004), the General Assembly of the UN urged all governments:

«To ensure the effective protection of the right to life of all persons under their jurisdiction and to investigate promptly and thoroughly all killings, including those targeted at specific groups of persons, such as racially motivated violence leading to the death of the victim, killings of members of national, ethnic, religious or linguistic minorities, of refugees, internally displaced persons, migrants, street children or members of indigenous communities, killings of persons for reasons related to their peaceful activities as human rights defenders, lawyers, journalists or demonstrators, killings committed in the name of passion or in the name of honour, all killings committed for any discriminatory reason, including sexual orientation, as well as all other cases where a person's right to life has been violated, and to bring those responsible to justice before a competent, independent and impartial judiciary and to ensure that such killings, including those committed by security forces, police and law enforcement agents, paramilitary groups or private forces, are neither condoned nor sanctioned by State officials or personnel».

(286) In fact, e.g., one of the rules of customary international law is that under which:

§III- Elements of an international crime:

Each crime is, as a rule, composed of two elements, namely: The *actus reus* and the *mens rea*. Those two elements are as well necessary for international crimes. However, the later requires a third one, i.e., the international element.

A) **The physical element (the *actus reus*):** i.e., the deed or the conduct⁽²⁸⁷⁾. This element concerns, *prima facie*, the illegality of an act or an omission. Accordingly, if there is no *actus reus* contrary to the law, there will be no crime: no *actus reus*, no crime.

B) **The mental element (the *mens rea*):** i.e., the condition of

= «States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects». Henckaerts and Doswaldbeck: Customary international humanitarian law, op. cit., vol. I., p. 607.

(287) In prosecutor V. Kuperskic, the trial chamber said that it «is able to conclude the following on the *actus reus* of persecution from the case-law above:

(a) A narrow definition of persecution is not supported in customary international law. Persecution has been described by courts as a wide and particularly serious genus of crimes.

(b) In their interpretation of persecution courts have included acts such as murder, extermination, torture, and other serious acts on the person such as those presently enumerated in Article 5.

(c) Persecution can also involve a variety of other discriminatory acts, involving attacks on political, social, and economic rights.

(d) Persecution is commonly used to describe a series of acts rather than a single act. Acts of persecution will usually form part of a policy or at least of a patterned practice, and must be regarded in their context. In reality, persecutory acts are often committed pursuant to a discriminatory policy or a widespread discriminatory practice.

(e) As a corollary to (d), discriminatory acts charged as persecution must not be considered in isolation. Some of the acts mentioned above may not, in and of themselves, be so serious as to constitute a crime against humanity. For example, restrictions placed on a particular group to curtail their rights to participate in particular aspects of social life (such as visits to public parks, theatres or libraries) constitute discrimination, which is in itself a reprehensible act; however, they may not in and of themselves amount to persecution. These acts must not be considered in isolation but examined in their context and weighed for their cumulative effect». Case No. IT-95-16, 14 January 2000, para. 615.

mind or «criminal intention», the guilty mind or the so-called «condition culpable intentionality». In fact, ICL intervenes where the deed or conduct is undertaken with a wicked intent or without justificatory excuse.

The mental or subjective element is a *sine qua non conditio* for the existence of crimes, particularly major and serious ones. Prima facie, the mental element presupposes, *inter alia*, the existence of freedom of will, a certain mental capacity and a possibility of a free choice.

Accordingly, a person is criminally responsible, if what he commits is with «intent» and «knowledge»:

In this regard, article 30 statute of ICC provides:

«1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge⁽²⁸⁸⁾.

2. For the purposes of this article, a person has intent where:

(a) In relation to conduct, that person means to engage in the conduct;

(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events».

Prima facie, the existence of intent and knowledge can be inferred, as a rule, from relevant facts and circumstances, i.e., on a case-by-case basis.

Moreover, many grave breaches of the rules applicable during armed conflicts specify the intent required as willfulness: as in «wilful killing, torture or inhuman treatment», or «willfully», e.g., article 85/3 Additional Protocol (1) of 1977 provides that «the following acts shall be regarded as grave breaches of this protocol,

(288) Article 4 para 2 Genocide convention (1948) refers as well to «acts committed with intent».

when committed willfully». The term «willfully» means: «consciously and with intent, i.e., with his mind on the act and its consequences, and willing them...; this encompasses the concepts of «wrongful intent» or «recklessness», viz, the attitude of an organ who, without being certain of a particular result, accepts the possibility of it happening; on the other hand, ordinary negligence or lack of foresight is not covered, i.e., when a man acts without having his mind on the act or its consequences»⁽²⁸⁹⁾.

In other words, «willfully» means that the accused must have acted with intent and consciously; this means that he has his mind on the conduct and its consequences, or at least without being certain of a particular result, he accepts that it might happen. Accordingly elements of willfulness are not satisfied when the accused acted without having his mind on the act or its consequences (e.g., by ordinary negligence, lack of foresight ... etc.).

The existence of the mental element is justifiable.

In fact under the principle of culpability the defendant should be reproachable for the offense he has committed: *Nulla poena sine culpa*⁽²⁹⁰⁾.

(289) Commentary on the Additional Protocols of 8 June 1977, op. cit., p. 994. Moreover, art. 11/4 of the Protocol considers as a grave breach «Any willful act or omission which seriously endangers the physical or mental health or integrity of any person who is in the power of a party».

(290) In Prosecutor V. Kupreskic, the Trial chamber made a comparison, concerning *mens rea*, between persecution and genocide:

«As set forth above, the *mens rea* requirement for persecution is higher than for ordinary crimes against humanity, although lower than for genocide. In this context the Trial Chamber wishes to stress that persecution as a crime against humanity is an offence belonging to the same genus as genocide. Both persecution and genocide are crimes perpetrated against persons that belong to a particular group and who are targeted because of such belonging. In both categories what matters is the intent to discriminate: to attack persons on account of their ethnic, racial, or religious characteristics (as well as, in the case of persecution, on account of their political affiliation). While in the case of persecution the discriminatory intent can take multifarious inhumane forms and manifest itself in a plurality of actions including murder, in the case of genocide that intent must be accompanied by the intention to destroy, in whole or in part, the group to which the victims of the genocide belong. Thus, it can be said that, from the viewpoint of *mens rea*, genocide is an extreme =

That being so, one should refer to the following remarks:

1- The two elements must coincide. This coincidence is a *sine qua non conditio* for liability.

2- Those two elements are set forth in the maxim «Actus non facit reum nisi mens sit rea» (an act does not itself constitute guilt unless the mind is guilty).

C) **The international element:** To constitute an international crime, the prohibited conduct or omission should concern an «internationally protected person, thing or interest». This is satisfied if the conduct or omission, as to its subject – matter or effects endangers or annihilates that person, thing or interest⁽²⁹¹⁾.

= and most inhuman form of persecution. To put it differently, when persecution escalates to the extreme form of wilful and deliberate acts designed to destroy a group or part of a group, it can be held that such persecution amounts to genocide». Case No. IT-95-16, 14 January 2000, para. 636.

See as well:

- W. Schabas: *The Jeliscic case and the mens rea of the crime of genocide*, Leiden J.L., vol. 14, 2001, pp. 125 ss.

- G. Werle and E. Jessberger: «Unless otherwise provided»: Article 30 of the ICC statute and the mental element of crimes under international criminal law, JICJ vol. 3, 2005, pp. 35-55.

(291) Ch. Bassiouni points out that there are five criteria applicable to the policy of international criminalization. They are: (1) the prohibited conduct affects a significant international interest, in particular, if it constitutes a threat to international peace and security; (2) the prohibited conduct constitutes an egregious conduct deemed offensive to the commonly shared values of the world community, including what has historically been referred to as conduct shocking to the conscience of humanity; (3) the prohibited conduct has transnational implications in that it involves or effects more than one state in its planning, preparation, or commission, either through the diversity of nationality of its perpetrators or victims, or because the means employed transcend national boundaries; (4) the conduct is harmful to an internationally protected person or interest; (5) the conduct violates an internationally protected interest but it does not rise to the level required by (1) or (2), however, because of its nature, it can best be prevented and suppressed by international criminalization».

He adds: «There are ten penal characteristics which, if found, even singularly, in any convention, is sufficient to characterize the conduct prohibited by the convention as constituting an international crime. These ten penal characteristics are:

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In this regard, art. 13 of the 1979 International convention against the taking of hostages states:

«This convention shall not apply where the offence is committed within a single state, the hostage and the alleged offender are nationals of that state and the alleged offender is found in the territory of that state».

Moreover, art. 4 para. 1 of the 1988 convention for the suppression of unlawful acts against the safety of maritime navigation provides:

«This convention applies if the ship is navigating or is scheduled to navigate into, through or from waters beyond the outer limit of the territorial sea of a single state, or the lateral limits of its territorial sea with adjacent states»⁽²⁹²⁾.

In the final analysis, elements of international crimes lead us to mention the following three rules, namely:

1- It is worth recalling that statutes of international criminal courts usually provide for the possibility to prepare and adopt an instrument concerning «elements of crime»⁽²⁹³⁾.

(1) Explicit or implicit recognition of proscribed conduct as constituting an international crime, or a crime under international law, or a crime; (2) Implicit recognition of the penal nature of the act by establishing a duty to prohibit, prevent, prosecute, punish, or the like; (3) Criminalization of the proscribed conduct; (4) Duty or right to prosecute; (5) Duty or right to punish the proscribed conduct; (6) Duty or right to extradite; (7) Duty or right to cooperate in prosecution, punishment (including judicial assistance); (8) Establishment of a criminal jurisdictional basis; (9) Reference to the establishment of an international criminal court or international tribunal with penal characteristics; (10) No defense of superior orders». Ch. Bassiouni: Introduction to international criminal law, op. cit., pp. 114-115.

(292) See as well, art. 3/3 of the 1970 convention for the suppression of unlawful seizure of aircraft; art. 3 of the 1997 International convention for the suppression of terrorist bombings; art. 3 of the 1999 International convention for the suppression of financing of terrorism.

(293) Cf. e.g., ICC, elements of crime, U.N. Doc. PCNTCC/2000/1/Add. 2 (2000).

It is worth recalling that article 9 ICC statute states:

«1. Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8. They shall be adopted by a two-thirds majority of the members of the Assembly of States Parties. =

The recourse to «elements of crimes» as a source of law applicable by an international criminal tribunal may be justified by the following reasons:

Primo, the statute (or agreement) establishing the court cannot all provide. It only sets forth general stipulations, leaving to further arrangements the task of determining *in extenso* the crimes, by supplementing the statute (or agreement) of detailed provisions dealing with those crimes.

Secundo, to assist the court in the interpretation and application of crimes of which it has jurisdiction.

Tertio, to precisely determine the elements necessary for the conviction of the perpetrator of the crime in question.

2- There are some international crimes which lie in the concern of the international community in its entirety, e.g., crimes of armed aggression, genocide, hijacking of aircrafts or vessels, grave breaches of human rights and fundamental freedoms, crimes against humanity and war crimes⁽²⁹⁴⁾. Such crimes constitute a

= 2. Amendments to the Elements of Crimes may be proposed by:

- (a) Any State Party;
- (b) The judges acting by an absolute majority;
- (c) The Prosecutor.

Such amendments shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.

3. The Elements of Crimes and amendments thereto shall be consistent with this Statute».

(294) In the *Barcelona Traction* case, the ICJ states:

«[A]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising *vis-à-vis* another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*».

The court added:

"Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (Reservations to the Convention on the prevention and punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 23); others are conferred by international instruments of a universal or quasi-universal character." (Barcelona, Light and power company Limited, Second phase, judgment. I.C. J. Reports 1970, p. 32 paras. 32-34).

transgression of rules of *jus cogens* (peremptory norms)⁽²⁹⁵⁾. For these rules subjects of international law are in the same interest (French: *font cause commune*), mainly because such rules, contrary to rules of *jus dispositivium*⁽²⁹⁶⁾, are at the *fons et origo* of the public policy (French: *ordre public*) of the international legal system. They are obligations *erga omnes* (obligations valid against all the world)⁽²⁹⁷⁾. The violation of such obligations entails not only the responsibility of their perpetrators, but also, in certain circumstances, that of the international community as a whole⁽²⁹⁸⁾.

Since 1951, the ICJ affirmed that the prohibition against genocide constitutes a *jus cogens* norm that cannot be reserved or derogated from⁽²⁹⁹⁾.

3- Obligations of a state concerning international crimes are applicable not only inside its borders, but in its relations with other states⁽³⁰⁰⁾.

(295) A norm of *jus cogens* is a norm «accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by the emergence of subsequent norm of general international law having the same character (article 53 Vienna conventions on the law of treaties 1969 and 1986).

(296) Rules of international law capable of being changed by way of agreement between the parties concerned.

(297) Ahmed Abou-El-Wafa: Public international law, op. cit., pp. 185-186.

(298) Thus, concerning the massacres which occurred in Srebrenica (Former Yugoslavia) where 8000 Muslims have been killed and other 25000 displaced, it had been maintained:

"A vrai dire, la responsabilité revenait à l'ensemble de la communauté Internationale incarnée par les Nations Unies qui, depuis le début de la guerre, avait opté pour une intervention "humanitaire". Pour certains, c'était un moindre mal, pour d'autres, un moyen d'éviter une intervention militaire. L'humanité était un alibi et une camisole".

For this reason, it is added:

"Nous attendons que l'Union européenne et de l'ONU que toute la lumière soit faite sur toutes les responsabilités, non seulement locales mais internationales" (Journal Le Monde, 10-11 Juillet 2005, p 13).

(299) ICJ, Rep., 1951, p. 15.

(300) It suffices to cite, here, the reply by the German Federal Government to the written question submitted by Bundestag members - Systematic rape as a means of Serb warfare, inter alia in Bosnia.

1. What knowledge does the Federal Government have of the systematic rape of predominantly Muslim girls and women by Serb soldiers and irregulars, in Bosnia?

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§IV- Object of international crimes:

A) International crimes concern:

1- Individuals or natural persons, e.g., murder, kidnapping, killing, rapeetc.⁽³⁰¹⁾

2- Things, e.g., attack on official premises (headquarters of an international organization, locations of an embassy), international means of transport, attack which is expected to cause widespread, long-term and severe damage to the natural environment etc.⁽³⁰²⁾

= Has the Federal Government made representations to the Serbian government in Belgrade in connection with such rape?

According to the information at the disposal of the Federal Government based on concurrent first-hand accounts, it must be assumed that mass rape is being committed against predominantly Muslim girls and women. Precise figures relating to the actual Extent of this serious violation of fundamental human rights are not available. There are growing indications that this is a case of systematic rape aimed at destroying the identity of another ethnic group. The Federal Government has therefore made vigorous and repeated representations to the "Yugoslav" government, both bilaterally and within the framework of the European Community, in connection with these rapes and other grave human rights violations.

2. In what way does the Federal Government intend to play its part in ensuring the investigation, prosecution and worldwide proscription of such rape?

Rape is already a criminal offence under the international law of war, which also applies to the region of the former Yugoslavia. The Federal Government is currently looking into possible ways in which those fundamental rules for the safeguard of human dignity can be widely implemented.

The Federal Government was the first to take practical measures to assist and counsel the girls and women concerned. The discussions held with the victims during that process are also serving to advance the investigation into the facts of each individual case. In addition, the Federal Government has asked UN Special Rapporteur Mazowiecki to devote particular attention to the issue of rape. Further investigation work is being carried out by self-help groups on the ground.

Cf, M. Sassoli and A. Bouvier: How does law protect in war, op. cit., p. 1143.

(301) See, e.g., art. 2/1/a convention on the prevention and punishment of internationally protected persons including diplomatic agents (1973).

(302) See, e.g., Additional protocol I of 1977 (articles 35, 55), world charter for nature (Res. 39/11 adopted by the General Assembly of the UN in 1982).

The Appeals chamber ICTY Prosecutor V. Strugar pointed out:

«92. While the crime of "devastation not justified by military necessity" has scarcely been dealt with in the Tribunal's jurisprudence, the elements =

3- International Persons, e.g., crossing borders of a state by armed forces (crime of aggression).

B) Moreover, international crimes may be divided into two categories, namely:

1- Offences containing a political element and endangering or disturbing international peace and security, e.g., crimes of war, crimes against humanity, crime of aggression, genocide, mercenarism, massive violations of human rights, international terrorism.

2- Other offences, e.g., piracy, human trafficking, slavery, traffic in dangerous drugs, damage to submarine cables, counterfeiting of currency ... etc.

C) International crimes may consist in an action or an omission⁽³⁰³⁾. An English proverb says: «There is a sin of omission as well as of commission»⁽³⁰⁴⁾.

Section II

Study of Some International Crimes

Classification and categorization of international crimes is a difficult task. This is mainly because:

1- International crimes have, nowadays, emerging trends and issues.

2- International crimes have become more and more numerous and increasingly motivated in particular by religious, racial, ethnic, scientific or economic reasons.

3- Globalization creates new and favourable contexts for crime⁽³⁰⁵⁾.

= of the crime of "wanton destruction not justified by military necessity" were identified by the Trial Chamber in the *'Kordic case*, and recently endorsed by the Appeals Chamber in that same case, as follows:

- (i) the destruction of property occurs on a large scale;
- (ii) the destruction is not justified by military necessity; and
- (iii) the perpetrator acted with the intent to destroy the property in question or in reckless disregard of the likelihood of its destructions»
Case. IT-01-42-AR 72, 22 Nov. 2002, para, 272.

(303) Vide supra

(304) R. Ridout and C. Witting: *English proverbs explained*, Librarie du Liban, Beirut, 1983, p. 156.

International crimes may be classified in several ways, the most important of which are outlined below:

§I- Modern international crimes:

There are some modern international crimes, the most salient of which are these:

A) Economic international crimes:

International crimes related to economic activities have enormously increased, due to globalization, the increase of international intercourse and the growing interdependence and needs⁽³⁰⁶⁾.

B) Organized international crimes:

These crimes endanger the existence of the international community. They are prepared by well organized gangs and persons⁽³⁰⁷⁾.

It is worth recalling that UN convention against transnational organized crime (2000)⁽³⁰⁸⁾ provides that an offence is transnational in nature, if:

(a) It is committed in more than one state;

(b) It is committed in one state but a substantial part of its preparation, planning, direction or control takes place in another state;

(305) See, e.g., M. Findlay: *The globalization of crime*, Cambridge Univ. Press, 2000, 243 pp. at p. 1.

(306) See, e.g.,:

- «Business criminality», *R. International de Droit Pénal*, 1982, pp. 1-523.

- The XVIIth international congress of penal law, preparatory colloquium section II: corruption and related offences in international economic activities, *IRPL*, 2003, pp. 1-582.

- E. Davidsson: *Economic oppression as an international wrong or as crime against humanity?*, *Netherlands Quarterly on human rights*, 2005, pp. 173-212.

(307) See as well: «Criminal justice systems facing the challenge of organized crime» preparatory colloquium, *IRPL*, 1998, pp. 1-562; Resolutions, *idem*, 1999, pp. 895-942, T. Weigend: *The criminal justice systems facing the challenge of organized crime*, *idem*, 1998, pp. 523-546; Ch. Van den Wyngaert: *The transformations of international criminal law in response to the challenge of organized crime*, *IRPL*, 1999, pp. 133-221. The author says (p. 140) that transforming the (international) criminal justice system in response to the challenge of organized crime is «a Trojan horse».

(308) Adopted by G.A. Res. A/55/383 (2000).

(c) It is committed in one state but involves an organized criminal group that engages in criminal activities in more than one state; or

(b) It is committed in one state but has substantial effects in another state.

The convention as well provides that states parties ensure:

- 1- The criminalization of participation in an organized group⁽³⁰⁹⁾.
- 2- The criminalization of the laundering of proceeds of crime.
- 3- The criminalization of corruption.

C) Enforced disappearance:

International acts concerning human rights consider some acts, as international crimes. Thus, the fourth paragraph of the preamble of the declaration against forced disappearance (adopted by the general Assembly of the UN in 1992) provides that the systematic practice of acts of forced disappearance «is of the nature of a crime against humanity».

Apartheid is as well regarded as a crime against humanity (General Assembly Res. 3068 of 1973)⁽³¹⁰⁾.

D) Crimes related to modern technology:

Modern technology has led as well to the commission of international crimes: High-tech crimes, e.g., those related to computer and internet⁽³¹¹⁾.

(309) An organized criminal group shall mean «a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this convention, in order to obtain, directly or indirectly, a financial or other material benefit» (art. 2 para. (a) of the convention).

(310) See as well:

- Ahmed Abou-El-Wafa: The international protection of human rights, Dar Al-Nahda Al-Arabia, Cairo, 2005-1425, p. 114.

- A. Annoni: The international responsibility of states in case of forced disappearance, *Rivista di diritto internazionale*, 2005, p. 667 et ss.

(311) See, e.g., the resolution adopted by the XVth international congress of penal law about «computer crimes and other crimes against information technology», in *IRPL*, 1995, pp. 54-61; see as well, *idem*, 1993, pp. 1-704; M. Zaharas: International computer crimes, *IRPL*, 2001, =

E) Attack on the environment:

Acts which constitute a continuous, wide-spread attack on the environment is now considered as an international crime⁽³¹²⁾.

= pp. 813-829; G. Berman: Electronic surveillance in the internet age, American criminal law review, 2004, pp. 1313-1352; U. Kohl: Eggs, jurisdiction, and the internet, ICLQ, 2002, pp. 555-582.

The G-8 agreed to endorse the following principles to combat high-tech crime:

- I. There must be no safe havens for those who abuse information technologies.
- II. Investigation and prosecution of international high-tech crimes must be coordinated among all concerned States, regardless of where harm has occurred.
- III. Law enforcement personnel must be trained and equipped to address high-tech crimes.
- IV. Legal systems must protect the confidentiality, integrity, and availability of data and systems from unauthorized impairment and ensure that serious abuse is penalized.
- V. Legal systems should permit the preservation of and quick access to electronic data, which are often critical to the successful investigation of crime.
- VI. Mutual assistance regimes must ensure the timely gathering and exchange of evidence in cases involving international high-tech crime.
- VII. Transborder electronic access by law enforcement to publicly available (open source) information does not require authorization from the State where the data resides.
- VIII. Forensic standards for retrieving and authenticating electronic data for use in criminal investigations and prosecutions must be developed and employed.
- IX. To the extent practicable, information and telecommunications systems should be designed to help prevent and detect network abuse, and should also facilitate the tracing of criminals and the collection of evidence.
- X. Work in this area should be coordinated with the work of other relevant international fora to ensure against duplication of efforts.

See text in IRPL, vol. 72, p. 824.

(312) See as well:

- P. Munerfeld: Les problèmes pénaux posés par des pollutions transfrontières et l'avant-projet de convention franco-allemande, R. Internationale de droit pénal, 1987, pp. 173-194.
- «Report submitted by the ICRC at the 48th Session of the general Assembly on the Protection of the environment in times of armed conflict» (29 July 1993), available on <http://www.icrc.org/ihl>.
- Ahmed Abou-El-Wafa: Reflections on the international protection of the environment against pollution, R. Egypt. D.I., 1993, pp. 45 et seqq. (in Arabic).

It is worth recalling that the ICJ said:

§II- War crimes:

This author said:

«29. The Court recognizes that the environment is under daily threat and that use of nuclear weapons could constitute a catastrophe for the environment. The court also recognizes that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of states to ensure that activities within their jurisdiction and control respect the environment of other states or of areas beyond national control is now part of the corpus of international law relating to the environment.

30. However, the court is of the view that the issue is not whether the treaties relating to the protection of the environment are or not applicable during an armed conflict, but rather whether the obligations stemming from these treaties were intended to be obligations of total restraint during military conflict.

The court does not consider that the treaties in question could have intended to deprive a state of the exercise of its right of self-defence under international law because of its obligations to protect the environment. Nonetheless, states must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with principles of necessity and proportionality».

The court added:

«31. The Court notes furthermore that Articles 35, paragraph 3, and 55 of Additional protocol 1 provide additional protection for the environment. Taken together, these provisions embody a general obligation to protect the natural environment against widespread, long-term and severe environmental damage; the prohibition of methods and means of warfare which are intended, or may be expected, to cause damage; and the prohibition of attacks against the natural environment by way of reprisals. These are powerful constraints for all the states having subscribed to these provisions.

32. General Assembly resolution 47/37 of 25 November 1992 on the protection of the Environment in Times of Armed Conflict, is also of interest in this context. It affirms the general view according to which environmental considerations constitute one of the elements to be taken into account in the implementation of the principles of the law applicable in armed conflict: it states that "destruction of the environment, not justified by military necessity and carried out wantonly, is clearly contrary to existing international law". Addressing the reality that certain instruments are not yet binding on all states, the General Assembly in this resolution "appeals to all States that have not yet done so to consider becoming parties to the relevant international conventions». ICJ, Rep., 1996, advisory opinion, paras. 29-39.

«La guerre est interdite, mais elle sevit partout. Elle est fomentée ici et là, pour des raisons graves ou insignifiantes»⁽³¹³⁾.

Horrors and crimes of war are well known⁽³¹⁴⁾.

The well established saying that «*inter arma silent leges*» (In battle laws are silent) is now superseded. In fact, amidst the clash of arms the laws are not silent.

During the last two centuries, there have been worldwide efforts to mitigate those horrors⁽³¹⁵⁾. In fact, during, because of hostilities, or even at the end of the later, parties to an armed conflict are required to respect *durante belle* rules of *jus in bellum* or rules of international humanitarian law.

A) International humanitarian law:

International humanitarian law aims at ensuring effective protection of both combatants and civilian victims of all kinds of armed conflicts, be they of an international or non-international character. In other words, these rules aim at mitigating, as far as possible, the severity of war and preventing the arbitrary judgment of military commanders.

International humanitarian law aims as well at achieving a balance between two fundamental principles, that is, the dictates of humanity and military necessity. These two principles mean that only acts necessary for the defeat of the opposing side are

(313) Ahmed Abou-El-Wafa: Le devoir de respecter le droit à la vie en, op. cit., p. 51.

(314) Thus, recently, the Trial chamber in prosecutor V. R. Krstic was satisfied that, following the take – over of Serbrenica, Bosnian Serb forces executed several thousand Muslims. The Trial chamber added that the «total number is likely to be within the range of 7000 to 8000 men» (ICTY, case No.: IT-98-33-T, 2 August 2001, p. 27).

(315) It is worth recalling that fourteen centuries ago, Islam has laid down the essential humanitarian rules applicable during armed conflicts, be they of an international or a non-international character, preceding as such positive contemporary international law.

See as well:

Ahmed ABOU-EL-WAFA: A book on the rules of international law and relations in Islamic shari'a, vol. 10: war in Islamic Shari'a, Dar Al-Nahda Al-Arabia, Cairo, 1421-2001, p. 101-188 (in Arabic).

permitted, whereas those which cause needless suffering or unnecessary pain are prohibited. Thus, in certain conditions, the necessities of war ought to yield to the requirements of elementary considerations of humanity.

International humanitarian law comprises four essential categories of rules, namely:

1- The law of the Hague, i.e., rules relating to the conduct of hostilities, principally found in the 1899 and 1907 Hague conventions.

2- The law of Geneva, i.e., rules concerning protection of victims of war, mainly drawn up by the 1949⁽³¹⁶⁾ Geneva conventions and the 1977 Two additional Protocols.

3- Other written sources (e.g., the 1997 Ottawa treaty concerning anti-personnel landmines.

4- Customary international humanitarian rules.

The essential principles of international humanitarian law, are:

*** Principle of distinction between combatants and non-combatants (civilians):** In fact, the state of war does not admit acts of violence, save between the armed forces of belligerent states⁽³¹⁷⁾. The exposure of civilian population and non-military objects to the destructive effects of means of war is, thus, prohibited.

*** Principle of the prohibition of reprisals:** Reprisals against protected persons (e.g., wounded, sick, prisoners of war., etc.) are prohibited (art.20 of the 1977 Protocol I). In fact, rules of international

(316) Referring to Geneva conventions of 1949, the ICJ said that their rules: "constitute a minimum yardstick "which reflects the elementary considerations of humanity", see:

ICJ, Rep., 1986, p. 114, para. 218.

See as well:

- Ahmed Abou-El-Wafa: The general theory of international humanitarian law, Dar Al-Nahda Al-Arabia, Cairo, 2006-1426, 241 pp (in Arabic).

- "Victims after the war: humanitarian action, reparation and justice", IRRC, 2003, p 461 - 626.

- "International humanitarian law and the challenges of contemporary armed conflicts", IRRC, 2004, p 213 - 244.

(317) Art. 1 of the 1880 Oxford manual on the laws of war on land, adopted by the IDI. Ann, IDI, vol. 5, 1881-1882, pp. 156-174.

humanitarian law aim at restricting the extent to which the parties engaged in a conflict may harm the adversary. These rules keep their validity notwithstanding the infringements suffered⁽³¹⁸⁾.

* **Principle of proportionality:** An action is proportionate so long as it does not cause incidental civilian damage, suffering and casualties which is excessive as regards the military advantage of the expected result of the military operation⁽³¹⁹⁾.

* **Principle of avoidance of unnecessary suffering and damage:** This principle means that all forms of violence as well as all needless and useless severity which are not necessary for the overpowering of the enemy are prohibited. Accordingly, it is prohibited to use weapons which cause:

- unnecessary injury or superfluous suffering⁽³²⁰⁾.

(318) However, between armed forces, permitted reprisals are those which a party apply to restore compliance with the law of war, provided that the action is proportionate to the breach of the law of war committed by the enemy, Cf F. de Mulinin: *Handbook on the law of war for armed forces*, ICRC, Geneva, 1987, p. 53.

(319) Rules 22-23 of the 1907 Hague convention IV (Regulations); art.57 of the 1977 Additional Protocol I.

(320) The declaration of St. Petersburg (1868) affirmed :
 "That the only legitimate object that states should endeavor to accomplish during war is to weaken the military forces of the enemy...
 That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable.
 That the employment of such arms would, therefore, be contrary to the laws of humanity".
 See also, Hague IV (1907), regulations 23; Additional protocol No. I (1977), articles 35,57.

In the legality of the threat or use of nuclear weapons, the ICJ emphasized that:

"it is prohibited to cause unnecessary suffering to combatants; it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. In application of that .. principle, states do not have unlimited freedom of choice of means in the weapons they use" ICJ, Rep., 1996, para.78.

The court as well added that that principle and the principle of the distinction between combatants and non-combatants constituted, "intransgressible principles of international customary law". At the heart of such principles lie the "overriding consideration of humanity" Ibid, paras. 79, 95.

- widespread, long-term and severe damage to the natural environment.

- casualties and damage for civilians and combatants without distinction because of their lack of precision or effects.

- harmful effects which go beyond the control, in time or place, of those employing them.

*** Principle under which the right of belligerents to adopt means of injuring the enemy is not unlimited:** For that reason, the following weapons are, inter alia, prohibited:

- Poison and poisoned weapons (1907 Hague convention No. IV, R. 23).

- Bacteriological (biological) gases⁽³²¹⁾.

- Expanding bullets (i.e., bullets which expand or flatten easily in the human body (Declaration concerning expanding bullets, the Hague 1899).

- Booby traps (Protocol II of the 1980 Geneva convention, art.6).

- Anti-personnel land mines (the 1997 Ottawa treaty).

- Incendiary weapons (Protocol III of the 1980 Geneva convention, art.2).

- Laser weapons specifically designed to cause permanent blindness (Protocol IV of the 1980 Geneva convention, adopted in 1995).

*** The substitute principle (De Martens clause):** According to this principle, in cases not covered by a conventional text, combatants as well as civilians remain under the protection and authority of the principles of international law derived from:

- established custom;

- the principles of humanity; and

(321) Cf, protocol for the prohibition of the use in war of asphyxiating, poisonous or other gases and of bacteriological methods of warfare, Geneva 1925; convention on the prohibition of the development, production and stockpiling of bacteriological (biological) and toxin weapons and on their destruction, 1972; art.3 of the 1899 Hague convention IV.

- the dictates of public conscience⁽³²²⁾.

*** Principle under which ruses of war are permitted whereas perfidy is forbidden:** Ruses of war (stratagem), which tend to mislead the enemy, such as camouflage, demonstrations, manifestations, mock operations, disinformation ... etc., are permitted under the laws and customs of war.

Perfidy is prohibited. It consists in the commission of a hostile act under a legal protection or the taking of acts inviting the confidence of the enemy with intent to betray that confidence. The following acts are examples of perfidy:

- feigning of an intent to negotiate under a flag of truth or of a surrender.
- feigning of an incapacitation of wounds or sickness.
- feigning of civilian, non-combatant status.
- feigning of protected status by the use of signs, emblems or uniform of the UN or of a state not a party to the dispute (art.37 of the 1977 Additional Protocol 1).

B) Examples of War crimes:

In present-day conditions, as a result of aggressive wars, war crimes are being committed in various parts of the world. *Prima facie*, the arrest and punishment of persons guilty of such crimes⁽³²³⁾, are important factors in the prevention of these crimes now and *in future*.

The most comprehensive text concerning war crimes is article 8 statute of the ICC⁽³²⁴⁾.

(322) Cf, preamble of the 1907 IV Hague convention; art. 1/2 of the 1977 Additional protocol I; preamble of the 1977 Additional protocol II.

(323) Cf, *Reining in impunity for international crimes and serious violations of fundamental human rights*. ed. by Joyner and Ch. Bassiouni, Editions Eres, 1998, 605 pp.

"Joint statement and exchange of notes between the United States and Austria concerning the establishment of the general settlement fund for Nazi-era and world war II crimes", ILM, 2001, p 565 ss.

(324) See as well grave breaches set forth by the Geneva conventions 1949 (articles 50, 51, 130, 147), Additional Protocol I of 1977 (articles 18, 66, 85, 87), statute ICTY (articles 2-3), statute ICTR (article 4), article 3 =

The «Elements of crime» highlighted, *in extenso*, the factors necessary for crimes of war⁽³²⁵⁾.

= **statute special court for Sierra Leone, Draft code of crimes against the Peace and security of mankind of 1996 (art. 20).**

(325) It suffices to mention, here, some examples:

Article 8 (2) (a) (i)

War crime of wilful killing:

Elements:

1. **The perpetrator killed one or more persons.**
2. **Such person or persons were protected under one or more of the Geneva Conventions of 1949.**
3. **The perpetrator was aware of the factual circumstances that established that protected status.**
4. **The conduct took place in the context of and was associated with an international armed conflict.**
5. **The perpetrator was aware of factual circumstances that established the existence of an armed conflict.**

Article 8 (2) (a) (iii)

War crime of wilfully causing great suffering

Elements

1. **The perpetrator caused great physical or mental pain or suffering to, or serious injury to body or health of, one or more persons.**
2. **Such person or persons were protected under one or more of the Geneva Conventions of 1949.**
3. **The perpetrator was aware of the factual circumstances that established that protected status.**
4. **The conduct took place in the context of and was associated with an international armed conflict.**
5. **The perpetrator was aware of factual circumstances that established the existence of an armed conflict.**

Article (2) (a) (iv)

War crime of destruction and appropriation of property

Elements

1. **The perpetrator destroyed or appropriated certain property.**
2. **The destruction or appropriation was not justified by military necessity,**
3. **The destruction or appropriation was extensive and carried out wantonly.**
4. **Such property was protected under one or more of the Geneva Conventions of 1949.**
5. **The perpetrator was aware of the factual circumstances that established that protected status.**
6. **The conduct took place in the context of and was associated with international armed conflict.**

=

C) Crimes committed during a non-international armed conflict:

1- The concept of a non-international armed conflict:

Cruelties committed during non-international armed conflicts are well-known. It suffices to mention atrocities committed during the Spanish civil war, the civil war in Congo, the Biafran conflict in Nigeria, the civil strife in Nicaragua, the conflict in the former Yugoslavia, the conflict in Rwanda, the conflict in Somalia, the conflict in Haiti...etc. The majority of armed conflicts are non-international⁽³²⁶⁾.

The phenomenon of civil wars exists from time immemorial. It dates back to as early as the existence of man over this planet.

The end of the twentieth century witnessed an escalation in the number of non-international armed conflicts (civil wars).

The term civil war is characterized by the following elements⁽³²⁷⁾:

= 7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

(326) According to the Appeals chamber:

«an armed conflict exists whenever there is a resort to armed forces between states or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state» (ICTY, IT-94-1-AR 72, 2 October 1995, Tadic Appeal I).

The chamber as well added:

«in the area of armed conflict the distinction between inter-state wars and civil wars is losing its value as far as human beings are concerned» (Ibid, para. 97).

(327) Under art. 1 Protocol II Additional to Geneva conventions of 1949, a non-international armed conflict is an armed conflict which takes place: "in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol".

Accordingly, situations of internal disturbances and tensions, such as riots and sporadic acts of violence are not considered as non-international armed conflicts.

Moreover, civil war is a:

"Lutte armée ayant éclaté au sein d'un Etat et ayant pris une importance et une extension qui la différencient d'une simple révolte ou insurrection =

- The occurrence of an armed conflict.

- This armed conflict breaks out in the territory of a state: for example, between the established government and insurgents or, in the absence of an established government, between two or more groups, each of them seeks the control of the state. Accordingly, the conflict is not of an international character.

During war civil wars are frequently committed acts of extermination of religious, ethnic or social groups as well as other severe infringements of human rights and fundamental freedoms.

A civil war may become an internationalized armed conflict in three cases, namely:

A-If the legitimate government recognizes the insurgents as belligerents.

B- If one or more foreign states come to the aid of one of the parties, of both, or each in aid of a different party. In fact, for various reasons, states may intervene to support rebels or the legitimate government. The intervention of a state in support of one party may attract counter-intervention by another state in favor of the other party.

C- If one or more IOS intervene in the conflict.

Thus, a conflict, having an internal nature, may, in certain circumstances, become internationalized⁽³²⁸⁾.

= "Dictionnaire de la terminologie du droit international, *Sirey, Paris, 1960, p. 308.*

See as well:

ICJ. Rep., 1996, p. 621, para. 43; a resolution adopted by the Institute of International law in 1975 (Ann. IDI, 1975, vol. II).

(328) See also:

C. Gray: *Bosnia and Herzegovina: civil war or inter-state conflict?*, BYIL, 1996, p. 155-198; *Convention on duties and rights of states in the event of civil strife (Havana 1928)*; *Protocol on the convention on duties and rights of states in the event of civil strife (Pan American Union 1957)*; *Additional Protocol II (1977)*; the 1965 GA declaration on the inadmissibility of intervention in domestic affairs of states ;the 1970 declaration on principles of international law; Farer: *The regulation of foreign intervention in civil armed conflict*, RCADI, 1974. II, p. 337-355.

2- International responsibility, for crimes committed during a non international armed conflict:

A state incurs the responsibility for acts of insurgents in a civil war, especially if it had not employed the due diligence and appropriate measures which ought to be normally taken in such conditions. In other words, because a major strife is tantamount to a *vis major*, there is a presumption against the responsibility of the state for acts of insurgents, unless it has clearly failed, in light of the circumstances of the case, to adopt measures dictated by "due diligence".

Prima facie, if the rebellion succeeds, insurgents will be held responsible for acts committed by them in the course of the conflict⁽³²⁹⁾. They as well become responsible for illegal acts of the

(329) Art. 10 Draft articles on State responsibility (2001) provides:

«1. The conduct of an insurrectional movement which becomes the new government of a State shall be considered an act of that State under international law.

2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law».

In the commentary, the ILC said:

«At the outset, the conduct of the members of the movement presents itself purely as the conduct of private individuals [...] and it is [...] not attributable to the State. Once an organized movement comes into existence as a matter of fact, it will be even less possible to attribute its conduct to the State, will not be in a position to exert effective control over its activities». The commission as well added:

«No distinction should be made for the purposes of article 10 between different categories of movements on the basis of any international "legitimacy" or of any illegality in respect of their establishment as a government, despite the potential importance of such distinctions in other contexts. From the standpoint of the formulation of rules of law governing State responsibility, it is unnecessary and undesirable to exonerate a new government or a new State from responsibility for the conduct of its personnel by reference to considerations of legitimacy or illegitimacy of its origin. Rather, the focus must be on the particular conduct in question, and on its lawfulness or otherwise under the applicable rules of international law. [...]

A further possibility is that the insurrectional movement may itself be held responsible for its own conduct under international law, for example =

previous government (in accordance with the principle of the "continuity of state").

3- Application of rules of international humanitarian law during a non international armed conflict:

Rules of international humanitarian law apply also to non-international armed conflicts. These rules are, *inter alia*, the following⁽³³⁰⁾:

A- Persons who do not take part in hostilities or are *hors de combat* are entitled to respect for their person, honour and convictions and religious practices, especially the following acts are prohibited⁽³³¹⁾:

- violence to the life, health or mental well-being of persons.
- collective punishments.
- taking of hostages.
- acts of terrorism.
- outrages upon personal dignity.
- slavery and slave trade.
- pillage.
- orders that there shall be no survivors.

B- All the wounded, sick and shipwrecked must be respected and protected. They must receive the necessary medical care.

C- Medical units and transports must be respected and protected.

D- The civilian population must be protected against the dangers arising from military operations.

E- Starvation of civilians is prohibited. For that reason, it is not, in principle, permissible to attack or destroy objects indispensable to

= for a breach of international humanitarian law committed by its forces». (Report of the ILC, A/56/10, 2001, paras. 2, 11, 12).

(330) See also, art.3 common to the four Geneva conventions of 1949; Additional Protocol II (1977).

(331) See as well other examples in art.8 para.2 statute of the international criminal court (1998); T. Meron: The international Criminalization of internal atrocities, AJIL, 1995, pp. 555 et ss.

the survival of civilians, such as: foodstuffs, crops, drinking water.. etc. .

F- Works and installations containing dangerous forces, e.g., dams, dykes and nuclear electrical generating stations must not be made the object of attack.

G- The protection of cultural objects and places of worship.

H- The prohibition of forced displacement of civilians, unless their security or imperative military reasons so demand.

§III- Crimes against humanity:

Crimes against humanity are, inevitably, among the most serious crimes of concern to states, individuals and the international community as a whole.

These crimes may occur in an international or non-international armed conflict in time of peace or in time of war. Thus, in Tadic case, the chamber said:

«It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflicts⁽³³²⁾.

(332) Decision of 2 Oct. 1995, case No. IT-94-1-AR 72, p. 72, para. 141.

The Crime against Humanity has passed through the following evolution:

- 1) It is not committed in violation of the common law, but owing to the suppression of this law, to the prejudice of certain categories of individuals : racial, national, religious, and political.
- 2) This suppression of internal criminal law is an act of State sovereignty.
- 3) This act of State sovereignty is a crime committed in violation of international laws limiting the sovereignty of States with respect to the human person.
- 4) The international laws limiting the sovereignty of States with respect to the human person govern the international order and are valid for both without distinction, in times of peace and in times of war, whether they are inserted in «the code» of the laws of war or in that of the laws of peace.
- 5) *Consequently the. Crime against Humanity committed in time of peace falls under the same laws as the Crimes against Humanity committed in time of war.* E. Aroneanu: *Le crime contre l'humanité*, Librairie Dalloz, Paris, 1961, p. 77. See as well : W. Fenrick : *The crime against humanity of persecution in the jurisprudence of the ICTY*, NYIL, 2001, pp. 81-96; Nasser: *Approche analytique du crime contre l'humanité en droit =*

As examples of crimes against humanity, one can mention para. 1 of article 7 statute of the ICC which provides⁽³³³⁾:

1. For the purpose of this Statute, crime against humanity⁽³³⁴⁾, means any of the following acts⁽³³⁵⁾ when committed as part of a

= international, RGDIP, 2001, pp. 281-306; Y. Jurovics: *Réflexions sur la spécificité du crime contre l'humanité* LGDJ, Paris, 2002, 525 pp.

(333) See, e.g., statute ICTY (art. 5), statute of ICTR (art. 3), 1996 Draft code of crimes against the peace and security of mankind (art. 18).

(334) Oxford dictionary widens the ambit of crimes against humanity: «the prohibition of crimes against humanity denies the right of any state to treat its citizens as it pleases» Oxford dictionary of law, 2003, p. 533.

(335) It is important to mention, here, some examples of what has been provided in the elements of crimes:

Crimes against humanity:

Article 7 (1) (a)

Crime against humanity of murder

Elements

1. The perpetrator killed one or more persons.
2. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
3. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.

Article 7 (1) (i)

Crime against humanity of enforced disappearance of persons

Elements

1. The perpetrator:
 - (a) Arrested, detained or abducted one or more persons; or
 - (b) Refused to acknowledge the arrest, detention or abduction, or to give information on the fate or whereabouts of such person or persons.
2. (a) Such arrest, detention or abduction was followed or accompanied by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons; or
(b) Such refusal was preceded or accompanied by that deprivation of freedom.
3. *The perpetrator was aware that:*
 - (a) Such arrest, detention or abduction would be followed in the ordinary course of events by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons; or
 - (b) Such refusal was preceded or accompanied by that deprivation of freedom.
4. Such arrest, detention or abduction was carried out by, or with the authorization, support or acquiescence of, a State or a political organization.

widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health⁽³³⁶⁾.

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- = 5. Such refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons was carried out by, or with the authorization or support of, such State or political organization.
 - 6. The perpetrator intended to remove such person or persons from the protection of the law for a prolonged period of time.
 - 7. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
 - 8. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

(336) Para. 2 of the same text gives a definition of the terms of para. 1 as follows:

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§IV- The crime of genocide:

A) In general:

Prima facie, genocide constitutes one of the most heinous crimes⁽³³⁷⁾. International instruments reproduce, integrally, the

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- (a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;
 - (b) "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;
 - (c) "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 power in the course of trafficking in persons, in particular women and children;
 - (d) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;
 - (e) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;
 - (f) "Forced pregnancy" means the unlawful confinement of a woman forcibly or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;
 - (g) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;
 - (h) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, 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;
 - (i) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom 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 prolonged period of time.

3. For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.

(337) The Trial chamber in Prosecutor V. R. Krstic made serious developments on the notion and elements of genocide, particularly the *actus reus* and the *mens rea* (See ICTY, IT-98-33-T, 2 August 2001, pp. 188-212, paras. 539-599).

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definition of the 1948 of the convention on the prevention and punishment of the crime of genocide⁽³³⁸⁾. Thus, Article 6 ICC statute says⁽³³⁹⁾:

= Extermination is recognized as a crime against humanity in many national instruments. See, e.g., section 7 (3.76) of the Canadian criminal code and article 212-1, paragraph 1 of the French penal code.

(338) See, e.g., art. 6 ICC, art. 4 ICTY, art. 2 ICTR.

(339) The ICC elements of crimes enumerated what is necessary for acts of genocide. It suffices to mention the following examples:

Genocide:

Article 6 (a)

Genocide by killing

Elements

1. The perpetrator killed one or more persons.
2. Such person or persons belonged to a particular national, ethnical, racial or religious group.
3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.
4. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.

Article 6 (c)

Genocide by deliberately inflicting conditions of life calculated to bring about physical destruction.

Elements

1. The perpetrator inflicted certain conditions of life upon one or more persons.
2. Such person or persons belonged to a particular national, ethnical, racial or religious group.
3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.
4. The conditions of life were calculated to bring about the physical destruction of that group, in whole or in part.
5. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.

Article 6 (d)

Genocide by imposing measures intended to prevent births

Elements

1. The perpetrator imposed certain measures upon one or more persons.
2. Such person or persons belonged to a particular national, ethnical, racial or religious group.
3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.
4. The measures imposed were intended to prevent births within that group.
5. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.

«For the purpose of this Statute, "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:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group».

The ICJ maintains:

1- That prohibition against genocide is a *jus cogens* norm that cannot be reserved or derogated from⁽³⁴⁰⁾.

2- That the principles forming the basis of the 1948 convention on the prevention and punishment of genocide are of a customary nature⁽³⁴¹⁾.

3- That the duty incumbent upon states concerning the prevention and punishment according to the convention is no different whether the conflict is international or internal⁽³⁴²⁾.

Prima facie, genocide requires the existence of a special criminal intent. i.e., to destroy one of the above-mentioned groups⁽³⁴³⁾.

(340) CJ, Rep., 1951, reservations to the convention on the prevention and punishment of the crime of genocide, p. 15.

(341) *ibid.*, p. 23.

(342) *ibid.*, 1996, case concerning application of the convention on the prevention and punishment of the crime of genocide (Bosnia – Herzegovina V. Yugoslavia), para. 31.

(343) The ILC, in commenting on its draft Code of Crimes against the Peace and Security of Mankind, states:

«... a general intent to commit one of the enumerated acts combined with a general awareness of the probable consequences of such an act with respect to the immediate victim or victims is not sufficient for the crime of genocide. The definition of this crime requires a specific intent with respect =

B) Hate speech and genocide:

Prima facie, the word may kill!!! An English proverb says: «words cut more than swords». Another one states: «tongue is not steel, yet it cuts». A third one says: «the pen is mightier than the sword»⁽³⁴⁴⁾. In fact, media, e.g., prints, news papers and airwaves may incite to commit international crimes in general, and genocide in particular. Criminalization of hate propaganda is now established in CIL. Offenders of such actions are held criminally responsible thereof.

In this connection, in Prosecutor V. Nahimana, the ICTR explained how mass media can be responsible for using words and prints to commit genocide. In fact, the Tribunal convicted three defendants for public and direct incitement to commit genocide and crimes against humanity through airwaves and print⁽³⁴⁵⁾.

= to the overall consequences of the prohibited acts». 1996 ILC report, UN doc. A/51/10, p. 88.

Therefore, the killing of one individual with such intent is genocide, but the killing of a thousand without the intent would only be homicide.

M. Roberge: The jurisdiction of ad hoc tribunals for the former Yugoslavia and Rwanda over crimes against humanity and genocide, IRRIC, 1997, p. 662.

See as well:

Special issue: «Genocide in Rwanda: 10 years on», JICJ, vol. 3, 2005, pp. 799-1033; International panel of eminent personalities: Report on the 1994 genocide in Rwanda and surrounding events, ILM, 2001, p. 141 ss.

In *Karadzic and Mladic case* the ICTY suggested :

«Genocide requires that acts be perpetrated against a group with an aggravated criminal intent, namely that of destroying the group in whole or in part. The degree to which the group was destroyed in whole or in part is not necessary to conclude that genocide has occurred. That one of the acts enumerated in the definition was perpetrated with a specific intent suffices. The intent which is peculiar to the crime of genocide need not be clearly expressed. (...) The intent may be inferred from a certain number of facts such as the general political doctrine which gave rise to the acts possibly covered by the definition in Article 4 [of the Statute], or the repetition of destructive and discriminatory acts. The intent may also be inferred from the perpetration of acts which violate, or which the perpetrators themselves consider to violate, the very foundation of the group — acts which are not in themselves covered in the list in Article 4 (2) which are committed as part of the same pattern of conduct». Case No. IT-95-5-R61, 11 July 1996, paras. 92-94.

(344) R. Ridout and C. Witting: English proverbs explained, op. cit., 179, 164, 138.

(345) In the same case, the chamber pointed out:

«The nature of the media is such that causation of killing and other acts of genocide will necessarily be effected by an immediately proximate =

§V- The crime of Aggression:

Evidently, acts of aggression may not amount to a "war" *stricto sensu*. In fact, launching limited armed hostilities against another state is an aggression, albeit it does not constitute a war. Hence, every war implies an aggression, but every aggression does not necessarily constitute a war.

Aggression has been defined by the GA of the UN in 1974 (Res.A/9631) as follows:

"Aggression is the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state, or in any other manner inconsistent with the charter of the United Nations"(art. 1).

Moreover, the first use of armed force by a state in contravention of the charter of the UN shall constitute: "prima facie evidence of an act of aggression" (art.2).

The following acts are considered acts of aggression:

- 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⁽³⁴⁶⁾.

= cause in addition to the communication itself. In the chamber's view, this does not diminish the causation to be attributed to the media, or the criminal accountability of those responsible for the communication». The prosecutor V. Nahimana *et al.*, Judgment of 3 Dec. 2003, para. 952. See as well: G. Gordon: A war of media, words, news papers and radio stations – The ICTR media trial verdict and a new chapter in the international law of hate speech, Virginia JIL, 2004, pp. 139-198. W. Timmermann: The relationship between hate propaganda and indictment to genocide: A new trend in international law towards criminalization of hate propaganda?, Leiden J.I.L., vol. 18, 2005, pp. 257-282.

A. Mercier: War and media: constancy and convulsion, IRRIC, No. 860, 2005.

J. Rikhof: Hate speech and international criminal law: The Mugesera decision by the supreme court of Canada, JICJ, vol. 3, 2005.

(346) Undoubtedly, an armed force which violates the frontiers of a state commits an aggression. In this context, the GA said that: "Armed intervention is synonymous with aggression" (Res. 2131, 1965). Moreover, art. 2 Draft code of offences against the peace and security of mankind (1954) provides that among these crimes:

- Bombardment by the armed forces of a state against the territory of another state.

- Blockade of the ports or coasts of a state by the armed forces of a state of the territory of another state.

- 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.

- The sending by a state of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another state (art. 3).

Finally, the following rules apply to any aggression:

1- No consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression.

2- A war of aggression is a crime against international peace.

3- No territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful.

4- Aggression gives rise to international responsibility (art.4).

= (1) Any act of aggression, including the employment by the authorities of a state of armed force against another state for any purpose other than national or collective self-defence or in pursuance of a decision or recommendation of a competent organ of the United Nations.

(2) Any threat by the authorities of a State to resort to an act of aggression against another State.

(3) The preparation by the authorities of a State of the employment of armed force against another State for any purpose other than national or collective self-defence or in pursuance of a decision or recommendation of a competent organ of the United Nations.

(4) The organization, or the encouragement of the organization, by the authorities of a State, of armed bands within its territory or any other territory for incursions into the territory of another State, or the toleration of the organization of such bands in its own territory, or the toleration of the use by such armed bands of its territory as a base of operations or as a point of departure for incursions into the territory of another State, as well as direct participation in or support of such incursions.

5- Aggression entails the criminal responsibility of individuals⁽³⁴⁷⁾.

It is worth recalling that article 5/2 of the Rome Statute of the International Criminal Court provides that the Court shall exercise jurisdiction over the crime of aggression once a provision has been adopted defining the crime and setting out the conditions for the exercise of jurisdiction with respect to this crime. Such a provision must be consistent with the Charter of the United Nations⁽³⁴⁸⁾.

The Rome Conference, which adopted the Statute, also adopted resolution F on the establishment of the Preparatory Commission for the International Criminal Court, which was entrusted with the preparation of proposals for a provision on aggression, including the definition and the elements of the crime of aggression as well as the conditions under which the International Criminal Court will exercise its jurisdiction with regard to this crime. The proposals are to be submitted to the Assembly of States Parties at a review conference, with a view to arriving at an acceptable provision on the crime of aggression for inclusion in the Statute⁽³⁴⁹⁾.

The Preparatory Commission considered the crime of aggression at its second to tenth sessions held from 1999 to 2002. At its second session, in 1999, the Preparatory Commission agreed to establish the Working Group on the Crime of Aggression at its next session. At its tenth session, the Preparatory Commission agreed to include in its report to the Assembly of States Parties the

(347) In this regard, art. 16 Draft code of crimes against the peace and security of mankind (1996) provides:

«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».

(348) See as well:

Rahim Kherad: *La question de la définition du crime d'agression dans le statut de Rome entre pouvoir politique du conseil de sécurité et compétence judiciaire de la CPI*, RGDIP, 2005, pp. 331-362.

(349) See Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June – 17 July 1998, vol. I, Final documents (United Nations publication, Sales No. 02.I.5), document A/CONF. 183/10, Annex I, F; The work of the international law commission, *op. cit.*, pp. 106-107.

discussion paper on the definition and elements of the crime of aggression.

§VI- The crime of Piracy⁽³⁵⁰⁾:

Piracy is considered, from time immemorial, as an international crime though committed by individuals. It constitutes the first international crime recognized by nations. This dates back to as early as the 1600^{s(351)}. Accordingly, it lies at the *fons et origo* of CIL.

The essential features and characteristics of piracy are the following:

- *ratione materiae*: Piracy consists of any illegal acts of violence or detention or any act of depredation.

- *ratione*: the act must be committed for private purposes; accordingly, the *animus furandi* (the intention to rob) is not required. In fact, piracy may be committed by feelings of revenge or hatred and not only by the desire for gain.

- *ratione personae*: piracy is committed by the crew or passengers of a private ship or aircraft. In fact, acts of piracy can be committed not only by ships, but also by aircraft, if such acts are directed against a ship.

- *ratione loci*: piracy may be committed only on high seas or in a place outside the jurisdiction of any state (i.e., piracy *jure gentium*), not within the internal waters or the territorial sea of a state.

- acts of piracy must be directed against another ship or aircraft or against persons on board such ship or aircraft; this means that acts committed on board a ship by the crew or passengers and directed against the ship itself or persons or property on the ship, cannot be considered as acts of piracy.

Moreover, the following rules are applicable to piracy:

(350) See as well art. 101 of the 1982 convention on the law of the Sea; Ahmed Abou-El-Wafa: *The international law of the sea*, Dar Al-Nahda Al-Arabia, Cairo, 1426-2006, pp. 346-350 (in Arabic).

(351) See as well, L.C. Green: *New trends in international criminal law*, Israel Y. of human rights, 1981, p. 12.

- every state may seize a pirate ship or aircraft or a ship or aircraft taken by piracy and arrest the persons and seize the property on board. The courts of that state may decide upon the penalties to be imposed and the action to be taken with regard to the ship, aircraft or property, subject to the rights of third parties acting in good faith⁽³⁵²⁾. Thus, all states may arrest and punish pirates apprehended on the high seas. This is a mere application of a long-established principle, i.e., the "universality principle".

- a seizure on account of piracy must be carried out by warships or military aircraft (art. 107)⁽³⁵³⁾.

- where the seizure of a ship or aircraft on suspicion of piracy has been effected without adequate grounds, the state making the seizure shall be liable for any loss or damage caused by the seizure (art. 106).

(352) This means that: "*pirata non initial dominium*" (piracy does not affect title of the rightful owner).

See also; Oppenheim: International law, vol.1, 8th ed., p. 616; C. Touret: La piraterie au Vingtième Siècle: Piraterie maritime et aérienne, LGDJ, Paris, 1992, 306 pp. Odier: La piraterie, espace et ressources maritime, E.R.M., 1994, No. 8, p. 107-114; Treves: intervention et haute mer et navires étrangères, AFDI, 1995, p. 651-675; a convention on piracy as well as piracy laws, in AJIL, 1932, vol.26, supp., p.739 et seqq.; convention for the suppression of unlawful acts against the safety of maritime navigation (1988), in "international instruments related to the prevention and suppression of international terrorism", UN, New York, 2001, p. 68-81; M. Voelckel: La piraterie est-elle un crime de droit des gens?, Annuaire du droit de la mer, t.v, 2000.

(353) Municipal law of states may contain provisions concerning piracy. Thus, article 122 of the Penal code of the Philippines reads: «Piracy in general and mutiny in the high seas: The penalty of reclusion temporal shall be inflicted upon any person who, on the high seas, shall attack or seize a vessel or, not being a member of its complement nor a passenger, shall seize the whole or part of the cargo or said vessel, its equipment or personal belongings of its complement or passengers» See as well H. Davide: Hostes humani generis: Piracy, territory and the concept of universal jurisdiction, in «Towards world constitutionalism» ed. By Macdonald and D. Johnston, M. Nijhoff publishers, Leiden – Boston, 2005, p. 715-736.

See as well art. 180 criminal code in Croatia which criminalizes piracy on the sea and in the air.

§VII- The crime of international terrorism:

It is well known that acts of terrorism have existed ab intiquo. They have developed to the extent of constituting a severe menace to the life and safety of persons as well as the security of property. Such acts are increasing on an alarming scale. They are inadmissible under present CIL.

Since terrorism is a comprehensive threat to states, it inevitably requires an equally broad-gauged response.

Nevertheless, international cooperation with respect to combating international terrorism has been almost, till recent years, entirely lacking⁽³⁵⁴⁾.

In recent years, it is well known that there are various international conventions concluded or adopted on the universal level concerning the terrorist phenomenon, the most important of which are the following:

- Geneva convention for the prevention and suppression of terrorism (1937).
- Convention on the offences and certain other acts committed on board aircraft(Tokyo 1963);
- Convention for the suppression of unlawful seizure of aircraft (The Hague 1970);
- Convention for the suppression of unlawful acts against the safety of civil aviation (Montreal 1971);
- Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents (New York 1973);

(354) See as well:

M. Sassoli:La guerre contre le terrorisme-le droit international humanitaire et le statut de prisonnier de guerre, Canadian YIL, 2001,p 211-250;"Symposium:

Terrorism: The legal implications of the response to September 11, 2001 "Cornell ILJ,2002,p457-683;US: Presidential military order on the detention, treatment and trial of certain non-citizens in the war against terrorism, ILM, 2002,p252ss; S. Szurek: La lutte Internationale contre le terrorisme sous l'empire du chapitre VII:Un laboratoire normatif, RGDIP, 2005, p 5-50; Ch. Wirz and E. Egger: Use of nuclear and radiological weapons by terrorists? IRRC, vol. 87, 2005, pp. 497-510.

- International convention against the taking of hostages (New York 1979);
- Convention on the physical protection of nuclear material (Vienna 1980);
- Protocol for the suppression of unlawful acts of violence at airports serving international civil aviation (Montreal 1988), supplementary to the Convention for the suppression of unlawful acts against the safety of civil aviation (Montreal 1971);
- Convention for the suppression of unlawful acts against the safety of maritime navigation (Rome 1988);
- Protocol for the suppression of unlawful acts against the safety of maritime navigation (Rome 1988);
- Convention on the marking of plastic explosives for the purpose of detection (Montreal 1991);
- Convention on the safety of United Nations and associated personnel (A/49/59, 1994);
- International convention for the suppression of terrorists bombings (A/52/164, 1997).
- International convention for the suppression of financing of terrorism (1999).
- Convention of the OIC on combating international terrorism (1999).
- OAU convention on the prevention and combating of terrorism (1999).
- Treaty of cooperation among states members of the commonwealth of independent states in combating terrorism (1999).
- Inter-American convention against terrorism (2002)⁽³⁵⁵⁾.
- Council of Europe: Protocol concerning amendment of the European convention for the suppression of terrorism (2003).

Between Arab States, the most important conventions are, in this regard, the following:

(355) Cf, ILM, 2003, p 19 ss.

1- Convention on extradition of criminals , adopted by the Council of the LAS, on 14 September 1952 , and ratified by Egypt on 8 March 1954⁽³⁵⁶⁾.

2- Convention on declarations and judicial delegations, adopted by the Council of the LAS, on 14 September 1952 , and ratified by Egypt on 25 Mars 1954⁽³⁵⁷⁾.

3- Convention on the execution of judgments, adopted by the Council of the LAS, on 14 September 1952 , and ratified by Egypt on 25 July 1954⁽³⁵⁸⁾.

4- The Arab anti-terrorism agreement, adopted by the joint meeting of the Councils of Arab interior and justice ministers on 22 April 1998.

Article 1 para. 2 of the agreement defines terrorism as follows⁽³⁵⁹⁾:

(356) Cf, "League of Arab States: A collection of treaties and conventions, Secretariat General, Tunis, 1985 p 101-106 . It is worth recalling that Egypt was the first Arab State to deposit its instrument of ratification. The convention prohibits extradition in political crimes. However, extradition is mandatory in the following crimes (article 4): 1- offences against the kings and presidents of states , their spouses, ancestors or offspring; 2- offences against crown princes;3- premeditated murder;4- terrorist offences.

In its instrument of ratification Egypt has made a reservation on the aforementioned four offences set forth in article 4, which include terrorist offences. Egypt has maintained that , in such offences, extradition is not mandatory (Cf, Ibid, p 102, at note 1).

(357) Ibid,p.92-95 .

(358) Ibid, p97.

(359) Article 86 of the Egyptian penal code, as amended by law No. 97 of 1992, states:

"For purposes of the application of the provisions of the present law, "terrorism" means any use or threat of the use of force, violence, threat or intimidation by a criminal for the realization of a criminal project, collective or individual , with a view to disrupting public order or endangering the safety and security of the society, if it involves hurting or intimidating its members, endangering their lives, their freedoms or security, damaging the environment, public telecommunications, means of public transportation, public funds, buildings, public or private property, or the occupation or seizure of such property, or preventing or impeding public authorities, places of worship and institutions of learning =

«Any act of violence or threatening with violence , regardless of its motives or purposes, that takes place in execution of a criminal undertaking, individual or collective, which aims at horrifying people, horrifying them through inflicting harm upon them, endangering their lives, freedom or security, harming the environment or any of public or private utilities and properties, occupying them, seizing them or endangering any of the national resources»⁽³⁶⁰⁾.

Moreover , para .3 of the same article provides that a terrorist crime means:

«Any crime or attempted crime committed in execution of a terrorist purpose in any one of the signatory states or against their nationals, properties, or interests in a way punishable by their national laws. The crimes stipulated in the following agreements, except those excluded or not ratified by the signatory states , are considered terrorist:

1- Convention on the offences and certain other acts committed on board aircraft (Tokyo 1963); 2- Convention for the suppression of unlawful seizure of aircraft (The Hague 1970); 3- Convention for the suppression of unlawful acts against the safety of civil aviation (Montreal 1971) and the annexed agreement signed at Montreal on 10/5/1984.; 4- Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents (New York 1973); 5- International convention against the taking of hostages (New York 1979); 6- The

= of their functions, or undermining the application of the constitution, laws and regulations in effect" .

The law contains as well a list of terrorist offences, such as: 1- establishing or subscribing to organizations threatening the state;2- compelling other persons to join illicit organizations; 3-communicating with a foreign state or organization for the purpose of committing terrorist acts against the state;4- joining the armed forces of a foreign state or joining foreign terrorist bands;5- seizing public means of transportation;6- engaging in conflict with law enforcement authorities controlling terrorism .

(360) Article 2 of the Agreement provides that all acts of struggle by different means, including military struggle against foreign occupation and aggression for liberation and self determination, in accordance with the principles of international law , are not considered crimes, save any act posing threat to the territorial integrity of any Arab state.

United Nations agreement on maritime law of the year 1983, the part concerning maritime piracy".

Moreover, the Agreement provides, *expressis verbis*, the measures of Arab cooperation for combating acts of terrorism⁽³⁶¹⁾.

The Agreement also provides that the crimes set forth by article 1 are not considered as political crimes. Additionally, the following crimes are not to be considered as political crimes, even if they were politically motivated (article 2 para, b): 1- Any offence against the kings, presidents and rulers of the signatory states as well as their spouses, ancestors and offspring; 2- Any offence against crown princes, vice-presidents, prime ministers and ministers of the signatory states; 3- Any offence against the internationally protected persons, including diplomats in the signatory states or those accredited in them; 4- premeditated murder or forced robbery of individuals, authorities or means of transport; 5- Sabotage of public properties and those dedicated to public service even if owned by another signatory state 6- Crimes of manufacturing, smuggling, or possessing weapons, ammunition or explosives, or any other substances intended for use in terrorist crimes.

(361) Those measures are the following: 1- measures for the prevention and combating terrorist crimes, i.e., prevention of the use of Arab territories for any form of terrorist crimes, cooperation and coordination, detection of the transportation, import, export, storage and use of weapons, prevention of infiltration through frontiers, consolidation of media activities, setting up of a database, arrest and trial of perpetrators, providing the necessary protection for those working in the criminal justice as well as witnesses and sources of information and the establishment of an effective cooperation (article 3); 2- The Arab cooperation for the prevention and combating of terrorist crimes through, e.g., exchange of information, investigation and exchange of expertise (article 4); 3- Conditions and procedures for the extradition of terrorists (articles 5-8, 22-28); 4- Judicial delegation (articles 9-12, 29-33); 5- Cooperation (articles 13-18); 6- Seizure and forfeiting of objects and articles resulting from the crime (articles 19-20); 7- Exchange of evidence (article 21); 8- Measures for the protection of witnesses and experts (articles 34-38); 9- Impossibility to put reservations by a contracting state, which implies a breach of the provisions of the convention or its objectives (article 41); 10- Possibility for a contracting state to withdraw from the Agreement after the lapse of a six months notice (article 42).

Prima facie, combating terrorism supposes, in addition to international cooperation, the adoption of some measures, the most important of which are the following:

- Media coverage and terrorist acts: Undoubtedly, mass media and others involved in providing information services have an important role with regard to the manner in which a state combats terrorism.

- the adoption of a hard line position or, *per contra*, a soft line (flexible) one constitutes, with respect to terrorist acts, a difficult decision. Usually, states adopt, in this regard, a hard, firm and uncompromising line. This means that, the principle of no negotiations with, no concessions to, perpetrators of terrorist acts is the rule applied by states.

- the control of funds⁽³⁶²⁾ sent for purposes of terrorist acts. Prima facie, the prevention of terrorist financing and money laundering offences are among the priorities of each legal system, be it national or international. This applies even to charitable and social goals.

(362) In this context, Egypt maintains that:

«control systems in national banks should be tightened to enable the monitoring of dirty money and facilitate the early detection without violating the rules of secrecy of bank accounts and bank transactions. This requires the establishment of committees or units within the bank itself, to ensure the transparency of capital movement on the one hand, and secrecy of transactions on the other. Financial institutions should also be empowered to check on the legality of the money deposited, if there be circumstantial reasons for doubt.

Egyptian law 205 of 1990, concerning the secrecy of accounts, has been cognizant of such aspects. The law provides for the exchange of information between the Central Bank and other banks, the right of control authorities to access to information about accounts» Cf, Arab Republic of Egypt national report, Ninth UN congress on the prevention of crime and the treatment of offenders, p 43.

Moreover, the laundering of funds may «be considered a crime of concealment of the truth prescribed by article 44 bis of the Egyptian penal code. The prescriptions of the criminal code pertaining to the crime of holding funds of an illicit source may be applicable to the laundering of funds» (loc. cit).

Additionally, in accordance with article 3 of the same law, the General Prosecutor, may request Cairo Court of Appeal to permit him to take data or information relating to accounts, if this is necessary to disclose truth in a crime or a misdemeanor.

- Pursuit and sentencing of perpetrators of criminal acts.

Nevertheless, an exhausted and indicated set of remedies and measures for combating and eliminating terrorism is an impossible task. These remedies and measures should ensure a decisive balance between three requirements, namely:

- the protection of national security;
- the preservation of lives and properties of innocent persons; and
- the respect of rights and fundamental freedoms of the accused, or even ,the suspected persons⁽³⁶³⁾.

That being so, the following remarks are to be mentioned⁽³⁶⁴⁾:

1- Acts of terrorism may be committed in the course of an armed conflict. Thus, article 33 of the fourth Geneva convention reads⁽³⁶⁵⁾: «No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or terrorism are prohibited»⁽³⁶⁶⁾.

2- Some states qualify acts of aggression as «state terrorism»⁽³⁶⁷⁾.

(363) See as well:

L. Moreillon et F. de courten: *La lutte contre le terrorisme et les droits du suspects: le principe de sécurité face à l'épreuve des droits fondamentaux*, RPS, 2003, pp. 117-140.

(364) *Prima facie* terrorists do not have a territorial base, unless they do, cf, V. Lowe: *Security concerns and national sovereignty in the age of worldwide terrorism*, in «Towards world constitutionalism – issues in the global ordering of the world community, ed, by R.J. Macdonald and D.M. Johnston, Martinus Nijhoff publishers, Leiden – Boston, 2005, p. 661.

(365) See as well art. 4 Additional Protocol II (1977).

(366) It has been maintained: «in resorting to intimidatory measures to terrorize the population, the belligerents hoped to prevent hostile acts. Far from achieving the desired effect, however, such practices, by reason of their excessive severity and cruelty, kept alive and strengthened the spirit of resistance» *Commentary: IV Geneva convention*, ICRC, Geneva, 1994, p. 226.

(367) Thus, in a reservation on the 1997 international convention for the suppression of terrorist bombings, Cuba says:
«In addition, the exercise of State terrorism has historically been a fundamental concern for Cuba, which considers that the complete eradication thereof through mutual respect, friendship and cooperation =

3- Acts of violence committed for the sole purpose of exercising the right of self-determination are not international crimes:

A war of national liberation is an armed conflict in which a people is fighting against alien occupation or colonial domination or against a racist regime in the exercise of its right of self-determination.

A war of national liberation was formerly classed by international law as a civil war (or a non-international armed conflict), but is now regarded by the law of armed conflicts as an international armed conflict⁽³⁶⁸⁾.

It is worth recalling that art. 1/2 UN charter provides that one of the purposes of the organization is:

«To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples».

Accordingly, acts of violence committed in order to fight foreign occupation do not constitute a crime⁽³⁶⁹⁾.

= between States, full respect for sovereignty and territorial integrity, self-determination and non-interference in internal affairs must constitute a priority of the international community. Cuba is therefore firmly of the opinion that the undue use of the armed forces of one State for the purpose of aggression against another cannot be condoned under the present Convention, whose purpose is precisely to combat, in accordance with the principles of the international law, one of the most noxious forms of crime faced by the modern world. To condone acts of aggression would amount, in fact, to condoning violations of international law and of the Charter and provoking conflicts with unforeseeable consequences that would undermine the necessary cohesion of the international community in the fight against the scourges that truly afflict it. The Republic of Cuba also interprets the provisions of the present Convention as applying with full rigour to activities carried out by armed forces of one State against another State in cases in which no armed conflict exists between the two» Multilateral treaties deposited with the Secretary General, op. cit., vol. II, p. 131.

(368) See, art. 1/4 of the 1977 Additional Protocol 1; the 1970 declaration on principles of international law concerning friendly relations and cooperation among states.

(369) However, western states do not share this point of view. It suffices to mention, e.g., what Sweden said: =

§VIII- The crime of Apartheid:

This crime is a stumbling block of human dignity. It was practiced particularly in South Africa, where the majority, the black people, was treated as persons whose existence lied at the bottom of the society. Prima facie, this crime chocked the conscience of mankind and is considered as an international crime⁽³⁷⁰⁾.

= «The Government of Sweden has examined the declaration made by the Government of Jordan upon ratification of the International Convention for the Suppression of the Financing of Terrorism, according to which the Government of Jordan does not consider acts of national struggle and fighting foreign occupation in the exercise of people's right to self-determination as terrorist acts within the context of paragraph 1 (b) of Article 2 of the Convention.

The Government of Sweden recalls that the designation assigned to a statement whereby the legal effect of certain provisions of a treaty is excluded or modified does not determine its status as a reservation to the treaty. The Government of Sweden considers that the declaration made by the Government of Jordan in substance constitutes a reservation.

The object and purpose of the Convention is to suppress the financing of terrorist acts, including those defined in paragraph 1 (b) of Article 2 of the Convention. Such acts can never be justified with reference to the exercise of people's right to self-determination.

The Government of Sweden further considers the reservation to be contrary to the terms of Article 6 of the Convention, according to which States parties are under an obligation to adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of the Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.

The Government of Sweden wishes to recall that, according to customary international law as codified in the Vienna Convention on the law of Treaties, a reservation incompatible with the object and purpose of a treaty shall not be permitted. It is in the common interest of States that treaties to which they have chosen to become parties are respected as to their object and purpose, by all parties, and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties» (Ibid, p. 170).

(370) Art. 2 of the international convention on the suppression and punishment of the crime of Apartheid (1973) provides:

«For the purpose of the present Convention, the term "the crime of apartheid", which shall include similar policies and practices of racial segregation and discrimination as practised in southern Africa, shall apply to the following inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them:

CHAPTER III
THE *RATIONE PERSONAE* ASPECT OF CIL
(THE PERSONS)

CIL pays a great attention, especially to three categories of persons, namely: the accused, the victims and witnesses.

The above-mentioned persons will be treated as follows:

Section I

The Accused

The study of the accused raises, *inter alia*, two issues, namely: The definition of the accused and his rights.

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- = (a) Denial to a member or members of a racial group or groups of the right to life and liberty of person:
- (i) By murder of members of a racial group or groups; (ii) By the infliction upon the members of a racial group or groups of serious bodily or mental harm, by the infringement of their freedom or dignity, or by subjecting them to torture or to cruel, inhuman or degrading treatment or punishment; (iii) By arbitrary arrest and illegal imprisonment of the members of a racial group or groups;
 - (b) Deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part;
 - (c) Any legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms, including the right to work, the right to form recognized trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association;
 - (d) Any measures, including legislative measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups, the prohibition of mixed marriages among members of various racial groups, the expropriation of landed property belonging to a racial group or groups or to members thereof;
 - (e) Exploitation of the labour of the members of a racial group or groups, in particular by submitting them to forced labour;
 - (f) Persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid».

§I- Definition:

An accused is a person against whom there are sufficient prima facie evidences that he has committed or participated in the commission of the international crime under consideration⁽³⁷¹⁾.

§II- Rights of the accused:

CIL is not the equivalent of simply putting people behind bars for any reason and without observing any rights.

The rights conferred upon every person involved in criminal proceedings, as embodied in the international instruments of human rights (e.g., the universal declaration on human rights, the international covenant on civil and political rights) and the international instruments related to CIL (for instance statutes of the ICTY, ICTR and ICC)⁽³⁷²⁾ are the following:

- To be informed promptly in a language which he understands of the nature and cause of the charge against him⁽³⁷³⁾.
- To be tried without undue delay.
- To examine the witnesses against him.
- To have the free assistance of an interpreter if he cannot understand or speak the language used in court.
- Not to be compelled to testify against himself or to confess guilt (art. 14/3 of the International Covenant on civil and political

(371) The «alleged offender» is a person as to whom there is sufficient evidence to determine prima-facie that he has committed or participated in the commission of an international crime. See as well article 1 para. 2, convention on the prevention and punishment of internationally protected persons, including diplomatic agents (1973).

(372) See: art. 8 Nuremberg Tribunal; art. 21 ICTY; art. 67 ICC; art. 17 Statute of special court for Sierra Leone; art. 20 ICTR; art. 11 Draft code of crimes against the peace and security of Mankind (1996).

(373) M. Ayat: Le droit de l'accusé d'être informé par le procureur des tribunaux pénaux internationaux ad hoc sur la nature des faits qui lui sont reprochés et leur qualification juridique, *Revue de DI des sciences diplomatiques et politiques*, 2005, pp. 79-124.

rights)⁽³⁷⁴⁾ and to remain silent, without such silence being a consideration in the determination of guilt or innocence⁽³⁷⁵⁾.

- To be accorded guarantees of fair treatment at all stages of the proceedings.

- To have the right to a «due and fair» trial on facts and law.

- Not to have imposed on him any reversal of the burden of proof or any onus of rebuttal.

- To ensure that the proof of guilt should be beyond any reasonable doubt.

- To treat him on the basis of the presumption of innocence until proved guilty by a competent court⁽³⁷⁶⁾.

(374) Some states have made certain declarations or reservations concerning art. 14:

- Thus, for persons who suffer as a result of a miscarriage of justice, unlawful arrest or imprisonment, certain states said that there was non-enforceable right to compensation against the state (e.g., India, Trinidad and Tobago), Cf «Human rights-Status of international instruments», UN, New York, 1987, p 9, 45 .

- Moreover , as regards public hearings , Denmark stated that under its law , the right to exclude the press and the public from trials might go beyond what is permissible according to the Covenant and that this right should not be restricted (Ibid , p 33) .

- Furthermore , some states declared that the guarantee of free legal assistance could not be satisfied (e.g., Barbados and Guyana) , cf Ibid , p 30,37 .

- Finally , Luxembourg (and in the same meaning Austria) said that in accordance with law " following an acquittal or a conviction by a court of first instance, a higher tribunal may deliver a sentence , confirm the sentence passed or impose a harsher penalty for the same crime . However , the tribunal's decision does not give the person declared guilty on appeal the right to appeal that conviction to a higher appellate jurisdiction " (Ibid , p 29,40)

(375) R. Geiss: Name, rank, date of birth and the right to remain silent, IRRC, No. 860, 2005, pp. 721-736.

(376) It is worth recalling that prisoners of war enjoy some procedural guarantees, namely:

- trial by military court, unless existing laws expressly permit trial of national military personnel by civilian courts.

- benefit of the law of war, even if convicted, for acts committed prior to capture, i.e., during hostilities.

- rapid judicial investigation.

(articles 82-86, 103-106 of the third Geneva Convention 1949).

- To have adequate time and facilities for the preparation of his defense⁽³⁷⁷⁾ and to communicate with counsel of his own choice.
- To be tried in his presence and to defend himself in person⁽³⁷⁸⁾ or through legal assistance of his own choosing.
- To be convicted only on the basis of evidence characterized by a twofold element: on the one hand, it must be legally obtained and⁽³⁷⁹⁾, on the other hand, it should be supported by proof beyond any reasonable doubt⁽³⁸⁰⁾.

Section II.

The Victims

The concept of victim requires that we focus on four points, i.e., the definition, the treatment of victims, their compensation and, finally, some concluding remarks.

(377) An author says:

«L'égalité des armes est perçue comme la condition même de la loyauté du procès. Les droits de la défense sont au centre de ce procès» A. Sow : L'égalité des armes au Tribunal Pénal international pour le Rwanda, *Revue de DI de sciences diplomatiques et politiques*, 2005, p. 241.

(378) The ICTY pointed out «that assignment of counsel against the wishes of the accused is a developing area of the law both in national and international jurisdictions», Prosecutor V. Milosevic, No. IT-02-54-T, para 22, 7 Dec., 2004.

However, the ad hoc international criminal tribunals said that the right to self-representation is not absolute.

See as well N. Jorgensen: The right of the accused to self-representation before international criminal tribunals: further developments, *AJIL*, 2005, pp. 663-668.

(379) In this regard, art. 95 Rules of procedure and evidence ICTY(January 30, 1995), provides:

«No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings». This is a mere application of a broader rule under which, before international tribunals, evidence obtained by violation of international law, is «inadmissible evidence». (C. Amerasinghe: Principles of evidence in international litigation, final report, Ann. IDI, vol. 70-I, 2003, p. 250).

(380) An author says:

«Proof beyond reasonable doubt seems generally to be too severe a standard».

It is «a luxury that the actor in international litigation cannot afford».

«It can be applied in certain kinds of cases, primarily in criminal ones». *Ibid*, pp. 290-293.

§I- Definition:

Clearly, a victim is a person who suffered from the international crime, either because he was the object of the act or omission committed, or he was affected by it.

In this connection, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power Adopted by General Assembly resolution 40/34 of 29 November 1985, provides⁽³⁸¹⁾:

1. "Victims" means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.

2. A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term "victim" also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization».

Moreover, rule 85 of the Rules of procedure and evidence of the ICC states:

« For the purposes of the Statute and the Rules of Procedure and Evidence:

(a) "Victims" means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;

(b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes».

(381) Human rights – A compilation of international instruments, UN, New York, 2002, p. 406.

§II- Treatment of victims of international crimes:

Because of the gravity of international crimes and their serious consequences, victims of those crimes should be treated in a special manner.

In this regard, the «Declaration on basic principles of justice for victims of crime and abuse of power», adopted in 1985 by the GA of the UN (Res. 40/34), provided some principles for the protection of rights of victims that must be observed by judicial and administrative organs, namely⁽³⁸²⁾:

1- Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress.

2- Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible.

3- The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:

(a) Informing victims of their role and the scope, timing and progress of the proceedings.

(b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings.

(c) Providing proper assistance to victims throughout the legal process.

(d) Taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation.

(e) Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims.

(382) Moreover, Rules of procedure and evidence of the ICC provide some rules to be followed in treating victims, namely, taking into account their need, protection of victims, participation of victims in the proceedings, legal representatives of victims, views of victims and their representatives (See Rules 86-93).

4- Informal mechanisms for the resolution of disputes, including mediation, arbitration and customary justice or indigenous practices, should be utilized where appropriate to facilitate conciliation and redress for victims.

5- Offenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependants. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights.

6- Governments should review their practices, regulations and laws to consider restitution as an available sentencing option in criminal cases, in addition to other criminal sanctions.

7- In cases of substantial harm to the environment, restitution, if ordered, should include, as far as possible, restoration of the environment, reconstruction of the infrastructure, replacement of community facilities and reimbursement of the expenses of relocation, whenever such harm results in the dislocation of a community.

8- Where public officials or other agents acting in an official or quasi-official capacity have violated national criminal laws, the victims should receive restitution from the State whose officials or agents were responsible for the harm inflicted. In cases where the Government under whose authority the victimizing act or omission occurred is no longer in existence, the State or Government successor in title should provide restitution to the victims.

9- Victims should receive the necessary material, medical, psychological and social assistance through governmental, voluntary, community-based and indigenous means.

§III- Compensation of victims of international crimes:

After some general developments, reference will be made to reparation of damage resulting from international crimes, some examples and some concluding remarks.

A) In general:

Compensation of victims of crimes is a general principle of law recognized by all nations, either in relations between states or with regard to particulars.

a- In relations between states:

If a state committed a crime (e.g., an aggression, genocide, war crimes, crimes against humanity), this constitutes an internationally wrongful act.

An international wrongful act requires from the state concerned:

- To take into account the principle *ex injuria non jus oritur*, which means that when a person had committed a wrongful act, it could not rely on that act to extract itself from a particular situation or to allege a right which he had not.

- to cease that act, if it is a continuing one⁽³⁸³⁾.

- to perform the international obligation incumbent upon the state⁽³⁸⁴⁾, by bringing its conduct into conformity with international law.

- to make full reparation to the injured state for the consequences flowing from that act.

Reparation, i.e., undoing the damage and eliminating the Consequences that the breach of an international obligation had caused, is an outstanding principle of present international law. The remedying of a breach of an international obligation is one of the most acceptable rules of the later⁽³⁸⁵⁾.

Reparation has three forms, namely:

1- *Restitutio in integrum* or the restoration of the *status quo ante*: Restitution in kind[(French: restitution en nature) means that the responsible state should restore or re-establish as far as possible the situation that had existed before the breach. Restitution is the

(383) In fact, states have an obligation to put an immediate end to an illegal Situation. Cf, ICJ, Rep., 1971, p.54.

In the Nicaraguan Case, the ICJ said that:

«the United States is under a duty immediately to cease and refrain from all such acts as may constitute breaches of the foregoing legal obligations» ICJ, Rep., 1986, p. 146-149.

(384) The responsible state may also be asked to offer appropriate assurances and guarantees of non-repetition, if circumstances so require, Cf., report of the ILC, 2000, op. cit., p. 131.

(385) The Draft Articles on State Responsibility, provides that "the responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act"

primary form of reparation, in addition to compensation where restitution does not fully make good the injury. Otherwise, responsible states would be able to avoid performing their international obligations by offering compensation (payment). Hence, the objective of restitution is, primarily, to remove the effects of the internationally wrongful act by re-establishing the status quo or the situation which would have existed without the wrongful act.

2- Compensation: *Prima facie*, payment of compensation for loss caused is a general principle of law⁽³⁸⁶⁾. In fact, *ubi jus ubi remedium* (Where there is a right, there is a remedy).

There is no doubt that compensation⁽³⁸⁷⁾ should cover any economically assessable damage sustained by the injured state. In fact, the wrongdoing state is obliged to make compensation, to the extent that such damage is not fully made good by the restitution. This means that «punitive damages» are not welcomed, since they

(386) The ICJ affirmed:

"It is a well-established rule of international law that an injured state is entitled to obtain compensation from the state which has committed an internationally wrongful act for the damage caused by it» ICJ, Rep., 1997, p. 69, para. 152.

The court as well said that:

"In order to award compensation, the court can only act with reference to a concrete submission as to the existence and the amount of each head of damage. Such an award must be based on precise grounds and detailed evidence concerning those acts which have been committed" ICJ, Rep., 1974, p. 204-205, para. 76.

See also, the compensation of «intersecting wrongs», in Id,Rep.,1997,p.69-70, paras. 148-154.

Even, under the principle of «incomplete privilege», the defendant is privileged to commit what would otherwise be a trespass, but upon the terms that he shall compensate the plaintiff for any damage caused (I. Brownlie: Principles of international law, p. 466).

(387) The quantification of compensation depends on various elements. Even, in many instances, states:

"have reached agreement on compensation for an internationally wrongful act, but on an *ex gratia* basis. Moreover, in the context of world trade and environmental issues, states had created special regimes for compensation, which excluded the application of general principles" Cf, Report of the ILC, 2000,op.cit,p. 60,para.189.

It is worth recalling that the ICJ affirmed that :

- "In general, jurisdiction to determine the merits of a dispute entails jurisdiction to determine reparation" ICJ, Rep., 1986,p. 142,para.283.

go beyond the **concept of reparation *per se*** and they are contrary to fairness and justice.

The calculation of the **amount of compensation** depends on the circumstances of the breach, the damage sustained and the content of the breached obligation.

3- Satisfaction: Satisfaction is usually made by the state which has committed the wrongful act, particularly for non-material injury (French: *préjudice immatériel*) occasioned by that act⁽³⁸⁸⁾.

Satisfaction usually takes the form of expression of regret, an acknowledgement of the breach, formal apology, application of disciplinary measures or punishment against tortfeasors or responsible officials, holding of an inquiry, the taking of measures to prevent the recurrence of the injury, damage or the internationally wrongful act.. etc. . Satisfaction may as well take the form of a judgment made by an international court⁽³⁸⁹⁾.

b- With regard to particulars:

It is now well established that victims of human rights violations have the right to **compensation and reparation of the injury incurred**⁽³⁹⁰⁾.

Thus, article 8 of the Universal declaration of human rights reads:

(388) However, satisfaction must be:

«proportionate to the injury in question and should not take a form humiliating to the responsible state» Cf, report of the ILC,2000,op.cit,p.51.

In fact, there was still a strong concern about imbalances of power that had historically *enabled* powerful states to impose humiliating forms of satisfaction on weaker states (ibid,p.68).

(389) In this regard, the ICJ said that:

«the court must declare that the action of the British Navy constituted a violation of Albanian sovereignty.

This declaration is ... in itself appropriate satisfaction» ICJ, Rep., 1949, p. 35.

(390) See: Ahmed Abou-El-Wafa: The international protection of human rights, op. cit., pp. 161-163; Commission des droits de l'homme rapport sur la cinquante-deuxième session, Ecosoc, Doc. Off.,1996,Supp.No3,p 142-144.

Ph. Fumer: La reparation des atteintes aux droits de l'homme internationalement protégés, R. trim. des droits de l'homme,No.27, 1996,p 329-352;"Revised set of basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law "(E/CN.4/Sub.2/1996/17, May 1996).

«Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law».

Moreover, article 19 of the Declaration on the protection of all persons from enforced disappearance provides:

«The victims of acts of enforced disappearance and their families shall obtain redress and shall have the right to adequate compensation, including the means for as complete a rehabilitation as possible»⁽³⁹¹⁾.

In its resolution 2002/441, the commission on human rights called upon the international community «to give due attention to the right to a remedy and, in particular, in appropriate cases, to receive restitution, compensation and rehabilitation, for victims of violations of international human rights law»⁽³⁹²⁾.

B) Reparation of damage resulting from international crimes:

Serious post – crime problems are great. So, post-crime remedial measures are necessary in order to minimize effects resulting therefrom.

Prima facie, the above-mentioned general rules of the law of international responsibility are applicable, *mutatis mutandis*, to international crimes which are, prima facie, internationally wrongful acts or omissions.

Moreover, numerous international legal instruments provide, *expressis verbis* or implicitly, the duty to make reparation for injury resulting from international crimes⁽³⁹³⁾. It suffices to mention article 75/2 of the statute of the ICC which gives the Court the power to

(391) Human rights – A compilation of international instruments, op. cit., vol. I, p. 432.

(392) See as well Ch. Bassiouni: The right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, IRPL, 2000, pp. 493 et ss; J-F. Marchi: Le règlement des affaires lockergie et du DC 10 d'UTA: indemnités et questions connexes, AFDI, 2004, pp. 173-212.

(393) See, e.g., art. 38 the second protocol to the Hague Convention for the protection of Cultural property, Geneva article 51, 52, 131 and 148 of the 1949, Conventions, according to which States cannot absolve themselves or another High Contracting party of any liability incurred in respect of grave breaches.

“make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation”⁽³⁹⁴⁾. UNTAET Regulation No. 2000/30 for East Timor gives the court the power “to include in its disposition an order that requires the accused to pay compensation or reparations to the victim”⁽³⁹⁵⁾.

Moreover, in its 1975 Resolution concerning «Conditions of application of rules, other than humanitarian rules, of armed conflicts to hostilities in which United Nations may be engaged», the Institute of international law affirmed that the parties «shall be under the obligation to make reparation for any damage which they might cause in violation of the rules of armed conflict» (art. 6)⁽³⁹⁶⁾.

C) Examples of cases in which reparation was decided concerning international crimes:

These examples are the following:

(394) See as well articles 79 and 85 ICC.

(395) This goes further than the powers of the ICTY and ICTR whose statutes (articles 24/3 and 23/3, respectively), only give them the power to “order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owner”.

(396) Additionally, Article 33 (2) of the Draft Articles on State Responsibility states that Part II of the Draft Articles «is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State».

In the commentary, the ILC says:

«When an obligation of reparation exists towards a State, reparation does not necessarily accrue to that State's benefit, for instance, a State's responsibility for the breach of an obligation under a treaty concerning the protection of human rights may exist towards all the other parties to the treaty, but the individuals concerned should be regarded as the ultimate beneficiaries and in that sense as the holders of the relevant rights». (Report of the ILC, 2001).

Finally, in two resolutions on the former Yugoslavia, the UN General Assembly recognized «the right of victims of 'ethnic cleansing' to receive just reparation for their losses» and urged all parties «to fulfil their agreements to this end» (See, Res. 48/153 and 49/196).

With regard to the right to compensation of refugees owing to displacement and ethnic cleansing, see E. Rosand: The right to compensation in Bosnia: an unfulfilled promise and a challenge to international law, Cornell I.L.J., vol. 33, 2000, pp. 113-158.

1- Recommendations made by the panel of commissioners concerning individual claims for serious personal injury or death (Category "B" claims)⁽³⁹⁷⁾.

Claims submitted by/for members of the Kuwaiti Armed Forces or the Allied Coalition Armed Forces: Decision 11 of the Governing Council states that

«...members of the Allied Coalition Armed Forces are not eligible for compensation for loss or injury arising as a consequence of their involvement in Coalition military operations against Iraq, except if the following three conditions are met:

(a) the compensation is awarded in accordance with the general criteria already adopted; and

(b) they were prisoners of war as a consequence of their involvement in Coalition military operations against Iraq in response to its unlawful invasion and occupation of Kuwait; and

(c) the loss or injury resulted from mistreatment in violation of international humanitarian law (including the Geneva Conventions of 1949).

The organization of the Allied Coalition Armed Forces began a few days after the occupation of Kuwait by Iraq, and continued with the placement of armed forces and air and naval military units from 28 countries, including Kuwait, in the Persian Gulf region.

Among the claims submitted for serious personal injury or death suffered by members of the Kuwaiti Armed Forces, several were put forward for events that occurred during the day of the invasion (August 2, 1990) or during the days immediately following. The Panel concludes that the exclusion from compensation stated in Decision 11 is not applicable to these claimants because the Allied Coalition Armed Forces did not exist at that time. In the Panel's view, these claims are compensable since the serious personal injury or death was the direct-consequence of Iraq's invasion and occupation of Kuwait.

(397) The claims before that Panel are claims for fixed amounts by individuals who have suffered serious personal injury or whose spouse, child or parent died, as a direct result of Iraq's unlawful invasion and occupation of Kuwait.

Source: UN Doc. S/AC. 26/1994/1 (26 May, 1994).

Claims were also submitted with respect to serious personal injury or death suffered by Kuwait military personnel, including members of the Kuwaiti resistance, at the end of the relevant time period. The Panel considers that the exclusion from compensation stated in Decision 11 of the Governing Council is applicable only to members of the Kuwaiti Armed Forces that were integrated as units under the command of the Allied Coalition Armed Forces. For this reason, Decision 11 is not applicable to Kuwaiti members of the resistance or other military personnel who remained within Kuwaiti territory and suffered personal injury or death due to the Iraqi invasion and occupation of Kuwait. Therefore, the Panel recommends the payment of compensation also in these cases.

2- In *Barayagwiza V.* The prosecutor (Prosecutor's request for review or reconsideration), the Appeals chamber of ICTR confirmed that «the Appellant's rights were violated, and that all violations demand a remedy». Accordingly, the Appeals chamber said that that remedy might be determined as follows:

- if the Appellant is found not guilty, he shall receive financial compensation.

- if the Appellant is found guilty, his sentence shall be reduced to take account of the violation of his rights⁽³⁹⁸⁾.

3- In a case concerning Mr. G. (From Bosnia Herzegovina), the Military tribunal of Division 1 decided a : Compensation of accused for non-pecuniary injury due to his acquittal. It said:

«the accusation that he was a war criminal, which was not proven beyond reasonable doubt, has caused him serious injury. but within the framework of the conflict in the former Yugoslavia it does not have the same magnitude as it might have had elsewhere. The fact that he was accused and then acquitted should in no way diminish the esteem which he may enjoy in the Serb part of Bosnia. Moreover, G. demonstrates in his correspondence in particular that he does not have high regard for the opinions and esteem of the Bosnian Muslims.

(398) Case No. IVTR-97-19-AR72, March 1, 2000, paras. 74-75.

He has indeed suffered from his prolonged imprisonment and has had to be treated, in particular psychologically, by prison doctors»⁽³⁹⁹⁾.

4- In its advisory opinion concerning the wall (2004), the ICJ affirmed that Israel should put an end to its violations of its international obligations resulting from the construction of the wall, and should pay compensation for natural and legal persons that have suffered injuries⁽⁴⁰⁰⁾.

5- In the case concerning armed activities on the territory of Congo (Congo V. Uganda), the ICJ, decided that Uganda is under an obligation to make reparation for the international crimes it had committed. The court says:

«259. The Court observes that it is well established in general international law that a State which bears responsibility for an

(399) Text in M. Sassoli and A. Bouvier: *How does law protect in war*, ICRC, Geneva, 1997, p. 1261-1262.

(400) The court says:

«The Court observes that Israel also has an obligation to put an end to the violation of its international obligations flowing from the construction of the wall in the Occupied Palestinian Territory. The obligation of a State responsible for an internationally wrongful act to put an end to that act is well established in general international law, and the Court has on a number of occasions confirmed the existence of that obligation (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p. 149; *United States Diplomatic and Consular Staff in Tehran*, Judgment, I.C.J. Reports 1980, p. 44, para. 95; *Haya de la Torre*, Judgment, I.C.J. Reports 1951, p. 82).

It also adds:

«The essential principle contained in the actual notion of an illegal act - a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals - is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear, the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it - such are the principles which should serve to determine the amount of compensation due for an act contrary to international law." (*Factory at Chorzow*, Merits, Judgment No. 13, 1928, P. C.I.J., Series A, No. 17, p. 47.». ICJ, Rep., 2004, para. 152.

internationally wrongful act is under an obligation to make full reparation for the injury caused by that act (see *Factory at Chorzow, Jurisdiction*, 1927, P.C.I.J., Series A, No. 9, p. 21; *Gabcikovo-Nagymaros Project (Hungary/Slovakia), Judgment*, I.C.J. Reports 1997, p. 81, para. 152; *Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment*, I.C.J. Reports 2004, p. 59, para. 119). Upon examination of the case file, given the character of the internationally wrongful acts for which Uganda has been found responsible (illegal use of force, violation of sovereignty and territorial integrity, military intervention, occupation of Ituri, violations of international human rights law and of international humanitarian law, looting, plunder and exploitation of the DRC's natural resources), the Court considers that those acts resulted in injury to the DRC and to persons on its territory. Having satisfied itself that this injury was caused to the DRC by Uganda, the Court finds that Uganda has an obligation to make reparation accordingly»⁽⁴⁰¹⁾.

D) Concluding remarks:

The principle under which reparation of injuries resulting from international crimes is now well-established in international law in general, and CIL in particular. The following remarks are to be highlighted:

1- The immunity of states because of the *jure imperii* character of the act or omission does not pay in respect of injuries

(401) ICJ, Rep., 2005, para. 259. The court adds:

«260. The Court further considers appropriate the request of the DRC for the nature, form and amount of the reparation due to it to be determined by the Court, failing agreement between the Parties, in a subsequent phase of the proceedings. The DRC would thus be given the opportunity to demonstrate and prove the exact injury that was suffered as a result of specific actions of Uganda constituting internationally wrongful acts for which it is responsible. It goes without saying, however, as the Court has had the opportunity to state in the past, "that in the phase of the proceedings devoted to reparation, neither Party may call in question such findings in the present Judgment as have become *res judicata*" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment*, I.C.J. Reports 1986, p. 143, para. 284). » (Ibid, para. 260).

resulting from international crimes⁽⁴⁰²⁾.

2- Because of the international nature of the crimes committed, the state concerned should repair the injury incurred, even when the offender is unable to pay compensation, if he acted in his official capacity⁽⁴⁰³⁾.

3- The assessment of reparations is made by the criminal court concerned⁽⁴⁰⁴⁾.

(402) In a decision rendered by the supreme court of India, the court said:

«The question, however, arises whether it is open to the State to deprive a citizen of his life and liberty [...] and yet claim an immunity on the ground that the said deprivation of life occurred while the officers of the State were exercising the sovereign power of the State? ... Can the fundamental right to life guaranteed by Art. 21 [of the Constitution] be defeated by pleading the archaic defence of sovereign functions? [...] We think not. Article 21 does not recognize any exception. [...].»

9. [...] [T]his Court [...] held that award of compensation in a proceeding under Article 32 by the Supreme Court or under Article 226 by the High Court is a remedy available in public law based on strict liability for contravention of fundamental rights. It is held that the defense of sovereign immunity does not apply in such a case even though it may be available as a defense in private law in an action based on tort. [...] It is one mode of enforcing the fundamental rights by this Court or High Court. Reliance is placed upon Article 9 (5) of the International Covenant on Civil and Political Rights, 1966 which says, "anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation". [...]

"[...] In the assessment of compensation, the emphasis has to be on the compensatory and not on punitive element. The objective is to apply balm to the wounds and not to punish the transgressor or the offender, as awarding appropriate punishment for the offence (irrespective of compensation) must be left to the criminal Courts in which the offender is prosecuted, which the State, in law, is duty bound to do. [...]"

14. Now coming to the facts of the case, we are of the opinion that award of compensation of Rs. 1,00,000/- [Rupees one lakh only] to the families of each of the deceased would be appropriate and just. [...]

Order accordingly. (M. Sassoli and A. Bouvier: *How does law protect in war*, op. cit., p. 1401).

(403) For ordinary crimes, the declaration of basic principles of justice for victims of crime and abuse of power provided similar solution. Thus, para. 12 stipulates:

«When compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation to:

(a) Victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes;

(b) The family, in particular dependants of persons who have died or become physically or mentally incapacitated as a result of such victimization».

(404) Rule 97 of Rules of evidence and procedure of the ICC, e.g., provides:

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4- Compensation of victims of international crimes may be ordered by national courts⁽⁴⁰⁵⁾ or international tribunals.

Section III

The Witnesses

Testimony raises two points, namely: Rules applicable thereto and the exception.

§I- Rules applicable to testimony:

Prima facie, witnesses have a great role in international criminal trials. They are a *sine qua non* source for the conduct of the later and, consequently, the proof of guilt or acquittal of the accused.

Statutes of international criminal courts as well as their Rules of evidence and procedure usually contain provisions concerning the *modus operandi* of testimony of witnesses, their protection etc⁽⁴⁰⁶⁾.

Thus, art.69/2 ICC provides that the testimony of a witness at trial «shall be given in person» and that the Court may also permit

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- «1. Taking into account the scope and extent of any damage, loss or injury, the Court may award reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both.
 2. At the request of victims or their legal representatives, or at the request of the convicted person, or on its own motion, the Court may appoint appropriate experts to assist it in determining the scope, extent of any damage, loss and injury to, or in respect of victims and to suggest various options concerning the appropriate types and modalities of reparations. The Court shall invite, as appropriate, victims or their legal representatives, the convicted person as well as interested persons and interested States to make observations on the reports of the experts.
 3. In all cases, the Court shall respect the rights of victims and the convicted person».

(405) See:

«The right of war crimes victims to compensation before national courts», JICJ, vol. 3, 2005, pp. 187-267.

(406) It is worth recalling that Swedish Penal code criminalizes as well «false or careless statement before an international court» See text in: Multilateral treaties deposited with the Secretary General, op. cit., vol. II, p. 142. See as well:

- Ch. Bassiouni: Introduction to international criminal law, op. cit., pp. 649-652.

- F. Nsanzuwa: The ICTR contribution to national reconciliation, JICJ, vol. 3, 2005, pp. 944-949.

the giving of oral or recorded testimony of a witness by means of video or audio technology.

Moreover, art. 22 ICTY reads:

«The International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity».

In order to protect witnesses from potential retaliation or intimidation measures necessary should be adopted by the competent court and states concerned, e.g., non-disclosure of their names or their whereabouts ... etc.

Moreover, to ensure the truthfulness of witness' testimony, owing to the results ensuing there from, false testimony is punishable under statutes of international criminal tribunals⁽⁴⁰⁷⁾.

§II- The exception:

An international tribunal may be barred from hearing the testimony of a witness, because of the existence of a customary international law prohibiting his testimony⁽⁴⁰⁸⁾.

(407) See, e.g., art. 70/1 ICC.

(408) In *Prosecutor V. Blagoje Simic and others*, the trial chamber affirms that a former employee of the ICRC may not give evidence before the ICTY because, under a rule of customary international law, the ICRC has a confidentiality interest that it is entitled to non-disclosure of the former employee's testimony. The effect of that rule is that it serves to bar the trial chamber from admitting the evidence or the information (cf. IT 95-9. PT, 27 July 1999, particularly paras. 65, 73, 76, 80).

See as well:

- S. Jeannot: *Non-disclosure of evidence before international criminal tribunals: Recent developments regarding the international committee of the Red cross*, ICLQ, 2001, pp. 643-656.

- S. Powles: *To testify or not to testify – privilege from testimony at the ad hoc tribunals-the Randal case*, Leiden J.I.L., vol. 16, 2003, pp. 511-524.

Moreover, an author says:

«International tribunals generally do not have to compel the presence of a witness or production of particular evidence or information. In this respect it differs from national systems of law. International law lacks the sanction available in national legal systems generally», C. Amerasinghe: *Principles of evidence in international litigation*, final report, Ann. IDI, Vol. 70-I, 2003, p. 241.

CHAPTER IV
THE *MODUS OPERANDI* ASPECT OF CIL
(MEASURES, PROSECUTION AND
PENALTIES)

The *modus operandi* of CIL to face the phenomenon of international crimes may be outlined in three kinds of measures, namely:

- * Operational measures.
- * Prosecution before criminal courts, be they of a national or an international character.
- * Penalties.

These three measures will be examined, *Seriatim*, as follows.

Section I

Operational measures

There are some «operational measures» within the realm of CIL which aim at preventing or, at least, reducing international crimes⁽⁴⁰⁹⁾. They are:

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- (409) One can mention, e.g., what has been recommended with regard to human trafficking:
- «States and, where applicable, intergovernmental and non-governmental organizations should consider:
- 1- Sensitizing law enforcement authorities and officials to their primary responsibility to ensure the safety and immediate well-being of trafficked persons.
 - 2- Ensuring that law enforcement personnel are provided with adequate training in the investigation and prosecution of cases of trafficking.
 - 3- Providing law enforcement authorities with adequate investigative powers and techniques to enable effective investigation and prosecution of suspected traffickers.
 4. Establishing specialist anti-trafficking units (comprising both women and men) in order to promote competence and professionalism.
 5. Guaranteeing that traffickers are and will remain the focus of anti-trafficking strategies and that law enforcement efforts do not place trafficked persons at risk of being punished for offences committed as a consequence of their situation.
 6. Implementing measures to ensure that "rescue" operations do not further harm the rights and dignity of trafficked persons.
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§I- Prevention is better than cure: «*Mieux vaut prévenir que guérir*»:

In fact, to prevent the commission of international crimes is the «*ultima ratio*» of CIL. This may be achieved by two methods, namely:

A- *Ab initio* i.e., by taking all necessary measures that prevent the occurrence of criminal acts⁽⁴¹⁰⁾.

B- *In fine*, namely, through application of appropriate penalties on perpetrators of international crimes. This, inevitably, leads to the reduction of crimes *in futuro*.

In this regard, art. 4 convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents (1973) provides that States parties shall co-operate in the prevention of those crimes, particularly by :

“a- taking all practicable measures to prevent preparations in their respective territories for the commission of those crimes within or outside their territories.

= 7- Sensitizing police, prosecutors, border, immigration and judicial authorities, and social and public health workers to the problem of trafficking.

8- Making appropriate efforts to protect individual trafficked persons during the investigation and trial process and any subsequent period when the safety of the trafficked person so requires. Appropriate protection programs may include some or all of the following elements: identification of safe place in the country of destination; access to independent legal counsel; protection of identity during legal proceedings; identification of options for continued stay, resettlement or repatriation.

9- Encouraging law enforcement authorities to work in partnership with non-governmental agencies in order to ensure that trafficked persons receive necessary support and assistance. (Recommended principles and guidelines on human rights and human trafficking, UN, Geneva, 2002, pp., 12-14).

(410) In this regard, an international conference recommended «that the Department of Peacekeeping Operations of the Secretariat and other concerned United Nations agencies, bodies and programs strengthen their coordination to discern patterns of serious violations of human rights and humanitarian law with a view to assessing the risk of further deterioration that could lead to genocide, war crimes or crimes against humanity». World conference against racism, racial discrimination, xenophobia and related intolerance», UN, New York, 2002, p. 102.

See as well, art. 11 of the convention on the safety of UN and associated personnel; art. 31 UN convention against transnational organized crime (2000).

b- exchanging information and co-ordinating the taking of administrative and other measures as appropriate to prevent the commission of those crimes”.

§II- The recourse to enquiry or good offices:

An alleged violation may be proved by recourse to an enquiry, fact finding or good offices with a view to establishing facts and repressing perpetrators of omissions or acts⁽⁴¹¹⁾.

(411) Thus, articles 52, 53, 132 and 149 (Common to the four Geneva conventions, respectively) provide:

«At the request of a Party to the conflict, an enquiry shall be instituted, in a manner to be decided between the interested Parties, concerning any alleged violation of the Convention.

If agreement has not been reached concerning the procedure for the enquiry, the Parties should agree on the choice of an umpire who will decide upon the procedure to be followed.

Once the violation has been established, the Parties to the conflict shall put an end to it and shall repress it with the least possible delay».

In 1947, the ICRC made the following recommendations:

«1. That the procedure of enquiry be initiated as rapidly as possible and in a practically automatic fashion.

2. That the enquiry may be demanded by any Party to the Convention concerned, whether belligerent or neutral.

3. That a single, central and permanent authority, for which provision is made in advance in the Convention, be entrusted with the nomination of the whole or part of the Commission of Enquiry.

4. That the Commission of Enquiry be appointed for each particular case, immediately the request is made, following an alleged violation of the Convention.

5. That the members of the Commission of Enquiry be appointed by the aforesaid authority from lists, kept up-to-date, of qualified and available persons, whose names have been submitted beforehand by Governments.

6. That special agencies be appointed in advance to undertake, in case of need, any immediate investigation of the facts which may appear necessary.

7. That the report of the Commission of Enquiry contain, where necessary, not only a record of the facts established, but also recommendations to the Parties concerned». Geneva convention of 12 August 1949, commentary I, ICRC, Geneva, 1995, p. 375.

Moreover, under article 90 Additional Protocol I of 1977, an International Fact-Finding commission is established. The competence of the later is:

- to enquire into facts alleged to be a grave breach.
- to facilitate, through its good offices, the restoration of an attitude of respect for Geneva conventions of 1949 and Protocol I.

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§III- The method of «truth commissions»:

In fact, to prepare a comprehensive report about the entirety of the truth concerning past events or conflicts, the practice of states and international community sometimes may have recourse to the establishment of «truth commissions», with a view to essentially realizing reconciliation and peace. Truth commissions have been established in countries such as Uganda, Chad, Chile, South Africa and Ethiopia.

The primary objective of truth commissions is to realize «reconciliation» among the people's of the state concerned⁽⁴¹²⁾ and, accordingly, turn the «page of the past».

§IV- Follow-up of state action in the field of combating international crimes:

Prima facie, to follow – up states action is necessary for ensuring compliance with obligations provided in international legal instruments concerning CIL.

Thus, article 11 of the convention of the prevention and punishment of crimes against internationally protected persons, including diplomatic agents, stipulates⁽⁴¹³⁾:

= Finally, art. 6 para. 2 of the convention for the suppression of unlawful acts against the safety of civil aviation (Montreal 1971) provides that any state in the territory of which the offender or the alleged offender is present «shall immediately make a preliminary enquiry into the facts», See as well art. 6 para. 2 of the convention for the suppression of unlawful seizure of aircraft (The Hague 1971).

(412) See as well:

J.M. Kamatali: *The challenge of linking international criminal justice and national reconciliation: The case of the ICTR*, Leiden J.I.L., vol. 16, 2003, pp. 115-133.

(413) Adopted by the General Assembly of the UN. Res. 3166 (1973).

See as well: articles 6-7 of the International convention against the taking of hostages (1979); art. 15 of the 1988 convention for the suppression of unlawful acts against the safety of maritime navigation; art. 16 of the 1997 International convention for the suppression of terrorist bombings; art. 19 of the 1999 International convention for the suppression of the financing of terrorism; art. 9 European convention on the suppression of terrorism as amended by its protocol 2003. art. 18 convention on the safety of UN and associated personnel. Art. 13 para. 2 adds that measures =

«The state party where an alleged offender is prosecuted shall communicate the final outcome of the proceedings to the Secretary – General of the United Nations, who shall transmit the information to the other states parties»⁽⁴¹⁴⁾. It is worth recalling that similar communications are provided in paragraph 1 of articles 5 and 6.

This means that the UN (represented by the Secretary General) and the other contracting parties of the convention should know the measures taken by a contracting party to apply the convention *in concreto*.

§V- Humanitarian intervention:

A) In international law:

International law prohibits intervention in the internal, or even external, affairs of states. In this context, the ICJ said:

«The court only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot ... find a place in international law... for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of justice itself»⁽⁴¹⁵⁾.

= to ensure prosecution or extradition shall be notified, in conformity with national law and without delay, to the Secretary General of the United Nations and, either directly or through the Secretary General, to:

- (a) The State where the crime was committed;
- (b) The State or States of which the alleged offender is a national or, if such person is a stateless person, in whose territory that person has his or her habitual residence;
- (c) The State or States of which the victim is a national; and
- (d) Other interested States.

(414) See the first application of this duty incumbent upon a state, when a state sent on January 7, 1981 a report concerning a penal proceeding that occurred on its territory related to the above – mentioned convention. A legal opinion of the secretariat of the UN said that that communication did not enter within the functions of the depositary of the convention. For «ces communications d'information ne modifient pas le statut ou la portée de la convention, elles se rapportent davantage a des fonctions administratives qui, en général, incombent au service administratif chargé du contrôle de l'exécution d'une convention». UNJY, 1981, pp. 153-154.

(415) ICJ, Rep., 1949, p. 35.

However, when there are massacres or oppressions committed against people in a certain state, another state or a group of states may decide to intervene in order to prevent those heinous acts. An author (M. Moore) considers that humanitarian intervention should satisfy the following conditions:

- 1- An immediate and extensive threat to fundamental rights, particularly a threat of wide-spread loss of human life;
- 2- A proportional use of force which does not threaten greater destruction of values than the human rights at stake;
- 3- A minimal effect on authority structures;
- 4- A prompt disengagement, consistent with the purpose of the action; and
- 5- Immediate full reporting to the Security council and appropriate regional organizations»⁽⁴¹⁶⁾.

It is worth recalling that humanitarian intervention may lead to some abuses and may be, in certain circumstances, in conflict with fundamental principles of international law⁽⁴¹⁷⁾.

(416) Cited in, R. Lillich and F. Newman: *International human rights – problems of law and policy*, Little Brown and Comp., Boston, 1979, p. 512.

See as well: V.S. Mani: *Humanitarian intervention today*, RCADI, vol. 313, 2005.

(417) This author said:

«On peut se demander si la violation grave des droits de l'homme dans un Etat donné surtout l'atteinte à (ou la menace de) la vie de certains individus ou groupes d'individus peuvent donner à un autre Etat le droit d'entreprendre une action militaire pour les sauver? la réponse est incertaine dans l'état actuel du droit international qui prohibe l'utilisation de la force. En effet, un tel droit est trop vaste pour qu'il puisse donner lieu a des abus et pour être accepté comme exception ou dérogation a la prohibition générale de faire appel à la force.

Cela est dû au fait que le recours à la force pour protéger les nationaux à l'étranger ou sauver des minorités persécutées heurte de front trois des principes fondamentaux de l'ordre juridique international actuel, i-e. le principe de la prohibition du recours à la force (art. 2 par. 4 de la charte de l'ONU), le principe de la non-intervention dans les affaires relevant de la juridiction nationale de chaque Etat ou, en d'autres termes, de son domaine réservé (art. 2 par. 7 de la charte) et le Principe du respect de la souveraineté et de l'intégrité territoriale de chaque Etat». Ahmed Abou-El-Wafa: *Le devoir de respecter le droit à la vie en droit international public*, op. cit., pp. 52-53.

B) In Islam:

Intervention to protect massacres of Muslims abroad is possible in Islamic Shari'a, under a well-established theory, i.e., that of *istinquath*⁽⁴¹⁸⁾.

§VI- Intervention of political organs of international organizations:

Political organs of international organizations may decide to intervene in a state on the territory of which international crimes are being committed. The striking example, in this regard, is article 4 of the constitutive instrument of the African Union which lists as one of the principles of the later: the right for the Union to intervene in a member state in serious circumstances such as war crimes, genocide or crimes against humanity (principle No. 8).

Another example is the intervention of the security council, through non-military or military measures, under chapter VII UN charter in case there are threats to the peace, breaches of the peace, and acts of aggression.

Section II**Prosecution and trial of offenders**

Obviously, Criminalization of actions or omissions unaccompanied by penalties and by a competent criminal jurisdiction would be ineffective.

This section will focus on the importance of the judiciary for trials concerning international crimes, trial before national as well as international criminal courts, and the protection of victims of international crimes by international non penal courts.

§I- Importance of the Judiciary for trials concerning international crimes:

Evidently, the purpose of prosecution⁽⁴¹⁹⁾ and trial of perpetrators of international crimes is to prevent the most appalling crimes from

(418) Vide infra.

(419) See as well: «Prosecutorial discretion before national courts and international tribunals», JICJ, vol. 3, 2005, pp. 124-186; «Dynamics of international criminal justice» essays in honour of Sir R. May, ed. By H. Abtahi and G. Boas, M. Nijhoff publishers, leiden, 2005, 318 pp; Y. Beigbeder: =

going unpunished. Thus, criminal courts are to be considered as one of the significant bastions against barbarity and impunity.

The trial for international crimes may be made:

- a) Either by a competent domestic court;
- b) Or by an international court.

This has been laid down since 1948 by the convention on the prevention and punishment of the crime of Genocide (article VI) which provides that persons charged with genocide:

«Shall be tried by a competent tribunal of the state in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those contracting parties which shall have accepted its jurisdiction».

A criminal tribunal, be it domestic or international, should observe a fundamental rule set forth by article 10 of the Universal declaration on human rights, namely:

«Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and any criminal charge against him».

Presumably, the judiciary is the main body charged with the protection of the rule of law . In fact, in a stable and democratic society, life's problems should generally lend themselves to court imposed solutions.

In this connection, the judiciary should be aware of its status and functions. The position adopted by courts of one country may have some repercussions for other countries. This is valid as well for international penal tribunals. This demonstrates an additional example of the interdependence of the international community .

Accordingly, in all human societies, justice ought to be done. For this reason, judicial institutions were established immediately after the organization of such societies. This dates back to a long history: from the Roman praetor to the kadi(judge) in Islam to actual domestic courts to regional courts (e.g., European and Inter-

= *International justice against impunity – Progress and new challenges*, M. Nijhoff publishers, Leiden, 2005, 238 pp.

American courts of human rights) to universal courts (such as the PCIJ and the ICJ) to, finally, war criminal courts (e.g., Nuremberg Tribunal and the two International Tribunals for crimes committed in former Yugoslavia and in Rwanda as well as the international criminal court)⁽⁴²⁰⁾.

Constitutional as well as international safeguards of human rights, though important, are of no lasting impact without institutional or structural means of enforcement and implementation. Courts of law, whether national or international, provide, in general, this mechanism and instrumentality. Judicial guarantee is, in truth, one of the most important pillars of modern society to face massive and flagrant violations of human rights. These violations constitute a major stumbling block to the existence of national as well as international societies.

The importance of the judiciary in the field of human rights is well pointed out by the fact that:

"judges are charged with the ultimate decision over life, freedoms, rights, duties and property of citizens"⁽⁴²¹⁾.

Consequently, rights and duties must be enforceable by national as well as international courts. In fact, without effective structures for ensuring compliance, human rights will amount to nothing more than a simple rhetoric. For rights lose their meaning if they are not protected and implemented. Additionally, the problem of impunity⁽⁴²²⁾ of perpetrators of human rights' violations and the absence of redress or relief for victims may be reduced or abolished by the existence of courts and tribunals

Consequently, there is a significant role for national as well as international courts to play in protecting, promoting, enhancing and

(420) See as well:

Ahmed ABOU-EL-WAFA: The protection of human rights by international courts and tribunals. R. Egyp.D.I., 1996, p. 37-92.

(421) Cf, «Basic principles on the independence of the judiciary», General Assembly of the UN, Res. 40/32, 40/146 (1985).

(422) See also, N. Roth-Ariaza : Impunity and human rights in international law and practice, Oxford Univ. Press, 1995, 398 pp.

Furthermore, it is evident that the protection of human rights by the judiciary, raises another problem, that is, the recognition and enforcement of foreign judgments.

developing *in concreto* the inalienable rights of man. In fact, courts are the *ultima ratio* means for the alleviation and/or eradication of suffering.

That being so, a "judicial curtain" for the protection of human rights must be built and established. In this regard, the role played by courts may be highlighted in a triangular relationship: prior to, during and after the trial. In other words, this role may be exercised on three levels, namely:

- * In the pre-trial stage;
- * In the trial and sentencing stage; and
- * In the post-sentencing stage⁽⁴²³⁾.

Obviously, the supreme function of a court is to apply and interpret law to a concrete case⁽⁴²⁴⁾. To judge is, on its face, to apply a rule of law to particular facts. This application must be proper and just. It constitutes the principal "judicial duty" of a court of justice, i.e., a court should adjudicate "*secundum legem*".

The importance of the judiciary has been, in this respect, highlighted by international instruments.

Thus, art. 7 of the universal declaration on human rights reads:

«All are equal before the law and are entitled without any discrimination to equal protection of the law».

Art.8 adds:

(423) *Priaia facie*, to establish a harmonious balance between the aforementioned three stages is a very complicated task .

(424) In this connection, the ICJ stated :

«Whatever the legal reasoning of a court of justice , its decisions must by definition be just, and therefore in that sense equitable. Nevertheless, when mention is made of a court dispensing justice or declaring the law, what is meant is that the decision finds its objective justification in considerations lying not outside but within the rules» ICJ, Rep., 1969 , p. 49-50.

Moreover, it had been maintained :

«The courts must generally limit themselves in aligning legal decisions with common sense not foster the illusion that courts are less concerned with justice than technicalities» cf, T. Georges: *The role of judges and magistrates in a one-party state*, in «*Human rights in a one-party state*», International commission of jurists, Search Press, London , 1976, p 56.

«Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law».

Moreover, art. 10 provides:

«Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of this rights and obligations and of any criminal charge against him».

§II- Trial by a national court⁽⁴²⁵⁾:

The role played by national courts with regard to international crimes may be highlighted in the following three points:

A) Possibility to try perpetrators of international crimes, before national courts:

Offenders of international crimes may be tried before domestic courts. Evidently, this is justifiable by the following reasons:

* To reduce the number of criminal cases on the international level.

* To prosecute criminals charged with the commission of those international crimes that are not within the jurisdiction of international courts.

* To give the state concerned the opportunity to try perpetrators of crimes. In fact, the final goal of CIL, i.e., to ensure that international crimes must not go unpunished, is secured through the means provided by the municipal legal system.

* To ensure the prosecution and trial of offenders in case of absence of an international criminal court or in case the state concerned is not a party to the statute of the later.

(425) An author says that the principal pretexts to prosecute and punish violations of international humanitarian law on the national level, are: 1) Repudiation of the competence of the legal authorities (declinature); 2) cases in which no action is taken or which are simply dealt with under disciplinary corps of the armed forces; 3) Exclusion of state secrets; 4) Refusal to class acts as legal or illegal; 5) The need to safeguard vital national interests; 6) The trial as catharsis (J. Verhaegen: Legal obstacles to prosecution of breaches of humanitarian law, IRRC, No. 261, 1987, pp. 607-620.

There are numerous international instruments which provide for the possibility to try persons accused of international crimes before national courts. It suffices to mention article 49⁽⁴²⁶⁾ of the first Geneva convention 1949 which provides that each state party is under the obligation to bring persons alleged to have committed, or have ordered to be committed grave breaches, regardless of their nationality, *before its own courts, or should the state concerned prefers, to hand them over for trial to another state concerned*⁽⁴²⁷⁾.

Article 86 of the 1977 Additional Protocol (1) provides:

«The High contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches».

Accordingly, in accordance with established principles of CIL, states are under an obligation to enact legislations necessary to repress breaches of the law of war and to provide effective penal sanctions for persons who have committed or ordered to commit them⁽⁴²⁸⁾.

Under Egyptian law, e.g., the following acts are war crimes:

- pillage or thieving of a dead, a wounded or a sick even if he is an enemy.
- inflicting an act of violence against a wounded or a sick incapacitated to defend himself⁽⁴²⁹⁾.

It is worth recalling that punishments may be imposed by «military courts»⁽⁴³⁰⁾. Thus, articles 49, 50, 129 and 149 (article common to four Geneva conventions 1949)⁽⁴³¹⁾ provides that:

(426) Article common to all Geneva conventions, see art. 50, art. 129, art. 149 of the other three conventions, respectively.

(427) Emphasis added.

(428) In Belgium, e.g., an Act has been adopted in 1999 concerning punishment of serious breaches of rules or international humanitarian law: "irrespective where such breaches have been committed" Cf, ILM, 1999, p.921-925.

(429) Ahmed ABOU-EL-WAFA: A report on Egypt practice relating to customary rules of international humanitarian law, R. Egyp. D.I., 1997, p. 145. See as well: articles 136-137 of the law No.25 (1966) concerning military judgements; articles 251 bis and 317/9 of the Egyptian penal law.

(430) See as well art. 87 Additional Protocol (1) of 1977.

(431) See, e.g., two judgments of 2000 and 2001 of the Swiss military tribunals condemning persons accused of having committed war crimes, in M. Sassoli *et al.*: How does law protect in war (2006), op. cit., vol. II, pp. 2233-2254.

Every commander who is aware that subordinates or other persons under his control / command are going to commit or have committed a breach of the law of war, shall initiate:

- a) the necessary steps to prevent such a breach; and/or
- b) disciplinary or penal action against the authors of the breach.

Moreover, art. 10 convention of the UN and associated personnel (1994) provides that a state may establish its jurisdiction over a crime in several cases⁽⁴³²⁾.

It is worth recalling that national courts have a threefold role with regard to prosecution of international crimes, namely:

1- to prosecute offenders of international crimes set forth in an international treaty that does not provide for the jurisdiction of an

(432) The text reads:

«1- Each state party shall take such measures as may be necessary to establish its jurisdiction over the crimes set out in article 9 in the following cases.

(a) When the crime is committed in the territory of that state or on board a ship or aircraft registered in that state.

(b) When the alleged offender is a national of that state.

2- A State Party may also establish its jurisdiction over any such crime when it is committed:

(a) By a stateless person whose habitual residence is in that State; or

(b) With respect to a national of that State; or

(c) In an attempt to compel that State to do so or to abstain from doing any act.

3- Any State Party which has established jurisdiction as mentioned in paragraph 2 shall notify the Secretary-General of the United Nations. If such State Party subsequently rescinds that jurisdiction, it shall notify the Secretary-General of the United Nations.

4- Each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set out in article 9 in cases where the alleged offender is present in its territory and it does not extradite such person pursuant to article 15 to any of the States Parties which have established their jurisdiction in accordance with paragraph 1 or 2.

5- This Convention does not exclude any criminal jurisdiction exercised in accordance with national law».

See as well art. 3 convention on the prevention and punishment of internationally protected persons, including diplomatic agents; art. 4 convention on offences and certain other acts committed on board aircraft (Tokyo, 1963); art. 6 convention for the suppression of unlawful acts against the safety of civil aviation (Montreal, 1971); art. 15 UN convention against transnational organized crime (2000).

international court (e.g., articles 49, 50, 129 and 146 four Geneva conventions 1949)⁽⁴³³⁾.

2- to prosecute perpetrators of international crimes in case the state concerned is not a party to an international convention establishing an international criminal court.

Thus, in resolution 1487 (2003), the security council points out:

«that states not party to the Rome Statute will continue to fulfil their responsibilities in their national jurisdictions in relation to international crimes».

3- to prosecute perpetrators of international crimes, in application of the principle of complementarity, in case the state is a party to an international treaty establishing an international criminal court and providing so (e.g., the statute of the ICC).

B) Concurrent jurisdiction between national courts of different states:

It is worth recalling that in case of concurrent jurisdiction between two states or more, a resolution of the XVI International congress of penal law (1999), provides.

«in the case of concurrent jurisdiction on the part of more than one state, with the concomitant risk of multiple prosecutions, individuals who suffer prejudice from this situation should have recourse to an international judicial authority. Ideally, decisions of this kind should be made by an international pre-trial chamber»⁽⁴³⁴⁾.

Moreover, in case more than one state has jurisdiction to prosecute an offender for the same offence, concurrent jurisdiction should be resolved by taking into account:

(433) In this regard, e.g., Danish criminal code (Section 8) provides:

The following acts committed outside the territory of the Danish state, shall also come within Danish criminal jurisdiction, irrespective of the nationality of the perpetrator.

5) where the act is covered by an international convention in pursuance of which Denmark is under an obligation to start legal proceedings». See text in *Multilateral treaties deposited with the Secretary General*, op. cit., vol. II, p. 140.

(434) IRPL, 1999, p. 913.

- not only the interests of the states concerned, but also the interests of the defendants and victims.

- in case of an equal chance of efficient criminal law enforcements, the choice should be in favor of the forum that best accommodates the interests of suspects and victims (in the fair administration of justice)⁽⁴³⁵⁾.

C) Concurrent jurisdiction of national and international courts:

Domestic and international courts may have, according to statutes of existing international courts, concurrent jurisdiction to prosecute persons for international crimes provided in their statutes⁽⁴³⁶⁾.

However, the order of priority between national and international courts is treated according to one of the following solutions:

1- Priority given to the international court:

This priority is given to the international court by articles 9/2, 8/2, 8/2 statutes of ICTY, ICTR, special court of Sierra Leone, respectively. Thus, art. 9/2 ICTY, e.g., provides:

«The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal»⁽⁴³⁷⁾.

(435) Ibid, p. 908.

(436) See, e.g., art. 9/1 ICTY, art. 8/1 ICTR. Art. 8/1 Special court for Sierra Leone.

(437) In Luxembourg, Law of 18 May 1999 on cooperation with international criminal courts consecrates subsection 2 for Deferral from the Luxembourg courts, as follows:

«Art. 3: The originals of requests from the international tribunal for deferral of cases from Luxembourg's investigative process or its courts shall be sent, accompanied by any documentary evidence, to the Minister of Justice, whose task shall be to ensure that they are properly constituted.

Art. 4 : Depending on the circumstances, either the chief state prosecutor or the state prosecutor shall instruct the investigating magistrate, if an investigation is under way, or the court already dealing with the case =

2- Complementarity of the international court to national courts:

This solution has been adopted by the statute of the ICC. In fact, in its preamble and art. 1, it provides that the court:

«Shall be complementary to national criminal jurisdictions»

Moreover, art. 17 states that a case is inadmissible where:

- it is being investigated by a state which has jurisdiction over it.
- it has been investigated by such a state and the later decided not to prosecute the person concerned.

However, art. 20/3 provides that a person who has been tried by another court may be tried by the international criminal court, if the proceedings in the other court:

- were for the purpose of shielding the person concerned.

= on the basis of committal for trial or direct summons, to defer the case to the international tribunal.

The request for deferral shall be communicated to the other parties concerned. Any observations prompted by that communication must be made within eight days. The investigating magistrate or the court dealing with the case may also decide to take oral statements from the parties, who shall be summoned for this purpose by the registrar by means of a registered letter.

Art. 5: If the investigating magistrate or the court dealing with the case finds that the offences constituting the basis of the request for deferral are covered by Article 1 of the present law and that there is no apparent error, he/she shall defer the case and refer it to the international tribunal. No appeal may be made against any decision by the investigating magistrate or the court dealing with the case to defer it.

Art. 6: Once a case has been deferred, the case file shall be sent by the Minister of Justice to the international tribunal.

Art. 7: The deferral of a case from the national judicial system shall not affect the rights of any party claiming damages to apply the provisions of Article 3 of the code governing the investigation of criminal cases.

Where a case has been deferred from a court, that court - unless otherwise stipulated by the law and without prejudice to the ability of the international tribunal to order the restoration to their rightful owners of all property and resources acquired by illegal means - shall retain its ability, at the request of a victim who sued for damages before the criminal case was deferred, to rule on the civil action after the international tribunal has issued a judgement on the criminal proceedings». See text in M. Sassoli *et al.*: How does law protect in war. op. cit. vol. II. pp. 2166-2167.

- otherwise were not conducted independently and impartially.

In Resolution 1487 (2003) the Security Council States:

«That states Parties to the Rome Statute have chosen to accept its jurisdiction in accordance with the Statute and in particular the principle of complementarity»⁽⁴³⁸⁾.

3- Referral of an indictment from an international tribunal to a national court:

Prima facie, this occurs for minor criminals and particularly, in order to lighten the case load of an international tribunal.

In resolution 1534 (2004), the security council called upon the ICTY and the ICTR to review their case load with a view to determining which cases should be proceeded with and which should be transferred to competent national jurisdictions»⁽⁴³⁹⁾. The same resolution added:

«The strengthening of competent national judicial systems is crucially important to the rule of law in general and to the implementation of the ICTY and ICTR completion strategies in particular».

(438) See as well:

- O. Solera: Complementary jurisdiction and international criminal justice, IRRIC, No. 845, 2003, pp. 145-171.
- J. Kleffner: The impact of complementarity on national implementation of substantive international criminal law, JICJ, vol. I, 2003, pp. 86-113.
- E. Rojo: The role of fair trial considerations in the complementarity regime of the international criminal court: from "no peace without justice" to "no peace with victor's justice"?, Leiden J.I.L., vol. 18, 2005, pp. 829-869.
- W.B.-White: Complementarity in practice: The international criminal court as part of a system of multi-level global governance in the Democratic Republic of Congo, *Idem*, pp. 557-590.

(439) As of July 28, 2004, article 11bis ICTY provides the possibility of the referral of an indictment which has been confirmed, irrespective of whether or not the accused is in the custody of the Tribunal, to the authorities of a state, provided that the accused will receive a fair trial and that the death penalty will not be imposed or carried out. This, obviously, enables the court to dispose of those accused who are viewed as «Small fry», instead of having them, for a long time, in the custody of the court. See as well: M. Bohlander: Referring an indictment from the ICTY and ICTR to another court – Rule 11bis and the consequences for the law of extradition, ICLQ, 2006, pp. 219-226.

D) Punishments imposed by national courts:

Here, there is a rule and an exception.

1- The rule:

Since national courts may prosecute and try offenders who have committed international crimes, it is apparent that they will apply the provisions of their domestic law. Accordingly there is, in this context, a separation between penalties applied by international courts and those applicable under domestic laws of states.

Thus, e.g., article 80 ICC provides:

«Nothing in this part affects the application by states of penalties prescribed by their national law, nor the law of states which do not provide for penalties prescribed in this part».

Accordingly, a domestic court may apply death penalty, though the later is not permitted by the ICC statute. In this regard, one can mention section 2401 US «war crimes act of 1996» which provides: «Whoever, whether inside or outside the United States, commits a grave breach of the Geneva Conventions, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death».

2- The exception:

The above – mentioned rule suffers an exception, i.e., the existence of a provision, in a treaty to which the state concerned is a party, providing otherwise. In this connection, one can mention, e.g., art. 82 of the third Geneva Convention (1949) which provides:

«A prisoner of war shall be subject to the laws, regulations and orders in force in the armed forces of the detaining power. If any law, regulation or order of the Detaining Power declares acts committed by a prisoner of war to be punishable, whereas the same acts would not be punishable if committed by a member of the forces of the detaining Power, such acts shall entail disciplinary punishments only».

The exception is justifiable by the principle of prevalence of international law over domestic law and the rule under which a state should abide by its international obligations.

§III- Trial before an international criminal court:

The study of this topic raises the following points: Importance of international criminal courts, their establishment, and a study of some examples of those courts.

A) Importance of international criminal courts:

This author said:

«Pendant longtemps, la société internationale, fondée exclusivement ou presque sur la souveraineté absolue des États, n'a pas connu en son sein – d'organes juridictionnels chargés d'assurer la fonction judiciaire sur le plan international. La création et l'établissement d'une juridiction internationale est donc un fait relativement récent dans l'histoire des relations internationales En effet, l'évolution de la société internationale a entraîné, sinon imposée, l'existence d'organes juridictionnels qui, à leur tour, ont influencé le développement et l'essence même des relations internationales, ce qui veut dire que l'existence desdits organes constitue à la fois une conséquence et une cause de l'évolution de la société internationale»⁽⁴⁴⁰⁾.

In fact, national justice is, in many cases, characterized by a *non possumus* or *non volumus* tendency to judge perpetrators of international crimes. Hence, the justification for international criminal justice.

Prima facie, the principal aims of Criminalization and punishment on the international level may be achieved, inter alia, through international criminal courts⁽⁴⁴¹⁾, which, in this respect, constitute the principal tool of the international community to punish offenders⁽⁴⁴²⁾.

(440) Ahmed Abou-el-Wafa: La non-comparution devant la CIJ, R. Egyp. DI, 2000, p. 8.

(441) It is worth recalling that, there are many initiatives and efforts by the UN to apply a post-conflict justice in some selected conflicts (e.g. Cambodia, Kosovo, East Timor, and Sierra Leone).

For more details, see ch. Bassiouni: Introduction to international criminal law, op. cit., p. 545-575.

(442) See:

- L. Arbour: The prosecution of international crimes: prospects and pitfalls, yearbook, international criminal tribunal for the former Yugoslavia, 1998.

- C. Santulli: Qu'est-ce qu'une juridiction internationale? Des organes repressifs internationaux à l'O.R.D., AFDI, 2000, pp. 58-81.

B) Establishment of international courts charged with the prosecution of perpetrators of international crimes:

Obviously, the establishment of those courts has a twofold result:

1- It reinforces and will inevitably strengthen, clarify and apply the norms and precepts of CIL.

2- The unexpectedly rapid development of CIL, especially after the establishment of ad hoc international penal tribunals (e.g., those of Nuremberg, of former Yugoslavia, of Rwanda ... etc.), and of the permanent international criminal court (ICC) is, undoubtedly, a leading by – product of the creation of those courts, especially their statutes and judgements.

The setting up of a court to prosecute and try perpetrators of international crimes, may be made by recourse to one of the following five methods⁽⁴⁴³⁾, namely:

a- By an agreement between the victorious states and the defeated state: In fact, under the Treaty of Versailles (1919), the Allies and Germany agreed to prosecute Kaiser Wilhelm II by an ad hoc international criminal tribunal for initiating the war (article 227). The same treaty provided as well to prosecute German military personnel accused of violating laws and customs of war before Allied military Tribunals or before the Military courts of any of the Allies (articles 228 and 229).

However, the Kaiser fled and sought refuge in the Netherlands which refused his surrender and extradition. The trial never took place. The accused died in Netherlands in 1944. As for other Germans, the allies, in order to preserve the stability of the already vulnerable Weimer Republic, asked Germany to prosecute a number of war criminals before the supreme court of Germany in Leipzig. Only 12 military German officers were prosecuted before

= - M. Findlay: *Synthesis in trial procedures? The experience of international criminal tribunals*, ICLQ, 2001, pp. 26-53.

(443) It is worth recalling that many ideas have been put forward to set up an international criminal jurisdiction to try war crimes committed by United States troops in Vietnam, or to prosecute the Iraqi regime for his crimes during the war against Iran (1980 – 1998), or to try war crimes in Chechnya and Zair (Now called the Congo), or to try crimes committed by Israel in the occupied Arab territories, or to prosecute the genocide committed in Cambodia.

that tribunal. Thus, the first attempt to try perpetrators of war crimes by an international court, failed.

b- By an agreement between the victorious states (e.g., the international military tribunal at Nuremberg⁽⁴⁴⁴⁾ and the international military tribunal for the far east⁽⁴⁴⁵⁾). In fact, after the second world war, it was the victors who established the courts and set rules for punishing the vanquished.

c- By the security council under chapter IIV UN charter (e.g., International criminal Tribunal for Yugoslavia, International criminal Tribunal for Rwanda)⁽⁴⁴⁶⁾ ..

d- By an agreement between states members of the international community (e.g., statute of the ICC)

e- By an agreement between an international organization and a state (e.g., the special court for Sierra Leone established, pursuant to security council resolution 1315 (2000) by an agreement concluded, on January 2002, between the UN and the Government of that country). Evidently, the special court of Sierra Leone has an international character⁽⁴⁴⁷⁾.

(444) Agreement for the prosecution and punishment of major war criminals of the European Axis, August 8, 1945.

(445) Establishment of an international military tribunal for the far east, January 19, 1946.

(446) In the Tadic case, the chamber discussed chapter VII as a basis for the establishment of the ICTY, particularly the power of the security council to establish a subsidiary organ with judicial power, the allegation whether the Tribunal was contrary to the general principle whereby courts must be established by law (IT-94-I-AR 72, October 2, 1995, paras. 28-48).

(447) In prosecutor V. Taylor, the Applicant said that the special court for Sierra Leone was not an international one. The special court refused this argument, basing itself on the fact that it has been established by an international agreement. The court said:

«The Agreement between the United Nations and Sierra Leone is thus an agreement between all members of the United Nations and Sierra Leone. This fact makes the Agreement an expression of the will of the international community. The Special Court established in such circumstances is truly international.

39. By reaffirming in the preamble to Resolution 1315 "that persons who commit or authorize serious violations of international humanitarian law are individually responsible and accountable for those violations that the international community will exert every effort to bring those responsible =

B) A study of some courts established for the trial of perpetrators of international crimes:

These courts may be classified into two categories, namely: ad hoc courts and the permanent court.

1- Ad hoc courts:

These courts have an ad hoc jurisdiction, i.e., they are linked to the conflict that gave rise to their establishment. This means that the court comes to an end once its functions have been realized. For, in such a case, its *raison d'être* has been achieved.

This study is limited to four salient example:

a- The Nuremberg tribunal:

The agreement for the prosecution and punishment of the major war criminals of the European axis (London, 1945) divided war crimes into two categories:

- German war criminals who have committed crimes or atrocities in a particular location, were returned to the countries where they committed their crimes in order that they might be judged and punished according to the laws of those countries.

- German war criminals whose offences have no particular location, would be judged by an international military tribunal: the Nuremberg tribunal. The tribunal had the power to try and punish persons who have committed one of the following crimes:

- crimes against peace.
- war crimes
- crimes against humanity.

The tribunal had to ensure fair trial for defendants (art. 16).It had the power to impose, on conviction, death or such other

= *to justice in accordance with international standards of justice, fairness and due process of law", it has been made clear that the Special Court was established to fulfil an international mandate and is part of the machinery of international justice.*

40. We reaffirm, that the Special Court is not a national court of Sierra Leone and is not part of the judicial system of Sierra Leone exercising judicial powers of Sierra Leone. This conclusion disposes of the basis of the submissions of counsel for the Applicant on the nature of the Special Court.» Case No. SCSL-2003-10-1, 3 May 2004 paras. 37-40.

punishment as should be determined by it to be just (art.27). The judgment of the tribunal, as to guilt or innocence, was final and without review (art.26).

Ab initio, the Tribunal had to face one of the fundamental principles of law, i.e., the principle «no crime nor punishment without law»⁽⁴⁴⁸⁾.

It is worth recalling that the Nuremberg trials have emphasized certain principles and guarantees for human rights of both victims and criminals of war. These principles were codified by the International Law Commission and endorsed by the General Assembly of the UN⁽⁴⁴⁹⁾.

b- The international criminal tribunal for former Yugoslavia:

The international tribunal for the prosecution of persons responsible for serious violations of international humanitarian law in the territory of the former Yugoslavia has been established by UN security council Res.827 on 23 May 1993 under chapter VII of the charter.

The purpose of the tribunal is to prosecute:

«Persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute» (art. 1).

(448) Thus, responding to the plea of defense that art . 6 of its charter (which enumerated the crimes for which the major war criminals were to be punished), constitutes an *ex post facto* provision , conflicting with the well established principle " *nullum crimen nulla poena sine lege* ", the Tribunal said " it is to be observed that the maxim *nullum crimen sine lege* is not a limitation of sovereignty , but is in general a principle of justice . To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring states without warning is obviously untrue " . For , the Tribunal added, in such circumstances "the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished (Cf, Nazi conspiracy and aggression, opinion and judgement, United States Government office, Washington, 1947, p. 49).

(449) Cf, Res. 95(1) on 11 December 1946 ; YILC , 1950 II, p 374 et ss .
See as well:

Ahmed ABOU-EL-WAFA: The protection of human rights by international courts and tribunals,op.cit,p.78-79.

The functioning, principles, rules and *modus operandi* applied by the Tribunal are inspired, to a certain extent, from those of Nuremberg Tribunal⁽⁴⁵⁰⁾.

c- The international criminal tribunal for Rwanda:

The tribunal was set up by security council Res. 955 (1994) for the prosecution of persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring states, between January 1, 1994 and December 31, 1994 (art. 1).

The tribunal was established owing to horrible massacres committed in Rwanda, which resulted in the death of approximately one million people⁽⁴⁵¹⁾.

d- The special court for Sierra Leone:

As mentioned above, the court has been set up under an agreement between the UN and the government of Sierra Leone. Thus, it is an international court⁽⁴⁵²⁾.

(450) With some exceptions. For example, art. 26 Nuremberg charter provided that the decisions of the Tribunal were definitive and without appeal. As for the International Tribunal for former Yugoslavia, the right of appeal is preserved (cf., e.g., art. 25 of the Statute as well as articles 107-118 of Rules of procedure and evidence). The later are published in IT/32/Rev.9, UN, 5 July 1996, p 68-72.

It is worth recalling that that right of appeal is in line with a recent tendency endorsed by the International Covenant on civil and political rights, which provides (art. 14/5):

«Everyone convicted of a crime shall have the right to appeal his conviction and sentence being reviewed by a higher tribunal according to law».

(451) See as well: F. Mégret: *Le tribunal pénal international pour le Rwanda*, Pedone, Paris, 2002, 250 pp.; L.J. Van den Herik: *The contribution of Rwanda Tribunal to the development of international law*, M.Nijhoff publishers, Leiden, 2005, 324 pp.

(452) Ch. Bassiouni lists among the new mixed models of international criminal justice, the special court for Sierra Leone, Ch. Bassiouni: *Introduction to international criminal law*, op. cit., pp. 566-575.

The court has: 1- a mixed jurisdiction over international crimes (crimes against humanity, violations of article 3 common to Geneva conventions of 1949 and of Additional Protocol II of 1977 as well as other serious violations of international humanitarian law) and crimes under Sierra Leonean law (abuse of girls and wanton destruction of property). 2- a mixed composition: the Trial chamber is composed of three judges of whom one shall be appointed by Sierra Leone and the two others by the Secretary General of the UN, whereas the Appeals chamber is composed of five judges of whom two are appointed by Sierra Leone and the three others by the Secretary General of the UN.

e- The completion strategies of ad hoc courts:

Since ad hoc tribunals are of a provisional character, they may fix an agenda for achieving their case load. This is known as the «completion strategy». It aims primarily at accelerating the work of the tribunal. It is as well justified by the desire to achieve «la bonne administration de la justice»⁽⁴⁵³⁾.

2- The Permanent court (the ICC):

The statute of the international criminal court has been adopted at Rome, on 17 July 1998⁽⁴⁵⁴⁾. The tribunal is an international institution of a permanent character⁽⁴⁵⁵⁾.

= See as well:

C. Denis: *Le tribunal spécial pour le Sierra Leone*, RBDI, 2001, I, pp. 236-290. C. Laucci : *Digest for jurisprudence of the special court for Sierra Leone*, M. Nijhoff. Leiden, 2006, 650 pp.

(453) In Resolution 1503 (2003), the security council called upon the ICTY and ICTR to complete all work in 2010 (the completion strategies).

It is worth recalling that the ICTY has decided to complete its mandate by 2010. The ICTR followed the same strategy as well. See as well,

- D. Mundis: *The judicial effects of the «completion strategies» on the ad hoc international criminal tribunals*, AJIL, 2005, pp. 142-158.

- L. Johnson: *Closing an international criminal tribunal while maintaining international human rights standards and excluding impunity*, AJIL, 2005, pp. 158-174.

(454) Under art. 120 of the statute, no reservations may be made to the statute, i.e., the later is a package deal to be accepted or refused as a whole.

(455) See, Ahmed Abou-el-Wafa: *The main features of the statute of the ICC*, R. Egyp. D.I., 2002, pp. 7-67 (in Arabic).

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The essential features of the court are the following:

a- Principles governing the *modus operandi* of the court:

These principles are, inter alia, the following:

- Principle of speciality, i.e., a person surrendered by a state to the tribunal may not be prosecuted for crimes other than those for which he had been surrendered.

- Principle of complementarity: In fact, the tribunal is complementary to national criminal jurisdictions⁽⁴⁵⁶⁾.

- Principle of cooperation with the court: States must cooperate fully with the court in its investigation and prosecution of crimes within its jurisdiction (art.86). They must comply with any requests for arrest and surrender of a person (art.89).

b- Jurisdiction of the court:

The jurisdiction of the court has four aspects, namely:

- **Jurisdiction *ratione materiae*:** The court has jurisdiction for the most serious crimes of international concern (art. 1). These crimes are: the crime of genocide, crimes against humanity, war crimes and the crime of aggression (art. S).

- **Jurisdiction *ratione temporis*:** The court has jurisdiction only as regards crimes committed after the entry into force of the statute (art. 1 I). The statute shall enter into force on the first day of the month after the 60th day following the deposit of the 60th instrument of ratification, acceptance, approval or accession with the secretary general of the UN (principle of non-retroactivity)⁽⁴⁵⁷⁾

= - «International criminal court ratification and national implementing legislation», IRPL, 2000, pp. 1-38.

- W. Bourdon et E. Duverger: *La cour pénale internationale*, Seuil, Paris, 2000, 290 pp.

- Ch. Bassiouni: *The international criminal court*, club of Judges, Cairo, 2001, 510 pp (in Arabic).

- R. Henham: *Some issues for sentencing in the international criminal court*, ICLQ, 2003, pp. 81-114.

- E.David: *La cour pénale internationale*, RCADI, vol. 313, 2005.

(456) Vide supra.

(457) In its declaration on the statute of the ICC, Egypt said:

ratione materiae). This occurred on the 1st of July 2002.

- **Jurisdiction *ratione personae***: The tribunal has jurisdiction only (art.24) over persons who commit crimes after the entry into force of the statute. Accordingly, no person shall be criminally responsible, under the statute, for crimes committed prior to the entry into force of the statute (principle of non-retroactivity *ratione personae*).

- **Exercise of jurisdiction**: The court may exercise its jurisdiction in three cases: if the alleged crime is referred to the prosecutor by a state party; if the alleged crime is referred to the prosecutor by the security council acting under chapter VII UN charter; if the prosecutor has initiated *proprio motu* an investigation on the basis of information on crimes within the jurisdiction of the court (art. 13)⁽⁴⁵⁸⁾.

To exercise its jurisdiction, the court must satisfy itself that:

- the alleged crime has been committed on the territory of a state party or by one of its nationals (article 12/2).

- When a state which is not a state party consents to the court's jurisdiction, the crime has been committed on that state's territory or by one of its nationals (article 12/3).

- When a national of a non-state party committed a crime on the territory of a state party or against one of its nationals, the state-party referred the case to the court.

= «that the principle of the non-retroactivity of the jurisdiction of the Court, pursuant to articles 11 and 24 of the Statute, shall not invalidate the well established principle that no war crime shall be barred from prosecution due to the statute of limitations and no war criminal shall escape justice or escape prosecution in other legal jurisdictions» (Multilateral treaties deposited with the secretary general, op. cit., vol. II, p. 147).

(458) On 16 December 2003, Uganda referred the Lord's Resistance Army to the prosecutor of the ICC. This constitutes the first time that a state party vests the court with jurisdiction in conformity with articles 13/a and 14 ICC statute.

See as well P. Akhavan: The Lord's Resistance Army case: Uganda's submission of the first state referral to the international criminal court, AJIL, 2005, pp. 403-421.

Moreover, in its decision 1593 (2005) the security council decided to refer the situation in Darfur (Sudan) since 1 July 2002 to the prosecutor of the ICC.

Accordingly, one can say that the ICC'S jurisdiction is based on the principle of territorial criminal jurisdiction, not that of universality, save for a referral from the security council. The later may refer to the court a crime committed on the territory of a state party or non-state-party.

c- Applicable law: The court shall apply(art.21):

- the statute, elements of crimes and rules of procedure and evidence.

- Applicable treaties and principles of international law, including the established principles of international law of armed conflicts.

- General principles of national laws of legal systems of the world.

- Principles and rules of law as interpreted in the court's previous decisions.

d- Organs of the court: The court is composed of the following organs(at.34):

- The presidency.

- A pre-trial division⁽⁴⁵⁹⁾, a trial division and an appeal division.

- The office of the prosecutor.

- The registry⁽⁴⁶⁰⁾.

e- Judges of the court: The court is composed of 18 judges elected by the Assembly of states. In the selection of judges, states should take into account:

- The representation of the principal legal systems of the world.

- Equitable geographical representation.

(459) The pre-trial division exercises some functions of a pre-trial character, such as the issuance of a warrant of arrest or a summons to appear.

(460) By its resolution 58/318 (2004), the General Assembly of the UN approved the Relationship Agreement between the UN and the ICC (cf, G.A., off. Rec., supp. No. 49, A/58/49, 2004, p. 15).

- A fair representation of female and male judges.

As a rule, judges shall hold office for a term of nine years.

f- Applicable penalties: The court may apply one of the following penalties on a convicted person:

- Imprisonment for a specified number of years, which may not exceed a maximum of 30 years.

- Life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.

- A fine.

- A forfeiture of proceeds⁽⁴⁶¹⁾, property and assets derived from the crime, without prejudice to the rights of *bona fides* third parties (art. 77).

Moreover, the court may decide any reduction of sentence (art. 110).

g- Enforcement of sentences of imprisonment: A sentence of imprisonment is to be served in a state designated by the court from a list of states which have indicated their willingness to accept sentenced persons. If no state is designated, the sentence of imprisonment shall be served in a prison facility made available by the host state (art. 103)⁽⁴⁶²⁾.

D) Examples of the *modus operandi* of trials before international criminal tribunals:

We will refer, here, to two examples: a ancient one, and a recent one.

1- Trial before the Nuremberg Tribunal:

Before the IMT (Nuremberg), proceedings at the trial have been determined by article 24 of the court statute, as follows:

«The proceedings at the *trial shall* take the following course:

a- The indictment shall be read in court.

(461) See as well:

M. Cassani: La "Proceeds of crime Act 2002" du Royaume Uni, RPS, t. 122. 2004, pp. 280-309, 313-345.

(462) *Vide infra* (investigation and trial before the ICC) and enforcement.

b- The tribunal shall ask each defendant whether he pleads "guilty" or "not guilty".

c- The prosecution shall make an opening statement.

d- The tribunal shall ask the prosecution and the defence what evidence(if any) they wish to submit.

e- The witnesses for the prosecution shall be examined and after that the witnesses for the defense.

f- The tribunal may put any question to any witness and to any defendant.

g- The prosecution and the defense shall interrogate and may cross-examine any witness or any defendant who gives testimony.

h- Defense shall address the court.

i- The prosecution shall address the court.

j- Each defendant may make a statement to the tribunal.

k- The tribunal shall deliver judgment and pronounce sentence».

2- Investigation and Prosecution before the ICC⁽⁴⁶³⁾:

(a) The prosecutor shall, on the basis of the information made available to him, make an investigation unless he determines that there is no reasonable basis to believe that a crime within the jurisdiction of the court has been or is being committed, the case would not be admissible under art. 17⁽⁴⁶⁴⁾ or that the investigation would not serve the

(463) See as well rules 104 – 144 Rules of procedure and evidence of the ICC.

(464) Art. 17 deals with «issues of admissibility». It reads:

«1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

(c) The person concerned has already been tried for conduct which is the subject of the **complaint**, and a trial by the Court is not permitted under article 20, paragraph 3;

interests of justice. The decision of the prosecutor is to be transmitted to the Pre-Trial Chamber which has the right to reconsider the prosecutor's decision (art. 53).

(b) The prosecutor has the right to extend the investigation to cover all facts and evidence relevant to the alleged crime. He may conduct investigations on the territory of a state⁽⁴⁶⁵⁾ (art. 54).

(c) The Pre-Trial Chamber plays an important role during the phase of investigations⁽⁴⁶⁶⁾.

= (d) The case is not of sufficient gravity to justify further action by the Court.

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;

(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings».

(465) Under Part 9 ICC statute or as authorized by the Pre-trial chamber in accordance with art. 57/3/d.

(466) Thus under articles 57/3 and 58/1, it exercises the following functions:

(a) At the request of the Prosecutor, issue such orders and warrants as may be required for the purposes of an investigation;

(b) Upon the request of a person who has been arrested or has appeared pursuant to a summons under article 58, issue such orders, including measures such as those described in article 56, or seek such cooperation pursuant to Part 9 as may be necessary to assist the person in the preparation of his or her defense;

(c) Where necessary, provide for the protection and privacy of victims and witnesses, the preservation of evidence, the protection of persons who have been arrested or appeared in response to a summons, and the protection of national security information;

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(d) A state party which has received a request for provisional arrest or for arrest and surrender shall take, immediately, the necessary measures to arrest the person in question. Once ordered to be surrendered by the custodial state, the person shall be delivered to the court as soon as possible (art. 59).

(e) Upon the surrender of the person to the court, the Pre-Trial Chamber shall satisfy itself that he has been informed of the crimes which he is alleged to have committed and of his rights, including the right to apply for interim release pending trial. The detention or the release is to be decided by the Pre-Trial Chamber (art. 60).

(f) The Pre-Trial Chamber, before trial, shall hold a hearing to confirm the charges⁽⁴⁶⁷⁾ on which the prosecutor intends to seek the trial, in the presence of the later, the accused and his counsel. The

= (d) Authorize the Prosecutor to take specific investigative steps within the territory of a State Party without having secured the cooperation of that State under Part 9 if, whenever possible having regard to the views of the State concerned, the Pre-Trial Chamber has determined in that case that the State is clearly unable to execute a request for cooperation due to the unavailability of any authority or any component of its judicial system competent to execute the request for cooperation under Part 9.

(e) Where a warrant of arrest or a summons has been issued under article 58, and having due regard to the strength of the evidence and the rights of the parties concerned, as provided for in this Statute and the Rules of Procedure and Evidence, seek the cooperation of States pursuant to article 93, paragraph 1 (k), to take protective measures for the purpose of forfeiture, in particular for the ultimate benefit of victims.

(467) Art. 61 para. 7 provides:

«7. The Pre-Trial Chamber shall, on the basis of the hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. Based on its determination, the Pre-Trial Chamber shall:

(a) Confirm those charges in relation to which it has determined that there is sufficient evidence, and commit the person to a Trial Chamber for trial on the charges as confirmed;

(b) Decline to confirm those charges in relation to which it has determined that there is insufficient evidence;

(c) Adjourn the hearing and request the Prosecutor to consider:

(i) Providing further evidence or conducting further investigation with respect to a particular charge; or

(ii) Amending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court.»

Pre-Trial Chamber may hold the hearing in the absence of the accused, in two cases, namely:

- * if the accused waived his right to be present, or
- * in case he fled or cannot be found (art. 61).

(g) Once the charges have been confirmed, the presidency shall constitute a Trial chamber which shall be responsible for the conduct of subsequent proceedings⁽⁴⁶⁸⁾.

(468) However, the Trial chamber may, if necessary for its effective and fair functioning, refer preliminary issues to the Pre-Trial Chamber (art. 64/4). Moreover, under art. 64 the Trial chamber has the following functions and powers:

«1. The functions and powers of the Trial Chamber set out in this article shall be exercised in accordance with this Statute and the Rules of Procedure and Evidence.

2. The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

3. Upon assignment of a case for trial in accordance with this Statute, the Trial Chamber assigned to deal with the case shall:

(a) Confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings;

(b) Determine the language or languages to be used at trial; and

(c) Subject to any other relevant provisions of this Statute, provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial.

4. The Trial Chamber may, if necessary for its effective and fair functioning, refer preliminary issues to the Pre-Trial Chamber or, if necessary, to another available judge of the Pre-Trial Division.

5. Upon notice to the parties, the Trial Chamber may, as appropriate, direct that there be joinder or severance in respect of charges against more than one accused.

6. In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary:

(a) Exercise any functions of the Pre-Trial Chamber referred to in article 61, paragraph 11;

(b) Require the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of States as provided in this Statute;

(c) Provide for the protection of confidential information;

(d) Order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties;

(e) Provide for the protection of the accused, witnesses and victims; and

(f) Rule on any other relevant matters.

(h) The trial shall be conducted in the presence of the accused, unless he disrupts the trial (art. 63).

(i) Where the accused has made an admission of guilt⁽⁴⁶⁹⁾, the Trial chamber may:

* convict him of the crime, in case it is so satisfied.

* order that the trial be continued under the ordinary trial procedures provided by the statute, in case it is not so satisfied (art. 65).

(j) The Trial chamber should strictly observe the rights of the accused, the protection of victims and witnesses (articles 65-68)⁽⁴⁷⁰⁾, and rules concerning evidence (art. 69, 72, 73).

(k) All the judges of the Trial chamber must be present at each stage of the trial and during deliberations (art. 74/1).

(l) The Decision of the Trial chamber shall be based on its evaluation of the evidence and the entire proceedings. The judges shall try to realize unanimity, failing which the decision shall be taken by a

= 7. The trial shall be held in public. The Trial Chamber may, however, determine that special circumstances require that certain proceedings be in closed session for the purposes set forth in article 68, or to protect confidential or sensitive information to be given in evidence.

8. (a) At the commencement of the trial, the Trial Chamber shall have read to the accused the charges previously confirmed by the Pre-Trial Chamber. The Trial Chamber shall satisfy itself that the accused understands the nature of the charges. It shall afford him or her the opportunity to make an admission of guilt in accordance with article 65 or to plead not guilty.

(b) At the trial, the presiding judge may give directions for the conduct of proceedings, including to ensure that they are conducted in a fair and impartial manner. Subject to any directions of the presiding judge, the parties may submit evidence in accordance with the provisions of this Statute.

9. The Trial Chamber shall have, *inter alia*, the power on application of a party or on its own motion to:

(a) Rule on the admissibility or relevance of evidence; and

(6) Take all necessary steps to maintain order in the course of a hearing.

10. The Trial Chamber shall ensure that a complete record of the trial, which accurately reflects the proceedings, is made and that it is maintained and preserved by the Registrar».

(469) Under art. 64/8/a.

(470) Vide infra.

majority of the judges (art. 74/2-3). The decision shall be in writing and contain a full and reasoned statement of evidence and conclusions (art. 74/5). In case of a conviction, the Trial chamber shall consider the appropriate decision to be imposed (art. 76).

(m) Decision of the court may be appealed by the convicted person or the prosecutor for any of the following grounds: procedural error, error of fact, or error of law. Moreover, the convicted person may make appeal on any other ground that affects the fairness or reliability of the proceedings or decision (art.81). If the appeals chamber finds that the proceedings or the decision appealed from were unfair or materially affected by errors of fact or of law, it may:

- Reverse or amend the decision or sentence; or
- Order a new trial before a different trial chamber (art. 83).

(n) A revision of conviction or sentence may be applied to the Appeals Chamber (art. 84)⁽⁴⁷¹⁾.

(471) Art. 84 provides:

«I. The convicted person or, after death, spouses, children, parents or one person alive at the time of the accused's death who has been given express written instructions from the accused to bring such a claim, or the Prosecutor on the person's behalf, may apply to the Appeals Chamber to revise the final judgement of conviction or sentence on the grounds that:

(a) New evidence has been discovered that:

- (i) Was not available at the time of trial, and such unavailability was not wholly or partially attributable to the party making application; and
- (ii) Is sufficiently important that had it been proved at trial it would have been likely to have resulted in a different verdict;

(b) It has been newly discovered that decisive evidence, taken into account at trial and upon which the conviction depends, was false, forged or falsified;

(c) One or more of the judges who participated in conviction or confirmation of the charges has committed, in that case, an act of serious misconduct or serious breach of duty of sufficient gravity to justify the removal of that judge or those judges from office under article 46.

2. The Appeals Chamber shall reject the application if it considers it to be unfounded. If it determines that the application is meritorious, it may, as appropriate:

- (a) Reconvene the original Trial Chamber;
- (b) Constitute a new Trial Chamber; or

§IV- Protection of victims of international crimes by an international non-criminal court:

During war or situations of public emergency many international crimes (e.g., war crimes, crimes against humanity or genocide) may be committed by the public authorities of state which, basing themselves on the existing situation, may commit such crimes.

Present international non-criminal courts may play a great role in preventing such crimes or repairing their effects. This may occur on the regional or universal level.

A) International courts on the regional plane:

fortunately, the two regional conventions on the protection of human rights, namely, the European and American ones, contain provisions to face the effect of war or public emergency on human rights and fundamental freedoms.

Thus, under art. 15 of the European convention of human rights, and art. 27 of the American convention of human rights, the following rules are, in principle, applicable:

1- In time of war (or other public emergency) some derogations are allowed with regard to human rights. This can be easily justified. In fact, according to a well established principle: «whenever the safety of the state is threatened, whatever may be the cause, it has a right within its national territory to take the requisite measures in order to ensure the safety of the community». Accordingly, *jus necessitatis* may excuse the non-observance of certain human rights.

2- These derogations must:

- relate to circumstances threatening the life of the nation, its independence or security. Thus, *necessitas non habet legem*;
- be taken to the extent strictly required by the exigencies of the situation, i.e., *ex necessitate*;

= (c) Retain jurisdiction over the matter, with a view to, after hearing the parties in the manner set forth in the Rules of Procedure and Evidence, arriving at a determination on whether the judgement should be revised.»

- not be inconsistent with the international obligations of the state;

- not involve discrimination on ground of race, colour, sex, language, religion or social origin;

- not involve the suspension of some important rights and freedoms, e.g., the right to life(which is, in fact, the *primus inter pares*), the right to juridical personality, the right to humane treatment, freedom *from ex post facto* laws, freedom of conscience and religion, the prohibition of slavery and torture.. etc. Clearly, these non-derogable rights are essential to the existence of the human being. Accordingly, they may not be derogated from, even in time of war or other public emergency threatening the life of the nation or the state.

3- These derogations are supervised in two ways, namely:

- An institutional supervision, i.e., the state concerned must keep the secretary general of the organization informed of the derogations thus taken; and

- A judicial supervision, namely, the European and Inter-American Courts on human rights may be seized of disputes concerning these derogations.

Thus , under art. 45 of the European convention:

«The jurisdiction of the court shall extend to all matters concerning the interpretation and application of the present convention».

Moreover, according to art.62/3 of the American convention:

«The jurisdiction of the court shall comprise all cases concerning the interpretation and application of the provisions of this convention that are submitted to it»⁽⁴⁷²⁾.

(472) See:

«Advisory opinion of the Inter-American Court of human rights on Judicial guarantees in states of emergency», OC-9/87 of October 6 , 1987.

In Las Palmares case, the Inter-American court of human rights said:

«When a State is a Party to the American Convention and has accepted the contentious jurisdiction of the Court, the Court may examine the conduct of the State to determine whether it conforms to the provisions =

B) International courts on the universal plane (e.g., the ICJ):

There is no legal impediment to the effect that a legal dispute may be presented to the ICJ relating to an armed conflict «*en cours*» between the parties or in the aftermath of that conflict.

In this respect, the following cases were, e.g., presented to the court:

- Military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America).

- The frontier dispute (Mali / Burkina Faso).

- Application of the convention on the prevention and punishment of the crime of genocide (Bosnia and Herzegovina V. Yugoslavia).

- The land and maritime boundary dispute between Cameroon and Nigeria (Cameroon v. Nigeria)⁽⁴⁷³⁾.

- Armed activities on the territory of Congo (Congo V. Uganda)⁽⁴⁷⁴⁾.

In such cases, the court may, *inter alia*, indicate certain provisional measures, such as: Cessation of hostilities, refraining from any action by the armed forces, freezing of the positions of armed forces, refraining from any action which may extend or aggravate the dispute, protection of some indispensable rights....etc.

Presumably, such measures aim at preserving the rights of the parties as well as those of individuals. In the later case, human

= of the Convention, even when the issue may have been definitively resolved by the domestic legal system. The Court is also competent to determine whether any norm of domestic or international law applied by a State, in times of peace or armed conflict, is compatible or not with the American Convention. In this activity, the Court has no normative limitation: any legal norm may be submitted to this examination of compatibility.

In order to carry out this examination, the Court interprets the norm in question and analyzes it in the light of the provisions of the Convention. The result of this operation will always be an opinion in which the Court will say whether or not that norm or that fact is compatible with the American Convention».

(473) Cf, ICJ , Rep , 1984 , p. 67; 1986 , p. 3; 1993 , p. 13.

(474) Ahmed Abou-el-wafa: A commentary on the case-law of the ICJ, R. Eyp. DI, 2005, pp. 1-213.

rights, particularly the right to life, shall be necessarily and primarily preserved.

Thus, in 1979, the ICJ held that:

«The continuation of the situation of the present request exposes the human beings concerned to deprivation, hardship, anguish and even danger to life and health and thus to a serious possibility of irreparable harm⁽⁴⁷⁵⁾.

Moreover, in 1993, the court ordered the parties not to take any action:

«... which may aggravate or extend the existing dispute over the prevention or punishment of the crime of genocide, or render it more difficult of solution».

In 1996, the court indicated that :

«Both parties should ensure that no action of any kind, and particularly no action by their armed forces, is taken which might prejudice the rights of the other in respect of whatever judgment the court may render in the case, or which might aggravate or extend the dispute before it».

Moreover, the ICJ said that:

«In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities»⁽⁴⁷⁶⁾.

Section III

Penalties

Penalties raise various issues such as their importance, factors determining them, applicable penalties, enforcement, amnesty, acquittal, and sanctions imposed on responsible states.

§I- Importance of application of penalties against offenders:

Perpetrators of international crimes are to be considered as *hostis humani generis* (enemies of all mankind) who threaten the international order. From a law enforcement perspective, any step

(475) Cf, ICJ, Rep., 1979, p 20, para. 42.

(476) Cf. «Legality of the threat or use of nuclear weapons», ICJ, Rep., 1996, para. 25.

that enhances the possibility of bringing those criminals to justice is a positive one⁽⁴⁷⁷⁾. This will, in turn, reduce international criminality.

Prima facie, the application of punishments on offenders is a leading policy of both national and international criminal systems⁽⁴⁷⁸⁾, i.e., it is an integral part of the later⁽⁴⁷⁹⁾. This, inevitably, reduces impunity.

(477) Though all breaches, minor or serious, are prohibited, the obligation to prosecute and punish a criminal may be, in some cases, limited to serious ones. Thus, e.g., the Geneva conventions of 1949 and Additional protocol (1) of 1977 treat only with «grave breaches».

In this context, it has been maintained that «Although the Parties to the conflict are under the obligation to take measures necessary for the suppression of all acts contrary to the provisions of the conventions and Protocol I, they are only bound to bring to courts persons having committed grave breaches of these treaties, which are in any case considered to be war crimes» (Commentary on the Additional Protocols of 8 June 1977, ICRC, 1987, p. 158-159). However, grave breaches and all other breaches which result from a failure to act «When under a duty to do so» should be repressed, article 86/1 Additional Protocol I of (1977).

(478) An author distinguishes the two systems and puts forward the consequences resulting therefrom, as follows:

«The international legal system's primary goal of punishment is the preservation of world order and the maintenance of peace and security. National criminal justice systems, while concerned with the preservation, restoration, and improvement of public order, strive to achieve the goals of rehabilitation and social integration of individual offenders.

Furthermore, the assumptions of general deterrence in national legal systems are different from those that can be made about the international legal system's capacity for generating deterrence, thus resulting in general prevention.

The differences between these two types of legal systems, the international and the national, imply consequences that go beyond considerations of philosophical and policy bases of punishment for international crimes. National legal systems have established institutions, structures and personnel to carry out the enforcement functions of the criminal justice system on a consistent and regular basis. Therefore, they produce certain results and allow for specific assumptions that can be made about prevention and deterrence. In contrast, the international legal system does not yet have a permanent system of international criminal justice with similar capabilities; consequently, the assumptions about its deterrence cannot be assessed. Retribution and just desert are more appropriate as philosophical and policy bases for the punishment of international crimes, whereas rehabilitation and social integration goals are more relevant to that of national criminal justice systems. Further, the functions of national =

Application of appropriate penalties will inevitably have a certain effect on criminals, by deterring them. In this connection, the preamble of the convention for the suppression of unlawful acts against the safety of civil aviation (1971) says:

“for the purpose of deterring such acts, there is an urgent need to provide appropriate measures for punishment of offenders”.

§II- Factors determining applicable penalties:

There are some factors which influence the decision of the criminal court with regard to the penalties to be applied⁽⁴⁸⁰⁾. They are, inter alia, the following.

A) The appropriateness of the punishment to the international crime committed: exclusion of revenge:

This means that the offender deserves only the just and fair penalty, no more no less. Accordingly, penalties that cause useless and unnecessary sufferings are to be excluded.

= criminal justice are also educational and thus have a preventive effect, a result of the socio-psychological impact of the notoriety attached to trials and prosecutions». Ch. Bassiouni: Introduction to international criminal law, op. cit., pp. 680-681.

(479) In fact, a criminal repression is «based on the idea that punishment forms an integral part of any comprehensive legal system, whether national or international» (National measures to repress violations of IHL (civil law systems) – report on the meeting of experts, ICRC, Geneva, 2000, p. 293).

(480) In fact one of the consolidated principles of CIL is that which necessitates the «imposition of punishment that is not based on the idea of revenge. The perpetrator should be punished for no more and no less what he deserves».

A. Carcano: Sentencing and the gravity of the offence in international criminal law, ICLQ, 2002, p. 609.

In this context the ICTY says:

«The principle of retribution ... must be understood as reflecting a fair and balanced approach to the exaction of punishment for wrongdoing. This means that the penalty imposed must be proportionate to the wrongdoing; in other words, that the punishment be made to fit the crime».

Case No. IT-95-99/1-S, 31 July 2001, paras 28-30.

Whereas the ICTR says:

«There is no argument that, precisely on account of their extreme gravity, crimes against humanity and genocide must be punished appropriately ... the chamber will prefer to lean more on its unfettered discretion each time that it has to pass sentence on persons found guilty of crimes falling within its jurisdiction». Case No. ICTR-97-23-5, 4 Sept. 1998, paras 17 and 25.

B) The gravity of the crime:

International crimes should be punished by penalties consistent with their grave nature. The harshest penalties should be imposed on the gravest crimes. Accordingly, penalties should be commensurate with the gravity of the crimes.

In this context, article 24/2 ICTY provides:

«In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person»⁽⁴⁸¹⁾.

The necessity to take into account the gravity of the crime has been as well confirmed by international criminal courts⁽⁴⁸²⁾.

C) The individual circumstances of the convicted person:

The individualization of penalties is one of the leading general principles of criminal policy, be it a national or an international one. Accordingly, in determining the sentence, the criminal tribunal must take into account «the individual circumstances of the convicted person»⁽⁴⁸³⁾. Thus, to individualize a penalty to fit the individual circumstances of every convicted person is a duty incumbent upon any criminal tribunal.

D) The aggravating or mitigating circumstances:

Aggravating or mitigating circumstances⁽⁴⁸⁴⁾ may influence the sentence imposed by the criminal tribunal.

(481) See as well art. 23/2 ICTR, art/ 78/1 ICC, art. 19/2 Special court for Sierra Leone.

(482) Thus, a chamber of the ICTY said:
«Chambers of the International Tribunal have consistently held that the gravity of the criminal conduct is the most important factor to consider in determining sentence» that «the principle that the gravity, of the offence is the primary consideration in imposing sentence» and that:
«The sentences to be imposed must reflect the inherent gravity of the criminal conduct of the accused. The determination of the gravity of the crime requires a consideration of the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crime.
(Cf, Tordovic judgement, case No. IT-95-9/1-S, July 31, 2001; Kupreski *et al.*, case No. IT-95-16-T, Judgement, Jan. 14, 2000.

(483) See, e.g., art. 24/2 ICTY, art. 23/2 ICTR, art. 78/1 ICC, art. 19/2 special court for Sierra Leone.

(484) Article 15 Draft articles of crimes against the peace and security of mankind (1996) stipulates: «In passing sentence, the court shall, where =

Thus, in Krstić case, the Trial Chamber considered:

* As aggravating circumstances: The level of criminal participation. The premeditation and motives of the convicted person.

* As mitigating circumstances:

- assistance to a crime is less serious than personal participation or commission as a principal.

- forced participation in the commission of a crime.

- co-operation with the prosecutor (this depends essentially on the quantity and quality of information provided by the accused).

- the health of the convicted Person⁽⁴⁸⁵⁾.

Moreover, Rules of evidence and procedure of international criminal courts usually list the circumstances, mitigating or aggravating, which may be taken into account by the court⁽⁴⁸⁶⁾.

= appropriate, take into account extenuating circumstances in accordance with the general principles of law».

(485) Case No. IT-98-33-T, 2 August 2001, paras. 704-726.

In the prosecutor V. Georges Ruggiu, the Trial Chamber considered the following aggravating circumstances:

- Gravity of the offences.

- The role of the accused in the commission of the offences.

As for mitigating circumstances, the same chamber referred to the following:

- The guilty plea.

- The accused's cooperation with the prosecutor.

- The absence of criminal record.

- Character of the accused.

- Regret and remorse.

- Accused's assistance to victims.

- No personal participation in the killings.

Case No. ICTR-97-32-1, June 1, 2000. In Plavsic case, the leadership (Superior) position of the accused was considered as an aggravating circumstance (case No. IT-00-39/40/1, Feb. 27, 2003). Whereas in Tadic case, the terrorizing of victims, sadism, cruelty and humiliation, espousal of religious and ethnic discrimination and the number of victims were considered as aggravating circumstances (case No. IT-94-1-AS, Jan, 26, 2000).

(486) Thus, Rule 145 of Rules of evidence and procedure of the ICC provides:

(c) In addition to the factors mentioned in article 78, paragraph 1, give consideration, *inter alia*, to the extent of the damage caused, in particular =

E) Cumulative convictions:

An accused person may be found guilty of several crimes⁽⁴⁸⁷⁾. In fact, it is possible that an accused be found guilty of two crimes

= the harm caused to the victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime; the degree of participation of the convicted person; the degree of intent; the circumstances of manner, time and location; and the age, education, social and economic condition of the convicted person.

2. In addition to the factors mentioned above, the Court shall take into account, as appropriate:

(a) Mitigating circumstances such as:

(i) The circumstances falling short of constituting grounds for exclusion of criminal responsibility, such as substantially diminished mental capacity or duress;

(ii) The convicted person's conduct after the act, including any efforts by the person to compensate the victims and any cooperation with the Court;

(b) As aggravating circumstances:

(i) Any relevant prior criminal convictions for crimes under the jurisdiction of the Court or of a similar nature;

(ii) Abuse of power or official capacity;

(iii) Commission of the crime where the victim is particularly defenseless;

(iv) Commission of the crime with particular cruelty or where there were multiple victims;

(v) Commission of the crime for any motive involving discrimination on any of the grounds referred to in article 21, paragraph 3;

(vi) Other circumstances which, although not enumerated above, by virtue of their nature are similar to those mentioned.

It is worth recalling that guilty plea is considered as a mitigating circumstance, mainly because: «admission of guilt demonstrates honesty and it is important for the International Tribunal to encourage people to come forth, whether already indicted or as unknown perpetrators. Furthermore, this voluntary admission of guilt which has saved the International Tribunal the time and effort of a lengthy investigation and trial is to be commended» case No. IT-96-22-I, 29 Nov. 1996, para. 16.

In this regard, an English proverb says: «A fault confessed is half redressed». See as well:

«Symposium on guilty plea», JICJ, vol. 2, 2004, pp. 1018-1081.

Moreover, under a text of an international convention, the penalty may be reduced. Thus, art. 87 third Geneva Convention 1949 provides:

«The courts or authorities of the Detaining Power are at liberty to reduce the penalty provided for the violation of which the prisoner of war is accused, and are therefore not bound to apply any minimum penalty prescribed by law».

(487) Thus, the ICTY found R. Krstic guilty of:

or more on the basis of the same criminal conduct⁽⁴⁸⁸⁾. This, inevitably, will have a certain impact on the penalties or the total penalty to be imposed⁽⁴⁸⁹⁾.

In this regard, in case there are two crimes or more, art. 78/3 ICC provides:

«When a person has been convicted of more than one crime, the court shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment. This period

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- =
- Genocide.
 - Persecution of murders, cruel and inhumane treatment, terrorizing the civilian population, forcible transfer and destruction of property of Bosnian Muslim civilians.
 - Murder as a violation of laws and customs of war (Prosecutor V. Krstic, November 1, 2000, para. 727).

In other words, «The question of cumulative convictions arises where more than one charge arises out of what is essentially the same criminal conduct». The Prosecutor V. Strugar, IT-01-42-AR 72, 22 Nov. 2002, para. 447.

(488) The Trial Chamber in Krstic case said:

«The Statute provides no guidance on cumulative convictions. The Rules indicate that the “Trial Chamber shall vote on each charge contained in the indictment”. As recently amended, they further state that the Trial Chamber “shall impose a sentence in respect of each finding of guilt and indicate whether such sentences shall be served consecutively or concurrently, unless it decides to exercise its power to impose a single sentence reflecting the totality of the criminal conduct of the accused». Case No. IT-98-33-T, 2 Aug. 2001, para. 656.

(489) The Appeals Chamber in the *Celebići* case held that cumulative convictions are permissible to punish the same criminal conduct if the following two prong test is met:

«Multiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other».

The Appeals Chamber further stated that:

«the Chamber must decide in relation to which offence it will enter a conviction. This should be done on the basis of the principle that the conviction under the more specific provision should be upheld. Thus, if a set of facts is regulated by two provisions, one of which contains an additional materially distinct element, then a conviction should be entered only under that provision».

(Ibid, para. 664; *Celebići* Appeal judgement, paras 412-413).

shall be no less than the highest individual sentence pronounced and shall not exceed 30 years imprisonment or a sentence of life imprisonment in conformity with article 77, paragraph 1 (b)».

§III- Applicable penalties:

In modern international criminal tribunals, i.e., ICC, ICTY, ICTR, contrary to the Nuremberg court, the death penalty is prohibited⁽⁴⁹⁰⁾. It does not appear among the penalties to be applied by those courts.

Thus, art. 24/1 ICTY provides:

«The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia»⁽⁴⁹¹⁾.

Para. 3 of the same article adds:

«In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners»⁽⁴⁹²⁾.

Under art. 77 ICC, the court may impose one of the following penalties⁽⁴⁹³⁾:

(490) See as well : A. Marchesi: *Death penalty in wartime, arguments for abolition*, IRPL, 1996, pp. 319-332; J. Ohlin: *Applying the death penalty to crimes of genocide*, AJIL, 2005, pp. 747-777.

It is worth recalling that the death penalty is prohibited or restricted in a number of provisions of the 1949 Geneva conventions (e.g., articles 100-101 third convention, articles 68 and 75 Fourth convention) and the 1977 of Additional Protocols (e.g., articles 76-77 Protocol I and article 6 protocol II).

(491) The Trial Chamber in *Erdemovic* noted that, regarding the national laws, the relevant provisions of the law in the former Yugoslavia in effect at the time of the events offer little guidance in the determination of the sentence. Consequently, it held that «whenever possible, the International Tribunal will review the legal practices of the former Yugoslavia but will not be bound in any way by those practices in the penalties it establishes and the sentences it imposes for the crimes falling within its jurisdiction». (Case No. IT-96-22-T, 29 Nov. 1996, Paras 27-31, 40).

(492) See as well art. 23/1-2 ICTR.

(493) In the overwhelming majority of international treaties codification =

- Imprisonment which may not exceed a maximum of 30 years; or

- A term of life imprisonment.

In addition to imprisonment, the court may order:

* A fine.

* A forfeiture of proceeds, property and assets derived directly or indirectly from the crime, without prejudice to the rights of *bona fides* third parties.

§IV- Enforcement:

Enforcement means the application *in concreto* of a decision pronounced against a convicted person. Since international tribunals have no prison facilities, sentences of imprisonment are, in principle, served in a state designated by the court.

In this regard, art. 27 ICTY provides⁽⁴⁹⁴⁾:

«Imprisonment shall be served in a State designated by the International Tribunal from a list of States which have indicated to the Security Council their willingness to accept convicted persons. Such imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the International Tribunal».

Moreover, art. 103 ICC stipulates:

«A sentence of imprisonment shall be served in a state⁽⁴⁹⁵⁾ designated by the court from a list of states which have indicated to

= international crimes, penalties are not contained therein. *Prima facie*, with the advent of statutes and charters of international criminal courts and tribunals (e.g., IMT, ICTR, ICTY, ICC), this is no longer valid. Ch. Bassiouni observed that «Penalties are not contained in ... 281 international criminal law conventions applicable to ... 28 categories of crime» ch. Bassiouni: Introduction to international criminal law, op. cit., p. 320.

(494) Art. 26 ICTR reproduces the same text save, *ab initio* it stipulates that imprisonment shall be served «In Rwanda or any of the States on a list of states ...».

(495) Some states accept only to enforce sentences of imprisonment concerning their nationals or residents in national territory. In this connection, e.g., Switzerland declares that:

the court their willingness to accept sentenced persons»⁽⁴⁹⁶⁾.

When the ICC designates a state, it shall take into account:

- The principle that states parties should share the responsibility for enforcing sentences of imprisonment, in accordance with principles of equitable geographical representation⁽⁴⁹⁷⁾.

- The application of international standards⁽⁴⁹⁸⁾ governing the treatment of prisoners⁽⁴⁹⁹⁾.

= «it is prepared to be responsible for enforcement of sentences of imprisonment handed down by the court (i.e., the International criminal court) against Swiss nationals or persons habitually resident in Switzerland».

Multilateral treaties deposited with the secretary general, op. cit., vol. II, p. 149. See as well declarations of Andorra, Lithuania, and Slovakia.

Other states say that the sentence must not exceed the maximum stipulated for any crime under the domestic law (cf, e.g., declaration of Spain).

One can mention, e.g., that D. Kordic and Z. Zagic were transferred on 8 June 2006 to Austria to serve their 25 year prison terms handed down by the ICTY (www.un.org/ICTY).

It is to be noted that art. 22 statute of the special court of Sierra Leone states that imprisonment shall be served.

- in Sierra Leone, or

- if circumstances so require, in any of the states which have concluded with the ICTR or the ICTY an agreement for the enforcement of a sentence; or

- in any other state with whom the special court has concluded a similar agreement.

(496) Between the giving of the sentence and its enforcement, the accused remains in the custody of the court pending the finalization of arrangements for his transfer to the state where he shall serve his sentence.

(497) Rules of evidence and procedure (Rule 201) provided for criteria concerning equitable distribution.

(498) Whereas art. 22/2 special court of Sierra Leone provides that conditions of imprisonment shall be governed by the law of state of enforcement subject to supervision of the special court.

(499) See as well: - D. Smit: *International imprisonment*, ICLQ, 2005, p. 357-386.

- N. Rodley: *The treatment of prisoners under international law*, clarendon press-Oxford, 1987, 374, pp.

It is worth recalling that the General Assembly of the UN adopted, by its Res. 45/11 (1990), the basic principles for the treatment of prisoners. They are:

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- The views of the sentenced person.
- The nationality of the sentenced person.

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- =
- «1. All prisoners shall be treated with the respect due to their inherent dignity and value as human beings.
 2. There shall be no discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
 3. It is, however, desirable to respect the religious beliefs and cultural precepts of the group to which prisoners belong, whenever local conditions so require.
 4. The responsibility of prisons for the custody of prisoners and for the protection of society against crime shall be discharged in keeping with a State's other social objectives and its fundamental responsibilities for promoting the well-being and development of all members of society.
 5. Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants.
 6. All prisoners shall have the right to take part in cultural activities and education aimed at the full development of the human personality.
 7. Efforts addressed to the abolition of solitary confinement as a punishment, or to the restriction of its use, should be undertaken and encouraged.
 8. Conditions shall be created enabling prisoners to undertake meaningful remunerated employment which will facilitate their reintegration into the country's labour market and permit them to contribute to their own financial support and to that of their families.
 9. Prisoners shall have access to the health services available in the country without discrimination on the grounds of their legal situation.
 10. With the participation and help of the community and social institutions, and with due regard to the interests of victims, favorable conditions shall be created for the reintegration of the ex-prisoner into society under the best possible conditions.
 11. The above Principles shall be applied impartially».

It is worth noting that execution of sentences against prisoners of war is subject to the following rule:

«Sentences pronounced on prisoners of war after a conviction has become duly enforceable, must be served in the same establishments and under the same conditions as in the case of members of the Detaining Power» (articles 88, 108 third Geneva conventions).

Moreover, the following rules govern the enforcement under statute ICC (articles 105-111) and Rules of evidence and procedure (Rules 198-225):

* The state party has not the right to modify a sentence of imprisonment.

* The enforcement of a sentence of imprisonment shall be under the supervision of the court.

* The sentenced person shall not be subject to other kinds of prosecution, punishments or extradition to a third state for a conduct committed prior to its delivery to the state of enforcement, save with the consent of the court.

* States should give effect to fines and forfeitures ordered by the court, without prejudice to the rights of *bona fides* third parties.

* The state of enforcement shall not release the person before expiry of the sentence pronounced by the court. The latter has alone the right to decide any reduction of sentence.

* If the sentenced person has escaped and fled the state of enforcement. The person shall be surrendered to the latter or to the court by the state in which that person is located, pursuant to international agreements or its national legislation. In this regard Rule 225 para. 4 provides:

«The entire period of detention in the territory of the state in which the sentenced person was in custody after his or her escape and ... the period of detention at the seat of the court following the surrender of the sentenced person from the state in which he or she was located shall be deducted from the sentence remaining to be served»⁽⁵⁰⁰⁾.

Prima facie, what is said *in fine* is inadmissible. For, under such a text, escape has no punishment. Even the period of custody or detention outside the state of enforcement is to be deducted from the sentence remaining to be served!! Thus, there is no difference between a person who escapes and flees and another person who does not do so!!

(500) Emphasis added.

* The court has alone the right to decide any reduction of sentence. In such a case, it shall take into account the following factors:

(a) The conduct of the sentenced person while in detention, which shows a genuine dissociation from his or her crime;

(b) The prospect of the resocialization and successful resettlement of the sentenced person;

(c) Whether the early release of the sentenced person would give rise to significant social instability;

(d) Any significant action taken by the sentenced person for the benefit of the victims as well as any impact on the victims and their families as a result of the early release;

(e) Individual circumstances of the sentenced person, including a worsening state of physical or mental health or advanced age⁽⁵⁰¹⁾.

(f) The early and continuing willingness of the person to cooperate with the court in its investigations and prosecutions.

(g) The voluntary assistance of the person in enabling the enforcement of the judgments and orders of the court (e.g., orders of fine, forfeiture and reparation)⁽⁵⁰²⁾.

§V- Amnesty:

Prima facie, there is, usually, a tension between the imperative of accountability and the practice of amnesty of those accused of commission of international crimes.

In this regard, there is a distinction between crimes committed during an international armed conflict and a non-international armed conflict:

A) As for international armed conflicts: there exists a duty to investigate and punish (e.g. War Crimes of serious breaches

(501) Rule 223 ICC rules of procedure and evidence.

(502) The International Congress of Penal Law (1999) pointed out: "Attention should be directed to a multidisciplinary approach to the establishment and evolution of international enforcement and non-enforcement regimes against organized crime, especially on the interaction of international organization theory, on the one hand, and criminal and international law on the other hand" see: IRPL, 1999, p. 907.

provided by Geneva Conventions 1949, genocide and crimes against humanity).

It is worth noting that pardon or commutation of a sentence rendered by an international court should be ordered by the later, not by the state of enforcement⁽⁵⁰³⁾.

B) Concerning non-international armed conflicts: Amnesty⁽⁵⁰⁴⁾ is possible in non-international armed conflicts. In this connection, art. 6/5 of the 1977 Additional Protocol II stipulates”

“At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict whether they are interned or detained”.

Evidently, amnesty is an internal act decided by the competent authorities in the State concerned in order to quickly ensure the restoration of peace and reestablishing normal relations among the divided parties of the nation. This may lead to rapid reconciliation among them.

The practice of amnesty is considered now as a customary rule of international law applicable in non-international armed conflicts⁽⁵⁰⁵⁾.

(503) Thus e.g., art: 28 ICTY provides:

“If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the international Tribunal accordingly. The President of the international Tribunal, in consultation with the judges, shall decide the matter on the basis of the interests of justice and the general principles of law” (see as well, art. 27 ICTR).

(504) Amnesty is “an act by the legislative power which eliminates the consequences of certain punishable offences, stops prosecutions and quashes convictions. Legally a distinction is made between amnesty and a free pardon. The latter is granted by the Head of State and puts an end to the execution of the penalty, though in other respects the effects of conviction remain in being” cf, commentary on the Additional Protocols of 8 June 1977, op. cit., p. 1402.

See another definition in, P. Verri: Dictionary of the international law of armed conflicts, ICRC, Geneva, 1992, p. 19.

(505) In addition to art. 6/5 Additional Protocol II, amnesty has been set forth in special agreements, domestic legislations, the decisions of the General Assembly and Security Council of the UN, European Union and NATO,=

However, it does not apply to war crimes and crimes against humanity for the following reasons:⁽⁵⁰⁶⁾

Primo, amnesty is incompatible with the well established principle under which states have the obligation to investigate, prosecute and punish perpetrators of crimes of war, crimes against humanity and genocide.

Secundo, it enables perpetrators of those barbarous and heinous crimes to evade criminal responsibility and punishments

= see, Henckaerts and Doswaldbeck: Customary international humanitarian law, op. cit., vol. I, pp. 611-612.

(506) See as well:

- D. Mulvihill: The legality of the Pardoning of paramilitaries under the early release provisions of Northern Ireland's Good Friday Agreement, Cornell I.L.J., Vol, 34, 2001, pp. 227-256.

- R. Boed: The effect of a domestic amnesty on the ability of foreign states to prosecute alleged perpetrators of serious human rights violations, Cornell I.L.J., Vol. 33, 2000, pp. 297-329.

It is worth recalling that in South Africa, there were two tendencies concerning acts committed under the regime of Apartheid, namely:

- those who favored a blanket amnesty; and
- those who were opposed to amnesties of any kind.

As a transactional solution, conditional amnesty was adopted by the interim constitution of 1993 "in respect of acts, omissions and offences associated with political objectives committed in the course of conflicts of the past. «The "Promotion of national unity and reconciliation Act. (Law No. 34 of 26 July 1995) established the truth and reconciliation commission whose task are:

- to provide for the Investigation and establishment of as complete a picture as possible of the nature, causes and extent of gross violations of human rights committed during the period from March 1, 1960 to December 6, 1993, as well as the fate or whereabouts of the victims of such violations;
- to grant amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective committed in the course of the conflicts of the past during such period;
- to afford victims an opportunity to relate the violations they suffered and take measures aimed to grant reparation to and rehabilitate and restore the human and civil dignity of victims; and
- to make a report about such violations and victims and recommend measures aimed at preventing such violations in the future. (see text in Leyla N. Sadat: International Criminal law and alternative modes of redress, op. cit., p. 172.)

resulting therefrom. In fact, amnesty puts the persons concerned out of the reach of law.

Tertio, amnesty for those crimes will entail the reprobation and indignation of the international public opinion.

Quatro, amnesty undermines the principle of the rule of law.

Finally, domestic amnesty may affect efforts to combat impunity of perpetrators of international crimes.

§VI- Acquittal of the accused:

It is well known that charging or cumulative charging of a person may not be proven. In fact, prior to the presentation of all of the evidence and even after that presentation, it is possible that the criminal tribunal cannot determine to a certainty which of the charge or charges brought against an accused may be retained. In fact, convictions should be based on the sufficiency of evidence and the absence of any doubt. As the Egyptian court of cassation put it "Al-Ahkam tobna ala algazm Walyaquin la ashak Watakhmeen" (English: "Sentences should be based on decisiveness and certainty, not doubt and guess).

This is applicable before international criminal tribunals:

- * Thus, it is well known that the Nuremberg tribunal pronounced the acquittal of some of the accused persons.
- * Moreover, for the first time an international criminal tribunal ordered the release of defendants immediately after reversing their convictions, for they have been convicted on uncorroborated eyewitness testimony.⁽⁵⁰⁷⁾
- * Finally, the ICTY pronounced the acquittal of a Bosnian Serb from genocide charges.⁽⁵⁰⁸⁾

(507) Judgment of appeals chamber of the ICTY, Case No. IT-95-16-A, October 23, 2001, Prosecutor V. Kupreskic.

(508) See as well T. Blumenstock: *The Judgement of the International Criminal Tribunal for the Former Yugoslavia in the Broanin Case*, Leiden J.I.L., Vol. 18, 2005, pp. 65-75. In the same decision the court did not uphold the concept of «joint criminal enterprise», for it is too broad to include a person structurally and geographically as remote as Broanin, and there was not agreement between the accused and the physical perpetrators (Loc. Cit.). =

§VII- Sanctions imposed against states responsible for the commission of international crimes:

Inevitably, sentence imprisonment is not possible vis-à-vis states responsible for the commission of international crimes (e.g., aggression, crimes of war, crimes against humanity or genocide). However, there are some sanctions which are more suited for states.

Those sanctions may be imposed:

A) By states, e.g., suspension of financial or economic assistance or loans facilities⁽⁵⁰⁹⁾, breaking off of diplomatic relations; or

B) By international organizations (IOS)⁽⁵¹⁰⁾: The later may impose sanctions upon reluctant or recalcitrant states. One can

= See also:

N. Jorgensen: The genocide acquittal in the Sikirica case before the ICTY and the coming of age of the guilty plea, *Leiden J.I.L.*, vol. 15, 2002, pp. 389-408.

The division court martial I in Switzerland acquitted "G" who was charged with a breach of the laws and customs of war and decided that he be awarded Fr. 30,000 as damages and the sum of Fr. 70,000 as non-pecuniary damages.

See M. Sassoli *et al.*: How does law protect in war, vol. II, op. cit., pp. 2063-2070.

(509) See, e.g.:

- Ahmed Abou-el-Wafa: The international protection of human rights, op. cit., pp. 219-223.

Norton : *L'incidence de la violation flagrante et systématique des droits de la personne sur les relations bilatérales du Canada* , *Etudes Internationales* , vol XXIV , 1993 , p 787 - 811.

Munnely: *Rebus redux - the potential utility of fundamental change of circumstances doctrine to enforce human rights norms*, *Cornell international law journal* , vol. 22, 1989 , p 147-169.

(510) With regard to Sanctions imposed by IOS, this author said:

«Admittedly ,IOS have many means of pressure against their members, in order to make recalcitrant members follow the right path . So , sanctions will have a deterrent and decisive impact on other members as regards their institutional obligations . Prima facie , the efficiency of sanctions depends on the degree of dependence of members on the organization : The more important the assistance of the organization to its members , the more efficient the sanctions will be.

However, IOS do not readily apply sanctions even when they are provided and even when there is a clear-cut infringement or a manifest violation of their constitutions by member states. Thus, sanctions lie =

mention, e.g., powers of the Security Council under chapter VII UN charter. The council has the right to impose two kinds of measures, namely⁽⁵¹¹⁾:

1- Measures not involving the use of armed force (art. 41), i.e., non-military measures, in order to bring sufficient pressure upon the state concerned to induce it to follow the right path⁽⁵¹²⁾. Such measures may include complete or partial interruption of economic relations⁽⁵¹³⁾ and of rail, sea, air, postal, telegraphic, radio and other means of communication, and the severance of diplomatic relations⁽⁵¹⁴⁾.

2- As for military enforcement measures (art. 42)⁽⁵¹⁵⁾, they may be imposed by the SC should it consider that the non military

= dormant in the great part of cases within and without contemporary IOS' Cf. A. ABOU EL WAFI: A manual on the law of international organizations, op. cit., p. 179 .

(511) Ibid, pp. 397-399.

(512) Before the end of the cold war, non military sanctions provided by chapter VII were imposed in only two cases : a trade embargo against Rhodesia (1966) and an arms embargo against South Africa (1977) . After the end of the cold war, measures short of the use of armed force were repeatedly applied by the SC in many cases .e.g.,: 1- by its Res. 748(1992) , the council imposed some non military sanctions against Libya; 2 -by its Res. 757,787 and 820 (1993), the council imposed an embargo on Yugoslavia; 3- by its Res.733 (1992), the SC imposed a general and complete embargo on all deliveries of weapons and military equipment to Somalia; 4 - by its Res. 1011 (1995), the council prohibited the sale or supply of arms and related materials to non governmental forces in Rwanda; 5- by its Res. 1070 (1996), the council imposed aircraft sanctions on Sudan.

(513) In this regard, the freeze or blocking of foreign assets has been decided several times by the SC since 1990 , see also G. Burdeau: Le gel d'avoirs étrangers, JDI, 1997, p 5-57 .

(514) See, Ahmed ABOU-EL-WAFI : The breaking off diplomatic relations, Dar Al Nahda Al -Arabia, Cairo, 1991-1411, 231 pp (In Arabic).

(515) Art. 42 has become a dead letter. In fact, it has never been widely applied by the Security Council. The Council has limited itself to authorizing states or a group of states to undertake enforcement action, .e.g., in the Korean peninsula in 1950 and in Kuwait in 1990. It has as well authorized member states to undertake enforcement action, if necessary, to facilitate humanitarian relief in Somalia and Rwanda, as well as to facilitate the restoration of democracy in Haiti.

In many occasions, the council decided to make recourse to peace-keeping operations to observe, e.g., a cease-fire or an armistice or to =

measures (art. 41) would be inadequate or have proved to be inadequate. In such circumstances, the council may take such action by air, sea or land forces as it deems necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade and other operations by air, sea or land forces of members of the UN⁽⁵¹⁶⁾.

Obviously, these sanctions should be applied according to the prevailing circumstances. Consequently, they must not be considered as adjacent points on a continuum, permitting easy transition from one to the other⁽⁵¹⁷⁾.

The charter provided the SC with the necessary means to implement those powers:

On the one hand, all members of the UN undertake to make available to the SC, on its call and in accordance with special agreements, armed forces, assistance and facilities, including rights of passage, necessary for maintaining international peace and security (art. 43)⁽⁵¹⁸⁾.

On the other hand, the charter established a Military Staff Committee to advise and assist the SC on all questions relating to its functions for the maintenance of international peace and security, the employment and regulation of armament and disarmament (art. 47).

= occupy a buffer zone between the parties. These forces are provided with weapons of a defensive character, which are to be used only in self-defense. Consent of the parties concerned constitutes the main difference which distinguishes peace-keeping operations from enforcement action.

(516) This listing, it seems, was not intended to be exhaustive.

(517) Referring to the sanctions imposed by the SC, the Secretary General of the UN said: «Concern has been expressed about the negative effects of such measures on the most vulnerable groups among the civilian population, as well as their collateral effects on other states», Cf, K. Annan: Renewal amid transition, Annual report on the work of the organization 1997, p 36.

(518) Moreover, in this respect, the specialized agencies undertook to assist the SC. Thus, e.g., art. VII of the agreement between UN and WHO states that the latter: «agrees to co-operate with the council in furnishing such information and rendering such assistance for the maintenance or restoration of international peace and security as the security council may request» Cf, «Basic documents», WHO, Geneva, 1996, p. 44.

CHAPTER V ISLAM AND CIL

§I- Introduction:

Islam appeared in Arabia in the seventh century AD, approximately fourteen centuries ago. The messenger of Islam is Mohamed, peace be upon him (PBUH). The principles and rules of Islam are mainly embodied in the Quran, the holy book, and the Sunna of the Prophet. All Muslims are considered as one Ummah. The bond, which unites them, wherever they are, is their common faith. The Prophet says: "A believer must hold to another believer as one solid edifice, each part consolidating the other."

Since the dawn of human civilization, religions have played, and still are playing, a leading role in the formation of our global community. All religions are closely bound to particular cultures. For example, Islam "was a revolt against empty theological polemics."⁽⁵¹⁹⁾ It is "a religion and a civilization (culture), both interpreting each other to some extent."⁽⁵²⁰⁾

In its arbitral award between Eritrea and Yemen, the tribunal stated:

As it has been aptly put, in today's world, it remains true that the fundamental moralistic general principles of the Quran and the Sunna may validly be invoked for the consolidation and support of positive international law rules in their progressive development towards the goal of achieving justice and promoting the human dignity of all mankind.⁽⁵²¹⁾

That being so, the study of CIL in Islam necessitates that we focus on the following points:

- principles of CIL in Islam.
- Classifications of crimes in Islam.

(519) Thomas Arnold: *the Preaching of Islam*, p. 67.

(520) M. Hofmann: *Basic Cultural Factors of Muslim Society: A View from Without*, in "Towards a Civilized Project for the Renaissance of the Muslim World," Eleventh General Conference of the Supreme Council for Islamic Affairs, Cairo, 1420-1999, p. 7.

(521) *Award of the Arbitral Tribunal in the Second Stage of the Proceedings (Maritime Delimitation)*, p. 28, para. 94.

- How does Islam combat international crimes.
- A concluding remark.

§II- Principles of CIL in Islam:

As in the case in contemporary CIL, there are, in Islam, some principles related to international crimes. They, *inter alia*, are:

A) «No bearer of burdens can bear the burden of another»:

Prima facie, this principle is the equivalent of the principle of individual criminal responsibility in present CIL and domestic penal legislations.

B) The presumption of innocence:

In fact, an accused is presumed to be innocent until proved guilty according to law. This exists in Islam according to the concept of *Istishab*, i.e., there is a presumption that a state of affairs existing in the past continues to exist until a change is proved.

C) Avoidance of *shubha* (resemblance, suspicions and doubts):

In fact, the prophet said: «Avert *hudud* in case of *shubhat*. For it is better for the imam (the ruler) to do a wrong in pardon than to do a wrong in punishment».

Evidently, this Islamic principle equals the contemporary principle in CIL under which "A person shall be convicted only on the basis of proofs beyond any reasonable doubt", or the principle according to which "judgments should be based on decisiveness and certainty, not doubt and guess".

E) The principle of legality:

The principle of legality *nullum crimen nulla poena sine lege* exists in Islam. The crimes and punishments of the *hadd* and *qisas* crimes are provided by the *shari'a*. As for the *ta'zir* crimes which comprises the crimes for which the *shari'a* does not provide an express punishment the punishment is decided by the Imam (ruler) or his delegates.

F) Acceptance of Good Deeds and the Prohibition of Bad Ones

Muslims must enjoin what is right and forbid what is wrong. The Quran says: "You are the best of peoples, envolved for mankind, enjoining what is right, forbidding what is wrong and believing in

God" (2: no). The Prophet states: "A Muslim who sees wrong must change it with his hands; if he cannot, with his tongue; if he cannot, with his heart and this last way is to be considered the weakest form of belief." He continues: "By God, you must order good deeds, prevent people from doing wrong deeds, fight the oppressor, or else God will cause you to lock each others hearts" (that is, against the right path). Under this heading, one can also add the principle under which "[i]t is allowed to follow a non-Muslim in good deeds," not bad ones. For similarity as regards what benefits human beings does not harm.

Undoubtedly, international crimes, being amongst the bad deeds, they are totally prohibited under this general principle of Islamic law.

G) No Harm and No Harming:

Under a well-established principle of international as well as internal orders: "He who causes a harm must repair it." Accordingly, harm should be averted and repaired. In Islam, harm, even unintentional, should be averted, this is a simple application of the principle: "No harm and no harming" (that is, "no harm and no infliction of harm"). Furthermore, "[i]f necessary then the lighter harm is preferred to the heavier one," "the lesser harm is preferred to the more serious one," and the "avoidance of greater evil by choosing the lesser one."

Accordingly, a person is forbidden from doing an act that is originally permitted for him, if, by his doing it, another person would be seriously harmed or a general harm would happen. Thus, Islam allows for conduct that either provides (i) an absolute benefit or (2) has benefits that are greater than its harm. Moreover, Islam forbids any conduct that (i) has an absolute harm or (2) is more harmful than it is useful.

The principle "no harm and no harming" means two major consequences in CIL, namely:

- On the one hand, international crimes are wholly prohibited according to Islam. For they cause the most serious harm to individuals and their belongings.

- On the other hand, during hostilities, invoking military necessities as a justification for an act or an omission is only possible if they satisfy the following test: avoidance of the greater evil by choosing the lesser one. This means that military necessity cannot be resorted to if it is more harmful than it is useful.

H) Non-Execution of Illegal Orders:

In international law, superior orders do not completely relinquish criminal responsibility for war crimes: The commission of war crimes in the execution of an order by the government or by a superior does not relieve the perpetrator from responsibility. However, it may be considered to be a mitigating circumstance. Under the statute of the International Criminal Court (Article 33), as mentioned above, the perpetrator may be relieved of criminal responsibility if:

- he was under a legal obligation to obey the orders in question;
- he did not know that the order was unlawful; or
- the order was not manifestly unlawful (it is worth recalling that orders to commit genocide or crimes against humanity are manifestly unlawful).

The Prophet says that no-one is obliged to obey the orders of any creature if the latter's orders amount to disobedience to the creator. Moreover, the prophet points out that "God ordered you to perform certain acts, do not waste them. He set out limits, do not cross them. He forbade you from certain things, do not commit them. He kept silence as regards certain things out of mercy do not look for them." The Prophet also states: "A believer should obey as long as he is not ordered to sin. If he is ordered to sin, then he should not listen or obey."

Accordingly, Islam is in total harmony with the principle of CIL according to which the commission of an international crime in execution of a superior's order is no defence (no excuse).

I) Irrelevance of official capacity:

It is related, e.g., that Osama Ibn-zeid asked the prophet forgiveness for a woman who committed stealing. The prophet said: "You want to violate one of the God's rules; those before us perished because they left an influential man (dignitary or honorable) to go

free if he stole, and if a weak (a common man) stole they punished him. By God, if my own daughter Fatma stole, I would cut her hand."

Unlike some systems of law that declare that the king can do no wrong, and in conformity with CIL which does not accept official capacity or immunity as a defense, Islamic law does not give this inviolability to the ruler for acts done in his private capacity. In such a case, he is as liable to be tried before an ordinary court as any other Muslim citizen commoner. Thus, authors of the biography of the prophet consecrated a chapter entitled "His Giving Retaliation (*lex talionis*) against His Own Person." The caliphs also heard cases against their proper persons.⁽⁵²²⁾ In short, in Islam, there is no discrimination between the ruler and the ruled, the rich and the poor, the noble and the commoner, the conqueror and the subject, the weak and the strong, the black and the white.

J) Collective Security and international cooperation:

In current international law, international organizations are *a. forum conveniens* for the application of collective security. For example, the Security Council of the United Nations, acting under Chapter VII, may apply some military or non-military measures to restore international peace and security. Moreover, under the Pact of the League of Arab States (Article 6), the council may, if an aggression occurs against a member state, determine the measures necessary to repulse the aggression.

The Quran highlights the fundamental law of collective security, mutual repulse or reciprocal self-defence, as follows: "And were Allah not to repel some people by another, the earth would have been utterly corrupted. But Allah is Bounteous to all mankind" (Al-Baqara "The Cow": 251). The Quran also states: "If two groups among the believers come to fight one another, promote peace between them, but if one of them transgresses beyond the bounds against the other, fight against the one that transgresses till it returns to God's order; But if it complies, then make peace between them with justice, and be fair: for God loves those who are fair and just (XLIX: 9). It is to be noted that, in his book *La sagesse*

(522) For more examples, see: Ahmed Abou-el-Wafa: *A Book on the Rules of International Law and Relations in Islamic Shari'a*, Vol. 6: Human Rights in Islamic Shari'a, op. cit., pp. 123-32.

de l'orient, Edmond Briva comments after having read this verse: "Il mériterait d'être inscrit sur le palais de Genève."⁵²³

It is believed that this verse lays down six fundamental principles, namely (1) the principle of the rule of law; (2) the principle of the prohibition of the illegal use of force; (3) the principle of the peaceful settlement of disputes; (4) the principle of the equitable and fair settlement of disputes; (5) the principle of a collective response to the aggressor (or that of a collective self defence); and (6) the principle of the application of a single criteria against the aggressor and the prohibition of a double standard in such a case.

Moreover, Anas (a companion of the prophet) reports the Prophet as saying: "Give aid to your brother be he the oppressor or the oppressed." Anas states: "O Messenger of Allah, we give him aid when he is oppressed, but how can we give him aid if he is oppressing? The Prophet replies: "By stopping him." This dialogue means that an alliance to repel the oppressor is permitted, whereas granting assistance to him is prohibited.⁵²⁴ Such a principle is justifiable. When the oppressor is sure that he will not be punished or that the oppressed will not have access to the ruler, he becomes even more oppressive and will transgress all bounds.

The principle of collective security and international cooperation is justifiable under another principle of Islamic law, whereby "[h]e who ignores the right is a silent devil." Furthermore, the Prophet says: "A Muslim is the brother to any other Muslim; he should not wrong him or leave him in troubles (by abstaining from helping him). He who helps his brother Allah will certainly help him."

The Prophet himself accepted the principle of collective security in what is known as the *Hilf Al-Fudul* (Alliance of Fudul), which was concluded for the following reason. The war of the "Fijjar," which was started by the murder of a member of the

(523) Quoted in, *A. Arabi: L Islam et la guerre a l'epoque du prophete Mahomat*, these, Lausanne, Ambilly, 1954, p. 48.

(524) *Ibn Hagar Askalany: Fath Al-Bari*, Dar Al-Manar, Cairo, 1999, vol. 6, pp. 599-600 (in Arabic). The Quran also says: "Now the man of his own religion appealed to him against his foe and Moses struck him with his fist and killed him" (XXVIII: 15).

Hawazin tribe and which lasted for four years, led the Meccans to reflect on the results that lawlessness had brought upon them. Mohamed (the prophet of Islam) and the other leading members of his clan (Bani Hashim and Bani Al-Mut-talib) and the leaders of the clans of Bani Zuhra and Bani Taym formed themselves into a league (that is, an alliance) and pledged to defend the weak and champion the oppressed and to vindicate their rights against tyranny and aggression. This league, which came to be known as Hilf Al-Fudul, exercised such efficient protection that for a long time the mere threat to apply it or to have recourse to it was sufficient to repress lawlessness and afford redress to the helpless or the defenceless. Mohamed was very proud of his membership in this alliance and used to say: "I would not have the riches of the earth in exchange for my membership of it."

Prima facie, this principle of collective security means that all members of the international community should fully cooperate and adopt measures necessary for combating international crimes.

K) The End Does Not Necessarily Justify the Means

In his book, *The Prince*, N. Machiavelli (1469-1532) adopted his well-known motto: "The end justifies the means." In explaining it, he says: "Let princes aim at conquering and maintaining the state, and the means will always be judged honourable and praised by everyone."⁽⁵²⁵⁾ With respect to the necessity of possessing deceptive character, Machiavelli states: "It is necessary [for the prince] to know well how to disguise this characteristic and to be a great pretender and dissembler ... It is unnecessary for a prince to have all the good qualities ... But it is very necessary to appear to have them ... to appear merciful, faithful, humane, religious, upright, and to be so, but with a mind so framed that should you require not to be so, you may be able and know how to change to the opposite."⁽⁵²⁶⁾

In Islam, the end does not necessarily justify the means. In fact, a good end necessitates a good means, which is the Islamic motto.

The Machiavellian philosophy is not accepted by Islam since:

- Islam prohibits cheating;

(525) *Niccolo Machiavelli*, *The prince*, translated by *W.K. Marriott*, London: J.M. Dent and sons Ltd., p. 144.

(526) *Ibid*, pp. 142-44.

- Islam orders its followers to observe justice and equity;
- Islam enjoins good deeds and prohibits bad ones; and
- Under an Islamic rule, "[w]hat leads to a prohibited thing is prohibited in itself." God says: "Making lawful for them the good things, and prohibiting for them the wicked things" (Al-A'araf: 157).

In other words, in Islam, whatever leads to the Haram (the unlawful) is in itself Haram. In fact, if something is, *per se*, prohibited, then everything that leads to it is also prohibited.

Thus, Islam requires that the means and the end must be lawful and legitimate - that is, the lawful means does not justify the illegal end, and the lawful end does not justify the illegal means. This principle is primarily justified by the fact that "[e]nds and means are intricately connected; a good end can never be achieved through bad means."

§III- Classifications of international crimes in Islam:

A) In general:

In Islam, crimes are of three kinds, namely the hadd and qisas crimes (prescribed by the Shari'a) and the ta'zir crimes, left to the discretion of the ruler who, in the criminal procedure, prosecution and determination of the punishment should apply the general principles of Islam.

In a reply sent to the General secretariat of the UN, Saudi Arabia says:

«It is a basic principle of the Islamic Shariah that whatever leads to the forbidden is itself forbidden. Terrorist acts are forbidden and are among the most serious crimes in the Shariah texts. Therefore, in accordance with the norms of the Islamic Shariah, anything that is conducive to or that facilitates the commission of such acts is also forbidden, and this includes the provision or collection of funds to be used for terrorist acts. Indeed, the penalty for those who contribute to a terrorist act by providing or collecting the necessary funds can be the same as that applied to the perpetrator of the terrorist act itself».⁽⁵²⁷⁾

(527) National laws and regulations on the prevention and suppression of international terrorism, UN, New York, 2004, Part II (M - Z), p. 263.

B) The attitude of Islam with regard to some international crimes:

We will study, here, the following crimes: crime of aggression, crime of international terrorism and the crime of genocide.

1- Crime of aggression:

Clearly, war holds a great place in history. The gravity of the phenomenon of wars and of the suffering that they cause are beyond any doubt.⁽⁵²⁸⁾ For this reason, war is now prohibited. War is, *par excellence* and *per definitionem*, murderous and destructive. The sorrows and sufferings of war are well known. With respect to Jihad, a Muslim scholar explains: "Jihad in Arabic means the exerting of one's utmost power in repelling an enemy."⁽⁵²⁹⁾ Accordingly, as far as its linguistic origins are concerned, Jihad is far from being an offensive war. Before and at the beginning of Islam there was no law but that of the powerful. The principle was that: "the strong swallow the weak."

The study of Jihad in Islam necessitates that we refer to: (i) the opinions of scholars; (2) the cases in which war is prohibited in Islam; and (3) the cases in which Jihad is permitted in Islam.

a. Opinions of Scholars

There are two leading views. The first is that war is the basis of relations between Muslims and non-Muslims. Certain authors consider that relations between Islam and other states are primarily based on war. In fact, some Western scholars describe Islam as a "warrior religion." In this respect, L. Milliot affirms: "*Les relations exterieures de la communauté musulmane étant ainsi définies par la guerre*".⁽⁵³⁰⁾ Nys explains: "*La guerre sainte, le Djihad, doit être entreprise contre tous les infidèles qui ... refusent d'embarasser*

(528) Thus, in regard to the use of force by the states members of NATO against Yugoslavia, the ICJ states that it is: "Profoundly concerned with the use of force in Yugoslavia." And that: "such use raises serious issues of international law" ICI, Rep., 1999, *Case Concerning Legality of the Use of Force (Yugoslavia V. Belgium)*, para, 17.

(529) *Al-Raghib Al-Asphahany*: *Al-Mufradat fi Ghareeb Al-Qur'an* (In Arabic).

(530) L. Milliot: *La conception de l'Etat et de l'ordre legal dans l'Islam*, *RCADI*, Vol. 75, 1949, p. 602.

l'Islamisme".⁽⁵³¹⁾ The second view is that peace is the basis of relations between Muslims and non-Muslims, recourse to war being the exception. According to this ideology, in Islam, only "a war which meets the tests of Jihad, i.e., one which has its objective the preservation of Islamic faith and community, may be undertaken."¹¹⁶ Moreover, D. Schwartz says: "Islamic law places strict limitations upon a state's exercise of military force. The western notion that Islam encourages or contributes to the current violent upheaval in the Middle East is absolutely inaccurate. The shariah does not counsel aggression."⁽⁵³²⁾ This second view is the one that had now been adopted by the overwhelming majority of Muslim scholars. It is understood from the cases in which war is prohibited and those in which war may be waged.

b. Cases in which War Is Prohibited in Islam

According to the jurist-philosopher Al-Farabi, there are four kinds of forbidden war, namely: (i) wars motivated by the ruler's personal advantage, such as lust for power, honour, or glory; (2) wars of conquest waged by the ruler for the subordination of peoples other than the people of the city over which he presides; (3) wars of retribution - the object of which can be achieved by means other than force; and (4) wars leading to the killing of innocent men for no reason other than the ruler's propensity or pleasure for killing.⁽⁵³³⁾ To this list, one can add three other types of war, namely: (i) waging war in cases other than those mentioned below (that is, cases in which a recourse to Jihad is permitted); (2) waging war in violation of a treaty prohibiting the use of force to settle a dispute; and (3) waging war against neutral states.

c. Cases in which Jihad is Permitted in Islam

Islam is not eager to wage war. The prophet says: "Do not be eager to meet enemy, and ask God for safety." In fact, when Allah sent His Apostle and ordered him to call all people to embrace his

(531) Nys: *Le droit des gens dans les rapports des Arabes et des Byzantins*, R. de DI et de législation comparée, 1894, p. 464; G.H. Bousquet: *Du droit musulman et de son application effective dans le monde*, imprimerie Nord-Africaine, Alger, 1949, p. 100.

(532) David A. Schwartz: *International Terrorism and Islamic Law*, Columbia Journal of Transnational Law, vol. 29, 1991, p. 641.

(533) Khadduri: *The Islamic Conception of Justice*, 1984, p. 172.

religion, Allah did not allow the prophet to fight until the believers were oppressed and tyrannized. At that very time, Allah permitted the Muslims to fight their enemies. In this context, the Quran says: "To those against whom war is made, permission is given (to fight), because they are wronged; and verily, God is the Most Powerful for their aid." This verse was the first to be revealed on the subject of fighting.

This being so, war is legitimate in Islam only in the following cases:

- In the event of an aggression against the Muslim state (self-defence). War in Islam is primarily of a defensive nature. It suffices to cite as an example Chapter 16: II of the holy Quran: "Fight in defence of the cause of God against those who attack you, but begin ye no hostilities. Verily, God loveth not the aggressors. And if they (i.e. the enemies) incline towards peace, incline thou (the prophet) also to peace, and have trust in God." Moreover, the Quran states: "And fight for the cause of Allah those who fight you, but do not commit aggression, for Allah loves not the aggressors" (Al-Baqara "The Cow": 190). Accordingly, resorting to combat "[h]ad been decreed to ward off mischief, because if the wicked were left to perpetrate wanton destruction without any hindrance or deterrent, confusion and corruption would spread throughout land and sea."⁽⁵³⁴⁾
- It is worth recalling that, in case of a sudden attack by enemies on a Muslim country, the Muslims of that country must repel them. If they cannot, Muslims who are nearest to the enemy must help them. If all fail, it becomes incumbent upon all other Muslims to fight until the enemy is repulsed. Accordingly, self-defence in Islam may be individual or collective.
- To liberate occupied Islamic territory. Jihad becomes a Fard-Ain if Dar Al-Islam is occupied. In such a case, every Muslim, whether his own country is close to, or remote from, the occupied territory, should participate, in one way or another, in repulsing the aggression or the occupying authority. In this

(534) *Abu Zahra*: The Jihad (striving), Al-Azhar, Fourth Conference of the Academy of Islamic Research, Cairo, 1388-1968, p. 50.

context, the Quran states: "And slay them and turn them out from where they have turned you out: for tumult and oppression are worse than slaughter; but fight them not at the Sacred Mosque, unless they (first) fight you there; but if they fight you, slay them." Even, war in Islam may be waged not only to protect Muslim mosques but also to save buildings pertaining to other religions - that is, churches, synagogues, and cloisters. In this regard, Chapter XXII, verse 40, of the holy Quran says: "Did not God check one set of people by means of another, they would surely have been pulled down monasteries, churches, synagogues, and mosques, in which the name of God is commemorated in abundant measure."

- Use of force to defend an ally, victim of an aggression. The striking example, in this respect, is the truce of Al-Hudaybiyah, which was concluded between the prophet and Quraysh. The fourth condition of the truce permitted third parties to choose sides as they wished. Accordingly, the Banu-Bakr allied themselves with Quraysh, and the Khuza'ah tribe with the prophet. In the times of Jahiliya, the Khuza'ah had been the allies of Abd-Al-Muttalib, and they sought to renew their pledge as given to the prophet's grandfather. The prophet reaffirmed the terms of the alliance and renewed the pledge, adding two conditions: first, not to aid the Khuza'ah if they turned oppressors and, second, to aid the Khuza'ah if they became oppressed. Two copies of the pact were then drawn up, and each party was handed one. At that time, the Khuza'ah had not been converted to Islam. They were still polytheistic in their beliefs.

2- Crime of international terrorism:

We will refer first to the Western view of "terrorist Islam" and then to arguments that prove that the said view is ill-founded.

a. *Western View of "Terrorist Islam"*

It is well known that acts of terrorism have existed *ab intiquo*. They have developed to the extent of constituting a severe menace to the life and safety of persons as well as the security of property. Such acts are increasing on an alarming scale. They are inadmissible under present international law. With respect to this phenomenon,

one can safely say that Islam has no link with such terrorist acts. It has been well established that Islam⁽⁵³⁵⁾ is a tolerant religion, which prohibits illegitimate violence, intimidation, and terror. However, in the western world, some writers make a *stricto sensu* relationship between Islam and terrorist acts that occur in Muslim and non-Muslim states. They think that Islam is responsible for these acts.⁽⁵³⁶⁾ This notion is gaining currency among Europeans and other non-Muslims, without anyone caring to debate it or to judge of its impact or repercussions.

b. Arguments Proving the Fallacy of the "Terrorist Islam" View

Prima facie, this tendency is untenable and ill-founded for the following reasons:

1. Islam prohibits any unjustified or illegitimate violence. The following Hadiths are relevant: (i) "Kindness is preferable to Allah in all affairs"; (2) "Allah is Kind, and thus He likes kindness. He gives reward for kindness more than what He gives for hardness (harshness) or other acts"; (3) "Kindness decorates anything whenever existent, and it distorts everything, whenever removed;" and (4) "He who has been given his share of kindness is given his share of blessings (goodness) while those who are prevented from their share of kindness are deprived of their share of blessings" (goodness). Even Islam is considered to be *a sine qua non instrumentum* to

(535) In regard to Islam, it has been highlighted that "with regard to religious tolerance, Islam seems to have a better record than Christianity" (*H. Bielfeldt: Muslim Voices in the Human Rights Debate, Human Rights Quarterly*, vol. 17, 1995, p. 597).

(536) Thus, in: "Terrorism: How the West Can Win", B. Netanyahu ed. (1986), we can find the following articles: *M. Khadduri: Political Terrorism in the Muslim World*; Lewis: *Islamic Ambivalence to Political Violence-Islamic Law and International Terrorism*, *German Y.I.L.*, 1988, pp. 307-336. Moreover, a writer speaks of "[t]he threat of Islamic fundamentalism" and of "the increasing and menacing threat posed by Islamic fundamentalists" (*M. Curtis: International Law and the Territories*, Harvard I.L.J., vol. 32, 1991, p. 467-68). Another writer says: "The term (Islamic revivalism) evokes various associations: antiwestern sentiment, terrorism, factional struggles, a return to traditions, the veil, the Koran (*K. Hamlin: The Impact of Islamic Revivalism on Contract and Usury Law in Iran, Saudi Arabia and Egypt*, *Texas I.L.J.*, vol. 22, 1987, p. 352).

combat terrorism. In this respect, the concept of Islam is clear. On the one hand, it is forbidden to attack the life of others. Thus, the holy Quran says: "Take not life which God Hath made sacred, except by way of justice and law" (6/151). It also says: "Those who invoke not, with Allah, any other God, nor slay any other life as Allah has made Sacred, except for just cause, nor commit fornication; and any that does this (not only) meets punishment" (Al-Furqan: 68). On the other hand, according to the holy Quran, the protection of the lives of others (and vice versa) is a matter that belongs to humanity in its entirety. Thus, the Quran says: "That if any one slew a person - unless it be for murder or for spreading mischief in the land - it would be as if he slew the whole people: and if any one saved a life, it would be as if he saved the life of the whole people."

This verse of the Quran connotes three consequences, namely (1) that terrorists are to be considered as "*hostis humane generis*." They must be reckoned as outside the pale of humanity. Their existence is considered injurious to all mankind; (2) that this inevitably means that respect of human life, in Islam, is a duty *erga omnes*, not only a duty *si omnes*; (3) that the holy Quran considers homicide to be an attack against all mankind and saving a man's life as saving the lives of all mankind (that is, terrorism ought to be considered as a *delicta juris gentium*). In this regard, one can say: "*Bref, l'Islam a pour but la préservation de la valeur absolue de la vie, étant donné son caractère précieux: la vie humaine doit toujours être respectée et protégée dans tous les cas où aucune raison valable ne justifie le contraire. Elle est en effet un don qui intéresse l'humanité toute entière. Cela exige, toujours du point de vue de l'Islam, l'irviolabilité des corps humains afin de préserver la vie de l'individu et, par ce biais, de la collectivité humaine*".⁽⁵³⁷⁾ Thus, Allah "equates the killing of an innocent person to that of annihilating the entire human kind."

(537) *Ahmed Abou-el-Wafa: Le devoir de respecter le droit à la vie en droit international public, Revue Egyptienne de droit international, vol. 40, 1984, p. 69.*

- 2- Moreover, the Prophet says: "A Muslim is not permitted to frighten another Muslim"; "Do not frighten a Muslim. For the frightening of a Muslim is a flagrant transgression (injustice); "No one should point to his brother with a weapon. For, he would not know that Satan might drop it from his hands and he would fall in a ditch of the fire"; "The first cases to be judged between people on the Day of Resurrection will be those of bloodshed"; "When anyone is killed unjustly, a portion of the sin falls upon the elder son of Adam, for he was the first to commit murder"; and "I was sent to preach a merciful religion, a gracious religion." The prophet as well says: "Surely I have been sent forth only to perfect righteous morals" (Makarem Al-Akhlak).
- 3- In this context, a Western author states: "An appeal to the Shari'ah doctrines might well provide an effective counter method to international terrorism." He adds that "Islamic law condemns terror-violence, and a terrorist who invokes that law may be legally wrong." This is mainly because "respect for human life and property is a fundamental principle of the Shari'ah." He concludes: "Islamic law coordinates, integrates and legislates against that which western jurists have so far failed to control. The Shari'ah is a resource the west must no longer overlook."⁽⁵³⁸⁾
- 4- In Islam, terrorism is regarded as the most inhumane practice. The offence is heavily punishable. The Quran says: "The punishment of those who wage war against God and His Apostle, and strive with might and main for mischief through the land is: execution, or crucifixion, or the cutting off of hands and feet from opposite sides, or exile from the land: that is their disgrace in this world, and a heavy punishment is theirs in the Hereafter" (V: 33). Moreover, in Islam, there is no impediment to the extradition of criminals. A classical example is that of the year 31 H (more than 1,400 years ago) when a pact was concluded whereby the King of the Nubians (Sudan) accepted the condition: "It will also be incumbent upon you to repulse towards the territory of Islam all fugitive slaves who come to

(538) D.A. Schwartz: International Terrorism and Islam, Columbia J. of Transnational Law, vol. 29, 1991, pp. 630, 650-51, 652.

you but who belong to Muslims. Further, you will repulse every Muslim combating Muslims and taking refuge with you. You shall return him from your territory towards the territory of the Muslims. You shall not incline to him nor protect him." A leading scholar affirms: "Against western claims that Islamic fundamentalism feeds terrorism, one powerful paradox of the twentieth century is often overlooked. While Islam may generate more political violence than western culture, western culture generates more street violence than Islam. Islam does indeed produce a disproportionate share of mujahideen, but western culture produces a disproportionate share of muggers."⁽⁵³⁹⁾

3- The crime of Genocide:

Islam aims to maintain the five «universals»⁽⁵⁴⁰⁾ («fundamentals» or «essentials»), namely religion, life (the soul), reason (the brain, mind), descendants (pogency), and property (money, the wealth). In Islam, man is God's vicegerent on earth. This belief is well illustrated by the following verses of the Quran: «Behold, your Lord said to the angels : I will create a vicegerent on earth. They said : will You place therein one who will make mischief therein and shed blood ? Whilst we de celebrate Your praises and glorify Your Holy (Name). He said, « I know what you know not. » And He taught Adam the names of all things, then he placed them before the angels, and said : « Tell me the names of these if you are right, » They said ; ‘Glory be to You : of knowledge we have none, save what You have taught us : in truth it is You who is perfect in knowledge and wisdom ; He said : « O, Adam, tell them their names. » When he had told them, God said, « Did I not tell you that I know the secrets of heavens and earth, and I know what you reveal and what you conceal ? » And behold, we said to the angels « Bow down to Adam, » and they bowed down : not so Iblis, he refused and was haughty ; he was of those who reject faith » (2 : 30-34). In Islam, there are two principles according to which « [t]he inviolability of a Muslim is better than the inviolability of the territory (Dar) » and « [a]

(539) A. Mazuri: *Islamic and Western Values*, Foreign Affairs, 1997, p. 130.

(540) This is, in my opinion, the best translation of the Arabic word : « Kuliaat. » The translation is that of *Dr. R. Gilani: The Reconstruction of Legal thought in islam*, Idara Turjman Al-Quran, La Hore, 1977, p. 365.

Muslim is not permitted to protect himself by sacrificing the soul of another person who is as inviolable as him.»⁽⁵⁴¹⁾

In its preamble, the universal declaration of human rights states that the «recognition of the inherent dignity ... is the foundation of freedom, justice and peace in the world.»⁽⁵⁴²⁾ Fourteen centuries before the universal declaration of human rights, Islam affirmed the same «*fons et origo*» of these rights. In fact, respect for human dignity is deep-rooted in Islam. It affirms that each human being enjoys his human dignity, irrespective of his race, colour, or religion. It suffices to mention that the holy Quran says : « And we have honoured the sons of Adam » (XVII : 70) ; « Surely, we have created man in the best stature » (XCV : 4) ; and « We have provided them (the human-beings) with transport on land and sea ; given them for sustenance things good and pure ; and conferred on them special favours above a great part of our Creation » (XVII : 70). Moreover, the prophet says that « [i]t is not permitted that believers humiliate themselves to others. » The prophet also states : « You all come from Adam, and Adam was created from dust. An Arab has no merit over a non-Arab, as well a white has no merit over a black, except by piety. » There are, in this regard, two islamic rules, namely: (i) « The human being is honoured even if he is non-Muslim (Kafir) » and (2) « The human being is the building of Allah, so it is forbidden to destroy the building of Allah.»⁽⁵⁴³⁾

Accordingly, genocide is prohibited by Islam. For that reason, Cairo declaration on human rights in Islam, adopted by the organization of Islamic conference in 1990, provides:

«It is forbidden to resort to such means as may result in the genocidal annihilation of mankind» (art. 2/b).

(541) *Ahmed Abou-el-Wafa* : A Book on the Rules of International Law and Relations in Islamic Shari'a, *op. cit.*, vol. 5, p. 331 ; vol. 15, pp. 261 ; vol. 6, p. 343 ; vol. 15, pp. 265-66.

(542) *Ahmed Abou-el-Wafa* : The International protection of Human rights, *R. Egyptienne de Droit International*, 1998, pp. 55-56.

(543) *Ahmed Abou-el-Wafa* : A Book on the Rules of International Law and Relations in islamic Shari'a, *op. cit.*, vol. 2, p. 209 ; vol. 15, pp. 257, 292p vol. 13, pp. 227.

§IV- How does Islam combat international crimes:

There are, *inter alia*, four means by which Islam combats international crimes, namely :

A) Criminalization of all international criminal acts, including participation, assistance:

Muslim jurists have known the principle of the international protection of human rights for many centuries and the prohibition of the commission of international crimes. Imam Sarakhsi (in his book *Al-Mabsut*) recognized the principle by saying:

« If the king of the dhimmis asked to be accorded full authority to rule his subjects: to kill and crucify whom he likes to be put to death, and to resort to other tyrannical measures which are inappropriate to be enforced in the land of Islam, his request should be wholly refused; since the recognition of injustice, while it is being possible to have it eradicated, is strictly Haram (Forbidden). This is also due to the fact that the dhimmi abides by the rules of Islam in his transactions. To stipulate any term that is contradictory to the covenant is null and void. If peace is made, together with the obligations accorded to dhimmis, terms included, proving to be contrary to the Islamic principles, cease to be effective; since the Prophet says, "Any condition or term, not explicitly mentioned in the Book of God (i.e., the Qur'an) is null and void."⁽⁵⁴⁴⁾

This saying means that :

- (1) it is forbidden to have relationships with those who violate human rights and fundamental freedoms;
- (2) it is indispensable to adopt all possible measures to remove every violation of human rights and fundamental freedoms since such violations, in Sarakhsi's opinion, are Haram;
- (3) the criterion to be adopted, in this regard, is that of consistency or not of the act with the rules of Islamic law;

(544) See : *Ahmed Abou-el-Wafa : A Book on the Rules of International Law and Relations in Islamic Shari'a*, vol. 6 : Human Rights in Islamic Shari'a, *op. cit.*, pp. 580-81.

- (4) the protection of human rights and fundamental freedoms of non-Muslims must constitute one of the essential concerns of the Islamic state;
- (5) a treaty providing for, or allowing, violations of human rights or the commission of international crimes is null and void; and
- (6) solidarity in regard to human rights is an Islamic principle. Moreover, Shaybani affirms: "It is a principle that the ruler of the Muslims is bound to protect foreigners as long as they are in our territory, and to do justice to them against those who do (them) wrong."⁽⁵⁴⁵⁾

B) Istinquath⁽⁵⁴⁶⁾ (or saving Muslims abroad). Under a well-known theory - that is, that of humanitarian intervention - some states, for example, the United Kingdom, the United States, France, and Belgium resort to force in order to save or protect their nationals abroad from imminent danger. In this regard, for example, the United Kingdom affirms that force may be used in self-defense against threats to one's nationals, if (i) there is good evidence that the target attacked would otherwise continue to be used by the other state in support of terrorist attacks against one's nationals; (2) there is, effectively, no other way to forestall imminent further attacks on one's nationals; and (3) the force employed is proportionate to the threat.⁽⁵⁴⁷⁾

The Istinquath, in Islam, is the equivalent of humanitarian intervention in contemporary international law. In fact, it may be applied in order to save the weakest men, women, and children who, being powerless, have been victimized by tyrants and oppressed by them. The holy Quran says: "And why should you not fight in the cause of God and of those who, being weak, are ill-treated (and oppressed)? – Men, women, and children, whose cry is: 'Our Lord! Rescue us from this village, whose people are oppressors; And raise for us from Thee one who will help and one who will make us win (IV: 75). Accordingly, the following

(545) *Shaybani* : *Sharh kitab siyar Al-Kabir*, vol. 4, p. 108 (in Arabic).

(546) *See, Ahmed Abou-el-Wafa* : *A Book on the Rules of International Law and relations in Islamic shari'a*, vol. 5, *The Islamic Shari'a and the Theory of Non-Intervention in the Jurisdiction of Third Parties*, pp. 77-186.

(547) *BYIL*, 1991, p. 732.

conditions are necessary for a nation to intervene to protect oppressed people abroad:

- (1) the fight should be in the cause of God, which means that it must be just and fair (that is, necessary and proportionate). Otherwise, it will not be "in the cause of God";
- (2) there must be the existence of some oppressed persons;
- (3) those people must be truly and seriously oppressed;
- (4) there must be in existence no treaty in force *vis-a-vis* the Muslim state that prohibits intervention. In fact, if there is a treaty that provides that the Muslim state should abide by the non-use of force, this treaty has precedence over the duty to protect Muslims abroad. This idea is highlighted by the holy Quran: "But if they seek your aid in religion, it is your duty to help them, except against a people with whom ye have a treaty" (VIII: 72).⁽⁵⁴⁸⁾ Commenting on this verse, a Muslim scholar explains that the verse proves that fulfillment of a pact has priority even over "religious solidarity."⁽⁵⁴⁹⁾ In a word, the Muslim state has not the right to intervene in favour of its co-religionists if it is bound by an agreement prohibiting such intervention.

C) Provocation of Evil Is Totally Prohibited in Islam

It is well known that, in present global community, there are some persons, states, or agencies whose sole task is to try to sow the seeds of instability, provoke evil or wrong among peoples, and spread chaos. Any of these actions are inadmissible according to the Shari'a. The Quran says: "Commit not evil in the land with intent to do mischief" (XI: 85). Moreover, in Islam, there is a rule that states: "We must not provoke wrong (evil) on the Muslim and non-Muslim."⁽⁵⁵⁰⁾ The prophet says: "If you pass by wicked people say to

(548) *Ahmed Abou-el-Wafa*: A Book on the Rules of International Law and Relations in Islamic shari'a, Vol. 5 : Islamic Shari'a and the Theory of Non Intervention in Third Parties' Affairs, Dar Al-Nahda Al-Arabia, Cairo, 1421-2001, pp. 132-47 (in Arabic).

(549) *Mahmassani* : The Principles of International Law in the Light of Islamic doctrine, RCADI, 1966, I. Vol. 117, p. 268.

(550) *Ahmed Abou-el-Wafa*: A Book on the rules of international law and relations in Islam, op. cit., vol. 1, p. 427, vol. 15, p. 283.

them salam (peace be upon you).⁽⁵⁵¹⁾ One Western author asserts that Islam is not a wicked religion:

« For ten centuries, however, Islam stood at the doorstep of the world of Christendom, sometimes knocking for entry, sometimes forcing open the door, but always an apparent threat to its religious ideology and power structure. It was no wonder therefore that in these ten centuries Islam was misrepresented as a force for evil by whatever media lay at the command of the age. Scholarly writing and religious preaching were the principal media available and the distortion and indoctrination continued for centuries through these media. Islam was represented as being wicked, blasphemous and opposed to all that civilisation stood for - although it stood for moral values, intellectual advancement and the rule of law. When the direct military threat ceased, around the sixteenth century, the same attitudes of prejudice continued, for Islam was still the world force which was a counterpoise to the world of Christianity.⁽⁵⁵²⁾

Undoubtedly, abstaining from provoking evil is an indispensable tool for a fruitful, positive, and cross-cultural dialogue. It means, prima facie, the prohibition of committing international crimes.

D) The criminal responsibility of the state as well as perpetrators of international crimes:

1- Concept of International Responsibility In Islam⁽⁵⁵³⁾

Islam has played an important role in crystallizing legal responsibility in general and international responsibility in particular.⁽⁵⁵⁴⁾ In fact, "[q]uestions of liability form one of the most

(551) *Ibid*, vol. 15, p. 239.

(552) C.G. Weeramantry: *Islamic Jurisprudence: An International Perspective*, Macmillan press, London, 1988, pp. 128-29.

(553) *Ahmed Abou-el-Wafa* : Contributions of Islam to the development of a global community based on rules of international law, in « Towards world constitutionalism », ed. by R.J. Macdonald and D.M. Johnston, M. Nijhoff, Leiden-Boston, 2005, pp. 327-331.

(554) *See* : *Ahmed Abou-el-Wafa* : A Book on the rules of International Law and relations in Islamic Shari'a, vol. 8 : International Responsibility in Islamic Shari'a, *op. cit.*, 271 pp ; *El-Sanhoury* : La responsabilité civile et pénale en droit musulman, *Revue de l'Union des Universités Arabes*, 1995, pp. 549-570 ; *Jacque El-Hakim* : Le dommage de source délictuelle en droit musulman, *LGDI*, Paris, 1964, 258 pp ; *Ch. Chehata* : Essai d'une théorie générale de l'obligation en droit musulman, thèse, Faculté =

intricate subject-matters in the Islamic law of obligations.⁽⁵⁵⁵⁾ One scholar explains : « *ce qu'il importe de relever dès maintenant, c'est le fait que nous nous trouvons dès le début du droit musulman en présence d'une théorie, moderne pour ainsi dire, de la responsabilité délictuelle. Elle est à base de faute.* »⁽⁵⁵⁶⁾ In Islamic jurisprudence, there are some rules that govern the question of responsibility, the most important of which are the following :

- Imam Kassani put a very concise rule concerning the origin of liability in Islamic doctrine, whereby « [l]iability in Shari'a is due to the breaking of an obligation or causing a destruction. »⁽⁵⁵⁷⁾
- The basis of responsibility in Islam lies essentially in a Hadith of the Prophet, under which, in Islam, there is "no harm and no harming."⁽⁵⁵⁸⁾ The rule "no harm and no harming" means:
 - That the prohibition of causing harm or damage is a well-established rule in Islam;
 - That responsibility is engaged *vis-à-vis* any perpetrator of the wrongful act, irrespective of the religion of the victim - that is, be he a Muslim or a non-Muslim;⁽⁵⁵⁹⁾ and
 - That the harm or damage must be removed or repaired.
- No-one can be held responsible for anyone else's guilt or actions (principle of personal liability) - that is, a person will be held responsible for his own deeds. The Quran states: "[N]o bearer of burden shall bear the burden of another" (LIII: 38); "Every soul will be (held) in pledge for its deeds" (LXXIV: 38); "[W]hoever works evil, will be requited accordingly" (IV: 123); "[T]hat was a people that hath passed away. They shall reap the fruit of what

= de Droit-Université du caire, 1936 ; *S.H. Amin* : Remedies for Breach of Contract in Islamic and Iranian Law, Royston Limited, Glasgow, 1984 ; *A. Kazmi* : L'Islam et la réparation du préjudice moral, Librairie Droz, Genève, 1990, 148 pp.

(555) *J. Schact* : An Introduction to Islamic Law, p. 147.

(556) *E. Tyan* : Le système de responsabilité en droit musulman, thèse, Lyon, 1926, p. 9, 201.

(557) *Kassani* : Bada'e Al-Sana'ea, vol. 7, pp. 167-18 (In Arabic).

(558) *Ahmed Abou-el-Wafa*: A Book on the Rules of International Law and Relations in Islamic Shari'a, vol. 8: Theory of International Responsibility in Islamic Shari'a, pp. 27 et ss.

(559) *Ibid.*, pp. 31-32.

they did, and Ye of what you do and Ye are not responsible of what they were doing" (2:134). Accordingly, vicarious liability is, in principle, forbidden in Islam. In this context, Imam Shawkani says that assets of persons are immune in Islam and that engaging the responsibility of a person whom the Shari'a does not consider responsible for the act is contrary to the fundamentals of Islam⁽⁵⁶⁰⁾.

- Under a well-established rule in Islamic Shari'a, "in case of doubt, reparation is forbidden" ("dans le doute, la réparation n'est point due")⁽⁵⁶¹⁾.

2- *Effects of International Responsibility in Islam*

Reparation - that is, undoing the damage and eliminating the consequences that the breach of an international obligation had caused - is an outstanding principle of present international law. Reparation essentially has three forms, namely *restitutio in integrum*, compensation, and satisfaction. Islam knows the effects of responsibility, especially *restitutio in integrum*, compensation, and satisfaction:

a) *Restitutio in integrum*:

Restitutio in integrum is established in Islam by the following verse: "God doth command you to render back your trusts to these to whom they are due" (IV: 58). Moreover, a Hadith of the Prophet says: "A hand (namely, a person) must render back what it (he) has taken."

There are many examples proving that Muslims have adopted the principle of *restitutio in integrum* or the restitution of status quo ante, the most important of which are the following:

- It is related, that when Qutaiba ibn Muslim (a commander) conquered the city of Samarcand, without warning, the latter sent to the just Caliph Umar ibn Abdul-Aziz, complaining of what Qutaiba had done. The Caliph referred the complaint to his magistrate and told him to investigate the case. The magistrate's inquiry proved the charge to be true, so the soldiers were told to go back to their camp and the choice was offered to the people of Samarcand who preferred to make a covenant with the Muslims.

(560) *Shawkani: Al-Sayl Al-garar*, vol. 3, p. 218.

(561) *El-Hakim: Le dommage de source delictuelle en droit musulman*, LGDJ, Paris, 1964, 153.

- When the Umayyad caliph Al-Walid ibn Yazid exiled the People of the Covenant from Cyprus and resettled them in Syria, the scholars of religion and law were furious with him and considered his action to be oppressive and hostile. When his son Yazid became the Caliph, the scholars addressed him about repatriating the Cypriots, because they knew him to be a just man. He agreed.
- At the time of the fourth Caliph Ali Bin Abi Taleb, Judge Shoraih ordered the Muslim army to evacuate an occupied city, for the army occupied it in contravention to the treaty of peace concluded with that city.

b) Compensation

Prima facie, the payment of compensation for loss caused is a general principle of law. The ICJ affirmed that "[i]t is a well-established rule of international law that an injured state is entitled to obtain compensation from the state which has committed an internationally wrongful act for the damage caused by it."⁽⁵⁶²⁾ This principle is also true in Islam. It suffices to mention the following example. The prophet Mohamed sent Khaled Ibn Al-Waleed to Bani-Gothaymah to call them to Islam, not to fight them. However, Khaled killed some of them and took their weapons. After the prophet had known what Khaled did, his reaction was twofold, namely (i) the prophet said: "O! God I do not approve what Khalid did" and (2) the prophet told Ali Ibn Abi-Taleb to go to Bani-Gothaymah in order to examine their case and ordered him (a) to disregard what happened in Djahilia - that is, "ignorance" or the dark days of Arabia (the state of things that was prevailing before Islam, for example, not to remember revenges or retaliations); and (b) to compensate them for each damage suffered by them (for example, concerning their blood or assets and even dogs). Having finished, Ali asked them: "[W]as there any thing (blood or asset) which had not been compensated?" They replied: "No." Then Ali, still having a great sum of money, told them: "I give you as well what rests with me from the sum of money sent by the prophet, as a precaution for what we know or do not know of the damage suffered by you. When Ali came back, he told the prophet what he had done. The prophet said: "[Y]ou were right and you did a good

(562) ICJ, Rep., 1997, P- 69, para. 152.

thing." Then, the prophet said (three times): I do not approve what Khalid did."⁽⁵⁶³⁾

This incident reveals three important principles, namely:

- The prophet did not follow what states follow now - that is, to cover errors of their armed forces. On the contrary, he did not approve them. This is in conformity with the obligation of non-repetition of the wrongful act, which was recently adopted by the international law commission in its 2001 draft articles on international responsibility (Article 30).⁽⁵⁶⁴⁾
- The prophet approved what Ali made, particularly paying more than what was necessary as a compensation. Needless to say that, nowadays, lump-sum agreements concluded between states usually compensate a part, not all, of the damage.
- Al-Waquedi said that the prophet borrowed the sum of money sent to Bani-Gothaymah.⁽⁵⁶⁵⁾ This proves that, in the eyes of the prophet, that compensating for the damage suffered must be made as soon as possible even in cases where there is a shortage of money. *Prima facie*, states do not usually apply this principle in present international relations.

c) Satisfaction

Satisfaction is usually made by the state that has committed a wrongful act, particularly, and not exclusively, for non-material injury (*préjudice immatériel* in French) that has been occasioned by that act. Satisfaction usually takes the form of expression of regret, an acknowledgment of the breach, formal apology, application of disciplinary measures or punishment against tortfeasors or responsible officials, the holding of an inquiry, the taking of measures to prevent the recurrence of the injury, damage, or the internationally wrongful act, and so on.

As an example of satisfaction in Islamic practice, one can mention the following incident. Muslims entered the territories of Jews and took some of what they had cultivated. The Jews complained to the prophet. The prophet, after having blessed God

(563) *Ibn-Hisham*: Al-Syrah Al-Nabaweya, vol. 2, p. 428-13 (in Arabic).

(564) General Assembly, off. Rec., supp. No. 49 (A/56/49), 2001, p. 503.

(565) *Al-Waquedi*: Kitab Al-Maghazi, vol. 3, p. 882 (in Arabic).

said: "The Jews complained that you entered their territory, we have given them Aman for their persons and assets and what they have in their territories, assets of Mua'hideen is not Mubah except for a just reason."⁽⁵⁶⁶⁾ Having heard this, the Muslims followed what the prophet said and did not take any thing from the Jews, save by buying it.

In the final analysis, one can safely affirm that, in Islam, there is a well-established rule according to which "[a] Muslim is forbidden from committing an internationally wrongful act."⁽⁵⁶⁷⁾ This rule is a result of the fact that "his religion and reason prohibits him from committing illegal acts."⁽⁵⁶⁸⁾

§V- A concluding remark:

Since international crimes constitute an aggression on human beings and their belongings as well as internationally protected persons and assets, they are totally prohibited by Islam.

As this author put it:

«Bref, l'Islam a pour but la préservation de la valeur absolue de la vie étant donnée son caractère précieux: la vie humaine doit toujours être respectée et protégée dans tous les cas où aucune raison valable ne justifie le contraire. Elle est en effet un don qui intéresse l'humanité tout entière. Cela exige, toujours du point de vue de l'Islam, l'inviolabilité des corps humains afin de préserver la vie de l'individu et, par ce biais, de la collectivité humaine»⁽⁵⁶⁹⁾.

(566) Ibid, vol. 2, pp. 690-91 (in Arabic).

(567) *Ahmed Abou-el-Wafa: A Book on ...*, vol. 8, op. cit., p. 251.

(568) Ibid., vol. 14, p. 274.

(569) Ahmed Abou-el-Wafa: *Le devoir de respecter le droit à la vie en droit international public*, op. cit., p. 69.

Conclusion

§ I- In General:

This author said:

«l'effectivité du droit et des normes juridiques ne résulte pas de leur consécration formelle, mais plutôt de leur application matérielle ou sociale et des relations qui se trouvent entre celles-ci et celles-là et qui est représentée par le respect total, en pratique, des droits garantis»⁽⁵⁷⁰⁾.

This means that international offenses should be criminalized.

They are under no circumstances justifiable by considerations of a philosophical, cultural, political, economic, racial, ideological, ethnic, or any other similar nature. They are, as well, unacceptable by whomsoever committed. This is mainly because they disturb the safe and orderly conduct of international relations due to their worldwide escalation. International crimes strike at the very heart of every thing the international community stands for.

To combat and suppress international crimes, the following factors should be totally observed in order to enhance the efficiency of CIL:

1- Actions must speak louder than words. This implies that states should adhere to *in concreto* action, not to mere *in abstracto* words.

In fact, states must take all appropriate measures to prevent the accomplishment of actions or omissions constituting international crimes, particularly to scrupulously apply the principle of international law according to which a state is required not to allow knowingly its territory to be used for acts contrary to criminal rules of international law.

This is mainly because each state has an obligation to promote the effectiveness of the international legal order⁽⁵⁷¹⁾. This implies,

(570) Ahmed Abou-el-Wafa: Quelques réflexions sur la convention européenne des droits de l'homme, l'Égypte contemporaine, No. 396, 1984, p. 35.

(571) In this context, see article 90 of the Netherlands constitution, in L. Besselink: The constitutional duty to promote the development of the international legal order: the significance and meaning of article 90 of the Netherlands constitution, NYIL, 2003, pp. 89-138.

prima facie, the cooperation in the prevention and suppression of international crimes. However, actions of some states have clouded the basic issues and obscured the fundamental topics of CIL.

In other words, *de facto* and *de jure* actions should be adopted, in order to implement the domestic and international obligations incumbent upon the competent authorities or organs of states⁽⁵⁷²⁾ and international organizations.

2- Elimination of all features of *non volumus* or *non possumus* in the the implementation of obligations resulting from CIL.

3- Application of the rule «chacun a sa loi» (everyone has his own law) should be eliminated.

Accordingly international penal rules have to be applied objectively. This means that double language, double standard and *deux poinds et deux mesures* must be set aside⁽⁵⁷³⁾.

4- Removal of all root causes of international crimes, be they *causa proxima*, or *causa remota*.

5- Taking into account the principle *ex injuria non jus oritur*, which held that when a person had committed a wrongful act, he could not rely on that act to extract himself from a particular situation or to allege a right which he had not.

6- Faithful application of conventional and customary rules of CIL is a must.⁽⁵⁷⁴⁾

All the above – mentioned factors mean that it is the «*utilitas publica*» of the international community not to tolerate the commission of international crimes.

(572) See, e.g., A. Winants: *Le ministère public et le droit pénal international*, R. de droit pénal et de criminologie, 2002, 1, p. 33.

(573) See, the Press release of Amnesty international: «No double standards on international justice» 1 July 2002, available on <http://www.amnesty.org>. See as well:

Ahmed Abou-el-Wafa: A commentary, in «Unity and diversity in international law», ed. By A. Zimmermann and R. Hofmann, Duncker & Humblot-Berlin, 2006, pp. 373-376.

(574) J. Franquet: *L'usage de drogue et les conventions internationales des Nations Unies – le dispositif des Nations Unies de lutte contre la drogue*, R. pénitentiaire et de droit pénal, 2001, 203-221.

The international community as well as domestic legal orders of states should redouble their efforts to make accountability for the commission of international crimes, more effective. This may be realized, *inter alia*, by a regime of accountability premised essentially but not exclusively, on the sincere application of rules of CIL.

The multifaceted nature of international crimes and their consequences suggest that different strategies are required for various manifestations of those crimes and the different settings in which they occur. The practical measures, activities and strategies should, in this context, essentially concern crime prevention and criminal justice:

Moreover, it is desirable that rules of CIL be reconsidered and readapted to the present new circumstances, so as to reinforce respect for that law and the protection of victims as well as the safety of assets and belongings. This constitutes an integral part of contemporary international order. No state or other international legal entities (e.g., non-state actors, international organizations) can escape obligations resulting therefrom⁽⁵⁷⁵⁾.

In fact, rules concerning the repression of international crimes have kept their full validity notwithstanding the breaches and infringements suffered. No purpose or objective, whatsoever, can constitute a justification for the commission of international crimes.

Clearly, international crimes can not be separated from the environment amidst which they are operating and evolving. They can even throw a light on the nature and extent of the existing legal system in each state and in the international community as a whole. They are the true mirror of each society which reflects the whole face of the later.

International crimes are a global, regional and sub-regional phenomenon that cannot be dealt with effectively and solely at the national level. For a strengthened national response and actions result often in the operations of criminals moving elsewhere. *Prima*

(575) In this context, the UN millennium (2000) declaration affirmed the resolve to intensify:

«efforts to fight transnational crime in all its dimensions, including trafficking as well as smuggling in human beings and money laundering» (para. 9).

facie, this necessitates cooperation and coordination between subjects of international law.⁽⁵⁷⁶⁾

Evidently, the commission of international crimes during the last century alone has led to millions of victims of men, women and children. The unimaginable atrocities and sufferings resulting therefrom shocked and is still shocking the conscience of humanity and the dictates of justice⁽⁵⁷⁷⁾.

This, inevitably, means that combating international crimes will contribute to saving countless lives.

In the field of international criminal justice⁽⁵⁷⁸⁾ one should not confuse the means and the end, the container and its content, the whole and the part. For it is impossible to set the clock back and undo what has passed. This is not a judgment of value, it is a mere statement of facts.

Accordingly, a *lingua franca* for the *reconquista* of international legitimacy, through the sound application of rules of CIL should constitute the watchword, not the catchword of present international community. This means that, as an English proverb puts it, «what must be must be», i.e., with regard to international crimes, the offender has no alternative but to bow to prosecution.

Otherwise many roadblocks will be created for arriving at a stable and quiet international society as well as a continuation of the dismaying downward trend in the level of effectiveness of CIL.

(576) See as well, B. De Smet: *Les droits de l'homme et la coopération policière et judiciaire, instruments d'intégration juridique en procédure pénale*, R. de droit pénal et de criminologie 2000, 7-8, pp. 759-771.

(577) This author said that violence endangers the existence of humanity, cf, Ahmed Abou-el-Wafa: *The legal dimension of violence in national laws, international law and Islamic Shari'a*, Police research center review, Cairo, January 2006, p. 120 (in Arabic).

Another Scholar pointed out: «After all, the limitation of violence is the very essence of civilization» F. Bugnion: *Just wars, wars of aggression and international humanitarian law*, ICRC, Geneva, 2003, p. 5.

(578) It is worth recalling that CIL may borrow some of its concepts from domestic penal systems, in procedural and substantive issues, see, e.g., M. Ayat: *Le silence prend la parole - la percée du droit de se taire en droit international pénal*, R. Pénitentiaire et de droit pénal, 2002, No. 4, pp. 705-729.

In conclusion, the importance of CIL lies in the fact that international crimes show no sign of decline. They are, it seems, like your grass. You keep cutting it, and it keeps growing back⁽⁵⁷⁹⁾.

§ II- In Islamic CIL (Islam admits international criminal responsibility of both individuals and abstractions):

In fact, there is no any impediment that Islam admits international criminal responsibility of individuals as well as abstract entities. It suffices to mention that Omar, the second caliph (ruler) of the Islamic State wrote to the commander of the army (more than 1400 years ago) after having heard that a muslim combatant said to a Persian combatant “don’t panic” and then killed him, that «I have known that some combatants said to non muslim combatants who were out of their reach, do not panic and after reaching them (because of these words), they killed them. I swear by God that if it reaches to my knowledge that some one does this act, I will cut his neck (i.e. he will be beheaded)»⁽⁵⁸⁰⁾

This proves that:

1- Islam does not accept perfidy. In fact, Omar, by his saying , wants to prohibit such an act. This is in line with both CIL and Islam.

- On the one hand, rules of international humanitarian law prohibit perfidy (e.g., article 37 Additional Protocol N° 1 of 1977).
- On the other hand, perfidy is totally prohibited in Islam. It is even *haram* (unlawful), being a *Kabira* (a great sin) and contrary to *aman* (safe-conduct)»⁽⁵⁸¹⁾

(579) This is true even for states. Thus, in an interview with two citizens from Pakistan, who were detained by American forces in Guantanamo, it is said: “Au total, en trois ans de détention, les deux frères ont été interrogés 126 fois! Dans la salle d’interrogatoire, “on est entièrement enchaînés, et pour nous provoquer comme musulmans, ils accrochaient des images pornos aux murs. Parfois, ils faisaient venir une femme nue pour obliger ceux qui refusaient de parler à avoir des relations sexuelles. La salle d’interrogatoire, c’est le lieu de tous les abus ! ». L’HEBDO, 9 Mars 2006, p. 26.

(580) Ahmed Abou-el-wafa: A book on the rules of international law and relations in Islamic Shari’a, op. cit., vol. 10, p. 182 (in Arabic).

(581) Ahmed abou-el-wafa: Contributions of Islam to the development of a global community based on rules of international law, op. cit., pp. 314-315.

2- Perfidy committed during war is a war crime, i.e., an international crime.

3- Perfidy is a grave crime. Consequently, it entails the application of a punishment commensurate with it. Omar considered that it deserves the death penalty.

4- Islam accepts the international criminal responsibility of perpetrators of international crimes.

5- Islam admits the two major kinds of international criminal responsibility, i.e., that of natural persons or individuals (this is well established in the above-mentioned saying of Omar), and that of abstractions or abstract entities (this is self-evident from what the Prophet Mohamed made with regard to what Khalid had done. The prophet, as mentioned above, sent Ali to Bani Gothaymah to compensate them. In fact, the prophet considered the Islamic state liable for the wrongdoing of Khalid. This is as well self-evident from the cases of *restitutio in integrum* as a leading effect of international responsibility in Islam).⁽⁵⁸²⁾

6- Islam admits what is now applied, as sanctions, on individuals and abstractions: corporal punishments may be applied to the former, whereas the later are punished by penalties which are in line with their nature, i.e., monetary compensation or *restitutio in integrum*.

(582) Vide *Supra*.

