

INTERNATIONAL CRIMINAL JUSTICE AND THE EROSION OF SOVEREIGNTY

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Abstract

The author states that any form of international justice always represents a means of limiting national sovereignty. In the case of International Criminal Law, this limiting is even more evident by compromising elements essential to the classical paradigm of International Law, as for example the punishing monopoly of States or the concept of a quasi-absolute State sovereignty. International criminal tools, crimes, sentences, jurisdictions, are all able to be, at least partially, a legal alternative to the issues of peace-keeping and national security, exclusively political and diplomatic. This alternative inevitable leads to tensions with a power structure that has not been altered since 1945. However, for this legal criminal alternative to be put in place, a long period of maturation will be required based on irrefutable technical and legal credibility.

Keywords:

Sovereignty; International Crimes; International Criminal Court; Security/Aggression Council

How to cite this article

Soares, Miguel de Serpa (2013). "International criminal justice and the erosion of sovereignty". *JANUS.NET e-journal of International Relations*, Vol. 4, N.º 2, November 2013-April 2014. Consulted [online] on date of last view, observare.ual.pt/janus.net/en_vol4_n2_art1

Article received on 27th May 2013; accepted for publication on 8th October 2013



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Introduction

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

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

1. State sovereignty: a flexible concept

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

The first is that there are two separate but overlapping realities in international legal order and these correspond to two different paradigms of thought. The "*Grocian*" (or "*Hobbsian*") paradigm, based on a state perspective of international relations and the "*Kantian*" paradigm, cosmopolitan and universal¹. In the first case, sovereign States develop cooperation relations with the single purpose of better pursuing interests they considered national interests. In the second case, States develop cooperation relations

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



also bearing in mind the interests of an international community separate from the States themselves.

In 2013, the State is still the primary subject of International Law and international society is basically the result of the interaction among territorially-based political communities, independent, protected by formal legal equality and having certain essential features. Simultaneously, the recent dynamics in international relations and the huge development of International Law, in particular after 1945, lead us to acknowledge the existence of real conditions, perhaps restraints, to the sovereign powers of States. In the latter case, the explosion of multilateralism, the appearance of international subjects such as international organizations, some including supranational elements, the restraints to *jus ad bellum*, the relativization of the principle of State immunity², the consolidating of a Humanitarian International Law and a Human Rights International Law, as well as the concept of international crimes and the creation of a permanent International Criminal Court, all contribute to the idea of a relative, flexible Sovereignty, in any case a sovereignty that needs to adapt to external factors affecting its powers, whether these are legal rules or competing centers of political and judicial power.

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

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

In 1928, the referee Max Huber stated that:

“La souveraineté dans les relations entre États signifie l’indépendance”³.

Independence affirmed against other subjects of international Law and a fundamental consequence of international legal personality exclusively acknowledged by International Law, in accordance with the formula of legal immediacy referred by Allain Pellet (Pellet, 2002: 424). In 1758, Vattel wrote that:

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

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



“Un nain est aussi bien un homme qu’un géant: une petite république n’est pas moins un État souverain que le plus puissant royaume” (Vattel, 1863: 100)

In the formal and legal translation of this principle, nothing fundamental has changed since the 18th century: article 2, n° 1 of the United Nations Charter lays down this principle of formal equality among States and, thus, adopts several principles which ensure that equality and independence.

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

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

Claim by States that they are *superiores non recognescentes* beings stems essentially from the rebellion by the princes against the double authority of the Emperor or the Pope and their refusal to acknowledge the secular universal authority of both (*potestas directa*). The fact that each community aspires to exercise sovereign powers within its territory and to relate with other political communities without the interference of other secular authorities embodies this first "aggressive" concept of sovereignty, which must be affirmed against other existing powers. Interestingly, the Portuguese are also at the base of extreme reactions against secular authority by the pope and in speeding the creation of the Modern State. The Treaty of Tordesillas in 1494, based on the assigning of new territories and seas exclusively to Portugal and Spain by papal edict added to the anger of other European nations against the power of the Pope and the old order *civitas christianna*. Sovereignty was argued as a claim for a space of freedom, freedom to gain territory, freedom to navigate and do commerce against a secular authority with a transcendent foundation⁴.

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

In this international legal order, basically consisting of a European public legal order, in the concert of "civilized nations", the principle of quasi-absolute State sovereignty has

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



become the basis for all international relations and Law⁵. The slow historical process leading to the collapse of this concept of absolute sovereignty starts after the 1950s.

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

From 1945 onwards, the international legal *acquis* and the multilateral institutional framework starts to be formed and develop in which sovereignty will be exercised. The United Nations Charter and the principle to forbid the threat to use force as means of conflict resolution, Humanitarian International Law including, namely the Geneva Conventions, the legal protection of the individual, even if in its early stages, through the adoption of different universal and regional treaties on human rights, the sophisticated formulas of joint exercise of sovereignty, as in the case of the European Union, and finally, the emergence of International Criminal Law, all create a mulch-layered reality in which the idea of absolute sovereignty cannot be reconciled with the idea of absolute sovereignty⁶. All these changes imply specific restrictions in exercising state sovereignty, largely based on legal rules that discipline the freedom of States.

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

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

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

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



and has its Constitution which is mainly in agreement with International Law⁷ and which even automatically accepts laws from general International Law. Portugal is not a permanent member of the Security Council, does not have significant natural resources beside a wide EEZ, its diplomacy has limited material resources and its population is rather small in world terms.

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

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

2. The End of the punishing monopoly of States: crime and punishment in International Law

In 1919, article 227, n.º 1 of the Treaty of Versailles laid down that:

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

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

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

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

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



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

In 1814, the Declaration of Vienna against Slave-trading refers to civilized nations", essentially European nations, slowly shifting the moral speech, in particular that of European powers, in a speech on International Law, gradually translated in legal rules. The Hague Peace Conferences in 1899 and in 1907 mark the first coding process of the laws of war and the so-called "Martens Clause"¹⁰, included in the preambles of the Conventions II of 1899 and 1907 stated that:

"until a more complete code of the laws of war is adopted, the parties consider adequate to declare that, in the cases not included in the provisions adopted, the populations and the warring parties are under the protection and observation of the Rights of People, considering they derive from customs among civilized nations, the laws of humanity and the demands of public conscience"¹¹.

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

The peace of Versailles originated the first instances of institutionalization of multilateralism, such as the failed Society of Nations as well as the transference of a criminal narrative to international scenario. The Legal Advisory Committee, appointed by the Society of Nations recommended in 1920 that an International Supreme Court should be founded with competence to try crimes committed against international public order and the universal law of nations. This court would also be assigned competence to define the list of crimes and applicable punishments, the means to enforce them as well as its rules of procedure. In 1920, Elihu Root asked the following question on this project:

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

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

¹¹ See Mateus Kowalski/Miguel de Serpa Soares (2011) "Cláusula Martens" in Manuel de Almeida Ribeiro/Francisco Pereira Coutinho/ Isabel Cabrita (eds) *Enciclopédia de Direito Internacional*. Coimbra: Almedina, p. 91.



“Are the Governments of the world prepared to give up their individual sovereign rights to the necessary extent?” (Ferencz 2000: 40)¹².

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

The Nuremberg and Tokyo Trials led to the collapse of the Sovereign's punishing monopoly and are a turning point in the erosion process, the adaptation *rectius* of state sovereignty. Several perspectives are possible on these historic trials: from considering it was all mere winner justice to a judicial catharsis of guilt and redemption; historians, political scientists and lawyers will hardly understand these events in the same way¹³.

In the aftermath of the victory by the allies in 1945, two possibilities opened to the winners: mere execution or imprisonment of the losers and their punishment following a trial. Benjamim Ferencz, the youngest member of the American prosecution team in 1945, says, in a rather humorous and acid tone about the British that

“In fact, the Foreign Office still did not favor war crimes trials. To avoid long legal proceedings, that might become a propaganda forum for Nazi leaders, the United Kingdom preferred a «political disposition». Always noted for their «fair play», the British argued that «execution without trial is the preferable course». Exactly who was to shoot whom and when to stop shooting was not made clear” (Ferencz 2000: 42).

The London Agreement on 8 August 1945, which led to the creation of the Nuremberg court, resulted mainly from the American perspective which, with the Soviet support, managed to be imposed on the remaining allies. In a vaguely grand speech about the trial, Judge Robert Jackson, Chief Prosecutor of the American team at Nuremberg, said:

“That four great nations, flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power as ever paid to Reason” (Ferencz 2000: 37).

The Charter of the International Military Court established as crimes under its competence for which individuals may be held accountable the crimes against peace, crimes of war and crimes against humanity, thus creating, for the first time a criminal list of international crime - the origins of the International Criminal Code. Article 6

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

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



typifies ("the following acts or some of them") as "*crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility*": crimes against peace (the predecessor of the "crime of aggression" adopted in the Kampala Conference in 2010); crimes of war ("namely the violations of the laws or customs of war"); crimes against humanity ("namely murder, extermination, enslavement, deportation and other inhumane acts"). A national criminalist today cannot but wonder in face of the open typification of these crimes.

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

The discomfort of some judges at the time, namely in terms of the crimes against peace, stemmed from the knowledge that the Nuremberg and Tokyo International Military Courts operated outside the framework of Criminal Law principles, namely the principles of *nullen crimen sine lege* and *nulla poena sine lege*. Judge William Douglas expressed his criticism on criminalizing "crimes against peace" as follows:

"(I) thought and still think that the Nuremberg trials were unprincipled. Law was created ex post facto to suit the passion and clamor of the time" (Glennon 2010: 75).

In 1946, Federal Judge Charles E. Wyzansky stated the following on criminalizing war of aggression:

"The body of growing custom to which reference is made is custom directed at sovereign states and not individuals. There is no Convention or Treaty which places obligations explicitly upon an individual not to aid in waging an aggressive war" (Glennon 2010: 76)

and to the question whether the bases for Nuremberg may lie in the general principles of Criminal Law common to all "civilized nations", he said that:

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



This debate was equally present at the Tokyo trial, two judges having voted against the final decision to sentence. The dissenting opinion of the Indian judge Radhabinod Pal, absolving all defendants at Tokyo is an extremely relevant text in the recent history of International Law, representing, under the appearance of a confrontation between naturalism and positivism, the first serious challenge to international legal order by western empires and is worth being reread today¹⁴.

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

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

In the period after 1945, the concept of individual criminal liability before International Law, withdrawn from States exclusive power to punish its nationals, began its slow consolidation process. First through adopting the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly in 1948¹⁵. Noteworthy is that the term "genocide" did not exist before 1946¹⁶, the extermination

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

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

¹⁶ Term created in 1946 by the Polish lawyer Raphael Lemkin, author of the preliminary draft of the 1948 Convention. See Mateus Kowalski/Miguel de Serpa Soares (2011) "Cláusula Martens" in Manuel de Almeida Ribeiro/Francisco Pereira Coutinho/ Isabel Cabrita (eds) *Enciclopédia de Direito Internacional*. Coimbra: Almedina, p. 143 and Larry May (2010) *Genocide: a Normative Account*, Cambridge: University Press. p. 2010.



of the Jews was tried and punished at Nuremberg as a crime of war or a crime against humanity. The narrative of the Law itself has undergone a change in the new order established in 1945: genocide, universal jurisdiction and universal punishment are terms that did not exist or were almost nonexistent in the period of almighty sovereignties¹⁷.

On 11 December 1946¹⁸, the first session of the United Nations General Assembly adopted a set of Resolutions with significant impact for the later development of International Criminal Law. In particular Resolution 95 restated the principles of International Law recognized in the Nuremberg Charter and appointed a Commission to prepare an International Criminal Code.

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

William Schabas¹⁹ declares that the idea of an international criminal justice was vaguely approached by George Bush and Margaret Thatcher in the 1990s when discussing the invasion of Kuwait by Iraq, according to preliminary studies by the American army. The idea would have been viewed positively by some European leaders but resulted in nothing.

After mid-1992, the USA were the biggest promoters for adopting Security Council Resolution 827 (1993) of 25 May 1993. This Resolution, adopted by consensus, is special because it was based on article VII of the Charter, in particular in articles 39 and 41, a new interpretation of the United Nations Charter. As Paula Escarameia points out, the Charter

¹⁷ Except for the crime of sea piracy.

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

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



"was probably not thought based on the principle that impunity of international criminals was a threat to or a breach of world peace and security and that the Council may, therefore, create courts with competence to try them. Thus, though that interpretation may be possible, it was only viable at a moment when world polarization had disappeared (...)" (Escarameia 2003: 34).

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

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

Analyzing the role of the two ad hoc Criminal Courts above mentioned is not in the scope of this paper. However, two elements should be emphasized: (i) from a purely legal perspective, these courts contributed to the development of an international criminal *corpus juris* and (ii) they prepared the way for a non-selective and permanent (and independent) criminal justice by adopting the Rome Statute²⁰.

3. The Rome Statute: a permanent and independent jurisdiction

After 1946 several attempts were made to codify International Criminal Law²¹. In July 1994, the Committee submits its draft statute of the Court and in 1996 it presented a draft for the Criminal Code. The approach of 1994 project by the Committee for International Law was extremely conservative and basically defined a model of criminal justice fully integrated in the United Nations system and, in particular, dependent on the Security Council. This project proposed a mode inspired in the ad hoc versions for Yugoslavia and Rwanda in a rather paradoxical way - an ad hoc type of court but permanent.

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

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

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

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



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

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

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

Philip Kirsch²² recalls that in the beginning of the negotiations, on 15 June 1998, the draft written by PrepCom was presented with about 1400 items about which there was disagreement, which were incomplete and hundreds of alternative proposals. Although the Statute was not approved in a consensus, its adoption was almost a miracle even if we consider that

"The Statute is nor a perfect instrument; no internationally negotiated instrument can be. It includes uneasy technical solutions, awkward formulations and fully satisfied no one" (Kirsch 1999: 2).

Negotiation agenda of the five permanent member at Rome was extremely heavy. Based on the direct testimony by David Scheffer²³, the USA's main goals were those of a court similar to the ad hoc courts and with an important role in the Security Council, having no independent power to investigate or submit cases, complementary and whose criminal list would be very limited. To sum up, a Statute that would take into consideration the fact that

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

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



“United States has special responsibilities and special exposure to controversy over our actions. This factor cannot be taken lightly when issues of international peace and security are at stake. We are called upon to act, sometimes at great risk, far more than any other nation. This is a reality in the international system” (Scheffer 1999: 12).

Still according to Sheffer

“Throughout the Rome Conference our negotiators struggled to preserve appropriate sovereign decision making in connection with obligations to cooperate with the court” (Scheffer 1999: 15).

The end result did not live to American expectations, the delegation complained of process's lack of transparency²⁴ and asked for formal voting of the final project and voted against it, thus breaking the desired consensus.

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

Alain Juppé's government proposed a system which required three levels of authorization for a case to be submitted to the Court (that of the State where the crime had occurred and those of the national States of both the victim and the aggressor) after a very difficult internal process of agreement among the different French Ministries. The compensation for France voting for the Resolution was the introduction of article 124, the possibility of opting-out for a seven-year period in terms of crimes of war committed by French nationals (France and Colombia were the only States that used the possibility allowed by article 124)²⁵.

²⁴ According to Scheffer “The process launched in the final forty-eight hours of the Rome Conference minimized the chances that these proposals and amendments to the text that the U.S. delegation has submitted in good faith could be seriously considered by delegations. The treaty text was subject to a mysterious, closed-door and exclusionary process of revision by a small number of delegates, mostly from the like-minded group, who cut deals to attract certain wavering governments into supporting a text that was produced at 2:00 A.M. on the final day of the Conference, July 17. Even portions of the statute that had been adopted by the Committee of the Whole were rewritten. This ‘take it or leave it’ text for a permanent institution of law was not subject to the rigorous review of the Drafting Committee or the Committee of the Whole and was rushed to adoption hours later on the evening of July 17 without debate” (Scheffer 1999:20). On another occasion, before a room of American army lawyers, Scheffer, when referring to the final outcome at Rome, declared the following on the limitations to American diplomatic power: “A negotiating room is not a conventional battlefield, but it is a theater of diplomatic conflict and cooperation.

Within the negotiating arena, as in the courtroom, overwhelming force is defined by logic (...) Our superpower status and the magnitude of our military forces mean very little in these settings. That is the hard reality today. We need to adjust and turn that reality to our own advantage with winning strategies and not self-righteous tactics that impress no one but ourselves” (Scheffer 2001: 9).

²⁵ “La position de la France a évolué au rythme d’un double arbitrage, difficile, entre le ministère de la Défense, le Quai d’Orsay et le ministère de la Justice d’une part (c’est à dire in fine de la décision du Premier ministre, ce que M. Lionel Jospin a fait pour les plus importants d’entre eux en avril 1998), et entre Matignon et l’Elysée d’autre part (son histoire et en grande partie secrète et reste à écrire, sauf à rappeler que les changements de premier ministre n’ont pas empêché que l’Elysée et le ministère de la



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

Four areas laid down in the Rome Statute include the key elements in the tension between sovereignty and judicial supra-nationalism, thus exemplifying the main ideas in the 1998 discussion of this issue²⁶.

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

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

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

The third element is related with the power of the Prosecutor and concerns the role of the Security Council and its relation with the Court. Though the Security Council holds a privileged procedural position (under article 13, the submission by the Security Council to the Prosecutor of a situation does not require the consent of the implicated States), it is in huge contrast with the solution found for previous ad hoc courts and with the

Défense soient globalement sur la même ligne). L'article 124 a été l'une des exigences du Ministère de la Défense et de l'Élysée» (Bourdon, 2000: 297).

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



1994 project of the Committee for International Law. In the 1994 project, the Prosecutor could only start a case after the Security Council had authorized; in the current article 16, the Security Council has only the power to suspend an already ongoing investigation. In the draft by the international law committee, as in previous ad hoc courts, exercising international criminal jurisdiction was completely conditioned to the powers of the Council and, as a result, to being vetoed by any of the five permanent members. This shift in balance is crucial: a permanent Member State that wishes to suspend an inquiry, either that it begins or that it develops, has to simultaneously ensure 9 of the 15 votes in the Council as well as the positive vote of the remaining permanent members.

Lastly, the fourth element concerns the commitment to complementarity/cooperation in the international criminal system as a whole. The idea of complementarity, laid down in the preamble and in article 1 of the Statute, is the formula that allows to reconcile judicial sovereignty and supranational or national justice. In the European Union there was heated debate on the affirmation of the principle of primacy and the affirmation of a judicial federal system, a debate where there was sometimes a conflict with constitutional courts from some Member-States. Similarly, in the international criminal system proposed by the Rome Statute, national criminal jurisdictions have primacy over the International Criminal Court jurisdiction. The latter cannot intervene unless as an alternative, in cases described in the Statute, which contradicts the idea of universal jurisdiction. Articles 17 to 19 include very detailed rules on this dynamic between national jurisdictions and the international jurisdiction. Articles 86 and following establish different specific cooperation obligations, thus tempering this primacy of national criminal jurisdiction. According to Marten Zwanenburg:

"The principle of complementarity constitutes a deference to national sovereignty, which is contrary to a development in international law away from broader notions of sovereignty" (Zwanenburg 1999: 130).

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

Considering the initial compromise adopted in Rome, William Schabas states that:

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

The degree of hostility, if not of active aggression, evidenced during the Bush administration against the court can only be understood if you consider the USA point



of view that an international criminal justice that is permanent and independent is a threat to strategic interests, a serious attack to national sovereignty. President Clinton signed the treaty on the last day possible, in a possible strategy to change the text as Member party, and this signature was immediately withdrawn by the new administration, in the famous episode of *unsigning*²⁷.

This escalating of hostility reaches its peak in 2002 with the adoption of the American Service-members' Protection Act (ASPA). Regardless of the gap between republicans and democrats, American legal and legal-political literature is divided on this matter²⁸.

In Portugal, as in several other States, the debate on the accession to the Rome Statute focused on the constitutionalization of the transference of sovereignty. The starting point for a constitutionalist is the sovereignist perspective: the national Constitution preserves the commanding capacity of a political community over its territory and a greater or lesser openness to the outside by the constitutional order is in itself a constitutional issue. Accession to the Rome Statute (as to other Treaties of European integration) is viewed as a surrender of sovereignty²⁹, which must first be included in the international Constitution, with its amendment if necessary. Vital Moreira³⁰ refers to the issue of accession to the Statute as an issue of judicial sovereignty: the capacity to investigate and try crimes committed in its territory is an essential feature of State sovereignty (in the Portuguese case, constitutional laws describe the courts as bodies of sovereignty). Therefore, specific laws in the Rome Statute represent derogation of the "Criminal or judicial Constitution". For a State like Portugal, judicial sovereignty, as any other type of sovereignty, has an adaptation strategy which includes flexibility in relation to its constitutional order. Article 7 of the Portuguese Constitution, amended in 1997, solves the conflict with a solution of openness, of a sovereignty able to accept limited schemes of supra-nationalism or of real legal federalism.

4. From Illegal War to the Crime of Aggression

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

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

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

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

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

³⁰ Moreira, Vital (2004). "O Tribunal Penal Internacional e a Constituição" in Vital Moreira/ Leonor Assunção/ Pedro Caeiro/ Ana Luisa Riquito, *O Tribunal Penal Internacional e a Ordem Jurídica Portuguesa*. Coimbra: Coimbra Editora, p. 20.



Article 6 of the London Charter on the International Criminal Court, which preceded the Nuremberg Trials, established, among the crimes submitted to the Court jurisdiction,

“Crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements and assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing”.

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

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

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

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

The fact that the General Assembly adopted Resolution 3314 on 14 December 1974 is one of the most important milestone in this process, in particular the inclusion in article 5 of the declaration that “a war of aggression is a crime against international peace”. The International Court of Justice analyzed issues related to the illegality of aggression in Nicaragua³¹ and referred some of the provisions in Resolution 3314. There was growing affirmation of the illegality of aggression, based on the system of the United Nations Charter, but still acts of aggression had not been clearly typified as an international crime. Though the prosecutions in Nuremberg and Tokyo were based on the assumption of an international crime of aggression having been committed (or a crime against peace as it was called at the time), the issue was not resolved until 1998.

The reasons leading to the crime of aggression not being definitely included in the Rome Statute are well-known and aimed only at making the compromise possible, a compromise that was difficult to achieve. Therefore, this discussion was postponed to a later date. Article 5, n.º 1 included the crime of aggression as submitted to the court jurisdiction but, under n.º 2 of the same precept, that jurisdiction could only be exercised with the adoption of amendments with the definition of the crime and the conditions for the exercise of jurisdiction by the Court.

Between 2002 and 2009, a Special Working Group for the Crime of Aggression, created by the first Assembly of States Party to the International Criminal Court and assigned to write a project of amendments, held several formal and informal meetings

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



to attain the objective mentioned in article 5, n.º 2³². The work carried out by this Group was the basis for the 2010 Diplomatic Conference.

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

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

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

The 2010 amendments are based on a still rather complex system that separates (i) entering in full force of (ii) exercise of jurisdiction by the Court and the still (iii) possible differentiated activation of the jurisdiction when cases are resubmitted by the Security Council or submitted by States and following an investigation initiated by the Prosecutor.³³ There is limited possibility for opting out in some jurisdiction situations, subjected to final decision at the Assembly of States party after 1 January 2017.

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

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

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



amendments must be in force and cannot have been opted out in terms of accepting jurisdiction on these cases (in the moments prior to the aggression). Besides these, there are specific obligations in the relationship between the Prosecutor and the Security Council and the powers of the latter as a jurisdiction filter as well as its being able to stop ongoing investigations under article 16 of the Statute.

Considering the description above is rather simplified and does not account for specific issues in interpretation regarding the application of regime 121, n.º 5 of the Statute and of the opting out system for some situations, this provides us with a very clear idea of the maze of interpretations this type of texts arouses. The road towards the full functioning of the Court as far as the crime of aggression is concerned will not be straightforward. In March 2013 only five State have ratified the Kampala amendments, which makes it seem difficult that the Court jurisdiction will be ensured after 2017 on the crime of aggression.

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

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

According to what is laid down in numbers 6 to 8 of the new article 15 bis³⁴:

"6 - If concluded there are sufficient grounds to open an inquiry regarding a crime of aggression, the prosecutor should ensure first that the Security Council has verified the existence of the act of aggression by that State.

The prosecutor should notify the United Nations Secretary-General of the case to be presented in court, as well as any other relevant information or documentation.

7 - Upon verification by the Security Council of the existence of an act of aggression, the prosecutor may open an inquiry in relation to the crime of aggression.

8 - Whenever the act of aggression is not confirmed within six months from the notification date, the prosecutor may open an inquiry in relation to an act of aggression as long as the inquiry office has authorized the opening of an inquiry in relation to an act of aggression pursuant to procedure laid down in article 15, and except if the Security Council decides otherwise, pursuant to article 16".

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



The text above was only possible after huge negotiation effort and mostly represents the defeat of the position of the five permanent members. The latter defended that the Court should be activated based on a green light proposal: in those cases submitted by the States or by the prosecutor, the latter could only pursue the investigation after a request by the Security Council to do so³⁵. The proposal that was approved is, thus, closer to a red light proposal: in case of inaction by the Security Council, the Prosecutor may pursue the investigation (authorized by the investigating judge) except if the Security Council decides otherwise (pursuant to article 16).

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

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

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

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

Another especially interesting situation is the one that will occur when the Security Council, required by the Prosecutor to determine by means of a resolution the nonexistence of a situation of aggression. The Prosecutor, when pursuing the investigation, or later the Court reach the opposite conclusion and declare that a crime of aggression was committed. Or the opposite situation occurs: under its prerogatives the Security Council determines the existence of a situation of aggression and the

³⁵ On the history and documentation of the negotiation and the different proposals submitted, see Stefan Barriga/Claus Kreß (eds.) (2012). *Crime of Aggression Library: the Travaux Préparatoires of the Crime of Aggression*. Cambridge: University Press.



Prosecutor or the Court conclude the opposite, that no crime of aggression was committed. Perhaps these are more theoretical than practical possibilities but the two are consequences of the amendments introduced in the Statute. And in these cases it is not worth it to state that the Security Council has an essentially political exercise while the Court has a judicial exercise. Even though from a different perspective - political or judicial - the possibility that the same facts may be classified as aggression or not (situation or crime of aggression) is nonetheless disturbing³⁶.

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

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

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

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

Before dealing with this issue, it is important to review some comments on the Kampala amendments. Zhou Lulu³⁷ should be quoted here, firstly because international legal Chinese thought is not well known and secondly because Zhou Lulu participated in the Chinese delegation to the Kampala Conference.

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

³⁷ Zhou, Lulu³⁷ (2012). "Brief Analysis of a Few Controversial Issues in Contemporary International Criminal Law" in Morten Bergsmo/ Ling Yang (eds.) *State Sovereignty and International Criminal Law*. Beijing: Torkel Opsahl Academic EPublisher, p. 21.



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

The ability awarded to the Court to assess situations of aggression in case there is inaction by the Council is not compatible with powers that article 39 the Charter awards the Council and the system of concurring competences between the two bodies affects the whole collective security system in force after 1945. The author also expresses great concern with the possibility of the two bodies (one of which, the Court, is independent from the United Nations system) being able to reach completely opposite conclusions as far as the existence of aggression in a real situation. In this situation, what type of obligations would arise for the States in article 103? The author refers implicitly that the precept would impose on States the disrespect for a Court sentence if that sentence would go against a prior decision by the Security Council. And the final result of different decisions by the Council and the Court would be that

"(...) not only will the international community be faced with the disorder brought on by the lack of clear right-or-wrong standards, the fragmentation of international law will be exacerbated which may stimulate states to go more on their own ways. In the long term, this will be harmful to preventing acts of aggression and maintaining international legal order" (Zhou 2012: 35).

Guo Yang describes the possible conflict in terms of decisions, saying:

"(...) to authorize the Prosecutor to proceed with the case in disregard of the decisions of the Council will put the reputation and credibility of both institutions at risk if their decisions conflict each other. It will also put the States into a dilemma when faced with conflicting decisions because they are required to give priority to the obligations from the Council under Article 103 of the Charter, which could hinder their co-operation with the Court (...) The intervention of the Court under these circumstances might not be a contribution to peace and security" (Guo 2012: 2012: 97).

Much of this debate presupposes that the powers of the Security Council under chapter VII of the Security Council (rather the mixed interpretations of articles 24, 25 and 39 of the Charter) are exclusive powers in the scope of international peace and security and, as a results, excludes all concurrent powers. The idea that the powers of the Council are exclusive is based on the perspective that determining aggression is, in its essence, a political decision and, therefore, one that only the Council as a political body is able to take. This is a narrative of excluding any attempt to judicially assess aggression, of excluding any technical-legal assessment of conducts. This is an aggressive narrative against the existence of judicial powers independent from the Council aimed at eliminating any alternatives to the Security Council in matters of international security.



There would be several ways to counter this concept of exclusive powers by the Council. Yet, you just have to consider that the uncompromising defense of this monopoly would in fact create a difference between Giant States and other States that Vattel referred to, a situation in itself incompatible in legal terms with the sovereign equality laid down in article 2 of the Charter. Ultimately, if the Court (or any ad hoc court) jurisdiction is made dependent of the veto dynamics would lead to absolute jurisdiction immunity in favor of five States for any international crime.

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

However, up to 1998³⁸, both were kept under Council control: the creation of ad hoc courts allowed for the Council claiming also the administration of international criminal justice, of crime and punishment, at least at an early stage. Two recent events, in 1998 and in 2010, have opened gaps in a punishing monopoly, which the 1945 order progressively took sovereignty from States to assign it to Super-Sovereigns at the Security Council. Article 15-bis, paragraph n° 4, makes it hard to support this exclusivity, as David Scheffer points out "However, in order for the pre-trial Division to authorize the investigation of a crime of aggression, it will need to determine (...) that a crime of aggression arises from an act of aggression.

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

As Kreß and von Holtendorff state, if the Court

"(...) succeeds, it is not unreasonable to assume that world opinion will begin to slowly exert its soft power towards the expansion of the ICC's jurisdictional reach" (Kreß/ Holtendorff 2010: 1179).

5. Conclusions

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

However, it is not accurate to state that the relations between sovereignty and international criminal justice are simply of opposition, there is no need for choice between sovereignty and international criminal justice³⁹. National sovereignties, usually subject to factors of erosion, have their own adapting and changing strategies, which

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

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



can even be viewed as consented and not permanent cessions of items of power and independence. Noteworthy is to remember that the Security Council has already submitted real situations of aggression for the Court to assess.

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

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

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

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

The judges deserve a vote of confidence. We must remember that without the judges in Luxemburg, often accused of judicial activism, European integration would not exist; similarly, without the judges in Strasbourg a European legal order of human rights would not exist. And can anyone realistically imagine a world legal order without the International Court of Justice? All these courts have contributed to creating a legal



framework in an environment of open conflict with those States concerned with preserving the most of judicial and even constitutional sovereignty. You just have to remember the tension between the European constitutional courts and the Luxemburg court or the difficult relation between the big States, namely France and the United States, and the compulsory jurisdiction of the International Court of Justice.

The events in the next few years will be critical to assess the credibility of this judicial alternative for world peace and security and for the fight against impunity: the implementation of the Kampala amendments, the dynamics in the discussions on complementarity and maturity process of a set of rules in International Criminal Law will be crucial tests to that very same credibility. Despite everything, we must bear in mind that in March 2013 the Rome Statute includes 122 States party and, therefore, the objective of universality is not naive or lyrical but a perfectly realistic goal.

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

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