

THE INTERNATIONAL CRIMINAL COURT AND THE CONSTRUCTION OF INTERNATIONAL PUBLIC ORDER

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Abstract

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

Key Words:

International Criminal Court; International Public Order; The Rome Statute; International Criminal Law; International Crimes; Terrorism; Responsibility to Protect

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

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

... justice is a fundamental building block of sustainable peace

Kampala Declaration, 11 June 2010.

1. Introduction

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

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

The preludes of an international criminal court as a protector and as a driving force of a public order date back to the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 under the auspices of the United Nations (UN)¹. Indeed, the

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



General Assembly, taking into account the question raised during the discussion on the punishment of crimes of genocide and the increasing need for a competent body for the trial of certain crimes under international law in a developing international community invited the International Law Commission to study the desirability and possibility of its establishment². The positive response of the Commission³ resulted in a draft statute, elaborated over several decades and submitted to the General Assembly in 1994 that advocated the importance of the creation of an international criminal court⁴. In this sense, the Assembly established a preparatory committee in 1996 with the aim of producing a draft text, which served as the basis for negotiations at the Rome Conference in 1998, culminating in the signature of the Statute.

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

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

2. The Rome Statute and the recent *praxis* of the ICC: key considerations

The Rome Statute of 1998 reaffirmed the relevance of the UN Charter objectives and principles⁵ and recognized the existence of common values such as peace, security and well-being of the world which should be safeguarded by the court.

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

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

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

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

⁵ See Articles 1 and 2 of the UN Charter.



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

The punitive facet of international humanitarian law was embodied in Article 8 related to the war crimes prescribed in the Geneva Conventions of 1949. The Court has jurisdiction over these crimes “when committed as part of a plan or policy or as part of a large-scale commission of such crimes”. This article covers grave breaches of these conventions, i.e., acts against persons or property and serious violations of the laws and customs applicable in international armed conflict under international law. In the case of non-international armed conflicts, war crimes refer to violations contained in Article 3, common to the Geneva Conventions. That is, acts committed against individuals taking no active part in the hostilities, including members of armed forces who have laid down their arms or were placed hors of combat: acts of violence to life and person, outrages upon personal dignity, hostage-taking, the passing of sentences and the carrying out of executions, without previous trial by a regularly constituted court, which affords all indispensable judicial guarantees as well as other serious violations of the laws and customs applicable to such conflicts under the international law framework.

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

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

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



This punitive system is based on the complementarity principle (Article 1), that even though constraining the ICC's power, enables the Court to exercise influence over the states' sphere of authority. It forms part of a gradual erosion process of the Westphalian view of the sacrosanctity of state sovereignty and internal affairs. As Miguel de Serpa Soares argues:

"any form of international justice always represents a means of limiting national sovereignty. In the case of International Criminal Law this limitation is even more evident by compromising elements essential to the classic paradigm of International Law, as for example the punitive monopoly of States or the concept of a quasi-absolute State sovereignty" (Soares, 2014: 9).

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

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

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

In 2012, Thomas Lubanga Dyilo was sentenced to 14 years in prison for war crimes. He was found guilty of enlisting and conscripting of children under 15 years of age to actively participate in a non-international armed conflict in the Democratic Republic of the Congo from 1 September 2002 to 13 August 2003⁶. In 2014, Germain Katanga was found guilty and sentenced to 12 years in prison for one count of crime against humanity (murder) and four counts of war crimes (murder, attacking a civilian population, destruction of property and pillaging) committed on 24 February 2003 during the attack on the village of Bogoro in the Democratic Republic of the Congo⁷.

Presently, the Office of the Prosecutor is investigating several situations by state party referral – Uganda (2004), Democratic Republic of Congo (2004), Mali (2012), The Union of the Comoros (2013) and Central African Republic (2005 and 2014) – by *proprio motu* action of the Prosecutor: Kenya (request submitted in 2009, authorization of the Pre-Trial Chamber in 2010), Ivory Coast (request submitted and authorization of

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

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



the Pre-Trial Chamber in 2011) – and conducting preliminary examinations concerning several states, namely Ukraine, a non-state party which accepted the jurisdiction of the Court (2014). Even more important is the referral of the situations in the Darfur region, in Sudan (2005) and in Libya (2011) by the UN Security Council due to the existence of evidence of international crimes⁸. It can be considered that these referrals are in line with the argument of universalism that this competence of the Council allows the extension of the Court's jurisdiction to non-States Parties and thus constitutes an "evolution in shaping the international order" (Kowalski, 2011: 124).

3. Limitations of the ICC and implications for the applicability of International Criminal Law

The limitations of the ICC result, firstly, from legal and political tensions arising from its relationship with the Security Council and the complementary character of its jurisdiction and, secondly, from the ambiguity of certain formulations contained in the provisions concerning the "crime of aggression" and "crimes against humanity", raising interpretive problems which the law applicable by the Court under Article 21 of the Statute⁹ does not clarify categorically.

3.1. Legal-political tensions and the problem of decision implementation

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

But it is mainly Article 16, according to which an investigation or a prosecution may not be initiated or proceeded with for a period of 12 months if the Council has requested the Court to that effect in a resolution adopted under Chapter VII, with the possibility

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

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



of renewal, that raises sharper criticism based on the argument that this action undermines the independence of the Court¹⁰. Jorge Bacelar Gouveia qualifies this mechanism as "whimsy" and underlines that:

"It is very difficult to accept the interference of a political organ in the heart of the exercise of public power of a body that should be jurisdictional, whose intervention, above all, can not only happen at any time in the proceedings, but also repeat itself, though it has in its favor the temporality and the astringent context of Chapter VII of the UNC" (2013: 792-793).

The Court's complementary nature to national criminal jurisdictions means that, as Judge Philippe Kirsch noted, the Statute is a two-pillar system: a judicial pillar represented by the Court and an enforcement pillar represented by the States¹¹. Yet, the absence of a permanent mechanism that ensures compliance with the court's decisions hampers the implementation of this pillar and, therefore, the fight against impunity.

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

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

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

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

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



Bashir¹³. As David Luban stated, the Court's weakness, namely, the gap between the aspiration for criminal justice and its accomplishment, became evident when most African and Arab states gathered to support the Sudanese President against the ICC's decision (2013: 508).

On several occasions, the ICC urged, unsuccessfully, the States Parties and non-States Parties to execute the arrest warrants issued against al-Bashir during his presence on their territory. In April 2014, the Pre-Trial Chamber determined that the Democratic Republic of the Congo failed to comply with its obligations to arrest and surrender Omar al-Bashir during his visit to the country. Consequently, in accordance with Article 87, paragraph 7, the Pre-Trial Chamber informed the Assembly of State Parties and the Security Council¹⁴. The fact that the latter may take the necessary measures on this matter demonstrates that the power to enforce the decisions of the Court lies also on this organ.

Another relevant case regards the current President of Kenya, Uhuru Muigai Kenyatta, accused of being criminally responsible as an indirect co-perpetrator for crimes against humanity. This case concerns the violence that occurred in Kenya following the 2007 presidential elections that caused numerous victims. In 2009, Luis Moreno-Ocampo submitted a request to the Pre-Trial Chamber for authorization of an investigation, which culminated, at request of the Prosecutor, with the issuance of an arrest warrant against six Kenyan officials, the so-called "Ocampo six", by the Pre-Trial Chamber in 2011. That year, the AU endorsed the Kenyan government's request to the Security Council to adopt a resolution, requesting the ICC to defer the proceedings against the Kenyan president and the vice president, William Ruto, pursuant to Article 16. The AU renewed the request in 2013, which was once again declined by the Security Council¹⁵.

In June 2014, the AU adopted an amendment to the protocol of the Statute of the future African Court of Justice and Human Rights, with jurisdiction over international crimes, that grants immunity from prosecution to heads of state and senior government officials, in opposition to Article 27¹⁶ of the Rome Statute, which allows for the prospect of the persistence of legal and political tensions between the AU and the ICC.

¹³ See Theresa Reinold (2012), *Constitutionalization? Whose constitutionalization? Africa's ambivalent engagement with the International Criminal Court*, *International Journal of Constitutional Law*, 10(4): 1076-1105, Ken Obura (2011), *The Security Council's Power to Defer ICC Cases under Article 16 of the Rome Statute*, *Journal of African and International Law*, 4(3) 581-583 and Stella Nyana (2011), *The ICC at a Crossroads: Between Prosecution and Peace in Africa*, *Journal of African and International Law*, 4(1): 1-74.

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

¹⁵ See Theresa Reinold (2012), *Constitutionalization? Whose constitutionalization? Africa's ambivalent engagement with the International Criminal Court*, *International Journal of Constitutional Law*, 10(4): 1076-1105, Ken Obura (2011), *The Security Council's Power to Defer ICC Cases under Article 16 of the Rome Statute*, *Journal of African and International Law*, 4(3) 581-583 and Stella Nyana (2011), *The ICC at a Crossroads: Between Prosecution and Peace in Africa*, *Journal of African and International Law*, 4(1): 1-74.

¹⁶ Article 27, paragraph 1 determines that "this Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence". Article 27, paragraph 2 states that "immunities or special procedural rules may attach to the official capacity of a person under national or international law, shall not bar the Court from exercising its jurisdiction over such a person".



3.2. Weaknesses in the interpretation of the Rome Statute

3.2.1. "Crime of Aggression" and "Act of Aggression"

The failure to reach an agreement on a definition of "crime of aggression" and respective elements at the Rome Conference resulted in the inclusion in the Statute of an additional clause to the incorporation of this crime as a "core crime". This clause provided for the exercise of jurisdiction once a provision was adopted in a Review Conference, in accordance with Articles 121 and 123, defining this crime and setting out the conditions for that purpose (Article 5, paragraph 2). In this sense, resolution F in Annex I of the Final Act of the Rome Conference established a preparatory commission with various tasks including the preparation of proposals for a provision on this crime¹⁷; this task was subsequently attributed to the *Special Working Group on the Crime of Aggression*.

The definition of the crime of aggression adopted at the Kampala Conference represents a significant development in international criminal law¹⁸. It is undeniable that the exercise of jurisdiction over the crime of aggression will constitute an evolution, since it will be the first time that a permanent criminal justice system imposes criminal liability for the illegal use of force. However, it is subjected to formal and material constraints, the latter giving rise to interpretive issues that may hinder the determination of the existence of such a crime.

Regarding the formal constraints, the Court will only have jurisdiction over crimes committed one year after acceptance or ratification by a minimum of thirty states¹⁹ and after a decision to be taken only after 1 January 2017 in the Assembly of States Parties to activate the Court's jurisdiction (Articles 15 *bis* and 15 *ter*, paragraphs 2 and 3). These limitations garner criticism by some authors as Mary Ellen O'Connell and Mirakmal Niyazmatov, who qualify this process as "byzantine" (2012: 191).

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

"Planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations".

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

¹⁸ See, among others, Niels Blokker; Claus Kress (2010), A Consensus Agreement on the Crime of Aggression: Impressions from Kampala, *Leiden Journal of International Law*, 23(4): 889-895.

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



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

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

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

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

As far as "act of aggression" is concerned, while the criteria of "gravity" and "scale" were included to avoid overloading the Court with minor cases, the criterion of "character" aimed to exclude controversial cases involving the use of force (Mancini, 2012: 236). However, the criteria of "character," "gravity" and "scale" used to assess whether an act constitutes a manifest violation of the Charter lack definition. The latter two undefined criteria are also used in the determination of an armed attack in Article 51 of the UN Charter and this lack of clarity could be problematic, particularly given the existing divergences regarding the lawful use of force in self-defence or in the case of humanitarian intervention (Santos, 2012). The elements of crimes refer that the determination of a "manifest" violation of the Charter is objective, but this process within the UN is not peaceful.

At the same time, the remission of paragraph 2 of Article 8 to resolution 3314 of the General Assembly with the purpose of clarifying the term "act of aggression" raises some questions. Firstly, some formulations in the resolution are vague and the enunciated list is not exhaustive, which may lead to controversial situations. Secondly, the article does not provide clarification whether and to what extent other articles of the resolution were applicable or relevant to the Court (Surendran Koran: 252).

In addition to the political character of the Definition of Aggression – the General Assembly can only make recommendations, devoid of any binding effect –, paragraphs 6, 7 and 8 of Article 15 *bis* confirm the power of the Security Council. In fact, Article 39



of the Charter stipulates the exclusive power of the Council to determine the existence of an act of aggression and it may refer to cases which are not mentioned in the Definition of Aggression. The practice, however, is not uniform, and, repeatedly, in its Chapter VII decisions the Security Council uses different wording.

Other aspects have been criticized such as the complete exclusion of acts committed by nationals of non-states parties – unlike the procedures relating to the "most serious crimes" – and the "*retrograde opt-out clause*" (Alam, 2010: 179-180) that provides for the possibility of voluntary exclusion from the Court's jurisdiction (Article 15 *bis*, paragraph 4). Other critics consider the resolution as a political guidance in determinations of state responsibility and, therefore, it did not contemplate its application to individual liability (Alam, 2010: 170).

But, an essential criticism can be pointed to the fact that the definition of aggression adopted in Kampala did not contemplate a possible aggression by non-state actors. The terrorist attacks of 11 September 2001 demonstrated the likelihood of such an act being committed by non-state actors as well as the magnitude, comparable to an action perpetrated by a State.

In fact, this solution reveals problems that cannot be underestimated otherwise it could hamper the proper functioning of the ICC. However, the pessimistic view of some more critical authors like Mary Ellen O'Connell and Mirakmal Niyazmatov who argue that "the substantive provision leaves experts unclear to what the prosecutable crime even is" cannot be corroborated. These authors doubt the feasibility of criminal proceedings and regret that the solution presented is different from the definition of crime of aggression under international law, affirming that this prohibition of aggression must not be undermined by the political compromise reached at Kampala (O'Connell; Niyazmatov 2012: 191, 207).

3.2.2. "Crimes against Humanity"

Some formulations of Article 7 reveal a certain ambiguity. Several authors highlight interpretive difficulties and their consequences.

Jordan J. Paust considers the formulations too restrictive and unclear: "Article 7 contains a limiting definition of 'attack' that is lacking in common sense. Instead of recognizing that one attack can constitute an 'attack', Article 7 (2)(a) requires that an 'attack' involves 'a course of conduct involving the multiple commission of acts'" (2010: 691). The author also argues that the use of the word "attack" instead of, for example, act(s) committed (against) is problematic, since this may result in the impossibility to include certain situations linked to crimes of this type and that are included in the listing. Moreover, according to the author, the phrases "course of conduct" and "multiple commission of acts" are debatable, since they do not include acts of torture, rape, persecution among others (*ibid.*: 692-693).

Further criticism can be pointed to the expression "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack", since it leaves open the following question: Which is the threshold of "widespread or systematic"?



Another interpretive problem relates to the understanding of the formulation "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental and physical health" (paragraph 1, subparagraph k). This interpretation became relevant for the first time in the joint indictment of Germain Katanga and Mathieu Ngudjolo Chui in 2008. The Office of the Prosecutor accused both of perpetrating such acts and in its decision confirming the charges, the Pre-Trial Chamber decided that the wording should be interpreted strictly. However, several authors like Bernhard Kuschnik support a broad interpretation (2010: 524-530).

According to Cameron Russell, one of the interpretive problems relates to the notion of "civilian". The author advocates that the parameters are not clear, which is partly a result of the decoupling of these crimes from the requirement of the existence of an armed conflict. This concept was employed to differentiate civilians from "combatants", but the fact that these crimes can be committed in times of peace generates interpretive problems (2011: 60-61). In addition, an "attack directed against any civilian population" implies a conduct "pursuant to or in furtherance of a State or organizational policy to commit such attack" (Paragraph 2, subparagraph a), since the term "organizational" is imprecise, which also results from the dissociation with the existence of an armed conflict. Thus, it becomes necessary to define "organization" to distinguish it from the entity of the state (*Ibid.*: 63). In the author's opinion, the requirement of "policy" seems to create some inconsistency within the Statute (*ibid.*: 70). Leila Nadya Sadat notes that the Pre-Trial Chambers have been demonstrating different positions on the interpretation of Article 7, especially, regarding the phrase "State or organizational policy" (2013: 335). This element for the prosecution for these crimes remains controversial (*ibid.*: 352) and should be interpreted broadly otherwise it could result in the fragmentation of international criminal law (*ibid.*: 375). The dissenting opinion of Hans-Peter Kaul, following the request of the Prosecutor to the Pre-Trial Chamber to open an investigation into the post-election violence in Kenya, showed an opposite understanding. According to the judge, only states or organizations with similar characteristics to a State following criminal policies may perpetrate crimes against humanity. This position has gathered support in the doctrine and within the Court (Sadat, 2013: 336).

It is also important to refer the minority opinion of Christine Van den Wyngaert of March 2014 concerning the case of Germain Katanga, since it illustrates this problematic and it can have repercussions in future trials. The judge disagreed with Germain Katanga's conviction for lack of evidence of his criminal responsibility to intentionally contribute to the perpetration of crimes by a group of persons with knowledge that this group had such purpose (Article 25, paragraph 3, subparagraph d, vii) and the interpretation of the evidence could have been made in a different and more convincing manner. As for the accusation of crimes against humanity, the judge argued numerous points. Firstly, the number of victims was insufficient to qualify the acts as crimes against humanity and, therefore, there was no multiple commission of acts; secondly, the intent of targeting the civilian population was not proved in an incontestable manner; thirdly, the existence of a policy and of an organization was not proved incontestably and, finally, the attack could not be considered systematic²⁰.

²⁰ ICC-01/04-01/07-3436-Anxl, Minority Opinion of Judge Christine Van den Wyngaert, 07.03.2014.



In this context, the decision of the International Law Commission to add the topic "crimes against humanity" to its program in June 2013 - following the recommendation of the *Working Group on the Long-term Programme of Work* based on the proposal prepared by a working group member, Sean Murphy – is to be welcomed. As the author of the proposal notes:

*"For example, the mass murder of civilians perpetrated as part of an international armed conflict would fall within the grave breaches regime of the 1949 Geneva Conventions, but the same conduct arising as part of an internal armed conflict (as well as internal action below the threshold of armed conflict) would not (...). A global convention on crimes against humanity appears to be a key missing piece in the current framework of international humanitarian law, international criminal law, and international human rights law."*²¹

Sean Murphy stressed the importance of the elaboration of an international convention on the prevention and punishment of such acts. The author mentioned aspects that should be taken into account by the Commission for the purposes of the Convention such as defining the offense of "crimes against humanity" as expressed in Article 7.

As for the articulation between the Convention and the ICC, Sean Murphy claims that the Convention would benefit substantially from the language of the Statute and related instruments as well as jurisprudence. In turn, the adoption of the Convention could address aspects that were not covered by the Statute and it could support the ICC's mission²². In particular because, among other aspects mentioned by the author, the Statute regulates relations between States Parties and the Court, but not among States Parties themselves and between State Parties and non-States Parties. Part IX, headed "International Cooperation and Judicial Assistance" implicitly recognizes that inter-state cooperation on crimes under the jurisdiction of the Court may occur outside the Rome Statute. The Convention could help to promote inter-state cooperation in relation to the investigation, detention, prosecution and punishment of individuals who commit such crimes, which would be consistent with the object and purpose of the Statute. The Convention would require the enactment of national legislation prohibiting and punishing these crimes, which in the author's opinion has not been made by several Member States yet, helping to fill a gap and, thus, encouraging all States to ratify or accede to the Statute. In the case of States that have adopted legislation in this regard, frequently it only authorizes the prosecution of crimes committed by nationals of that State or in its territory. The Convention would require the State Party to broaden its legislation to cover other individuals who are in their territory - nationals of other States who commit an offense in the territory of another State Party to the Convention. In the event that a State Party receives a surrender request from the Court and at the same time, an extradition request from another State in accordance with the Convention, Sean Murphy proposes that the Convention should be designed to

²¹ U.N. Doc. A/68/10, Sean D. Murphy, Annex B, Report of the International Law Commission, Sixty-fifth session, General Assembly, Official Records, Sixty-eighth session, 2013, §2 and §3, pp. 140-141.

²² *Ibid.*, §8, §9, pp. 142 and f.



ensure that States which are party to the Statute and to the Convention can continue to follow the procedure outlined in Article 90 of the Statute on competing requests.²³

4. Multifaceting the ICC

Certain challenges such as terrorism in all its forms and manifestations, the profusion of intrastate conflicts with different nuances and complexities and the phenomenon of fragile states, failed or collapsed demonstrate the increasing number of distinct and intricate situations in which a state is unwilling or unable to conduct an investigation or prosecution or is incapable of protecting its population from international crimes.

Thus, these challenges justify the indispensability of rethinking the ICC through a process of adding new facets and deepening facets foreseen in the Statute. More specifically, rethinking the competence of this body to expand its jurisdiction to the crime of international terrorism – i.e. large-scale terrorist acts, which "*threaten the peace, security and well-being of the world*", acts of atrocities "*that deeply shock the conscience of humanity*" and of concern "*to the international community as a whole*", paraphrasing the preamble, similarly to what occurs with the most serious crimes under the jurisdiction of the Court – and rethinking the action of the ICC with a view of protecting populations from those crimes which should be implemented in articulation with the "*responsibility to protect*" concept.

4.1. Categorization of terrorism as an "international crime"

Terrorist acts, methods and practices can take many forms and manifestations and aim the destruction of human rights and fundamental freedoms²⁴. The dissemination of a new type of terrorism of transnational nature and the proliferation of terrorist groups in different parts of the globe, including the territories of States Parties to the Statute, groups that could include nationals of those States, imply to revisit the question of the possibility of ICC jurisdiction over this matter.

The idea of including terrorism as one of the most serious crimes of concern to the international community dates back to the Draft Statute for an International Criminal Court of the International Law Commission of 1994. The Commission's proposal contained an article - Article 20 - which contemplated - along with the crimes of genocide, aggression, serious violations of the laws and customs applicable to armed conflict and crimes against humanity - a specific subparagraph, subparagraph e), regarding the "treaty crimes" which included terrorism: "*Crimes, established under or pursuant to the treaty provisions listed in the Annex, which, having regard to the conduct alleged, constitute exceptionally serious crimes of international concern.*"²⁵

²³ *Ibid.*, §10 and §12. See Article 90 of the Rome Statute.

²⁴ U.N. Doc. A/RES/60/288, The United Nations Global Counter-Terrorism Strategy, 20.09.2006, p. 2.

²⁵ U.N. Doc. A/49/10, Draft Statute for an International Criminal Court, Report of International Law Commission on the work of its forty-sixth session, 2 May-22 July 1994, Official Records of the General Assembly, Forty-ninth session, Supplement No.10, Yearbook of the International Law Commission, 1994, vol. II (2), p. 38. The Annex refers, for example, the Convention for the Suppression of Unlawful Seizure of Aircraft of 1970, the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1971, the International Convention against the Taking of Hostages, 1979 and the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988, pp. 67 ff.



Similarly, the Preparatory Committee on the Establishment of an International Criminal Court created by the UN General Assembly in 1996 – with the purpose of preparing a widely accepted consolidated text, serving as a basis for negotiation for the establishment of an international criminal court - suggested the inclusion of the crimes of terrorism among others (Article 5, subparagraph e))²⁶ as an offense covered by the conventions mentioned in the Commission's draft statute (paragraph 2), but it went further by specifying these crimes as follows:

"Undertaking, organizing, sponsoring, ordering, facilitating, financing, encouraging or tolerating acts of violence against another State directed at persons or property and of such a nature as to create terror, fear or insecurity in the minds of public figures, groups of persons, the general public or populations, for whatever considerations and purposes of a political, philosophical, ideological, racial, ethnic, religious or such other nature that may be invoked to justify them" (paragraph 1).

"An offense involving use of firearms, weapons, explosives and dangerous substances when used as a means to perpetrate indiscriminate violence involving death or serious bodily injury to persons or groups of persons or populations or serious damage to property" (paragraph 3).

The dissent among States at the Rome Conference prevented the incorporation of the crime of terrorism in the Statute, but States in resolution E of Annex I to the Conference Final Act recognized that *"terrorist acts, by whomever and wherever perpetrated and whatever their forms, methods or motives, are serious crimes of concern to the international community"*. At the same time, the States, deeply apprehensive about the persistence of this serious threat to international peace and security, recommended that a Review Conference pursuant to Article 123 of the Statute²⁷ should consider the crimes of terrorism to achieve a consensual definition and their inclusion in the list of the most serious crimes²⁸. However, this topic was not discussed at the Kampala Review Conference of 2010. Undoubtedly, the main difficulty lies in the absence of an universal legal and political definition enshrined in a

²⁶ U.N. Doc. A/CONF.183/13(Vol. III), Report of the Preparatory Committee on the Establishment of an International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Official Records, Rome 15 June-17 July 1998, United Nations, 2002, p. 5 and p. 21.

²⁷ Article 123, paragraph 1 provides that "seven years after the entry into force of this Statute the Secretary-General of the United Nations shall convene a Review Conference to consider any amendments to this Statute. Such review may include, but is not limited to, the list of crimes contained in Article 5."

²⁸ UN Doc. A/CONF.183/13 (Vol. I), United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Official Records, Rome 15 June-17 July 1998, United Nations, 2002, pp. 71 and f. At the Rome Conference, several States supported the court's jurisdiction over the crimes of terrorism, *ibid.*, Vol. II (for example, Algeria, §18, p. 73, Kyrgyzstan, §71, p. 77, Costa Rica, §74, p. 77, Armenia, §83, p. 78, Albania, "institutionalized State terrorism" §12, p. 82, India, §52, p. 86 and f., Tajikistan, §17, p. 92, Russian Federation, "most serious terrorist crimes", §20, p. 115, Congo, §49, p. 117, Sri Lanka, §35, p. 123, Turkey, "Terrorism shouldn't have been included among crimes against humanity, since it was often the root causes of such crimes", §41, p. 124).



comprehensive convention on international terrorism, prescribing that large-scale terrorist acts constitute an international crime.

Several authors stress that acts of international terrorism as the 11 September 2001 attacks could qualify as crimes against humanity under Article 7 of the Statute and be tried by the ICC. Mireille Delmas-Marty argues that paragraph 2 of this article which establishes the notion of an attack directed against a civilian population as an element of crimes against humanity could have been applied to these terrorist acts (2013: 561). In this regard, Vincent-Joël Proux adds: *“other acts of international terrorism, which do not compare in magnitude to the events of September 11th, yet still constitute an affront to the principles of humanity, should be prosecuted under this mechanism”* (2004: 1085). Lucy Martinez contemplates the possibility of individual acts of international terrorism falling under crimes against humanity or war crimes, under the condition of the existence of an armed conflict (2002: 50). In turn, Surendra Kumar although arguing that crimes with the magnitude of 11 September attacks could be considered crimes against humanity, minor terrorist acts may not reach the threshold and, therefore, not fall under the jurisdiction of the ICC. Moreover, the author sustains that while some terrorist acts, to some extent, can be perceived as a crime of genocide – the conviction for such acts will always depend on whether the evidence is sufficient to meet the elements of the crime of genocide - or as a war crime - when committed in armed conflicts, terrorist acts may not always hold these characteristics (2008: 200-202). In this sense, Surendra Kumar proposes an amendment to the Statute, *“the need of the hour is that crimes of terrorism, inducing suicide terrorism should be incorporated as a separate category and deserves separate contemplation and prosecution”* (2008: 202).

The arguments put forward in favor of including the crime of terrorism within the jurisdiction of the Court relate to the limitations of national judiciary systems and to the fact that such acts possess features which are common to the most serious crimes under the Statute.

The Netherlands proposed an amendment to the list of such crimes in 2009 and explained the problematic as follows:

“We have all committed ourselves to cooperate fully in the fight against terrorism, in accordance with our obligations under international law, in order to find, deny safe haven and bring to justice, on the basis of the principle of extradite or prosecute, any person who supports, facilitates, participates or attempts to participate in the financing, planning, preparation or perpetration of terrorist acts or provides safe haven. Yet, at the same time, there is all too often impunity for acts of terrorism in cases where states appear unwilling or unable to investigate and prosecute such crimes. (...) In the light of the absence of a generally acceptable definition of terrorism, the Netherlands proposes to use the same approach as has been accepted for the crime of



*aggression, i.e. the inclusion of the crime of terrorism in the list of crimes laid down in article 5, paragraph 1, of the Statute (...)*²⁹.

According to this proposal, the crime of terrorism would be integrated in a new subparagraph (subparagraph e) of Article 5, paragraph 1. Furthermore, this article would include a third paragraph that would reproduce *ipsis verbis* the content of the second paragraph concerning the crime of aggression in the Statute:

“The Court shall exercise jurisdiction over the crime of terrorism once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations” (Article 5, paragraph 3).

The proposal also provided for the establishment of an informal working group on the crime of terrorism at the Kampala Conference tasked to assess to what extent the Statute would require changes as a consequence of the introduction of the crime of terrorism within the jurisdiction of the Court as well as other relevant questions linked to the extension of its jurisdiction.

If the attacks of 11 September 2001 relaunched the question on whether large-scale terrorist acts could constitute “international crimes” and fall within the jurisdiction of the ICC, presently several arguments can be enunciated that support the inclusion of terrorism as a crime within the jurisdiction of the Court.

The Security Council referred to these attacks as a threat to international peace and security (resolution 1368 (2001)). In several resolutions, this organ reaffirmed that terrorism in all its forms and manifestations constitutes one of the most serious threats to international peace and security. The UN Global Counter-Terrorism Strategy of 2006 referred to this phenomenon in the same terms³⁰.

The seriousness of this threat is accentuated by its different and multiple forms and manifestations, being also perpetrated by non-state actors, groups resorting to different methods and with different motivations.

It is important to underline that terrorism can not and should not be associated with any religion, nationality, civilization or ethnic group - as mentioned by the Security Council in Chapter VII decisions and by the General Assembly in the above-mentioned Strategy³¹ - currently, the actions of several extremist groups, most of them considered terrorist groups, in which nationals of States Parties may be participating and whose acts may occur in the territories of these states is an argument in this sense.

²⁹ ICC-ASP/8/43/Add. 1, Report of the Bureau on the Review Conference, Annex IV, 10.11.2009, pp. 12 and f.

³⁰ U.N. Doc. A/RES/60/288, The United Nations Global Counter-Terrorism Strategy, 20.09.2006, p. 1.

³¹ *Ibid.*, p. 2.



It is undoubtedly significant that the ICC Prosecutor, Fatou Bensouda, has initiated an investigation (January 2013) due to the existence of evidence indicating that war crimes had been committed since January 2012. These acts are mainly attributed to the National Movement for the Liberation of Azawad (MNLA), the Defenders of the Faith group (Ansar Dine), the Organization of Al-Qaida in the Islamic Maghreb (AQIM) and the Movement for Unity and Jihad in West Africa (MUJAO)³², the last three terrorist groups are ideologically inspired and linked to al-Qaida³³. Likewise, it is significant that the Prosecutor conducts a preliminary examination concerning the activities of the jihadist group Boko Haram, a terrorist group linked to al-Qaida³⁴, which according to the report could have committed crimes against humanity since July 2009³⁵. Nevertheless, if the Prosecutor decides to prosecute, formulating an accusation, it is for the Pre-Trial Chamber and, eventually, the Trial Chamber to corroborate these assessments.

The acts committed by the jihadist group "Islamic State"³⁶, a splinter group of al-Qaida, against Iraqi security forces and civilians were condemned by the Security Council. This organ, and several State Parties, qualified these acts as terrorist attacks/acts³⁷. The proclamation of a transnational caliphate by this group – comprising northern Syria and eastern Iraq, with expansionist tendencies, threatening neighbouring countries including Jordan, a State Party to the Statute – could increase the perpetration and the magnitude of terrorist acts and diversify the characteristics of such acts.

In this regard, it is important to mention resolution 2170 (2014), in which the Security Council:

"Deplores and condemns in the strongest terms the terrorist acts of ISIL and its violent extremist ideology, and its continued gross, systematic and widespread abuses of human rights and violations of international humanitarian law".

"Recalls that widespread or systematic attacks directed against any civilian populations because of their ethnic or political background, religion or belief may constitute a crime against humanity, emphasizes the need to ensure that ISIL, ANF [Al Nusra Front] and all other individuals, groups, undertakings and entities

³² ICC, The Office of the Prosecutor, Situation in Mali, Article 53 (1) Report, 16.01.2013, pp. 13-28. This investigation follows a preliminary examination based on the Mali government's referral dated of 13 July 2012 in accordance with Article 14 given the impossibility of pursuing or prosecuting those responsible for crimes against humanity and war crimes especially in the northern part of the territory. See Referral Letter, République du Mali, Ministère de la Justice, 13.07.2012.

³³ The Security Council linked the Ansar Dine group on 20 March 2013 and the MUJAO on 5 December 2012 to al-Qaida. The AQIM had originally been associated with the name Salafist Group for Preaching and Combat on 6 October 2001.

³⁴ On 22 May 2014, the Security Council placed Boko Haram in the list of entities associated with Al-Qaida.

³⁵ ICC, The Office of the Prosecutor, Report on Preliminary Examination Activities, 2013, §206 and §209-§219.

³⁶ Since June, the designation replaced the previous self-designation of the group of "Islamic State of Iraq and the Levant", also known by the acronym ISIS (Islamic State of Iraq and Syria) or ISIL (Islamic State of Iraq and the Levant).

³⁷ U.N. Doc. SC/11437, Security Council Press Statement on Iraq, 11.06.2014. On 30 May 2013, the Security Council included this group and the al-Nusra Front in the list of terrorist organizations linked to al-Qaida.



associated with Al-Qaida are held accountable for abuses of human rights and violations of international humanitarian law (...)".

It is also relevant that the Security Council alludes to the possibility of certain acts constitute crimes against humanity and, at the same time, to the existence of other types of international crimes, while reaffirming, however, that the acts of ISIL can not and should not be associated with any religion, nationality or civilization.

However, not all terrorist acts can be covered by the provisions and respective elements relating to the most serious crimes of international concern.

Whilst the qualification as a war crime implies the existence of an armed conflict, the crime of genocide - although alluding to the "intent to destroy", which is also a characteristic of terrorist acts - requires that this intent aims to destroy in part or in whole a national, ethnical, racial or religious group as stated in Article 6, which might not be the purpose of certain terrorist acts or it might not be unequivocally proven. With regard to crimes against humanity, the Statute's definition states that the attack must be widespread or systematic and this prevents a large-scale attack that does not possess these characteristics from being subsumed under this article. In addition, the definition states that an attack against any civilian population means a course of conduct pursuant to or in furtherance of a State or organizational policy. But it may be difficult to establish a link between the conduct and a policy of a State or an organization, since terrorist acts can be perpetrated by isolated individuals. The crime of aggression can only be committed by a person in a leadership position of an act of aggression; as it requires an act of aggression by a State it would not apply to non-state entities.

Besides, the principle *nullum crimen sine lege* provides that a person shall not be criminally responsible for a conduct unless it constitutes, at the moment it takes place, a crime within the jurisdiction of the Court (Article 22), this could mean that the perpetrators of terrorist acts, shielded by this principle, would go unpunished.

The underlying ideas of terrorism are the creation of feelings of terror, fear and insecurity in individuals and the perpetration of indiscriminate violence involving the use of different types of weapons. Hence, the proposal of the Preparatory Committee appears the most appropriate solution, but the definition enshrined in paragraph 1 should be further broadened to include non-state entities. Terrorist acts such as the use of a conventional explosive combined with radioactive material in order to disperse it over a wide area, exposing victims to radiation (the so-called "dirty bomb") or the intentional release of pathogenic microorganisms could be covered by paragraph 3 of the Committee's proposal. At the same time, in line with the Commission and the Committee, the insertion of the reference to treaties on terrorism could circumvent the existing gap concerning a comprehensive international convention on terrorism and a binding and consensual definition. Also a procedure that would enable the inclusion of future conventions, which is justified by the increase in the number of conventions on this matter in recent years, should be incorporated.

Alternatively, although the amendment proposal submitted by the Netherlands did not gather sufficient support for its consideration at the Kampala Conference and it was withdrawn in June 2013, within the *Working Group on Amendments* established by the



Assembly of States Parties as a mechanism for discussing amendment proposals³⁸, the proposal could be an intermediate solution to resolve this impasse, similarly to what happened with the crime of aggression.

4.2. The ICC and the Responsibility to Protect

The rethinking of ICC's action with a view of protecting populations from international crimes should be implemented in articulation with a "responsibility to protect" of the international community.

Similarly to the ICC, this responsibility focuses on the crimes of genocide, ethnic cleansing, crimes against humanity and war crimes. This concept was developed by the "*International Commission on Intervention and State Sovereignty*" (ICISS) and presented in the report "*The Responsibility to Protect*" of 2001. Its relevance was acknowledged by the UN Member States in the final document of the 2005 World Summit, which incorporated its general features: the responsibility to protect resides primarily at the State level and encompasses the prevention of such crimes, including its incitement through appropriate and necessary means. When appropriate, the international community should encourage and assist a State so that it can exercise this responsibility; if national authorities are unwilling or are unable to protect its population, the international community should take appropriate collective measures to protect it from genocide, war crimes, ethnic cleansing and crimes against humanity in a timely and decisive manner under Chapters VI, VII and VIII of the UN Charter³⁹.

The UN Secretary-General, Ban Ki-moon, has clarified the responsibility to protect concept and, as the Prosecutor of the ICC, Fatou Bensouda, has defended this articulation. The Secretary-General affirmed, in the report "*Implementing the Responsibility to Protect*" of 2009, that an important measure under the pillar on the protection responsibilities of a State - which include the prevention of such crimes and their incitement – concerns first of all the accession to the Statute as well as to relevant international instruments and the incorporation of international standards in national legislation to ensure that the crimes and their incitement are criminalized under national law and practice⁴⁰. Ban Ki-moon stressed that the threat of referrals to ICC may have a preventive effect⁴¹.

The deepening of the foreseen preventive facet by the Court is essential, making the most of its permanent character – unlike the international ad hoc criminal tribunals, implementing, thus, a preventive justice system, also through the encouragement and provision of assistance to States Parties in order to build capacity to protect their populations, when such need exists.

In other words, "prevention" should be regarded as a dissuasive and as a deterrent measure. As Ban Ki-moon underlines:

³⁸ ICC-ASP/12/44, Report of the Working Group on Amendments, 24.10.2013, §4.

³⁹ U.N. Doc. A/Res/60/1, World Summit Outcome, 24.10.2005, §138 and §139.

⁴⁰ U.N. Doc. A/63/677, Implementing the responsibility to protect, Report of the Secretary-General, 12.01.2009, §17.

⁴¹ U.N. Doc. A/66/874, Responsibility to protect: timely and decisive response, Report of the Secretary-General, 25.07.2012, §29.



"by seeking to end impunity, the International Criminal Court and the United Nations-assisted tribunal have added an essential tool for implementing the responsibility to protect, one that is already reinforcing efforts at dissuasion and deterrence"⁴².

In the same vein, Phakiso Mochochoko, Director of the Jurisdiction, Complementarity and Cooperation Division of the ICC, affirms:

"Prevention is key to all our efforts. For the Office, this preventive role is foreseen in the Rome Statute Preamble and reinforced in the Office's prosecutorial strategies. In fact, the Preamble makes clear that prevention is a shared responsibility in writing that State Parties are `determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes`. The Office of the Prosecutor will make public statements referring to its mandate when violence escalates in situations under its jurisdiction; it will visit situation countries to remind leaders of the Court's jurisdiction; it will also use its preliminary examinations activities to encourage genuine national proceedings and thereby attempt to prevent the recurrence of violence. Given that the commission of massive crimes can threaten international peace and security, the Security Council can complement the OTP's [Office of the Prosecutor's] preventive efforts"⁴³.

In this context, the Prosecutor could play a significant role in the preventive efforts since he/she may initiate an investigation *proprio motu* based on information on crimes (Article 15). The Office of the Prosecutor, as a separate and independent organ, is "responsible for receiving referrals and any substantiated information (...), for examining them and for conducting investigations and prosecutions before the Court" (Article 42, paragraph 1). It is important to note, however, that a greater celerity and agility on the part of these entities is needed in order to prevent violence, i.e., in the pre-violence stage or when it is unfolding, to prevent further occurrence of crimes, restraining it within a short period of time.

The establishment of the *Scientific Advisory Board* on June 25, 2014 by the Office of the Prosecutor represents a major change. This board will meet annually and make recommendations to the Prosecutor about the most recent technological developments as well as new scientific methods and procedures that can reinforce the Office's capabilities in the collection, management and examination of scientific evidence

⁴² U.N. Doc. A/63/677, Implementing the responsibility to protect, Report of the Secretary-General, 12.01.2009, §18.

⁴³ ICC, The Office of the Prosecutor, Phakiso Mochochoko, Address on behalf of the Prosecutor, Open Debate of the United Nations Security Council on "Peace and Justice, with a special focus on the role of the International Criminal Court", 17.10.2012.



relating to an investigation and prosecution⁴⁴. But the creation of an early warning and situation evaluation capability that could materialize in the establishment of a specific organ by the Prosecutor or by the Assembly of States Parties, with competence to establish subsidiary bodies, would be indispensable. This organ would pay particular attention, but not exclusive, to the phenomenon of fragile, failed or collapsed states that are unable to meet their international commitments. This organ could assist in the detection, bringing to the attention of the Prosecutor and of the Office relevant situations and support and assist the Court in the determination whether the State, due to a total or substantial collapse of the national judicial system or its unavailability, is unable to conduct an investigation or prosecution (Article 17, paragraph 3).

A joint study conducted by experts from Oxford University and the Australian Government suggests that the Court's preventive dimension should be implemented through encouraging the Statute's ratification, namely among non-signatories, strengthening capacities at the national level, raising awareness activities to inform populations on crimes under the jurisdiction of the Court, developing clear and more objective criteria for Security Council referrals and guaranteeing a more consolidated alignment between preventive instruments as non-military coercive measures and mediation and criminal justice mechanisms⁴⁵. These measures could be implemented in the articulation process of the ICC with the responsibility to protect.

As for the materialization of this interconnection, the Security Council referral⁴⁶ of the situation in Libya in 2011 took on a paradigmatic significance for two reasons. Firstly, resolution 1970 linked the Court's role to the responsibility to protect and, secondly, the resolution was unanimously adopted, despite the reluctance of the United States, the Russian Federation and China regarding the ICC's mission, permanent members of the Council, which seems to indicate a change in the perception of the Court.

Although the resolution does not explicitly allude to a responsibility to protect by the international community, it refers in the Preamble "*recalling the Libyan authorities' responsibility to protect its population*". This decision imposed an obligation on the Libyan authorities to cooperate and provide the necessary support to the Court and the Prosecutor. In resolution 1973 (2011), the Council reiterated the authorities' responsibility to protect the Libyan population. In addition, it authorized coercive military measures and recalled the decision to refer the situation to the ICC, emphasizing that those responsible for or complicit in attacks against the civilian population, including aerial and naval attacks, must be held accountable.

Carsten Stahn (2011) affirmed regarding resolution 1970 that:

"This resolution marked the first incident in which the ICC was expressly recognized in Council practice as a core element of preventing and adjudicating atrocities in line with the 'R2P' [responsibility to protect] concept (...) With the Security Council

⁴⁴ ICC, Press Release, The Office of the Prosecutor of the International Criminal Court Establishes a Scientific Advisory Board, 27.06.2014.

⁴⁵ Oxford Institute for Ethics, Law and Armed Conflict, Australian Government, Australian Civil-Military Centre, The Prevention Toolbox: Systematising Policy Tools for the Prevention of Mass Atrocities, The International Criminal Court, Policy Brief Series No.5, September 2013, p. 3.

⁴⁶ The importance of the "responsibility to protect" was highlighted for the first time in resolution 1674 (2006).



referral, international justice has become one of the primary means of constraining violence and securing accountability, not only in the context of hostilities, but also in ensuring justice after conflict".

Nevertheless, the author warned that the Libyan case became a test for the management of the idea of "*shared responsibility*", after the detention of Saif Al-Islam Gaddafi by the Libyan authorities (Stahn, 2012), who is still not under the custody of the Court, despite several unsuccessful attempts to challenge its jurisdiction.

The articulation between the ICC and the responsibility to protect, more specifically, the role of this jurisdictional organ will inevitably be conditioned by the Security Council, i.e., by its decision to refer situations relating to non-states parties under Chapter VII if one or more crimes under ICC jurisdiction appear to have been committed, after its determination of the existence of a threat to peace under Article 39 of the Charter. The lack of a Security Council decision with respect to failed states and the divergences among permanent members on the interpretation of "threat to peace" will certainly hinder the referral of certain situations to the ICC.

In fact, the Security Council lacks objective binding criteria to determine a threat to peace and is held hostage to political discretion. The establishment of criteria in this regard and the introduction of changes concerning the right of veto (Santos, 2012: 560-561) would avoid situations in which the Council is unable to refer the case to the ICC due to the threat or use of the veto, as in the case of Syria. Even recently, in May 2014, the Russian and Chinese vetoes prevented the adoption of a resolution in this regard.

The process should, therefore, be allied to an uniform application to similar situations by permanent members and to previous changes to the veto system to avoid such situations. It is important to note that the ICISS in its report "*The Responsibility to Protect*" declared:

"(...) the Commission supports the proposal put to us in an exploratory way by a senior representative of one of the Permanent Five countries, that there be agreed by the Permanent Five a "code of conduct" for the use of the veto with respect to actions that are needed to stop or avert a significant humanitarian crisis. The idea essentially is that a permanent member, in matters where its vital national interests were not claimed to be involved, would not use its veto to obstruct the passage of what would otherwise be a majority resolution. The expression "constructive abstention" has been used in this context in the past (...)"⁴⁷.

Among the Security Council reform proposals it should be referred the introduction of a voluntary conduct limiting the exercise of the veto right in situations of genocide, war

⁴⁷ International Commission on Intervention and State Sovereignty (2001), *The Responsibility to Protect*, §6.21, p. 51.



crimes, crimes against humanity or ethnic cleansing or the elimination of this right, which appears infeasible, or the need of current and eventual new permanent members to justify this action.

This articulation is justified by the observation of common denominators, at the beginning of a timid practice – which should be explored and deepened – and by the possibility of contributing to the consolidation and enabling a broader exploration of the Court's role and to increased human rights protection.

This jurisdictional organ could be relevant in the prevention prior to the occurrence of violence or when it is unfolding as a reaction mechanism - which could occur alongside an intervention with use of force by the international community. The objective is to end violence through its intervention by putting those responsible under its custody. This action is justified by the fact that a State's judicial system may be unable to function in times of conflict or even in the reconstruction phase, after the international intervention with use of force, i.e., in the reconciliation and criminal retribution process. Regarding justice and reconciliation, the ICISS warned of the possibility that in many situations the state in whose territory a military intervention took place may have never had a non-corrupt or properly functioning judicial system⁴⁸.

The effects of the "responsibility to protect" and the mission of the ICC will have a greater impact if this concept acquires the status of an international norm (Santos 2012: 562). Although the relationship between the ICC and the Security Council is viewed with scepticism and concern, which is to some extent justifiable due to the Security Council's political nature, a tripartite cooperation in this context may be beneficial.

5. Conclusions

An effective international public order is desirable. The sustainability of an order with such features, however, requires a permanent construction process in order to meet adequately the increasing and different challenges and to overcome emerging vulnerabilities. International criminal law embodied in the ICC will be crucial to achieve this aspiration.

By resorting to "a graphical representation" it can be concluded "that the substantive law that the ICC applies is a smaller concentric circle within a larger circle, which represents the total international criminal law" (Bacelar Gouveia, 2013: 784) and important limitations can be pointed out to the ICC such as the possibility of its activity be constrained by the Security Council, tensions deriving from the complementary nature of its jurisdiction and interpretive questions raised by certain provisions of the Statute, but focusing only on those facts entails the risk of obtaining a reductive assessment of the merits and potential of the ICC.

The Statute's regulatory project and, specifically, the Court may be more successful and influence the construction of an international public order in a more effective manner if the process of permanent construction of this body takes into account the need to fill gaps and the challenges of the contemporary world.

⁴⁸ *Ibid.*, §5.13, p. 41.



In this sense, there should be clarification of ambiguous aspects by the Court relating to the crime of aggression and crimes against humanity, as underestimating these aspects could hamper the efficient and expeditious delivery of justice. In the case of the crime of aggression the evolutive process cannot be oblivious to the Security Council's determinations. In the case of crimes against humanity, the Court shall specify the content of Article 7, a task that would be facilitated by the entry into force of a future international convention on the prevention and punishment of such crimes.

The Court should also explore new facets and deepen those foreseen in the Statute, making the most of its independent and permanent character, which allowed its detachment from a "victor's justice" connotation attributed to the international ad hoc criminal tribunals.

The distinct and intricate situations of passivity, inaction or impunity on the part of States that require the protection of the human dignity, which result from new challenges, imply a greater involvement of the ICC. Thus, a rethinking of its jurisdiction, extending its scope to the crime of terrorism, subjecting the perpetrators of terrorist acts to international justice is necessary. This inclusion is justified by the increasing dissemination of terrorism at the global level and by the fact that its different forms and manifestations may not be covered by the provisions and elements of crimes prescribed in the Statute. Simultaneously, this article proposes an articulation of the ICC's mission with the "responsibility to protect" of the international community which should be expressed in the different dimensions of this responsibility: prevention, reaction and rebuilding a lasting peace.

Although the jurisprudence is still scarce, namely concerning convictions, it cannot be ignored that the threshold of the first decade of the 21st century marks a turning point in the activity of the ICC. The gradual confluence around the Court by States Parties, by non-party States and by the Security Council demonstrates the growing recognition of the Court's relevance by the international community as well as the application of the system envisioned in the Statute.

These reasons and the potential of the ICC allow for the prospect of a passage from the present adolescence (Soares, 2014: 10) to adulthood characterized by increasingly confident steps, a maturing process leading to a consolidated and more effective criminal justice system.

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