

MAJOR VIOLENCE (CRIMES) AGAINST THE INTERNATIONAL COMMUNITY

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Abstract

The foundation of ICC in 1998 and the fact that its Statute entered into force in 2002 allowed the international community to provide a permanent legal mechanism to dissuade and repress extreme violent and cruel acts. However, the change in international scenario after the USSR fell apart, which led to the increase in political violence - preventative war/pre-emptive war - and the affirmation of exceptional policies, has had a considerable impact in the negotiation of the Statute and later in the definition of the crime of aggression, approved in the Kampala Conference. The great powers structured their negotiation strategies in terms of their long term interests, which are made evident in the approved texts, namely in the possibility of human rights securitization and the preference for selective multilateralism that the Statute and the Kampala declaration were not able to prevent, thus raising questions as to the basis for the Court and its future. The text advocates that this arrogance should not be understood as a manifestation of US vitality, which can question the legitimacy of the ICC. In fact, this hostility is a strategy for political survival aimed at maintaining the freedom of strategic action in a strategic scenario increasingly dynamic and demanding.

Keywords:

International Criminal Court; International Law; Theory of Hegemonic Stability; Revolution in Military Affairs

How to cite this article

Saraiva, Francisca (2013). "Major violence (crimes) against the international community". *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_art2

Article received on 27th May 2013; accepted for publication on 12th September 2013



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Introduction

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

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

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

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

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

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

In fact, the United States opposition to the Court's jurisdiction (which has caused some embarrassing diplomatic situations) shows, in our opinion, that the chosen policy is



counterproductive because it endangers the long term interests of the United States and of other technologically developed powers. In this sense, the analysis of events indicates that this is mostly a survival strategy by Washington before an international system in rapid change which it does not fully control anymore. It is true that many other States have also resisted the International Criminal Court. These are mostly great powers, such as China, India, Pakistan, Indonesia, Malaysia, Turkey (which did not sign it; noteworthy is that the first three are nuclear powers) and the Russian Federation (which signed but did not ratify it), just to mention the most obvious. Some small and medium-sized powers - especially but not only from Africa - have also opposed to it with more or less vigor, motivation and success: from Libya to Saudi Arabia, from Cuba to El Salvador, from Mauritania to Sudan¹. It is, however, our contention that the USA are the country which has resisted more successfully (considering American power), more consistently (because better explained by authors such as Henry Kissinger and virtually all Secretaries of State for Defense, both Democratic and Republican) and more clearly, in the sense that they themselves have publicized it widely. It is important, therefore, that we focus some of our attention to the American administration, though we reserve the right to further conduct more fully, less "*ad hominem*" and reductionist analyses.

1. The social contract and political violence

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

Generally, governments claim the responsibility to protect the citizens living in their jurisdiction. The State as a conflict mediator is, in fact, the main guarantee for social stability and internal peace. In times of war, the State claims the monopoly for the legitimate use of physical violence to maintain the political space of the community and ensure that the most essential asset, human life, is not placed at risk by external and internal threats to the community².

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

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

¹ <http://www.iccnw.org/>, retrieved on March 3, 2013.

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



essence of government. If we consider power from this perspective, authority should keep order by using violence as a power establishing strategy as little as possible.

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

For a significant number of governments, the conflicting character of politics prevails over the idea that power must become authority to legitimize politics. This is why the United Nations' founding fathers realized that the world needed a new social contract based on the principle of the illegality of violence as a mechanism for conflict resolution, except in the case of self defense or under the global collective safety mechanism. In this sense, the rules in the United Nations Charter intentionally dissociate the concept of power from the idea of violence, reiterating the perspective that violence is a tool that, though available, is not the essence of power.

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

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

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

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

The idea that rulers have responsibilities they should answer for arose after WWI, due to the atrocities committed by the armies during the conflict. This new era of Criminal Law establishes, besides common crime, more atrocious and heinous crime, characterized by violence, cruelty and barbarity. Hence, the concept of international crime as

"an act universally seen as criminal, a serious issue that raises international concern and that, for some reason, cannot be considered of the exclusive jurisdiction of a State which, under normal circumstances, would have control over it" (Military Tribunal V 1947-1948, Hostage case).

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



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

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

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

In the 1990s, the USSR started to break up and globalization was spreading fast, leading to new forms of violence and terror and conflict "civilization". The core feature of armed conflicts at the end of the 20th century is the narrowing of the gap between fighters and non fighters. The result is increased pressure on those who are not linked to the conflict, the civilians - direct victims of the hostilities or killed by hunger or disease as a consequence of armed conflicts³. Technology has also made a great impact in the new conflict morphology and in the global effects it has in the international system. Finally, a third element, the narrative on the insecurity of the international system - the "war on terrorism", presented as a response to the new terrorist threat, is perhaps the most significant narrative created by the American foreign policy in the post bipolar era - is now so pervasive in the political debate that it has considerably influenced the creation of a permanent international criminal court able to effectively repress those responsible for more serious international crimes.

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

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

The truth is that the new Court has a mandate to prevent and repress war and punished those responsible for war but it cannot forget that there are other institutions able to limit the external sovereignty of States. This is, thus, an institution that is not alone. There is practical need to coordinate the ICC and the UNSC, as the latter is

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



responsible for monitoring the full respect for the law preventing the strategic use of armed coercion outside the (restricted) framework of self-defense.

2. Collective security and individual criminal responsibility for international crimes

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

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

In theory

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

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

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

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

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

We do not aim to preview new UNSC trends, nor would it be advisable to do so; the most important is to emphasize that these parameters have decisive implications for the future of this institution.

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

In 1945, it seemed viable to build a system of global collective security based on legal convergence and spreading of consensus at international level. This was possible



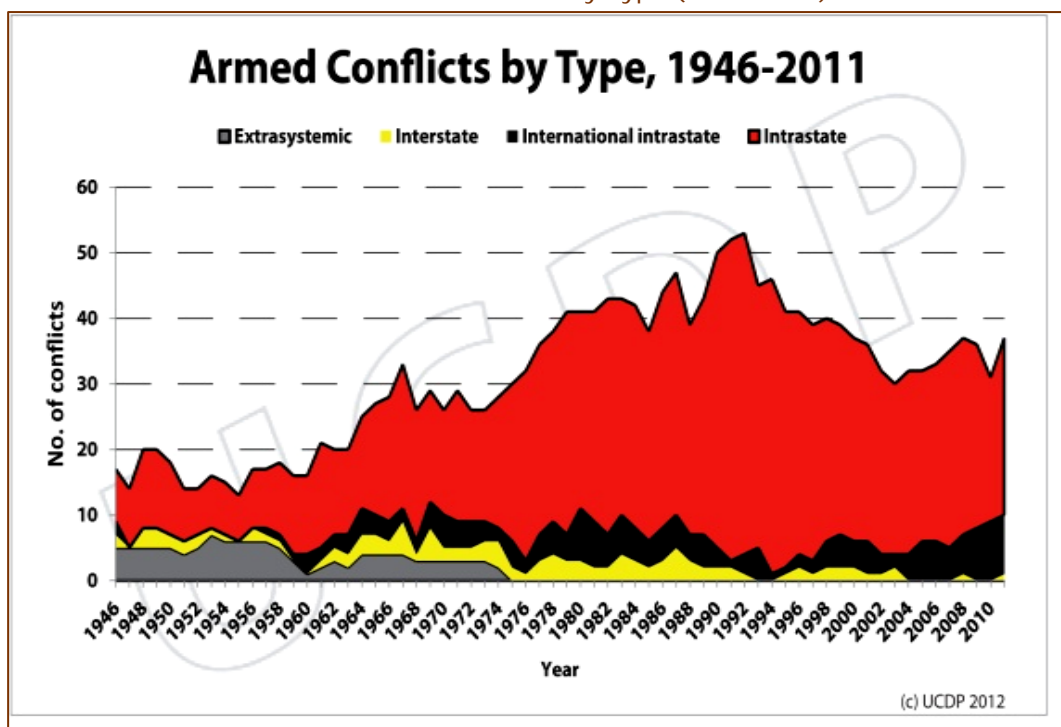
because there was a coalition of States strong enough to impose their will on other system members. During the Cold War, the balance of power United States/USSR prevented any public understanding from occurring which would allow the UNSC to act against perpetrator States. Yet, in this case, there was little interest in acting and no lack of capacity for acting.

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

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

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

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



Source: Uppsala Data Program,
http://www.pcr.uu.se/digitalAssets/122/122554_conflict_type_2011.jpg.jpg



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

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

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

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

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

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

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



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

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

3. Violence, cruelty and power

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

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

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

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

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

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

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

The crimes against the civilian population, genocide and crimes against humanity, are the visible side of a barbarian and cruel State that persecutes and kills common citizens as a political strategy to maintain power, in the context of armed conflicts or within their policies of repression. They are also expressions of violence used by irregular



armed groups over defenseless populations. Generalized violence against civilians is now part of many people's daily life, which allows for perverse coordination between this violence and external and transnational conflict, thus creating a complex mix of tension that destroys societies.

The crimes of war are another aspect of violence and cruelty. As violations of law and war rules include acts committed during military conflicts that are condemned and forbidden both by international rules and by the Hague legislation, by the Geneva legislation and, ore recently, by the New York legislation. These crimes are framed by rules on the use of armed force in terms of allowed weapons and methods of combat once the decision has been made to use armed force by States or resistance groups.

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

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

The crime of genocide

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

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

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

Thus,

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

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



In fact, at the end of WWII, the legal lexicon did not include a category expressing the act of mass extermination of the Jewish people. Some years later, a convention in 1948⁴ defined and made autonomous a new type of international crime, "genocide", which meant crimes against humanity, against the dignity of humanity.

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

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

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

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

This is made evident through one example, of the many available: the United States eagerly condemned the events in Darfur as genocide, at a time when the report of the International Commission of Inquiry on the situation in Darfur⁵, created at the request of UNSC and presided by Antonio Cassese, had been unable to obtain conclusive evidence of the intent to eradicate groups completely or partly, therefore concluding there was no genocide policy in Darfur but military actions to counteract rebel action by a political group (Hamilton, 2011). Having the means at their disposal, it would have been easy for the United States to support the Commission's recommendation, which referred the need to reference the case to the ICC, thus allowing for the trial of those responsible for the atrocities committed in Darfur. Instead of supporting the proposal, the United States suggested the creation of a hybrid African court.

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

In the beginning of September 2004, after the investigation promoted by the American administration on the crimes committed in Darfur, the State secretary Colin Powell described the crimes in Darfur as genocide and President George W. Bush used the

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

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



same term in a speech in the United Nations some weeks later (Hamilton, 2011). In the crisis in Darfur, American foreign policy broke with tradition and spoke about this type of atrocity. Yet, direct reference to the ongoing dehumanizing process in Sudan did not lead to decisive action towards the serious events.

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

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

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

We conclude, in this case, that, from the point of view of the United States' strategy, international legal tools are closely linked with a national strategy to promote democratic regimes, within the framework of a wider and more integrated security which includes, among others, defining spheres of interest, maintaining hegemony and the country's energy security. We believe the interventions of other great powers have a very similar dual pattern.

Crimes against humanity

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

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

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

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



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

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

For International Criminal Law, persecuting political groups is a crime against humanity in the framework of a generalized or systematic attack against any civilian population, and this attack⁶ is known in the framework of armed conflicts or outside that framework.

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

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

The inclusion and definition of the crimes of sexual violence in the ICC Statute was one of the most significant victories of Portuguese diplomacy and in particular a result of Paula Escameia's⁷ commitment, who largely contributed to in-depth studying of these issues during the negotiations of the Statute and of the Crime Elements.

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

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

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

⁶ ICC Statute, article 7.

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



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

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

Other solutions are, thus, needed. Yet, as seen previously, the technical and legal difficulties and the political reservations regarding the typification of some behaviors as crimes against humanity make it more difficult the implementation of international criminal justice based solely on a permanent universal jurisdictional institution. It is, therefore, obvious that the inter-relation between Law and international politics requires more thought.

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

Crimes of war

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

Crimes of war include two elements: the crimes are committed within the context of armed conflict and the crime is connected with that conflict. The difference between crimes of war and crimes against humanity is the need for an armed conflict, international or not⁸.

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

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

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

⁸ ICC Statute, articles 7 and 8.



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

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

Before this achievement of international public order, the United States doubled their efforts to find alternatives to the Statute because in theory the American military abroad may be subject to ICC jurisdiction if they commit crimes in the territory of States party and they do not want or cannot try them⁹.

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

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

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

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

The policy of the United States towards multilateral mechanisms is not a new factor in international relations: what concerns the United States is that the ICC has the capacity to enforce international rules at a global level, thus conditioning the design of great powers' national policies, in this case, their policies (May et al, 2006: 354).

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

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



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

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

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

Noteworthy, however, is to acknowledge that the Prosecutor has shown prudence in exercising his functions. In the case of the intervention in Iraq, the Prosecutor received several messages requesting that Blair, Bush and Rumsfeld were tried (Lindberg, 2010, 24-25). In a letter made public, the Prosecutor recognized that American soldiers (belonging to a State that is not a State party, just like Iraq) acted in collusion with British soldiers (belonging to a State party) in the way they treated their prisoners in Iraq. Nevertheless, the Prosecutor decided that the UK was internally investigating the facts and, from his point of view, it made no sense to involve the ICC¹⁰.

Besides everything that was mentioned so far, the United States created a new conflict with international justice regarding the prohibition to use torture, a principle laid down in International customary Law and in the international treaties as *jus cogens*. This is banned practice by all peoples and criminalized in the ICC Statute as crime of war, crime against humanity and genocide¹¹.

Amnesty International, among other organizations, accused the former President Bush, former vice-president Dick Cheney and the former secretary of State for the Defense Donald Rumsfeld, as well as the former CIA director George Tenet of having ordered practices legally considered torture against prisoners in the context of "war against terrorism"¹² in secret detention facilities ran by the CIA¹³. Former president George W. Bush's statements on television acknowledging that he had authorized torture and official documents confirmed these practices (Guantanamo, Abu Grahb) (Ross, 2007).

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

Torture in democracy is not acknowledged as official policy and it is simply a method of illegally obtaining information. This is why it is particularly difficult to understand why George W. Bush acknowledged he had authorized **torture** to prisoners in the custody

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

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

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

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



of the United States. The Bush administration openly compromised the universal prohibition of torture, laid down in article 2 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, threatening the bases of political liberalism and the idea that people are the objective. To relativize the immorality and illegality of torture and its institutionalization in the democratic state represents a flaw in the information system, in particular of HUMINT, unacceptable because this is a country with huge international responsibilities and global interests.

Obama tried to remedy the situation and approved a new National Security Strategy that condemns the use of torture as a means of fighting terrorism, suggesting that the United States are willing to abolish this practice once and for all¹⁴. Yet, the truth is that the doctrinal discussion on the legitimacy of torture in exceptional cases cannot be dissociated from the doctrine on preventative war, which the 2010 National Security Strategy maintained in full. This has made it difficult to consolidate the principles of international law and justice.

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

Crime of aggression

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

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

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

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

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



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

This specific feature of American home politics helps to understand the extreme importance of the "crimes against peace" in the post-war period:

"At the International Conference on Military Tribunals, held in London between 26 June and 8 August 1945, the most controversial issue was still aggressive war criminality. The USA insisted on defending the idea that aggressive war was an international crime that implies that those responsible should be criminally made accountable. The crime of aggression was presented at the Conference on the same day that the San Francisco Conference made it illegal to use force in the United Nations Charter" (Saraiva, 2009: 221).

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

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

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

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

The succession of obstacles placed by the dominant power throughout this whole process evidences its deep suspicion of international laws in force that rule the use of armed force as these are like a defensive barrier to territorial integrity of the most fragile political units in the international system (Saraiva, idem). The Non-Aligned

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



Movement (NAM) has questioned the position of the P5 and has already stated it is not willing to effect the interventionist agenda of western powers as a specific solution for humanitarian emergency erupting in their territories and which the local authorities cannot control or are the primary responsible for. In this sense, NAM always have favored the EU proposals in the like-minded group, advocating the inclusion of the crime of aggression and a wider scope of action for the Court against the open opinion of great powers.

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

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

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

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

This strategic option of the United States, put in practice by the Bush administration and continued by Obama, is based on the preventative war doctrine because it is a long-term strategy, "by definition, a strategy that is developed in a framework of strategic superiority because only when in military advantage is it possible to stop the emergence of potential rivals (Saraiva, idem: 2029). In this sense, the idea that technological superiority would be decisive in future conflicts, which would make them shorter, less intense and with less casualties (Espírito Santo, 2007) has won over other permanent UNSC members and allowed for the adoption of a common position by the P5 in regards to the crime of aggression.

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

During the negotiation of the crime, many strategies were followed to attain the objective. For example, in 1999, in the aftermath of NATO intervention in Kosovo, the German delegation advocated that the restricted concept of the crime sets aside categories of the crime beyond the idea of "armed attack whose objective or effect is the military occupation or annexation of a territory by another State"¹⁶ This means, air bombing and sea blockade would not be acts of aggression (Saraiva, 2009: 295). AS

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



you know, the argument was not accepted by the Preparatory Commission (PrepCom) because it did not seem reasonable to thus exonerate NATO of responsibility in the air campaign in Kosovoⁱⁱ.

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

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

However, in Kampala the diplomatic initiatives of the United States managed to win over the resistance of African and Asian countries. According to the wording of the final approved text, the crimes committed in States not party are excluded from the Court's jurisdiction. This implies that the crime of aggression committed by American nationals in a State party can no longer be tried by the Court, thus making it easier for military coalitions to be formed for interventions. These coalitions include the United States (State not party) and a State party to the Statute (UK or France, for example) in the territory of a State not party, because, in this case, the ICC cannot try the crime of aggression (Trahan, 2011: 91-93).

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

The situation is worsened by the fact that the solution found does not allow that a crime can be tried before 2012, at best¹⁷.

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

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

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

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



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

The compromise formula rather reverts the initial strategy of the great powers which was focused on a restricted definition of the crime of aggression. This strategy was eventually put aside and replaced by another, focused not on the definition but on the conditions to exercise the Court jurisdiction. In practical terms, the Court will be very selective and will have greater difficulty in trying crimes of aggression involving the great powers, which emphasizes the multilateralism *à la carte* of the Statute. On the other hand, the establishing of a broader definition of the crime of aggression allows appropriate trying of reported cases, considering that the crime, as it was typified, allows to place in the Court jurisdiction most aggressive phenomena that are typical of current conflicts and, thus, contribute to the reinforcement of international legal order.

Conclusion

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

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

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

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

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

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