The evolution of individual criminal responsibility under international law

by
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THE international legal provisions on war crimes and crimes against humanity have been adopted and developed within the framework of international humanitarian law, or the law of armed conflict, a special branch of international law which has its own peculiarities and which has gone through an intense period of growth, evolution and consolidation in the last 50 years.

The rules of humanitarian law concerning international crimes and responsibility have not always appeared sufficiently clear. One of the thorniest problems is that relating to the legal nature of international crimes committed by individuals and considered as serious violations of the rules of humanitarian law.[1] As regards the traditional tripartition — crimes against

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[1] See M. C. Bassiouni/P. Nanda, *A Treatise on International Criminal Law*, Springfield, 1973; S. Glaser, *Droit international pénal conventionnel*, Brussels, 1970-78; G. Sperduti, "Crimini internazionali", *Enciclopedia del diritto*, XI, 1962, p. 337; N. Ronzitti, "Crimini internazionali", *Enciclopedia giuridica*, X, 1988; F. Francioni, "Crimini internazionali", *Digesto delle discipline pubblicistiche*, IV, 1988, p. 464.

peace, war crimes and crimes against humanity — this paper will be devoted essentially to the latter two categories, which are more closely linked to the core of international humanitarian law and are of major interest at this tormented end of the twentieth century. Indeed, the world today is confronted by a disturbing proliferation of conflicts which are no longer international in nature,[2] as was traditionally the case, and in which the basic problem regarding the classification of offences seems to be that the borderline between war crimes and crimes against humanity appears blurred. In any case, both types of crime, together with the crime of genocide, come under the broader concept of *crimina juris gentium*. The category of crimes against peace has been left aside as its scope is more uncertain and the particular features it presents imply a close connection with *jus ad bellum* issues.

The following section will attempt to analyse the development of crimes within the international legal and jurisdictional framework, starting with the most doubtful precedents (even from the distant past) and then concentrating primarily on the decisions of the Nuremberg and Tokyo International Military Tribunals. The activities of these Tribunals marked the beginning of an important legal evolution, which was later more clearly defined with the setting-up of the ad hoc Tribunals for the former Yugoslavia and for Rwanda and, last but not least, with the diplomatic conference that adopted the Rome Statute of the International Criminal Court.

A brief conclusion will provide some general remarks and touch on the prospect of evolution in the international system in keeping with various trends manifested within the United Nations,[3] especially within its International Law Commission.

War crimes and crimes against humanity: origin and evolution of a legal sphere

Before the Nuremberg and Tokyo trials

Already in the Ordinance for the Government of the Army, published in 1386 by King Richard II of England, limits were established to

2 On the problems arising from non-international armed conflicts, see T. Meron, "International criminalization of internal atrocities", *AJIL*, 1995, p. 554; T. Graditzky, "Individual criminal responsibility for violations of international humanitarian law committed in non-international armed conflicts", *IRRC*, No. 322, March 1998, p. 29.

3 See L. Condorelli, A. La Rosa, S. Scherrer (eds), *Les Nations Unies et le droit international humanitaire/The United Nations and International Humanitarian Law*, Éditions Pedone, Paris, 1996.

the conduct of hostilities and — on pain of death — acts of violence against women and unarmed priests, the burning of houses and the desecration of churches were prohibited. Provisions of the same nature were included in the codes issued by Ferdinand of Hungary in 1526, by Emperor Maximilian II in 1570 (humanitarian rules are found in Articles 8 and 9) and by King Gustavus II Adolphus of Sweden in 1621.[4] Article 100 of the Articles of War decreed by Gustavus II Adolphus established that no man should "tyrannise over any Churchman, or aged people, Men or Women, Maydes or Children".

The earliest trial for war crimes seems to have been that of Peter von Hagenbach, in the year 1474.[5] Already at the time — as during and after the Nuremberg Trial — punishment of the accused hinged on the question of compliance with superior orders.[6] Charles the Bold, Duke of Burgundy (1433-1477), known to his enemies as Charles the Terrible, had placed *Landvogt Peter von Hagenbach* at the helm of the government of the fortified city of Breisach, on the Upper Rhine. The governor, overzealously following his master's instructions, introduced a regime of arbitrariness, brutality and terror in order to reduce the population of Breisach to total submission. Murder, rape, illegal taxation and the wanton confiscation of private property became generalized practices. All these violent acts were also committed against inhabitants of the neighbouring territories, including Swiss merchants on their way to the Frankfurt fair. When a large coalition (Austria, France, Bern and the towns and knights of the Upper Rhine) put an end to the ambitious goals of the powerful Duke (who also wanted to become king and even to gain the imperial crown), the siege of Breisach and a revolt by both his German mercenaries and the local citizens led to Hagenbach's defeat, as a

4 See G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, vol. II: *The Law of Armed Conflict*, Stevens, London, 1968, p. 15; K. Ögren, "Humanitarian law in the Articles of War decreed in 1621 by King Gustavus II Adolphus of Sweden", *IRRC*, No. 313, July-August 1996, p. 438. The Swedish Articles of War had considerable influence in Europe; at the same time, they were based on the first continental models of the sixteenth century.

5 See Schwarzenberger, *op. cit.* (note 4), p. 462.

6 See Y. Dinstein, *The Defence of "Obedience to Superior Orders" in International Law*, Leyden, 1965; E. Muller-Rappard, *L'ordre supérieur militaire et la responsabilité pénale du subordonné*, Paris, 1965; L.C. Green, *Superior Orders in National and International Law*, Leyden, 1976; G. Sacerdoti, "A proposito del caso Priebke: la responsabilità per l'esecuzione di ordini illegittimi costituenti crimini di guerra", *Rivista di diritto internazionale*, 1997, p. 130; P. Gaeta, "Rilevanza dell'ordine superiore nel diritto internazionale penale", *Rivista di diritto internazionale*, 1998, p. 69.

prelude to Charles' death in the battle of Nancy (1477). Already the year before Charles was killed, the Archduke of Austria, under whose authority von Hagenbach was captured, had ordered the trial of the bloody governor. Instead of remitting the case to an ordinary tribunal, an ad hoc court was set up, consisting of 28 judges of the allied coalition of States and towns. In his capacity as sovereign of the city of Breisach, the Archduke of Austria appointed the presiding judge. Considering the state of Europe at the time — the Holy Roman Empire had degenerated to the point where relations among its different entities had taken on a properly international nature, and Switzerland had become independent (even though this had not yet been formally recognized) — it can be concluded that the tribunal was a real international court.[7]

At the trial, a representative of the Archduke acted as plaintiff, stating that von Hagenbach had "trampled under foot the laws of God and man". More precisely, the defendant was charged with murder, rape, perjury and other *malefacta*, including orders to his non-German mercenaries to kill the men in the houses where they were quartered so that the women and children would be completely at their mercy. The defence essentially played the card of compliance with superior orders, considering that "Sir Peter von Hagenbach does not recognise any other judge and master but the Duke of Burgundy", whose orders he could not dispute. "Is it not known that soldiers owe absolute obedience to their superiors?" This basic consideration was underlined by the fact that the Duke himself had personally confirmed and ratified *ex post factum* "all that had been done in his name". Von Hagenbach requested an adjournment to ask for confirmation from the Duke, but the tribunal refused, because this request was considered contrary to the laws of God and because the defendant's crimes had already been established beyond doubt. Therefore, the tribunal found the accused guilty, and, deprived of his rank of knight and related privileges (because he had committed crimes which he had the duty to prevent), von Hagenbach was executed following the Marshal's order: "Let justice be done".

7 According to Schwarzenberger, in a framework of quasi-international law, whose characteristic is "a state of *de facto* equality in which entities conduct their mutual relations as if they were subjects of international law", the Holy Roman Empire "had degenerated to such an extent that relations between its members were conducted on a footing hard to distinguish from international relations". *Op. cit.* (note 4), p. 464.

This case is extremely interesting for several reasons. While it is not easy to establish that the acts in question were war crimes, since most of them were committed before the formal outbreak of hostilities, at the time (as today) the borderline between war and peace was difficult to distinguish and more "fluid" than in later centuries. In any case, Breisach had to be considered as occupied territory. Moreover, even if it is difficult to classify these acts as war crimes, they can nevertheless be considered as early manifestations of what are now known as "crimes against humanity".

Several centuries elapsed before the foundations were laid for incriminating individuals for war crimes considered as grave violations of the law applicable in international armed conflicts. During the American Civil War (1861-1865), President Abraham Lincoln issued the Lieber Code (Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, of 24 April 1863).[8] Prepared by Francis Lieber, professor of law at Columbia College in New York, and revised by a board of officers, this text represents the first attempt to codify the laws of war. Under Article 44 "all wanton violence committed against persons in the invaded country, all destruction of property", "all robbery, all pillage or sacking" and "all rape, wounding, maiming or killing of such inhabitants" are punishable (these acts are strictly in the field of war crimes). In Article 47, "crimes punishable by all penal codes", like "arson, murder, maiming, assaults, highway robbery, theft, burglary, fraud, forgery and rape", committed by an American soldier on the territory of an enemy State, are considered as if they had taken place "at home" and are severely punished. Even if only destined for American soldiers and only binding on them, the Lieber Code had an important influence on military regulations of other armies as well.

A further leap was made in the twentieth century. After the First World War, the Treaty of Versailles of 28 June 1919 — in its Articles 228 and 229 — established the right of the Allied Powers to try and punish individuals responsible for "violations of the laws and customs of war".[9] In particular, Article 228 declared that "the German Government recognizes the right of the Allied and Associated Powers to bring before military tri-

8 Text in D. Schindler/J. Toman, *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and other Documents*, Martinus Nijhoff/Henry Dunant Institute, Dordrecht/Geneva, 3rd ed., 1988, p. 5.

9 Text in *The Treaties of Peace 1919-1923*, vol. I, Carnegie Endowment for International Peace, New York, 1924, p. 121.

bunals persons accused of having committed acts in violation of the laws and customs of war". The German government therefore had the duty to hand over "all persons accused", in order to permit them to be brought before an allied military tribunal. In the case of an individual "guilty of criminal acts against the nationals of more than one of the Allied and Associated Powers", the possibility of setting up an international tribunal was provided for.

Moreover, Article 227 stated that *Kaiser* Wilhelm II of Hohenzollern was responsible "for a supreme offence against international morality and the sanctity of treaties" and the Allied Powers agreed to establish "a special tribunal" composed of judges appointed by the United States, Great Britain, France, Italy and Japan to try the accused. "In its decision the tribunal will be guided by the highest motives of international policy, with a view of vindicating the solemn obligations of international undertakings and the validity of international morality." The Powers also agreed to submit a request to the government of the Netherlands for the Emperor's surrender, an initiative that failed. As can be seen, the provisions of this article anticipated the category of "crimes against peace", which was to emerge after the Second World War.

The Hague Conventions of 1899 and 1907 and the Geneva Convention of 1929 Relative to the Treatment of Prisoners of War had no provisions on the punishment of individuals who violated their rules.[10] Only the 1929 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field had a somewhat weak provision in Article 30.[11] But these Conventions were to be referred to later in the Nuremberg Judgement.

Nuremberg and Tokyo International Tribunals

It was only after the Second World War that a movement started up within the international community which clearly began to shape a deeper consciousness of the need to prosecute serious violations of the laws of war,[12]

10 Texts in J.B. Scott, *The Hague Conventions and Declarations of 1899 and 1907*, Carnegie Endowment for International Peace, New York, 1915; Schindler/Toman, *op. cit.* (note 8).

11 "On the request of a belligerent, an enquiry shall be instituted, in a manner to be decided between the interested parties, concerning any alleged violation of the Convention; when such violation has been established the belligerents shall put an end to and repress it as promptly as possible." (Art. 30). Text in Schindler/Toman, *op. cit.* (note 8), p. 325.

12 "Serious violations of the laws and customs of war" is a broader concept than that of "grave breaches".

with regard both to the traditional responsibility of States[13] and to the personal responsibility of individuals.[14] The horrible crimes committed by the Nazis and the Japanese led to a quick conclusion of agreements among the Allied Powers and to the subsequent establishment of the Nuremberg and Tokyo International Military Tribunals "for the trial of war criminals whose offences have no particular geographical location whether they be accused individually or in their capacity as members of organisations or groups or in both capacities".[15] These special jurisdictions also took into account the new categories of crimes against humanity[16] and crimes against peace.

Article 6 of the Charter of the Nuremberg International Military Tribunal established the legal basis for trying individuals accused of the following acts:

— *Crimes against peace:* the planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties,[17] agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

— *War crimes:* violations of the laws and customs of war. A list follows with, *inter alia*, murder, ill-treatment or deportation into slave labour or for any other purpose of the civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, the killing of hostages, the plunder of public or private property, the wanton destruc-

13 On State responsibility, see R. Ago, *Scritti sulla responsabilità internazionale degli Stati*, 2 vol., Napoli, 1978-1986; I. Brownlie, *State Responsibility*, Oxford, 1983. On crimes of State, see also J. Weiler/A. Cassese/M. Spinedi (eds), *International Crimes of State*, Berlin, 1989; G. Carella, *La responsabilità dello Stato per crimini internazionali*, Napoli, 1985; A. Cassese, "Remarks on the present legal regulation of crimes of States", B. Conforti, "In tema di responsabilità degli Stati per crimini internazionali", and M. Sahovic, "Le concept du crime international de l'État et le développement du droit international", in *Essays in Honour of Roberto Ago*, Milano, 1987.

14 "Pour la première fois, les crimes de guerre, les crimes contre la paix, les crimes contre l'humanité sont expressément prévus et définis dans leurs éléments constitutifs par un texte conventionnel", P. Daillier/A. Pellet, *Droit international public*, Paris, 1999, p. 676. See also D.W. Greig *International Law*, London, 1976, p. 115; M. Giuliano/T. Scovazzi/T. Treves, *Diritto internazionale*, Parte generale, Milano, 1991, p. 183.

15 Art. 1 of the London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, of 8 August 1945, in Schindler/Toman, *op. cit.* (note 8), p. 911.

16 See E. Schwelb, "Crimes against humanity", *BYIL*, 1946, p. 178; J. Graven, "Les crimes contre l'humanité", *RCADI*, 1950, I, p. 427; M. C. Bassiouni, *Crimes Against Humanity in International Criminal Law*, Dordrecht, 1992; E. Zoller, "La définition des crimes contre l'humanité", *Journal du droit international*, 1993, p. 549.

17 There is no longer any reference to the "sanctity" of treaties, as compared with Art. 227 of the Versailles Treaty.

tion of cities, towns or villages, or devastation not justified by military necessity.

— *Crimes against humanity:* murder, extermination, enslavement, deportation, and other inhuman acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.[18]

As far as jurisdiction *ratione personae* is concerned, it covered "leaders, organisers, instigators and accomplices" who had taken part in the formulation or execution of a common plan or conspiracy to commit any of those crimes: all of them were considered for "all acts performed by any persons in the execution of such plan".

International legal heritage after the Nuremberg and Tokyo trials

The Nuremberg trials (and, with a minor impact, the Tokyo trials) produced a large number of judgements, which have greatly contributed to the forming of case law regarding individual criminal responsibility under international law.[19] The jurisdictional experience of Nuremberg and Tokyo marked the start of a gradual process of precise formulation and consolidation of principles and rules during which States and international organizations (namely, the United Nations and the International Committee of the Red Cross) launched initiatives to bring about codification through the adoption of treaties. As early as 11 December 1946 the UN General Assembly adopted by unanimous vote Resolution 95(I), entitled "Affirmation of the Principles of International Law Recognised by the Charter of the Nuremberg

18 A similar provision (with fewer specifications) is to be found in the Statute of the Tokyo Tribunal, Art. 5.

19 *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946*, Official Documents and Proceedings, Nuremberg, 1947. See also T. Taylor, *The Anatomy of the Nuremberg Trials*, New York, 1992; R.H. Jackson, *The Nürnberg Case*, New York, 1948, and *The Case Against the Nazi War Criminals*, New York, 1945; H. Donnedieu de Vabres, "Le procès de Nuremberg devant les principes modernes du droit pénal international", *RCADI*, 1947, I, p. 481; M. Merle, *Le procès de Nuremberg et le châtiment des grands criminels de guerre*, Paris, 1949; Schwarzenberger, *op. cit.* (note 4), p. 467; G. Ginsburg/V. Kuriastev (eds), *The Nuremberg Trial and International Law*, Dordrecht, 1990. On the Tokyo Tribunal, see B. Röling/A. Cassese, *The Tokyo Trial and Beyond*, Oxford, 1993.

Tribunal".[20] After "having taken note" of the London Agreement of 8 August 1945 and its annexed Charter (and of the parallel documents relating to the Tokyo Tribunal), the General Assembly took two important steps. The first one was of considerable legal importance: the General Assembly "affirmed" the principles of international law recognized by both the Charter and the Judgement of the Nuremberg Tribunal. This meant that in the General Assembly's view the Tribunal had taken into account already existing principles of international law, which the court had only to "recognize". The second was a commitment to have these principles codified by the International Law Commission (ILC), a subsidiary organ of the UN General Assembly. Through this resolution the UN confirmed that there were a number of general principles, belonging to customary law, which the Nuremberg Charter and Judgement had "recognized" and which it appeared important to incorporate into a major instrument of codification (either by way of a "general codification of offences against the peace and security of mankind" or even as an "international criminal code"). By the same token the resolution recognized the customary law nature of the provisions contained in the London Agreement.[21]

In 1950, the ILC adopted a report on the "Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgement of the Tribunal".[22] The ILC report does not discuss whether these principles are part of positive international law or not, or to what extent. For the ILC, the General Assembly had already "affirmed" that they belonged to international law. The ILC therefore limited itself to drafting the content of these principles.

Principle I states that "any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment". It constitutes official recognition of the fact that an individual — in the broadest sense ("any person") — may be held responsible for having committed a crime. And this may be the case even if the act is not considered a crime under domestic law (Principle II). Principles III and IV provide that a person who acts in his capacity as head of State or as a government official and one who acts on the orders of the government or of

20 Schindler/Toman, *op. cit.* (note 8), p. 921.

21 "Article 6 of the Nuremberg Charter has since come to represent general international law." I. Brownlie, *Principles of Public International Law*, Oxford, 1991, p. 562. Along the same lines, M. Shaw, *International Law*, Cambridge, 1998, p. 471; Daillier/Pellet, *op. cit.* (note 14), p. 677.

22 Schindler/Toman, *op. cit.* (note 8), p. 923.

a superior are not thereby relieved of responsibility. These two principles affirm what was established in Articles 7 and 8 of the Nuremberg Charter. Article 8, on superior orders, accepted the possibility of mitigation of punishment "if the Tribunal determines that justice so requires".

Principle IV of the ILC text modifies the approach: the individual is not relieved of responsibility "provided a moral choice was in fact possible to him". This leaves a great discretionary power to the tribunals that are called upon to decide whether or not the individual did indeed have a "moral choice" to refuse to comply with an order given by a superior.

Principle VI codifies the three categories of crime established by Article 6 of the Nuremberg Charter. What was defined in the London Agreement as "crimes coming within the jurisdiction of the Tribunal" has now been formulated as "crimes under international law", using the same wording found in Article 6. Principle VI represents the core of a possible international criminal code. The affirmation of the Nuremberg principles by the 1946 General Assembly resolution and their formulation by the International Law Commission were important steps toward the establishment of a code of international crimes entailing individual responsibility. But further progress lay ahead.

Already on 9 December 1948, on the eve of the adoption of the Universal Declaration of Human Rights, an important development of the concept of crimes against humanity led to the adoption (by 56 votes to none) of the Convention on the Prevention and Punishment of the Crime of Genocide.[23] The Convention, which entered into force on 12 January 1951, clearly classifies genocide, whether committed in time of peace or in time of war, as a crime under international law. Article 2 defines genocide as "acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group", such as killing members of the group, causing serious bodily or mental harm to them, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures intended to prevent births within the group, forcibly transferring children of the group to another group. Article 3 of the Convention states that such acts are considered punishable as are

23 Schindler/Toman, *op. cit.* (note 8), p. 231. See also Brownlie, *op. cit.* (note 21), p. 562; R. Lemkin, "Genocide as a crime under international law", *AJIL*, 1947, p. 145; J. L. Kunz, "The United Nations Convention on genocide", *AJIL*, 1949, p. 738; N. Robinson, *The Genocide Convention: A Commentary*, New York, 1960.

various degrees of involvement in them: conspiracy to commit the acts, direct and public incitement, attempts or complicity. But it is Article 4 that establishes the obligation to punish not only "rulers" or "public officials", but also "private individuals". As for Article 6, it places the competence to try offenders in the hands of both domestic and international tribunals.

It follows that this important Convention introduces a new crime under international law, directly linked to the legal category already established by Article 6 of the Nuremberg Charter, that of crimes against humanity. And, again, international treaty law goes far beyond the traditional boundaries of State responsibility, underlining that individuals are "in the front line" with respect to obligations under a particular branch of international law. And, in keeping with the previous documents, the Genocide Convention offers a broad definition of the crime of genocide and of various levels of participation in it (direct acts, conspiracy, incitement, attempts, complicity). The customary nature of the principles which form the basis of the Convention has been recognized by the International Court of Justice.[24]

Shortly afterwards, the four Geneva Conventions of 12 August 1949, drafted on the initiative of the ICRC in the wake of the dramatic experiences of the Second World War, reshaped the entire treaty-based system dealing with the protection of war victims.[25] The parties to these Conventions undertake the basic general obligation "to respect and to ensure respect" for their rules "in all circumstances" (Article 1 common to the four treaties). An entire chapter of each of the Geneva Conventions deals with acts against protected persons. They are called "grave breaches"[26] — and not war crimes —,[27] but they are undoubtedly crimes under international law. These acts are defined in detail in Article 50 of the First Convention, Article 51 of the Second Convention, Article 130 of the Third Convention and Article 147 of the Fourth Convention, and include crimes such as wilful killing, torture or inhuman treatment (including biological experiments), wilfully causing

24 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion of 18 May 1951, I.C.J. Reports, 1951, p. 23.

25 Schindler/Toman, *op. cit.* (note 8), p. 367. See also the commentaries published under the general editorship of Jean S. Pictet, ICRC, Geneva, 1952-1956; G.I.A.D. Draper, "The Geneva Conventions of 1949", *RCADI*, 1965, I, p. 59.

26 G. Doucet, "La qualification des infractions graves au droit international humanitaire", in F. Kalshoven/Y. Sandoz (Eds), *Implementation of International Humanitarian Law*, Dordrecht/Boston/London 1987, p. 79.

27 But there is no doubt that grave breaches constitute "war crimes". See Brownlie, *op. cit.* (note 21), p. 563; J.A.C. Gutteridge, "The Geneva Conventions of 1949", *BYIL*, 1949, p. 294.

great suffering or serious injury to body or health, extensive destruction or appropriation of property, compelling a prisoner of war to serve in the forces of a hostile power or wilfully depriving him of the right to a fair and regular trial, unlawful deportation, the transfer or confinement of a protected person, and the taking of hostages "not justified by military necessity and carried out unlawfully and wantonly". As far as the scope of application *ratione personae* is concerned, the Conventions establish the responsibility of the direct authors of those grave breaches and that of their superiors. The scope of the rules is, in fact, very wide since the word "person" comprises both civilians and combatants, whether the latter are members of official or unofficial forces.

The Hague Convention of 14 May 1954 for the Protection of Cultural Property in the Event of Armed Conflict commits the contracting parties to protecting what is called the "cultural heritage of all mankind". They have "to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions" upon those persons "who commit or order to be committed a breach" of the Convention.[28]

The two 1977 Protocols additional to the Geneva Conventions of 1949 have added more precise rules to what has become an extensive legal system.[29] In particular, Article 11 strengthens the protection of individuals as far as their physical and mental health and integrity are concerned by stipulating that serious violations constitute a grave breach of international humanitarian law. Moreover, Article 85 adds a great number of violations to the already existing list of grave breaches. Again, with Article 1 of Protocol I, parties undertake "to respect and ensure respect" for the Protocol "in any circumstances".

Evolution in the 1990s: from the ad hoc Tribunals to the International Criminal Court

An important step in the lengthy process of developing rules on individual criminal responsibility under international law was taken with

28 Art. 28, Schindler/Toman, *op. cit.* (note 8), p. 745. Art. 85, para. 4(d) of the 1977 Protocol I makes also attacks against historic monuments, works of art or places of worship under certain conditions a war crime. See M. Frigo, *La protezione dei beni culturali nel diritto internazionale*, Milano, 1986; J. Toman, *The Protection of Cultural Property in the Event of Armed Conflict*, Paris, 1996.

29 Texts in Schindler/Toman, *op. cit.* (note 8), p. 621. See also Y. Sandoz/C. Swinarski/B. Zimmermann, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC/Martinus Nijhoff, Geneva, 1987.

the setting-up of the two ad hoc Tribunals for the prosecution of crimes committed, respectively, in the former Yugoslavia (ICTFY) and in Rwanda (ICTR). These Tribunals represent major progress towards the institution of a kind of permanent jurisdiction. But they have also provided clarification as regards the substance of what is becoming a sort of international criminal code, in the sense envisaged by the UN General Assembly in its Resolution 95 (I).[30]

The various UN Security Council resolutions on the establishment of tribunals for the prosecution of individuals responsible for acts committed in the former Yugoslavia and in Rwanda contain provisions on acts punishable under international law.[31] In particular, Articles 2, 3, 4 and 5 of the Statute of the International Tribunal for the former Yugoslavia enumerates the different crimes coming under the jurisdiction of the court. Article 2, on grave breaches of the 1949 Geneva Conventions, gives the Tribunal the power to prosecute persons "committing or ordering to commit" such grave breaches. Article 3 enlarges the scope to cover violations of the laws and customs of war. Article 4 reproduces Articles 2 and 3 of the 1948 Genocide Convention.

Article 5 authorizes the Tribunal to prosecute persons responsible for crimes committed against civilians in armed conflicts "whether international or internal in character". In the already codified tradition, Article 7 gives a wide scope to "individual criminal responsibility", covering all persons who "planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime". The responsibility of a person with an official position (head of State or government,

30 *Op. cit.* (note 20).

31 *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, adopted 25 May 1993 by SC Resolution 827/1993; text in UN Doc. S/25704 (1993). See also E. David, "Le Tribunal international pénal pour l'ex-Yougoslavie", *Revue belge de droit international*, 1992, p. 565; A. Pellet, "Le tribunal criminel international pour l'ex-Yougoslavie – Poudre aux yeux ou avancée décisive?", *Revue générale de droit international public*, 1994, p. 7; D. Shraga/R. Zacklin, "The International Criminal Tribunal for the Former Yugoslavia", *European Journal of International Law*, 1994, p. 360; A. Cassese, "The International Criminal Tribunal for the Former Yugoslavia", in *Studi Panzera*, Bari, 1995, I, p. 235; G. Carella, "Il Tribunale penale internazionale per la ex-Yugoslavia", in P. Picone (ed.), *Interventi delle Nazioni Unite e diritto internazionale*, Padova, 1995, p. 463; P. Tavernier, "The experience of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda", and M. C. Roberge, "Jurisdiction of the ad hoc Tribunals for the Former Yugoslavia and Rwanda over crimes against humanity and genocide", *IRRC*, No. 321, November-December 1997, pp. 605 and 651 respectively.

government official) and the effects of superior orders are treated in Article 7 along the same lines as in the Nuremberg Charter and the ILC report of 1950 (Principles III and IV). Reference is made to the possibility of mitigation "if the International Tribunal determines that justice so requires" (as in Article 8 of the Charter).

The Statute of the Rwanda Tribunal appears slightly different, but the global approach of its provisions does not reveal major differences.[32]

This great *corpus* of principles and rules, all this legal heritage has now been codified in an organic way in a single instrument, the Rome Statute of the International Criminal Court (ICC), adopted by a UN diplomatic conference on 17 July 1998.[33] Articles 5 to 8 of the Statute deal with the definition of the crimes coming under the jurisdiction of the ICC. They are "the most serious crimes" and are "of concern to the international community as a whole" (Article 5). This is a comprehensive definition which covers, from a genuinely universal perspective, both "grave breaches" and "serious violations" of the Geneva Conventions and of the laws and customs of war in general. Such offences contravene the legal and ethical rules and principles of the international community.

The Rome Statute has adopted a new typology of crimes, with four categories instead of three: genocide, crimes against humanity, war crimes and crimes of aggression. As indicated earlier, this paper leaves aside the problem of whether or not the crime of aggression constitutes a "crime against peace", as defined in the Nuremberg Charter, or a "crime against the peace and security of mankind", as defined in the Draft Code prepared by the International Law Commission. Article 6 of the Rome Statute confirms, in the same words, the provisions of the 1948 Genocide Convention and represents a further step towards the codification of principles and rules which appear to be generally accepted. It is with Articles 7 and 8 that a major evolution has taken place in respect of crimes against humanity and war crimes. Here, detailed provisions have replaced those of Article 6 of the Nuremberg Charter and of their successive formulations.

32 The Statute lists genocide and crimes against humanity in the first place and adds a reference to Art. 3 common to the Geneva Conventions and to 1977 Additional Protocol II. The peculiar context of the Rwanda conflict explains these differences.

33 UN Doc. A/CONF. 183/9. Final Act: UN Doc. A/CONF. 183/10. See also F. Lattanzi (ed.), *The International Criminal Court: Comments on the Draft Statute*, Napoli, 1998; F. Lattanzi/E.Sciso (eds.), *Dai Tribunali penali internazionali ad hoc a una Corte permanente*, Napoli, 1996; P. Ungari/M.P.Pietrosanti Malintoppi, *Verso un Tribunale permanente internazionale sui crimini contro l'umanità*, Roma, 1997.

"Crime against humanity" means — in a comprehensive definition — an act "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack" (Article 7).[34] It belongs to general, customary international law and it has been defined in several instruments subsequent to the Nuremberg Charter and its Article 6. A clear indication of what constitutes a crime against humanity is given by the International Tribunal for the former Yugoslavia in its decision on the *Erdemovic* case: "Crimes against humanity are serious acts of violence which harm human beings by striking what is most essential to them: their life, liberty, physical welfare, health and/or dignity. They are inhumane acts that by their extent and gravity go beyond the limits tolerable to the international community, which must perforce demand their punishment. But crimes against humanity also transcend the individual because when the individual is assaulted, humanity comes under attack and is negated. It is therefore the concept of humanity as victim which essentially characterises crimes against humanity".[35] Obviously, no distinction is made between war and peace, international or internal armed conflicts.[36] What is identified as the core principle is the concept of humanity itself. The individual, the victim, becomes part of a much broader concept: that of mankind. There is a close link here to the Martens Clause, as codified by the Hague Convention No. IV of 1907, which in its preamble refers to "the principles of the law of nations, as they result from the usages established among civilised peoples, from the laws of humanity, and the dictates of public conscience", and confirmed by Article 1 of 1977 Additional Protocol I.[37]

The structure of Article 7, with its two parts, reflects a new approach: the first part enumerates acts that constitute crimes against humanity and the second offers definitions for some of them. The inclusion of murder, extermination, enslavement and deportation simply confirms the

34 Donat-Cattin, "Crimes against humanity", in Lattanzi (ed.), *op. cit.* (note 33), p. 49.

35 Decision of 29 November 1996, UD Doc. IT-96-22-T.

36 This principle was already stated by the ICTY in the *Tadic* case, judgement of 7 May 1997, UN Doc. IT-94-1-T. The Statute of the Rwanda Tribunal makes no distinction, because most of the crimes committed in the first period lacked the character of having taken place in a conflict situation.

37 See S. Miyazaki, "The Martens Clause and international humanitarian law", in C. Swinarsky (ed.), *Studies and Essays in Honour of Jean Pictet*, ICRC, Geneva, 1984, p. 433; P. Benvenuti, "La clausola Martens e la tradizione classica del diritto naturale nellla codificazione del diritto dei conflitti armati", in *Scritti degli allievi in onore di Giuseppe Barile*, Padova, 1995, p. 171.

Nuremberg heritage. What in the Nuremberg Charter was generally referred to as "other inhuman acts committed against any civilian population", in the Rome Statute becomes a list of acts which takes into account the dramatic experiences of populations over the last 50 years in both international and domestic conflicts and even in times of so-called peace: "imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity; enforced disappearance of persons, *apartheid*". Each one of these acts is defined in the second part of Article 7. As can be seen, a considerable number of them are crimes of a sexual nature. Since the Hagenbach case, the behaviour of certain men in conflicts and other situations of violence has gone dramatically beyond what at the time was considered as the crime of rape: today such crimes have become "widespread" and "systematic".[38] But the seriousness of the crime has always been the same: "He that forces any Woman to abuse her, and the matter be proved, he shall dye for it".[39] Moreover, the acts committed in the former Yugoslavia have given rise to the concept of "ethnic cleansing", which has been commented on by the ICTY, particularly in its decision on the *Review of Indictment against Karadzic and Mladic*.[40] Article 7 ends the list with a broad category: "other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or mental or physical health". Such a definition leaves the door open to the future inclusion of other acts, thus taking into account the fact that cases brought before domestic and international jurisdictions have shown men to be only too capable of enlarging on this category of crime, which constitutes the most serious violation of the idea of humanity itself.

Article 8 of the Rome Statute deals with the traditional concept of war crimes. A comparison between the list it contains and that found in Article 6 of the Nuremberg Charter shows that the process of defining

38 See T. Meron, "Rape as a crime under international humanitarian law", *AJIL*, 1993, p. 424; K.D. Askin, *War Crimes against Women, Prosecution in International Law*, The Hague, 1997.

39 Art. 88, *Articles of War*, in Ögren, *op. cit.* (note 4), p. 441.

40 UN Doc. IT-95-5-R61.

various acts as war crimes has developed enormously and led to an enlarged and more detailed codification.[41]

In a broad sense, war crimes come under the jurisdiction of the ICC, in particular when "committed as a part of a plan or policy or as part of a large scale commission of such crimes" (Article 8). This means that the ICC is also given jurisdiction over acts committed by individuals.[42] Several categories of crime are dealt with. The first is the grave breaches established by the Geneva Conventions. The second comprises "other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law". The list which follows is extremely detailed, with 26 types of act or behaviour. It is the longest list of crimes ever included in an internationally binding instrument. The third category refers to serious violations of Article 3 common to the Geneva Conventions, which pertains to armed conflicts not of an international character and covers acts committed against persons taking no active part in the hostilities (such as violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; and outrages upon personal dignity, in particular humiliating and degrading treatment, the taking of hostages and refusal to grant judicial guarantees "recognised as indispensable"). A fourth is related to "other serious violations of the laws and customs applicable in armed conflicts not of an international character". The last two categories are followed by clauses excluding from the ICC's jurisdiction acts committed in situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence "or other acts of similar nature". The general right of States to maintain or establish law and order or to defend their unity and territorial integrity "by all legitimate means" is

41 See H. H. Jescheck, "War crimes", *Encyclopedia of Public International Law*, 4, p. 294; Y. Dinstein/M. Tabory (eds), *War Crimes in International Law*, The Hague/Boston/London, 1996; T.L.H. McCormack/J. Simpson (Eds.), *The Law of War Crimes. National and International Approaches*, The Hague/Boston/London, 1997; P. Lamberti Zanardi/G. Venturini (eds), *Crimini di guerra e competenza delle giurisdizioni nazionali*, Milano, 1998; C. Keith Hall, "The jurisdiction of the permanent International Criminal Court over violations of humanitarian law", in Lattanzi, *op. cit.* (note 33), p. 19; M. Lachs, *War Crimes: An Attempt to Define the Issues*, London, 1945. Daillier/Pellet, *op. cit.* (note 14), p. 679: "La structure interne d'apparence complexe répond à un souci d'efficacité face à la diversité des conflits armés – internationaux et non internationaux – et à l'opposabilité variable des acquis conventionnels de 1949 et de 1977 aux États."

42 M. C. Roberge, "The new International Criminal Court: A preliminary assessment", *IRRC*, No. 325, December 1998, p. 674.

expressly recognised.[43] In any case, the fourth category applies to situations of "protracted armed conflict between governmental authorities and organised armed groups or between such groups", that is, the vast majority of contemporary internal conflicts.

A few concluding remarks

The categories of war crimes, crimes against humanity and genocide, considered as part of the broader category of *crimina juris gentium*, have developed in a significant and considerable way since the Second World War.[44]

A proliferation of treaties and constant work to expand the scope of international law by creating new jurisdictions and by clarifying concepts both in legal provisions and in judicial decisions are the salient features of the evolution described in these pages.

When Article 6 of the Nuremberg Charter was adopted, its provisions on war crimes were already declaratory of general international law of customary origin. War crimes were violations of existing provisions of *jus in bello*. The Nuremberg Judgement stated in that regard that "with respect to war crimes, however, as has already been pointed out, the crimes defined by Article 6, Section b, of the Charter were already recognised as war crimes under international law. They were covered by Articles 46, 50, 52 and 56 of the Hague Convention of 1907, and Articles 2, 3, 4, 46 and 51 of the Geneva Convention of 1929. That violation of these provisions constituted crimes for which the guilty individuals were punishable was too well settled to admit of argument".[45] As we have seen, however, the customary origins of rules on war crimes go back nearly half a millennium.

The notion of crimes against humanity appears to have undergone the greatest development. Under the Nuremberg Charter, crimes against humanity were linked to war crimes (which in turn were connected to crimes against peace). The point of reference was the Second World War, and crimes were considered only if committed before or during that war. But the Judgement anticipated the autonomous character of such crimes: Julius Streicher and Baldur von Schirach were convicted solely of crimes against

43 No doubt, these provisions must be interpreted in a very strict way.

44 B. Conforti, *Diritto internazionale*, Napoli, 1997, p. 204.

45 *Trial of the major war criminals before the International Military Tribunal, op. cit.* (note 19), p. 253.

humanity.[46] For Streicher, this led to the death sentence. Although explicitly recognized only after the Second World War, crimes against humanity were taken into account already long before as they were seen to be closely linked to the principle of humanity, which is a cornerstone of humanitarian law. Von Hagenbach and others responsible for *crimina juris gentium*, in war, in peace and in borderline situations, committed acts which could be termed crimes against humanity under international law. After 1946, it appeared beyond any doubt that this category of crimes had become part of customary international law. The judgement of the ICTY in the *Tadic* case affirmed it openly. The Rwanda Statute considers crimes against humanity an autonomous category. The connection with war crimes has disappeared: Article 1 of the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, referring to crimes against humanity under Article 6 of the Nuremberg Charter, completes the wording with "whether committed in time of war or in time of peace".[47]

If war crimes and crimes against humanity are now two autonomous, self-sustained categories, it cannot be denied that they are often closely linked in modern conflicts, especially in connection with crimes against the civilian population. Murder, deportation and other acts in the long lists that appear in recent instruments are clear examples of connection and overlapping. The four Geneva Conventions and Protocol I codify a significant range of acts and situations which demonstrate that violations can be classified both as war crimes and crimes against humanity.

An important contribution to the evolution of the concept of individual criminal responsibility has been made by the Draft Code of Offences against the Peace and Security of Mankind, prepared by the International Law Commission. Already in the 1951 and 1954 drafts,[48] Article 1 provided that "offences against the peace and security of mankind are crimes under international law, for which the responsible individual shall be punished". Article 1 of the 1996 text now states that "crimes against the peace and security of mankind are crimes under international law, and punishable as such, whether or not they are punishable under national law".[49] According to

46 *Ibid.*, pp. 301-304 and 317-320. See also L. Oppenheim, *International Law*, R. Jenning and A. Watts (eds), Part 2, London, 1992, p. 996.

47 Adopted on 26 November 1968. Text in Schindler/Toman, *op. cit.* (note 8), p. 925.

48 *Yearbook of the International Law Commission*, vol. II, 1954.

49 Text in *Yearbook of the International Law Commission*, vol. II(2), 1996.

Article 2, "a crime against the peace and security of mankind entails individual responsibility". As far as the list of acts is concerned, the Draft Code takes into account all the developments described above. The crime of genocide (Article 17) reflects the 1948 Convention, with the same wording as in Article 6 of the Rome Statute. For crimes against humanity, the Code (Article 18) adds that acts are "instigated or directed by a Government or by any organisation or group". The list is, however, less detailed than that in Article 7 of the Rome Statute. In particular, instead of mentioning the crime of *apartheid*, the Code includes it in a general provision on "institutional discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population". War crimes are listed more or less in the same way as that later chosen for Article 8 of the Statute, but in a less extensive formulation. However, all the different categories of crime mention the acts as "committed wilfully in violation of international humanitarian law". A new provision on the protection of the natural environment is introduced which says that "in the case of armed conflict, using methods or means of warfare not justified by military necessity with the intent to cause widespread, long-term and severe damage to the natural environment and thereby gravely prejudice the health or survival of the population".

Article 19 adds a further provision relating to crimes against UN and associated personnel committed with a view to preventing or impeding an operation involving such personnel. The only exclusion is when UN personnel are engaged as combatants against organized armed forces in an enforcement action authorized by the Security Council under Chapter VII of the UN Charter. In that case, "the law of international armed conflicts applies". The protection of UN personnel under the Rome Statute is included in Article 8 (b) iii and (e) iii.

Not only has the typology of crimes entailing individual responsibility been enlarged and given a clearer outline, but some general principles have also been laid down. When an act is being considered, the crime of omission is taken into account. Starting with the judgement of the US military commission in the *General Yamashita* case on atrocities committed against the civilian population in the Philippines, failure to prevent a crime from being committed has been considered to be an act as serious as the crime itself and deserving of equal punishment. "Where murder and rape and vicious revengeful actions are widespread offences, and there is no effec-

tive attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops."[50] Articles 86 and 87 of Additional Protocol I and the Rome Statute clearly take the same line.

Another important development should be mentioned here in relation to the practice of codifying international law: there is a growing connection between humanitarian law and human rights law. Indeed, some recently adopted provisions of humanitarian law appear clearly influenced by human rights rules and standards of protection. The Rome Statute refers to concepts like "personal dignity", the prohibition of "humiliating and degrading treatment", "judicial guarantees", the prohibition of "persecution" (as "intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity"), discrimination and *apartheid*. These concepts have all been established in the main instruments adopted by the UN for the protection of the rights of the individual. However, the principle of humanity is at the core of international humanitarian law and forms the basis of all the developments discussed in this paper.[51] Moreover, the principle of individual responsibility has clearly been established by humanitarian law.

Finally, there is a growing reciprocal influence between treaty-based and customary international law. Customary law has come to play a role of paramount importance, since contemporary humanitarian law applicable in armed conflicts is no longer limited to the Geneva Conventions and their Additional Protocols. Customary law has accelerated the development of the law of armed conflict, particularly in relation to crimes committed in internal conflicts. In this respect, the case law established by the ad hoc Tribunal for the former Yugoslavia has made an important contribution.[52]

50 Judgment of 7 December 1945, UN War Crimes Commission, 4 *Law Reports of the Trials of War Criminals*, 1948, 3.

51 E. Greppi, "Diritto internazionale umanitario dei conflitti armati e diritti umani: profili di una convergenza", in *La comunità internazionale*, 1996, p. 473. On the relationship between international humanitarian law and human rights law, see the bibliography in *IRRC*, No. 324, September 1998, p. 572.

52 See L. Condorelli, "Il sistema della repressione dei crimini di guerra nelle Convenzioni di Ginevra del 1949 e nel primo Protocollo addizionale del 1977", in Lamberti Zanardi/Venturini, *op. cit.* (note 41), p. 26. Also: T. Meron, "War crimes in Yugoslavia and the development of international law", *AJIL*, 1994, p. 70; A. Cassese, "The International Tribunal for the Former Yugoslavia and the implementation of international humanitarian law", in *op. cit.* (note 3), p. 229.

We have come a long way since the 1474 Hagenbach case. But the basic idea underlying the legal heritage whose foundations were laid many years ago and which has since been developed remains the same: the principle of humanity must be considered as the very heart of a legal system aimed at providing protection against criminal acts committed by individuals, both in war — whether internal or international — and in peace. This is not only a moral duty, but a basic obligation under international customary law.

The laws of humanity and the "dictates of public conscience", today as well as in the past, call for exceptional efforts aimed at promoting principles and rules designed to ensure effective protection of the individual, who is to a dramatically increasing extent the victim of acts of generalized violence. The "peace and security of mankind", together with the protection of human rights and severe sanctions for serious violations and grave breaches of humanitarian law applicable in armed conflicts, are among the international community's major assets. For this, we should be grateful first and foremost to the International Committee of the Red Cross on the 50th anniversary of the Geneva Conventions of 12 August 1949.[53]

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53 The 50th anniversary offers an excellent opportunity for reflection, because "some anniversaries are bound to evoke powerful memories" (C. Sommaruga, "Humanitarian challenges on the threshold of the twenty-first century", *IRRC*, No. 310, January-February 1996, p. 20). On the role of the ICRC and with that of the United Nations, see H.P. Gasser, "The International Committee of the Red Cross and the United Nations involvement in the implementation of international humanitarian law", in *op. cit.* (note 3), p. 259.

Résumé

Quelques réflexions sur l'évolution en droit international de la notion de crime commis par une personne physique

par EDOARDO GREPPI

Bien que l'idée de la responsabilité pénale individuelle pour des violations du droit international soit ancienne, ce sont en fait les procès contre les grands criminels de guerre, à l'issue de la Seconde Guerre mondiale, qui en ont fait une réalité incontestable et incontestée. L'auteur retrace l'évolution de la notion de crime international jusqu'à nos jours, en rappelant les premières expériences faites au Moyen- Âge, puis, en examinant la jurisprudence des Tribunaux de Nuremberg et de Tokyo, l'activité des Tribunaux ad hoc pour l'ex-Yougoslavie et le Rwanda, et les dispositions prises pour établir la Cour pénale internationale. Un intérêt particulier est porté au développement de la notion de «crime contre l'humanité». Le renforcement de l'idée de la responsabilité individuelle et sa concrétisation sur le plan pénal mettent également en évidence les liens qui existent entre le droit international humanitaire et les droits de l'homme.