From Breisach to Rome: International Criminal Court's long Road.[1][2]

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Abstract

This article intends to analyze the International Criminal Court historical predecessors, purposing that they are fundamental for the understanding of the motivations and dynamics that led to the necessity of creating a permanent court to protect Human Rights.

Key Words: International Criminal Court. Humanitarian Law. International Justice.

Resumo

O presente artigo tem por objecto analisar os antecedentes históricos do Tribunal Penal Internacional, enquanto fundamentais para a compreensão das motivações e dinâmicas que levaram à obrigatoriedade de garantir a criação de um tribunal permanente de protecção dos Direitos Humanos.

Palavras-chave: Tribunal Penal Internacional. Direito Humanitário. Justiça internacional

Introduction

Through a process of progressive evolution, International Public Law has developed towards a more comprehensive protection of the individual, both as a central subject in International Law and as part of an effort to establish Immanuel Kant's universal ethical ideal. However, at a time when the number of States in the world was much smaller, it is awe inspiring that the Second World War was not efficiently used by

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the defenders of the universalist movement as a way to spark the creation of international organisms capable of safeguarding human rights.

In fact, it was not for another 50 years, after the end of the Second World War, that the first international criminal court, of a permanent nature, came in to existence: the International Criminal Court (ICC). ICC's Statute was approved in Rome, July 17 1998, and it entered into force, after having been ratified by 60 countries, in July 1st 2002, in accordance with article 126 of the Rome Treaty[3]. ICC has universal territorial jurisdiction and the ability to bring to trial people who have committed human rights violations, but haven't been hold accountable due to the inability or lack of will of domestic institutions.

The negotiating process that led to the Rome Statute, which set the foundations for the ICC and its legal tools[4], was concluded after long and difficult talks. This process was made difficult by a number of problems and points of contention such as the opposition from the United States and the matter of the Prosecutor's powers. Furthermore, the role of the United Nations Security Council and other matters of a formal, political and material nature aggravated the controversy surrounding a Court that appear to function without a security net and overly ambiguous criteria.

Despite the increase in the number of States that have ratified the Rome Statute, ICC's actions have become the target of growing frustration and opposition from African States, who claim the Court has taken an imperialistic approach to its functioning. Former Prosecutor Luís Moreno-Ocampo argument that only some cases raise and deserve the interest and intervention from the Court puts it in a difficult position. As a result, the ICC is often seen as a political organism that acts through legal instruments to promote Western States agenda.

1. Origins of international justice

[3] The official version of the treaty in Portuguese may be found in the website of the Office of Documentation and Comparative Law (http://www.gddc.pt/direitos-humanos/textos-internacionais-dh/tidhuniversais/tpi-estatuto-roma.html). Currently, 122 States have joined the ICC, being Ivory Coast the last one to have done so, in February 15 2013. Cfr. ICC welcomes Côte d'Ivoire as a new State party", *International Criminal Court*, March 19 2013. Available at: http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20 releases/Pages/pr884.aspx.

[4] Deserving special attention the "Rules of Procedure and Evidence" and the "Elements of Crime". All legal tools are available at ICC Official Website (http://www.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools/).

There is no consensus in the literature about the first signs of a concerted action by a number of States towards the creation of an international court or the development of a body of criminal law applicable to more than one State.

Author such as GEORG SCHWARZENBERGER argue that the first *ad hoc* international criminal court was created in 1474, having been summoned 28 judges from Alsace, Austria, Rhineland and Switzerland with the goal of holding a trial for PETER VON HAGENBACH, in the city of Breisach. Though the author points to the relevance of this trial, since it focused on one of the most controversial aspects of the trials held after the end of the Second World War – the following of orders given by a superior –, there is some question if this trial was indeed held by an international court. Seeing that the judges were originally from States that were part of the Holy Roman Empire, there are those who argue it was actually a court of a confederation, not an international one[5].

It is not possible, however, to ignore the fact that true origins of International Criminal Law *stricto sensu* appeared much later, in the 18th century, with the expansion of maritime piracy and the need to suppress it. In order to do so, trials were held, where pirates were considered "enemies of the human species", because they dared to limit the freedom of the seas.

Piracy was seen as a permanent threat to people and goods transported overseas and, consequently, to the economic security of States. Thus, piracy became the first internationally recognized crime and, as such, was the first exception to the principle of State's territoriality: it was accepted that any State had the right to detain and prosecute pirates, no matter their nationality and the place where the crime was committed[6]. There

[5] See GEORG SCHWARZENBERGER, "Breisach Revisited – The Hagenbach Trial of 1474", *Grotian Society Papers – Studies in the history of the law of nations*, Haia, C. H. Alexandrowicz (Edição de Autor), 1968, pp. 46-51; WLADIMIR BRITO, "Processo Penal Internacional", *Que Futuro Para o Direito Processual Penal – Simpósio em Homenagem a Jorge de Figueiredo Dias, por ocasião dos 20 anos do Código de Processo Penal Português*, Coimbra Editora, 2009, p. 208.

[6] See BARTRAM S. BROWN, "The Evolving Concept of Universal Jurisdiction", *SelectedWorks*, 2001. http://works.bepress.com/cgi/viewcontent.cgi?article=1004&context=bartram_brown, p. 384; EDUARDO CORREIA BAPTISTA, *Ius Cogens em Direito Internacional*, Lisboa, Lex, 1997, p. 179.
ANTONIO CASSESE, *International Criminal Law*, Nova Iorque, Oxford University Press, 2003, p. 16, argues that the crime of piracy lost strength, becoming obsolete, argument we oppose, seeing that piracy is not only still happens all around the world – especially in the Horn of Africa and Southeast Asia – but has been on the rise. Cfr. "2009 Worldwide piracy figures surpass 400", *ICC Commercial Crime Services*,

was a need for States to gather in order to find solutions aimed at putting an end to the culture of impunity for a crime that was putting international peace and security in jeopardy.

As time went on, States began to worry about other activities, besides piracy, with a focus on those actions that put in danger the security of human beings. The international community started to come to terms with the need to establish a permanent court to hold accountable those that would put at risk essential legal assets and would benefit from the protection of their own States[7].

The principle of territoriality, in this case, gained strategic importance for the practice of state sovereignty, as the element limiting the area over which each State had powers to enforce their respective criminal law[8]. This state of affairs would be subject to changes as a result of an overriding tendency to increase State's jurisdiction to include acts performed in other territories when the people involved, either as victims or as perpetrators, were nationals[9].

This tendency, highlighted by States increasing their jurisdiction over other territories, would suffer changes, later coming to the conclusion that this exercise in power should not focus only in cases in which there is involvement of a national. It should rather include crimes against which a significant number of countries had an interest in fighting, because they went against Humanity's common interests. And in this case, the nationality of those involved or the place where the crime was committed

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January 14 2010. Available at http://www.icc-ccs.org/news/385-2009-worldwide-piracy-figures-surpass-400.

[7] It is worth noting "that the Westphalia Treaty (from 1648) recognized the principle of sovereignty as the principle of independence of European States from one another and from any higher powers" (JORGE MIRANDA, *Curso de Direito Internacional Público*, Cascais, Principia, 2006, p. 12), "being considered the starting point of the evolution international public law has gone through"(cfr. NGUYEN QUOC DINH, PATRICK DAILLIER, ALAIN PELLET, *Direito Internacional Público*, Lisboa, Fundação Calouste Gulbenkian, 2003, 2nd edition, p. 53).

[8] In this regard, see ANTONIO CASSESSE, op. cit., p. 37

To this day, Portuguese jurisprudence sees in the principle of territoriality "the basic connecting point in international criminal law, because territorial limits usually coincide with the principles of sovereignty, independence and equality among Sovereign States." Opinion by the Advisory Council of the Attorney General of the Republic, from December 21 1999 (Opinion nº P000751999), by ISABEL PAIS MARTINS, available at http://www.dgsi.pt/ (http://www.dgsi.pt/pgrp.nsf/7fc0bd52c6f5cd5a 802568c0003fb410/306910e39e0710948025681f005f07af?OpenDocument&Highlight=0,P000751999).

[9] About the importance of territoriality in the exercise of State's jurisdiction over people and the development of this Power over space, see JOSÉ MANUEL PUREZA, " Da cultura da impunidade à judicialização global: o Tribunal Penal Internacional". *In: Revista Crítica de Ciências Sociais*, n.º 60, October 2001, pp. 124-126, available at http://www.ces.uc.pt/rccs/includes/download.php?id=761.

should not matter. Among said crimes, those that were capable of generating economic harm to States, such as piracy, should obviously be included.

Throughout the 18th century, the American (1776) and French (1789) Revolutions set the entry of a new paradigm in International Law: the United States Revolutionary movement allowed the entry of the first non-European State into the league of States recognized under International Law; and the French Revolution illustrated the rise of the popular classes over the nobility and clergy, claiming the exercise of sovereignty to the detriment of the King[10].

This period of time changed the established paradigm: International Law is not the Law among kings, but the Law among the peoples in the world[11]. This would change the way States saw the common interests that deserved protection, with the emerging notion that not only States needed protection, but also the individuals[12].

The shift in paradigm, that would lead to the beginning of a concerted effort to fight slavery, did not take the goal of protecting individual much further than attempts to humanize the *jus ad bellum* (the law of wars). This specific effort received an impulse after the Battle of Solferino, July 24 1859 – fought between the allied forces of France and Sardinia against the Austrian Army –, when the horrors scenarios that unfolded, with several wounded and dying soldiers left abandoned in the field of battle, inspired JEAN HENRY DUNANT to start a campaign to help wounded soldiers in the battlefield[13]. This campaign eventually led to the creation of the International Committee of the Red Cross (ICRC) in 1863[14].

Later, in 1872, complementing Durant's efforts, GUSTAVE MOYNIER, Chairman of the CICV, proposed the creation of a permanent international court to prevent and prosecute violations to the 1864 Geneva Convention, which aimed at protecting injured soldiers. The intention behind this effort was to encourage States to uphold said Convention, in the hope that the establishment of a permanent court would have an impact over the member States reluctant to abide by its terms. This initiative

[10] See JORGE MIRANDA, op. cit., p. 13.
[11] See JORGE MIRANDA, op. cit., p. 13.
[12] Among others, from slavery – its prohibition is a *ius cogens* principle. See JORGE MIRANDA, op. cit., p. 127.
[13] See "1859 Batalha de Solferino", *Cruz Vermelha Portuguesa*, s.d.. Available at http://www.cruzvermelha.pt/ movimento/direito-int-humanitario/476-1859-batalha-de-solferino.html.
[14] See "Comité Internacional da Cruz Vermelha", *Cruz Vermelha Portuguesa*, s.d.. Available at http://www.cruzvermelha.pt/movimento/580-comite-internacional-da-cruz-vermelha.html.

was not well received by States and one of the reasons for this is that the costs incurred for the establishment and maintenance of this Court would have to be funded by the warring parties, not by the international community as a whole.

Despite the many initiatives that followed, aimed at curbing State's belligerent drive – initiatives that were later perceived as the first elements of International Humanitarian Law[15] –, nothing would be enough to prevent new wars and the ensuing extensive loss of life.

The atrocities perpetrated during the First World War heavily contributed to the formation of an understanding, by the international community, about the need to form an international criminal court that would prosecute certain States for the atrocities committed during the period[16]. Besides the First World War, the massacre in Armenia, by the Turkish Empire, led to the death of over 600,000 people, having come under scrutiny by the French, British and Russian governments, who demanded that the people responsible for this genocide be brought to justice.

The Versailles Treaty (1919) is very important in this scenario because it (i) established an *ad hoc* international criminal court; (ii) imposed harsh sanctions to Germany, the foremost responsible for the beginning of the war; (iii) and gave way to the creation of the League of Nations[17], a failed project that came before the United Nations.

As a matter of fact, the Versailles Treaty, Articles 227-229, established the creation of a court to bring to trial: (i) German Emperor Wilhelm II to trial "for a supreme offence against international morality and the sanctity of treaties"; (ii) as well as other officials accused of acting against the laws and costums of war; and (iii) "persons guilty of criminal acts against the nationals of more than one of the Allied and Associated Powers will be brought before military tribunals composed of members of

[15] For example, the efforts to create an International Criminal Code and an international permanent court, through The Hague Conventions of 1899 and 1907 (Convention for the Pacific Settlement of International Disputes).

[16] Especially the ones perpetrated Germany, the Austro-Hungarian Empire, Bulgaria and the Turkish Empire.

[17] See Publications of the Permanent Court of International Justice", *International Court of Justice*, s.d.. Available at http://www.icj-cij.org/pcij/index.php?p1=9.

the military tribunals of the Powers concerned", applying, thus, the passive personality principle[18].

At the same time, the Versailles Treaty imposed sanctions on Germany that would later be considered excessive by the Germans and other signatories of the treaty, causing the emergence of a sentiment of rebellion that would eventually lead to Hitler's rise to power, triggering the Second World War[19]. Lastly, the League of Nations created the International Permanent Court of Justice, in 1922, located at The Hague. This was the first permanent court of universal jurisdiction, with powers to solve conflicts between States, though it did not have powers in criminal law matters. It would later be officially closed in 1946, after the creation of the UN, and be replaced in its functions by the International Court of Justice.

The Versailles Treaty also broke ground in International Law when it (i) combined the principle of self-determination of peoples to the concept of world peace, through United States President Woodrow Wilson's 14 Points[20]; (ii) inspired the tendency to abandon the notion that the actions performed by the Head of State are acts of the State, leading to the individual possibly being charged by his actions no matter his position in government; and (iii) reinforced the need to create international courts to address violations of International Humanitarian Law, since questions arose to the ability and will of national courts to handle these matters.

The biggest contributions to International Humanitarian Law, by the Versailles Treaty, is that it demonstrated the possibility of breaching the primacy of State Sovereignty, since it established the possibility of political interventions in the domestic affairs of a State with the goal of protecting Human Rights. It also reinforced the

[18] See JOSÉ ALBERTO AZEREDO LOPES, *Textos Históricos do Direito e das Relações Internacionais*, Porto, Universidade Católica Portuguesa, 1999, pp. 257-258.

[19] For more details about the consequences of this treaty, see FILIPE RIBEIRO MENESES, "História dos grandes tratados europeus: O Tratado de Versalhes (1919)", *Janus 2008*, 2008. Available at http://www.janusonline.pt/2008/2008_2_ 7.html.

[20] The "14 Points" speech, from January 8th 1918, set the foundations to talks that led to Germany's surrender. See "President Wilson's Fourteen Points", *The World War I Document Archive*, s.d.. Available at http://wwi.lib.byu.edu/index.php/President_Wilson%27s_Fourteen _Points; JORGE MIRANDA, op. cit., pp. 14-15; PAULA ESCARAMEIA, "O que é a Autodeterminação? – Análise Crítica do Conceito na sua Aplicação ao Caso de Timor", *O Direito Internacional Público nos Princípios do Século XXI*, Coimbra, Almedina, 2009, reprinting of Sptember 2003 edition, pp. 131-134.

emergence of the individual as a subject of international law, not only an object, left to be handled only as a matter of domestic law.

2. Post-Second World War

In 1945, the international community would have, after the end of the Second World War, a new opportunity to put in practice its plans to punish, exemplarily, the *delicta iuris gentium,* creating the International Military Tribunal at Nuremberg to prosecute the crimes against peace, crimes of war and crimes against humanity perpetrated by the Nazis criminals.[21]

The International Military Tribunal at Nuremberg was established following the signing of the London Charter, in August 8 1945, to try "war criminals whose crimes do not have a specific geographical location, who are being accused whether as individuals or as members of organizations".

The following year, General MacArthur's[22] Declaration would prompt the creation of the Tokyo Tribunal, with the goal of bringing to trial the Japanese leaders during the Second World War, for the same crimes the Court at Nuremberg was prosecuting, even though the military nature of the former was more pronounced, considering it did not stem from an agreement among States and the harshness of its judgments, which disregarded several basic rights[23].

Nuremberg and Tokyo Tribunals set the start of a new age for International Criminal and Humanitarian Law, because of:

- The repeated tendency to disregard immunity to the occupants of the higher posts in German and Japanese governments[24], as well as the determination to focus the court's work on high-level officials, leaving the trials of less prominent criminals to the national courts;

[21] See JOSÉ ALBERTO AZEREDO LOPES, op. cit., pp. 496.
[22] Who, at the time, served as Supreme Commander of Allied Forces in the Far East.
[23] See DIOGO FEIO, op. cit., pp. 167-168.
[24] See NGUYEN QUOC DINH, PATRICK DAILLIER, ALAIN PELLET, op. cit., p. 711.

- The evolution of the concept of international criminal responsibility of individuals, as a way of criminalizing the conduct of the moral perpetrators of said crimes and the individuals that actually performed the crimes. There was a successful attempt to include in this latter category people who occupied leadership positions and high-ranking positions in the military;
- The purpose to clearly state the crimes that represented severe violations to the most important values of International Law[25]; this would remain as "the core of future normative developments"[26].

The codification process of 1945 would represent a significant contribution towards the adoption of documents recognizing the importance of Humanitarian Law, in a manner more and more universal and standardized[27]. There are several examples of this: the Convention on the Prevention and Punishment of the Crime of Genocide (1948), the Fourth Geneva Convention on Humanitarian Law (1949), the Draft Code of Crimes against Peace and Security of Mankind (1954), the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (1968) and the Convention on the Suppression and Punishment of the Crime of Apartheid (1973).

3. *Ad hoc* Courts

Despite the acceleration in legislative activity that followed the creation of the Tribunals at Nuremberg and Tokyo, *realpolitik* still loomed large over the protection of Human Rights, in such a manner that the world witnessed, for the first three decades of the Cold War, individuals acting blatantly against mankind without being punished. Among the most serious cases, the military interventions in Vietnam and the Gulf and violations of Human Rights in Cuba, Chile, Argentina and South Africa stand out.

[25] The London Charter, article 6, typified three crimes already denounced by the International Community, through costums, being the International Military Tribunal at Nuremberg empowered to prosecute them. The same crimes would be listed in the article 5 of the International Tribunal for the Far East Charter.
[26] See JOSÉ MANUEL PUREZA, op. cit., pág. 127.
[27] See JORGE BACELAR GOUVEIA, op. cit., pp. 9-10.

This tendency would be halted in the first half of the 90's, with the end of the Cold War and the return to the standard of *ad hoc* international criminal courts. They were set up to prosecute the *delicta juris gentium* that occurred in Yugoslavia and Rwanda, causing the death of thousands of human beings[28], all exacerbated by ethnic hatred.

The creation of these courts represented a new phase for International Criminal Law, in as much as:

- The creation of said courts was prompted by action from the Security Council, not an agreement among victors or unilateral statements by leaders. In itself, this was enough to prevent the questioning of the international legitimacy of these courts[29].
- The mission given to these courts went beyond the simple punishment of those who went against International Law; they were seen as essential tools "to reestablish and maintain peace"[30];
- The International Criminal Tribunal for Rwanda represents the first time a country formally requested the establishment of an international court in its territory – despite having voted against Resolution 955 (1994) for disagreeing with certain aspects, among them the prohibition of the death penalty, the Rwandan Government reiterated its support for the tribunal. For more on this subject[31];
- The courts worked concurringly with the national court system, even though they had primacy over them. This is markedly different from Nuremberg and Tokyo, when the national courts worked only to complement the job done by the international courts – despite some individuals actually being tried by the

[28] Some estimates put to the number of people killed during the Yugoslavia Wars at 150,000 (starting in 1991) and the number of *Tutsis* killed by the *Hutu*-led Rwanda Government closer to one million (1994).
[29] This was an argument made by, among others, Dusko Tadic to the International Criminal Tribunal for the Former Yugoslavia. See Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, October 2 1995, reported by DOROTHEE DE SAMPAYO GARRIDO-NIJGH, available at http://www.iilj.org (http://www.iilj.org/courses /documents/Prosecutorv.Tadic.pdf).
[30] See the eight and seventh paragraphs of the documents discussed in the previous note.
[31] See DAPHNA SHRAGA; RALPH ZACKLIN, "The International Tribunal for Rwanda", *European Journal of International Law – Vol. 7 – n.º 4*, 1996. Available at http://www.ejil.org/pdfs/7/4/1390.pdf.

national courts, with international intervention, they would never try higher priority cases;

- The definitive affirmation of the individual as a separate entity, with its own international judicial personality; a subject of International Law[32] in its own right. This is, again, very different from what was seen in the post-Second World War Tribunals, when there was a tendency to consider the responsibility of individuals only as members of organizations – for example "German officials and members of the Nazi Party" –, never on their own right[33].
- Contrary to the trials at Nuremberg and Tokyo, there was a concerted effort to protect the rights of the accused, recognizing the inviolability of the human life as a fundamental right. Examples can be seen in the possibility of appeal from sentences and the strict limits to the penalties, in particular life in prison.

4. International Criminal Court

The events that led to the establishment of the *ad hoc* courts in the beginning of the 90's would lead, finally, to the realization of the ideal of a permanent court, as set out in the Geneva Conventions of 1949. This court would only come to life after "very long and difficult negotiations", with the signing of the Rome Statute (RS) in July 17 1998. This treaty came into full effect on July 1st 2002 and created the International Criminal Court (ICC)[34].

The creation of the ICC began with a proposal from Trinidad and Tobago to the United Nations General Assembly (Resolution 44/39). This proposal was initially motivated by the will to create a court that would prosecute the crime of international drugs trafficking, which would not end up in the roster of crimes of the Rome Statute. There is no doubt that the events in Yugoslavia and Rwanda were essential for the creation of the ICC, accelerating this process.

[32] See M. CHERIF BASSIOUNI, *Introduction au Droit Pénal International*, Bélgica, Bruylant, 2002, pp. 41-43.
[33] See JOSÉ ALBERTO AZEREDO LOPES, op. cit., pp. 496.

[34] See PAULA ESCARAMEIA, op. cit., pp. 225, 226 e 230.

In accordance with article 5 of the RS, the ICC has powers to try crimes of genocide, crimes against humanity, crimes of war and crimes of aggression. It can apply two types of penalties: time to be spent in prison through "imprisonment for a specified number of years, which may not exceed a maximum of 30 years" (art. 77º, n.º 1, al. a)) or a term of life in prison (art. 77º, n.º 1, al. b)); in addition to a fine (art. 77º, n.º 2,al. a)) or the "forfeiture of proceeds, property and assets derived directly or indirectly from that crime" (art. 77º, n.º 2, al. b)).

The ICC is different from previous international criminal courts in that it is a permanent court[35], given wide geographical jurisdiction, increasingly universal in nature, that enjoys relative independence and jurisdiction *ratione temporis* limited to crimes committed after the entry into force of the Statute[36]. It should be pointed out the non-applicability of the statute of limitations to the crimes within its jurisdiction[37].

This court deserves further attention because (i) it bases its actions on two other texts – the "Rules of Procedure and Evidence" and the "Elements of Crimes"[38]; (ii) it works in a manner to complement the national courts; and (iii) it focuses its attentions on individuals connected to the government apparatus, looking to strengthen the concept of international criminal responsibility of the individual and to ignore his official status.

The negotiating process that led to the creation of the ICC was not easy. Rather it was considered "technically challenging" and "politically strenuous"[39], putting in opposite sides States that value Human Rights and States that value most the stability of regimes.

There are other important aspects that deserve attention, such as (i) the mandatory unconditional cooperation between Member-States and the ICC[40], (ii) the reformulation of the concept of *ius puniendi*, and (iii) the conflicts between the RS and national Constitutions regarding matters such as extradition of national citizens, a

[35] Despite the fact that the judges to the various organs of the ICC work in a system of terms, the structure of the Court at The Hague stays in place, operational and intact, not being affected by violations to the International Humanitarian Law.
[36] See Art. 11 RS.
[37] See Art. 29 RS.
[38] See Art. 9 RS. These texts can be found on the official website of the ICC, specifically at http://www.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools/.
[39] *Ibidem*, pp. 164 e ss.
[40] See arts. 12.º, n.º 3, 2.ª parte e 89.º do ER.

common problem to most States, who are often reluctant to give up their nationals; immunity of high-level government officials; length of penalties; amnesties; and the acceptance of courts different than those established in their Constitutions.

It is interesting to note that immunity given to high-level officials of governments tends to fall out of use, given the growing concern of States and the international community with the protection of individuals in detriment of the protection of political power. However, many States still give immunity from prosecution to their leaders, including some Portuguese-speaking countries[41].

Despite the significant contributions of the ICC to International Criminal and Humanitarian Law, there are still imperfections to this model: there are many errors from the time of the creation of the Court, errors that put in jeopardy its efficiency and credibility.

In this sense, and because these problems are of various natures (political, formal, and practical), it is worth pointing out some of the ICC more severe issues:

- The "principle of selective justice", according which only some cases can be prosecuted by the ICC[42]. The use of this criterion, as a way of choosing the cases that will be pursued by the Court affects, negatively, the mission to uphold International Law, since some cases receive more attention because they are apparently easier to solve. This represents what is known as a double standard, something that damages the Court's credibility. Even though the RS states that it "should apply equally to all persons" (art. 27º, nº 1), the Court's inability to ensure trials of all those involved – especially considering the enormous complexity of most cases, something that can lead investigations to go on and on with no end in sight can delay the application of justice – leads the Prosecutor to focus its investigations "on those that bear the gravest responsibility for the crimes". This is a rekindling of the criteria used by the *ad hoc* courts, despite the fact that the Statute already demands that actions of the ICC take into account

[41] See PAULA ESCARAMEIA, op. cit., pp. 171-174.
[42] The fact that this principle is in full force has been accepted by ICC Prosecutor Luis Moreno-Ocampo, who pointed out that the first criteria in selecting cases to be investigated is the "severity of the crimes". See THOMAZ FAVARO, "Entrevista: Luís Moreno-Ocampo – A lição da Justiça", *VEJA*, – Edição 2070, July 23rd 2008. http://veja.abril.com.br/230708/entrevista.shtml.

the "gravity of the crime" (preamble and art. 1º and 53º, nº1, al. c))[43]. This practice can lead to States invoking the principle of *exceptio non adimpleti contractus*, which allows for the termination of operation of a treaty when there is a failure to accomplish its objectives because of the action of one of the parties (art. 60 Vienna Convention on the Law of Treaties). This, in turn, can lead to States refusing to comply with the RS if they understand that the discretion left to the ICC to interpret the expression "gravity of the crime" can be used to avoid the application of the Statute to Great Powers or to situations that happen outside Africa[44].

- The Security Council as an all-knowing, all-powerful entity, stationed above Customs and Treaty Law. The powers attributed by the RS to the Security Council confer to this organ an excessive level of influence over the ICC, when the majority of its permanent member (three out of five) have not ratified the Rome Statute[45].
- In light of the RS, the Security Council has powers to (i) "refer to the Prosecutor a situation in which a crime [foreseen in the RS] appears to have been committed" (art. 13º, al. b)); and (ii) to defer the proceedings of the Court for a period of 12 months, renewable without limits, if a "resolution adopted under Chapter VII of the Charter of the United Nations has requested the Court to that effect" (art. 16º). There is, thus, an unheard of system: on one hand, the Vienna Convention on the Law of Treaties is in full effect and Member-States of the RS are required to take appropriate action in the realm of the Statute, and on the other hand, the Charter of the UN, as if it were an universal constitution, places the Security Council as a "protector of legality", in a political perspective, compromising the efficacy of International Law. The "principle of international justice seems to prevail only as far as the ambiguous standards set out by the Security Council allow for it". It should be pointed out that the Security Council

[43] See "Second Public Hearing of the Office of the Prosecutor – Sessio 3 – Luís Moreno-Ocampo, Chief Prosecutor", *International Criminal Court*, October 17 2006. Available at http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Network+with+Partners/Public+Hearings/Second+Public+Hearing/Session+3/Luis+Moreno_Ocampo_+Chief+Prosecutor.htm.

[44] See JORGE MIRANDA, op. cit., p. 89.

[45] Of the "P5" (*Permanent 5*), only United Kingdom and France are part of the RS. The United States, Russia and China have all refused to take part in ICC.

is severely criticized by States, who accuse it of being partial and having double standards when it comes to stamping a given situation as a crime of aggression or any other qualifications foreseen in Chapter VII of the Charter;

- Africa as the sole target of ICC's actions. Despite the Prosecutor occasionally giving attention to other continents, like South America, it is clear that the most important cases discussed by the Court happened in the African continent. This situation has given rise to hostilities from African States towards the Court;
- The matter of the United States. If, on one hand, Russia and China evade the powers that the RS bestow upon them, as permanent members of the Security Council (opposing any action by the ICC that can be seen as meddling in the internal affairs of States), on the other hand, the US presses a number of countries, especially African ones, to collaborate with the ICC, while its own position has been markedly hostile towards the RS. After campaigning in favor of the ICC, the US changed its position radically, voting against it and only signing it on December 31 2000, the last day in which it would be possible to obtain observer status without proceeding to its ratification. It also passed into law the American Service Members Protection Act (ASPA), in December 7 2001, which vetoed any collaboration with the ICC and established that it would cease military support to any State that would not sign bilateral agreements with the US, preventing the detainment of US citizens, without Washington's consent[46]. All of this contributes to the loss of credibility of the ICC and its image as a "colonial tribunal"[47];
- The absence of coercive means, specifically security forces with universal jurisdiction, to ensure compliance of ICC's rulings by States, the beginning of investigations and the detainment of suspects. It remains, thus, hostage to the *animus* of State members, who are not always willing to fully collaborate;
- The tendency of States to use the ICC as a political tool in the hands of statesmen who want to do away with political rivals, simultaneously projecting a

[46] For more on the subject, see PAULA ESCARAMEIA, op. cit., p. 238.
[47] See DAVID P. FORSYTHE, *Human Rights in International Relations*, Cambridge, Cambridge University Press, 2006, 2nd Edition, pp. 106-110.

Human Rights-friendly image towards the international community for joining the RS;

- There is a possible conflict between ICC's complementarity in the face of the States's action[48] – no matter the penalty applied, however symbolic that is – and the possibility this principle is overridden if the ICC understand the proceedings at the State level "were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court" (art. 20º, nº 3, al. a)) of if they "were not conducted independently or impartially (…) and were conducted in a manner which was inconsistent with an intent to bring the person concerned to justice (art. 20º, nº 3, al. b)). Knowing that the concept of justice can be relative[49] and that, in some cases, like that of South Africa after the Apartheid, Commissions for Justice and Reconciliation have been put in place, there are still no standards, to be applied by the ICC, to establish more concrete limits to and to prevent the political use of said rules;
- There are some big normative gaps in the Rome Statute regarding the rights of the accused, since there is no solution to problems like the maximum period allowed for preventive custody[50] or the destination of individuals to whom temporary freedom is granted – this freedom depends on the availability of States. Another issue is that art. 107º, nº 1 of the RS states that the State is obliged to receive a person following the completion of his sentence, something we consider to be a violation of state sovereignty, since this concerns matters that go beyond the scope of International Humanitarian and Criminal Law. It is also worth pointing out the imprecise nature of the expression "unreasonable period", set out in art. 60º, nº 3. Lastly, art. 72º allows for States to not collaborate fully with the ICC when this may affect their national security. This provision may be used by people interested in influencing the course of

[48] See n. 59.

[49] Cultural relativism causes the concept of justice to vary, in such a manner that is accepted in some States, such as Somalia, that the victim or their representatives can choose how to apply justice. See KAL EL, "Somali Islamic court sets 100 female camels as price of aid worker's murder", *Infidels Are Cool através de AFP*, March 26th 2009. Available at http://infidelsarecool.com/2009/03/26/islamic-court-declares-a-human-life-is-worth-100-female-camels/.

[50] This becomes even more worrisome if the slow pace of ICC proceedings is taken into account. After eight years of work, the ICC still has not concluded its work on any cases, raising doubts about its efficiency and celerity.

investigations to protect specific interests. This may relate to all States, but African nations, in particular, have been found to have an extensive interpretation of concepts such as terrorism, subversion and national security for the purposes of this provision.

It seems clear that we live in a time in which it is difficult not to see Human Rights violations as a threat to world peace. The ICC is, in this scenario, the permanent institution responsible for ensuring the punishment of those high-level officials who should protect Human Rights, but instead disappoint people who put their trust in their hands, committing heinous actions, repudiated by Mankind.

However, the imperfections of the system in place prevent the proper functioning of the Court, which ends up limited by those who financially support it. As a consequence, it pursues a political agenda, losing credibility in the face of a number of signatories of the RS, many of whom were pressed to ratify the treaty for fear of retaliation.

Conclusion

The functioning and survival of the ICC still depends on the will of States to collaborate with the Court. In the case of African nations, this occurs when local elites use the Court as an instrument to further their political strategies for staying in power locally and for promoting a good image internationally.

The ICC is an instrument of soft power[51], available for those who believe in universalizing Human Rights and reject the traditional mechanisms of accountability, among which the African ones. It establishes a western system that does not accept amnesties or the work of truth and reconciliation commissions, like that of South Africa, as ways of promoting justice.

The ICC appears to be, on one hand, a successful project – given the elevated number of States members – and, on the other, a project doomed in that it depends essentially on occasional contributions from States to delay complete failure. As a

[51] The author holds doubts as to whether it is an instrument of soft power or of smart power, given the way the Court's decision can be used in a coercive manner by outside parties.

matter of fact, it is difficult to uphold the Court's jurisdiction when a State called to collaborate (i) has no connection to case at hand and (ii) the State where the crime took place shows no intention of prosecuting it.

In these cases, the ICC acts based on the principle of Universal Jurisdiction that has been subject to limitations[52] from States such as Spain[5354], something that damages the Court's legitimacy. How to criticize the decision of States, like Chad and Kenya when they refused to detain Al Bashir in situations their own States refused to do it?

International Law still seems to be submerged in a sea of ambiguity as it relates to the immunity of high-level State officials. While the Rome Statute takes away the protection from government officials, European States, like Belgium[55], and African nations, like Kenya, despite having signed the Statute, refuse to apply International Customs which would also dispel the immunity of State's rulers.

It is odd to notice African States transferring events to countries that have not signed the Rome Statute in order to prevent the prosecuting of crimes. This ignores the simple fact that Customs Law is of universal nature, meaning countries such as Ethiopia, despite not being part of the RS, should also prosecute people accused of practicing genocide[56].

In this scenario, it is important to discuss the future of the International Criminal Court, specifically, and international justice's future, considering the balance keeps tilting towards the powerful, putting in jeopardy one of the most essential features of Justice: impartiality.

[52] See "Baltazar Garzón: Justiça universal está em retrocesso", *In Verbis: Revista Digital de Justiça e Sociedade – Portal Verbo Jurídico*, November 8 2010. Available at http://www.inverbis.net/actualidade/baltazar-garzon-justica-universal-retrocesso.html.

[53] See "El Congreso limita la Justicia Universal a las competencias de España", *europapress*, June 25 2009. Available at http://www.europapress.es/nacional/noticia-congreso-limita-justicia-universal-competencias-espana-20090625171125.html.

[54] On opposite direction, Belgium seems to promote na expansion of the concept. See "Belgian Court Won't Try Sharon", *Los Angeles Times*, February 13 2010. http://articles.latimes.com/2003/feb/13/world/fg-sharon13.

[55] Ibidem.

[56] See "Kenya admits ICC warrant for Bashir forced IGAD venue change", *Sudan Tribune*, November 13 2010. Available at http://www.sudantribune.com/Kenya-admits-ICC-warrant-for,36933.