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CRIMES AGAINST HUMANITY

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ABSTRACT

Despite being one of the core crimes in the field of international law, crime against humanity is still a controversial concept. It is the only core crime under the jurisdiction of the major international criminal tribunals established to date that has not yet been addressed by a global treaty – war crimes have been codified by the means of the "grave breaches" of the 1949 Geneva Conventions and genocide gained its own Convention in 1948. No such comparable instrument exists concerning crimes against humanity, thus there is no requirement for the States to prevent and punish said conduct and to cooperate among themselves to achieve these ends. The perpetration of such crimes remains an atrocious reality in a number of hostilities worldwide. The evident lack in the framework of international humanitarian law, international criminal law and international human rights law could only be met by the establishment of a global convention on crimes against humanity.

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1 HISTORICAL BACKGROUND

1.1 NUREMBERG TRIALS

The concept "crimes against humanity" was formally born at the end of the Second World War (Geras 2011). During this period the Allied Nations - United States of America, Great Britain, Soviet Union and France - noticed that some of the most atrocious acts committed by the Germans were not prohibited by international law. Until there, the laws of war only proscribed violations involving the adversary or the enemy, while the Germans perpetrated inhuman acts against their own citizens (Cassese 2005).

With strong pressure from the US, the Allies decided that it would be more fruitful to put the major war criminals on trial rather than execute them (Cassese 2005). For this reason, on November 20 of 1945, the trials of leading German officials before the International Military Tribunal (IMT) were open in Nuremberg, Germany, where each Ally participated with a judge and a prosecution team (Museum 2014).

The London Charter, the constitutive document of the Nuremberg IMT signed by the Allied Powers on August 8 1945, gave the Tribunal jurisdiction over three crimes, namely, war crimes, crimes against peace and crimes against humanity (Geras 2011). Article 6 (c) of the Nuremberg Charter defined crimes against humanity for the first time, as follows:

> Crimes Against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane 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 (Allied Nuremberg Charter, 1945).

The aforementioned article provided the basis for the Control Council Law No. 10, another legal instrument of the same period utilized to continue prosecution of crimes committed by lower level German forces. These prosecutions were undertaken by the Allied powers in German local courts inside their respective zones of occupation (Geras 2011). Article II 1 (c) of Control Council No. 10 it reads as follows:

> Crimes against humanity: atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape or other inhumane acts committed

> against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated (Allied Control Council Law No. 10, 1945).

On the notion of crimes against humanity during the trial of the major Nazi war criminals, the Chief Prosecutor, Sir Hartley Shaw cross referred directly to the teachings of Grotius' (Geras 2011). He argued that, although 'it is for the state to decide how it shall treats its own nationals', some issues in international law are outside the realm of the will of the state. This would ensure that individuals are not deprived from the protection of mankind when the state curtails his or her rights[1] (Nuremberg 1947).

Some argue that Crimes against Humanity in the Nuremberg Charter is born out of the Martens Clause (Geras 2011). This clause, which was incorporated into the 1899 Hague Convention II (Ticehusrt 1997), aimed at offering a minimum protection to individuals in armed conflict in the absence of a specific applicable rule of international law. The main merit of the clause is that it approached the problem of the humanitarian laws for the first time not as a moral issue but from a positivist perspective (Cassese 2000). The Martens Clause provides a link between positive norms of international law relating to armed conflicts and natural law through the dictates of the public conscience (Ticehusrt 1997).

A significant feature of the Nuremberg definition was the requirement that crimes against humanity take place "in execution of or in connection with any crime within the jurisdiction of the Tribunal" (Clark 2010). This means that the prosecution had to prove a connection of acts listed as crimes against humanity to the conspiracy to wage aggressive war rather than a freestanding desire to exterminate certain groups (Geras 2011). This was upheld by the Nuremberg Tribunal's jurisprudence. In conclusion, in its inception crimes against humanity were not an altogether free-standing and independent offence.

Some argue that, since the drafters of the London Charter were not engaged in a codification exercise (Clark 2010), definition of crimes against humanity contained in this Charter is not appropriate. Hannah Arendt[2], for example, wrote that the judges at Nuremberg had left this new crime in a "tantalizing state of ambiguity" (Geras 2011). Albeit its undeniable historical importance, the London Charter, and hence its definition of crimes against humanity, were not binding on

1 Trial of the Major War Criminals before the International Military Tribunal. Nuremberg, 14 November 1945-1 October 1946, International Military Tribunal Nurember, 1947, Vol. 19, pp. 471-2.

2 Hannah Arendt. Eichmann in Jerusalem: A Report on the Banality of Evil. Penguin Books: London, 1977. Pg. 257.

states as a general treaty. This somewhat changed with the adoption of Resolution 95 (I), the United Nations General Assembly (UNGA) adopted on December 11, 1946, when the General Assembly reaffirmed the principles of international law recognized by the Nuremberg Tribunal Charter and the Judgment of the Tribunal (Clark 2011). Although still non-binding on states, this Resolution somewhat elevates the status of the London Charter in general international law.

On November 1947 the General Assembly established the International Law Commission (ILC) and, on the same day, another resolution was adopted in which the ILC was directed to formulate the principles of International Law recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal and prepare a draft code of offences against the peace and security of mankind (Brownlie,2012). In Principle VI, a part of the initial ILC's work on the matter, crimes against humanity were defined, as

> murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime (ILC 1950).

In conclusion, one can affirm that the Nuremberg trial had an enormous influence in the international humanitarian law. Although restricted to the conflict in Germany and connected to the commission of other crimes within that Tribunal's jurisdiction, the definition provided in the London Charter and the outcome of the judgment jumpstarted open discussions regarding crimes committed by the state against their own civilians. It started the movement that until today seeks codification in order to better protect mankind from this category of crime.

1.2 CRIMES AGAINST HUMANITY IN IMTFE, ICTY AND ICTR'S JURISDICTION

The judgments held at Nuremberg, within the scope of the International Military Tribunal, were indeed of great importance for the development of international criminal law. It could not have been any different: never before it was possible to hold individuals who committed serious violations accountable for their actions outside the traditional domestic level (Sadat 2011).

Because of its groundbreaking feature and of the worldwide impact of its awards, the Nuremberg Tribunal's natural fate was to become a source of jurisprudential reference. Unfortunately, the Holocaust was not the last human tragedy

and grave breaches of Human Rights continued to take place largely in human history; trials were also conducted in the International Military Tribunal for the Far East to deal with serious crimes were committed in Asia by the Japanese regime during the Second World War.

A long period after this, tribunals were created to deal with individuals involved in the Yugoslav Wars (1991-2001) and the Rwandan Genocide (1994). Besides the fact that they were created ex post facto and had primacy over national courts, the ICTY and the ICTR were the post-IMT starting point for usage of the concept crimes against humanity in a context of global repercussion; both tribunals continued the practice, exercised for the first time in Nuremberg, of promoting the prosecution of individuals accused of crimes under international law.

Proceedings before these tribunals, as previously mentioned, are conducted against individuals, not states. There are investigations, charges are brought by the tribunals' respective Prosecutors against certain individuals believed to be guilty of crime within the respective tribunals' jurisdiction, and a criminal trial is carried out. The accused can be considered guilty or not guilty.

In order to identify similarities and differences among these international criminal tribunals' jurisdiction over and interpretation of crimes against humanity, a few interesting aspects are discussed below.

1.2.1 INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST (IMTFE)

Unlike the Nuremberg Tribunal, the International Military Tribunal for the Far East (IMTFE), broadly known as Tokyo Tribunal, was not a product of an international agreement between the Allies, which perhaps compromised its legitimacy. Indeed, it was the quite the opposite: the Tokyo Tribunal was a proclamation of General Douglas MacArthur, the Supreme Commander of the Allied Powers, as a result to the end of the Second World War and the Declaration of Potsdam[3]. Even though nowadays it may seem extremely unlikely to imagine unilateral acts of the sort, this was not the reality of the half of XX century.

It is not a surprise, though, that the context of its foundation was the same as the Nuremberg's one, which was the judgment of perpetrators of heinous crimes in the period of the IIWW. In fact, they were implemented only a few months apart and the trials at Tokyo lasted three times more than those in Germany.

Due to the same environment of what can be sustained as being a victor's

3 The document was signed in July 26th 1945 and, combined to the Instrument of Surrender of Japan from September 2nd 1945, it allowed the Allied Parties to establish a court to make it possible that "justice shall be meted out to all war criminals including those who have visited cruelties upon our prisoners" (IMTFE 1946, preamble).

justice (May 2005), the formal characteristics of both IMTFE and IMT are quite the same, even though the latter is less disapproved than the former, due to its instauration in a slightly more democratic manner. Their Charts are alike and, specially, they hold a very similar definition of crimes against humanity. There are two slight differences between IMT Charter's article 6 and IMTFE Charter's article 5(3). In the later, a semicolon was substituted by a comma in the text, which required from a crime against humanity to have nexus to another one within the court's jurisdiction. In addition, the crime of persecution on religious grounds was withdrawn from the list, since it was not as relevant in this specific conflict in Asia (Sadat 2011).

The IMTFE Charter article 5(3) reads as follows:

> Article 5
> 3. Crimes against Humanity:
> Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed before or during the war, or persecutions on political or racial 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. Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan (IMTFE 1946).

It is curious that, although possible, no one has been charged - and therefore convicted – with Crimes Against Humanity in this Court (Sadat 2011). Consequently, one cannot look to the IMTFE's jurisprudence to help understand crimes against humanity.

1.2.2 INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (ICTY)

The International Criminal Tribunal for the Former Yugoslavia (ICTY), based in the Hague, Netherlands, although no longer charging more individuals, is still finishing pending cases (ICTY 2015). Unlike the two courts discussed before, the ICTY is not a military tribunal, nor was it established by the end of the Second World War; instead, it was created as a response to the atrocities committed against civilian population during the Balkans War (May 2005).

Nonetheless, it drew inspiration from the Nuremberg Principles[4]. Crimes

4 In 1950, the UN General Assembly passed the Resolution 177 (II), paragraph (a), prepared by ILC, which objective was summarize the principles of international law recognized in the

against humanity are under ICTY's rationae materiae jurisdiction and, although the definition does not match the one made in 1945, it is similar thereto. In verbis:

> ICTY Statute
> Article 5
> Crimes against humanity
> The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:
> (a) murder;
> (b) extermination;
> (c) enslavement;
> (d) deportation;
> (e) imprisonment;
> (f) torture;
> (g) rape;
> (h) persecutions on political, racial and religious grounds;
> (i) other inhumane acts (ICTY 1993).

Either ICTY and IMT were not created by a treaty, but by a UN Security Council Resolution. Their similarity, though, are not limited to this instrument, but results from the UN Secretary-General's serious concern that crimes addressed by the ICTY jurisdiction would have to be also recognized as grave breaches under customary international law (Sadat 2011). This was so because the tribunal was created after the facts and there were the willing of not compromising the core principle nulla poena sine lege.

The most important modification posed in ICTY Statute in relation to its World War II predecessors is the requirement that the violations be committed during armed conflict[5]. In addition, the term civilian population is put explicitly, and the crimes of rape, enslavement and torture are included as actus reus. The most interesting difference between Nuremberg and the ICTY, however, is of a more practical nature; unlike Nuremberg, where the first to be prosecuted were Nazi leaders (Bassiouni 2011), in the Hague the first charges were brought against the so called "minor players". This was due to the difficulty of capturing the ones who gave orders, since, by the establishment of ICTY, the war was still going on (May 2005).

Concerning the very first case presented by the prosecution, against Dusko Tadic, it is adequate to make some notes. The defendant, considered a minor

Charter of the Nuremberg Tribunal and in the judgment of the Tribunal.

5 Later on, the jurisprudence started not to consider this aspect anymore, due to the difficulty of putting apart the war and peace context by the improving of hostilities.

actor, sustained during his trial that ICTY lacked jurisdiction over the case because the conflict was of a non-international character, which raised issues as to the applicability of international humanitarian law and the criminalization of breaches thereof. He argued that ignoring this would mean a violation not only of the Statute itself, but also of international customary law, in which the Tribunal's jurisdiction is founded (Shelton 2004).

The response given by the Appeals Chamber enabled not only the functioning of the ICTY in Tadic and future cases, but also the establishment of International Criminal Court itself. It was said that the jurisprudence since 1945 has evolved to permit the prosecution not only crimes against humanity not connected to international conflicts but that happened in peace time. The impact of this decision in the international arena was such that Tadic Case would be used later for the advocates of universal jurisdiction (Shelton 2004).

1.2.3 INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (ICTR)

International Criminal Tribunal for Rwanda (ICTR) was set in November 8th 1994 (Geras 2011) as a response from UN Security Council to the internal conflict between Hutus and Tutsis that led to the genocide. Contrasting to the suffering in southern Europe during the Yugoslav Wars, there was nothing like an independence war taking place in Rwanda. Given such distinct context, ICTR Statute had a correspondingly distinct definition of crime against humanity.

The ICTR Statute suppressed the "armed conflict" requirement present ICTY's. Instead, the context required to prosecute was a massacre on ethnic basis. The main particularity is the presence of the expression "systematic attack against any civilian population" and the lack of a reference to formal hostilities (Geras 2011). The text reads as follows:

> ICTR Statute
> Article 3
> Crimes against humanity
> The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:
> (a) Murder;
> (b) Extermination;
> (c) Enslavement;
> (d) Deportation;
> (e) Imprisonment;
> (f) Torture;

(g) Rape;
(h) Persecutions on political, (ICTR 1994) racial and religious grounds;
(i) Other inhumane acts

Analyzing the several differences the concepts of crimes against humanity and the successes and failures in different jurisdictions is helpful to decide how to proceed. Indeed, this exercise was conducted when drafting the International Criminal Court's Statute, which has its own definition of crimes against humanity, explored in the next section.

1.3 ROME STATUTE

The Rome Statute of the International Criminal Court was adopted on July 17th, 1998 by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome Conference). In accordance with its own article 126, it only entered into force on July 1st, 2002. The statute instituted the International Criminal Court (ICC) versing, among other subjects, on the court's structure, functions and jurisdiction.

It is not widely known that the first proposal for a permanent international criminal court was made in 1872 by Gustav Moynier, one of the founders and longtime president of the International Committee of the Red Cross. At that time, he faced many of the same problems which confronted the drafters of statute during the Rome Conference. One of his main concerns was that national judges lacked the detachment needed to fairly judge offences committed in times of wars in which their own countries were involved (Hall, 1998).

Given the so called Nuremberg Promise that someday there would be effective mechanisms to hold all individuals accountable for the most serious crimes under international law, it was generally expected that a permanent court for the prosecution of international crimes would be established. However, there was no such early proposal.

In 1948 the United Nations General Assembly approved the Convention for the Prevention and Punishment of the Crime of Genocide (Genocide Convention). In doing so, it requested that the ILC analyzed the convenience and possibility of the establishment of an international judicial organ for the prosecution of the crime of genocide (UNGA 1948). A draft statute for such court was delivered by the appointed special committee in 1950. It was mainly due to political reasons that the matter was never brought forward. Concerning legal aspects, the General Assembly decided to postpone until there was a definition of the

crime of aggression and the Code of Offences was complete (UNGA 1954). In turn, the Code was put aside. There was a general reluctance towards the establishment of a permanent international court, and, during the Cold War, the matter was placed in lower priority while the attention was turned to the development of more effective means of inter-State cooperation in the national prosecution of crimes.

It was only in 1989 that the creation of a permanent international criminal court was again discussed; Trinidad and Tobago proposed that this be put back on the agenda of the United Nations. Ironically the State made the petition to secure the prosecution of international drug offences, which is not under ICC jurisdiction today. Therein, the General Assembly requested that the ILC draft a statute for such court. The Commission promptly proceeded to present the final text in 1994 (ILC 1994).

The draft statute gave the ICC jurisdiction over more crimes that it has now. Since it was submitted under a favorable conjuncture, after only a year there was enough support to set up a Preparatory Committee[6]. A significant group of States was supportive of a new court emerging, and agreement was reached to hold a conference in Rome in the summer of 1998 to finalize and conclude the treaty. Evidently, the draft statute produced by the Preparatory Committee served as base for the deliberations at the Rome Conference (UN Doc. A/CONF.183/13).

When drafting the section on crimes against humanity of the Rome Statute, there was considerable confusion and great variation in the delegates' views due to the historic inconstancy of its definition. Indeed, the challenges to the drafters were enormous in comparison with genocide, for which a well-accepted and overall static concept existed since the 1948 Genocide Convention. A new definition of crimes against humanity had to be crafted from the ever-fragile basis of international customary law; defining it was as much an exercise of progressive development as it was of codification (Schabas, 2010).

Crimes against humanity were recognized under the statute in its Article 5, which lists the crimes under ICC jurisdiction. Under this provision, "only the most serious crimes of concern to the international community as a whole" (Rome Statute 1998, art. 5.1) were to be put before the ICC. Article 7 defines crimes against humanity for the purposes of the ICC; this definition differs from previous ones not only since it was not imposed by victors, as was the case of Nuremberg and Tokyo Charters, neither by the Security Council, which was

6 The ad hoc Committee on the Establishment of an International Criminal Court, assembled by GA Res. 49/53, conducted two sessions in 1995. It produced a report (UNGAOR A/50/22) which contains the preliminary discussions on the major features of the court.

the case of the Statutes of Yugoslavia and Rwanda Tribunals (Defining "Crimes Against Humanity" at the Rome Conference, 1999). The article reads as follows:

> Article 7 Crimes against humanity
> 1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
> (a) Murder;
> (b) Extermination;
> (c) Enslavement;
> (d) Deportation or forcible transfer of population;
> (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
> (f) Torture;
> (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
> (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
> (i) Enforced disappearance of persons;
> (j) The crime of apartheid;
> (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.
> 2. For the purpose of paragraph 1:
> (a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;
> (b) "Extermination" includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;
> (c) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;
> (d) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

> (e) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;
> (f) "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;
> (g) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;
> (h) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;
> (i) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.
> 3. For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above. (Rome Statute, 1998)

Article 7 is, to date, the most extensive and detailed definition of crimes against humanity. Although considered a welcome step by the international community on the task of defining crimes against humanity (Bassiouni, 2011) , the Rome Statute, as inherent to any treaty, app lies only to State Parties. It cannot be said that Article 7 is customary international law in its entirety; the statute features 113 State Parties, and less than fifteen of those implemented legislation on this topic (Ibid.).

Article 7 was the result of diplomatic negotiations based on the text presented to the Diplomatic Conference by the Preparatory Committee (Bassiouni, 2005), which might be the reason why it lacks clarity: it was construed on the basis of "constructive ambiguity"[7], as often is the case with documents negotiated

7 In a political or diplomatic context, the deliberate use of ambiguous language on a sensitive issue in order to advance some political purpose. The term is widely attributed to Henry Kissinger.

by diplomats, leaving the judges room to decide the terms' content. The judges themselves, however, are appointed via a political process, and thus sometimes ill-equipped to deal with the complexity of a criminal trial dealing with mass atrocities (Bassiouni, 2011). The adoption of the Elements of Crimes, which aid the Court in interpreting the statute and further developed the definition of crimes against humanity in the Rome Statute, aims at reducing the scope of uncertainty faced by judges (Ibid.). Though that is why it is commonly said within the United Nations that the jury is unsure on how the judges of the ICC will deal with Article 7.

Important considerations in relation to paragraph 1 of this definition of crimes against humanity include: (i) the absence of a requirement of a nexus to armed conflict, (ii) the existence of a requirement of a state or organizational policy, (iii) the absence of a requirement of a discriminatory motive, (iv) the "widespread or systematic attack" criterion, and (vi) the element of mens rea (Defining "Crimes Against Humanity" at the Rome Conference, 1999). Concerning first aspect, since the ICC statute makes no mention of nexus to armed conflict, under the ICC crimes against humanity may occur not only in situations of armed conflict, but also in times of peace or civil strife. This is due to the fact that the majority of the delegations present at the conference understood that if such limitation were imposed on the concept it would most of times fall under within the definition of "war crimes" (Ibid.).

Since the International Military Tribunal's decision on *France et al v. Goering et al* it has been understood that "crimes against international law are committed by men and not by abstract entities" (1946). However, the famous pronouncement may mislead to interpreting that State's role is irrelevant in the discussion of crimes against international law. Any such presumption has been mitigated later with the adoption of the text of the Elements of Crimes:

> "Attack directed against a civilian population" in these context elements is understood to mean a course of conduct involving the multiple commission of acts referred to in article 7, paragraph 1, of the Statute against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack. (…) It is understood that "policy to commit such attack" requires that the State or organization actively promote or encourage such an attack against a civilian population.(2002)

The ICC jurisprudence on the matter has established that the requirement of an organizational policy is justified as means of ensuring that an attack "even if carried out over a large geographical area or directed against a large number of victims, must still be thoroughly organized and follow a pattern". (2008)

The Rome Statute differs from previous regulations insofar as it does not require a "discriminatory motive". This "discriminatory motive" requirement appeared in the Nuremberg Charter and was incorporated in the drafting of the ICTR statute. Nonetheless, the dominant view is that it is only relevant for the crime of persecution. Virtually, even when the ICTY adopted such criterion, the Trial Chamber argued that this requirement did not seem to be founded in any relevant legal instrument[8]. The delegates in charge of drafting the Rome Statute came to the conclusion that a discriminatory motive is not an element necessary to every crime against humanity since its imposition could in fact result in the exclusion of some of the most serious violations from the jurisdiction of the Court.

Although *mens rea* is a fundamental element of any crime, since *actus non facit reum nisi mens sit rea*[9], there is difficulty in applying elements of criminal liability to State sponsored action. However, the matter of State responsibility will be treated in the section 2.5. The definition of crimes against humanity in the Rome Stature corroborates with the fact that the accused, while not necessarily responsible, must at lest be aware of the attack. In fact, the obligation to prosecution to prove the mental element of crime has been long seen as the "golden tread" of criminal law. Actually, it's the connection of the requisite of mens rea with widespread or systematic attack is what features what would be an otherwise ordinary crime as a crime against humanity (Robinson 1999).

1.4 CRIMES AGAINST HUMANITY IN ICC'S JURISDICTION

Genocide is a crime extraordinarily difficult to prove, so it is unsurprising that only three charges of genocide were brought against individuals before the International Criminal Court (ICC) in its nearly fifteen years of existence. Crimes against humanity are not easy to prove, but their scope of application is broader. It is an international criminal offense that can be used, for example, to cover situations in which genocide cannot be proved, situations taking place during peacetime and situations involving acts such as, but not limited to, sexual violence and enforced disappearance of persons. Not surprisingly then, as stated by Mrs. Leila Sadat, appointed Special Adviser on Crimes Against Humanity to the International Criminal Court Prosecutor since 2013, "one would expect crimes

8 Prosecutor v.Tadic, Opinion and Judgment, No. IT-94-1-T, para. 652 (May 7 1997), excerpted in 36 ILM 908, 944 (1997), paras. 943-44.

9 The maxim can be generally translated as "an act is not necessarily a guilty act unless the accused has the necessary state of mind required for that offence" (Oxford Reference).

against humanity to emerge as a crucial tool at the ICC" (Sadat 2013, 355).

If one looks at the ICC's activity so far, it will effortlessly confirm the trend summarized by Mrs. Sadat. The OTP presented charges of crimes against humanity in all seven situations pending before the Court[10]. In three of these situations, namely Kenya, Cote D'Ivoire and Libya, due to the inexistence of armed conflict or infeasibility of alleging genocide, crimes against humanity actually constituted the sole basis upon which the ICC can have jurisdiction *rationae materiae* (Sadat 2013).

When it comes to understand ICC's interpretation of Article 7 of the Rome Statute, two decisions are worth of a more thoroughly analysis: (i) Pre-Trial Chamber I decision on confirmation of charges against Germain Katanga and Ngudjolo Chui and (ii) Pre-Trial Chamber II decision on the Prosecutor's request to open an investigation regarding the situation in Kenya (Situation in Kenya 2010).

The first major ICC decision on the application of Article 7 was Katanga's confirmation of charges on September 2008, from now on referred to as *Katanga*. In *Katanga*, the ICC relied heavily on the jurisprudence of the *ad hoc* tribunals – mainly ICTY and ICTR -, with two major points worthy of comment.

First, the Pre-Trial Chamber I seemed to cumulate the elements *widespread and systematic* and *organizational policy* to configure attacks as *crime against humanity*, a reading that deviates from a strict interpretation of Article 7's wording. The Pre-Trial Chamber I decision implies that an attack must be both widespread, systematic, and conducted in furtherance of a common policy, as follows:

> § 396. Accordingly, *in the context of a widespread attack*, the requirement of an organisational policy pursuant to article 7(2) (a) of the Statute ensures that the attack, even if carried out over a large geographical area or directed against a large number of victims, must still be *thoroughly organised* and follow a *regular pattern*. It must also be conducted in furtherance *of a common policy* involving public or private resources (The Prosecutor v. Germain Katanga… 2008, 126) [italics added]

Secondly, as pointed by Mrs. Sadat, Pre-Trial Chamber I's decision "tangentially addressed the meaning of *civilian population*" (Sadat 2011, 360), a concept that was left undefined by the Rome Statute, for the purpose of Article 7. In the decision's *obiter dictum*, it was held that:

10 Situation in Uganda; Situation in the Democratic Republic of the Congo; Situation in Darfur, Sudan; Situation in the Central African Republic; Situation in the Republic of Kenya; Situation in Libya; Situation in Côte d'Ivoire; Situation in Mali and Situation in the Central African Republic II. On these later two situations (Mali and CAR II) the OTP has not presented charges yet.

> § 399. The drafters in Rome also left the exact meaning of the term "any civilian population" undefined. However, the Chamber observes that, as opposed to war crimes which are provided for in article 8 of the Statute, the term "civilian population" within the meaning of article 7 of the Statute affords rights and protections to "any civilian population" regardless of their nationality, ethnicity or other distinguishing feature (The Prosecutor v. Germain Katanga… 2008, 127).

Almost two years later, Pre-Trial Chamber II issued a decision on the Prosecutor's request to open an investigation regarding the situation in Kenya; many scholars consider this decision to be the most significant ICC contribution to the debate on *crimes against humanity* (Kress 2010; Sadat 2011). In this decision, from now on referred as *Kenya*, there was a vivid discussion between Judge Hans-Peter Kaul and the majority – formed by Judge Ekaterina Trendafilova, Presiding Judge, and Judge Cuno Tarfusser - on the understanding of the *policy element* required in Article 7(2)(a).

For recollection, the aforementioned article reads as follows:

> 7(2)(a) For the purpose of paragraph 1: "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, *pursuant to or in furtherance of a State or organizational policy to commit such attack* (Rome Statute 1998) [italics added].

In spite of ICC be a relatively young tribunal, considering its jurisprudence is of paramount importance for developing the law on crimes against humanity. The example above mentioned, of disagreement on the understating of policy requirement to configure attacks as crime against humanity, is one of the great questions that must be addressed by an international framework on crimes against humanity.

1.5 CRIMES AGAINST HUMANITY IN NATIONAL LEGISLATIONS

After World War II, there were a few notorious national prosecutions for crimes against humanity in Germany, Austria, France, Israel, Italy, Canada and Argentina (Bassiouni 2011).

According to M. Cherif Bassiouni, by 2011 fifty-five States had legislation criminalizing crimes against humanity (2011, 660). Most of these legislations were developed post-2002.

In Bassiouni's view, there are two categories of States whose legislation covers crimes against humanity: the first includes States whose legislation has a criminal

offense such as 'crimes against humanity' that includes acts "deemed part of crimes against humanity under customary international law "(2011, 660). The second category is made of States that have ratified the Rome Statute and "enacted a law to that effect, but have not adopted specific national legislation" (2011, 660). Consequently, States within this second category can surrender persons charged with crimes against humanity to the ICC, but cannot prosecute them by themselves, since the crimes under ICC jurisdiction are not nationally defined and enforceable.

2. STATEMENT OF THE ISSUE

A global convention on crimes against humanity is often referred to as a key missing piece in the current framework of international law. The ILC recently included the topic on its programme, and it is working to present the draft articles of a global treaty on crimes against humanity.

2.1 NECESSITY OF A CONVENTION

International conventions are the most significant sources of international law in the present day, although evidently they not the only ones listed in article 38 of the International Court of Justice (ICJ) Statute (Shaw, 2008). In relation to sources of international criminal law for the purposes of the ICC, the main authority is article 21 of the Rome Statute.

In order to better understand the issue concerning the impending need for a Convention on crimes against humanity, one must refer to the role and nature of international written agreements. The most acknowledged definition of treaty is found in the 1969 Vienna Convention on the Law of Treaties, which entered into force in 1980. Thus, treaty may be defined as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation". The vagueness of the concept is fairly intentional given the numerous shapes a convention can present. Moreover, this is the reason why treaties are not considered as such due to their content – since almost everything[11] can be object of an agreement –, but actually due to their

11 The exception to validate this rule are the compromises known as the gentlemen agreements, which are intrinsically connected to a declaration of intentions emerging from the statist himself or herself (Rezek 2005).

form. Accordingly, a treaty *must* be presented in written form.

Crimes against humanity are the only crimes of the three core crimes which make up the jurisdiction of international criminal tribunals that is not the subject of a global treaty that requires States to prevent and punish such conduct and to cooperate among themselves toward those ends. The period which many historians call total war of the 20th century culminated with the institution of the United Nations and called for the adoption of treaties to prevent the atrocities occurred during the World War II. It was under this framework that war crimes were codified by the means of the "grave breaches" of the 1949 Geneva Conventions and the crime of genocide gained its own convention in 1948.

Yet, crimes against humanity may be more rampant than both war crimes and genocide, since they may transpire in situations not involving armed conflict and not requiring the specific intent to destroy a protected group. One must also stress that there are conventions on the prevention, punishment and inter-State cooperation for far less appalling offences. Still, currently numerous atrocities occur and, more often than not, there will be no applicable treaty addressing inter-State cooperation (Belgium v. Senegal 2012).

The most important current codification of crimes against humanity is, undoubtedly, the Article 7 of the Rome Statute. Still, as a definition, it is overly broad and it possesses three major faults. First, the Statute does not impose the direct obligation for its State Parties to criminalize such offenses within their internal systems. Additionally, more than half the world's population are citizens of countries which are not members of the ICC. Thus, a global treaty on crimes against humanity would define the crimes in a way to extend the rule of law and implant a uniform definition of crimes against humanity into the law of the States (Stanton 2011).

Nevertheless, the main question is whether an international convention on crimes against humanity would have any practical role in the prevention and prosecution of these crimes. It is clear 1948 Genocide Convention lacked the means to prevent genocide and to date it is seldom invoked by prosecution. Its drafters failed to establish new institutions to enforce it. For instance, its Article VI provides that persons charged with genocide maybe tried "by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties, which shall have accepted its jurisdiction". However, this court was only created in 1998, which is the ICC itself.

Aiming at a universal treaty would be significant insofar as it helps build a network of international cooperation in a way that the ICC Statute by itself cannot. In extending the reach of the rule of law beyond the ICC and the ad hoc

tribunals, a global convention would implant a sound definition of crimes against humanity into internal law systems all over the globe and enable a worldwide body of national case law to develop on this matter. A convention in itself would, as treaty law has already succeeded in respect of other offences, allow inter-State cooperation on prevention, investigation, prosecution and extradition for such crimes (Stanton 2011). As precisely states the ILC's Special Rapporteur for this topic:

> "Such a convention could help to stigmatize such egregious conduct, could draw further attention to the need for its prevention and punishment and could help to adopt and harmonize national laws relating to such conduct, thereby opening the door to more effective inter-State cooperation on prevention, investigation, prosecution and extradition for such crimes" (ILC 2015)

Thereby, a global convention with respect of crimes against humanity may be a key missing piece in the matter of further development of international humanitarian law, international criminal law and international human rights law. The main objective of such a treaty would be to chastise this conducts, drawing the attention of the international community in order encourage countries to harmonize national law in such way (U.N Doc. A/CN.4/680).

2.2. DEFINITION OF CRIMES AGAINST HUMANITY

Over the past century, the definition of crimes against humanity has been the subject of many different formulations. Nowadays, the most accepted is based on constructions built in the *Nuremberg* and *Tokyo Charters*, the *Nuremberg Principles,* the *1954 draft Code of Offences against Peace and Security of Mankind*, the *1993 Statute of the International Tribunal for the Former Yugoslavia*, the *1994 Statute of the International Criminal Tribunal for Rwanda*, the *1994 draft Statute for an International Criminal Court*, of the International Law Commission, and the *Commission's 1996 draft Code of Crimes against the Peace and Security of Mankind (ILC 2015*). This more used and recognized definition is the one present in the article 7 of the Rome Statue, in which there is an exhaustive list on acts to be consider inside this category of crimes:

> 1. For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
> (a) Murder;
> (b) Extermination;

(c) Enslavement;
(d) Deportation or forcible transfer of population;
(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
(f) Torture;
(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
(i) Enforced disappearance of persons;
(j) The crime of apartheid;
(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.
2. For the purpose of paragraph 1:
(a) 'Attack directed against any civilian population' means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;
(b) 'Extermination' includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;
(c) 'Enslavement' means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;
(d) 'Deportation or forcible transfer of population' means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;
(e) 'Torture' means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;
(f) 'Forced pregnancy' means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;
(g) 'Persecution' means the intentional and severe deprivation of

> fundamental rights contrary to international law by reason of the identity of the group or collectivity;
> (h) 'The crime of apartheid' means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;
> (i) 'Enforced disappearance of persons' means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.
> 3. For the purpose of this Statute, it is understood that the term 'gender' refers to the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above. (Rome Statute, 1998).

Although some disagreements may exist regarding whether the definition brought by Article 7 of the Rome Statue reflects customary international law or what constitutes the best interpretations of some of its aspects, it was crafted with the agreement between 122 States parties of the statue, and it continues to be the definition more widely accepted by states (ILC 2015).

A single individual can be liable for this category of crime if he or she commits one or more inhumane acts, since there is no requirement that the perpetrator be a ringleader or architect of a broader campaign (Cryer, et al. 2010).

2.2.1. REQUIREMENTS

Therefore, for one of the acts listed in article 7 to be considered a crime against humanity, there are some requirements to be filled that will be explain below.

2.2.1.1. WIDESPREAD OR SYSTEMATIC ATTACK

This concept emerged in the 1990s as the accepted formulation of one of the contextual elements of crimes against humanity (Cryer, et al. 2010). It appeared for the first time in the Statute of the International Criminal Tribunal for Rwanda (ILC 2015), and establishes that inhumane acts – such as murder, torture, rape, sexual slavery – must be part of a widespread or systematic attack in order to constitute crimes against humanity (Cryer, et al. 2010).

When the Rome Statue was drafted, some States articulated the opinion that the "widespread" and "systematic" elements should be *conjunctive requirements*, and that both conditions should be fulfilled when establishing the execution of the crime. Their argument was based on the need to avoid that spontaneous waves of widespread, but unrelated, crimes be characterized as crimes against humanity (ILC 2015). A compromise was reached in this debate, by specifying a definition of "attack" under Article 7 which contains a policy element (see below).

The case law of the International Criminal Court has confirmed (International Criminal Court, 2010) that the widespread or systematic test is disjunctive. This means that the prosecutor only needs to satisfy one of the elements, i.e. the attack must be widespread *or* systematic; the "attack" requirement needs to be present (ILC 2015). Consequently, the acts can be either widespread or systematic, but an attack, and thus a policy to conduct such acts, must exist (Cryer, et al. 2010).

The term "widespread" has been defined in various ways (Cryer, et al. 2010), but usually connotes the "large-scale nature of the attack and the number of victims", as defined by the Trial Chamber of the International Tribunal for the Former Yugoslavia in *Prosecutor v. Kunarac* (Tribunal Chamber of International Tribunal for the Former Yugoslavia, 2001). As the case shows, the main point of this requirement is the multiplicity of victims, which excludes isolated acts of violence (ILC 2015); murders directed against individual victims by persons acting on their own volition rather than as part of a broader initiative cannot be considered a widespread act. On the contrary, a single act occurred within the context of a broader campaign, even if committed by an individual perpetrator, will meet the "widespread" requirement (ILC 2015).

Yet, "widespread" may also be denote a geographical dimension, when the attack occurs in different locations, as established by the ICC Pre-Trial Chamber in *Prosecutor v. Ntaganda* (International Criminal Court, 2012). Similarly to other cases before the ICC, in *Ntaganda* the Chamber established that there was sufficient evidence to consider that an attack was "widespread" on the basis of reports of attacks in different locations in a large scale geographical area. Nevertheless, this criterion does not require an outsized geographical space, since the attack can be in a small geographical area, against a large number of civilians (ILC 2015)

The term "systematic" can also be defined in many ways. The most recent cases converge insofar as they refer to an organized nature of the acts of violence and the improbability of their random occurrence (Cryer, et al. 2010). Again in *Prosecutor v. Ntaganda*, Pre-Trial Chamber II considered the attack systematic since the perpetrators employed similar means and methods to attack the different locations:

> "they approached the targets simultaneously, in large number, and from different directions, they attack villages with heavy weapons, and systematically chased the population by similar methods, hunting house by house and into the bushes, burning all properties and looting" (International Criminal Court, 2012).

Meeting these criteria of widespread and systematic nature elevate crimes that could be under national jurisdiction to international jurisdiction (Cryer, et al. 2010).

2.2.1.2. ATTACK "DIRECTED AGAINST ANY CIVILIAN POPULATION"

The term "attack" in relation to crimes against humanity is not used in the same manner as in the case of war crimes. For the purposes of crimes against humanity, an attack refers to the wider course of the conduct of which the prohibited acts of the accused form a part; it is not necessary for armed forces to be involved (Cryer, et al. 2010).

The International Tribunal for the Former Yugoslavia established in *Prosecutor v. Kunarac* that the terms "directed against" mean that the civilian population must be the main target of the attack, and not just incidental victims (Trial Chamber of the International Tribunal for the Former Yugoslavia, 2001). Moreover, as codified in Additional Protocol I to the Geneva Conventions, the presence of individuals "who do not come within the definition of civilians" within the civilian population does not deprive the population of its civilian character (ILC 2015).

In conclusion, according to ICTY case law (Trial Chamber of the International Tribunal for the Former Yugoslavia, 2001), any particularly victim shall be targeted because of she or he is a member of the civilian population, and not because of her or his individual characteristics (ILC 2015).

2.2.1.3. "POLICY" ELEMENT

Article 7 of the Rome Statute includes a requirement that crimes against humanity be committed pursuant to a *State or organizational policy*[12]. As pointed by Mettraux, "it has been debated for some time in the literature whether or not the definition of crimes against humanity includes an element of policy" (2011, 142).

12 It is interesting to note that the ICTY Statute did not have a policy requirement for crimes against humanity.

Of all elements of the definition of crimes against humanity, the so-called policy requirement is the most controversial. Sadat already summarized the core of the problem surrounding the policy requirement debate:

> "This element has appeared as one of many possible criteria do be used to *distinguish crimes against humanity from ordinary crimes* in discussions of crimes against humanity during the meetings of the ICC Preparatory Committee in 1996" (Sadat 2011, 352).

Said differently, the policy requirement is perceived as the element that unites otherwise unrelated inhumane acts, distinguishing crimes against humanity – inhumane acts committed *pursuant to a State or organizational policy* - from ordinary crimes. Consequently, it is not difficult to see that the policy requirement was conceived as a threshold to the jurisdiction of the ICC.

Discussing this issue implies discussing what the requirement of "policy" is supposed to mean. Insofar, this expression does not seem to have sufficiently clear contours and, as an element that forms part of the very definition of crimes against humanity, ambiguity in it shall lead to serious implications over, for instance, evidentiary procedure (Mettraux 2011). Mettraux points out that many consider this requirement similar to the Anglo-Saxon concept of "conspiracy", i.e. a sort of agreement, plan or practice. In its first major decision on the application of Article 7, ICC explicitly referred to ICTY's opinion on *Blaskic*, and noted that a plan or policy to commit an attack could be *inferred* from a "series of events" (*The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* 2008).

When addressing the "pros" and "cons" of having a policy element within the definition of crimes against humanity, Mettreaux (2011) summarized some of the "pros" as following: (i) it better reflects the historical reality, once crimes against humanity have usually been committed as part of a state-based policy; (ii) without the policy element, isolated or domestic crimes could qualify as crimes against humanity, and (iii) the perpetrators of crimes against humanity are not mere executioners, they usually play a policy or organizational role.

On the other hand, the cons arguments could be that (i) the concept of policy is too uncertain to be applied in a criminal context, (ii) the requirement may be used to shield nationals or officials, that a State does not want or can prosecute, from prosecution, i.e. it could be used opportunistically and create serious jurisdictional impediments, and (iii) it makes a return to the idea of collective responsibility.

If one accepts that there is a policy requirement to the definition of crimes against humanity, it must then face the question of *whose policy*. ICC Statute speaks of State or organizational policy. Some scholars, as Mr. Bassiouni, sustain

that only a State policy – state actors or groups capable of using the power and resources of government - can fulfill the requirement (Bassiouni 2011). On the other hand, in *Katanga*, the ICC read State and organizational disjunctively by majority, Judge Hans-Peter Kaul being outvoted. Such slightly distinction has, as other slightly distinctions in Law, important consequences on the reasoning of what is the defining criteria a group must hold to commit an "attack directed against any civilian population" that can possible fulfill the policy threshold to be considered a crime against humanity.

Reading State and organizational policy disjunctively means that a group's organization need not be state-like to fulfill the policy requirement as conceived in article 7(2)(a) of the Rome Statute. In the referred case, the majority's decision held, *in verbis*:

> 90. With regard to the term "organizational", the Chamber notes that the Statute is unclear as to the criteria pursuant to which a group may qualify as "organization" for the purposes of article 7(2)(a) of the Statute. Whereas some have argued that only State-like organizations may qualify, the Chamber opines that the formal nature of a group and the level of its organization should not be the defining criterion. Instead, as others have convincingly put forward, a distinction should be drawn on whether a group has the capability to perform acts which infringe on basic human values. (The Prosecutor v. Germain Katanga, 2008, para. 90).

Judge Hans-Peter Kaul dissented, arguing precisely the opposite:

> 51. I read the provision such that the juxtaposition of the notions "State" and 'organization' in article 7(2)(a) of the Statute are an indication that even though the constitutive elements of statehood need not be established those 'organizations' should partake of some characteristics of a State. Those characteristics eventually turn the private 'organization' into an entity which may act like a State or has quasi-State abilities. These characteristics could involve the following: (a) a collectivity of persons; (b) which was established and acts for a common purpose; (c) over a prolonged period of time; (d) which is under responsible command or adopted a certain degree of hierarchical structure, including, as a minimum, some kind of policy level; (e) with the capacity to impose the policy on its members and to sanction them; and (f) which has the capacity and means available to attack any civilian population on a large scale.
>
> 52. In contrast, I believe that non-state actors which do not reach the level described above are not able to carry out a policy of this nature, such as groups of organized crime, a mob, groups of (armed) civilians or criminal gangs. They would generally fall outside the scope of article 7(2)(a) of the Statute (The Prosecutor v. Germain Katanga, 2008).

2.2.2. THE "GENDER" PROBLEM IN THE GENDER-BASED CRIMES AGAINST HUMANITY

The term "gender crimes" may refer to incidents of violence targeting or affecting women either disproportionately or exclusively, for the simple reason they are women, or it may refer to violence against women that is rooted in or, also, serves to perpetuate socially-constructed gender roles or the power discrepancy between men and women (Moshan 1998). In this context, the inclusion of gender-motivated crimes in the ICC's definition of crimes against humanity, in article 7(3), was indispensable to give emphasis to women's wartime experiences and injuries, albeit insufficient to ensure gender justice.

First, the term "gender" is often used as a synonym for "women" inside the United Nations. Indeed, the article 7(3)'s definition of the term acknowledges the social construction of gender and the accompanying roles, behaviors, activities and attributes assigned to women and men, girls and boys (International Criminal Court 2014). Although the recognition of sexual violence committed against women in the context of international crimes is extremely important and revolutionary, it only represents part of the understanding of gender.

The conception of gender, as linked only to woman, has been criticized by feminist theorists (Sadat 2011). Some feminist theorists claim that gender is a "set of relations", and not an individual attribute, while others argue that only the feminine gender is marked – the "universal person and the masculine gender are conflated" –, following Simone de Beauvoir in her book The Second Sex (Butler 1990). But, since the gender is not the same as sex, the international criminal tribunals have been collapsing gender into sex, understanding the gender analysis of international crimes in a simplistic way as an analysis of sexual crimes (Sadat 2011).

Despite the fact that there is not a single concept of gender accepted, the term is widely understood as the social construction concept of "maleness" and "femaleness", that can vary between cultures and over time (Sadat 2011). The United Nations Office of the Special Adviser on Gender Issues ("OSAGI") addressed this as follows:

> "social attributes and opportunities associated with being male and female and the relationships between women and men and girls and boys, […]. Gender determines what is expected, allowed and valued in a women or a man in a given context. " (UN Office of the Special Adviser on Gender Issues and Advancement of Women, 2015)

Some say that international tribunals prosecuting crimes years after a con-

flict or event, taking care of the differing variables, shall take measures do understand the construction of gender as it was understood by the relevant culture at the time and in the place of the events in question. Gender is an understanding entrenched in a specific time, it means that the way gender is constructed is not static or inherent (Sadat 2011).

For this reason, there are some critics to the definition contained in article 7 of the Rome Statue and, also, to the inclusion of a definition of the term in treaties codifying crimes against humanity (Sadat 2011). Even though article 7(3) settled that "it is understood that the term 'gender' refers to the two sexes, male and female, within the context of society" (Rome Statute 1998), it fails in its definition of gender, while it links only to the sex. Also, it doesn't mention the issue that the understanding of gender it is not static.

Another critic of this article is the list of gender-based crimes only linked to sexual violence. Some authors, such as Leila Sadat (2011) defend that a "crimes against humanity treaty should also list acts that may or may not contain sexual aspects", such as gender-based persecution, enforced sterilization, forced aborting, forced marriage.

2.3 OBLIGATION TO PREVENT CRIMES AGAINST HUMANITY

It is an understatement that the main focus of the majority of treaties which address efforts to criminalize conducts is on the persecution of the perpetrators for once the crime is committed, in order to punish them accordingly. Although, some may also contain, to certain extent, an obligation to prevent the crime incumbent upon states. Such assessment may be addressed broadly in a single article or may be encompassed in several articles which convey the same end in conjunction. (U.N. Doc. A/CN.4/680).

2.3.1. THE GENERAL OBLIGATION TO PREVENT

At its most general level, the obligation to prevent simply requires that State parties take the necessary actions to prevent the crime; the remainder treaty will follow with specific articles focused on the matter of the punishment of individuals. This general obligation to prevent manifests itself in two forms. Firstly, it imposes over States the obligation not "to commit such acts through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law" (Bosnia & Herzegovina v. Serbia & Montenegro 2007). Secondly, States are through those treaties obliged to "to

employ the means at their disposal (...) to prevent persons or groups not directly under their authority from committing" these acts (Ibid.). For the latter, states are truly expected to conduct policies that "influence effectively the action of persons likely to commit, or already committing".

The International Court of Justice understands that a breach of the general obligation to prevent is not an international crime of states, but a breach of international law which generates international responsibility (Ibid.). The Court's assessment is consistent with the International Law Commission's previous views, as exposed in the ILC Articles on State Responsibility (U. N. Doc. A/53/10). In its commentary's to the aforementioned articles, the Commission affirms that "Where crimes against international law are committed by State officials, it will often be the case that the State itself is responsible for the acts in question or for failure to prevent or punish them" (U.N. Doc A/56/10).

2.3.2. SPECIFIC MEASURES FOR PREVENTION

There are some conventions which pursue the obligation to prevent internationally wrongful acts in through specific measures devised to hinder the offence from occurring. A treaty may impose many concrete obligations of the most varied nature. Usually, for the most atrocious offences such obligations are accompanied by a further imposition dictating that no exceptional circumstances may be invoked in justification of the violation. This general statement stresses the non-derogable nature of the obligation not to commit said violation. (U.N. Doc. A/CN.4/680).

Evidently, the specific measures will depend on the particular crime at issue as well as the context and potential risks to any State party arising from their commission. Yet, generally, this obligation will normally bind the State to:

> (a) adopt national laws, institutions and policies necessary to establish awareness of the criminality of the act and to promote early detection of any risk of its commission;
> (b) continually to keep those laws and policies under review and as necessary improve them;
> (c) pursue initiatives that educate governmental officials as to the State's obligations under the convention;
> (d) develop training programmes for police, military, militia and other relevant personnel as necessary to help prevent the commission of crimes against humanity; and
> (e) once the proscribed act is committed, fulfil in good faith other obligations within the convention that require the State party to investigate and either prosecute or extradite offenders, since doing so serves,

> in part, to deter future acts by others. Such measures, of course, may already be in place for most States, since the underlying wrongful acts associated with crimes against humanity (murder, torture, etc.) are already proscribed in most national legal systems. (U.N. Doc. A/CN.4/680).

2.3.3. NON-DEROGATION PROVISION

As previously noted, and applicable to both general and specific obligations on prevention, a further provision stating that no exceptional circumstances may be invoked as justification to an offence may follow. Particularly, such general assessment is found in treaties which address most serious crimes. Most often, it is placed at the outset of these conventions, thus it has the advantage of endorsing that the obligation not to commit the offence is of non-derogable nature (U.N. Doc. A/CN.4/680).

The background for the non-derogation provision hails from several human rights conventions which allowed states to derogate from their obligations under specific situations; under these conventions, a State could either limit or derogate certain rights under specific situations, but a core set of rights did not permit derogations or limitations (Danelius 1998). The Convention against Torture carries such provision of underogability in its Article 2(2). The subsequent Article, 2(3), establishes that orders given by a superior officer cannot be invoked as a justification to the crime of torture. For a comparable provision to be applicable to crimes against humanity it must first be settled whether this crime constitutes in itself an offence under criminal law.

2.4 OBLIGATION TO PUNISH CRIMES AGAINST HUMANITY

Criminalizing harmful conducts, either at the national or international level, aims to prevent such conducts from happening by means of general deterrence. And, as said by Bassiouni, "general deterrence is only as effective as the likelihood of prosecution and punishment" (Bassiouni 2011, 269).

Many international treaties entrench clauses of obligation to punish. The Genocide Convention, for instance, establish in its article IV that "persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constituonally responsible rulers, public officials or private individual". Similarly, Geneva Conventions[13] and their 1977 Additional Protocols

13 Geneva Convention I, article 49; Geneva Convention II, article 50; Geneva Convention III,

prescribe universal jurisdiction and an *aut dedere aut judicare* obligation when it comes to "grave breaches". The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment – that recently was object of analysis by the ICJ in the case *Senegal v Belgium* – also include an *aut dedere aut judicare* provision.

The operational details that make possible the punishment of an international crime comprise a variety of aspects, such as national legislation and international cooperation. Due to its special relevance to the effectiveness of a convention on crimes against humanity, the section below details this later aspect.

2.5 INTER-STATE COOPERATION

The Rome Statute focuses on the relationship of States to the ICC, but not on the relationship between States themselves. Neither the Rome Statute deal with inter-State cooperation on prosecution and punishment of crimes against humanity neither does any other existing multilateral convention (ILC 2015). Consequently, at this time due to a normative gap there is no international obligation – *i.e.* no provision for State Responsibility – to nationally prosecute or extradite alleged offenders of crimes against humanity to another State, or to provide legal assistance in prosecutions conducted by another State.

One of the main tasks of a specialized convention on crimes against humanity is "open the door to more effective inter-State cooperation on prevention, investigation, prosecution and extradition for such crimes" (ILC 2015, 7). In order to do so,

> "[…] the convention could require robust inter-State cooperation by the parties for investigation, prosecution and punishment of the offence, including through the provision of mutual legal assistance and extradition. The convention could also impose an *aut dedere aut judicare* obligation when an alleged offender is present in territory under a State party's jurisdiction" (ILC 2015, 7).

2.5.1 AUT DEDERE AUT JUDICARE

The Latin formula *aut dedere aut judicare* is used to designate the alternative or coexistent obligation concerning the treatment of an alleged offender present in a State's territory (Olson 2011). A State subject to the *aut dedere aut judicare* obligation must prosecute if it does not extradite, or extradite if it does not pros-

article 129; Geneva Convention IV, article 146.

ecute (Bassiouni and Wise 1995)[14]. The acknowledgment of this obligation's role in supporting international cooperation is centuries old:

> The role the obligation to extradite or prosecute plays in supporting international cooperation to fight impunity has been recognized at least since the time of Hugo Grotius, who postulated the principle of *aut dedere aut punier* (either extradite or punish): "When appealed to, a State should either punish the guilty person as he deserves, or it should entrust him to the discretion of the party making the appeal (ILC 2014, 2).

The terminology has moved from *punishment to prosecution* to better reflect the possibility that an alleged offender may be found not guilty (Bassiouni 2011). The idea underlying the *aut dedere aut judicare* obligation, however, remains very much the same since Grotius first wrote about it. If the draft articles present an *aut dedere aut judicare* provision, States shall have an obligation to prosecute alleged offenders of crimes against humanity present in territory under its jurisdiction and/or to extradite them to a third State willing and able to do so.

In the recent case *Questions relating to the obligation to prosecute or extradite* (*Belgium v. Senegal*), ICJ ruled on the interpretation of the *aut dedere aut judicare* provision of Torture Convention's article 7, to which both Belgium and Senegal were parties. Belgium argued that Senegal had refused to grant its request for extradition of Mr. Hissène Habré, former President of the Republic of Chad, and alternatively requested Senegal to prosecute Mr. Habré. The Court decided that Senegal should submit "without delay the "Hisséne Habré case" to its competent authorities for the purpose of prosecution" or, failing that, "extradite Mr. Habré to Belgium without further ado" (Obligation to Prosecute or Extradite 2012, ¶ 118).

One can debate whether the obligation to extradite or prosecute is customary international law, but neither the ICJ has not ruled on this matter yet, neither the ILC came with this conclusion on its final report on *The obligation to extradite or prosecute* (*aut dedere aut judicare*) (ILC 2014). Practically speaking, given the debate on the customary nature of this obligation, the ILC shall decide whether the draft articles could impose – *i.e.,* contain an explicit provision on – an *aut dedere aut judicare* obligation.

In the modern regulation of armed conflicts, the obligation to extradite or prosecute seems well established. The 1949 Geneva Conventions, in their Common Articles on repression of Grave Breaches, includes a provision of this kind. The Genocide Convention's article 1 states an obligation to punish (Bassiouni 2011).

14 For further information on the topic aut dedere aut judicare, consult the International Law Commission Study Guide of UFRGSMUN 2013, available at <http://www.ufrgs.br/ufrgsmun/2013/?page_id=1387>.

Likewise, the 1948 UN Torture Convention contains, in its article 7, an obligation that if the State Party does not extradite the alleged offender, it shall submit the case to its competent authorities for the purpose of prosecution.

As explained in ILC's final report on T*he obligation to extradite or prosecute (aut dedere aut judicare)*, provisions containing the obligation to extradite or prosecute vary in their formulation, contention and scope, specially "in terms of the conditions imposed on States with respect to extradition and prosecution and the relationship between these two courses of action" (ILC 2014, 13).

Traditionally, clauses on the obligation to extradite or prosecute fall into one of these categories:

> (a) those clauses pursuant to which the obligation to prosecute is only triggered by a refusal to surrender the alleged offender following a request for extradition; and (b) those imposing an obligation to prosecute *ipso facto* when the alleged offender is present in the territory of the State, which the latter may be liberated from by granting extradition (ILC 2014, 13).

The language of a convention may choose one of this course of actions – what, at the end of the day, means to choose "whether *aut dedere aut judicare* imposes alternative or coexistent duties" (Olson 2011, 327). If no general preference between *dedere* or *judicare* is established, there may be specific situations in which one is preferable to another. In the latter case, there are some factors – such as, but not limited to, where was the impact of the offence felt, the nationality and residence of the accused, which jurisdiction has the greatest interest in prosecuting – that may be considered in determining whether there is a primary obligation to prosecute or to extradite (Olson 2011).

When it comes to *extradition*, one of the two prongs of the *aut dedere aut judicare* obligation, one of the greatest obstacle to the effective implementation of it is that "without a specific bilateral extradition treaty pertaining to the specific extraditable offense, most States cannot extradite" (Olson 2011, 330). Furthermore, the grounds for refusal to extradition must also be considered in seeking for possible solutions. As summarized by Olson, "political offenses usually constitute mandatory grounds for refusal of extradition" (2011, 332). Also the imposition of certain penalties, such as the death penalty, and the alleged offender being a national of the requested State may be grounds for a State refuse to extradite.[15]

Prosecution, that is the second prong of the *aut dedere aut judicare* obliga-

15 As pointed by Olson (2011), particularly in civil law countries the refusal to extradite its own nationals is a widespread constitutional provision.

tion, will be addressed in the following section on its implication over inter-State cooperation by means of requirements of mutual legal assistance.

2.5.2 MUTUAL LEGAL ASSISTANCE

"If a State is to prosecute effectively, it is likely to need judicial assistance, particularly if the crime was not committed on its territory" (Olson 2011, 336). Traditionally, judicial assistance between States begin through *rogatory letters*. Through a rogatory letter, one State can request another to hear a witness, collect or share evidence, freeze assets etc. This process, however, is usually inefficient and time-consuming.

As successful cooperation between States is key to enforcement of the convention, it is expected the draft articles establish the basis to guarantee an effective mutual legal assistance between States. The UN Model Treaty on Mutual Legal Assistance may be of use, as it has provisions on designation of central authorities, content and execution of requests, protection of confidentiality, obtaining of evidence, availability of persons in custody to give evidence or to assist in investigations, proceeds of crime, among others (UN 1990). Additionally, treaties as the UN Convention Against Corruption and the UN Convention Against Transnational Organized Crime, both of which include detailed provisions on mutual legal assistance, may also offer some guidance on the matter.

Perhaps the most challenging aspect of inter-State legal cooperation is the admissibility of foreign-obtained evidence in judicial proceedings. Olson points out that usually the law of evidence to be applied is the law of the forum State (Olson 2011, 339); it is possible to choose between this approach or one that admits the validity of evidence obtained by another State, even when the legal standards and proceedings do not conform to those of the forum State.

2.6 CRIMES AGAINST HUMANITY AND STATE RESPONSIBILITY

As previously noted, IMT's decision on *France et al v. Goering et al* has established that crimes against international law are committed by people (see section 1.3). Accordingly, the international responsibility of States concerns its own matter within international law, least to say it is not dependent upon the legal responsibility of an individual[16].

16 International responsibility of States constitutes in itself a matter of international law. It was a topic in the programme of work of the International Law Commission for almost fifty years (1954 -2001). Their work culminated on the Draft Articles on Responsibility of States for Internationally Wrongful Acts. The document was adopted on the Commission's fifty-third session and

Nonetheless, recently the question of State responsibility for international crimes was dealt with directly by the ICJ in the Bosnian Genocide case[17]. The Court analyzed both the "effective control" test set out in its *Nicaragua v. United States* case and the "overall control" test enunciated by the International Criminal Tribunal for the former Yugoslavia in the *Tadić* case. Both these tests assert when the actions of non-state groups can be attributable to a state.

The ICJ understands that the "effective control" test coincides with the the standards required by the ILC in the Article 8 of the Articles on State Responsibility[18], which according to the Court reflects international customary law[19]. This dispositive attributes to a State the conduct by persons or groups acting 'on the instructions', or 'under the direction', or 'under the control' of a State. The Commentary on the Articles clarifies that these three criteria are disjunctive, not cumulative[20]. Thereafter, the Court establishes that effective control is exercised when a group is under complete dependence on a State[21]. Thus, when these requisites are met, the persons, groups or entities can be considered *de facto* organs of the State, and the State will be responsible for their actions.

When the ICTY devised the "overall control" test, it was not concerned with a matter of State responsibility, but with the classification of the conflict in Bosnia as national or non-international, which has implications over the law applicable to

submitted to the General Assembly as part of the report covering the work of that session (U. N. Doc. A/56/10). The report, which also contains commentaries on the draft articles, appears in the Yearbook of the International Law Commission, 2001, vol. II, Part Two.

17 Even though, the Court decided that neither of these tests were applicable to this specific case.

18 Article 8 states that "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct" (ILC, 2001)

19 "[...] the applicable rule, which is one of customary law of international responsibility, is laid down in Article 8 of the ILC Articles on State Responsibility [...]" (Bosnia and Herzegovina v. Serbia and Montenegro, 2007)

20 "In the text of article 8, the three terms "instructions", "direction" and "control" are disjunctive; it is sufficient to establish any one of them. At the same time, it is made clear that the instructions, direction or control must relate to the conduct which is said to have amounted to an internationally wrongful act" (ILC, 2001)

21 "[...] according to the Court's jurisprudence, persons, groups of persons or entities may, for purposes of international responsibility, be equated with State organs even if that status does not follow from internal law, provided that in fact the persons, groups or entities act in "complete dependence" on the State, of which they are ultimately merely the instrument. In such a case, it is appropriate to look beyond legal status alone, in order to grasp the reality of the relationship between the person taking action, and the State to which he is so closely attached as to appear to be nothing more than its agent: any other solution would allow States to escape their inter- national responsibility by choosing to act through persons or entities whose supposed independence would be purely fictitious." (Bosnia and Herzegovina v. Serbia and Montenegro, 2007)

Tadic's case. To some extent the Tribunal was establishing a criterion for indirect State intervention in a non-international armed conflict.

The Appeals Chamber grounds it's attribution on the Article 8 of the Draft on State responsibility as provisionally adopted by the ILC in 1998[22]. It finds that "the requirement of international law for the attribution to States of acts performed by private individuals is that the State exercises control over the individuals. The degree of control may, however, vary according to the factual circumstances of each case" (Prosecutor v. Tadic, 1999). Moreover, the Tribunal decided that it ought to be demonstrated that "he State issued specific instructions concerning the commission of the breach in order to prove [...] that the individual acted as a *de facto* State agent. [...] [or to] show that the State has publicly given retroactive approval to the action of that individual." (*Ibid.*). However, the ICTY understands that solely a generic authority over the individual is not be sufficient to attribute international responsibility to the State. Furthermore, the ICC seconds the "overall control" test for the purpose of classification of conflicts (Prosecutor v. Lubanga 2007).

This question of acknowledging State responsibility becomes especially intricate in relation to crimes against humanity when it concerns conceptual matters such as the requirement of a State or organizational policy and the element of *mens rea*. It remains that intention is required to commit a crime against humanity. A main concern in attribution criminal responsibility to States is the understanding which arises from the IMT decision in *France el al v. Goering et al*. Thus, applying the mental element to States, which is indispensable for the imputation of criminal liability, has become a tortuous task.

Ultimately, the requirement of a State or organizational policy can be analyzed in relation to both the "effective control" and the "overall control" test. Consolidated international jurisprudence attributes international criminal responsibility to a States when a person or a group is acting its *de facto* organ. Accordingly, "It is understood that "policy to commit such attack" requires that the State or organization actively promote or encourage such an attack against a civilian population." (ICC 2002), it raises the question whether crimes against humanity, in themselves, do not in fact indirectly holds states liable.

22 The text of Article 8 as provisionally adopted by the ILC Drafting Committee in 1998 provides: "The conduct of a person or group of persons shall be considered an act of the State under international law if the person or group of persons was in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct"

3. PREVIOUS WORK BY THE ILC

Since World War II, a few efforts were taken to forge an international convention on crimes against humanity – unfortunately without success. Differently than genocide and war crimes, that have been codified through the Genocide Convention and the 1949 Geneva Conventions respectively, crimes against humanity persisted as a crime mainly under customary international law.

It is worth to mention that the United National General Assembly asked the International Law Commission to produce a "Draft Code of Crimes Against the Peace and Security of Mankind" (Draft Code) in 1947 (General Assembly Res 177 (II) 1947), a broader category in which crimes against humanity would be included. It took fifty years to the ILC to conclude the Draft Code and, by the time it was done, in 1996, the definition of crimes against humanity was very close to the Nuremberg formulation (Clark 2011).

It reads as follows:

> A crime against humanity means any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group:
> (a) murder;
> (b) extermination;
> (c) torture;
> (d) enslavement;
> (e) persecution on political, racial, religious or ethnic grounds;
> (f) institutionalized 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;
> (g) arbitrary deportation or forcible transfer of population;
> (h) arbitrary imprisonment;
> (i) forced disappearance of persons;
> (j) rape, enforced prostitution and other forms of sexual abuse;
> (k) other inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm.

The Draft Code of Crimes Against the Peace and Security of Mankind never came into force. Nonetheless, Clark (2011) points out that the set of acts included in the Draft Code had a significant influence on the Rome Statute.

Bassiouni summarizes the reasons that lie behind the ILC earlier unsuccessful approach to codify crimes against humanity:

> "[…] But the uncertainty with which the drafters proceeded, and their vacillation, evidences how politically sensitive the ILC has become. Of greater significance is the fact that the main problems with the definition of CAH and the identification of its elements have still not been resolved, while there is still no specialized international convention" (Bassiouni 2011, 183).

Because crimes against humanity is the only core crime under the jurisdiction of the major international criminal tribunals established to date that has not yet been addressed by a global treaty, the ILC decided to include the topic "Crimes against humanity" in its programme of work at its sixty-sixth session in 2014. Insofar, only the First Report of the Special Rapporteur has been published. The report addresses the potential benefits of developing draft articles, draws a general background with respect to the concept of crimes against humanity and proposes two draft articles (ILC 2015).

4 QUESTIONS TO PONDER

The ILC Members, when approaching the topic crimes against humanity on its different developments with the purpose to adopt draft articles, are asked to consider the following questions during the debates:

1. Why is a convention on crimes against humanity needed?

2. How to define the offence of "crimes against humanity" for purposes of the Convention?

3. How to require the Parties to criminalize the offence in their national legislation?

4. How to require robust inter-State cooperation by the Parties for investigation, prosecution, and punishment of the offence?

5. How to impose an *aut dedere aut judicare* obligation when an alleged offender is present in a Party's territory?

6. What if the State has an obligation to extradite and the national law of the requested State prohibits extradition (*eg*, of its nationals)?

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