

## INTERNATIONAL CRIMINAL PROSECUTION FROM AD-HOC TO PERMANENT CRIMINAL JURISDICTIONS

M. Floroiu

**Mihai Floroiu**

Faculty of Juridical, Social and Political Sciences/Legal Studies Department

“Dunărea de Jos” University of Galați, Romania

\*Correspondance: Mihai Floroiu, Faculty of Juridical, Social and Political Sciences, Galați,  
Str.Domnească, nr.111

Email: [mihai.floroiu@ugal.ro](mailto:mihai.floroiu@ugal.ro)

**Abstract:** *Crimes against humanity committed by dictators obsessed with power have been constant throughout history. The front impunity for the most heinous crimes is something that causes immense social unrest and brings the message that the law does not reach those who are in power. States, begun striving to find mechanisms to punish those guilty of crimes against humanity and establish a permanent international criminal jurisdiction.*

**Keywords:** International Criminal Court, Universal Justice

### **Introduction - idea of an international criminal justice for crimes against humanity**

The necessity of an international jurisdiction for crimes against humanity has revealed a serious conflict between States that do not want assign their national jurisdiction, totally or at least in part, to the trial of crimes against humanity. The legitimizing basis of a jurisdiction going across national borders is given in the so-called principle of universal justice, which is based on the protection of supreme values, such as justice and humanity, regardless the fact that the commission of an offense has been held outside the sovereign territory of one State.

As international community started to confuse the responsibilities of States with the ones of their rulers or citizens in their service, in order to directly reach individuals, started to gradually develop the idea that individuals should also be immediate subject of a “sanctioning” international law, which would not give them rights, but also impose certain obligations or punish different misbehaviours.

### **Historical evolution of international criminal jurisdictions**

The international community intended to impose certain obligations on all individuals, as well as to punish the guilty ones for committing unlawful acts that were so serious that they hit the core values of the human species. Thus, if individuals could not be legally liable based on the general international law, this issue needed to be adressed by the international society which developed the concepts of International Criminal Law and International Criminal Jurisdiction.

The idea of international criminal jurisdiction dates back to 1872 when Gustave Moynier presented at a Conference of the Red Cross, the first formal proposal directed to the establishment of a court with jurisdiction over war crimes, called “*Convention on the Establishment of an International Judicial Board for the Prevention and Punishment of Violations of the Geneva Convention*”.

However, it is in the twentieth century that the most important events for the development of international criminal law took place.

Regarding the historical development of the concept of crimes against humanity and international criminal jurisdiction related to their punishment, the first instrument in which such references were made, though not explicit, was the Convention on the customs and laws of land warfare, signed at The Hague in 1907, which, specifically in the Martens clause, provides: “*Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to*

*INTERNATIONAL CRIMINAL PROSECUTION  
FROM AD-HOC TO PERMANENT CRIMINAL JURISDICTIONS*

*declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience”<sup>1</sup>.*

The Second World War demonstrated that excesses of dictators could threaten other countries, their people and democracy itself. Thus, international awareness about the need for international criminal tribunals that would ensure the punishment of the greatest crimes against humanity, started to reset, in order to avoid impunity and transmit to dictators the message that nobody is above the law and that the law values the dignity of the human person.

Thus, the need to prosecute those responsible for crimes against humanity was collected for the first time in the Charter of the International Military Tribunal, established on August 8, 1945 by France, the United Kingdom, USA and the USSR, which, mentioning also the concept of crimes against humanity responded to the desire of the Allies to prosecute not only those who had committed war crimes in the traditional sense, but also other types of crimes that were not included in this concept, as those in which the victim was stateless or had the same nationality as the criminal. Subsequently, the crime against humanity concept was also present in the Charter of the International Military Tribunal of Tokyo, signed on January 19, 1946.

However, in spite of the efforts to establish a system of international criminal justice, a break of almost half a century, mainly attributable to the confrontations of the Cold War, limited drastically the efforts to establish such international jurisdictions. It was only in 1993 and 1994, respectively, that this process was resumed, as two criminal courts were established to judge crimes committed in the Former Yugoslavia and Rwanda. Although these four courts were, and the last two still are, ad-hoc instances, i.e limited to prosecute crimes committed in specific conflicts, with their powers restricted to a period of time and determined place, it can be said that international community had merely adopted international treaties calling for respect for human rights, while the effective prosecution of the attackers was left to the States themselves, without there being an international institution that could judge those individuals.

So, based on the needs felt by the international community, at the beginning of the process of globalization and the increase of cross-border criminality and terrorism, for the creation of an international jurisdiction over persons and not with respect to States as such a Court for the States was created by the UN in 1945, namely the International Court of Justice, based in The Hague, but whose major drawback that can only judge States that voluntarily submit to its jurisdiction, a new international court judging individuals was created at The Hague in 1998 and one could say that, to some extent, the ICC would create together with the ICJ a complete kit of international jurisdiction.

***Ad-hoc tribunals to judge crimes against humanity created by the UN***

The most important *ad-hoc* tribunals constituted in the history of the United Nations, up to date, are the Tribunal for the Former Yugoslavia (1993) and the Tribunal for Rwanda (1994), established by the Security Council, although other similar jurisdictions were created by the Security Council for Cambodia, Sierra Leone and Lebanon.

As international community interpreted the commission in those countries of massacres and other serious violations of international humanitarian law as a major threat to international peace and security, which empowers the Council, under Chapter VII of the UN Charter, to intervene in the internal affairs of a State, it was estimated that these two courts, created during the war, unlike the Nuremberg and Tokyo, that were made *post bellum* (after the war) would help to curb violations of international humanitarian law that were being committed and also restore peace, although the UN Charter does not expressly provides for the establishment of *ad-hoc* tribunals. However, the reality was that those two tribunals found their legitimacy because

---

<sup>1</sup> R.Ticehurst, *The Martens Clause and the Laws of Armed Conflict*, in International Review of the Red Cross, No. 317, 1997 - <https://www.icrc.org/eng/resources/documents/misc/57jnhy.htm>

the States have reached a general consensus on this matter and we may think that the creation of tribunals for the former Yugoslavia and Rwanda was a substitute for other political or armed interventions by the international community, as the Security Council did not reach an agreement regarding the policy to be followed in both crises, and many countries were reluctant to endanger the lives of their soldiers by sending troops. Probably, the coverage of the media on the atrocities and concern and mobilization of public opinion urged to action and contributed to the creation of such jurisdictions.

Anyway, these courts deserve a positive assessment in different aspects, namely:

- their creation fulfilled a symbolic function, reflecting a breakthrough in the commitment of the international community to respect international humanitarian law, in the recognition that certain monstrous crimes threaten all humanity and must not go unpunished. Thus, they have served as a preliminary step and testing for the subsequent adoption in 1998 of the Statute for a permanent International Criminal Court, signed in Rome<sup>2</sup>. Moreover, the administration of justice by an independent institution has contributed, at least partially, in addition to the identification and punishment of the guilty ones, to the elucidation of the historical truth while noting the crimes committed. The knowledge of what happened and overcoming the feeling of impunity are necessary foundations for the post-war rehabilitation and possible reconciliation between belligerents;
- at the same time, the two courts have also played both a repressive role, as to the identification and punishment of those responsible and also a preventive one, because of the possibility of being judged that discouraged many individuals, even partially, to commit new crimes;
- the exclusion of the death penalty, although this may lead to a double standard of punishment, because it is possible that a national court could still apply it, in accordance to own national rules and regulations.

### **The International Criminal Tribunal for the Former Yugoslavia**

The Court is headquartered in The Hague and was created by the UN through the Resolution 827 of 25.05.1993<sup>3</sup> to try those suspected of serious crimes committed in the territory of the former Socialist Federal Republic of Yugoslavia between 1 January 1991 and a date that the Security Council consider once peace restored. As the Council had not given to the jurisdiction of the Court in March 1999, all crimes committed in the Kosovo crisis entered within its jurisdiction, which has led to the indictment of Slobodan Milosevic.

The Council Resolution 827 was based on the aforementioned Chapter VII of the UN Charter, which gives special powers to that body for the maintenance of international peace and security. The Council interpreted that the widespread violations of international humanitarian law, including mass murder and practices of „ethnic cleansing” constituted a threat to international peace and security, and the process of creating such an international criminal jurisdiction, through a Security Council resolution, was considered, at the time as rapid and unattended until that moment, as allowed the court to enter into operation on the first day after the Resolution was issued.

As for the law applicable by the court, the first question to be raised is whether it should apply rules corresponding to international or internal armed conflicts, as, in the former Yugoslavia, there have been conflicts both at domestic and international levels. However, the Security Council implicitly recognized that it was an international conflict and therefore, the Court applies the rules of international humanitarian law. The fact that it this is customary law – and therefore source of law, it means that there was no problem posed by the fact that some States originated from the former Republic of Yugoslavia did not accede to the Conventions that are applied by the Tribunal, (the Geneva Conventions of 1949; the Hague Convention IV of

---

<sup>2</sup> D. Donovan, International Criminal Court: Successes and Failures of the Past and Goals for the Future, 2012 - <http://www.internationalpolicydigest.org/2012/03/23/international-criminal-court-successes-and-failures-of-the-past-and-goals-for-the-future/>

<sup>3</sup> [http://www.icty.org/x/file/Legal%20Library/Statute/statute\\_827\\_1993\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Statute/statute_827_1993_en.pdf)

*INTERNATIONAL CRIMINAL PROSECUTION  
FROM AD-HOC TO PERMANENT CRIMINAL JURISDICTIONS*

1907; the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 and the Statute of the Nuremberg Tribunal of 1945), allowing the Court to pursue four types of crimes, according to art. 2-5 of the Statute of the Court (grave breaches of the Geneva Conventions of 1949; the violation of the laws or customs of war; genocide and crimes against humanity).

**International Criminal Tribunal for Rwanda**

Following the massacres that killed nearly half a million of Rwandans in April and May 1994, the Security Council established the Court on 8 November of that year with 13 votes in favour, the opposition of Rwanda (although this State was the one who initially proposed it) and the abstention of China, by Resolution 955<sup>4</sup>. The court is based in Arusha (Tanzania) and the Office of the Prosecutor is in Kigali (Rwanda), its competence applying to acts committed between 1<sup>st</sup> of January and 31<sup>st</sup> of December 1994 both in Rwanda and on the territory of neighboring States.

Its constitution was the result of recommendations made to the Secretary General by a Commission composed of independent experts at the request of the Security Council. The Commission concluded that there was evidence that members of the Hutu genocide had been committed to the destruction of the Tutsi group. The experts also recommended that the trials of those suspected of committing serious violations of international humanitarian law, crimes against humanity and acts of genocide should be carried out by an international criminal tribunal.

The peculiarity of the case of Rwanda is that, even though most of the atrocities were committed in the context of an internal conflict, the situation had important international implications for its neighboring countries receiving large waves of refugees, which was interpreted as a serious threat to regional and international peace. Thus, the Statute of the Rwanda Tribunal is essentially the same as the former Yugoslavia and, like it, has jurisdiction over genocide and crimes against humanity. However, the Security Council took into account the fact that the crimes committed in Rwanda were conducted in the framework of a purely internal conflict, so that instead of referring to “grave breaches of the Geneva Conventions of 1949 and the laws and customs of war” it referred to “violations of Article 3 common to the Geneva Conventions and Additional Protocol II” since both cover internal armed conflicts.

Even though the two courts have represented an evolution in the development of the concept of international criminal jurisdiction, the fact of being *ad-hoc* tribunals created by the Security Council, which is an essentially political body, could be interpreted that the permanent members in the Council Security would never would create *ad-hoc* tribunals on their own territories or in some other States where they have specific interests. Also, the figure of the *ad-hoc* tribunals could lead to comparative grievances and bias the administration of justice by relevant States, and in addition, the two courts may incur an alibi to the passivity of the States and also of the international community, allowing them not to adopt policies or broader military action against violations of human rights committed outside their soils, considering that a justice with two levels of security was established, especially in the case of the Rwanda Tribunal, since it protects the life of the main culprits, it does not consider the death penalty and assures to those culprits better conditions of detention than the ones that are persecuted and convicted by the Rwandan national jurisdiction<sup>5</sup>.

**International Criminal Court**

The International Criminal Court is the jurisdiction created to try individuals responsible for the most serious violations of human rights<sup>6</sup>. It can, specifically, judge four types of crimes: crimes against humanity, war crimes, aggression and genocide.

---

<sup>4</sup> <http://www.unictt.org/Portals/0/English%5CLegal%5CResolutions%5CEnglish%5C955e.pdf>

<sup>5</sup> <http://ictj.org/news/impact-yugoslav-and-rwanda-tribunals-lessons-international-criminal-court-0>, 2009

<sup>6</sup> A.Bogdan, *Drept International Public*, Universitaria Publishing House, Craiova, 2012, pag. 218.

The International Criminal Court (ICC) is based in The Hague and entered into force on 1<sup>st</sup> of July 2002, once 60 out of the 120 signatory countries have ratified the Statute adopted in Rome on 17<sup>th</sup> of July 1998<sup>7</sup>. Its creation represented a major milestone for the development of international criminal law. The most important element to be stressed out here is that ICC is an independent international organization, not belonging to the UN system.

By its creation, the international community decided to give itself its own specific criminal mechanisms, other than those of States, in order to prosecute individuals responsible for such crimes. The emergence of the individual as soft subject of international relations is being confirmed as such by international law, being added to the States and other subjects, with rights but also subject to sanctions. The ICC intends to exercise its jurisdiction directly to individuals, ignoring the shield of State sovereignty.

The achievement of the Statute in the Rome Conference was a remarkable success for the countries that defended this concept, considering that at the beginning of this endeavour pessimism regarding the elements that could be achieved was prevailing. While opposing States constitute a minority, they represented important global or regional powers, such as USA, China, India or Mexico. However, three factors ultimately led to its achievement<sup>8</sup>. First of all, the commitment of some 50 States advocated the creation of the ICC (such as Germany, Canada, Romania, Republic of Korea, Egypt, Italy, Norway, United Kingdom and South Africa, to name a few). Secondly, the pressure exerted from the beginning of the preparatory work by some 130 NGOs, most of them built in the Coalition for an International Criminal Court. And third, the role of those responsible for directing the work at the Conference itself.

Finally, the ICC Statute was adopted by an overwhelming majority. Among the 120 votes in favor included all of the States of the European Union, and in general throughout Europe including Russia and most of the Latin American and some Asian States. However, under the argument of the defense of the principle of State sovereignty, 20 States abstained and seven voted against. The latter include USA, China, India and Israel, countries with huge political weight and implication in international conflicts

Anyhow, the Rome statute is the result of balance and contains a number of commitments and provisions carefully measured to respond to the divergent interests of the various High Contracting Parties. Consequently, it has both pro and cons. Among the most positive features of the Statute we could name the definition of crimes (with the exception of the lack of definition of crimes by use of weapons of mass destruction), the powers granted to the Prosecutor and many elements of the system of complementarity with the international courts. Indeed, the Court may prosecute and punish all major crimes either on the prosecutor's initiative or when internal justice systems are unable or unwilling to exert their repressive functions. By contrast, the main problems of the Court is that it is not allowed to judge war crimes committed during a period of the seven years following the entry into force of the Statute, and that the Security Council United Nations has the power to paralyze the action of the Court<sup>9</sup>, as it, in accordance with a resolution adopted pursuant to Chapter VII of the UN Charter, can ask the ICC to suspend the investigation or prosecution has started. Such suspension shall not exceed twelve months but can be renewed<sup>10</sup>.

The Rome Statute is an international treaty of universal vocation. The Nuremberg and Tokyo Courts were formed on the basis of a decision taken by a small number of States, while the *ad-hoc* tribunals for the former Yugoslavia and Rwanda were settled for two resolutions of the UN Security Council. Neither way was appropriate for the ICC, since those courts were limited both *ratione tempore* and *ratione loci*. The ICC, being an international organization, is

---

<sup>7</sup> <http://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283948/RomeStatuteFra1.pdf>

<sup>8</sup> Concepcion Escobar Hernandez, *La progresiva institucionalización de la jurisdicción penal internacional: La Corte Penal Internacional* in García Arán, M., y D. López Garrido (coords.), *Crimen internacional y jurisdicción universal*, Tirant lo Blanch, Valencia, 2000.

<sup>9</sup> Art. 123 of the Rome Statute

<sup>10</sup> Art. 16 of the Rome Statute

*INTERNATIONAL CRIMINAL PROSECUTION  
FROM AD-HOC TO PERMANENT CRIMINAL JURISDICTIONS*

binding only for States that accepted its Statute, unlike the *ad-hoc* tribunals, in which the obligation is on all members of the United Nations.

The internal organization of the International Criminal Court, strictly speaking, is not only of a court, as this is a complex of international criminal justice, where several structures, formally regarded as organs of the Court, function together:

- **the Presidency**, consisting of a president and two vice-presidents, that also function as judges of the Court, elected for a three years term by their pairs, are responsible for the administration of all other organs except the prosecution ones

- **the Chambers** (instruction, trial and appeal), consisting of a total of 18 judges, elected for a unique term of nine years and divided into three sections<sup>11</sup>:

- instruction chamber, also called preliminary questions section, whose jurisdiction extends from the decision to allow an investigation into the decision to investigate the complaint;

- judgment chamber, with jurisdiction for the causes that should end with a trial decree of acquittal or conviction of the accused;

- review chamber, responsible to analyze appeals entered against a previous decision.

- **the Prosecutor's office**, headed by the Prosecutor who shall act independently, being responsible for receiving *criminis notitia* and any information about crime within the jurisdiction of the court, for examining them and for conducting investigations and prosecutions before the court. The Prosecutor is assisted by one or more public prosecutors that must serve as fulltime. Both the Prosecutor and the assistants must be of different nationalities, must be fluent in at least one of the working languages of the Court (English or French), and should also be competent to perform the duties and possess extensive practical experience in the process or trial of criminal cases.

- **the Secretariat**, responsible for the non-judicial aspects of the administration and other services, is directed a the Secretary, elected by the judges by absolute majority and by secret ballot. The mandate is for five years, with possibility of being re-elected only once. The Secretary must create a Victims and Witnesses Unit that should provide all agreements and protective security measures needed in order to ensure appropriate help for witnesses or victims and others who appear in court and who are at risk because of their testimony, as, although victims do not *have locus standi* before the ICC, they have the right to submit informations to the prosecutor.

As for the operations referred to the Court, its jurisdiction will be triggered by the Prosecutor following a triple initiative<sup>12</sup>:

- complaint of a State Party referred to the Prosecutor requesting to proceed with the investigation;
  - complaint by the Security Council of the United Nations;
  - complaint of the Prosecutor himself after finishing his investigations.

As regards penalties for the convicted individuals, the statute provides for imprisonment of up to 30 years or life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted<sup>13</sup>. The prison sentences are served in a State designated on the basis of a list of States which have indicated their willingness to accept convicted criminals. Seclusion may be accompanied by a fine and forfeiture of proceeds, property and assets derived directly or indirectly from that crime.

### **Conclusion**

The ICC came up with an advanced configuration in the sense of not being a temporary court or a court of the victors over the vanquished. In this sense, the know-how achieved from the criticisms of the Nuremberg and Tokio Tribunals and the UN *Ad-Hoc* Tribunals was quite useful, as the International Criminal Court, created to punish international criminals, performs

---

<sup>11</sup> Art. 39 of the Rome Statute

<sup>12</sup> Art. 13 and 15 of the Rome Statute

<sup>13</sup> Art. 77 of the Rome Statute.

also an important function of conveying a message to the international society that there will be no tolerance or impunity with violators of the major international crimes.

**Bibliography**

- D. Donovan, *International Criminal Court: Successes and Failures of the Past and Goals for the Future*, 2012;
- Bogdan, *Drept International Public*, Universitaria Publishing House, Craiova, 2012;
- Concepcion Escobar Hernandez, *La progresiva institucionalización de la jurisdicción penal internacional: La Corte Penal Internacional* in García Arán, M., y D. López Garrido (coords.), *Crimen internacional y jurisdicción universal*, Tirant lo Blanch, Valencia, 2000;
- 1998 Rome Statute of the International Criminal Court;
- R.Ticehurst, *The Martens Clause and the Laws of Armed Conflict*, in *International Review of the Red Cross*, No. 317, 1997;
- 1994 UN Resolution 955 on the International Tribunal for Rwanda;
- 1993 UN Resolution 827 on the International Tribunal for former Yugoslavia.