CHAPTER ONE

INTERNATIONAL CRIMINAL TRIALS AFTER THE 1994 GENOCIDE

SUMMARY: 6. Accountability and criminal trials after the 1994 genocide. – 7. The establishment and functioning of the ICTR. – 8. Accomplishments of the ICTR: A. Its contribution to the development of international criminal law. – 9. (*follows*): B. The transfer of ICTR's cases to national courts. – 10. Failures of the ICTR. – 11. States' obligation to cooperate with the ICTR and the War Crimes Rewards Program. – 12. The ICTR legacy.

6. Accountability and criminal trials after the 1994 genocide

After the commission of genocide or other human rights crimes, in addition to socio-economic restoration, the complex question of how to deal with those atrocities and their legacies arises: a question that is primary for the societies in which crimes occurred, but also for other members of the international community [1]. In those societies, one of the priorities is to ensure accountability of the offending entities and to guarantee a post-crimes justice for victims; this being namely an achievement in light of the complexity of any transition process that requires the balancing of local specificities with universal demands of justice.

Accountability measures are different and may include international,

[1] ROTH-ARRIAZA N., MARIEZCURRENA J. (eds.), *Transitional Justice in the Twenty-first Century: Beyond Truth Versus Justice*, CUP, Cambridge, 2006; CHETAIL V. (ed. by), *Post-Conflict Peacebuilding: A Lexicon*, OUP New York, 2009; AMBOS K., LARGE J., WIERDA M. (eds.), *Building a Future on Peace and Justice: Studies on Transitional Justice*, Springer, Berlin, 2008; CHERIF BASSIOUNI M., ROTHENBERG D., *The Chicago Principles on Post-Conflict Justice*, International Human Rights Law Institute, De Paul University College of Law, 2008; CHERIF BASSIOUNI M. (ed.), *The Pursuit of International Criminal Justice: A World Study on Conflicts, Victimization, and Post-Conflict Justice*, Intersentia, Cambridge, 2010; PARMENTIER S., "Transitional Justice", in SCHABAS W.A. (ed. by), *The Cambridge Companion to International Criminal Law*, CUP, Cambridge, 2016, pp. 52-72.

supranational, and national prosecutions [2]; international and national investigatory commissions; truth-seeking by non-judicial commissions; national lustration mechanisms; civil remedies; and administrative mechanisms for reparation to victims [3]. These justice instruments and strategies should contribute to at least three sets of interconnected and universally applicable goals: first, to ensure the legal, political, and moral dissociation from the atrocities committed under the previous regime, by punishing perpetrators, acknowledging the suffering of the victims, and establishing the truth about the past; second, to promote deterrence of future conflicts, by establishing social and political conditions conducive to peace and socio-political stability; third, to create and stabilize a new democratic framework conducive to effective conditions of respect for all human rights (thus including the economic and cultural ones), protection of groups and minorities that suffered under the old regime, and promotion of the rule of law [4]. Although these goals often cannot be achieved simultaneously, they are equally important to a degree depending on the transitional context in place. The fact remains that in some contexts and time periods it might be only possible or more appropriate to opt for amnesty or non-judicial strategies, such as truth commissions or institutional reforms, rather than investigations and

[2] A distinction between international and supranational courts is here proposed. The terms "are often used interchangeably, which may be due to the fact that there is currently no single definition of supranationalism", see DE BAERE G., WOUTERS J. (ed. by), *The Contribution of International and Supranational Courts to the Rule of Law*, Edward Elgar, Cheltenham, 2015, p. 32. Various scholars have outlined some indicators they associate with supranational organizations, *ibid.*, such as the power to: "take decisions that are binding on the Member States, adopt rules that directly bind the inhabitants of Member States, to enforce its decisions, even if only through the help of an organ of the Member States", see SCHERMES H.G., BLOKKER N.M., *International Institutions Law: Unity with Diversity*[5], Brill, Leiden-Boston, 2011, p. 56 et seq. Further indicators concern the fact that "the organs taking decisions are not entirely dependent on the cooperation of all Member States", they "enjoy financial autonomy", and "no unilateral withdrawal from the organization is possible", *ibid*. According to DE BAERE G., WOUTERS J., while these indicators primarily "fit rule-making organizations, they can also to a large extent be applied to judicial bodies", see ID. (ed. by), *The Contribution of International*, cit., p. 33, although a clear-cut distinction between international and supranational courts is impossible, *ivi*, p. 35. Other scholars have doubted the usefulness of the notion of supranationalism (KLABBERS J., *An Introduction to International Institutional Law*[2], CUP, Cambridge, 2009, p. 24), and other have rejected it at all (SCHERMES H.G., BLOKKER N.M., *International Institutions*, cit., p. 57). To the writer's opinion the experience of the ICTR is an interesting case of a supranational court governed by its mini-apparatus, and the following paragraphs should be read with this interpretation in mind.

[3] CHERIF BASSIOUNI M., *Introduction to International Criminal Law*[2], Brill, Leiden-Boston, 2012, p. 938.

[4] DIMITRIJEVIĆ N., "Accountability Mechanisms", in STAN L., NEDELSKY N. (ed. by), *Encyclopedia of Transnational Justice*, 1, CUP, Cambridge, 2013, p. 5.

punishment of the human rights violations and wrongdoers. In any case, two aspects cannot be set aside: victims' acknowledgment and adequate reparation for the harm they suffered.

In the last 30 years, the international community has primarily focused on international, supranational, and national prosecutions of individuals.

The principle of individual responsibility, as indicated abundantly in international law literature, has acquired an accepted meaning after Nuremberg, regularly confirmed by the work of the international criminal courts in the last 30 years. In truth, the start of this development goes back even to before the trials at Nuremberg and Tokyo. In 1915, the British, French, and Russian governments jointly declared their intent to prosecute those responsible for "the new crimes of Turkey against humanity and civilization": namely, the atrocities that today we call the genocide of the Armenians [5].

The 1920 Treaty of Sévres authorized prosecutions of the persons responsible for the massacres committed during the war on Turkish territory, once the Turkish government would have undertaken to hand them over to the Allied Powers [6]. Art. 230 indicated that those trials should have had to take place before an international court "in the event of the League of Nations having created in sufficient time a tribunal competent to deal with the said massacres" [7]. Although the proposed trials did not take place, those treaty provisions favoured significant changes in international law [8].

As to the type of organs in charge of prosecution, however, rulers, also at the international level, have and continue to show a preference for the action of national criminal jurisdictions. National tribunals, indeed, should be the natural

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[5] In their joint Declaration of 24 May 1915, those governments solemnly condemned "the connivance and often assistance of the Ottoman authorities" in the massacres of Armenians. "In view of [those] new crimes of Turkey against humanity and civilization", moreover, the Allied governments announced publicly "that they [would have] hold personally responsible … all members of the Ottoman Government and those of their agents who [were] implicated in such massacres", see DADRIAN V.N., "Genocide as a Problem of National and International Law: the World War I Armenian Case and its Contemporary Legal Ramifications", Yale JIL, 14, 1989, p. 262; also KAISER H., "Genocide at the Twilight of the Ottoman Empire", in BLOXHAM D., MOSES A.D. (eds.), *The Oxford Handbook of Genocide Studies*, OUP, Oxford, 2010, pp. 365-385.

[6] Art. 230 of the Treaty of Sévres – a peace treaty between the Allied and Associated Powers and Turkey, signed at Sévres, August 10, 1920 – intended to cover offenses which had been committed on Turkish territory against persons of Turkish citizenship, though of Armenian or Greek race.

[7] Indeed, the Treaty never entered into force and was superseded by the Treaty of Lausanne, signed on 24 July 1923.

[8] SCHABAS W.A., "Introduction", in ID., *The Cambridge Companion*, cit., p. 2.

forum for criminal trials concerning unlawful acts committed in the territory by and/or against the local population.

The interest at international law level for the prosecution by national courts can be traced back to the drafters' decision of the Convention on the Prevention and the Punishment of the Crime of Genocide [9] to establish an obligation to prosecute and repress genocide only for the State of the *locus commissi delicti* without, at the same time, creating an international jurisdiction – although such a possibility was certainly envisaged and, indeed, expected to materialize in the future. Similarly, according to the principle of complementarity embraced by the ICC Statute fifty years later in art. 17, States have the first responsibility and right to prosecute international crimes [10]. The ICC may only exercise jurisdiction where national legal systems fail to do so, including where they purport to act but, in reality, are unwilling or unable to genuinely carry out proceedings. Thus, the principle of complementarity is based both on respect for the primary jurisdiction of States and on considerations of efficiency and effectiveness, since States will generally have the best access to evidence, witnesses, and resources to carry out judicial proceedings [11].

The importance of national jurisdictions is further highlighted by the extension of the *ratione personae* jurisdiction, as supranational criminal tribunals generally focus on the senior level and highest in rank decision-makers and planners. National prosecutions should reach all, or almost all, persons who have committed criminal acts, provided there is compliance with the different types of accepted heads of jurisdiction [12].

The most effective approach to achieving individual criminal accountability for international crimes includes enhanced investigatory and prosecutorial capabilities, at both national and international level, coupled with improved international cooperation in criminal matters (especially when alleged perpetrators are sheltered in foreign States) [13], full compliance with international due

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[9] See art. VI of the Convention on the Prevention and the Punishment of the Crime of Genocide, adopted on 9 December 1948, entered into force 12 January 1951, UNTS, 78, p. 277 ff., see also GA Res. A/RES/260(III) [hereinafter Genocide Convention]. Also, SCHABAS W.A., *Genocide in International law*, 2009, cit., p. 400.

[10] Rome Statute of the ICC, 17 July 1998, UNTS, 2187, p. 90 ff., entered into force on 1 July 2002.

[11] *The Principle of Complementarity in Practice*, Informal Expert Paper, ICC-OTP 2003, at http://www. http://www.icc-cpi.int/NR/rdonlyres/20BB4494-70F9-4698-8E30-907F631453ED/281984/complementarity.pdf (9/20/2018).

[12] CHERIF BASSIOUNI M., *Introduction to International*, cit., pp. 944-945.

[13] See among the others: CHERIF BASSIOUNI M., "The 'Indirect Enforcement System': Modalities of International Cooperation in Penal Matters", in ID., *Introduction to International Criminal Law*, cit., pp 487-534; SADAT L.N., "Competing and Overlapping Jurisdictions", in

process norms and standards [14], and with the inclusion of victims' redress as part of the targets and mechanisms of criminal justice.

Enhanced cooperation, however, requires the existence of States' will to assist judicially and economically the justice systems in place. This is even more apparent in States struck by ongoing civil conflicts or that have emerged from such conflicts, and whose legal systems have either collapsed or been significantly impaired. These States are often faced with competing economic priorities and pressing social needs, and their governments are often unable to allocate enough resources for meeting the criminal justice's goals [15].

This and the next Chapter will investigate how the Rwandan genocide fits in this legal and political framework. Retributive justice, at both supranational and national level, has been one of the primary choices made by the Rwandan government and the international community to deal with the atrocities of the 1994 genocide. Rwanda opted for a domestic judicial system to be operational, but it recognized that, for its own credibility, some trials at international level had to be held. It thus requested that the UN SC establish an international criminal court [16]. Accordingly, the SC resolution on the establishment of the ICTR stressed "the need for international cooperation to strengthen the courts and judicial system in Rwanda, having regard to the necessity of those courts to deal with a considerable number of suspects" [17].

Thus, immediately after the 1994 genocide, three institutional judicial levels

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CHERIF BASSIOUNI M. (ed. by), *International Criminal Law: Multilateral and Bilateral Enforcement Mechanisms*[2], Brill, Leiden-Boston, 2008, p. 201 ss.

[14] See TRECHSEL S., *Human Rights in Criminal Proceedings*, OUP, Oxford, 2006; BAYEFSKY A., *The UN Human Rights Treaty System: Universality at the Crossroads*, 2001, Report at http://www.bayefsky.com/report/finalreport.pdf (7/17/2018).

[15] DE GRIEFF P., DUTHIE R. (eds.), *Transitional Justice and Development: Making Connections*, Social Science Research Council, New York, 2010; SHAW R., WALDORFS L., HAZAN P. (eds.), *Localizing Transitional Justice: Intervention and Priorities after Mass Violence*, Stanford University Press, Stanford, 2010; YUSUF H.O., *Transitional Justice, Judicial Accountability and The Rule of Law*, Routledge, Oxford, 2010; STROMSETH J., *Accountability for Atrocities: National and International Responses*, Brill, Leiden-Boston, 2003; TIETEL R.G., *Transitional Justice*, OUP, New York, 2002.

[16] See UN Doc. S/1994/1115, 29 September 1994, *Statement on the Question of Refugees and Security in Rwanda*, 28 September 1994.

[17] See *Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and other such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994*, adopted 8 November 1994 by UN SC Res. 955 (1994), UN Doc. S/RES/955, 8 November 1994, then amended by UN SC Res. 1855 (2008), Res. 1878 (2009), Res. 1932 (2010) [hereinafter ICTR Statute]. See artt. 2-4 of the Statute, also at http://legal.un.org/avl/pdf/ha/ictr_EF.pdf (7/17/2018).

developed to prosecute the Rwandan genocide-related crimes: the ICTR, the Rwandan national ordinary courts, and a system of 9,000 community-based courts known as *gacaca* [18].

Among the three judicial levels[19], the domestic courts' system that was in ruins in the aftermath of the genocide is the one still in place. Indeed, on December 31, 2015, the ICTR formally closed, while the *gacaca* courts finished to operate in June 2012.

Foreign courts also started to prosecute perpetrators but later in time, and some courts are still prosecuting Rwandan suspects: their jurisdiction complements the just-mentioned judicial triad.

Some scholars defined this judicial structure in post-genocide Rwanda a "stratified-concurrent jurisdiction", in which different judicial bodies have been charged with the prosecution of the same pool of suspects, but where a legal hierarchy dictates which of these bodies has priority jurisdiction over the cases [20]. In truth, no explicit or formal principles existed and applied for the distribution of suspects between the ICTR and the territorial and extraterritorial courts. Therefore, scholars speak of "unregulated interactions" between national courts and international/supranational courts, where no international treaty or rule of customary international law provides clear guidance as to the proper outcome [21].

In any case, with the Rwandan genocide having spawned prosecution in multiple fora, it will be interesting to understand the balance and possible outcomes that emerged by the interplay of simultaneous contemporary exercise of jurisdiction by the territorial State, foreign States (generally using the head of universal jurisdiction), and supranational courts [22]. Of interest is also the

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[18] Organic Law n. 40/2000, entered into force on 26 January 2001, set up "Gacaca Jurisdictions" and Organized Prosecutions for Offences Constituting the Crime of Genocide or Crimes against Humanity Committed between October 1, 1990 and December 31, 1994, at http://www.inkiko-gacaca.gov.rw/pdf/Law.pdf, and http://jurisafrica.org/docs/statutes/ORGANIC%20LAW%20N0%2040.pdf (7/17/2018). The law underwent substantial revisions through: Organic Law n. 16/2004 of 19 June 2004, dealing with the Organization, Competence and Functioning of *Gacaca* Courts (OG Special n. of 6/19/2004), hereinafter also *Gacaca* Law 2004; *Gacaca* Organic Law n. 28/2006 of 27 June 2006, (OG special n. of 12 July 2006); *Gacaca* Organic Law n. 10/2007 of 1 March 2007, (OG n. 5 of 1 March 2007), and *Gacaca* Organic Law n. 13/2008 of 19 May 2008 (OG n. 11 of 1 June 2008).

[19] CLARK P., "Grappling in the Great Lakes: The Challenges of International Justice in Rwanda, the Democratic Republic of Congo and Uganda", in BOWDEN B., CHARLESWORTH H., FARRALL J. (ed. by), *The Role of International Law in Rebuilding Societies after Conflict. Great Expectation*s, CUP, Cambridge, 2009, pp. 244-269, p. 248.

[20] MORRIS M.H., "The Trial of Concurrent Jurisdiction: The Case of Rwanda", Duke JICL, 7, 1997, p. 367.

[21] See SHANY Y., *Regulating Jurisdictional Relations between National and International Courts*, OUP, Oxford, 2007, p. 9.

[22] SADAT L.N., *Transjudicial Dialogue*, cit., p. 544.

comparative empirical analysis of sentencing practices of individuals convicted of genocide and other crimes in those different types of jurisdictions [23].

Indeed, with approximately one million people facing trial, Rwanda arguably constitutes the world's most comprehensive and complex case of criminal accountability for genocidal acts. It thus presents a unique case-study of prosecution and punishment following a genocide. As stated by W.A. Schabas, "the Rwandan experiment is contributing a new element to the ongoing debate between those who brook no compromise in dealing with impunity, and others who argue that reconciliation, cultural differences or simple pragmatism militate in favour of moderation" [24]. In Chapter Two, we will focus more extensively on the experimentation that, in connection with the Rwandan genocide, took and still takes place at the domestic legal level.

7. The establishment and functioning of the ICTR

The UN SC established the ICTR in 1994 at the request of the government of Rwanda. The Tribunal was intended to enforce individual criminal accountability on behalf of the international community, to ensure an effective redress of both serious violations of international humanitarian law and the culture of impunity, and to foster national reconciliation and peace in Rwanda [25].

UN SC resolutions 1503 (2003) [26], 1534 (2003) [27], and 1966 (2010) [28]

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[23] HOLA B., NYSETH BREHM H., "Punishing Genocide: A Comparative Empirical Analysis of Sentencing Laws and Practices at the International Criminal Tribunal for Rwanda (ICTR), Rwandan Domestic Courts, and *Gacaca* Courts", GSP, 10, 2016, pp. 59-80.

[24] SCHABAS W.A., "Genocide Trials and *Gacaca* Courts", JICJ, 3, 2005, p. 895.

[25] See Preamble, ICTR Statute.

[26] UN SC Res. 1503 (2003) called on the ICTY and the ICTR to take all possible measures to complete investigations by the end of 2004, to complete all trial activities by the end of 2008, and to complete all work in 2010, and requested the Presidents and Prosecutors, in their annual reports to the SC, to explain their plans to implement the completion strategies. The SC then urged the ICTR to formalize a detailed strategy, modelled on the ICTY Completion Strategy, to transfer cases involving intermediate and lower-rank accused to competent national jurisdictions, including Rwanda, to allow the ICTR to complete all its judicial work in 2010, see UN Doc. S/RES/1503 (2003), 28 August 2003.

[27] In Res. 1534 (2004) the UN SC reaffirmed the necessity of bringing to trial the persons indicted by the ICTR and called on all States, especially Rwanda, Kenya, and the DRC, to intensify cooperation with and render all necessary assistance to the ICTR, including on investigations of the RPA and on bringing all at-large indicted to surrender to the ICTR. The SC requested the ICTR to provide, every six months, assessments by the President and Prosecutor on the progress made towards implementation of the completion strategy, see UN Doc. S/RES/1534 (2004).

[28] UN SC Res. 1966 (2010) established the Residual Mechanism for International Criminal

elaborated the ICTR "completion strategy", a process towards the total close down of the Tribunal[29]. Until the adoption of those resolutions, the Tribunal operated with no real strategy or time limit in mind[30]. The *Butare* appeal judgment, in which six accused have been involved, among them Pauline Nyiramasuhuko – the only woman the ICTR has tried for genocide – signed the formal conclusion of the *judicial activity* of the Tribunal on 14 December 2015[31].

On that date, the ICTR sentenced "61 people to terms of up to life imprisonment for their roles in the massacres", 14 accused were acquitted, and 10 others were referred to national courts[32]. The highly selective focus of the ICTR meant that, since its establishment, the attention of its organs had been upon the prosecution of individuals who allegedly were in position of leadership. The indicted individuals resulted in high-ranking military and government officials, politicians, and businessmen, as well as religious, militia, and media leaders.

The remaining functions of the ICTR (and of the ICTY) and the task of prosecuting the fugitives at large are now on the MICT[33]. In the following pages the focus will be on: A. the origin of the ICTR, B. the legitimacy issues regarding its creation, and C. the ICTR structure and jurisdiction.

Tribunals (MICT) to carry out several functions of the ICTR and ICTY after the completion of their respective mandates, see the Statute of the MICT attached to the resolution, UN Doc. S/RES/1966 (2010).

[29] See ICTR News, *ICTR Expected to Close Down in 2015*, 2 February 2015, at http://www.unictr.org/en/news/ictr-expected-close-down-2015 (8/20/2018).

[30] See HOROVITZ S., "How International Courts Shape Domestic Justice: Lessons from Rwanda and Sierra Leone", Is. LR, 46, 2013, p. 343.

[31] ICTR AC, *The Prosecutor* v. *Pauline Nyiramasuhuko, Arséne Shalom Ntahobali, Sylvain Nsabimana, Alphonse Nteziryayo, Joseph Kanyabashi, and Élie Ndayambaje*, Case No. ICTR-98-42-A, 14 December 2015.

[32] UN News Center, *UN Tribunal on Rwandan Genocide Formally Closes – Major Role in Fight against Impunity*, 31 December 2015, at http://www.un.org/apps/news/story.asp?NewsID=52926#.Wa8gdLpFyUn (7/17/2018).

[33] Specifically, MICT *ad hoc* functions are: tracking and prosecution of remaining fugitives; appeals proceedings; retrials; trials of contempt of the Tribunal and false testimony; proceedings for the final judgments' review. *Continuing* functions comprise: victims and witnesses' protection; supervision of sentences' enforcement; assistance to national jurisdictions; preservation and management of the MICT, ICTR and ICTY's archives. According to the MICT Report of 16 April 2018, from 1 January 2016 through 13 April 2018 the President and judges of the Mechanism delivered 954 decisions and orders, see UN Doc. S/2018/347, p. 7.

A. *The origin of the ICTR*

It has been said that the establishment of this *ad hoc* Tribunal, and of the ICTY, represented the first attempt to make the second limb of art. VI of the Genocide Convention a living reality [34]. Art. VI sets out the rule whereby persons charged with genocide shall be tried either by a competent tribunal of the territorial State [35] or by an *international penal tribunal* "as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction".

Actually, the entire provision of art. VI is commonly considered as limited in use and scope and to a considerable extent dead letter for many decades. Indeed, the drafters of the Genocide Convention were conscious that the tribunals of the territorial State might well be unable or unwilling to discharge their obligation to punish genocide [36]. The provision for the establishment of an international criminal tribunal was thus seen as both a necessity, in the attempt to provide for a mechanism that could impose on recalcitrant States the prosecution of genocidal offenders [37], and as a way to ensure the existence of a judicial body in cases where States were unable to carry out trials, providing that those States accepted its jurisdiction.

In ratifying the Genocide Convention, however, several States specified, by way of reservations or declarations, their position regarding art. VI. Most of the reserving States' statements, in fact, stressed the necessity of an *ad hoc* consent of States and that the exercise of jurisdiction by such an international penal tribunal should be considered as exceptional [38]. Moreover, some reserving States

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[34] See ZAPPALÀ S., "International Criminal Jurisdiction over Genocide", in GAETA P. (ed. by), *The UN Genocide Convention. A Commentary*, OUP, Oxford-NY, 2009, p. 263.

[35] For a discussion of this provision see next Chapter, para. 13, below.

[36] For the drafting history of the Convention and of this provision, see, among others, ROBINSON N., *The Genocide Convention: A Commentary*, Institute of Jewish Affairs, New York, 1960.

[37] SCHABAS W.A., "National Courts Finally Begin to Prosecute the Crime of Crimes", JICJ, 1, 2003, p. 39.

[38] Morocco for instance stated that "with reference to article VI, the government of His Majesty the King considers that Moroccan courts and tribunals alone have jurisdiction with respect to acts of genocide committed within the territory of the Kingdom of Morocco. The competence of international courts may be admitted exceptionally in cases with respect to which the Moroccan government has given its specific agreement", at UNTC online website, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&clang=_en (9/12/2019). Venezuela noticed that "any proceedings to which Venezuela [might] be a party before an international penal tribunal would be invalid without Venezuela's prior express acceptance of the jurisdiction of such international tribunal", *ibid.*, also ZAPPALÀ S., *International Criminal Jurisdiction*, cit., p. 264, footnotes 15 and 17. Almost all States parties made also reservations on art. IX of the Genocide

underlined that no State, other than the State of the *locus commissi delicti*, could claim jurisdiction based on art. VI, therefore clarifying that the provision of applicability of the principle of universal jurisdiction had to be excluded [39].

The limited chances to implement the Genocide Convention's provision dealing with how to exercise the criminal jurisdiction were due to the prevailing political circumstances, the lack of mutual trust among States, and the fears of reciprocal instrumentalization, fueled by the beginning of the cold war. States were not ready to accept any form of international monitoring over the fulfilment of their obligations.

In a changed international political scenario, the establishment of the ICTR, and the ICTY, contributed to shed new light on the provisions of the Genocide Convention. In the 2007 judgment on *Bosnia Herzegovina* v. *Serbia*, the ICJ held that "the notion of an international penal tribunal within the meaning of art. VI must at last cover all international criminal courts created after the adoption of the Convention (at which date no such court existed) of potentially universal scope and competent to try the perpetrators of genocide…", and it added that "the nature of the legal instrument by which such a court [had been] established [was] without importance" [40]. Hence, the ICJ concluded that art. VI should have been interpreted as covering the establishment of the ICTY [41], and thus the ICTR.

Authors have criticized this ICJ's conclusion, underlining that the normative and philosophical basis behind the establishment of the ICTR, and the ICTY, are not the same as those of art. VI of the Genocide Convention. One of the most repeated arguments is the absence of the *ad hoc* consent by concerned States [42]. In this light has to be read the intervention by the Permanent Representative of Brazil to the UN during the debate on the adoption of Res.

Convention regarding the ICJ's jurisdiction: they stated that for the submission of any dispute concerning the interpretation, application or fulfilment of the Convention to the ICJ, the express consent of all the parties to the dispute was required in each case, see UNTC at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&clang=_en (9/12/2019).

[39] For example, Myanmar stated: "(1) With reference to article VI, the Union of Burma makes the reservation that nothing contained in the said Article shall be construed as depriving the Courts and Tribunals of the Union of jurisdiction or as giving foreign Courts and tribunals jurisdiction over any cases of genocide or any of the other acts enumerated in article III committed within the Union territory", at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&clang=_en (9/12/2019).

[40] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina *v.* Serbia and Montenegro), Judgment, 26 February 2007, ICJ Reports 2007, para. 445 [hereinafter ICJ 2007 Judgment, or *Bosnian Genocide* case].

[41] *Ibid.*

[42] See ZAPPALÀ S., *International Criminal Jurisdiction*, cit., pp. 268-269.

955 (1994) establishing the ICTR. The Representative stressed that "the principle set out in article VI … which stipulates that the jurisdiction of an international penal tribunal must be accepted by the parties concerned, should have been respected" [43]. This seemingly is to say that such a States' consent was not held to have been obtained in the specific case of the ICTR establishment. Nonetheless, the consent of the UN Member States not sitting in the SC when Res. 955 was adopted may be held embodied in the consent explicitly expressed when they had ratified the UN Charter: a Charter that precisely provides for the establishment of a body endowed with normative powers [44].

Rwanda was the most interested State in the establishment of an international criminal tribunal and, even if, as we will see more precisely below, it ended up voting against the adoption of Res. 955, the government emphasized several reasons for its initial support [45].

For one thing, the RPF, which had defeated the previous government[46],

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[43] See UN Doc. S/PV.3453, SC Meeting Verbatim Records, 8 November 1993, pp. 9-10.

[44] The category of these sources of international law is a characteristic feature of modern international law and responds to the need of facilitating States' consent in some specific and defined areas in relation to which it would be difficult and time consuming for them to get together and unanimously agree upon a set of rules as soon as the necessity for such rules arises, see CASSESE A., *International Law*, OUP, New York, 2003, p. 154.

[45] See AKHAVAN P., "The International Criminal Tribunal for Rwanda", in LATTANZI F., SCISO E. (a cura di), *Dai Tribunali penali internazionali* ad hoc *a una Corte permanente*, Ed. Scientifica, Napoli, 1996, pp. 191-201.

[46] From an international-law perspective, in dealing with the RPF, an interesting issue is how to qualify its legal status during the civil war and when it took governmental control of the existing Rwandan State by ending the 1994 genocide. RPF acted as an insurgent and belligerent party (for our purposes also called insurrectional movement). On the distinction and relationship between insurgents and belligerents see ARANGIO-RUIZ G., *Sulla dinamica della base sociale nel diritto internazionale*, A. Giuffrè, Milano, 1954. International law scholars are divided on whether to recognize the international legal personality to insurgent parties involved in an armed conflict, and whether the insurgents, if successful in their fight against the existing State, would become the continuator or a successor State. The consensus among the different scholars seems on the fact that insurgents, as entities with international legal personality, are bound by the rules of international law with respect to the conduct of hostilities when they effectively control part of the territory, i.e. they exercise a *de facto* administration on that specific territory, and authoritatively act in such conditions of independence from the existing State. See, among others, BROWNLIE I., *Principles of International*, OUP, Oxford, 2012, p. 117 ff.; CASSESE A., *International Law*[2], OUP, Oxford, 2005, p. 124-131; SHAW M.N., *International Law*[6], CUP, Cambridge, 2008, pp. 245-248. For some scholars, if the insurgent party (*governo di fatto locale*) succeeds in overthrowing the existing government (*governo di fatto generale*) it becomes the successor State, and no continuity exists with respect to the defeated State. Among the scholars of this minority group see ARANGIO-RUIZ G., *Sulla dinamica della base sociale nel diritto internazionale*, cit., ID., *Gli enti soggetti dell'ordinamento internazionale,* I, A. Giuffrè, Milano, 1952. Also, CONFORTI B., *Diritto Internazionale*[8], Ed. Scientifica, Napoli, 2010, pp. 21, 128-129. Since the beginning of the civil

thought that it was imperative that matters of genocide, which were of international concern, be rectified before an impartial and neutral judge. Hence, there would be no question whatsoever about the good-grounded veracity of the claims that genocide had been committed.

Secondly, the importance of punishing at individual level those atrocious crimes was connected to the need to bring about national reconciliation.

> *Exterminating half-a-million to one million people in fourth months is an art and a science, it is not something which occurs simply because of spontaneous outburst of tribal hatred. So, in that connection, individualizing criminal responsibility in the context of Rwanda, and absolving entire groups of collective guilt, is a very important part of the reconciliation process* [47].

The third reason about the Rwandan support for the creation of the ICTR by UN was linked to the question of how to ensure the arrest of fugitives in third States: the arrest of the defeated Hutu-led government's members who had escaped to neighbouring countries was extremely difficult without systematic international cooperation.

Finally, the Rwandan government believed that there was a common interest on the part of the international community in the suppression and punishment of the crime of genocide. It was hardly a matter simply of the Rwandan people having been victimized, but the entire world should have felt victimized through what had happened in Rwanda [48].

Making a step further in the legal analysis, this is to say that, in the aftermath of mass atrocities, all States of the international community shall be considered subjects requested to fight against the possible impunity as to crimes committed. This consideration lies upon the existence of two sets of international obligations: on one side, under art. 28 of the ICTR Statute [49], States have an obligation to cooperate with the Tribunal, without which the functioning of said Tribunal would be impaired. On the other hand, the States' interest to end impunity has developed into three distinct but related international obligations: the obligation to criminalize the genocide in domestic law; the obligation to give national courts jurisdiction over it as a core crime; and the obligation to exercise jurisdiction, most often where a suspect is found on a

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war in the 1990s, RPF had the effective control of some portions of the Rwandan territory (mainly at the border with Uganda) in which it was settled. In 1993, it had been invited as a party to conclude the Arusha Agreements with the Hutu-led government.

[47] AKHAVAN P., *The International Criminal Tribunal*, cit., p. 196.

[48] *Ibid.*

[49] On States' cooperation see para. 11, below.

State's territory, as embodied in the obligation *aut dedere aut judicare* [50].

Looking at this specific scenario concerning Rwanda in relation to art. VI of the Genocide Convention, it is interesting to underscore that no explicit reference to that article can be found either in the reports leading to the ICTR establishment, in the UN SC resolutions, or in the ICTR Statute [51].

B. *The legitimacy issues regarding the Tribunal's creation*

A different legal issue to tackle is the specific legal basis, and thus the procedure, by which the UN has established the ICTR. As mentioned, the Tribunal has not been envisaged and set up within an international conference of States, as with the ICC case [52], nor through an agreement between the UN and the concerned State, such as in the case of hybrid or internationalized courts [53].

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[50] This issue will be explored more extensively in the next Chapter that investigates the practice of foreign courts in prosecuting atrocity crimes committed in Rwanda.

[51] See ZAPPALÀ S., *International Criminal Jurisdiction*, cit., p. 270.

[52] See SHAW M.N., *International Law*, cit., p. 407.

[53] The hybrid or internationalized courts are an institutional model created after the *ad hoc* tribunals also to criminally prosecute individuals for human rights crimes: The Special Court of the Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia (ECCC), the Special Tribunal for Lebanon, the Extraordinary African Chambers (EAC) and, the last born, the Special Criminal Court in the Central African Republic. On the latter Court see LABUNDA P.I., "The Special Criminal Court in the Central African Republic. Failure or Vindication of Complementarity?", JICJ, 15, 2017, pp. 175-206. Of interest are the EAC, established within the courts of Senegal to prosecute international crimes committed in Chad between 7 June 1982 and 1 December 1990, under the Habré's regime. Hisséne Habré has been accused of thousands of political killings and systematic torture while he was in power. HRW assessed at least 12,231 victims of various human rights crimes, see HRW, *The Trial of Hisséne Habré*, at https://www.hrw.org/tag/hissene-habre (7/17/2018); also BERCAULT O. et AL., in *La Plaine des Morts* (The Plain of the Dead), mentioned by HRW, *Chad: Habré' s Government Committed Systematic Atrocities*, 13 December 2013, at https://www.hrw.org/news/2013/12/03/chad-habres-government-committed-systematic-atrocities (7/17/2018). The special court within the Senegalese justice system is the outcome of the Senegal – AU agreement signed on 22 August 2012. The Chambers include Senegalese (investigative) judges and a mix of Senegalese judges and judges from other AU countries – both at the TC within the Dakar Court of Appeals and the AC attached to the Dakar Court of Appeals. The agreement came on the heels of the ICJ's decision on 20 July 2012 ordering Senegal to bring Habré to justice either by prosecuting him domestically or extraditing him for trial. On 30 May 2016, the EAC convicted Hisséne Habré of crimes against humanity, war crimes, and torture, including sexual violence and rape, and sentenced him to life in prison. On 27 April 2017, an appeals court confirmed the verdict and ordered Habré to pay approximately 123 million euros in victim compensation. For an account on how the case developed see BRODY R., *Victims Bring a Dictator to Justice, The Case Hisséne Habré*, Bread for the World, Berlin, 2017. The *New York Times* reported that "never in a trial for mass crimes have the victims' voices been so dominant", in CRUVELLIER T., "The Trial of Hisséne Habré", 15

The legitimacy of the ICTY and ICTR's creation has been challenged by several defendants before the *ad hoc* Tribunals and by scholars [54], especially in the first years of functioning of those tribunals. The issue is not debated anymore, but it remains interesting to remember the arguments raised to challenge such a legitimacy, as they have influenced the very foundation and efficiency of the *ad hoc* Tribunals [55].

Kanyabashi remains the most interesting ICTR case in which the legitimacy of the Tribunal has been challenged. *Kanyabashi* was a former Mayor of the Ngoma commune in Butare préfecture, southern Rwanda, where he held the position of authority until he left Rwanda in July 1994. On 17 April 1997, the Defence of *Kanyabashi* filed a pre-trial motion before ICTR TC II challenging the jurisdiction of the ICTR and, more specifically, the fact that the *ad hoc* Tribunal was not competent to review the act of its establishment adopted by the SC.

At that time, in the *Tadić* case, the ICTY AC had addressed the same question, recognizing how it touched on the sensitive issue of whether a decision of the SC could be subjected to review by a judicial body. The AC found it had jurisdiction to entertain the legal challenge, and noted that this was not a judicial review in any general sense, but rather a validation of the legality of its own establishment. According to the AC:

February 2016, at https://www.nytimes.com/2016/02/16/opinion/the-landmark-trial-of-hissene-habre.html (7/18/2018). On the reparation award see DIAB N.I., "Challenges in the Implementation of the Reparation Award against Hisséne Habré: Can the Spell of Unenforceable Awards across the Globe be Broken?", JICJ, 16, 2018, pp. 141-163.

[54] Among them, ARANGIO-RUIZ G., "The Establishment of the International Criminal Tribunal for the Former Territory of Yugoslavia and the Doctrine of Implied Powers of the United Nations", in LATTANZI F., SCISO E. (a cura di), *Dai Tribunali penali internazionali* ad hoc, cit., pp. 31-47. Arangio-Ruiz's discourse deals solely with the legitimacy of the procedure by which the UN established the ICTY, but the same arguments are applicable to the ICTR. The author's position is also critical about the implications this kind of decision may have for other past or future UN operations. However, he did value highly the institution that emerged, see p. 32. In favour of the procedure followed, among others, LAMB S., "Legal Limits to the United Nations Security Council Powers", in GOODWIN-GILL G.S., TALMON S. (eds.), *The Reality of International Law: Essays in Honor of Ian Brownlie*, OUP, Oxford, 1999, pp. 378-379.

[55] On the ICTR and *ad hoc* Tribunals in general, as a tool to protect the interest of the international community, see RAO P.S., "The Concept of International Community in International Law: Theory and Reality", in BUFFARD I., CRAWFORD J., PELLET A., WITTICH S. (eds.), *International Law between Universalism and Fragmentation. Festschrift in Honour of Gerhard Hafner*, Nijhoff, Boston-Leiden, 2008, p. 88. According to some scholars, "it is not an exaggeration to state that a system for the prosecution of individuals committing grave violations of the fundamental rules of international legal order belongs also to a core element of constitution of the international community", see TOMUSCHAT C., "International Law as the Constitution of Humankind", in UN *International Law on the Eve of the Twenty-first Century: Views from the International Law Commission*, UN Publication, New York, 1997, p. 39.

This power, known as the principle of 'Kompetenz-Kompetenz' in German or 'la competénce de la competénce' in French, is part, and indeed a major part, of the incidental or inherent jurisdiction of any judicial or arbitral tribunal, consisting of its 'jurisdiction to determine its own jurisdiction' [56].

This competence is a necessary component in the exercise of the judicial function and does not need to be expressly provided for in the constitutive acts of tribunals, although this kind of provision is often spelled out. The AC preliminary conclusion, however, could not be taken as authority of the existence of any broader jurisdiction within the ICTY to review SC decisions [57].

In the *Kanyabashi* Decision, the ICTR TC did not explicitly delve into the same issue and, while noting that some of the issues raised by the Defence had been addressed by the ICTY AC in the *Tadić* case, the Tribunal found that, "in view of the issues raised regarding the establishment [of the Tribunal], its jurisdiction and independence, and interests of justice, the Defence Counsel's motion deserved a hearing and full consideration" [58]. This was the conclusion even if the motion had been filed by the Defence after the deadline, and the prosecution had failed to address the untimely filing of the motion. The TC, that is, granted relief from the waiver *suo motu*.

The *Kanyabashi*'s Defence, in its turn, raised different objections.

Firstly, the ICTR establishment violated the sovereignty of States, particularly Rwanda, because it had not been established by means of a treaty. According to the TC, however, the establishment of the Tribunal by the SC had not violated the sovereignty of Rwanda because the Rwandan government itself had called for its establishment [59]. Regarding the sovereignty of other UN Member States, the TC

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[56] ICTY, AC, *Tadić*, IT-94-1-T, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 18.

[57] *Ivi*, para. 20. A few years earlier the ICJ had shown great reticence when asked to sit in judicial review of a SC's decision. Several members of the ICJ thought it improper for the Court to review acts of the SC, given that the UN Charter had set no hierarchy among its principal organs, see ICJ, *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (Libya *v*. USA), Provisional Measures Order, April 14, ICJ Reports 1992, pp. 140, 156, 192-193, 196, 174-175.

[58] ICTR, TC, *The Prosecutor* v. *Kanyabashi*, Decision on the Defence Motion on Jurisdiction, 18 June 1997, para. 6.

[59] *Ivi*, para. 14. According to SCHABAS W.A., the authority within the SC can now be found in the ICC Statute when it does recognize "the power of the SC to refer cases to the Court and, moreover, to block prosecutions under certain circumstances, all pursuant to its powers under Chapter VII. (…) The obstacles to the creation of future tribunals by the Security Council (and, indeed, referral of cases to the International Criminal Court) are political, not judicial, in nature", in *The UN International Criminal Tribunals. The Former Yugoslavia, Rwanda and Sierra Leone*, CUP, New York, 2006, p. 53.

recalled that the UN Charter provides the SC with the power to issue binding legal decisions when it acts under the conditions spelled out in Chapter VII and VIII. Art. 41, specifically, provides that the SC "may decide what measures not involving the use of armed force are to be employed to give effects to its decisions". These are binding decisions on the strength of art. 25 of the UN Charter [60].

Secondly, the situation in Rwanda was not appropriately qualified as a threat to international peace and security, and the choice to establish a Tribunal could have not been a measure contemplated by art. 41 of the UN Charter. In addressing this claim, the TC followed the AC's judgment in the *Tadić* case according to which the establishment of an *ad hoc* tribunal to prosecute perpetrators of genocide and other violations of international humanitarian law falls within the scope of the measures – not involving the use of force – aimed at restoring and maintaining peace, notwithstanding the absence of any direct mention of the establishment of judicial bodies in the UN Charter.

> *The list of actions contained in Article 41 is clearly not exhaustive but indicates some examples of the measures which the SC might eventually decide to impose on States in order to remedy a conflict or an imminent threat to international peace and security* [61].

This justification has in turn been put into question on two accounts. One argument is that art. 41 measures, although decided by the SC, are to be implemented by States – which, for the defendant, was not the case with a criminal law tribunal directly set up and empowered to operate by the SC. The other argument is that art. 41 measures are of a temporary nature. Although the duration of the Tribunal could be viewed *per se* as a temporary one, and the closure is now in place, the effects of the Tribunal's operation as the subjection of condemned persons or the revision of judgments, or grace, are not [62].

The objection based upon the indirect nature of the SC's measure under art. 41 has been rebutted by the argument that, if the SC is empowered to resort directly to the use of armed force against a State, it is *a fortiori* entitled to directly adopt non-military measures.

Likewise, art. 42 of the UN Charter has been debated as the proper legal basis for the establishment of the *ad hoc* tribunals. According to Conforti, the establishment of the ICTY could be considered as a measure adopted to

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[60] Art. 25 states: "The Members of the United Nations agree to accept and carry out the decisions of the Security Council".

[61] ICTR, TC, *The Prosecutor v. Kanyabashi*, cit., para. 28.

[62] See ARANGIO-RUIZ G., *The Establishment of the International*, cit., pp. 34-35.

organize the government of a territory that the SC was carrying out in the Former Yugoslavia and covered as such under art. 42 [63]. It would be a kind of non-military, non-armed forcible measure in which the strength would consist, in a sense, of the criminal prosecution and possible punishment of persons accused of violations of humanitarian law and the law of war amounting to a threat to peace. Apart from the radical difference in nature between the two kinds of action, it seems difficult to the latter scholar to see in what sense an action such as the establishment and operation of a tribunal entrusted with the exercise of criminal jurisdiction vis-à-vis individual nationals or officials of States could be envisaged per se as "*necessary* to maintain or restore international peace and security". As alleged by the UN SG and SC, the Tribunal could have been *useful*, and this did not imply to be necessary [64].

At least in Rwanda, it has been thus a matter of debate – maybe it still is – whether the establishment of the ICTR is an appropriate and positive measure for restoring and maintaining internal, but also international, peace and security. As stated by some scholars, the maxim "no peace without justice" may be highly inspiring but, empirically, is largely unproven [65].

On this aspect, the *Kanyabashi*'s Defence further added that the SC was not competent to act in the case of the conflict of Rwanda, also because international peace and security had *already* been re-established by the time the SC decided to establish the ICTR. On this issue, the TC underlined:

> *[…] the cessation of the atrocities of the conflict does not necessarily imply that international peace and security had been restored, because peace and security cannot be said to be re-established adequately* without justice being done. *[…] The achievement of international peace and security required that swift international action be taken by the SC to bring to justice those responsible for the atrocities in the conflict* [66].

The Defence also questioned the nature of the ICTR as a subsidiary organ of the SC. According to art. 29, the SC may "establish such subsidiary organs as it deems necessary for the performance of its functions". Art. 29 constitutes the sole legal basis for the SC to establish subsidiary organs necessary for the carrying out of its principal functions [67], but alone is not a sufficient legal basis

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[63] See CONFORTI B., *Diritto internazionale*[8], cit., pp. 419-420.

[64] *Ibid.*

[65] SLUITER G., "*Ad Hoc* International Criminal Tribunals (Yugoslavia, Rwanda, Sierra Leone)", in SCHABAS W.A. (ed. by), *The Cambridge Companion*, cit., p. 119.

[66] ICTR, TC, *The Prosecutor v. Kanyabashi*, cit., para. 26, emphasis added.

[67] See SAROOSHI S., "The Legal Framework Governing United Nations Subsidiary Organs",

for the establishment of such an organ, especially when entitled to issue binding decisions against individuals [68].

The valid legal basis is thus again art. 41. In the words of the AC, the SC "has resorted to the establishment of a judicial organ in the form of an international criminal tribunal as an instrument for the exercise of its principal function of maintenance of peace and security" [69]. Thus, the SC reacted to specific situations where the occurrence of breaches of the peace and violations of humanitarian law were closely intertwined [70].

The TC also underscored "the wide margin of discretion of the SC" in deciding when and where there exists a threat to international peace and security and in its choice of means [71]. The conflicts in Rwanda and the former Yugoslavia were different, and the former was primarily an internal armed conflict. The Defence argued that issues of international peace and security engaging the SC simply did not arise in situations of *internal armed conflicts*. The TC rebutted this issue by stating that, while it deferred to the SC's assessment on this,

> *[t]he SC has established that incidents such as sudden migration of refugees across the borders to neighbouring countries and extension or diffusion of an internal armed conflict into foreign territory may constitute a threat to international peace and security. This might happen, in particular, where the areas immediately affected have exhausted their resources* [72].

BYIL, 67, 1996, p. 424 ff.; SIMMA B. et AL. (ed. by), *The Charter of the United Nations. A Commentary*[3], OUP, Oxford, 2012, p. 1014.

[68] BOWETT D.W., *United Nations Forces. A Legal Study*, Praeger, New York, 1964, p. 178.

[69] AC, *Tadić, IT-94-1-T, Decision on the Defence Motion*, cit., paras. 28, 38.

[70] The establishment of a criminal law tribunal would have been equally possible according to art. 22 of the UN Charter: "The GA may establish such subsidiary organs as it deems necessary for the performance of its functions". As known, this method has been also favoured by some States at the time when the SC's action was expected to be blocked by the veto. A fair number of States on the contrary considered the GA resolution method to be unacceptable, see CARELLA G., "Il tribunale penale internazionale per la ex-Jugoslavia", in PICONE P. (ed.), *Interventi delle Nazioni Unite e diritto internazionale*, Cedam, Padova, 1995, pp. 469-471. Arangio-Ruiz also criticized this GA resolution theory on the point that an international criminal court established as a subsidiary body of the GA could even be envisaged as an institution of the international rather than the inter-State community. Yet, this approach seems to suggest that the criminal tribunal would be a direct institution of the "legal community of mankind", that is this approach would support the thesis that the SC and GA not only are vested with inter-States functions, but they also exercise supranational functions. For the author this is inconceivable, ARANGIO-RUIZ G., *The Establishment of the International*, cit., p. 40.

[71] TC, *The Prosecutor* v. *Kanyabashi*, cit., para. 20.

[72] *Ivi,* para. 19. The TC took "judicial notice of the fact that the conflict in Rwanda created a massive wave of refugees, many of whom were armed, into neighbouring countries" entailing a

The TC, then, accurately underlined that

> *the decisive pre-requisite for the SC's prerogative under Articles 39 and 41 of the UN Charter is not whether there exists an international conflict, but whether the conflict at hand entails a threat to international peace and security. Internal conflicts, too, may well have international implications which can justify Security Council actions* [73].

A legal argument that is less considered in the literature to defend the legitimation of the *ad hoc* tribunals' establishment, is the relevance of art. VIII of the Genocide Convention: "[a]ny Contracting Party may call upon the competent organs of the UN to take such action under the Charter of the UN as they consider appropriate for the prevention and the suppression of acts of genocide or any of the other acts enumerated in article III".

This article, together with art. IX of the Genocide Convention, considers the challenge of ensuring compliance with the obligations set forth in the text. When acts of genocide are committed, the sovereignty of the State on whose territory those acts are committed would act as a barrier with regard to prevention and repression, and art. VIII was formulated as if the UN organs could provide some effective response [74].

The Rwandan request to the UN for the establishment of a criminal tribunal could be interpreted in the light of art. VIII: namely, a request motivated by several reasons, not least the collapsed status of the internal judiciary system.

The legitimacy issue also has another face that is the legitimacy of the ICTR in consideration of some of its organizational features. In this regard, the *Kanyabashi* Defence raised three interesting arguments: 1) the ICTR's establishment violated the principle of *jus de non evocando* [75]; 2) the ICTR jurisdiction over individuals was contrary to the UN Charter since the SC's authority was limited to States and did not extend to individuals; 3) the ICTR was not an impartial and independent judicial body because it had been established by a political body. Indeed, regarding the latter argument, the Defence characterized the ICTR as "just another appendage of an international organ of policing and coercion, devoid of independence" [76]. The TC contrasted the latter criticism by

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considerable risk of destabilization of the local areas in the host countries where the refugees settled, para. 21. The social and political instability of the Great Lakes region is indeed strictly connected to the Rwandan civil conflict, thus a cause and a consequence of the genocide events in the '90s.

[73] TC, *The Prosecutor* v. *Kanyabashi*, cit., para. 24.

[74] GAJA G., "The Role of the United Nations in Preventing and Suppressing Genocide", in GAETA P. (ed. by), *The UN Genocide Convention*, cit., p. 398.

[75] For more consideration on this claim see, in this para, section C. below.

[76] ICTR TC, *The Prosecutor* v. *Kanyabashi*, cit., para. 37.

underlying that the Tribunal was not bound by national rules of evidence; the judges had to "exercise the judicial duties independently and freely", being "under oath to act honourably, faithfully, impartially and conscientiously"; and it did not have to account "to the SC for the judicial functions". Finally, the requirement of personal independence of the judges as mandated in art. 12(1) of the ICTR Statute and their duty to be committed to the full respect of the rights of the accused further concurred in trying to keep the ICTR's judicial proceedings within the international standards of fairness and justice.

Another strong criticism against the ICTR's legitimate operation has been the accusation that it functions in violation of the principle *nullum crimen sine lege*. The principle firmly requires only that the criminal behaviour be laid down as clearly as possible in the definition of the crime. In addition, the principle of legality forbids retroactive punishment, or analogy as a basis for punishment (*nulla poena sine lege*) [77]. The principle has several corollary principles: the idea that criminal prohibitions must be sufficiently precise to guide behaviour (principle of specificity) and a law must not be passed that has retrospective effect (prohibition on retroactivity); criminal law must be construed strictly, and the ambiguity is to favour the defendant (*in dubio pro reo*); finally, the definition of crimes may not be extended or applied by analogy [78].

The principle of legality had played a major role at the Nuremberg trials [79]. The IMT took the defence's *ex post facto* argument as an opportunity to examine (and affirm) the criminal nature of the acts against peace at the time the defendants committed them [80].

The UDHR restated this principle of justice in art. 11(2): "No one shall be held guilty of any penal offence because of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed" [81]. Other human rights treaties and declarations included then a similar provision [82].

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[77] According to CASSESE A., the principle *nulla poena* does not apply to international criminal law, in *International Criminal Law*, cit., p. 157.

[78] GUILFOYLE D., *International Criminal Law*, OUP, Oxford, 2016, p. 19.

[79] UN GA Res. 95(1), 11 December 1945, and NOVAK M., *UN Covenant on Civil and Political Rights. CCPR Commentary*[2], NP Engel, Kehl, 2005, p. 368.

[80] IMT, *The Trial of German Major War Criminals, Proceedings of the International Military Tribunal Sitting at Nuremberg*, Judgment 1 October 1946, Part. 22: "(…) the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice", p. 444.

[81] On the *nullum crimen* principle, see SCHABAS W.A., "General Principles, *Nullum Crimen* and Accountability for International Crimes", in ACCONCI P. et AL. (eds.), *International Law and the Protection of Humanity. Essays in Honour of Flavia Lattanzi*, Brill-Nijhoff, Leiden-Boston, 2016, pp. 496-505.

[82] ECHR, art. 7; ACHR, art. 9; ACHPR, art. 7(2); Arab CHR, art.15; EU Charter of

At the time of their establishment, both *ad hoc* tribunals were given jurisdiction over crimes committed in the past, although they were also endowed with prospective jurisdiction to various extents [83].

Addressing the issue in his report on the establishment of the ICTY, the SG underlined that the ICTY would only be able to prosecute offences that were unquestionably recognized as such under customary international law [84]. However, the SC was apparently not as squeamish about *nullum crimen sine lege* when it adopted the ICTR Statute. As indicated in the SG's report issued subsequently to the adoption of the ICTR Statute, in fact

> *the SC has elected to take a more expansive approach to the choice of the applicable law than the one underling the Statute of the Yugoslav Tribunal, and included within the subject-matter jurisdiction of the Rwanda Tribunal international instruments regardless of whether they were considered part of customary international law or whether they have customarily entailed the individual criminal responsibility of the perpetrator of the crime. Article 4 of the Statute, accordingly, includes violations of Additional Protocol II, which, as a whole, has not yet been universally recognized as part of customary law, and for the first time criminalizes common article 3 of the four Geneva Conventions* [85].

A decade later, the UN Commission of Inquiry on Darfur referred to the UN SG remarks in that report on the adoption of the ICTR Statute and the applicable law, pointing out that no member of the SC objected to the "expansive approach he had taken" [86]. Thus, the Commission of Inquiry on Darfur suggested that the recognition by the SC that violations of common art. 3 and of the Additional Protocol II were punishable was sufficient to hold these categories of crimes as covered by customary international law [87].

The ICTR has then regularly confirmed that serious violations of common

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Fundamental Rights, art. 49. Art. 15 of the ICCPR contains the same guarantee's clause, followed by a second clause stating: "Nothing in [that] article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations".

[83] See SCHABAS W.A., *The UN International Criminal Tribunals*, cit., p. 61.

[84] *Report of the SG pursuant to Paragraph 2 of the SC Resolution 808*, UN Doc. S/25704 (1993), para. 34.

[85] Report of the SG pursuant to para. 5 of UN SC Res. 955 (1995), UN Doc. S/1995/134, para. 12.

[86] *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General, Pursuant to Security Council Resolution 1564 of 18 September 2004*, Geneva, 25 January 2005, para. 160.

[87] *Ibid.*

art. 3 of the four 1949 Geneva Conventions, and of Additional Protocol II – codified in art. 4 of the ICTR Statute – were applicable in Rwanda as a matter of international customary law [88].

It can thus be said that the principle of legality is currently part of customary international criminal law [89]; and if it has not been consistently respected throughout the history of international criminal law, this was to some extent the price of its development and is now a less relevant concern [90].

C. *The ICTR structure and jurisdiction*

The ICTR Statute is largely modelled after the ICTY's one, and thus its structure [91].

It has been questioned whether the international community would have established an international court for Rwanda if the sequence of events were changed. According to some scholars, and we concur, atrocities committed against Africans simply do not generate the same outrage and revulsion. Thus, in a sense, it was fortunate that the Rwanda tragedy occurred after the ICTY was established, "because the precedent was already there, and it was unthinkable to have one tribunal for ethnic cleansing in the Former Yugoslavia, and then to ignore the appalling horrors of Rwanda" [92].

The ICTR consisted of three TCs, an Office of the Prosecutor, and a Registry with functions similar to those of the same Yugoslav Tribunal's organs. The Chambers were composed of sixteen independent permanent judges and a maximum at any one time of nine *ad litem* independent judges. The ICTR and ICTY shared a joint AC, as well as a Prosecutor, until 2003, when a separate one was appointed to the ICTR. Although the appointment of a sole prosecutor for both tribunals sometimes made the workload impossibly difficult and was objected to by the Rwandan government, it may also have ensured that the two tribunals had equal prestige, which is also true of the common AC. The idea, at

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[88] ICTR, *Prosecutor* v. *Semanza*, ICTR-97-20-T, Judgment and Sentence, 15 May 2003, para. 353. The principle of legality is now set out in artt. 22 and 23 of the ICC Statute, at the head of the "general principles" section.

[89] WERLE G., *Principles of International Criminal Law*, cit., p. 32.

[90] VAN SCHAACK B., "*Crimen sine Lege*: Judicial Lawmaking at the Intersection of Law and Morals", Georgetown LJ, 97, 2008, p. 119.

[91] The UN response to atrocity crimes in Rwanda followed a similar pattern to the one taken as to Yugoslavia: the SC condemned the violence (UN Doc. S/Res/918, S/Res/925, 1994); an investigatory commission was established (UN Doc. S/Res/935, 1994); the SG prepared reports (UN Doc. S/1994/640, S/1994/879, 1994); the SC created the Tribunal (UN Doc. S/Res/955, 1994), see GUILDFOYLE D., *International Criminal Law*, OUP, Oxford, 2016, p. 81.

[92] AKHAVAN P., *The International Criminal Tribunal for Rwanda*, cit., p. 194.

least in theory, was economy of scale, as well as uniformity of both prosecutorial policy and appellate jurisprudence [93].

However, the facts behind the separation of the OTP between the two *ad hoc* Tribunals go back to when Carla Del Ponte initiated investigations of the RPF commanders for three massacres that took place during the civil war that ended the Rwandan genocide. Rwanda's President Paul Kagame put pressure on Del Ponte to withdraw her plans by denying exit visas to Rwandan witnesses traveling to the ICTR in Arusha, thereby triggering the suspension of several trials. When Del Ponte publicized Kagame's obstruction and asked the UN SC to enforce a mandate that it had itself authorized, the SC responded six months later with an account calling for a "constructive dialogue" between the ICTR and the Tutsi-led government over what should have been a binding legal obligation. Shortly thereafter, the US tried to break a deal between Del Ponte and Rwanda in which the RPF trials would be delegated to the Rwandan courts. After she refused, the SC stripped her of the Rwandan portfolio by creating separate chief prosecutors – one for the ICTY and the other for the ICTR. Some features of this episode were unique to the ICTR: Rwanda's ability to deflect pressure for accountability by shaming Western governments for their inaction during the genocide and the SC's authority to remove a chief prosecutor [94].

In addition to gross human rights violations committed in the territory of Rwanda, the ICTR jurisdiction extended to serious violations of humanitarian law committed by Rwandan citizens "in the territory of neighbouring States" (artt. 1, 7), including crimes committed in refugee camps outside Rwanda [95].

The *personal jurisdiction* of the Tribunal was restricted to natural persons [96]. The ICTR Statute then codified the no-exception rule on account of immunities under international law: the official position of an accused person, such as a Head of State, shall not have relieved that person from criminal responsibility (art. 6(2)). As seen in the previous section, the ICTR jurisdiction *ratione materiae* covered not only genocide, but also crimes against humanity and violations of art. 3 common to the 1949 Geneva Conventions and of Additional Protocol II [97]. The

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[93] SCHABAS W.A., *An Introduction to the International Criminal Law*, CUP, Cambridge, 2011, p. 13.

[94] RODMAN K.A., *How Politics Shapes the Contributions of Justice: Lessons from the ICTY and the ICTR*, Symposium on the ICTY and ICTR: Broadening the Debate, originally online on 23 November 2016, https://www.asil.org/sites/default/files/Rodman%2C%20How%20Politics%20Shapes%20the%20Contributions%20of%20Justice.pdf (2/20/2019).

[95] See UN Doc. S/1995/134, cit., para. 13.

[96] Art. 5, ICTR Statute.

[97] The Statute of the Special Court for the Sierra Leone copied the ICTR Statute's provision by penalising violations of common art. 3 of the Geneva Conventions and Additional Protocol II.

ICTR Statute also de-linked crimes against humanity from the existence of an armed conflict.

The ICTR shared concurrent jurisdiction with national courts of all States (art. 8 of the Statute) but by Statute it also enjoyed primacy over those courts and could have asserted exclusive jurisdiction over any case that fell within its mandate. This arrangement made sense with the ICTR, at least at the beginning of its existence, because of an anticipated failure of national courts to address the envisaged crimes [98]. The primacy of the ICTR's jurisdiction over national courts was indeed one of the claims challenged by *Kanyabashi*, whose Defence contended that the Tribunal's establishment violated the principle of *jus de non evocando* [99].

In the TC's words, however, the ICTR was "far from being an institution designed for the purpose of removing, for political reasons, certain criminal offenders from fair and impartial justice and to have them prosecuted for political crimes before prejudiced arbitrators" [100]. In addition, "the primacy entrenched for the Tribunal [was] exclusively derived from the fact that the Tribunal [was] established under Chapter VII of the [UN] Charter, which in turn enable[d] the Tribunal to issue directly binding international legal orders and requests to States, irrespective of their consent" [101].

The controversial relationship between States and the ICTR however arose also from and was kept alive by the fact that *ad hoc* international criminal tribunals lacked a police force of their own to investigate crimes, collect evidence, and carry out arrests [102]. These judicial bodies are therefore necessarily dependent on States to do their work or to allow their work to be done, and that includes both States where crimes have occurred and any State where evidence of criminality might reside. Art. 28 of the ICTR Statute is self-explanatory in this regard: States are requested "to cooperate with the [ICTR] in the investigation and prosecution of persons accused of committing serious violations of

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However, contrary to the ICTR Statute, the Special Court Statute contained a residual war crimes provision penalising other serious violations of international humanitarian law, including recourse to child soldiers.

[98] CASSESE A., ACQUAVIVA G., FAN M., WHITING A. (eds.), *International Criminal Law*, OUP, Oxford, 2011, p. 525.

[99] ICTR, *Prosecutor* v. *Kanyabashi*, cit., para. 30 ff. This principle, originally derived from the constitutional law of civil law legal systems, implies that persons accused of certain crimes should retain the right to be tried before regular domestic criminal courts, rather than by politically founded *ad hoc* criminal tribunals.

[100] *Ivi*, para. 31.

[101] *Ivi*, para. 32.

[102] This challenge is common to all the other institutional models so far created to seek individual criminal accountability for international crimes: i.e. purely international tribunals, hybrid courts, the international system created by the ICC Statute, see CASSESE A., ACQUAVIVA G., FAN M., WHITING A., *International Criminal Law*, cit., p. 521.

international humanitarian law" and to "comply with no undue delay with any request for assistance or an order issued by a Trial Chamber" [103].

This reliant relationship between States and the ICTR inevitably goes to the heart of the question of the effectiveness of the Tribunal's work. The attitude that the same Rwandan government held along the duration of the ICTR's functioning is an interesting example of how often the Tribunal judicial capacity has been jeopardized.

It is interesting to remember that, displeased with some aspects of the SC Res. 955, Rwanda eventually cast the sole dissenting vote against the Tribunal's establishment [104]. The representative of the Rwandan government gave several reasons for their objection: the narrow temporal jurisdiction of the ICTR covering only events that occurred in 1994 and not the earlier massacres committed in 1990-1993; the initial existence of only two trial chambers, of six judges and the shared Prosecutor and AC with the ICTY, which seemed rather modest in the face of enormous crimes and the vast number of perpetrators; the possibility that nationals from "certain countries" it believed complicit in the civil war be nominated and serve as ICTR judges [105]; the exclusion of the death penalty from the possible measures of punishment [106]; and the location of the Tribunal outside Rwanda: namely, something that would have lessened the Tribunal's educational impact on the widespread culture of impunity dominant in the country [107].

Furthermore, Rwanda was not satisfied with the substantive jurisdiction of the ICTR. In the first place, it argued that the ICTR should try only genocide and not "minor" war crimes and, secondly, that the Statute should at least have indicated an order of priority on crimes to prosecute for the OTP.

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[103] On States' cooperation with the ICTR see more in para. 11, below.

[104] Rwanda was coincidentally a rotating member of the SC at the time. Only China abstained from voting, see UN Doc. S/PV.3453, 8 November 1994, p. 3. The Chinese representative to the UN explained that his government abstained both because it considered that the SC was exceeding its authority by invoking Chapter VII to establish an international criminal tribunal through a SC resolution and also because the SC should have consulted the Rwandan government further on the tribunal's format, see KAUFMAN Z.D., *United Nations Criminal Tribunal for Rwanda*, 2019, electronic copy available at: https://ssrn.com/abstract=3327004; DES FORGES A., LONGMAN T., *Legal Responses to Genocide in Rwanda*, cit., p. 54 ff.

[105] In saying "certain countries" Rwanda was, allegedly, referring to France, see GUILFOYLE D., *International Criminal Law*, cit., p. 82; SCHABAS W.A., *The UN International*, cit., p. 29.

[106] UNSC, Verbatim Record, SCOR, 3453 Meeting, 8 November 1994. On the issue of death penalty see more in para. 9, below.

[107] On the reasons to have had Arusha as the seat of the ICTR notwithstanding the Rwandan government's protests – a Tribunal in Rwanda would have achieved more in terms of accountability and national reconciliation – see the report of the UN SG on practical arrangements for the effective functioning of the ICTR, recommending Arusha as the seat of the Tribunal, UN Doc. S/1995/134, 13 February 1995.

A few years later, since the ICTR simply could not operate without the consent of Rwanda's government, the ICTR has been required to make certain political concessions to the Tutsi-led government. The most controversial of these concessions was the decision not to indict any member of the then current government despite the availability of reliable evidence of crimes committed by the RPF forces after taking power in July 1994 [108].

Today, the Tribunal's remaining judicial activity rests solely with the MICT [109]. The ICTR has completed its work with respect to the substantive cases for genocide and other serious violations of international humanitarian law committed in 1994 [110]; proceedings have been concluded for 85 accused [111], including 5 transferred to other jurisdictions (3 to Rwanda [112] and 2 to France [113]). Transferred cases are being monitored by the MICT. 5 fugitive cases have been transferred to Rwandan courts [114] and 3 more remain under MICT jurisdiction [115].

The time is ripe to hereafter explain the ICTR's accomplishments.

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[108] KOOSEDL D., "The Paradox of Impartiality: A Critical Defence of the International Criminal Tribunal for Rwanda", U. Miami ICLR, 19, 2012, p. 246. See also UN Doc. S/RES/935, 1 July 1994. This issue will receive more consideration in para. 10, below.

[109] The MICT started to hold the ICTR's residual functions on 1 July 2012.

[110] Since the last ICTR trial judgment has been delivered on 20 December 2012, in the *Ngirabatware* case, the completion strategy's deadline fixed in SC Res. 1503 (2003) has been retarded of two years, see *Report on the Completion Strategy of the ICTR as at 5 May 2014*, UN Doc. S/2014/343, 15 May 2014, p. 3.

[111] 31 convicted have been transferred to a State to serve sentence, 1 is still awaiting transfer to a State to serve the sentence, 22 convicted have served their sentence, 6 died before or while serving their sentence, 14 were acquitted and released, 2 had their indictments withdrawn, 1 died before being transferred to serve his sentence, 3 died before judgment, see *Key Figures of ICTR Cases*, September 2018, at http://www.irmct.org/sites/unictr.org/files/publications/ictr-key-figures-en.pdf (1/11/2019). The supervision of the sentences' enforcement falls on the MICT.

[112] Transferred indicted are: Munyagishari, Bernard (ICTR-05-89), Uwikindi, Jean-Bosco (ICTR-01-75), Ntaganzwa, Ladislas (ICTR-96-9).

[113] Transferred indicted are: Bucyibaruta, Laurent (ICTR-05-85), Munyeshyaka, Wencelas (ICTR-05-87).

[114] Fugitive cases wanted under Rwandan jurisdiction are: Kayishema Fulgence (ICTR-01-67), Munyarugarama Pheneas (ICTR-02-79), Ndimbati Aloys (ICTR-95-1F), Ryandikayo (ICTR-95-1E), Sikubwabo Charles (ICTR-95-1D), at http://www.unictr.org/en/cases, and http://www.irmct.org/en/cases/searching-fugitives (7/22/2018).

[115] Fugitive cases wanted under MICT jurisdiction are: Bizimana Augustin (ICTR-98-44), Kabuga Félicien (ICTR-98-44B), Mpiranya Protais (ICTR-00-56), *ibid*. On fugitives see also the Facebook page at https://www.facebook.com/RwandaGenocideFugitives/ (1/11/2019). On 24 August 2018, Judge Seon Ki Park confirmed an indictment dated 5 June 2018 submitted by the Prosecutor Brammertz for contempt of court and incitement to commit contempt for Maximilien Turinabo, Anselme Nzabonimpa, Jean de Dieu Ndagijimana, Marie Rose Fatuma, and Dick Prudence Munyeshuli, pursuant to Artt. 1(4)(a), 14(1) and 16(4) of the MICT's Statute and Rule 90 of the MICT's RPE, this case at https://www.irmct.org/en/cases/mict-18-116 (9/12/2019).