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# International Criminal Tribunals: Crimes

## Summary

International crimes appear as mass crimes. To overcome the dangers to human dignity and global stability, an international response is inescapable. It is clear that the above-mentioned crimes are diverse. It seems appropriate to review war crimes, crimes against humanity, the crime of genocide and the crime of aggression. The crime of terrorism will not be analyzed in depth. There can be no doubt that criminal justice bodies play a pivotal role in the implementation of human rights and international humanitarian law.

International criminal courts have been established by the Security Council under Chapter VII or by agreement between the UN and a state in crisis. Composite in nature, they can be divided into three categories: the first concerns *ad hoc* tribunals (the ICTY, the ICTR and the International Residual Mechanism for Criminal Tribunals), the second covers hybrid tribunals (the SCSL and the STL) and the third includes the chambers set up in Kosovo and East Timor. The first two categories need to be examined, with particular reference to the Security Council's power to establish, operate and neutralize the above-mentioned repressive bodies.

*Per se*, it should not be forgotten that *ad hoc* and hybrid tribunals are ephemeral jurisdictions on the grounds that their jurisdiction is circumscribed.

## Keywords

International crimes - 1949 Geneva Conventions - ICTY - ICTR - SCSL – UN Security Council.

## **Acronyms and abbreviations**

<b>GA</b>	UN General Assembly
<b>ICJ</b>	International Court of Justice
<b>ICC</b>	International Criminal Court
<b>UN</b>	United Nations
<b>PUF</b>	Presses universitaires de France (University Presses of France)
<b>ICTY</b>	International Criminal Tribunal for the former Yugoslavia
<b>ICTR</b>	International Criminal Tribunal for Rwanda
<b>SCSL</b>	Special Court for Sierra Leone
<b>TSL</b>	Special Tribunal for Lebanon
<b>TMIN</b>	International Military Tribunal for Nuremberg
<b>TMIEO</b>	International Military Tribunal for the Far East

# International crimes

## I. Definition

1. International crimes are diverse (the crime of genocide, crimes against humanity, war crimes and the crime of aggression). Each crime has its own criteria for determination. They are crimes committed on a large scale against persons or property, or mass crimes. What's more, they share common characteristics: they are international, universal and imprescriptible, without discrimination of any kind, governed by customary international law and subject to repression by domestic and international courts, but not subject to amnesty or pardon, and so on.

2. It should always be borne in mind that international crimes have the same constituent elements as domestic crimes. Under the statutes of international criminal jurisdictions, every crime is made up of a legal element, *mens rea* (moral element), and a material element, *actus reus*.

3. The distinctive feature of international crimes is that they cover offences of universal scope that offend human dignity and are provided for and punished by domestic laws and international texts, and enforced by domestic and international criminal courts.

## II. The diversity of the *ratione materiae* jurisdiction of international tribunals

4. *A priori*, international courts are responsible for punishing international crimes. The latter have similar characteristics, but are subject to an evolution from military tribunals to the ICC. It is therefore appropriate to analyze the material jurisdiction of the repressive judicial bodies according to the classic logic set out in Article 5 of the Rome Statute: the crime of genocide (1), crimes against humanity (2), war crimes (3) and the crime of aggression (4).

### 1) The crime of genocide

5. The term 'genocide' was first coined by the Polish jurist Raphaël Lemkin, who defined it as 'the destruction of a national, ethnic or religious group'.<sup>1</sup>

Article II of the Convention on the Prevention and Punishment of the Crime of Genocide of December 9, 1948 states that « In the present Convention, genocide means any of the following

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<sup>1</sup> R. MAISON, *Justice pénale internationale*, Collection « Droit fondamental », Paris, PUF, 1<sup>re</sup> éd., juin 2017, p. 130. The Convention on the Crime of Genocide was adopted by the UN General Assembly in resolution 260 A III of December 9, 1948.

acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group. »

6. On analysis, the crime of genocide is enshrined respectively in article 2 of the ICTR Statute, article 4 of the ICTY Statute, article 1 (1) of the Statute of the International Residual Mechanism for Criminal Tribunals, article 4 of the Statute of the Extraordinary Chambers in the Courts of Cambodia, article 6 of the Statute of the Court, article 5 of the Statute of the Extraordinary African Chambers and article 17 of the 1948 Code of Crimes against the Peace and Security of Mankind. In concrete terms, all these texts, in particular the Rome Statute, take up the definition of genocide established by the 1948 Geneva Convention<sup>2</sup>. In this case, the aforementioned article specifies the *mens rea*<sup>3</sup>, i.e. the intention or psychological element, and the *actus reus*<sup>4</sup>, the material element of the crime of genocide. *A fortiori*, jurisprudence requires an additional condition, the *dolus specialis*, i.e. the specific intention of the existence of genocide<sup>5</sup>. In any case, it makes little difference why or when the act was committed.

7. In so doing, the Geneva Convention has been implemented by the jurisprudence of the ICTR<sup>6</sup>. According to the latter, the notion of group falls into four categories: the national group (based

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<sup>2</sup> Rome Statute of ICC, Part 1: Jurisdiction, Admissibility and Applicable Law, Article 6, Crime of Genocide “For the purpose of this Statute, “genocide” means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

<sup>3</sup> ICTR, Trial Chamber II, *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Judgment, ICTR-95, 21 May 1997, p. 29, paras. 91 and 92.

<sup>4</sup> *Idem*, p. 32, paras. 100 and following.

<sup>5</sup> ICJ, *Croatia v. Serbia*, application of the Convention on Prevention and Punishment of the Crime of genocide, Judgment, 3 February 2015, p. 66 and following, paras. 143-148; ICC, Pre-trial Chamber, *The Prosecutor v. Oumar Hassan Ahmad Al Bashir*, 12 July 2010, ICC-02/05-01/09, p. 8, paras. 4 and following; ICTR, Trial Chamber II, *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Judgment, ICTR-95, 21 May 1997, p. 29, para. 89.

<sup>6</sup> ICTR, *The Prosecutor v. Akayesu*, ITCR- 96-4-T, 2 September 1998, p. 281; TPIR, Trial Chamber II, *The Prosecutor v. Clément Kayishema et Obed Ruzindana*, Judgement, ICTR-95, 21 May 1997, p. 29, paras. 91. 698 and following.

on the legal bond of nationality between its members), the ethnic group (based on a common culture or language), the racial group (linked to the hereditary character of physical persons) and the religious group (based on denomination)<sup>7</sup>.

8. It should be emphasized that the ICTR considers that « destroy a national, ethnical, racial or religious group, as such.

"Thus, the acts must be directed towards a specific group on these discriminatory grounds. An ethnic group is one whose members share a common language and culture; or, a group which distinguishes itself, as such (self-identification); or, a group identified as such by others, including perpetrators of the crimes (identification by others). A racial group is based on hereditary physical traits often identified with geography. A religious group includes denomination or mode of worship or a group sharing common belief »<sup>8</sup>.

It should be noted that the ICTR was the first court to convict for genocide<sup>9</sup>. The Rome Statute, after some hesitation, finally endorsed the definition of genocide established by the 1948 Convention and ICTR case law.

9. It follows that article 4 (3) of the Rome Statute and article 4 (3) of the Statute of the Cambodian Special Panels incriminate incitement, attempt, conspiracy, participation, etc., to commit genocide. Article III of the Convention of December 9, 1948 on the Crime of Genocide is reproduced *expressis verbis* :

« The following acts shall be punishable:

- (a) Genocide;
- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide ;
- (d) Attempt to commit genocide;
- (e) Complicity in genocide. »

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<sup>7</sup> O. BEAUVALLET, ‘‘ Article 6. Crime de génocide’’, cité par Raphaëlle NOLLEZ-GOLDBACH, *La Cour pénale internationale*, PUF, 2018, Cairn, p. 33.

<sup>8</sup> ICTR, Trial Chamber II, *The Prosecutor v. Clément Kayishema and Ober Ruzindana*, Judgment, ICTR-95, 21 May 1997, p. 32, para. 98.

<sup>9</sup> For the first punishment of crime of genocide, ICTR, *The Prosecutor v. Akayesu*, ICTR-96-4-T, 2 September 1998, p. 281, paras. 698 and following. That decision was confirmed on appeal. See Appeal Chamber, *The Prosecutor v. Jean Akayesu*, ICTR-96-4-T, 1 June 2001, p. 198.

However, the commission of genocide is presumed in accordance with Articles II and III of the Convention. It is for the prosecution to demonstrate, both incriminating and exonerating, in accordance with the law, who is the perpetrator responsible for this offence.

**10.** In 2005, the ICC judges ruled on the crime of genocide. This was the situation in Darfur referred to by the Security Council. According to the arrest warrant, the crime of genocide was committed by murder, physical or moral injury and genocide on each designated group. However, the judges stated in the arrest warrant issued against Mr. Oumar Al Bashir that there are no reasonable grounds to believe that he is responsible for three counts of genocide against the ethnic groups of the Four, Masalit and Zaghawa. The Prosecutor appealed the decision. The Appeals Chamber requested the Pre-Trial Chamber to re-examine the matter<sup>10</sup>. The crime of genocide was finally maintained<sup>11</sup>.

In 2018, he was ousted by a popular protest. The interim government has not indicated its willingness to transfer Al Bashir to the ICC. In 2024, he is not tried before the Court for refusal of cooperation by certain States parties and non-parties.

**11.** In addition, Article 17 of the draft Statute on Crimes against Peace and Security defines the crime of genocide in the same terms as the Geneva Convention. Admittedly, this text has not yet been adopted by States. Once adopted, it could be applied by domestic courts and the ICC. Consequently, the draft is not officially in force.

*A fortiori*, genocide is a matter of customary international law<sup>12</sup>. The ICJ has consistently held that this offence constitutes an obligation *erga omnes*, and that the prohibition of genocide is a matter of *jus cogens*, a peremptory norm of international law<sup>13</sup>.

## **2) Crime against humanity**

**12.** Both *de jure* and *de juris*, crimes against humanity appear for the first time in the Nuremberg Charter. Crimes against humanity are recognised respectively in Article 6 (c) of the Charter of

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<sup>10</sup> ICC, Pre-trial Chamber, *The Prosecutor v. Oumar Hassan Ahmad Al Bashir*, 12 July 2010, ICC-02/05-01/09, p. 9, paras. 6 and following.

<sup>11</sup> ICC, Appeals Chamber, *The Prosecutor v. Oumar Hassan Ahmad Al Bashir*, Judgment on the Prosecutor's appeal against the decision on the prosecution's application for the issuance of a warrant of arrest for Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-OA, 3 February 2010, p. 19, paras. 41 and 42.

<sup>12</sup> ICJ, *Reserve to the Convention on Prevention and Punishment of the Crime of genocide*, Advisory Opinions, Collection, 1951, p. 23; ICTR, Trial Chamber II, *The Prosecutor v. Clément Kayishema et Ober Ruzindana*, Judgment, ICTR-95, 21 May 1997, p. 29, para. 88.

<sup>13</sup> Barcelona Traduction, Light et Power Co. (*Belgique v. Espagne*, 1970); ICJ, *Democratic republic of Congo v. Rwanda*, Jurisdiction and Admissibility, Recueil, 2006, p. 31-32; ICTR, Trial Chamber II, *The Prosecutor v. Clément Kayishema et Ober Ruzindana*, Judgment, ICTR-95, 21 May 1997, p. 29, para. 88.

the Nuremberg Tribunal, Article 5 (c) of the Charter of the Tokyo Tribunal, Article 5 of the ICTY, Article 1 (1) of the Statute of the International Residual Mechanism for Criminal Tribunals, Article 2 of the SCSL Statute, Article 3 of the ICTR, Article 5 of the Extraordinary Chambers in the courts of Cambodia Statute, Article 6 of the Statute of the Extraordinary African Chambers, Article 2 of the SCSL and Article 18 of the 1996 Code of Crimes against the Peace and Security of Mankind. The Rome Statute includes the acts listed in Article 6 (c) of the Charter of the Nuremberg Tribunal. It should also be pointed out that most of these crimes against humanity can be classified as war crimes. Crimes against humanity and war crimes are dissociated by Article 6 of the Nuremberg Statute.

**13. *De lege lata***, Article 7 of the Rome Statute clearly lists the acts that may be classified as crimes against humanity<sup>14</sup>. The crime doit be committed “as part of a widespread or systematic

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<sup>14</sup> Rome Statute, Part 2: Jurisdiction, Admissibility and Applicable Law, Article 7 « 1. For the purpose of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

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



attack directed against any civilian population, and in recognition of such attack”<sup>15</sup>. What about the civilian population ? The civilian population is defined as opposed to “members of the armed forces and other lawful combatants”<sup>16</sup>.

14. Only the attack, and not the individual acts of the accused, must be “widespread or systematic”<sup>17</sup>. This is why an act can be considered a crime against humanity if it occurs in a certain context<sup>18</sup>. A widespread attack is directed against a plurality of victims<sup>19</sup>. Moreover, a systematic attack is understood to mean an attack perpetrated in application of a preconceived policy or plan<sup>20</sup>. This may involve acts and the improbability of their accidental nature<sup>21</sup>. In addition, the attack must meet one or other condition; more specifically, it may be systematic or widespread<sup>22</sup>, or both<sup>23</sup>, which therefore excludes isolated acts<sup>24</sup>. If the Pre-Trial Chamber concludes that the attack was widespread, it is not obliged to consider whether it was also

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(h) “The crime of apartheid” means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

(i) “Enforced disappearance of persons” means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of this Statute, it is understood that the term “gender” refers to the two sexes, male and female, within the context of society. The term “gender” does not indicate any meaning different from the above.

<sup>15</sup> In the same vein, see the Statute of Extraordinary Chambers in the Courts of Cambodia, Article 5 (2).

<sup>16</sup> ICC, Pre-Trial Chamber, *The Prosecutor v. Bemba*, Decision on the confirmation of charges, para. 78; ICTY, Trial Chamber, *The Prosecutor v. Kunarac and consorts*, Judgment, p. 25; ICC, Trial Chamber II, *The Prosecutor v. Katanga*, 7 March 2014, ICC-/01-04/07, p. 447, para. 1102.

<sup>17</sup> ICTY, Appeals Chamber, *The Prosecutor v. Kunarac and consorts*, Judgment, Case n°IT-96-23/1-A, p. 135, para. 431.

<sup>18</sup> ICTY, Trial Chamber, *The Prosecutor v. Kupreskic*, Case n°IT-95-16-T, Judgment, 14 January 2000, para. 550; ICTY, Trial Chamber, *The Prosecutor v. Tadic*, Case n°IT-94-T, Judgment, 7 May 1997, para. 649; Appeals Chamber, *The Prosecutor v. Kunarac and consorts*, Judgment, Case n°IT-96-23/1-A, p. 134, para. 427.

<sup>19</sup> ICTR, Trial Chamber II, *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Judgment, Case n°ICTR-95, 21 May 1997, p. 37, para. 123; Trial Chamber II, *The Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Judgment, Case n° IT-03-66-T, 30 November 2005, p. 73, para. 183; ICC, Trial Chamber II, *The Prosecutor v. Katanga*, 7 March 2014, ICC-/01-04/07, p. 445, para. 1098.

<sup>20</sup> ICTR, Trial Chamber II, *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Judgment, ICTR-95, 21 May 1997, p. 37, para. 123 ; ICC, Trial Chamber II, *The Prosecutor v. Katanga*, 7 March 2014, ICC-/01-04/07, p. 445, para. 1098.

<sup>21</sup> ICTY, Appeals Chamber, *The Prosecutor v. Blaskic*, para. 101; Trial Chamber II, *The Prosecutor v. Fatmir Limaj, Haradin Bala et Isak Musliu*, Judgment, IT-03-66-T, 30 November 2005, p. 73, para. 193.

<sup>22</sup> ICTR, Trial Chamber II, *The Prosecutor v. Clément Kayishema et Obed Ruzindana*, Judgment, ICTR-95, 21 May 1997, p. 37, para. 123; Trial Chamber, *The Prosecutor v. Kunarac*, para. 93; Trial Chamber II, *The Prosecutor v. Fatmir Limaj, Haradin Bala et Isak Musliu*, Judgment, IT-03-66-T, 30 November 2005, p. 73, para. 183 ; Appeals Chamber, *The Prosecutor v. Kordic*, para. 94.

<sup>23</sup> ICTY, Appeals Chamber, *The Prosecutor v. Kunarac*, Judgment, Case n°IT-96-23/1-A, para. 94; Trial Chamber II, *The Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Judgment, Case n°IT-03-66-T, 30 November 2005, p. 73, para. 183.

<sup>24</sup> ICTY, Appeals Chamber, *The Prosecutor v. Kunarac*, Judgment, Case n°IT-96-23/1-A, p. 134, para. 427.

systematic<sup>25</sup>. The conditions of scale and systematicity are not necessarily cumulative<sup>26</sup>. In any case, these two criteria seem difficult to separate<sup>27</sup>.

**15.** This reasoning was subsequently taken up by the ICTY's *Tadic jurisprudence* in 1995. The ICTY concluded that in the context of crimes against humanity, the attack was not limited to the use of armed force, but also included any ill-treatment inflicted on the civilian population<sup>28</sup>.

**16.** The ICTY Appeals Chamber has delineated the boundary between crimes against humanity and war crimes. It abandoned the link between crimes against humanity and other international crimes. The Court requires conduct that results in the commission of multiple acts, without necessarily being military in nature. It defines a crime against humanity as a campaign or operation against the civilian population. It specifies the elements constituting a crime against humanity, referring to case law.

**17.** However, crimes against humanity can be committed against a civilian population in times of peace as well as war. In addition, acts that may be considered crimes against humanity include murder, extermination and deportation, although this list is far from exhaustive. Political and military leaders and their accomplices are liable before the International military Tribunal.

**18.** It is worth recalling the relevant case law of the French *Cour de cassation*. In this respect, the *Klaus Barbie case* is evocative. Barbie was accused of crimes against humanity. The Indictment Division ordered his referral to the Assize Court. Crimes against humanity have been part of French law since 1964. In its ruling, the Cour de cassation clarified the concept of crimes against humanity: “Inhuman acts and persecutions which [...] have been systematically committed not only against persons on account of their membership of a racial or religious group, but also against opponents of this policy, whatever form their opposition may take, constitute imprescriptible crimes against humanity within the meaning of Article 65 (c) of the Statute of the Nuremberg International Military Tribunal annexed to the London Agreement of

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<sup>25</sup> ICTY, Appeals Chamber, *The Prosecutor v. Kunarac*, Judgment, Case n°IT-96-23/1-A, p. 30, para. 93; ICC, Pre-Trial Chamber, *The Prosecutor v. Katanga*, 30 September 2008, ICC-/01-04/07, p. 412 and following.

<sup>26</sup> ICTY, Trial Chamber, *The Prosecutor v. Tadic*, Case n°IT-95, paras. 646-647; ICTR, Trial Chamber, *The Prosecutor v. Akayesu*, Judgment, para. 579; ICTY, Trial Chamber, *The Prosecutor v. Kayishema*, para. 123 ; Rome Statute of the ICC, Article 7 (1).

<sup>27</sup> ICTY, Trial Chamber, *The Prosecutor v. Blaskic*, Judgment, p. 73, para. 207.

<sup>28</sup> ICTY, Appeals Chamber, *The Prosecutor v. Dusko Tadic*, paras. 67 and 70; Trial Chamber, *The Prosecutor v. Tadic*, Judgment, p. 562-572; Appeal Chamber, *The Prosecutor v. Kunarac*, para. 55; Trial Chamber, *The Prosecutor v. Zenil Delalic and consorts, Case Celebici*, paras. 184-185 ; Trial Chamber, *The Prosecutor v. Krnojelac*, par. 51; Trial Chamber, *The Prosecutor v. Naletilic*, para. 225; Trial Chamber II, *The Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Judgment, Case n°IT-03-66-T, 30 November 2005, p. 37, para. 83.

August 8, 1945, even though they would also qualify as war crimes under Article 6 (b) of that text.”<sup>29</sup>

The French Supreme Court overturns the distinction based on the victim's status. It ruled that a crime against humanity could be perpetrated against a combatant or a non-combatant. The Supreme Court reaffirmed this solution in the *Touvier ruling*<sup>30</sup>, followed by the *Papon ruling*<sup>31</sup>.

After settling the question of the distinction between war crimes and crimes against humanity, the Cour de cassation ruled that “crimes against humanity are imprescriptible by nature, their imprescriptibility being deduced [...] from the general principles of law recognized by all nations”<sup>32</sup>.

**20.** In the *Katanga case*, concerning the attack on the village of Bogoro, the ICC considers that the one hundred victims should be classified as crimes against humanity<sup>33</sup>. Systematic attacks against a population are qualified as crimes against humanity in the *Bemba case*<sup>34</sup>. The Court recalls that such conduct consists in the commission of multiple acts against civilians without necessarily being of a military nature<sup>35</sup>. Lastly, in application of Article 7 of the Statute of the Court, case law specifies that the attack may be “widespread or systematic”<sup>36</sup>. launched against a civilian population by the policy of a State. These constituent elements are essential to the qualification of a crime against humanity. This condition is sometimes combined, sometimes dissociated. The organization may be state or private. The attack may be launched by a private entity, as in the *case of Charles Taylor*<sup>37</sup>. Attack was defined by the *Kunarac jurisprudence* as “conduct [course of conduct] involving the commission of violence”. This was confirmed by the ICTY Appeals Chamber. This definition is widely shared by the ICC. Moreover, the notion of attack is distinct from that of “armed conflict” in the sense of the law of war, since an attack can occur without armed conflict. Moreover, the notion of conflict is not limited to the use of

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<sup>29</sup> See Cass. Crim., pourvoi n°85-95166, 20 December 1985, First application of crimes against humanity in France. That’s our traduction.

<sup>30</sup> Cass. Crim., 27 November 1992, pourvoi n°94-82590.

<sup>31</sup> Cass. Crim., 23 January 1997, Collection D., p. 249.

<sup>32</sup> Bull. Crim., n°34, JCP, II, 20197, 1984.

<sup>33</sup> ICC, Trial Chamber II, *The Prosecutor v. Katanga*, 7 March 2014, ICC-/01-04/07, p. 459 and following.

<sup>34</sup> ICC, *The Prosecutor v. Jean Pierre Bemba Gombo*, 15 June 2008, case n°ICC-01/05-01/08, p. 129.

<sup>35</sup> *Idem*.

<sup>36</sup> ICTY, Appeals Chamber, *The Prosecutor v. Tadic*, Case n°IT-1-A, Substances judgment, 15 July 1999, p. 116, para. 251 : ‘If the perpetrator has knowledge, either actual or virtual, that his acts were committed in a widespread or systematic manner [...], that is sufficient to hold him responsible for a crime against humanity. Consequently, the perpetrator must know that there is aggression against the civilian population, know that his act is consistent with the aggression [...]’

<sup>37</sup> SCSL, *The Prosecutor v. Charles Taylor*, 18 May 2012; R. MAISON, *Justice pénale internationale, op. cit.*, p. 130.

armed force. Article 7 (a) of the Rome Statute states that “an attack directed against any civilian population” may originate from a State or an organization.

**21.** The article 7 (2) of the ICC Statute stipulates that the attack must be launched against a specific group and target individuals within that group. The attack must be carried out in a “deliberate, massive and coordinated manner”. The Statute lists all such acts: murder, extermination, enslavement, deportation or forcible transfer of populations, imprisonment, torture, rape, sexual slavery, enforced prostitution, forced pregnancy and sterilization, all forms of sexual violence, persecution on political, racial, national, ethnic, cultural, religious or gender grounds, enforced disappearance, apartheid. Sexual slavery appears for the first time as a crime against humanity.

**22.** Also, two States, Ukraine and Guinea-Conakry, had referred situations of crimes against humanity to the Court's Prosecutor. First, it is worth recalling the Court's acceptance of jurisdiction over the events of November 21, 2013 to February 22, 2014 on Kiev's Maidan Square, with a death toll of 75 and injuries of 700. Following the assessment of the situation in Kiev, the Prosecutor concluded that the conditions required by Article 7-2 (a) of the Statute had not been met. The attack on the civilian population in Kiev was not widespread. In other words, it was limited to the city of Kiev. In view of this reasoning, it cannot be systematic. He therefore decided not to prosecute for lack of a reasonable basis.

**23.** In Guinea-Conakry, crimes were committed on September 28, 2009 at the Conakry stadium. The attack left 156 people dead and 109 women victims of rape. The Guinean authorities referred the situation to the Public Prosecutor, who described the attack as “widespread” but not “systematic”. He also concluded that there was no reasonable basis for the attack.

**24.** The Prosecutor considered that the attack on the population in Kiev was not generalized, but admitted that the crimes committed in Conakry were generalized. In fact, the crimes committed against the population were limited to one town and not extended to the whole country (Ukraine and Conakry). Are the Prosecutor's assessment criteria in line with Article 7 (2) (a) of the Statute? His assessment of these situations is debatable. However, the notion of reasonable basis is not defined, leaving the Prosecutor to assess the admission of situations on a case-by-case basis. It would seem advisable to establish an explicit definition of the notion of “reasonable basis” for initiating an investigation, and of “sufficient basis” for prosecution, in the Rome Statute, by virtue of the principle of legality of offences and penalties.

### 3) War crimes

25. Legally, the law of war is governed by conventions, specifically the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land<sup>38</sup>, the 1949 Geneva Conventions and their Additional Protocols, and the 1954 Convention on the Prohibition of Certain Weapons. War crimes refer extensively to the above-mentioned conventions in terms of definition, elements of crime, etc.

War crimes are also enshrined in article 6 (b) of the Charter of the Tribunal of Nuremberg, article 5 (b) of the Charter of the Tribunal of Tokyo, article 2 of the ICTY Statute, article 4 of the ICTR Statute, article 1 (1) of the Statute of International Residual Mechanism for Criminal Tribunals, article 7 of the Statute of the Extraordinary African Chambers and article 20 of the Code of Crimes against Peace and Security of 1996. Essentially, the aforementioned article is quite broad, incorporating the achievements of the jurisprudence of the ICTY and ICTR.

26. As things stand, war crimes are provided for in Article 8 of the Rome Statute of the Court, when they form part of a plan or policy, or when they are part of a series of crimes committed on a large scale. The aforementioned provision enshrines the classic distinction between international armed conflicts (Article 2, a, b) and non-international armed conflicts (Article 2, c, d, e, f)<sup>39</sup>, and makes the link between the conflict and the alleged crime<sup>40</sup>. In concrete terms, the acts that may be qualified as war crimes are set out in the above-mentioned provision<sup>41</sup>.

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<sup>38</sup> The architecture of this document comprises a preamble and 56 articles. This instrument sets out the rights and obligations of both civilian and military parties to an armed conflict. It essentially governs international conflicts.

<sup>39</sup> R. MAISON, *Justice pénale internationale*, *op. cit.*, p. 112.

<sup>40</sup> R. NOLLEZ-GOLDBACH, *La Cour pénale internationale*, *op. cit.*, p. 45.

<sup>41</sup> Rome Statute, Part II : “Jurisdiction, Admissibility and Applicable Law”, Article 8 « 1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

2. For the purpose of this Statute, “war crimes” means:

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(i) Wilful killing;

(ii) Torture or inhuman treatment, including biological experiments;

(iii) Wilfully causing great suffering, or serious injury to body or health;

(iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;

(vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;

(vii) Unlawful deportation or transfer or unlawful confinement;

(viii) Taking of hostages.

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;

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- (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
  - (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
  - (v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;
  - (vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;
  - (vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;
  - (viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;
  - (ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
  - (x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
  - (xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;
  - (xii) Declaring that no quarter will be given;
  - (xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;
  - (xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;
  - (xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;
  - (xvi) Pillaging a town or place, even when taken by assault;
  - (xvii) Employing poison or poisoned weapons;
  - (xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
  - (xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;
  - (xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;
  - (xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
  - (xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;
  - (xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;
  - (xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
  - (xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;
  - (xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities;
  - (xxvii) Employing weapons, which use microbial or other biological agents, or toxins, whatever their origin or method of production.
  - (xxviii) Employing weapons the primary effect of which is to injure by fragments which in the human body escape detection by X-rays.

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(xxix) Employing laser weapons specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision, that is to the naked eye or to the eye with corrective eyesight devices.

(c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause :

(i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(iii) Taking of hostages;

(iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

(d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(v) Pillaging a town or place, even when taken by assault;

(vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2

(f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;

(vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;

(viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;

(ix) Killing or wounding treacherously a combatant adversary;

(x) Declaring that no quarter will be given;

(xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;

(xiii) Employing poison or poisoned weapons;

(xiv) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

(xv) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;

(xvi) Employing weapons, which use microbial or other biological agents, or toxins, whatever their origin or method of production.

xvii) Employing weapons the primary effect of which is to injure by fragments which in the human body escape detection by X-rays.

(xviii) Employing laser weapons specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision, that is to the naked eye or to the eye with corrective eyesight devices.

(f) Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

**27.** The elements of these crimes are manifold. The characteristic elements of war crimes are laid down in the 1949 Geneva Convention and included in article 8-2 of the Rome Statute. This convention aims to protect civilians in the face of international conflict and violations of the customs of war. Article 8 (2) (a) of the ICC Statute also virtually reproduces the 1907 Hague Convention on International Armed Conflicts. As such, violations may be directed against persons, property or practices of warfare.

**28.** Firstly, war crimes are attacks on non-combatants: homicide, rape, torture, bodily harm, deportation, transfer of populations, illegal detention, hostage-taking, use of child soldiers.

Secondly, war crimes are attacks on property: destruction, appropriation, looting, attacks on non-military targets, attacks on educational, religious or historical buildings or hospitals, or environmental damage.

Thirdly, war crimes are prohibited war practices: forcing a prisoner of war to fight for an enemy country, killing a prisoner who has laid down his arms, attacking United Nations missions, using gas and certain types of chemical weapons.

**29.** The *Tadic case* is a perfect application of Article 8 of the ICC Statute. Indeed, the defense argued that there was no hostility in the Prijedor region, within the detention camp where Tadic had committed the alleged crimes. In other words, the defense argued that this was an internal conflict to which the ICTY Statute could not apply. The court ruled that « we find that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.»<sup>42</sup>

It follows from the *Kunarac judgment* that two general conditions must be met for article 3 of the Statute to apply: the existence of an armed conflict and a link between the conflict and the acts of the accused<sup>43</sup>.

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3. Nothing in paragraph 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.

<sup>42</sup> ICTY, Appeals Chamber, *The Prosecutor v. Dusko Tadic*, Cas n° IT-94-1, Judgment, concerning the Defense Appeal on the Preliminary objection as to jurisdiction, 2 October 1995, p. 13, para. 70; ICC, Trial Chamber II, *The Prosecutor v. Katanga*, Case n°ICC-/01-04/07, Judgment on application of article 74 of the Statute, 7 March 2014, p. 453 and following, para. 1173; ICC, Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on application of article 74 of the Statute, 14 March 2012, ICC-01/04-01/06, paras. 531 and following; SCLS, *The Prosecutor v. Moinina Fofana*, Case n°SCSL-2004-14-AR72 (E), Decision on preliminary motion based on lack of jurisdiction *materia* : nature of the army conflict, 25 May 2004, para. 21.

<sup>43</sup> ICTY, Appeals Chamber, *The Prosecutor v. Dusko Tadic*, Case n°IT-94-1, Judgment, 2 October 1995, p. 13, para. 413 ; Appeals Chamber, *The Prosecutor v. Dusko Tadic*, Case n°IT-94-1, Judgment, 2 October 1995, paras. 249 and 251 ; ICTY, *The Prosecutor v. Kunarac*, Case n°IT-96-23 and Case n°IT-96-23/1, 12 June 2002, p. 27, para. 83.



#### **4) The act of aggression, a prerequisite for the definition of the crime of aggression**

The definition of the act of aggression is a *sine qua non* condition **(a)** for the definition of the crime of aggression **(b)**.

##### **a) The act of aggression**

**31.** Classically, the word “aggression” derives from the Latin word *agressio*, and the latter from *agredi*<sup>44</sup>, which means a sudden, brutal and unprovoked attack by an act of force, among other things, against a state. Neither the Charter nor the Covenant of the League of Nations defines aggression.

**32.** The UN Charter defines aggression as “the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations”<sup>45</sup>. The guarantor of the international order under this definition remains primarily the UN Security Council, in accordance with Articles 39, 41 and 42 of the Charter. However, the Charter is silent on the conditions of application of the act of aggression, creating legal uncertainty. It is therefore up to the Security Council, subject to the purposes and principles of the Charter, to define the conditions of application of aggression.

The act of aggression is mentioned in one of the categories of situations referred to in Article 39 of the Charter. However, no explicit definition is provided by this article, which does not determine the various criteria.

**33.** At present, the definition of aggression is the work of the UN General Assembly. Pursuant to resolution 2330 (XXII)<sup>46</sup>, it decided to set up a special committee to propose a definition. The draft definition was submitted on March 12, 1974<sup>47</sup>.

**34.** Article 8 (bis) (2) of the Rome Statute defines an act of aggression as “the use by a State of armed force against the sovereignty, territorial integrity or political independence of another State in any manner inconsistent with the Charter of the United Nations”. For a better understanding of the definition enshrined in the Statute of the Court, it should be borne in mind that Article 8 (bis) (2) expressly reproduces Articles 1 and 3 of Resolution 3314 (1974).

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<sup>44</sup> CORNU Gérard (dir.), *Vocabulaire juridique*, Grand dictionnaire, Paris, PUF, 8<sup>e</sup> éd., Collection « Quadrige », février 2000, p. 41.

<sup>45</sup> UN Charter, Chapter I, « Purpose and principles », article 2 (4) ; UN GA, A/RES/2330, adopted 29th session, 1 638th meeting, 11 December 1957, para. 3.

<sup>46</sup> UN doc., A/RES/2330 (XXII), 18 December 1967.

<sup>47</sup> UN doc., A/RES/3314 (XXIX), 14 December 1974.

35. The Statute's definition of an act of aggression is autonomous from the UN Charter. It refers to Article 1 of General Assembly resolution 3314 (1974), which is inspired by Article 2 (4) of the Charter<sup>48</sup>. The General Assembly recognizes the prerogatives conferred on the Security Council. Its interpretation must be made in the light of the Charter.

36. Article 8 (bis), paragraph 2 of the Statute of the Court, revised in Kampala in June 2010 by the Assembly of States Parties, reproduces word for word all the acts of aggression listed in UN General Assembly resolution 3314. According to this provision, these acts are attack, invasion, annexation, occupation, bombardment, etc.<sup>49</sup>. However, the failure to declare war or the declaration of war is irrelevant in the light of UN General Assembly Resolution 3314 (XXIX) of December 14, 1974.

37. The act must be “in manifest violation of the Charter of the United Nations” in terms of “its nature, gravity and scale”<sup>50</sup>. This jurisprudential requirement is in addition to the pre-established criteria.

## **b) The specific definition of the crime of aggression in international criminal law**

38. The crime of aggression is defined in the Third Hague Convention of 1907 on the outbreak of hostilities. To define the contours of such an offence, we need to understand the right to use force or *jus ad bellum*<sup>51</sup>. It can be defined as the violation of the right to use force. The crime of aggression was defined by the 1948 Convention. This definition was enshrined in the Statute

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<sup>48</sup> UN Charter, Chapter I: Purposes and Principles, Article 2 (4) « All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.»

<sup>49</sup> Rome Statute, Part II: Jurisdiction, Admissibility and Applicable Law, Article 8 (bis) : (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(c) The blockade of the ports or coasts of a State by the armed forces of another State;

(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

<sup>50</sup> ASP, resolution 6, 13th plenary meeting, adopted par consensus, 11 June 2010, Annex ; Rome Statute, Part II: “Jurisdiction, Admissibility, and Applicable Law”, Article 8 (bis) (1).

<sup>51</sup> R. MAISON, *Justice pénale internationale, op. cit.*, p. 130.

as the six acts enumerated in article 6, namely “to destroy, in whole or in part, a national, ethnical, racial or religious group”.

**39.** It is on this basis that the crime of aggression was defined in article 6 (a) of the Nuremberg Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) as a “crime against peace”, a term taken up again in article 5 of the ICTY Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY)<sup>52</sup>.

**40** It is clear that the Tokyo International Military Tribunal considers that “it is men, and not abstract entities, who commit the crimes which must be punished as a sanction of international law”<sup>53</sup>. This responsibility has been confirmed by the ICTY. It is clear that States, by definition, cannot be subject to criminal sanctions similar to those provided by international penal systems<sup>54</sup>.

**41.** Since 1945, primary responsibility for the maintenance of international peace and security has been vested in the Security Council. It is the key body for assessing acts of aggression. As for the Court, it is empowered to classify crimes of aggression and to punish offenders. How can the Security Council's prerogatives be reconciled with the Court's responsibility to punish the perpetrators of crimes of aggression? The answer to this question is set out in article 15 (ter) of the Statute. In other words, the Court may exercise jurisdiction over crimes of aggression upon referral by the Security Council, following ratification or acceptance of the amendment by thirty States. The Court is not bound by an external finding.

Objectively, it may not accept the UN Security Council's characterization. The latter can block the Court's activities on the basis of Article 16 of the Statute of the Court.

**42.** On the basis of precedent, the ICC Statute reaffirms the Court's jurisdiction in paragraph 4 of the preamble, which states that it has jurisdiction over that the most serious crimes of concern to the international community<sup>55</sup>. Aggression was described by the Nuremberg International Military Tribunal as “the supreme crime, [which] does not differ from other war crimes in that

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<sup>52</sup> Charter of the Nuremberg Tribunal, Article 6 (a) “namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing”.

<sup>53</sup> M. KAMTO, *Aggression en droit international, extrait de l'agression, crime de l'individu*, éd. Pedone, Paris, France, p. 273.

<sup>54</sup> ICTY, *The Prosecutor v. Blaskic*, IT-95-14-AR bis, reaffirmation of the judgment Nuremberg Tribunal, p. 197, and Tokyo Tribunal, p. 1142, PCNICC/2002/WGCA/L.1; O. DE FROUVILLE, *Droit international pénal*, éd. A. Pedone, Paris, 2012, p. 313.

<sup>55</sup> Trial of the major war criminals before the International Military Tribunal, Nuremberg, 14 November 1945 - 1 October 1946, Judgement, p. 93.

it contains everything”. Maurice Kamto describes the crime of aggression as “the mother of war crimes and crimes against humanity”<sup>56</sup>. It should be emphasized that, in order to avoid any competition over the qualification of the question of aggression<sup>57</sup>, the Security Council has primary responsibility for peacekeeping under Article 24 of the UN Charter<sup>58</sup>. However, it can, under the imperial seal of Chapter VII, react within the framework of collective security to stop aggression. Of course, the Security Council cannot judge the perpetrators of crimes of aggression.

**43.** The definition of the crime of aggression was amended on June 11, 2010 at the Kampala conference: “crime of aggression” means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations<sup>59</sup>.

Prosecution of the crime of aggression is subject to certain conditions. First and foremost, States Parties must ratify to allow the Court to exercise its jurisdiction. The Court will be able to exercise its jurisdiction one year after ratification by thirty States Parties. The crime of aggression poses an ambiguity. A State party may refuse the Court's jurisdiction in the event of an act of aggression, in accordance with article 12 of the Statute. This mechanism makes it possible to mitigate criminal proceedings against the nationals of States that have not ratified the Statute. He is required to make a prior declaration. However, this declaration has no effect when the situation has been referred by the Security Council on the basis of articles 13 b, 15 (ter) and 15 (bis) of the Statute<sup>60</sup>.

As a matter of principle, *a notitia criminis* situation referred under the crime of aggression entails the exclusive exercise of investigations and prosecutions for all offences (the crime of genocide, crimes against humanity and war crimes) pursuant to articles 1, 5, 8 (bis), 15 (ter), 15 (bis), 53, 19 (1) and 119 (1) of the Rome Statute. No one can delimit the jurisdiction of the Court other than the judicial authorities (the Prosecutor and the judges). This does not fall within

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<sup>56</sup> M. KAMTO, *Agression en droit international*, op. cit., p. 274.

<sup>57</sup> P. GARGUILO, *Il controverso rapporto*, cité par M. CHIAVARIO, *La justice pénale internationale entre le passé et l'avenir*, D., 2003, Guiffè Editore, p. 122.

<sup>58</sup> G. GAJA, “*The Long Journey*”, cité par O. PORCHIA, *La justice pénale internationale entre le passé et l'avenir*, D., 2003, Guiffè Editore, p. 122.

<sup>59</sup> Rome Statute, Part II: Jurisdiction, Admissibility and Applicable Law, Article 8 (bis) (1).

<sup>60</sup> *Ibid*, Article 15 (bis) (9).

the competence of political bodies, more specifically neither the Security Council nor the States parties or third parties.

**44.** The crime of aggression and the crime against peace constitute crimes for which individual responsibility may be incurred, without prejudice to any State responsibility<sup>61</sup>. Aggression is an offence against international public order. It is characterized by material, formal and legal criteria. Aggression is a fluctuating concept. Chronologically, it is worth recalling its evolution<sup>62</sup>. The peace organ refers to the criteria laid down in the Charter. The peace body refers to the criteria set out in the Charter.

**45.** In international criminal law, the crime of aggression is defined for the first time by article 6 (a) as “namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing”.

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<sup>61</sup> Draft code of crimes against peace and security, 1996, Article 4.

<sup>62</sup> On the history of aggression: Article I of the Briand-Kellogg Pact of August 1928 condemned the use of war. At the end of the First World War, without the term “aggression” being mentioned, the Allies affirmed in Article 227 of the Treaty of Versailles that Wilhelm II was impeached for the supreme offense against international morality and the sacred authority of treaties. In 1919, the members of the League of Nations made provision in the Covenant for the prevention and restoration of peace in the event of a threat or danger of aggression. Article 10 of the SDN Covenant calls on member states to prevent “external aggression, the territorial integrity and political independence of all members”. According to the same article, in the event of aggression, the Council “shall ensure the fulfilment of this obligation”. In 1933, the London Convention was adopted by Romania, Spain, Poland, Latvia, Turkey, Persia, the Soviet Union, Finland and Afghanistan. This convention was inspired by the Briand Kellogg Pact. It establishes conditions identifying the aggressor state :

- (1) Declaration of war upon another State;
- (2) Invasion by its armed forces, with or without a declaration of war, of the territory of another State;
- (3) Attack by its land, naval or air forces, with or without a declaration of war, on the territory, vessels or aircraft of another State;
- (4) Naval blockade of the coasts or ports of another State;
- (5) Provision of support to armed bands formed in its territory which have invaded the territory of another State, or refusal, notwithstanding the request of the invaded State, to take, in its own territory, all the measures in its power to deprive those bands of all assistance or protection.

At the end of the 2nd World War, the London Agreement signed by the Allies, to which article 6 of the Nuremberg Statute is appended, enshrines the expression “crime against peace”, the forerunner of the crime of aggression, thus providing definitional criteria, and acts of aggression. The crime is also defined in article 5 of Tokyo Tribunal Charter. Still in 1945, it is not surprising that the United Nations, in Article 39 of the Charter, enshrined the “act of aggression” and designated the Security Council as its primary guardian. Its role is to warn of a threat to the peace, a breach of the peace or an act of aggression. It is authorized to use all available means to avert any danger to the peace. It should be noted, however, that the UN Charter does not clearly define acts of aggression. In 1950, the ILC indicated to the General Assembly that the Code of Crimes against the Peace and Security of Mankind had characteristics similar to those of aggression, the definition of which had been entrusted to a special committee. By resolution 897 (IX) of December 4, 1954, the General Assembly decided to adjourn work on the draft text. Adopting resolution 36/106 (1981), it invited the ILC to resume its work on drafting a Code of Crimes against the Peace and Security of Mankind. This work resulted in a draft code which has not yet been officially approved by the General Assembly. In resolution 3314 of December 14, 1974, the General Assembly adopted the legal definition of aggression and enumerated the acts of aggression. The various drafts of the definition of the crime of aggression were largely inspired by the various legal works. Finally, the definition is prescribed in article 8 (bis) of the ICC Statute.

46. This definition is taken almost literally by Article 5 (A) of the Charter of the Military Tribunal for the Far East. Article 16 of the draft Code of Crimes against the Peace and Security of Mankind also defines the crime of aggression in the following terms: “An individual who, as leader or organizer, actively participates in or orders the planning, preparation, initiation or waging of aggression committed by a State shall be responsible for a crime of aggression”. This definition has not yet been adopted by the Member States. This project is not in force.

47. Article 5 (b) of the Rome Statute places the crime of aggression among the crimes within the jurisdiction of the Court. It thus makes effective attribution conditional on the adoption of a definition by consensus. The specificity of the definition of the crime of aggression lies in the fact that it must inevitably be compatible with the UN Charter. This definition was reached at the Statute Review Conference held in Kampala from May to June 2010. However, it should be noted that the consensus reached was incorporated into Article 8 (bis) of the Statute of the Court.

48. The material elements (*actus reus* and *mens rea*) of this crime are mentioned in article 8 (bis) (1) of the Rome Statute. The assessment of the crime falls exclusively within the competence of the Court as a judicial authority.

49. The definition refers to certain criteria that can be summed up in any action: “person”, “responsibility within a state apparatus”, “act of aggression”, “violation of the UN Charter”. This is in line with the approach taken in the context of collective security. The result is uncertainty about the definition of the crime, and foreseeable difficulties for the Court in exercising such jurisdiction<sup>63</sup>. It is clear that the definition of this crime gives the Prosecutor and the Court a monopoly on the implementation of criminal proceedings, insofar as the Security Council does not intervene at this stage of the proceedings, or in the concrete implementation of the offence. It is linked to the UN Charter by the phrase “[...] constitutes a manifest violation of the Charter of the United Nations”. This criterion is subjective. This implies that the characterization of this offence will be interpreted with explicit reference to this text. Article 8 (bis) (1) and (2) of the Statute make explicit reference to the Charter. In practice, their interpretations should in principle recognize the characterization made by the Security Council.

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<sup>63</sup> ALABRUNE François, « La compétence de la Cour pénale internationale sur le crime d’agression », in FERNANDEZ Julian, PACREAU Xavier et UBÉDA-SAILLARD Muriel (dir.), *Statut de Rome de la Cour pénale internationale : Commentaire article par article*, Paris, éd. A. Pedone, 2<sup>e</sup> éd., vol. I, Collection « Statut de Rome », September 2019, p. 391.

**50.** Since the act of aggression must first be qualified as a crime, the responsibility of the perpetrator is defined under article 25 (1) of the Statute<sup>64</sup>. The difference of interpretation between the Security Council and the Court is not clear-cut. *A fortiori*, the principle of strict interpretation of criminal law prohibits any analogical interpretation.

According to this principle, “the definition of a crime is to be interpreted strictly and cannot be extended by analogy”<sup>65</sup>. This prevents the Court from referring to the characterization made by the Security Council<sup>66</sup>. It is eminently foreseeable that the issue of article 22 (2) may come under scrutiny in future trials<sup>67</sup>. However, failure by the Prosecutor and the judges to respect the aforementioned principle would be questionable. A general adaptation of the activation of the Court's jurisdiction over the crime of aggression would have been desirable, rather than the partial fragmentation of its jurisdiction. Article 4 of resolution 3314 (1974) authorizes the UN Security Council to qualify other acts of aggression. However, article 22 (2) of the Statute of the Court prohibits any teleological interpretation based on the criterion of aggression not provided for in article 8 (bis) (2) of the Statute. There is thus an incompatibility between the two texts<sup>68</sup>.

**51.** The characterization of the crime of aggression based on the UN Security Council's determination is not based on the criteria required by article 8 (bis) (2) of the Statute. It should be recalled that this constitutes an infringement of the principle of the legality of offences and penalties, which is a matter of domestic and international customary law. It is indisputable that the above-mentioned principle is a matter of *jus cogens*, which cannot be derogated from by any judicial or political organization, not even by the Security Council. It is regrettable that the Security Council did not adopt resolution 3314 (1974).

**52.** It has to be said that the criteria for an act of aggression are not exhaustive in the light of article 4 of resolution 3414 (1974). This article authorizes the Security Council to determine other acts of aggression under the UN Charter. Qualifications remain discretionary in this

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<sup>64</sup> Rome Statute, Part III: General Principles of Criminal Law, Article 25 (1).

<sup>65</sup> *Ibid.*, article 22 (2) ; GROVER Leena, « Interpreting the Crime of Aggression », in KREß Claus (dir.), *Crime of Aggression: commentary*, Cambridge University Press, 2017, p. 376.

<sup>66</sup> MCDUGALL Carrie, *The Crime of Aggression under the Rome Statute of the International Criminal Court*, Cambridge University Press, Cambridge Studies in International and Comparative Law, 2013, p. 100.

<sup>67</sup> *Ibid.*, p. 131.

<sup>68</sup> ASCENSIO Hervé, DECAUX Emmanuel et PELLET Alain, *Droit international pénal*, Paris, éd. A. Pedone, Collection « Centre international de droit de Paris Ouest Nanterre », 2012, p. 175.

respect. The result is the definition established by General Assembly resolution 3314 of December 14, 1974<sup>69</sup>.

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<sup>69</sup> UN General Assembly, A/RES/3314, 14 December 1974 ; ICC, Resolution ICC-ASP/10/Res. 6, approved by 13th meeting (by consensus), June 11, 2010, Annex I, Article 8 (bis); Rome Statute, Part II: Jurisdiction, Admissibility and Applicable law, Article 8 (bis):

- (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
- (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
- (c) The blockade of the ports or coasts of a State by the armed forces of another State;
- (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
- (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
- (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
- (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.



## Conclusion

**53.** International crimes, namely the crime of genocide<sup>70</sup>, crimes against humanity<sup>71</sup>, war crimes and the crime of aggression, are not subject to any statute of limitations.<sup>72</sup> Crimes against humanity are governed by *jus cogens*, i.e. peremptory norms which are clearly non-derogable. No body or organization is empowered to order the commission of such offences. Domestic courts are the first link in the international criminal justice chain in the application of human rights and international humanitarian law. In the event of incapacity or unwillingness, international courts are responsible.

**54.** The crime of terrorism has not been defined. However, a draft definition does exist, notably that of the Preparatory Committee<sup>73</sup>, as well as the jurisprudential applications established by the Special Tribunal for Lebanon.

**55.** It would be desirable to set up a committee which, on the basis of antecedents, could define this crime, in order to extend the jurisdiction of the International Criminal Court. This would enable States, the Prosecutor and the Security Council to activate the Court's jurisdiction for this purpose.

Criminalizing the crime of terrorism by means of an international convention would appear to be an additional lever in the protection of human rights and international humanitarian law.

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<sup>70</sup> The Extraordinary Chambers in the Courts of Cambodia Statute, Article 4 (2).

<sup>71</sup> *Idem*, Article 5 (1).

<sup>72</sup> Rome Statute, Part III: General Principles of Criminal Law, Article 29; Statute of Extraordinary Chambers in the Court of Cambodia, Article 4 (2) ; Statute of the Extraordinary Chambers in the Courts of Senegal, Article 5.

<sup>73</sup> See the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June - 17 July 1998, Official Documents, Volume III, page 21:

For the purposes of the present Statute, "crimes of terrorism" means:

(1) Undertaking, organizing, sponsoring, ordering, facilitating, financing, encouraging or tolerating acts of violence against another State directed at persons or property and of such a nature as to create terror, fear or insecurity in the minds of public figures, groups of persons, the general public or populations, for whatever considerations and purposes of a political, philosophical, ideological, racial, ethnic, religious or such other nature that may be invoked to justify them;

(2) An offence under the following Conventions:

(a) Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation;

(b) Convention for the Suppression of Unlawful Seizure of Aircraft;

(c) Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents;

(d) International Convention against the Taking of Hostages;

(e) Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation;

(f) Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf;

(3) An offence involving use of firearms, weapons, explosives and dangerous substances when used as a means to perpetrate indiscriminate violence involving death or serious bodily injury to persons or groups of persons or populations or serious damage to property.]

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## Summary of international crimes

### 1) Punishment of international crimes of a humanitarian nature

Offences	Sources	Positive Law	Application	Interest of justice	Interest of peace	Interest of humanity
<b>Crime of genocide</b>	Convention of 9 December 1948 ; ICTR, ICC, Statutes etc.	Yes	ICT and ICC	Yes	Yes	Yes
<b>War crimes</b>	1907 Hague Convention (IV) ; 1949 Geneva Conventions ; Statutes of ICT and ICC	Yes	ICT and ICC	Yes	Yes	Yes
<b>Crimes against humanity</b>	Statutes of ICT and ICC	Yes	ICT and ICC	Yes	Yes	Yes
<b>Crime of aggression</b>	A/RES/3314 (1974) and Security's resolutions ; Rome Statute and international military tribunals Statutes	Yes	ICT (IMTN and IMTFE)	Yes	Yes	Yes

## 2) The specific nature of the crime of aggression in international criminal law

Situation of aggression				
Referral actors : ICC States Parties, Prosecutor and Security Council				
Persons	Offences	Qualifiers	<i>Lege lata</i>	Application
State	Acte of aggression	Security Council	UN Charter, A/RES/3314 (XXXIX) ; Case Law of the ICJ ; Rome Statute	Yes
		Court		No
Individual person	Crime of aggression	Court	Rome Statute	No

### 3) The crime of terrorism (no international convention)

Offence	Positive Law	<i>De lege ferenda</i> (future)	Application	Interest of justice	Interest of peace	interest of humanity
Crime of terrorism	No	Yes	Yes (by the STL)	Yes	Yes	Yes

#### Comment

It should be stressed that terrorist acts are criminalised under domestic law and not under international criminal law. Furthermore, it is desirable to criminalise the crime of terrorism in international law on the grounds that it is largely contrary to human rights and international humanitarian Law.

## Overview of *ad hoc* and hybrid criminal tribunals

### I. Security Council and ICT

#### 1) *Ad hoc* tribunals and the Security Council

<i>Ad hoc</i> tribunals	Founder	Legal basis	Legislator	Regulatory authority	Neutralization	Comment
ICTY	Security Council	Chapter VII of the Charter and S/RES/827 (1993)	Security Council	Judges	S/RES/1966 (2010)	Intervention increased
ICTR		Chapter VII of the Charter and S/RES/955 (1994)				

## 2) International Residual Mechanism for Criminal Tribunals

Penal bodies	Founder	Legal basis	Closure	Mandate
Branch (ICTY)	Security Council	Chapter VII and S/RES/1966	No	A period of 4 years renewable by the Security Council 2022-2024 And 2024-2026
Branch (ICTR)				

### 3) Hybrid tribunals and the Security Council

#### a) The conventional hybrid court

<b>Tribunal</b>	<b>Founders</b>	<b>Creative act</b>	<b>Nature</b>	<b>External legal guarantee</b>	<b>Internal legal guarantee</b>
<b>SCSL</b>	UN and Sierra Leone	Agreement and S/RES/1315	Independent judicial body	Preamble	Judges article 2 (2) of the Statute  Prosecutor (article 3 (1) of agreement ; article 15 of the Statute



## b) Non-conventional hybrid courts

<b>Tribunals</b>	<b>Founder</b>	<b>Creative act</b>	<b>Nature</b>	<b>Closure</b>
<b>STL</b>	Security Council	S/RES/1757 (2007)	<b>Autonomous body</b>	No
<b>Timor special Panels</b>	Special representative (Under the authority of Security Council)	S/RES/1272 (1999)	No	Yes
<b>Special Chambers created in Kosovo</b>	Special representative (Under the authority of Security Council)	S/RES/1244 (1999)	No	Occasional

## II. The Special Chambers in the Domestic Courts

Tribunals	Founders	Creative acts	Nature	Closure
<p><b>Extraordinary Chambers in the courts of cambodia</b></p>	<p>UN and Cambodia</p>	<p>Agreement between UN and Cambodia ; A/RES/57/228 13 May 2003</p>	<p>Repressive bodies integrated into the judicial system Cambodian</p>	<p>No</p>
<p><b>The Extraordinary Chambers in the Courts of Senegal</b></p>	<p>African Union and Senegal</p>	<p>Agreement between Afriacan Union and Senegal ; Chambers Statute, 2013</p>	<p>Integrate Judicial bodies</p>	<p>Yes</p>