A Study of the Legal Heritage for Accountability of Individuals for Crimes against Humanity: A post 1945 Spectrum

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I. Introduction:

History is witness to the fact that wherever an individual or groups of individuals have become powerful, they have flagrantly tortured the weak and the defenseless. The truth behind the cliché "power corrupts and absolute power corrupts absolutely"[2] cannot be ignored. Even where power is legitimated and turned into a legally valid authority, abuse of power and torture of the weak and the defenseless has continued. In this back drop considerable legal mechanism has developed for the exercise of such raw power.

An international crime has been broadly defined as "an act universally recognized as criminal, that is, an act that is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the state that would have control over it under ordinary circumstances". Today, international criminal liability exists in respect of war crimes, crimes against humanity, genocide and torture. Other crimes such as terrorism-related crimes, enforced disappearances and extrajudicial killings can arguably also be considered international crimes.

International criminal law is a body of international law designed to prohibit certain categories of conduct commonly viewed as serious atrocities and to make perpetrators of such conduct criminally accountable for their perpetration. Principally, it deals with genocide, war crimes, crimes against humanity as well as the war of aggression.

"Classical" international law governs the relationships, rights, and responsibilities of states. Criminal law generally deals with prohibitions addressed to individuals, and penal sanctions for violation of those prohibition imposed by individual states. International criminal law comprises elements of both in that although its sources are those of international law, its consequences are penal sanctions imposed on individuals.

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There may be as many as twenty-four different international crimes. It may be useful to distinguish between the "core crimes" such as aggression, genocide, war crimes, and crimes against humanity—and other international crimes.

II. The Core Crimes:

II. I. Aggression

Among the four crimes covered by the Rome Statute for an International Criminal Court, the crime of aggression has been the most troublesome and controversial. The precedent for the crime of aggression was the crime against peace charge filed against the defendants at the Nuremberg Trials.[3]

As a consequence, the definition of aggression was not included in any multilateral convention, nor was it generally included as a crime in national criminal legislation. Most significantly, it does not appear in the statute of either the Yugoslavia or Rwanda Tribunals, and there have been no prosecutions for crimes against peace or aggression since the Nuremberg and Tokyo Trials and the trials of German and Japanese defendants that followed in their wake.[4]

It is thus perhaps surprising that aggression would appear in the Rome Statute for the International Criminal Court.[5] The court's jurisdiction would be deferred, however, until such time as the states parties have

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[3] John F. Murphy," Crimes Against Peace at the Nuremberg Trial, in The Nuremberg Trial and International Law", p. 141–53 (G. Ginsburgs & V.N. Kudriavtsev eds. 1990).as cited in John F. Murphy," Civil Liability for the Commission of International Crimes as an Alternative to Criminal Prosecution", Harvard Human Rights Journal , Vol. 12, 1999,p.1.

[4] In addition to the trials of Nazi leaders held before the International Military Tribunal, numerous prosecutions of Nazis below the level of those tried before the I.M.T. were held at Nuremberg under Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, Allied Control Council Law No. 10, 20 December 1945, Official Gazette of the Control Council for Germany, No. 3, Berlin, January 31, 1946, reprinted in Benjamin B. Ferencz. An International Criminal Court: A Step Toward World Peace 488 (1980). In these trials the judicial machinery was part of the occupation administration for the American zone. The Tokyo Tribunal, which consisted of eleven judges, was appointed by General MacArthur. Charter of the International Military Tribunal for the Far East, Jan. 19, 1946, amended April 26, 1946, 4 Bevans 20. The Tribunal tried 28 Japanese leaders and convicted 25. Other allied tribunals tried over 5000 other Japanese for war crimes. See M. Cherif Bassiouni, Editor's Note, in 3 International Criminal Law 97–98 (M. Cherif Bassiouni, ed. 1986).

[5] *See* art. 5(1) (d) of Rome Statute of The International Criminal Court.

defined the crime and set out the conditions under which the Court shall exercise jurisdiction with respect to this crime.[6] It remains to be seen whether the states parties will be able to accomplish this task.

II. II. Genocide

Scholars and practitioners of international law often regard genocide as the most heinous international crime. The Charter of the Nuremberg Tribunal did not expressly use the term "genocide," but the definition of the crimes against peace charge covered many acts today regarded as constituting genocide, the indictment of the defendants expressly charged them with genocide, and the prosecution used the term during the proceedings. Moreover, unlike the other crimes against humanity, the crime of genocide has been defined in a widely ratified multilateral convention—the Genocide Convention of 1948—and the prohibition against genocide is generally regarded as a jus cogens norm. Notably, both the Yugoslavia Tribunal and the Rwanda Tribunal have jurisdiction over the crime of genocide.

II. III. War Crimes

The law of war crimes has a long vintage and was arguably already well established by the time of the Nuremberg Trials.[7] The Geneva Conventions of 1949, as well as Additional Protocol I, designate certain "grave breaches"[8] as universal and extraditable offenses within the criminal jurisdiction of each state party and require states parties to search for alleged offenders, submit them for prosecution before their own courts, or alternatively, to extradite them to another state party. For its part, in 1953 the United Nations General Assembly adopted a resolution that, inter alia, reaffirms that war crimes and crimes against humanity are subject to universal jurisdiction, " and provides that persons accused of war crimes and crimes against humanity should be tried in the countries where they committed their crimes, that states shall cooperate on questions of extraditing such persons and that states shall not grant asylum to any person who is suspected of having committed a "crime against peace, a war crime or a crime against humanity."

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6 See id., at art. 5(2)

7 Ibid at 78–80.

8 Principles of International Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity, G.A. Res. 3074, U.N. GAOR, 28th Sess., Supp. No. 30, at 78, U.N. Doc. A/9030 (1973).as cited in http://www.law.harvard.edu, March 11, 2012, 11.32 am.

II. IV. Crimes against Humanity

Like aggression, but unlike genocide and war crimes, crimes against humanity have not been the subject of development through widely ratified multilateral treaties. Hence, development of the law on crimes against humanity has been primarily through customary international law. This evolution has resulted in a situation where the precise scope and content of crimes against humanity are uncertain.

As we have seen, the Charter of the Nuremberg Tribunal contained the charge of crimes against humanity, and this has been described as "the birth of the modern notion of crimes against humanity." Since the Nuremberg Trial, however, there has been no definition of crimes against humanity enjoying universal acceptance. Arguably, the most authoritative definition is that found in the Rome Statute for the International Criminal Court, since it is the product of deliberations stretching over several years and involving over 160 countries and numerous nongovernmental organizations and private experts.

Article 7[9] would, at least for the purposes of the Rome Statute, resolve a variety of issues that have arisen regarding the definition of crimes against humanity. A primary issue has been whether, as in the case of the charge at Nuremberg, there must be a connection between the crime and armed conflict. In keeping with the modern trend, Article 7[10] would not require any such connection.

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[9] Article 7 of the Rome Statute provides: 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.

[10] ibid

III. The Criminal Responsibility of Individuals for Violations of International Humanitarian Law:

There have been many terrible abuses of humanitarian law and customary international law stemming from official policy decisions that loom large in history—the Holocaust of the Jews and the dropping of the atom bombs on Hiroshima and Nagasaki during World War II, to name only two. In response to the massive destruction of World War II and in hope of preventing future wars, the international community formed the United Nations (U.N.) and began codifying longstanding principles of international law in treaty form.[11]

It has taken centuries for the principle of individual criminal responsibility to evolve in national law. The concept that a person is only culpable to the extent of his own free will or guilty mind can be traced to canonical law and the insights of Italian jurists in the Renaissance. Today, the national concept of individual criminal responsibility is represented by recognition of the concept's emancipation from collective responsibility, the release from immunity of state officials who previously relied on release based on the Act of State doctrine. As to international individual criminal responsibility, culpability was recognized and applied by the first generation of international criminal tribunals, namely the Nuremberg and Tokyo Tribunals in the early post-World War II era. The second generation of international criminal tribunals carried forward individual culpability with respect to international criminal law in the ad hoc International Criminal Tribunal for the former Yugoslavia (ICTY), and the ad hoc International Criminal Tribunal for Rwanda (ICTR). Evolution of individual criminal responsibility is carried on in the codification-process of international criminal law in the adoption of the 1998 Rome Statute of the International Criminal Court, which has created a permanent criminal forum, potentially with universal reach, on July 1, 2002.

Nuremberg's International Military Tribunal represented the starting point of modern war crimes law on the international level in holding individual war criminals responsible for international crimes; it ended the Act of State doctrine previously claimed as immunity by government officials to escape criminal liability for international crimes.

The laws of war or armed conflict also included humanitarian interests, and from the international war crimes law there has now developed a separate, but related, body of international humanitarian law that is now a branch of the international criminal law.

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[11] Elies Van Sliedregt, "The Criminal Responsibility of Individuals For Violations Of International Humanitarian Law", The Hague, The Netherlands: T.M.C. Asser Press. 2003. Pp. Xxiv, 437, ISBN: 90-6704-166-1.

The international legal provisions on war crimes and crimes against humanity have been adopted and developed within the framework of international humanitarian law, or the law of armed conflict, a special branch of international law which has its own peculiarities and which has gone through an intense period of growth, evolution and consolidation in the last 50 years.[12]

The rules of humanitarian law concerning international crimes and responsibility have not always appeared sufficiently clear. One of the thorniest problems is that relating to the legal nature of international crimes committed by individuals and considered as serious violations of the rules of humanitarian law[13]. As regards the traditional tripartition — crimes against peace, war crimes and crimes against humanity — this paper will be devoted essentially to the latter two categories, which are more closely linked to the core of international humanitarian law and are of major interest at this tormented end of the twentieth century. Indeed, the world today is confronted by a disturbing proliferation of conflicts which are no longer international in nature, as was traditionally the case, and in which the basic problem regarding the classification of offences seems to be that the borderline between war crimes and crimes against humanity appears blurred.

The following section will attempt to analyse the development of crimes within the international legal and jurisdictional framework, starting with the most doubtful precedents (even from the distant past) and then concentrating primarily on the decisions of the Nuremberg and Tokyo International Military Tribunals. The activities of these Tribunals marked the beginning of an important legal evolution, which was later more clearly defined with the setting-up of the ad hoc Tribunals for the former Yugoslavia and for Rwanda and, last but not least, with the diplomatic conference that adopted the Rome Statute of the International Criminal Court.

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[12] Edoardo Greppi, “The evolution of individual criminal responsibility under international law”, International Review of the Red Cross, No. 835.

[13] G. Sperduti, “Crimini internazionali”, Enciclopedia del diritto, XI, 1962, p. 337;as cited in Edoardo Greppi, The evolution of individual criminal responsibility under international law, IRRC, No. 835 as cited in http://www.ICRC.com,February 21, 2012,11.55 am.

IV. War Crimes and Crimes against Humanity--- Origin and Evolution of a Legal Sphere:

IV. I. Before the Nuremberg and Tokyo trials

In the modern history the first reference to a tribunal to try international crimes is contained in the Article 227[14] of the Treaty of Versailles[15], which was concluded at the end of the World War I. It provided for the prosecution of Keiser Wilhelm II before an international tribunal for the "supreme offence against international morality and the sanctity of treaties". Article 228[16] also required that the German Government surrender to the Allies anyone accused of having committed war crimes to enable their prosecution by an international military tribunal. Owing to political considerations, the prospect of international adjudication did not materialize. In 1937, the League of Nations adopted a convention against terrorism, whose protocol contained a statute for an International Criminal Court.

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[14] Article 227: The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties.
A special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defence. It will be composed of five judges, one appointed by each of the following Powers: namely, the United States of America, Great Britain, France, Italy and Japan.
In its decision the tribunal will be guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality. It will be its duty to fix the punishment which it considers should be imposed.
The Allied and Associated Powers will address a request to the Government of the Netherlands for the surrender to them of the ex- Emperor in order that he may be put on trial.

[15] League of Nations Offcial Journal 3 (1920), 11 Martens Nouveau Recueil (3d) 323, in M.Cherif Bossiouni, A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal, (Dordrecht, 1987), pp.2-5.

[16] Article 228: The German Government recognises the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. Such persons shall, if found guilty, be sentenced to punishments laid down by law. This provision will apply notwithstanding any proceedings or prosecution before a tribunal in Germany or in the territory of her allies.
The German Government shall hand over to the Allied and Associated Powers, or to such one of them as shall so request, all persons accused of having committed an act in violation of the laws and customs of war, who are specified either by name or by the rank, office or employment which they held under the German authorities.

However, this Convention never entered into effect because of insufficient ratifications[17].

IV. II. Nuremberg and Tokyo International Tribunals

It was only after the Second World War that a movement started up within the international community which clearly began to shape a deeper consciousness of the need to prosecute serious violations of the laws of war, with regard both to the traditional responsibility of States and to the personal responsibility of individuals[18]. The horrible crimes committed by the Nazis and the Japanese led to a quick conclusion of agreements among the Allied Powers and to the subsequent establishment of the Nuremberg and Tokyo International Military Tribunals "for the trial of war criminals whose offences have no particular geographical location whether they be accused individually or in their capacity as members of organisations or groups or in both capacities"[19]. These special jurisdictions also took into account the new categories of crimes against humanity and crimes against peace.

Article 6[20] of the Charter of the Nuremberg International Military Tribunal established the legal basis for trying individuals accused of the acts of crimes against peace, war crimes, crime against humanity.

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[17] Y.S.R. Murthy, "A Giant Forward or Delusion- an evaluation of the Rome Statute of the international criminal court", IJIL, vol.40 (2000) p.507

[18] "Pour la première fois, les crimes de guerre, les crimes contre la paix, les crimes contre l'humanité sont expressément prévus et définis dans leurs éléments constitutifs par un texte conventionnel", P. Daillier/A. Pellet, Droit international public, Paris, 1999, p. 676. See also D.W. Greig International Law, London, 1976, p. 115 ; M. Giuliano/T. Scovazzi/T. Treves, Diritto internazionale, Parte generale, Milano, 1991, p. 183 as cited in http://www.ICRC.com, February 21, 2012,11.55 am.

[19] Art. 1 of the London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, of 8 August 1945, in Schindler/Toman, p. 911.

[20] Article 6: The Tribunal established by the Agreement referred to m Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.
The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility: (a) crimes against peace: 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; (b) war crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in

As far as jurisdiction ratione personae is concerned, it covered "leaders, organisers, instigators and accomplices" who had taken part in the formulation or execution of a common plan or conspiracy to commit any of those crimes: all of them were considered for "all acts performed by any persons in the execution of such plan".

IV. III. International legal heritage after the Nuremberg and Tokyo trials

The Nuremberg trials (and, with a minor impact, the Tokyo trials) produced a large number of judgments, which have greatly contributed to the forming of case law regarding individual criminal responsibility under international law. The jurisdictional experience of Nuremberg and Tokyo marked the start of a gradual process of precise formulation and consolidation of principles and rules during which States and international organizations (namely, the United Nations and the International Committee of the Red Cross) launched initiatives to bring about codification through the adoption of treaties. As early as 11 December 1946, the UN General Assembly adopted by unanimous vote Resolution 95(I), entitled "Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal"[21]. After "having taken note" of the London Agreement of 8 August 1945 and its annexed Charter (and of the parallel documents relating to the Tokyo Tribunal), the General Assembly took two important steps. The first one was of considerable legal importance: the General Assembly "affirmed" the principles of international law recognized by both the Charter and the Judgment of the Nuremberg Tribunal. This meant that in the General Assembly's view the Tribunal had taken into account already existing principles of international law, which the court had only to "recognize". The second was a commitment to have these

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occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity; (c)crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

[21] Article 6 of the Nuremberg Charter has since come to represent general international law. I. Brownlie, "Principles of Public International Law, Oxford", 1991, p. 562.

principles codified by the International Law Commission (ILC), a subsidiary organ of the UN General Assembly. Through this resolution the UN confirmed that there were a number of general principles, belonging to customary law, which the Nuremberg Charter and Judgment had "recognized" and which it appeared important to incorporate into a major instrument of codification (either by way of a "general codification of offences against the peace and security of mankind" or even as an "international criminal code"). By the same token the resolution recognized the customary law nature of the provisions contained in the London Agreement.

In 1950, the ILC adopted a report on the "Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgement of the Tribunal". The ILC report does not discuss whether these principles are part of positive international law or not, or to what extent. For the ILC, the General Assembly had already "affirmed" that they belonged to international law.

Already on 9 December 1948, on the eve of the adoption of the Universal Declaration of Human Rights, an important development of the concept of crimes against humanity led to the adoption (by 56 votes to none) of the Convention on the Prevention and Punishment of the Crime of Genocide[22]. The Convention, which entered into force on 12 January 1951, clearly classifies genocide, whether committed in time of peace or in time of war, as a crime under international law. Article 2 defines genocide as "acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group", such as killing members of the group, causing serious bodily or mental harm to them, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures intended to prevent births within the group, forcibly transferring children of the group to another group. Article 3 of the Convention states that such acts are considered punishable as are various degrees of involvement in them: conspiracy to commit the acts, direct and public incitement, attempts or complicity. But it is Article 4 that establishes the obligation to punish not only "rulers" or "public officials", but also "private individuals". As for Article 6[23], it places the competence to try offenders in the hands of both domestic and international tribunals.

It follows that this important Convention introduces a new crime under international law, directly linked to the legal category already established by Article 6 of the Nuremberg Charter, that of crimes against humanity. And, again, international treaty law goes far beyond the traditional boundaries of State responsibility, underlining that individuals are "in the

[22] Ibid.
[23] Supra note 22

front line" with respect to obligations under a particular branch of international law. And, in keeping with the previous documents, the Genocide Convention offers a broad definition of the crime of genocide and of various levels of participation in it (direct acts, conspiracy, incitement, attempts, complicity). The customary nature of the principles which form the basis of the Convention has been recognized by the International Court of Justice.[24] Shortly afterwards, the four Geneva Conventions of 12 August 1949, drafted on the initiative of the ICRC in the wake of the dramatic experiences of the Second World War, reshaped the entire treaty-based system dealing with the protection of war victims. The parties to these Conventions undertake the basic general obligation "to respect and to ensure respect" for their rules "in all circumstances" (Article 1 common to the four treaties).

An entire chapter of each of the Geneva Conventions deals with acts against protected persons. They are called "grave breaches"[25]— and not war crimes —, but they are undoubtedly crimes under international law. These acts are defined in detail in Article 50[26] of the First Convention, Article 51[27] of the Second Convention, Article 130[28] of the Third Convention and Article

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[24] Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion of 18 May 1951, I.C.J. Reports, 1951, p. 23.

[25] G. Doucet, "La qualification des infractions graves au droit international humanitaire", in F. Kalshoven/Y. Sandoz (Eds), Implementation of International Humanitarian Law, Dordrecht/ Boston/London 1987, p. 79 as cited in http://www.ICRC.com, February 21, 2012, 11.55 am.

[26] Article 50: Grave breaches to which the preceding Article50 relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

[27] Article 51: Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

[28] Art 130. Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.

147[29] of the Fourth Convention, and include crimes such as willful killing, torture or inhuman treatment (including biological experiments), willfully causing great suffering or serious injury to body or health, extensive destruction or appropriation of property, compelling a prisoner of war to serve in the forces of a hostile power or willfully depriving him of the right to a fair and regular trial, unlawful deportation, the transfer or confinement of a protected person, and the taking of hostages "not justified by military necessity and carried out unlawfully and wantonly". As far as the scope of application ratione personae is concerned, the Conventions establish the responsibility of the direct authors of those grave breaches and that of their superiors. The scope of the rules is, in fact, very wide since the word "person" comprises both civilians and combatants, whether the latter are members of official or unofficial forces.

V. Evolution in the 1990s--- From the Ad Hoc Tribunals to the International Criminal Court:

An important step in the lengthy process of developing rules on individual criminal responsibility under international law was taken with the setting-up of the two ad hoc Tribunals for the prosecution of crimes committed, respectively, in the former Yugoslavia (ICTFY) and in Rwanda (ICTR). These Tribunals represent major progress towards the institution of a kind of permanent jurisdiction. But they have also provided clarification as regards the substance of what is becoming a sort of international criminal code, in the sense envisaged by the UN General Assembly in its Resolution 95 (I).

The various UN Security Council resolutions on the establishment of tribunals for the prosecution of individuals responsible for acts committed in the former Yugoslavia and in Rwanda contain provisions on acts punishable under international law[30]. In particular, Articles 2, 3, 4 and 5 of the Statute of

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[29] Art. 147: Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

[30] Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, adopted 25 May 1993 by SC

the International Tribunal for the former Yugoslavia enumerates the different crimes coming under the jurisdiction of the court. Article 2[31], on grave breaches of the 1949 Geneva Conventions, gives the Tribunal the power to prosecute persons "committing or ordering to commit" such grave breaches. Article 3[32] enlarges the scope to cover violations of the laws and customs of war. Article 4 [33] reproduces Articles 2 and 3 of the 1948 Genocide Convention.

Article 5[34] authorizes the Tribunal to prosecute persons responsible for crimes committed against civilians in armed conflicts "whether

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Resolution 827/1993; text in UN Doc. S/25704 (1993) as cited in http://www.ICRC.com, February 21, 2012,11.55 am..

31 Article 2: Grave breaches of the Geneva Conventions of 1949**:**The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention: (a) wilful killing; (b) torture or inhuman treatment, including biological experiments;(c) wilfully causing great suffering or serious injury to body or health; (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power; (f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial; (g) unlawful deportation or transfer or unlawful confinement of a civilian; (h) taking civilians as hostages.

32 Article 3: Violations of the laws or customs of war**:** The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to: (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering; (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity; (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings; (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science; (e) plunder of public or private property.

33 Article 4: Genocide: 1. The International Tribunal shall have the power to prosecute persons committing genocide. 2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a nationa, 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. 3. 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.

34 Article 5: Crimes against humanity: The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed

international or internal in character". In the already codified tradition, Article 7[35] gives a wide scope to "individual criminal responsibility", covering all persons who "planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime". The responsibility of a person with an official position (head of State or government, government official) and the effects of superior orders are treated in Article 7 along the same lines as in the Nuremberg Charter and the ILC report of 1950.

They are inhumane acts that by their extent and gravity go beyond the limits tolerable to the international community, which must perforce demand their punishment. But crimes against humanity also transcend the individual because when the individual is assaulted, humanity comes under attack and is negated. It is therefore the concept of humanity as victim which essentially characterizes crimes against humanity". Obviously, no distinction is made between war and peace, international or internal armed conflicts. What is identified as the core principle is the concept of humanity itself. The individual, the victim, becomes part of a much broader concept: that of mankind.

The structure of Article 7, with its two parts, reflects a new approach: the first part enumerates acts that constitute crimes against humanity and the second offers definitions for some of them.

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in armed conflict, whether international or internal in character, and directed against any civilian population:(a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; (i) other inhumane acts.

[35] Article 7: Individual criminal responsibility: 1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime. 2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment. 3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof. 4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.

VI. A Few Concluding Remarks:

The categories of war crimes, crimes against humanity and genocide, considered as part of the broader category of crimina juris gentium, have developed in a significant and considerable way since the Second World War.

A proliferation of treaties and constant work to expand the scope of international law by creating new jurisdictions and by clarifying concepts both in legal provisions and in judicial decisions are the salient features of the evolution of international jurisdiction.

When Article 6 of the Nuremberg Charter was adopted, its provisions on war crimes were already declaratory of general international law of customary origin. The Nuremberg Judgment stated in that regard that "with respect to war crimes, however, as has already been pointed out, the crimes defined by Article 6, of the Charter were already recognized as war crimes under international law. That violation of these provisions constituted crimes for which the guilty individuals were punishable was too well settled to admit of argument"[36]. As we have seen, however, the customary origins of rules on war crimes go back nearly half a millennium.

The notion of crimes against humanity appears to have undergone the greatest development. Under the Nuremberg Charter, crimes against humanity were linked to war crimes (which in turn were connected to crimes against peace). The point of reference was the Second World War, and crimes were considered only if committed before or during that war. But the Judgment anticipated the autonomous character of such crimes: Julius Streicher and Baldur von Schirach were convicted solely of crimes against humanity[37]. For Streicher, this led to the death sentence. Although explicitly recognized only after the Second World War, crimes against humanity were taken into account already long before as they were seen to be closely linked to the principle of humanity, which is a cornerstone of humanitarian law. Von Hagenbach and others responsible for *crimina juris gentium*, in war, in peace and in borderline situations, committed acts which could be termed crimes against humanity under international law. After 1946, it appeared beyond any doubt that this category of crimes had become part of customary international law. The judgment of the ICTY in the *Tadic* case affirmed it openly. The Rwanda Statute considers crimes against humanity an autonomous category. The connection with war crimes has disappeared: Article 1 of the 1968 Convention on the Non-Applicability of Statutory

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[36] Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946, Official Documents and Proceedings, Nuremberg, 1947, p. 253.

[37] Ibid., pp. 301-304 and 317-320.

Limitations to War Crimes and Crimes Against Humanity, referring to crimes against humanity under Article 6 of the Nuremberg Charter, completes the wording with "whether committed in time of war or in time of peace".

If war crimes and crimes against humanity are now two autonomous, self-sustained categories, it cannot be denied that they are often closely linked in modern conflicts, especially in connection with crimes against the civilian population. Murder, deportation and other acts in the long lists that appear in recent instruments are clear examples of connection and overlapping. The four Geneva Conventions and Protocol I codify a significant range of acts and situations which demonstrate that violations can be classified both as war crimes and crimes against humanity.

An important contribution to the evolution of the concept of individual criminal responsibility has been made by the Draft Code of Offences against the Peace and Security of Mankind, prepared by the International Law Commission. Already in the 1951 and 1954 drafts[38], Article 1 provided that "offences against the peace and security of mankind are crimes under international law, for which the responsible individual shall be punished". Article 1 of the 1996 text now states that "crimes against the peace and security of mankind are crimes under international law, and punishable as such, whether or not they are punishable under national law"[39]. According to Article 2, "a crime against the peace and security of mankind entails individual responsibility".

Not only has the typology of crimes entailing individual responsibility been enlarged and given a clearer outline, but some general principles have also been laid down. When an act is being considered, the crime of omission is taken into account. Starting with the judgment of the US military commission in the *General Yamashita* case on atrocities committed against the civilian population in the Philippines, failure to prevent a crime from being committed has been considered to be an act as serious as the crime itself and deserving of equal punishment. "Where murder and rape and vicious revengeful actions are widespread offences, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops." [40]

Another important development should be mentioned here in relation to the practice of codifying international law: there is a growing

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[38] Yearbook of the International Law Commission, vol. II, 1954.

[39] Text in Yearbook of the International Law Commission, vol. II (2), 1996.

[40] Judgment of 7 December, 1945, UN War Crimes Commission, 4 Law Reports of the Trials of War Criminals, 1948, 3, as cited in http.//www.ICRC.com, February 21, 2012,11.55 am.

connection between humanitarian law and human rights law. Indeed, some recently adopted provisions of humanitarian law appear clearly influenced by human rights rules and standards of protection. The Rome Statute refers to concepts like "personal dignity", the prohibition of "humiliating and degrading treatment", "judicial guarantees", the prohibition of "persecution", discrimination and *apartheid*. These concepts have all been established in the main instruments adopted by the UN for the protection of the rights of the individual. However, the principle of humanity is at the core of international humanitarian law and forms the basis of all the developments discussed in this paper[41]. Moreover, the principle of individual responsibility has clearly been established by humanitarian law.

Finally, there is a growing reciprocal influence between treaty-based and customary international law. Customary law has come to play a role of paramount importance, since contemporary humanitarian law applicable in armed conflicts is no longer limited to the Geneva Conventions and their Additional Protocols. Customary law has accelerated the development of the law of armed conflict, particularly in relation to crimes committed in internal conflicts. In this respect, the case law established by the ad hoc Tribunal for the former Yugoslavia has made an important contribution.

We have come a long way since the 1474 Hagenbach case. But the basic idea underlying the legal heritage whose foundations were laid many years ago and which has since been developed remains the same: the principle of humanity must be considered as the very heart of a legal system aimed at providing protection against criminal acts committed by individuals, both in war — whether internal or international — and in peace. This is not only a moral duty, but a basic obligation under international customary law.

The laws of humanity and the "dictates of public conscience", today as well as in the past, call for exceptional efforts aimed at promoting principles and rules designed to ensure effective protection of the individual, who is to a dramatically increasing extent the victim of acts of generalized violence. The "peace and security of mankind", together with the protection of human rights and severe sanctions for serious violations and grave breaches of humanitarian law applicable in armed conflicts, are among the international community's major assets.

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[41] E. Greppi, "Diritto internazionale umanitario dei conflitti armati e diritti umani: profili di una convergenza", in La comunità internazionale, 1996, p. 473. On the relationship between international humanitarian law and human rights law, see the bibliography in IRRC, No. 324, September 1998, p. 572, as cited in http://www.ICRC.com, February 21, 2012, 11.55 am.