

The scope and patterns of Erga Omnes obligations in International Law

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I. INTRODUCTION¹

The topic of these lectures first announced in the program: “*Jus cogens* and international crimes in general international law” involves itself a number of legal problems to which the doctrine and the case law have not offered clear answers so far.

It is a matter above all of the relationship of State responsibility, which is obviously not of criminal nature, and personal criminal responsibility of individuals for the commission of the same internationally wrongful acts. At stake are, for instance, situations of grave breaches of the 1949 Geneva Conventions on humanitarian law, or of the commission of the crime of genocide, where both types of responsibility are involved.

The International Law Commission created confusion in this respect by eradicating in its final text of the Responsibility of States (2001) the former draft article 19. That former provision provided a distinction between international crimes and “ordinary” international delicts. By doing this, the Commission tried to circumvent the problem of State responsibility for international crimes altogether, replacing it with the concept of “serious breaches of obligations under peremptory norms of general international law” (article 40). However, the concept of *jus cogens* is in its interpretation and practical application more diffuse than the notion of international crimes which are now well defined in international instruments.

In respect of personal criminal responsibility of individuals for the commission of the most serious international crimes, what is now widely discussed in the doctrine is the universal criminal jurisdiction of municipal courts for the prosecution of their perpetrators. That kind of domestic jurisdiction also gives rise to some misunderstandings. The jurisdiction of the permanent International Criminal Court (ICC) is envisaged in the Rome Statute of 1998 to be complementary with national criminal jurisdiction. This presupposed the functioning of both domestic courts and of the ICC to the same end.

The two aspects of State responsibility and personal responsibility of individuals for the same unlawful acts cannot be separated by a Chinese wall. They should be discussed from a broader outlook of *erga omnes* obligations, which is the ultimate topic of these conferences here.

¹ In this paper the author largely used parts of his already published writings, in particular the following ones: *Sources of International Law* (Martinus Nijhoff Publishers), The Hague 1997, 564 pages; “Création et disparition de l’Etat (à la lumière du démembrement de trois fédérations multiethniques en Europe)”, Académie de droit international de La Haye, *Recueil des Cours*, tome 279 (1999), Chapitre VIII, pp. 330-366; “On the Sources of International Criminal Law”, *Chinese Journal of International Law* 2005, No.1, pp. 45-83; and V.D. Degan - B. Pavišić: *Međunarodno kazneno pravo, /International Criminal Law/,* Rijeka 2005, 563 pages. These texts are rich with bibliographical references.

The Institute of International Law adopted a resolution on this subject-matter at its last Krakow Session in 2005. As usual, the text adopted was the lowest common denominator of what was acceptable to most of its members. The resolution did not dare to deal with different patterns of these obligations, which should not be overlooked.

In addition to international crimes there are two types of the norms of *jus cogens* according to the criteria set out in Articles 53, 64 and 71 of the 1969 Vienna Convention on the Law of Treaties. And in addition to *jus cogens*, there are a plenty of norms belonging to general international law of the nature of *jus dispositivum*. The question is under what conditions could these norms also be treated as a source of *erga omnes* obligations.

Hence, there are a plenty of legal problems for which we shall try to find solutions here.

II. THE NOTION OF *ERGA OMNES* OBLIGATIONS²

1. A Review of the Practice of the International Court of Justice

As already said above, the complexity of problems should be dealt first, having the large concept of *erga omnes* obligations in view. This concept was the product of the practice of the International Court of Justice (ICJ). The first and the most important pronouncement in this respect remained an *obiter dicta* statement by the Court in its Judgment of 1970 in the *Barcelona Traction* case.

However, this important statement was a reaction by the Court itself to its wrong Judgment of 1966 in the Second Phase of the *South West Africa* cases. It seems important to invoke here the facts from that previous affair.

Two former members of the League of Nations —Ethiopia and Liberia— instituted the proceedings against South Africa on the basis of Article 7 of the Mandate for South West Africa (actual Namibia) of 1920. Paragraph 2 of that Article reads:

“The Mandatory (The Union of South Africa) agrees that, if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations...”³.

² See, “Obligations and Rights *Erga Omnes* in International Law”, *Annuaire de l’Institut de droit international*, Session de Cracovie, Vol.71-I, Paris 2005, pp. 119-212. See in particular the first report by Giorgio Gaja and the literature indicated therein.

³ Since 1946, that jurisdiction was replaced by the newly-established International Court of Justice, in application of Article 37 of its Statute and Article 80(1) of the UN Charter. This fact was later confirmed in the Court’s Advisory Opinion on *International Status of South-West Africa* of 11 July 1950. Cf., *I.C.J. Reports 1950*, pp. 138 and 143.

Ethiopia and Liberia asserted in their application that the Mandatory Power, which was the Union of South Africa, persistently violated its obligations assumed by the Mandate, especially for practicing *apartheid* on that Territory. South Africa objected to the jurisdiction of the Court, in particular that the applicants and their nationals had no material interests in that dispute.

By its Judgment of 21 December 1962 the Court dismissed all the objections raised by South Africa and proclaimed its competence in the case. With regard to the aforementioned argument, the Court was clear:

“The Respondent’s contention runs counter to the natural and ordinary meaning of the provisions of Article 7 of the Mandate, which mentions “any dispute whatever” arising between the Mandatory and another Member of the League of Nations “relating to the interpretation or the application of the provisions of the Mandate”. The language used is broad, clear and precise: it gives rise to no ambiguity and it permits of no exception...”⁴.

However, during the second phase of the proceedings on merits, the majority within the Court changed⁵. The new majority raised the question of legal rights and interests of the applicants again and it proclaimed it to be a question of merits, although the respondent himself did not raise any objection of this kind again. And quite surprisingly, by its Judgment of 18 July 1966 on the Second Phase, by the President’s casting vote, the votes being equally divided seven to seven, the Court found that Ethiopia and Liberia could not be considered to have established any legal rights or interests appertaining to them in the subject-matter of their claim. On that ground the Court rejected these claims.

That new Judgment contradicted the previous one of 1962 which was *res judicata* for all the questions decided, and it in addition acted *ultra petitem*⁶.

The consequence of that scandalous Judgment was that for several years the Court had no new case before it to decide. However in its first Judgment on merits in the *Barcelona Traction* case (new Application of 1962), issued on 5 February 1970, the new majority of Judges drew “an essential distinction”:

⁴ *I.C.J. Reports* 1962, p. 343.

⁵ In 1965, the Egyptian Judge Badawi deceased. The then president of the Court Sir Percy Spender from Australia excluded the newly elected Pakistani Judge Sir Muhammad Zafrulla Khan from the proceedings because of his previous exercising the function of chairing the General Assembly where the question of South West Africa was on agenda. That decision was not made by the Court, and it proved not to be justified by Article 17 of the Statute.

⁶ The previous 1962 Judgment was rendered by eight Judges against seven. It was supported by Judges Alfaro, Badawi, Moreno Quintana, Wellington Koo, Korecki, Bustamante y Rivero, Jessup and Judge *ad hoc* Sir Louis Mbanefo. Voted against Judges Winiarski, Basdevant, Spiropoulos, Sir Percy Spender, Sir Gerald Fitzmaurice, Morelli and Judge *ad hoc* Wan Wyk. In the second phase of the proceedings Alfaro, Basdevant, Badawi, Moreno Quintana and Bustamante y Rivero did not participate. Of the newly elected Judges Tanaka, Padilla Nervo and Forster voted against the Judgment of 1966, and only Gros voted for it. For the rest, all Judges who supported the Judgment of 1962 were against that of 1966, and *vice versa*. Nevertheless, the votes divided seven to seven, and the new president Sir Percy Spender decided the case.

“...between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.”

34. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including the protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23); others are conferred by international instruments of a universal or quasi-universal character”⁷.

The term “international crimes” was not mentioned in that context. But it is undisputable that almost all obligations described there are obligations derived from *jus cogens*, as being obligations *erga omnes*.

Hence, following that statement from the Court’s 1970 Judgment, South Africa’s practice of *apartheid* in its Mandate territory was obviously not only the question of legal rights or interests by Ethiopia and Liberia and their citizens in the field of diplomatic protection. That practice of racial discrimination runs counter South Africa’s *erga omnes* obligation which is by its very nature the concern of all States in the world.

However, the Hague Court expressed a similar idea already in its Advisory Opinion of 28 May 1951 concerning the *Reservations to the Genocide Convention of 1948*. It discerned there the genocide as being “a crime under international law”:

“...The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as “a crime under international law” involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations... /T/he principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation...”⁸.

Hence, the Court was of the view that genocide is an international crime, above all because of its evil consequences and not only because specific legal rules consented to by States prohibit it or not. That idea was a radical refusal of the narrow positivistic doctrine which until then was dominant in jurisprudence and State practice⁹.

Shortly after the 1966 Judgment, by its resolution 2145 (XXI) of 27 October of the same year, the UN General Assembly terminated the Mandate for South West

⁷ *I.C.J. Reports 1970*, p. 33, paras. 33, 34.

⁸ *I.C.J. Reports 1951*, p. 23.

⁹ That statement was also an important step forward in respect of previous Judgments of the Nürnberg and Tokyo Tribunals. These earlier Tribunals pretended to have acted on the basis of positive international law as was allegedly being accepted before World War II by Germany and Japan. But it was not proved in their verdicts that especially the responsibility of individuals for crimes against peace and against humanity were previously accepted as such by these two, or by other States.

Africa. Subsequently, on 30 January 1970, the Security Council adopted resolution 276 (1970) declaring that continued presence of South Africa in Namibia was illegal and calling upon States to act accordingly.

Due to persistent refusal by South Africa to withdraw its administration from Namibia the Security Council requested the ICJ, by its resolution 284 (1970) of 29 July 1970, to issue an advisory opinion on that situation. In its Advisory Opinion of 21 June 1971 the Court confirmed the legality of the above decisions. It *inter alia* stressed that:

“...the termination of the Mandate and the declaration of the illegality of South Africa’s presence in Namibia are opposable to all States in the sense of barring *erga omnes* the legality of the situation which is maintained in violation of international law”¹⁰.

We shall now briefly refer to other cases in which the Hague Court was dealing with *erga omnes* obligations.

In the *Nicaragua* Judgment of 27 June 1986 the Court *inter alia* stated that:

“...if a State lays mines in any of waters whatever in which the vessels of another State have right to access or passage, and fails to give any warning or notification whatsoever, in disregard of the security of peaceful shipping, it commits a breach of the principle of humanitarian law underlying the specific provisions of Convention No VIII of 1907. Those principles were expressed by the Court in the *Corfu Channel* case as follows:

“certain general and well recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war” (*I.C.J. Reports 1949*, p. 22)”¹¹.

These “elementary considerations of humanity” were largely dealt with in the Advisory Opinion of 8 July 1996 (requested by the General Assembly) on *Legality of the threat or use of nuclear weapons*. On the basis of an analysis of all the general conventions on humanitarian law the Court discerned its two “cardinal principles”, valid in all armed conflicts. The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants. According to its second cardinal principle it is prohibited to cause unnecessary sufferings to combatants. Hence, States do not have unlimited freedom of choice of means in the weapons they use¹².

¹⁰ *I.C.J. Reports 1971*, p. 56, para.126. In spite of these rulings South Africa continued its unlawful presence in Namibia until 1990. On the other hand, the 1966 Judgment probably helped the preservation of *apartheid* in South Africa itself until 1991. As a result of the first democratic and multiracial elections in that State held in 1994, Nelson Mandela, a victim of *apartheid* himself and a captive of that regime between 1962 and 1990, became its president. He was received in Britain and elsewhere with great honour and enthusiasm as one of world leaders, while nobody knows what became of Sir Percy Spender after he finished his functions at the Hague Court.

¹¹ *I.C.J. Reports 1986*, p. 112, para.215. In that Judgment the Court, in addition, stated that “the conduct of the United States may be judged according to the fundamental general principles of humanitarian law; in its view, the Geneva Conventions are in some respects the development, and in other respects no more than the expression of such principles.” *Ibid.*, p. 113, para.218. The elementary considerations of humanity and fundamental general principles of humanitarian law are but synonymous with *jus cogens*.

¹² *I.C.J. Reports 1996*, p. 257, para.78.

As already said above, the conclusion of the Court was that these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, “because they constitute intransgressible principles of international customary law”¹³. In other words these fundamental rules are *jus cogens*.

The Court has dealt again with the 1948 Genocide Convention in its Judgment on Preliminary Objections of 11 July 1996, in the still pending dispute between Bosnia-Herzegovina and FR Yugoslavia. Having quoted the above passage from its 1951 Advisory Opinion, it added:

“It follows that the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*. The Court notes that the obligation each State thus has to prevent and to punish the crime of genocide is not territorially limited by the Convention”¹⁴.

The statement by the Court in its Judgment issued a year before, on 30 June 1995, on *East Timor* (Portugal v. Australia) is perhaps of even more far-reaching legal consequences. There the Court confirmed Portugal’s assertion,

“...that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character is irreproachable. The principle of self-determination of peoples has been recognized by the United Nations Charter and in the jurisprudence of the Court (see *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*. Advisory Opinion, *I.C.J. Reports 1971*, pp. 31-32, paras. 52-53; *Western Sahara*, Advisory Opinion, *I.C.J. Reports 1975*, pp. 31-33, paras. 54-59); it is one of the essential principles of contemporary international law...”¹⁵.

This right was the subject-matter of a more comprehensive explanation by the Court in its Advisory Opinion of 9 July 2004 on *Legal consequences of the construction of a wall in the occupied Palestinian territory*. It was first noted:

“...that the principle of self-determination of peoples has been enshrined in the United Nations Charter and reaffirmed by the General Assembly in resolution 2625 (XXV)...., pursuant to which “Every State has the duty to refrain from any forcible action which deprives peoples referred /in that resolution/... of their right to self-determination”. Article 1 common to the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights reaffirms the right of all peoples to self-determination, and lays upon the States parties the obligation to promote the realization of that rights and to respect it, in conformity with the provisions of the United Nations Charter”.

The Court further recalled its previous practice on this issue, quoting in particular its *East Timor* Judgment of 1995, where it made clear “that the right of peoples to self-determination is today a right *erga omnes*”¹⁶.

It can be concluded from the above review that under the notion of *erga omnes* obligations towards the international community as a whole the Hague Court considers

¹³ *Ibid.*, p. 257, para.79.

¹⁴ *I.C.J. Reports 1996*, p. 616, para.31.

¹⁵ *Cf.*, *I.C.J. Reports 1995*, p. 102, para.29.

¹⁶ *I.C.J. Reports 2004*, para.88.

the commission of some universally recognized international crimes, such as the acts of aggression, genocide, slavery, perhaps *apartheid*, but also other peremptory norms of general international law protecting basic human rights. To this are added some other unlawful practices by States, such as laying mines without warning, which go counter to the “elementary considerations of humanity”.

On the basis of general conventions of humanitarian law the Court further ascertained some “cardinal principles”, valid in all armed conflicts that must be observed by all their parties whether a respective State is a party to them or not. They are also based on the “elementary considerations of humanity”.

All the above rules should be encompassed by the concept of *jus cogens*, according to its definition in Article 53 of the 1969 Vienna Convention on the Law of Treaties. They do not allow exceptions in their application. Any deviations from them constitute internationally wrongful acts entailing international responsibility of their actors. Some of these norms are universally recognized as international crimes, and some are not.

It is a somewhat different case with the statements by the Court in 1995 and 2004 that the right of self-determination of peoples, as an essential principle of contemporary international law, has also an *erga omnes* character. This right is in permanent conflict with the principle of territorial integrity of all the existing States which is deemed to be one of the cornerstones of international peace and security. Peoples who want to attain this right must sometimes suffer great losses in fighting for it.

It is not certain that a State seeking to preserve its territorial integrity by peaceful and political means commits in all circumstances unlawful acts of the same character as for instance the maintenance of *apartheid*¹⁷. On the other hand, most of heinous international crimes are committed in the so-called non-international armed conflicts in which insurgents pretend to the fighting for self-determination.

Of still a different nature seems to be the statement by the Court in the *Namibia* case of 1971. It implies an *erga omnes* duty not to recognize illegal situations which are maintained in violation of international law. It was, however, done in the context of unlawful presence of South Africa in Namibia which continued its practice of *apartheid* there. But perhaps non-compliance with this duty in respect of other illegal situations should not have the same legal consequences.

This means that sometimes succinct and laconic statements by the Court, that are held as the starting point of all the problems discussed here, should be carefully analyzed in order to avoid wrong conclusions.

¹⁷ Nevertheless, as quoted above, a forcible action which deprives peoples of their right to self-determination is today an internationally wrongful act.

2. Deliberations in the International Law Commission on State Responsibility

It seems important now to explain how the International Law Commission envisaged *erga omnes* obligations in different phases of its efforts to codify the rules of State responsibility. This important subject-matter was on the agenda of the Commission between 1956 and 9 August 2001, when it adopted its final text on the Draft Articles on Responsibility of States for Internationally Wrongful Acts. Hence, under several Special Rapporteurs the Commission dealt with the State responsibility during forty-five years.

In the focus of the first Special Rapporteur F.V. García Amador from Cuba was the State responsibility for injuries to aliens and their property. This Rapporteur considered it his task to propose a complete set of substantive rules of international law in the domain of diplomatic protection¹⁸. Between 1956 and 1961, he submitted six reports to the Commission, but they were never discussed on an article by article basis.

Substantial progress was achieved under the Special Rapporteur Roberto Ago from Italy. He proposed, and the Commission adopted it, a division into primary and secondary rules of State responsibility. *Primary rules* relate to the content of international obligations of States or their interpretation, whatever their origin. However, these primary rules were put aside and were not the subject of codification¹⁹. The emphasis was on the *secondary rules*, i.e. the general conditions under international law for States to be considered for wrongful actions or omissions and the legal consequences which flow therefrom, whatever the origin of the primary rules at stake.

This division has been universally recognized since then and was also endorsed in the final draft articles of the Commission. However justified, it sometimes raises serious problems which are the topic of our explanation here.

Another contribution by Roberto Ago, which was not of a lasting effect, was his proposed division into international crimes and ordinary international delicts. It was obviously made under the impact of the statement by the Court on *erga omnes* obligations in the 1970 *Barcelona Traction* Judgment.

The scope and definition of international crimes in general international law will be the subject of our special concern. Here should be mentioned only that paragraph 2 of draft article 19 proposed by Roberto Ago contains two elements of international crimes. First is that an internationally wrongful act must result from the breach by a

¹⁸ Already the 1930 Hague codification conference had on its agenda the responsibility of States for damages done in their territory to persons or property of foreigners. That attempt failed due to complete disagreement between the participating States on some essential problems.

¹⁹ Hence Ago's proposed draft article 17 reads as follows: "1. An act of State which constitutes a breach of an international obligation is an internationally wrongful act regardless of the origin, whether customary, conventional or other, of that obligation. 2. The origin of the international obligation breached by a State does not affect the international responsibility arising from the internationally wrongful act of that State". This provision was replaced by a short Article 12 in the final text of 2001, which reads: "There is a breach of an international obligation by a State when an act of the State is not in conformity with what is required of it by that obligation, regardless of its origin or character".

State of an international obligation “essential for the protection of fundamental interests of the international community”. However, only by this an international crime would not be different from other peremptory norms of general international law within the meaning of Article 53 of the 1969 Vienna Convention on the Law of Treaties²⁰. It was expressly provided for, in addition, that the international obligation in question is so essential “that its breach is recognized as a crime by that community as a whole”²¹.

As was stressed in the commentary of the Commission, the criterion of international crimes has two aspects: “one is the requirement that the obligation breached shall, by virtue of its content, be essential for the protection of fundamental interests of the international community; the other, which completes the first and provides a guarantee that is essential in such a delicate matter, makes the international community as a whole responsible for judging whether the obligation is essential and, accordingly, whether its breach is of a “criminal” nature.”²²

Paragraph 4 of draft article 19 provides a negative definition: “Any internationally wrongful act which is not an international crime in accordance with paragraph 2 constitutes an international delict”.

In paragraph 3 of that draft article Roberto Ago made an exception and he enumerated *exempli causa* some kinds of primary rules constituting international crimes:

“3. Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, *inter alia*, from

(a) a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;

(b) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;

(c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and *apartheid*;

(d) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas”²³.

This extensive list was not complete because crimes committed in international and non-international armed conflicts were not mentioned there. But there were some

²⁰ The said Article 53 reads that “...a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”

²¹ The entire provision reads as follows: “2. An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as crime by that community as a whole constitutes an international crime.”

²² Cf., *Yearbook of the International Law Commission 1976*, Vol.II, Part Two, p. 119, para.61.

²³ *Ibid.*, p. 95.

doctrinal criticisms of the examples exposed. It was argued that in the present international law acts under (d) are not even norms of *jus cogens*.

The draft article 19 proposed by Roberto Ago was in 1976 unanimously adopted by the International Law Commission. Since then, nobody in the doctrine has seriously challenged the above distinction, especially in the light of rapid expansion of international criminal judiciary and the adoption of the Rome Statute of the International Criminal Court in 1998. Thus even in the Draft articles on State responsibility the Commission adopted in 1996, article 19 remained untouched.

It is true that throughout its work since 1976 the Commission has been unable to ascertain legal consequences for States committing international crimes. It became obvious to everybody that, unlike individuals in their personal capacity, sovereign states cannot be criminally responsible.

On the other hand, during further elaborations of the rules on State responsibility under Special Rapporteurs who followed Ago, there was little room for the determination of *erga omnes* obligations as such.

In the Draft articles adopted in 1996 some rights were provided in favour of the “injured State”, and some obligations on the charge of all other States. In these provisions some of *erga omnes* obligations could be traced.

In the long and complicated text of Article 40 concerning the meaning of “injured States”, it was provided in its paragraph (e) that rights of such a State can be infringed by the act of another State which arises *inter alia* “from the rule of customary international law”. However, a further condition laid down under (i) was that “the right has been created or is established in its favour”. Hence, there was no question here of a customary rule of general international law, but only of a particular custom.

It was perhaps different in the situations envisaged under (iii), if “the right has been created or is established for the protection of human rights and fundamental freedoms”. There is the question whether all States forming the international community as a whole can be considered, in these situations, as “injured States”.

However, paragraph 3 of Article 40 provided the following: “In addition, “injured State” means, if the internationally wrongful act constitutes an international crime”, all other States.” Thus, mainly in the cases of commission of international crimes all other States are to be considered injured States. By this, the notion of obligations *erga omnes* from the *Barcelona Traction* Judgment was more or less confined to international crimes.

Under the label of “obligations for all States”, *erga omnes* obligations were provided in Article 53 of Chapter IV of Part Two, concerning international crimes again. It provides that an international crime committed by a State entails an obligation for every other State: (a) not to recognize as lawful the situation created by the crime; (b) not to render aid or assistance to the State which has committed the crime in maintaining the situation so created; (c) to cooperate with other States in carrying out the

obligations under (a) and (b); and (d) to cooperate with other States in the application of measures designed to eliminate the consequences of the crime.

The final and the most authoritative text on the Responsibility of States for Internationally Wrongful Acts, as adopted by the Commission on 9 August 2001, turned these things upside down. The former draft article 19 was suppressed altogether and the adjective “criminal” was omitted throughout the newly adopted text. Rules providing rights of “injured States” and obligations for all other States in cases of commission of international crimes were replaced with new provisions concerning “serious breaches of obligations under peremptory norms of general international law” (Articles 40-41).

That happened after a quarter of a century of existence of that essential provision concerning international crimes that was generally understood as reflecting a customary rule of general international law.

That radical change was a concession to representatives of a number of States in the Sixth Committee of the UN General Assembly. They vigorously argued that the responsibility of States is not of a criminal nature. At the first glance this allegations seems to be correct²⁴.

But shortly after the adoption of these draft articles tragic events occurred on 11 September 2001 in New York, Washington, D.C. and Pennsylvania. The fact that the terrorist organization Al Q’aeda had its bases in Afghanistan under the Taliban regime was the pretext for the armed intervention in that State as an act of “self-defense” by the United States. If nothing else, it revealed the truth that active support by a State to some transnational terrorist organizations acting abroad could nevertheless have certain “criminal” features. But even if such accusations were grounded, there is a tricky question whether an “injured State” is empowered unilaterally to resort to its alleged right to “self-defense” under Article 51 of the UN Charter, and whether it can on this ground undertake in particular an armed attack against another State even without the authorization by the Security Council on behalf of its Chapter VII. That is the problem of the armed intervention against Iraq in 2003 which still lasts.

In spite of the above objections, let us now consider this problem under the presumption that the responsibility of States cannot be of criminal character at all. Whether even under this presumption international crimes as defined in the former

²⁴ The last Special Rapporteur James Crawford explained the following five arguments in favour of elimination of Article 19 and of any allusion to criminal responsibility of States: “...First of all, the crimes should be properly defined: *nullum crimen sine lege*. Secondly, there would need to be an adequate procedure for their investigation on behalf of the community. Thirdly, there should be a system of due process in relation to the trial of crimes: international corporate criminals should not be left to some disorganized international hue and cry. Fourthly, there would need to be some appropriate sanctions consequential upon a determination, on behalf of the international community, that a crime has been committed... And fifthly, we would expect some system by which the wrongdoing entity could purge its guilt...”. Cf., J. Crawford: *The International Law Commission’s Articles on State Responsibility*, Cambridge University Press 2002, pp. 18-19. These arguments seem to be justified except the first one. However even the rest of them cannot preclude the discussion of “international” (not criminal) responsibility of States in cases of their commission of genuine international crimes, for which individuals bear responsibility under international criminal law.

Article 19(2) could be replaced with a larger concept of “serious breaches of obligations under peremptory norms of general international law”.

In the comment of the Commission, among the examples of these “serious breaches” (every breach of *jus cogens* is serious in itself), are quoted: prohibition of aggression, prohibition of slavery and slave trade, genocide, and racial discrimination and *apartheid*, torture, some basic rules of humanitarian law, and the right of peoples to self-determination. This list is, of course, not all-exhaustive²⁵.

It appears from the above cited examples that the changes in the attitude of the Commission were formal only, in order to avoid some political objections²⁶. That is because even by the application of the former draft Article 19(2) almost all of the above acts constitute proper “international crimes”. However, if only formal changes were the real intention of the Commission, their practical consequences seem to be more serious.

As mentioned above, according to the former Article 19(2), the international community is as a whole responsible for judging whether some internationally wrongful acts are so essential for the protection of fundamental interests of the international community that they constitute international crimes. From now on, a very powerful State can judge for itself that another State committed a serious breach of obligations under peremptory norms of general international law against it.

The new situation also results in the confusion of terminology. Before the Rome Statute of 1998, all international crimes, except the crimes against humanity, were qualified as such in humanitarian and other codification conventions with a broad participation of States. All these conventions provide or imply the responsibility of their States parties in case of their violation²⁷. Except in respect of the crimes earlier provided in the statutes of international military tribunals in Nürnberg and Tokyo, personal responsibility of individuals for these crimes was aggregated²⁸, especially in the statutes of international criminal tribunals later on. This personal responsibility cannot, of course, eliminate the responsibility of States in case of violation of their conventional obligations.

Now we come to a curious situation. On the basis of its jurisdiction under Article IX of the 1948 Genocide Convention, the ICJ can be competent to establish the responsibility of a State which is a party to it for its violation. Its Article I expressly states

²⁵ Cf., J. Crawford: *op. cit.*, pp. 246-247. This precious book serves to expose the views of the Commission in its deliberations.

²⁶ These important changes do not seem entirely justified especially in the light of another decision by the Commission not to prepare draft articles of a codification convention for a future diplomatic conference on this subject-matter. Instead, the Commission adopted a restatement of provisions having primarily doctrinal importance.

²⁷ The matter was for instance of the 1948 Genocide Convention, or of “serious breaches” of the four 1949 Geneva Conventions on humanitarian law.

²⁸ It is true that States parties to these Conventions undertook to enact the same crimes in their national legislations and to provide effective penalties for persons found guilty. That aspect of conventional obligations will be discussed in the last part of this text.

that genocide is a crime under international law. Acts provided in its Articles II and III mean that the responsible State committed that international crime on its own.

However, according to the new logic introduced by the International Law Commission, this crime in this case was not committed. What was committed was a “serious breach of an obligation under the peremptory norm of general international law” prohibiting genocide. That is because of the fact that the responsibility of States is not criminal. The genuine crime of genocide can be committed, according to this logic, only by individuals for which the ICC is competent, not the ICJ.

In spite of that, in both situations the matter is of the same internationally wrongful act. Even its qualification in Article II of the 1948 Genocide Convention and in Article 6 of the 1998 Rome Statute is the same. This means that the Hague Court and criminal tribunals apply the same legal rules and that violations of the prohibited acts have the same heinous consequences for their victims.

For this very reason we cannot avoid the discussion of responsibility of States for their direct and blunt commission of international crimes as being distinguished from all other “serious breaches of obligations under peremptory norms of general international law”. We cannot also neglect the important problems of “original” and “vicarious” responsibility of a State (according to old-fashioned terminology) in cases when international crimes were committed by its highest authorities or their simple soldiers.

Nevertheless, this new situation could have as advantage for the International Law Commission to provide rules on *erga omnes* obligations not strictly confined to international crimes. But what was set up in the final text were a few secondary rules of very general character. Even in the comment of the Commission there was no clear indication as to which kinds of primary rules are the source of *erga omnes* obligations to which these secondary rules relate²⁹.

As a consequence, even a careful reader of the secondary rules in the draft articles of 2001 relating to *erga omnes* obligations (Articles 33(1), 42(b), 48 and 54), identifies them almost exclusively with the peremptory norms of general international law from its Articles 26, 40 and 41. The reader has thus the impression that all these provisions form a unity. Only with an even greater intellectual effort could it be discerned that these secondary rules are applicable to a set of State obligations larger than *jus cogens* or international crimes.

Let us now make a brief comment of the draft articles of 2001 relating to *erga omnes* obligations proper. *Article 33* is a general provision concerning the content of the international responsibility of a State as set out in Part Two. In its paragraph 1 it is

²⁹ It is true that the codification of the entire set of primary rules whose breaches could entail the international responsibility of their actors would be an equivalent to the codification of the entire international law. The efforts undertaken by the first Special Rapporteur García Amador prove that this was an impossible job. However, since Ago, the Commission went to the opposite extreme. Whenever it estimated that it could overlook the patterns of primary rules, it did so.

provided that the obligations of the responsible State “may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach”.

Throughout this text *erga omnes* obligations are called “obligations owed to the international community as a whole”. Collective obligations of all other parties to a treaty are sometimes called obligations *erga omnes partes*, or integral obligations. They are also contained in the text of this Article.

The mention of the character and content of obligations has in view the primary rules that can be breached. As an example of all the above situations the comment cited: “For example, pollution of the sea, if it is massive and widespread, may affect the international community as a whole or the coastal States of a region; in other circumstances it might only affect a single neighbouring State”³⁰. It does not appear that this was the best example for mentioning *erga omnes* obligations.

Paragraph 2 provides with good reason the reservation: “This Part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State”. Obviously, in case of a breach of a human rights convention the ultimate beneficiaries and holders of relevant rights should be individuals rather than other States parties to such a convention.

Article 42 is related to the invocation of responsibility by an injured State. The matter is also of a secondary rule but couched in much a simpler way than the former Article 40. It provides that a State is entitled “as an injured State” to invoke the responsibility of another State if the obligation breached is owed to: (a) that State individually; or (b) a group of States including that State, “or the international community as a whole, and the breach of the obligation: (i) specially affects that State...”. Invocation of responsibility by a State other than an injured State is provided separately, in Article 48.

The pollution of the seas is invoked in the comment again, but for a better reason. “For example a case of pollution of the high seas in breach of article 194 of the United Nations Convention on the Law of the Sea may particularly impact on one or several States whose beaches may be polluted by toxic residues or whose coastal fisheries may be closed. In that case, independently of any general interest of States parties to the 1982 Convention in the preservation of the marine environment, those coastal States parties should be considered as injured by the breach”³¹.

Article 48 is of specific importance in this context. When invoking the obligations of a State towards the international community as a whole, the 1970 Judgment of the Hague Court on *Barcelona Traction* stated that by their very nature they are the concern of all States and that all States can be held to have a legal interest in their protection. This could imply that in case of their breaches all States invariably are considered to

³⁰ J. Crawford, *op.cit.*, p. 209.

³¹ *Ibid.*, p. 259.

be “injured States” in the sense of Article 42. If this is the case, all member States of the international community could be entitled to full reparation of the injury caused, even by pecuniary compensation. That, of course, goes too far even in the cases of the commission of genuine international crimes.

In order to dispel misunderstandings, the text adopted in 2001 introduces a special provision of Article 48 concerning the invocation of responsibility by a State other than an injured State. It says that any State other than injured State is entitled to invoke the responsibility of another State if: “(a) the obligation breached is owed to a group of States including that State, and is established for the protection of collective interests of the group; or (b) the obligation breached is owed to the international community as a whole”.

Paragraph (1) (a) has in view the collective interests of all States parties to a multilateral treaty establishing, for instance, a regional nuclear free zone or a regional system for the protection of human rights. They all constitute obligations *erga omnes partes*. For our analysis paragraph (1) (b) is more important by which genuine *erga omnes* obligations are recognized as such.

However, in both the situations mentioned above, according to paragraph (2), a State which has not its own legal rights and interests may claim from the responsible State only: “(a) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition”, and “(b) performance of the obligation of reparation” not to its own benefit, but “in the interest of the injured State or of the beneficiaries of the obligation breached”. In that other situation beneficiaries can be individuals even from the State responsible for such an internationally wrongful act.

Hence, States other than an injured State cannot claim compensations on their own account. According to Article 48 they can claim them in the interest of the injured State or its citizens or other beneficiaries, even if the injured State does raise such a claim itself. In these situations other States can, for instance, claim restitution if it is materially possible.

It should be stressed that Article 41 in Chapter III of Part Two, concerning serious breaches of obligations under peremptory norms of general international law, makes in this respect a notable distinction in respect of Article 48 which is applicable to all other obligations owed to the international community as a whole. In Article 41, relating to the particular consequences of serious breaches of *jus cogens*, it was provided that: “1. States shall cooperate to bring to an end through lawful means any serious breach (of these norms); 2. No State shall recognize as lawful a situation created by a serious breach..., nor render aid or assistance in maintaining that situation”.

The above obligations correspond to the *erga omnes* obligations from the former Article 53 of 1996, relating to international crimes. This is but another evidence that by serious breaches of *jus cogens* the Commission envisaged international crimes from its text of 1996.

These draft articles, like the previous ones, confirm the right of an injured State to take lawful countermeasures against a State which is responsible for an internationally wrongful act “in order to induce that State to comply with its obligations” [Article 49(1)]. These countermeasures are provided among the circumstances precluding their wrongfulness (Article 22). However in order to prevent their abuses, Articles 49 to 53 provide strict requirements to be satisfied in order that such countermeasures were lawful. There is in general international law no doubt that an injured State is entitled to undertake such countermeasures.

Article 54 relates, however, to “measures” (not countermeasures) taken by a State other than an injured State. The matter here is not of institutional reactions to internationally wrongful acts in the framework of international organizations, such as sanctions imposed by the Security Council acting under Chapter VII of the UN Charter. The matter is of measures taken by some States acting either individually or collectively outside the United Nations.

In the comment of this article some cases of such measures are cited from practice. Nevertheless, the Commission concluded that it is not appropriate to include in that Article a provision authorizing them. Instead, it provided a saving clause which reserves a position and leaves the resolution of the matter to the future development of international law. Article 54 thus states:

“This Chapter does not prejudice the right of any State, entitled under article 48, paragraph 1 to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interests of the injured State or of the beneficiaries of the obligation breached”.

3. Resolutions adopted by the Institute of International Law

(i) Among the resolutions dealing with *erga omnes* obligations and with their gross violations the most important is that on: “The Protection of Human Rights and The Principle of Non-intervention in Internal Affairs of States”.

This Resolution is of historical importance. It was adopted at the Session of the Institute at Santiago de Compostela on 13 September 1989, celebrating the bicentenary of the French Declaration of the Rights of Men and of the Citizens. Brutal suppression of the manifestations of students at the Tien an Men Square in Peking preceded these events. Shortly afterwards, the Berlin Wall fell, which was the beginning of the end of one-party regimes in Eastern Europe. The rapporteur of the Commission at the Institute was Italian Professor Giuseppe Sperduti.

The Resolution is therefore confined to *erga omnes* obligations calling for the respect of human rights. It does not deal with obligations having the same scope in other domains of international law and it does not directly relate to the problems of State responsibility, nor of international crimes.

The Resolution categorically denies that the matters of human rights belong to the domestic jurisdiction of States only. In addition it specifies the conditions to be

fulfilled in order that collective or individual measures of reaction by other States are lawful, especially in cases of grave violations of human rights anywhere. In this respect this Resolution is more specific than Article 54 adopted by the International Law Commission in 2001. It also derives from the statement by the International Court of Justice of 1970 in the *Barcelona Traction* Judgment.

Instead of describing of its text, it is best to quote the first four Articles from that Resolution:

“*Article 1.* Human rights are a direct expression of the dignity of the human person. The obligation of States to ensure their observance derives from the recognition of this dignity as proclaimed in the Charter of the United Nations and in the Universal Declaration of Human Rights.

This international obligation, as expressed by the International Court of Justice, is *erga omnes*; it is incumbent upon every State in relation to international community as a whole, and every State has a legal interest in the protection of human rights. The obligation further implies a duty of solidarity among all States to ensure as rapidly as possible the effective protection of human rights throughout the world.

Article 2. A State acting in breach of its obligations in the sphere of human rights cannot evade its international responsibility by claiming that such matters are essentially within its domestic jurisdiction.

Without prejudice to the functions and powers which the Charter attributes to the organs of the United Nations in case of violation of the obligations assumed by the members of the Organization, States acting individually or collectively, are entitled to take diplomatic, economic and other measures towards any other State which has violated the obligations set forth in Article 1, provided such measures are permitted under international law and do not involve the use of armed force in violation of the Charter of the United Nations. These measures cannot be considered as unlawful intervention in the internal affairs of that State.

Violations justifying recourse to the measures referred to above shall be viewed in the light of their gravity and of all the relevant circumstances. Measures designed to ensure the collective protection of human rights are particularly justified when taken in response to especially grave violations of these rights, notably large-scale or systematic violations, as well as those infringing rights that cannot be derogated from in any circumstances.

Article 3. Diplomatic representations as well as purely verbal expressions of concern or disapproval regarding any violations of human rights are lawful in all circumstances.

Article 4. All measures, individual or collective, designed to ensure the protection of human rights shall meet the following conditions:

(1) except in cases of extreme urgency, the State perpetrating the violation shall be formally requested to desist before the measures are taken;

(2) measures taken shall be proportionate to the gravity of the violation;

(3) measures taken shall be limited to the State perpetrating the violation;

(4) the States having recourse to measures shall take into account the interests of individuals and of third States, as well as the effect of such measures on the standard of living of the population concerned”³².

³² Cf., Institut de Droit international, *Tableau général des Résolutions adoptées (1957-1991)*, Paris 1992, pp. 206-213.

This text is probably the best expression of *erga omnes* obligations and of their scope under general international law in this specific domain to date. However, if decision-makers in States read the text of this Resolution at all, they took it as a statement *de lege ferenda* that could be useful for justifying interventions against the States which are their political opponents. In a similar way, within the framework of the Conference of Security and Co-operation in Europe, the high expectations of the Charter of Paris for a New Europe signed on 21 November 1990, have never materialized to the letter³³.

(ii) This review will be concluded with the recent resolution on “Obligations *erga omnes* in international law”, adopted by the Institute at its Session in Krakow on 27 August 2005. The rapporteur of the Commission was the Italian Professor Giorgio Gaja, and this author was one of its members.

Its short text has no historical invocation and has not ambition to clarify all the problems of obligations of this kind that can arise in practice³⁴. According to Article 6(a) of this Resolution, its articles are without prejudice “to the rights and remedies pertaining to a State which is specifically affected by the breach of an obligation *erga omnes*”. It thus deals with the obligations of States other than injured States. With a few innovations, it does not depart from the context of the statement by the Hague Court in the *Barcelona Traction* case.

Its Article 1 offers definitions of obligations *erga omnes* proper, and those *erga omnes partes*. The latter are defined as:

“(b) an obligation under a multilateral treaty that a State party to the treaty owes in any given case to all the other States parties to the same treaty, in view of their common values and concern for compliance, so that a breach of that obligation enables all these States to take action.”

More important for the present study are obligations *erga omnes* proper. It was provided that for the purposes of the present articles, an obligation *erga omnes* is:

“(a) an obligation under general international law that a State owes in a given case to the international community, in view of its common values and its concern for compliance, so that a breach of that obligation enables all States to take action...”.

The emphasis on the common values of the international community is likely to refer primarily to international crimes, as defined in the former draft article 19(2) of the International Law Commission. This impression is confirmed in a paragraph of the preamble to the Resolution, which reads:

³³ That is especially the case with the freedom of movement between all the participating States, economic liberty coupled with social justice, and solidarity with other countries in the world. Some of the participating States nowadays stubbornly violate the prohibition of arbitrary arrest and detention, of torture or other cruel, inhuman or degrading treatment or punishment and the right to fair and public trial, although all these commitments were confirmed in that Charter.

³⁴ In its preamble it was even stressed that it constitutes but the first step in clarifying certain aspects of inter-State relations created by these obligations.

“Considering that a wide consensus exists to the effect that the prohibition of acts of aggression, the prohibition of genocide, obligations concerning the protection of basic human rights, obligations relating to self-determination and obligations relating to the environment of common spaces are examples of obligations reflecting those fundamental values”.

Article 2 is not different from Article 48(2) of the Draft articles by the International Law Commission of 2001. It reads as follows:

“When a State commits a breach of an obligation *erga omnes*, all the States to which the obligation is owed are entitled, even if they are not specifically affected by the breach, to claim from the responsible State in particular:

- (a) cessation of the internationally wrongful act;
- (b) performance of the obligation of reparation in the interest of the State, entity or individual which is specially affected by the breach. Restitution should be effected unless materially impossible”.

But it is not quite certain that the above applies to obligations the breaches of which constitute international crimes only. Article 5 introduces some aggravated qualitative elements which remind to “serious breaches of obligations under peremptory norms of general international law”:

“Should a widely acknowledged grave breach of an *erga omnes* obligation occur, all the States to which the obligation is owed:

- (a) shall endeavour to bring the breach to an end through lawful means in accordance with the Charter of the United Nations;
- (b) shall not recognize as lawful a situation created by the breach;
- (c) are entitled to take non-forcible counter-measures under conditions analogous to those applying to a State specially affected by the breach”.

Sub-paragraphs (a) and (b) are couched in terms of legal obligations of all States. Sub-paragraph (c) is provided rather as an option. But unlike Article 54 of the draft articles by the International Law Commission, non-forcible counter-measures in these aggravated situations seem to be lawful. In this respect this Resolution follows the previous one adopted by the Institute in 1989.

The obligation of non-recognition is today likely to be part of positive international law. Other provisions are now perhaps still *lex ferenda*.

What this Resolution should be reproached for so far is inconsistency with the terminology used by the International Law Commission. The terms “injured State” and “States other than an injured State” are not used here. However, to “international crimes” and to “serious breaches of obligations under peremptory norms of general international law” are here added: “widely acknowledged grave breaches of *erga omnes* obligations”³⁵. After that it is really difficult to grasp the primary rules which are not ordinary “international delicts” as being conceived by late Roberto Ago.

³⁵ While “serious breaches” of *jus cogens* are likely to be an objective element, “widely acknowledged grave breaches of *erga omnes* obligations” allow subjective assessments.

For the rest, Articles 3 and 4 relate to the procedures primarily before the International Court of Justice. They are of dissimilar legal effects. According to Article 3:

“In the event of there being a jurisdictional link between a State alleged to have committed a breach of an obligation *erga omnes* and a State to which the obligation is owed, the latter State has standing to bring a claim to the International Court of Justice or other international judicial institution in relation to a dispute concerning compliance with that obligation”.

This statement indirectly confirms the illegality of the Judgment by the Hague Court of 18 July 1966 in the Second Phase of the *South West Africa* cases³⁶. Hence in case of existence of a jurisdictional link, when the matter is of a violation of an *erga omnes* obligation by a State even against its own citizens, the application by another State cannot be dismissed on the ground that the applicant did not prove its own rights and interests.

Article 4 is *lex ferenda*. Similar to the procedure on advisory opinions provided in Article 66 of the Statute of the ICJ, it proposes the following:

“The International Court of Justice or other international judicial institutions should give a State to which an obligation *erga omnes* is owed the possibility to participate in proceedings pending before the Court or that institution and relating to that obligation. Specific rules should govern this participation”.

This Article is a suggestion to competent bodies to provide specific rules to this end, that could have an effect of *actio popularis* in judicial proceedings.

4. Summing up

As has been stressed above, it is quite understandable that the International Law Commission could not effectively deal with all the primary rules the breaches of which entail international responsibility of their actors. Nevertheless, the shortcomings of the efforts to codify secondary rules specifically relating to *erga omnes* obligations seems to be a result of an equal neglect in studying different patterns of the primary rules giving rise to rights and obligations of this kind. These primary rules are not so abundant in the positive international law to make such an effort impossible.

III. *ERGA OMNES* OBLIGATIONS WITHIN THE FRAMEWORK OF SOURCES OF INTERNATIONAL LAW

1. Article 38(1) of the Statute of the ICJ

The first step in undertaking a study of the primary rules in the domain of State Responsibility is envisaging all the possible kinds of *erga omnes* obligations in the

³⁶ Nevertheless, throughout the deliberations of the Commission and in plenary sessions nobody mentioned that Judgment.

framework of sources of international law. Article 38(1) of the Statute of the International Court of Justice is generally received as the most authoritative statement of these sources. This is because the Statute constitutes an integral part of the UN Charter and the ICJ is the principal judicial organ of the UN³⁷.

It is not necessary to quote the text of this provision which is known to all students of international law. What is important is to stress that it makes a distinction between the principal sources: international conventions, international custom and the general principles of law; and “subsidiary means for the determination of the rules of law”, which are judicial decisions and the doctrine.

Although authoritative, this enumeration is not all-exhaustive today. The principal sources include some kinds of unilateral acts by which a State can assume some legal obligations at its expense or, in some situations, acquire new rights to its benefit³⁸.

The principal sources of international law should be understood as complex processes of creation, operation and termination of its rules (law-creating processes).

Depending on the scope of their territorial application, the rules forming parts of what is understood as “the international legal order” are to be divided into two large groups. Into the first large group fall the rules of *particular international law*. They are obligatory for a limited number of international persons, not for all of them, as for instance: for parties to a treaty, for parties to a particular customary rule, or for a State which assumed certain legal obligations unilaterally. Into the second and more important group for our study fall positive rules of *general international law*, binding indiscriminately all international persons if applicable to them.

According to this division all the principal sources, i.e. law-creating processes, must also be divided into two groups. The largest part of rules of *particular international law* are stipulated in treaties. Thus treaty-making is by far the most important law-creating process in the domain of particular international law. But rules of this kind can sometimes be generated in customary process, or they can be created by issuing some kinds of unilateral acts by States. This does not happen very often in actual international practice.

All *erga omnes* rights and obligations form a part of *general international law*. The most important law-creating process of the rules of this scope of application is still custom. Of much lesser practical importance are the general principles of law.

³⁷ Paragraph 2 of Article 38, which reads: “This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto”, does not reflect sources of international law and can be overlooked in this analysis.

³⁸ To the general custom indicated in sub-paragraph (b) “as evidence of a general practice accepted as law”, there should be added particular customary rules which, like treaties, relate to a limited number of international persons. And subsidiary sources include a wide scale of other acts, such as some declarations by the UN General Assembly, unilateral acts and attitudes of States, etc. As will be seen, treaties can have a double effect in international law: as a source of rights and obligations of their parties, and as acts of the generation or codification of rules of general international law.

This means that almost all *erga omnes* rights and obligations derive predominately from general customary international law.

2. General principles of law

In order to dispel frequent misunderstandings it seems necessary to explain here the nature of “the general principles of law recognized by civilized nations” from Article 38-(1)-(c) of the Statute of the Hague Court. Besides, the general principles of criminal law have a special place in all judicial proceedings of this kind.

First, these general principles can be understood as the basis of any legal relationship. That is because no legal order can properly function in the absence of such principles as the rules of positive law. In the opposite sense, in the absence of an applicable treaty or customary rule, i.e. in case of gaps (*lacunae*) in what is considered positive international law, sub-paragraph c. of Article 38(1) is usually interpreted as an option, or even an authorization given to international judges to resort to some legal principles common to national legal systems.

It is, however, more important here to envisage the general principles of law in the broad sense, as a basis of any legal order. There they are not opposed to customary law and treaties, but in this perspective all these three main sources form a unity.

As an example of these general principles in general international law the basic norm of *pacta sunt servanda* should be quoted, i.e. the duty of all parties to carry out and to respect in good faith all the stipulations agreed in their treaty³⁹. The matter is also of the principle of good faith (*bona fides*); or of that according to which every internationally wrongful act of a State entails its international responsibility and the duty of the wrong-doing State to provide a full reparation for the injury caused. This duty, however, implies some circumstances precluding wrongfulness (consent, self-defence, lawful countermeasures, *force majeure*, distress and necessity), which are also contained in the general principles of law.

Among these general principles probably the most numerous are in the law of treaties. Besides *pacta sunt servanda* and the principle of good faith, here belong the principles: *pacta tertiis nec nocent nec prosunt* (that agreements neither impose obligations nor confer rights upon thirds), *inadimplendi non est adimplendum* (the right unilaterally to suspend the operation of a treaty which the other party unlawfully repudiates), and some general principles vitiating the consent by a party to a treaty commitment (error, fraud, corruption and different kinds of coercion).

³⁹ It is worth quoting the explanation of the principle *pacta sunt servanda* given by Sir Gerald Fitzmaurice: “...This rule does not require to be accounted for in terms of any other rule. It could neither not be, nor be other than what it is. It is not dependent on consent, for it would exist without it. There could not be a rule that *pacta sunt non-servanda*, or *non sunt servanda*, for then the *pacta* would no longer be *pacta*. Nor could there be a rule that *pacta sunt interdum servanda et interdum non sunt servanda*. The idea of *servanda* is inherent and necessary in the term *pacta*.”. Cf., Sir Gerald Fitzmaurice: “Some Problems regarding the Formal Sources of International Law”, *Simbolae Verzijl*, The Hague 1958, p. 153.

There are some general principles of law which do not relate only to treaty relations and responsibility of States but, like the principle of good faith, have a larger application. Among them is that: *non concedit venire contra factum proprium* (nobody is in right to ask of others different conduct than is his own), or *nemo plus juris in alium transferre potest quam ipse habet* (a State cannot transfer more rights to others than it itself actually possesses), or that precluding “*enrichissement sans cause*”.

There are some general principles of law proper to all judicial and arbitral proceedings, such as the principles of independence and impartiality of the judicial body, that *audiatur et altera pars* (right of the accused to be heard), litispendence (precluding proceedings on the same subject-matter before two jurisdictions), or that of *res judicata* (that the final judgment has binding force between the parties to the dispute).

If a judicial or arbitral organ in exercising its functions ignores one or more basic procedural rules it will jeopardize the legality of its judgment and its own character as a judicial body. Therefore, the general principles of law of that kind are as legal rules absolutely obligatory for all the judicial agencies of international or of whatever other character.

However, almost all of the above general principles have already been assimilated and embodied in the positive rules of general customary law. That occurred mostly through codification conventions like the 1969 Vienna Convention on the Law of Treaties, but also through the draft articles on State Responsibility by the International Law Commission. The general procedural principles are confirmed in statutes of international courts and tribunals as well.

But because of their axiomatic character, the general principles of criminal law should be prescribed in advance in the statute of a new international criminal court or tribunal. Herein lies their practical importance as independent sources.

With this important exception, we can reiterate our general conclusion that almost all *erga omnes* rights and obligations derive predominately from general customary international law⁴⁰.

3. Custom in general international law

A customary rule of whatever kind consists of a material element: practice, which can be general or common to two or more international persons in their mutual relations only; and a psychological element: *opinio juris sive necessitatis*, i.e. the fact

⁴⁰ The genuine nature of these general principles of law is most transparent in the so-called “transnational law” which is extremely poor in substantial legal rules. When arbitrators decide disputes about contracts concluded between States and foreign corporations or private banking institutions, there are almost no other sources of applicable law except the contract itself. Then the arbitrators largely apply “general principles of law recognized by civilized nations”, because the text of the contract would in their absence be almost meaningless. See details on that practice - V.D. Degan: *Sources of International Law* (Martinus Nijhoff Publishers), The Hague 1997, pp. 113-126.

that a uniform, consistent and durable practice (or “usage”) has been “accepted as law” by its participants.

It is generally admitted that the practice of States (and of other international persons as well), in order to be a factor in customary process must be constant, uniform, durable, and emanating from competent State organs⁴¹. At a moment which is not always easy to pinpoint, the States actors of this practice acquire the conscience that it has become obligatory (*opinio juris sive necessitatis*), and that a different practice would be a deviation from the legal rule and could even entail the international responsibility of its actor.

In the generation of customary rules specific to general international law there must be a “general practice”. This does not always mean universal practice by all States members of the international community. That is because silence of even a large number of States can be construed as acquiescence, even where there is no proof of their tacit acceptance. Only the opposition and protests by a considerable number of States, including these having special interest in the matter of regulation, will prevent the creation of *communis opinio juris*.

Customary rules are still frequently associated with the *gradual customary process* in which practice precedes *opinio juris*. In this process there appeared some important rules of general international law, such as those prohibiting piracy on the high seas, slavery and slave trade, freedoms of the high seas, right of innocent passage by all ships through the territorial sea of all States, etc. However, factors of the generation of these rules in this process were sometimes legislative acts of important States, their bilateral agreements, or verdicts issued by their judiciary. It is frequently understood that in this gradual process there appear unwritten legal rules. However, most of them were later on confirmed in some universal codification conventions as having been rules already in force.

Customary process is practically the only substitute for world-wide legislation in regard to emerging, modifying and terminating rules of general international law. The intensified international co-operation as well as growing urgency and problems which cross national frontiers, require an increasing number of legal rules of this kind, which for reasons of legal security must be couched in very precise terms.

When important individual interests of States are at stake, the development of these rules can hardly be left to slow, gradual and predominantly spontaneous customary process, where the final results often remain uncertain. There are trends to influence their articulation and acceleration by some wilful acts. The matter is of the so-called “*articulated customary process*”. Several ways in this regard have proved to be effective.

The acts of its articulation can for instance be some resolutions (or “declarations”) adopted in the UN General Assembly unanimously, almost unanimously, or by con-

⁴¹ This element of customary rules raises much more practical problems and allows important exceptions. See an explanation - V.D. Degan, *op.cit.*, pp. 147-162.

sensus (without vote), if they formulate general and abstract rules of conduct of States. Although these resolutions are in principle not more than recommendations, it would be wrong to deny any legal effect of any of them. On the contrary, some of them have proved to be effective means of articulation of the customary process.

The International Court of Justice has explained this relationship in general terms in its 1996 Advisory opinion requested by the General Assembly, on *Legality of the threat or use of nuclear weapons*:

“70. The Court notes that General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule”⁴².

In fact, the Court confirmed some aspects there of its findings from its 1986 Judgment in the *Nicaragua* case, relating specifically the *opinio juris*:

“...*opinio juris* may, though with all due caution, be deduced from, *inter alia*, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions, and particularly resolution 2625 (XXV) entitled “Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations”. The effect of consent to the text of such resolutions cannot be understood as merely that of a “reiteration or elucidation” of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves”⁴³.

In the *Nicaragua* case “fundamental principles of international law” concerning non-use of force and non-intervention were at stake. In its 1986 Judgment the Court largely quoted parts of the said Declaration⁴⁴, as well as the 1965 Declaration on the Inadmissibility of Intervention [2131(XX)]⁴⁵, and Definition of Aggression [resolution 3316 (XXIX) of 1974]⁴⁶, all of them as having law-declaring effect.

By far the most important mode of intentional articulation and acceleration of the customary process in general international law after World War II were universal conventions of the codification and progressive development of some of its parts.

The double function of codification conventions in international law is more stressed than of other treaties, where it is merely potential. Like all other agreements, they operate between their parties according to the rules of the law of treaties. However, their main function is to influence the customary process. The essential provisions of

⁴² *I.C.J. Reports 1996*, pp. 254-255, para.70.

⁴³ *I.C.J. Reports 1986*, pp. 99-100, para.188.

⁴⁴ *Ibid.*, p. 101, para.191; p. 106, para. 202; p. 107, para.203; p. 119, para.228; p. 133, para. 264.

⁴⁵ *Ibid.*, p. 107, para.203; p. 134, para.266.

⁴⁶ *Ibid.*, p. 103, para. 195.

conventions of this kind agreed after the World War II are couched in the form of normative rules, providing rights and duties for all States, and not for their parties only.

Due to different stages of the customary process attained at the time of the signature of the convention in question, the rules laid down in them are to be divided into three different categories. Eduardo Jiménez de Arechaga, the former President of the International Court of Justice, has formulated three modalities of customary law resulting from general codification conventions: (a) declaring effect; (b) crystallizing effect; and (c) constitutive or generating effect⁴⁷.

Law declaratory rules are of pure codification. The convention embodies, in regard of them, the already received rules of customary law, in the sense that it is merely declaratory of the existing rules. Such provisions serve mainly as documentary evidence of the existence and content of the customary law in question. To this category belong, for instance, almost all the provisions concerning the legal regime of the high seas, which are the same in the 1958 Geneva Convention and in the 1982 UN Law of the Sea Convention.

Law crystallizing rules are normative rules aimed at being factors of progressive development of general customary law. They confirm some existing practices of States which before the adoption of the convention did not achieve a degree of uniformity, and the norms in question have not yet been “accepted as law” (*opinio juris*) by a necessary majority of States. Their best example are rules concerning the exclusive economic zone in articles 55 to 75 of the 1982 Law of the Sea Convention.

Finally, *law generating rules* are set up in a codification convention that cannot be corroborated by any actual practice of States, and in regard to which the customary process has not yet begun at the time of its adoption. The rules of this kind are unavoidable when practically all States in the world want to harmonize and reconcile their individual interests and by means of these new rules aim at influencing the direction of further customary process. As an example of them rules can be cited on transit passage in straits used for international navigation consecrated in Articles 37 to 44 of the 1982 Law of the Sea Convention. Another example are its Articles 76(8) and 82 concerning the special obligations of coastal States in their continental shelf beyond 200 nautical miles.

In case that almost all States of the world become parties to such a codification convention, all its normative rules are thereby transformed into general customary law. That is, for instance, the case with “grave breaches” of the four 1949 Geneva Conventions on humanitarian law. However, if some important States having special interests in the matter refuse to become parties to such a convention, the above division does not lose its importance. This is, for instance, the case with the two 1977 Additional Protocols to the said Geneva Conventions, or with the 1998 Rome Statute

⁴⁷ Cf., Eduardo Jiménez de Arechaga: “International Law in the Past Third of a Century”, *R.C.A.D.I.* 1978, tome 159, pp. 14-22.

on the International Criminal Court. Specially interested States are, among others, all the permanent members of the UN Security Council.

The most important codification conventions which were adopted and which entered into force after World War II are, *inter alia*: the 1961 Vienna Convention on Diplomatic Relations; the 1963 Vienna Convention on Consular Relations; the 1969 Vienna Convention on the Law of Treaties; the 1982 UN Law of the Sea Convention and the 1994 Agreement Relating to the Implementation of Part XI of that Convention.

Erga omnes obligations should be sought in particular in human rights conventions of universal character, such as: the 1965 International Convention on the Elimination of All Forms of Racial Discrimination; the 1966 International Covenant on Civil and Political Rights; the 1979 Convention on the Elimination of All Form of Discrimination against Women; the 1989 UN Convention on the Rights of Children; etc.

International crimes were the subject-matter of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide; of the four 1949 Geneva Conventions on Humanitarian Law with two Additional Protocols of 1977; of the 1973 International Convention on the Suppression and Punishment of the Crime of *Apartheid*; and of the 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. Definitions of these international crimes can also be found in some instruments establishing international criminal tribunals like the 1945 London Statute of the International Military Tribunal in Nürnberg, and above all the 1998 Rome Statute of the International Criminal Tribunal.

Because the bulk of *erga omnes* obligations relate to human rights and humanitarian law, it is of particular importance to make a precise note of States' practice and the *opinio juris* especially in the domain of the law applicable in international and non-international armed conflicts.

It is here certainly not a matter of the "practice" in everyday application of respective legal rules, such as those on diplomatic and consular relations, on the law of treaties, or on the law of the sea. A "general practice" does not require a world-wide armed conflict in which all States should apply these rules in their mutual relations. Sufficient proof of the "practice" and of the *opinio juris* is the general participation of States as parties to universal conventions in these domains.

However, especially in the domains of humanitarian law and of international criminal law, customary legal rules appear mainly in the practice of sovereign States coupled with the *opinio juris* of their main decision-makers⁴⁸. In any case the matter cannot be of the *opinio juris* of judges or of professors of international law⁴⁹.

⁴⁸ The practice of political organs of international organizations, such as the UN General Assembly or the Security Council, is easy to assimilate in the practice of the States which take part in their deliberations.

⁴⁹ *Opinio juris* means a belief (i.e. a conviction) that a practice is rendered obligatory by the existence of a rule of law requiring it. The *opinio juris* can, therefore, never be understood as a simple "legal opinion" by a judge or a legal author.

There are a number of cogent reasons for that. Only sovereign States keep regular armed forces under control which are able to commit crimes in international armed conflicts in violation of the States' legal commitments. And in case of internal insurgencies, it is of the utmost importance that the respective State conducts the operations against a rebel movement (which usually invokes its right to self-determination) in accordance with the legal obligations it assumed for that kind of conflicts. In case that, in order to preserve its national and territorial integrity, such a State treats rebels with cruelty, the conflict quickly degenerates into numerous crimes on both sides. Then, retrospective application on their perpetrators of new "customary rules", which were invented by judges, will certainly not dissuade other States, and rebels in other regions, from repeating the practice of the most cruel misdeeds.

Hence, because international judges (or professors) have no armed forces under their command, their own *opinio juris* on the existence of some customary rules is not the *opinio juris* of any States. And because every legal rule on warfare consists in fact of a compromise based on "the desire to diminish the evils of war, as far as military requirements permit"⁵⁰, the "customary rules" in this domain cannot be deduced by judges straight away from "elementary considerations of humanity" as they conceive them⁵¹. These judges will better fulfill their mission in insisting on the respect of customary rules which form positive international law.

4. Treaty as the main source of particular international law

As said above, the law of treaties is based on some general principles of law common to all agreements between whatever parties. Before 1969, these general principles were recognized and generally adopted in the State practice and doctrine, but there was no unanimous agreement on the conditions of their applicability to treaties entered by States. The matter of long debates was for instance the scope of the *clausula rebus sic stantibus* on the fundamental change of circumstances in regard of the time of the conclusion of a treaty.

The Vienna Convention on the Law of Treaties was signed on 23 May 1969 and has entered into force on 27 January 1980. It is applicable on the treaties in written form and it has resolved the above dilemmas.

Following its adoption, most provisions from this Convention acquired an objective character. Almost all of them are now admitted as declaratory of the customary rules of general international law, contested by nobody. Its written provisions apply today,

⁵⁰ That was provided in the preamble to the Fourth Hague Convention Respecting the Laws and Customs of War on Land of 1907. The said compromise is in the core of all the rules on armed conflicts that States are willing to accept and observe in their actual practice at a given time. Nevertheless, the history of warfare since 1907 proved many examples where even this minimum of legal commitments was disavowed.

⁵¹ This tendency is present in particular in the practice of international criminal tribunals for the former Yugoslavia and Rwanda. On the contrary, the International Court of Justice is much more cautious in these matters.

or are considered to be applicable, to parties to all the treaties, even those concluded by the States (like France) which have not ratified the Vienna Convention. It is exactly for this reason that this Convention is probably the most important convention on the codification of international law today.

5. Sources of international criminal law

The above sources from Article 38(1) of the International Court of Justice normally function in the international legal order of sovereign States and other international persons. However, when discussing *erga omnes* obligations we cannot avoid international crimes and personal criminal responsibility of their perpetrators.

In international criminal law relations between judges, the prosecutor, the accused and his counsel, and the victims of the crime, are not the same as the relations between sovereign States, which enjoy legal equality and possess the autonomy of will. This is a matter of trials of accused persons, which are not substantially different from criminal trials before national courts. However, one essential difference is that the source of law in the proceedings before international criminal tribunals is not the national criminal law of any State, but the law emanating from the sources listed in Article 38(1).

The general principle of all criminal law: *nullum crimen nulla poena sine lege* is called by many the principle of legality (in its narrow sense)⁵². The said principle is an achievement of the 1789 French Declaration of the Rights of Man and of the Citizen and is embodied in the constitutions of a great many States as being one of the guarantees of the rights of individuals⁵³. Even if, strictly speaking, this general principle is not a peremptory norm of general international law (*jus cogens*), it is better to observe it than to undermine its importance in any criminal proceedings⁵⁴.

Where we actually take this principle into account, and there are no convincing reasons to do the contrary, all sources of international law provided in Article 38(1) appear in a somewhat different light than in inter-State relations. From this principle proceed the following requirements of a fair criminal trial:

⁵² It seems to be more appropriate to embrace, under the principle of legality, the sum of general principles of criminal law which should be observed in any criminal proceedings.

⁵³ A. Cassese: *International Criminal Law*, Oxford 2003, pp. 139-158, has exposed many arguments challenging this principle as allegedly consisting in the doctrine of "strict legality", in contrast to the doctrine of "substantive justice". His arguments that this "doctrine" (including the principle of non-retroactivity of law) does not operate in international law in the same way as within States with codified law, do not seem to be convincing enough.

⁵⁴ In any case, the principles opposed to it: *nullum crimen sine poena* (that no crime must remain unpunished) and of "sound popular feeling", being the sources of law for Nazi criminal judges in Germany between 1933 and 1945, were strongly criticized by the Permanent Court of International Justice. See its 1935 Advisory Opinion on *Danzig Legislative Decrees* (PCIJ, Series A/B, No.65, p. 56). Those who consider the former judicial practice altogether as "customary law", should on the basis of the *stare decisis* doctrine observe this precedent. They should not neglect this advisory opinion as non-existent.

- *Nullum crimen sine lege scripta*: the basis of a criminal charge should be either in the national law of a State, or in a statute of an international criminal court or tribunal. In both instances the matter should be subject to a rule of positive law in written form. This excludes incriminations based exclusively on (unwritten) customary law⁵⁵.
- *Nullum crimen sine lege certa*: the elements of crimes must be precisely defined by a rule. This forbids the criminal judge to resort to analogy⁵⁶.
- *Nullum crimen sine lege previa*: a crime must be forbidden by law at the time of its commission. Retrospective application of new criminal laws is forbidden, unless they were more favourable to the accused (*lex mitius*).
- *Nulla poena sine lege*: the penalties for specific crimes should also be provided by a legal rule in advance. This requirement is difficult strictly to observe in international criminal proceedings. The scale of prison sentences for the crimes within the competence of international criminal tribunals have so far not been provided in their Statutes.

Hence in criminal law, either municipal or international, written sources have preference over the unwritten ones. This means that, in international criminal law, customary rules cannot have the same importance as in the international legal order of sovereign States in which a near totality of rules of general international law is of a customary character.

There is another substantial difference to be noticed here. When two or more States agree on the jurisdiction of the International Court of Justice, or on international arbitration, they expect to obtain in these procedures the final judgment of their case. To this end, in order to avoid *non liquet*, judges resort to all the sources of law provided in Article 38(1). They must find applicable legal rules to any dispute which States can refer to them.

International criminal judges do not have such a large power. As stated, they are strictly forbidden to resort to analogy, or to apply new rules of positive criminal law retrospectively to the accused, or even to create new rules of “customary law” and by that cure the imperfections in public international law.

For the prosecution of international crimes such as genocide there can be competent either national jurisdictions of States or international criminal courts and tribunals on the basis of their statutes.

If there is an *erga omnes* obligation based on general customary international law to prevent and punish the crime of genocide, a national judge cannot give effect to this

⁵⁵ This prerequisite excludes even to a higher extent the quasi-legislative function of criminal judges and forbids them to create new rules which at the time of the commission of a crime were not *lex lata*, and then to apply them to the accused retrospectively.

⁵⁶ To this end, the Assembly of States Parties to the Rome Statute of 1998 has adopted the Elements of Crimes, to be applied by the International Criminal Court.

obligation unless his State did enact this crime in its national legislation in advance, and has provided the scale of prison sentences for it. That is because criminal judges cannot apply customary rules of general international law straight away, and that law cannot provide penalties for the crimes in question.

This does not, however, exclude in principle the international responsibility of a State which failed to enact the necessary legislation. However, the conventional obligations from the 1948 Genocide Convention are in this respect more specific than the customary rule of general international law prohibiting genocide.

The same is with the *erga omnes* obligation to prevent and prosecute the crime of aggression, which according to the Nürnberg Judgment of 1946 is “the supreme international crime... that contains within itself the accumulated evil of the whole.”⁵⁷ Because actual statutes of international criminal jurisdictions did not confer jurisdiction over the crime of aggression to these bodies, this *erga omnes* obligation remains abstract and without effect. This, however, does not exclude the international responsibility of the aggressor State for the commission of that crime.

The above examples prove serious shortcomings of the effects of *erga omnes* obligations in criminal procedures.

It can be concluded that all *erga omnes* obligations, including those prohibiting international crimes, appear, modify and terminate in the law-creating processes envisaged in Article 38(1) of the Statute of the ICJ. The most important of them is the customary process articulated by codification conventions or by some declarations of the UN General Assembly. However, when it comes to the prosecution of suspects for these crimes, different rules apply among which custom cannot have the primary importance.

IV. PATTERNS OF *ERGA OMNES* OBLIGATIONS

1. Preliminaries

In a perfect legal order, which has actually never existed, all rules of general international law should have some *erga omnes* effects. Nevertheless, since the *Barcelona Traction* Judgment of 1970, all determinations of *erga omnes* obligations have in this respect had the norms of *jus cogens* in view. After explaining various patterns of norms of this legal scope, we shall discuss the question whether some of customary rules of general international law having the scope of *jus dispositivum* could also be considered to possess some *erga omnes* effects.

Now, all kinds of norms of *jus cogens* are in our focus. The International Law Commission, when codifying the draft articles on State Responsibility, did its utmost to conform its proposed secondary rules with what it considered to be the secondary rules

⁵⁷ 1947 AJIL, p. 186.

in the 1969 Vienna Convention on the Law of Treaties. It was aware that two separate branches of international law were involved. But its care was justified not to provide different secondary rules, for situations than can equate to when State responsibility results from breaches of conventional obligations.

There was, however, not the same concern in respect of the primary rules. When replacing, in its final text of 2001, the former Article 19 with “serious breaches of obligations under peremptory norms of general international law” set out in new Articles 40 and 41, the Commission had in view the definition of *jus cogens* from Article 53 of the 1969 Vienna Convention. But it seems that it did not care enough about the fact that the 1969 Convention defines two types of these norms. One is contained in its Articles 53 and 71(1) with respect to already existing norms, and the other in Articles 64 and 71(2) in respect of new norms of this kind.

The above, however, indicates that the general concept of *jus cogens* is more diffused in international practice and doctrine than the definition of international crimes from the former Article 19(2).

Every analysis of *erga omnes* obligations must take as its starting point all these provisions from the 1969 Vienna Convention. Article 53 reads:

“A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”.

Hence, such a treaty is void *ab initio*. Article 71(1) determines the consequences of the already existing norms of this kind for the existing but invalid treaties:

“1. In the case of a treaty which is void under article 53 the parties shall:

(a) Eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law; and

(b) Bring their mutual relations into conformity with the peremptory norm of general international law”.

In respect of new peremptory norms the situation cannot be the same. Article 64 provides:

“If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.”

And the consequences of this new *jus cogens* for the existing treaty relations, determined in Article 71(2), are different than the previous ones:

“2. In case of a treaty which becomes void and terminates under article 64, the termination of the treaty:

(a) Releases the parties from any obligation further to perform the treaty;

(b) Does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination, provided that those rights, obligations or

situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law.”

Nevertheless, the wording of Article 53 suggests that some norms of *jus cogens* can exist which do not produce all the legal effects provided in the above Articles 64 and 71(2). The doctrine does not always take this fact into account.

We shall here try to discern three different kinds of norms of general international law which are all generally considered to be *jus cogens*. The first are international crimes (or crimes under international law), which in the final draft articles of 2001 were actually renamed as “serious breaches of obligations under peremptory norms of general international law”. The second are all the other peremptory norms within the meaning of articles 53, 64 and 71 of the 1969 Vienna Convention, but which are *not recognized* by the international community as international crimes. To the third class fall other very important peremptory or mandatory rules of general international law which do not meet all these requirements but have not the effect of *jus dispositivum*. The most important thing here is to stress that all these three classes are creative of *erga omnes* obligations.

As already stated, most *erga omnes* obligations are the product of the customary process in which codification conventions and some declarations by the UN General Assembly play an important role.

2. International crimes

For the reasons already explained it is not possible to ignore the concept of international crimes even when the responsibility of States is at stake. In order to see an international crime actually emerge in general international law several conditions must be fulfilled:

(a) It is always a matter of customary rules of general international law binding, as positive legal rules, all States and other international persons. If an important group of States refuses to accede to a general codification convention, and among them are one or more permanent members of the UN Security Council, “grave breaches” defined in it are not part of general international law.

(b) These rules must at the same time consist of peremptory norms of general international law as defined in the above cited Article 53 of the 1969 Vienna Convention. It should not be a matter of a customary rule of general international law having the character of *jus dispositivum*, which States could lawfully modify by their treaties *inter se*, or in other particular relations.

(c) Although all international crimes constitute *jus cogens*, all peremptory norms of this character are not international crimes. As mentioned above, one of the aspects of international crimes proposed by Roberto Ago in the former draft article 19(2) was that the international obligation in question is so essential that its breach is recognized as a crime by the international community as a whole.

The new Article 40 in the final text on State Responsibility of 2001 has diluted this criterion. Rejecting the concept of international crimes altogether, it replaced it with “serious breaches of obligations under peremptory norms of general international law”. In paragraph 2 of that Article, precision was added: “A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation”.

This innovation does not seem sufficient. The 1948 Genocide Convention and the 1973 *Apartheid* Convention declare themselves that the unlawful acts prescribed in them constitute international crimes⁵⁸. Equally, Article 5(2) of the Definition of Aggression, as adopted by the UN General Assembly in 1974, provides that: “A war of aggression is a crime against international peace. Aggression gives rise to international responsibility” (meaning in that context State responsibility). Therefore, although the responsibility of States is not of a criminal character, a State committing acts prohibited in these instruments has committed nothing less than international crimes.

In respect of “violations of the laws or customs of war”, as set out in Article 3 of the Statute of the ICTY, the Report of the UN Secretary-General stressed that: “The Nürnberg Tribunal recognized that many provisions contained in the (1907) Hague Regulations, although innovative at the time of their adoption were, by 1939, recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war”⁵⁹. This statement reflects a *communis opinio juris*. Therefore, the violations of laws and customs of war from the 1907 Hague Regulations constitute international crimes that can be committed in international, as well as in non-international armed conflicts.

In the same way “crimes against humanity”, first provided in Article 6(c) of the 1945 London Statute on the International Military Tribunal in Nürnberg, are now recognized as international crimes by the international community as a whole. The London Statute was originally concluded only by the United States, the Soviet Union, the United Kingdom and France. The first time these crimes were codified in a convention of universal character was Article 7 of the 1998 Rome Statute on the International Criminal Court.

Furthermore, the term “international crimes” is synonymous with “grave breaches” of the Geneva Conventions of 1949 on humanitarian law. To these “grave breaches” all kinds of misconduct should be added which these Conventions prohibit as acts of reprisals in armed conflicts.

⁵⁸ The question whether *apartheid* itself became a crime under general international law will be discussed below.

⁵⁹ Cf., *Report of the Secretary-General*, presented 3 May 1993 (S/25704), para.42. Namely, Article 2 of the 1907 Convention (IV) Respecting the Laws and Customs of War on Land originally provided a clause *si omnes*: “The provisions contained in the Regulations referred to in Article 1, as well as in the present Convention, do not apply except between contracting Powers, and then only if all the belligerents are the parties to the Convention.”. The above means that this conventional clause is not applicable anymore.

Whether all the “grave breaches” set out also in the 1977 Protocol I to the 1949 Geneva Conventions, and all the war crimes provided in Article 8 of the 1998 Rome Statute, will in the future transform into customary rules of general international law, largely depends on the accession to them by “specially interested States”. This process is now in progress.

All this means that the international community as a whole has recognized some internationally wrongful acts as international crimes, even if committed by States. Hence, all these crimes involve State responsibility which in principle is not criminal.

(d) When it comes to personal criminal responsibility of individuals the above abstract definitions of international crimes are not sufficient. They cannot operate in practice unless national legislation of States and/or statutes of international criminal courts and tribunals provide them as criminal offences, simultaneously determining the penalties for them. The general principle of law *nullum crimen nulla poena sine lege* is part of the constitutional guarantees of human rights in many States. It is also provided in all the main human rights conventions as an obligation of all their States parties. Hence, this general principle cannot be interpreted otherwise than it is.

This means that it is not sufficient to prove, on the basis of the above criteria, that an offence is an international crime and expect that all States in the world give full effect to it in their criminal proceedings just because it consists of a peremptory norm of general international law.

In this respect a variety of situations exist in practice. For instance, the supreme crime of aggression is now not in the competence of any international criminal court or tribunal. National jurisdictions are absolutely unfit to prosecute this specific international crime, especially against their own heads of State and Government. But the situation with other international crimes can be different. For this reason this complexity of problems shall be discussed in the last part of this text.

To this end it is important to stress another significant distinction relating to the perpetrators of internationally wrongful acts. Crimes of piracy, slavery and drug trafficking are usually committed by individuals or groups acting for their own interests. Although anything in life is possible, it is difficult to impute these acts to one or more States.

Some of the most dreadful crimes such as genocide, *apartheid*, or terrorism, or crimes against humanity, can also be committed by groups of individuals acting in their own capacity; but individuals can be inspired by or act as agents of a State.

However, crimes against peace (i.e. the crime of aggression) can by definition be committed by individuals only if acting in the capacity of State organs. State responsibility cannot be dissociated from them, while in other cases it should be proved.

On the basis of the above criteria we shall now try to explain some unlawful acts which can be considered to constitute international crimes in general international law of the present time. Where appropriate, we shall quote their definitions from

conventional instruments. Where these definitions are extensive we shall indicate the provisions in which they were agreed.

(i) *Piracy on the high seas* is the international crime from time immemorial. That is because it has always epitomized the actual threat to the minimal legal order and security in the parts of the sea in which no State enjoys exclusive jurisdiction. All States are entitled to exercise universal criminal jurisdiction in repression of this crime (see below)⁶⁰.

This customary rule was confirmed and codified for the first time in Articles 14 to 20 of the 1958 Geneva Convention on the High Seas. The same provisions were reproduced in Articles 100 to 106 of the 1982 UN Law of the Sea Convention, which is the proof that here the matter is of an ancient customary legal rules. The definition of piracy is set out in Article 15 of the 1982 Convention and confirmed in Article 101 of the 1982 Convention:

“Piracy consists of any of the following acts:

(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

(i) on the high seas, against another ship or aircraft, or against a person or property on board such ship or aircraft;

(ii) against a ship, aircraft, persons or property, in a place outside the jurisdiction of any State;

(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(c) any act of inciting or of intentionally facilitating an act described in sub-paragraph (a) or (b)”.

(ii) *Slavery and slave trade*

The prohibition of trafficking in slaves and the complete abolition of slavery was a long process achieved through domestic legislation and by some treaties between European Powers throughout the 19th century.

The Slavery Convention of 1926 offered summary definitions of slavery and slave trade in its Article 1. It reads as follows:

“For the purposes of the present Convention, the following definitions are agreed upon:

(1) Slavery is the status or conditions of a person over whom any or all of the powers attaching to the right of ownership are exercised.

(2) The slave trade includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave

⁶⁰ Piracy must be distinguished from the practice of privateering in armed conflicts on sea, which was a lawful means of warfare until the 1856 Paris Declaration Respecting Maritime Law. It consisted in arming private ships commissioned by a belligerent State to cruise against enemy ships and commerce.

acquired with a view to being sold or exchanged, and, in general, every act of trade and transport in slaves”.

Articles 1 to 7 of the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, have supplemented and developed the above definitions. They should now be considered to be declaratory of the customary rules of general international law binding even on the States which are not parties to this Supplementary Convention.

Because the 1948 Universal Declaration of Human Rights and all human rights conventions prohibit slavery and slave trade they should be considered as one of crimes under general international law. This status is an abnegation of all other human rights of a person which constitute *jus cogens*⁶¹.

(iii) *Aggression*

It was for the first time in the Pact of Paris (Kellogg-Briand Pact) of 1928 that its States parties have solemnly condemned recourse to war for the solution of international controversies and renounced it as an instrument of national policy in their relations with one another.

The UN Charter of 1945 goes much further. Its Article 2(4) contains the far-reaching obligation of all its Members to 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.

An authoritative interpretation of this principle was given in the related part of the “Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations”. It was adopted by the UN General Assembly resolution 2625 (XXV) in 1970, by consensus. It declares, *inter alia*, that: “A war of aggression constitutes a crime against peace, for which there is responsibility under international law”; and that “States have a duty to refrain from acts of reprisals involving the use of force”.

The 1945 London Statute conferred “crimes against peace” to the competence of the International Military Tribunal in Nürnberg. The same provision was reproduced in the 1946 Charter of the International Military Tribunal for the Far East in Tokyo. In its Article 6 the following was provided:

“(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 accomplishment of any of the foregoing;...”.

After many years of preparations, the UN General Assembly has adopted the Definition of Aggression in its resolution 3314 (XXIX) of 14 December 1974, without vote. This definition is the most authoritative international instrument in this subject-

⁶¹ Together with the UN Convention against Transnational Organized Crime the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children was concluded in 2000. See the text, *International Legal Materials* 2001, No.2, pp. 377-384.

matter until its possible replacement with a convention to the same effect, which itself should obtain universal participation of States.

It is important to stress that the crime of aggression was not embodied in the statutes of *ad hoc* criminal tribunals for the former Yugoslavia and Rwanda. And in spite of its being mentioned in Article 5 of the 1998 Rome Statute, a new provision must subsequently be adopted defining this crime and setting out the conditions under which the ICC shall exercise jurisdiction with respect to it.

(iv) *Crimes against humanity*

They were first recognized in Article 6(c) of the London Charter and the Judgment of the Nürnberg Tribunal, as follows:

“(c)... namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecution on political, racial, or religious ground in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of domestic law of the country were perpetrated”.

Later development of general international law did not attach the commission of this crime to the crimes against peace and war crimes anymore.

In the Report of the UN Secretary-General (S/25704), para. 48) of 1993, it was stressed that in the conflict in the territory of the former Yugoslavia such inhumane acts have taken the form of the so-called “ethnic cleansing” and widespread and systematic rape and other forms of sexual assault, including enforced prostitution. Hence, the matter here is not of new crimes, but of particular forms of crimes against humanity as have already been universally recognized.

It is now generally admitted that these crimes can be committed in international and internal armed conflicts, but also in time of peace.

These crimes were conferred to the jurisdiction of both *ad hoc* international criminal tribunals for the former Yugoslavia and Rwanda. Their definitions do not differ in substance from the London Statute, except of adding, in the last sub-paragraph, “other inhumane acts”.

Crimes against Humanity are more comprehensively enumerated in Article 7(1) of the 1998 Rome Statute than in previous instruments. Compared with the previous definition, this Article additionally includes in its sub-paragraph (i) “enforced disappearance of persons”, and in sub-paragraph (j) the crime of *apartheid*, although the 1973 Convention on *Apartheid* has never been adhered to by the States of the former Western block. Whether the crime of *apartheid* will transform into general international law largely depends on the future participation of the States to the Rome Statute.

It is, however, important that in paragraph 2 of Article 7 the meanings of most of the crimes listed in its paragraph 1 were included.

(v) *Genocide*

The definition of the most heinous international crime of all was given in Article II of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. Since that Convention, genocide has not been considered a particular form of crime against humanity anymore. It represents an international crime in itself. Article II disposes:

“In the present Convention, genocide means any of the following acts committed with the 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 birth within the group; (e) forcibly transferring children of the group to another group”.

According to Article III, 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.

Genocide, with its above definition, was confirmed later on in Article 4 of the ICTY Statute and Article 2 of the ICTR Statute. In the short text of Article 6 of the 1998 Rome Statute it is defined exactly according to Article II of the 1948 Convention⁶². Hence, this definition is deeply rooted in the general customary international law without the need for any subsequent improvements.

The special intent “*to destroy, in whole or in part, a national, ethnical, racial or religious group*” is not always easy to prove. In this special intent genocide differs from crimes against humanity.

(vi) *War crimes*

The concept and content of war crimes was the product of treaty regulations of the “laws and customs of war” on the one hand, and of those aimed at the protection of the victims of war on the other. The results of these codification efforts of many years were explained in a condensed form in the 1996 Advisory opinion of the Hague Court on the *Legality of the threat or use of nuclear weapons*. It is worth quoting this explanation here:

“75. A large number of customary rules have been developed by the practice of States and are an integral part of the international law relevant to the question posed. The “laws and customs of war” —as they were traditionally called— were the subject of efforts at codification undertaken in The Hague (including the Conventions of 1899 and 1907), and were based partly upon the St.Petersburg Declaration of 1868 as well as the results of the Brussels Conference of 1874. This “Hague Law” and, more particularly, the Regulations Respecting the Laws and Customs of War on Land, fixed the rights and duties of belligerents in their conduct of operations and limited the choice of methods and means of injuring the

⁶² Nevertheless, the text of Article III of the Genocide Convention was not reproduced in Article 6. Acts of perpetration of or participation in all the crimes within the jurisdiction of the ICC are regulated by Article 25(3) of the Rome Statute. But direct and public incitement of others to commit genocide constitutes, in its sub-paragraph (e), a separate crime.

enemy in an international armed conflict. One should add to this the “Geneva Law” (the Conventions of 1864, 1906, 1929 and 1949), which protects the victims of war and aims to provide safeguards for disabled armed forces personnel and persons not taking part in the hostilities. These two branches of the law applicable in armed conflict have become so closely interrelated that they are considered to have gradually formed one single complex system, known today as international humanitarian law. The provisions of the Additional Protocols of 1977 give expression and attest to the unity and complexity of that law”⁶³.

The London Statute of 1945 provided in its Article 6(b) a summary determination of war crimes sufficient for the prosecution of “major war criminals” at the Nürnberg Trial:

“*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 labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder or public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;...”.

Having in view the sinister experience of World War II, each of the four 1949 Geneva Conventions on humanitarian law enumerates in its text its “grave breaches”, which are but an euphemism of war crimes. Practically all the States of the world became parties to these Conventions. They are now one of the best examples of transformation or rules from codification conventions into general international law.

However, all these four Conventions, except their common Article 3, relate to international armed conflicts only⁶⁴. Unlike that, common Article 3, relating to conflicts not of an international character, does not itself contain provisions concerning “grave breaches”.

The results of new codification efforts in the domain of humanitarian law were similar. The extensive text of 1977 Additional Protocol I to the 1949 Conventions relates to the protection of victims of international armed conflicts. It contains a long list of its “grave breaches” in Article 85. Additional Protocol II relates to the protection of victims of non-international armed conflicts. By the will of sovereign States represented at that Conference, its text is much shorter than the Protocol I, and it again lacks provisions concerning its “grave breaches”.

In addition, both Protocols of 1977 were so far acceded by more than 150 States. Nonetheless, their parties do not actually include some important States such as the United States, Israel, India, Pakistan and some Arab countries. This means that, unlike with the 1949 Geneva Conventions, the provisions from these Protocols do not constitute general international law.

When codifying international crimes applicable by the ICTY its drafters tried to respect the principle *nullum crimen sine lege*. In Article 2 of its Statute grave breaches

⁶³ I.C.J. Reports 1996, p. 256, para.75.

⁶⁴ Their common Article 2 provides in fact a definition of international armed conflicts.

of the Geneva Conventions of 1949 are listed, but not the breaches of Protocol I of 1977. In its Article 3 provisions concerning violations of laws or customs of war are contained, but not all of them as being provided in the 1907 Hague Regulations.

It seems that by this the drafters of the Statute of the ICTY have not conceived the full importance of the problem of applicable law, based on the conventions, in non-international armed conflicts⁶⁵. Its Article 2 is not applicable to crimes committed in non-international armed conflicts, while Article 3, which is applicable to all sorts of conflicts, was poorly drafted and it provides an open definition of crimes⁶⁶. Hence, conventional provisions on war crimes in internal conflicts have remained insufficient.

The conflict in Rwanda was an internal armed conflict during its entire period between 6 April and 17 July 1994. Article 4 of the Statute of the ICTR provides, in fact, a new crime: "Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II", although, as already said, these provisions do not define their own grave breaches, neither were they provided in the Statute of the ICTY.

These complicated problems were facing the drafters of the Rome Statute when codifying war crimes in its present Article 8. This provision is the longest and the most complex in its entire text.

A clear intention of States parties to the Rome Statute was to confirm the distinction of war crimes that can be committed in international armed conflicts from the crimes committed in "armed conflicts not of an international character"⁶⁷. The former are set forth in its paragraphs 2(a) and 2(b), and the latter in paragraphs 2(c) and 2(e) of Article 8. However, in paragraphs 2(d) and 2(f) which follow, it was repeated that paragraphs 2(c) and 2(e) do 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".

By this, Article 8 confirms all sorts of situations from the aspect of applicability of humanitarian law, as previously provided in common Articles 2 and 3 of the 1949 Geneva Conventions and in Article 1 of the 1977 Protocol II.

⁶⁵ In the gradual process of demise of that Federation all conflicts started as non-international. At a later stage some of them became international armed conflicts between independent States. However, temporary struggles between some factions in Bosnia-Herzegovina, and the conflict in Kosovo in 1998 and 1999 between the Serbian police and the Yugoslav Army and the Kosovo Liberation Army, remained non-international.

⁶⁶ Both *ad hoc* criminal tribunals for the former Yugoslavia and Rwanda found in that and other *lacunae* in their statutory provisions a large opportunity for law-creating. That cannot be a function of any criminal judicial body. See our critical remarks on "judge-made law" produced by Judges of these Tribunals - V.D. Degan: "On the Sources of International Criminal Law", *Chinese Journal of International Law* 2005, No.1, pp. 45-83. Much more comprehensive provisions of the 1998 Rome Statute, with its extensive Rules of Procedure and Evidence and Elements of Crimes, will exclude such law-making by Judges as unnecessary.

⁶⁷ Hence, this division has been part of positive international law at least since the adoption of the 1949 Geneva Conventions. The views *de lege ferenda* by some Judges of the ICTY and some other authors on its unfitness from the aspect of "elementary considerations of humanity", do not reflect positive international law.

Unlike the previous statutes of *ad hoc* tribunal, which were adopted by the UN Security Council resolutions, the Rome Statute is a conventional instrument. It depends on the sovereign will of any State whether it will become a party to it or not. From this aspect there was plenty of room for its drafters to provide “law-generating rules” of general international law, i.e. new rules intended to legislate, and to “improve” the law of armed conflicts and international criminal law.

It is, however, to the credit of the drafters of the Rome Statute that in spite of that freedom to legislate, Article 8 adheres to the division between the “law declaratory rules” of general customary law in this domain, and the “law crystallizing rules” in cases when respective codification conventions have not yet attained the universal approval.

Among the rules declaratory of the existing general customary law on international crimes there are war crimes that were provided in its paragraph 2(a) and 2(c). Paragraph 2(a) relates to the well-known Grave breaches of the 1949 Geneva Conventions, which are couched in the exactly same terms as in Article 2 of the ICTY Statute.

In paragraph 2(c) serious violations of Article 3 common to the 1949 Geneva Conventions in case of non-international armed conflicts are enumerated. Their enumeration was obviously inspired by Article 4 of the ICTR Statute. However, it leaves out the acts of terrorism, while pillaging is provided in paragraph 2(e). This means that since the entry into force of the Rome Statute, all States parties to it consider these crimes declaratory of general international law.

On the other hand, paragraph 2(b) enumerates a long list of 26 sub-paragraphs as constituting “/o/ther serious violations of the laws and customs applicable in international armed conflicts”, but stressing: “within the established framework of international law”.

The same reservation appears in paragraph 2(e) concerning “/o/ther serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law”, in no less than 12 sub-paragraphs.

In the view of this author the above reservation should be understood in the context of the law of treaties. If a suspect is accused of a crime originally provided in a convention of which his State is not a party, he could plead the fact that such a crime cannot be imputed to him “within the established framework of international law”⁶⁸.

We hope that this reservation is of a temporary importance only. Once a great majority of States, including all the permanent members of the UN Security Council, become parties to the Rome Statute, its Articles 7 and 8 will be considered a complete codification of general customary international law in the domain of international

⁶⁸ It is, nevertheless, in the discretion of the Court to attach to this wording any meaning it finds appropriate.

crimes, humanitarian law and the law of armed conflicts, all of which, in fact, form a unity.

However, until this requirement is fully satisfied, some newly-added crimes in Articles 7 and 8 will be contained in particular legal rules obligatory for the ICC itself. However, on the conventional basis they are already obligatory for all the States parties to the Rome Statute and their citizens, in particular if they take part in enforcement and peace-keeping missions abroad. These States must from now on fully conform the operations of their armed forces to all these provisions. Otherwise, their members could fall under the jurisdiction of the ICC for committing the crimes provided in its Statute⁶⁹.

(vii) *The crime of international terrorism*

After the events of 11 September 2001 in the United States, followed by similar terrorist attacks in other countries as well, the terrorist acts of transnational organized groups are in the focus of attention of the international community.

The reason that this particular crime has so far not attained all the features of other international crimes is that the international community as a whole has not yet agreed on its definition. Many non-aligned States, supported by the former Soviet block, wanted to exclude from such a definition the armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination. Western States, which are exposed to terrorist attacks the most, have never agreed to that exception.

From this followed a paradoxical situation. A few general conventions against all forms of terrorism, but short of its definition, were concluded within some regional organizations (the Organization of American States in 1971, the Council of Europe concerning extradition in 1977, the South Asian Association for Regional Co-operation (SAARC) in 1987, and the Arab League in 1998).

On the other hand, the so-called “sectorial conventions” of universal character, relating to some forms of terrorism such as high-jacking, attacks against the safety of maritime navigation, taking hostages, etc. were concluded within the UN or some of its specialized agencies. These conventions include definitions of criminal acts, but for their own purposes only.

From the doctrinal point of view the most plausible definition of international terrorism seems to be that of the Italian Professor Antonio Cassese, containing its three main elements: (i) the acts must constitute a criminal offence under most national legal systems (for example, assault, murder, kidnapping, hostage-taking, extortion, bombing, torture, arson, etc.); (ii) they must be aimed at spreading terror (that is, fear and intimidation) by means of violent actions or the threat thereof directed against a

⁶⁹ In this respect the British or Polish Armed Forces in Iraq are subject to the Rome Statute, as well as to the provisions on serious breaches from Protocol I of 1977. For the time being the US Armed Forces have not the same obligations.

State, the public, or particular groups or persons; (iii) they must be politically, religiously, or otherwise ideologically motivated, that is not motivated by the pursuit of private ends⁷⁰.

This author alleges that there exists a broad agreement on the above general definition of terrorism, and that the acts in question are banned by customary law. He might be perfectly right, but what is at stake is the criminal responsibility of suspects for the perpetration of these acts. It would be therefore preferable that a definition similar to his is embodied in a general codification convention encompassing all the forms of international terrorism.

Even a better solution seems to be to include in the present text of the Rome Statute, at the next Review Conference, the definitions of the crime of international terrorism, as well as that of the crime of aggression. There are no more suitable impartial instances than the ICC for combating this scourge of the international community.

As already said, the International Court of Justice stated in its 1995 Judgment on *East Timor* that the right of peoples to self-determination, as an essential principle of contemporary international law, has an *erga omnes* character. However, the exercise of this right of peoples, in their fighting against colonial domination and alien occupation and against racist regimes, must also be in accordance with the UN Charter and the 1970 Declaration on Principles concerning Friendly Relations and Co-operation. Hence, perpetration of terrorist acts in the struggle for self-determination is unlawful in itself⁷¹.

(viii) *Probable generation of new crimes under international law*

It cannot be excluded that, like terrorism, some other international crimes appear in future, if they satisfy all the above criteria. These could be some transnational organized crimes, such as large-scale drug-trafficking, participation in organized criminal groups, money-laundering, obstruction of justice, smuggling of migrants, or trafficking in arms. To these ends the UN Convention against Transnational Organized Crimes was signed in Palermo in 2000, with its three supplementing protocols so far.

⁷⁰ A. Cassese: *International Criminal Law*, Oxford 2003, p. 124.

⁷¹ Cf., Patrick Robinson: "The Missing Crimes" in A. Cassese, P. Gaeta, J.R.W.D. Jones: *The Rome Statute of the International Criminal Court, A Commentary*, Oxford 2002, Volume I, p. 520. On the other hand, in its Advisory Opinion of 2004 on the *Construction of a wall in the occupied Palestinian territory*, the International Court of Justice has defined many obligations of Israel with which it is in breach for many years. This territory is considered occupied when it is actually placed under the authority of the hostile army, where Israel has the status of the occupying Power with all the obligations from the 1907 Hague Regulations (para. 78). The construction of the wall severely impedes the Palestinian people of exercising of its right to self-determination, and is therefore a breach of Israel's obligation to respect that right (para. 122, 149). Israel has a duty to respect, in that occupied territory and with regard to its inhabitants, all the human rights conventions (para. 103-113, 124-128). It has particularly the duty not to settle its own population on that territory.

(ix) *Some conclusions to be derived*

The first conclusion is that the responsibility of sovereign States is not criminal. One of the reasons for it is that it cannot be conceived as realistic to establish a criminal tribunal for prosecuting States which would render punitive sanctions against them. On the other hand, the jurisdiction of the ICJ and of arbitral tribunals is voluntary and is based on the agreement by all the parties to a dispute on it. It does not seem realistic that a State accused of international crimes would be willing to agree on such a procedure with its victim.

It is different only with the 1948 Genocide Convention, which in its Article IX prescribes:

“Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide, or for any other act enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute”.

Because the Convention attained a large participation of States, some cases to which Serbia and Montenegro (the former Federal Republic of Yugoslavia) is a party are now pending before the ICJ. The most important of them is the case with Bosnia-Herzegovina on which the judgment on merits is expected soon. However, in all these cases that can be initiated by unilateral applications, the jurisdiction of the Court is strictly limited to the violations by its parties of the Genocide Convention. It cannot be extended on other international crimes that were committed on the territory of the former SFRY.

Nevertheless, widespread and systematic international crimes committed by a State, either against its own population, or in an aggressive war on the territory of another State, will incite negative reactions by the international community as a whole. In such an appalling situation what is the most important is not the extent of treaty obligations of that State, or its *erga omnes* obligations as a member of the international community, or conventional definitions of crimes committed by it. Important are only the consequences of such a criminal policy.

A State which is considered responsible for the crimes inflicting enormous human sufferings and material damage, which moved a mass of refugees to neighbouring countries, can expect even belated sanctions by the UN Security Council.

Such a State can expect vigorous pressures to punish the indicted persons itself, or to surrender them to an international criminal tribunal, or to the jurisdictions with mixed composition of foreign and domestic judges. To this end the UN Security Council has established the ICTY in 1993 and the ICTR in 1994. And on behalf of Article 13(b) of the Rome Statute the Security Council can now refer such a situation to the Prosecutor of the ICC, if acting under Chapter VII of the UN Charter.

It must be clear however, that the Security Council is a political organ and not a court of justice. Its actions under Chapter VII cannot be successful if one of its permanent members committed international crimes itself, or another State did the same

acting under its protection. And if the enforcement measures by the UN are necessary to stop the crimes, they frequently fail because the UN mission abroad has the mandate to observe or the peace-keeping mandate. That actually occurred in Bosnia-Herzegovina, Somalia, Rwanda, Sierra Leone, and elsewhere.

Bearing all these situations in mind, it is not possible to assert that the criminal responsibility of States exists at all, or that legal consequences for a State committing an international crime can be regulated by impersonal norms in the Draft Articles on State Responsibility by the International Law Commission.

We shall close this explanation with some general conclusions of rather a doctrinal character.

(a) The commission of any of international crimes is in breach of *erga omnes* obligations towards the international community as a whole. At the same time all international crimes consist of breaches of peremptory norms of general international law within Articles 53, 64 and 71 of the 1969 Vienna Convention on the Law of Treaties. The commission of any of the recognized crimes is itself a serious breach of the norms of this kind.

To this effect a new international crime, such as some new forms of terrorism, produces the effects on the existing treaties as provided in Articles 64 and 71(2) of this Convention.

(b) International crimes have a double effect. Their commission produces the international responsibility of the wrongdoing State. But in this imperfect international community in which we must live, it is impossible to define the legal consequences of that responsibility for such a State through impersonal norms, as it already said above.

The commission of all these international crimes produces personal criminal responsibility of their perpetrators. But its particular effects must be explained in the last part of this text.

It should be only mentioned here that some international crimes, such as piracy, slavery, drug trafficking, or minor acts of terrorism are not suitable for proceedings before international criminal courts or tribunals. Normally, they fall within the jurisdiction of domestic courts in States, mostly on the basis of the principle of territoriality. However, all the crimes which are now within the jurisdiction of the ICC (genocide, crimes against humanity and war crimes), are also fit for domestic procedures. In recent times, the universal criminal jurisdiction of national courts seems to be in expansion. But it has its own limits and shortcomings and it cannot replace the jurisdiction of the ICC.

However, as already stressed, by the will of the most powerful States, the crime of aggression is now not in the competence of any international criminal tribunals, while domestic courts are incapable of its prosecution.

(c) International crimes which consist of the breaches of fundamental human rights and of the rules of humanitarian law are absolutely forbidden as acts of countermeasures or of reprisals in armed conflicts.

Already the 1928 Arbitral Award in *Naulilaa* case (Portugal v. Germany), ordained *inter alia* that reprisals must be “limited by considerations of humanity” (*les expériences de l’humanité*)⁷². The Institute of International Law prescribed in its Resolution of 1934 on the Regime of Reprisals in Time of Peace, that a State in exercising reprisals must: “abstain from all vigorous measures which would be contrary to the laws of humanity and requirements of public conscience”⁷³.

The International Law Commission has devoted a large part of its final Draft Articles on State Responsibility (Articles 49 to 54) to counter-measures. It provides *inter alia* in Article 50 that countermeasures shall not affect: (b) obligations to protect human rights; and (c) obligations of a humanitarian character prohibiting reprisals.

Because all the international crimes fall into the above categories, a State which is itself a victim of one or more international crimes cannot as an act of legitimate countermeasures or reprisals reciprocate with the same or different international crimes.

(d) There is a long debate whether the statutory limitations apply to international crimes. The 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, adopted by resolution 2391 (XXIII) of the UN General Assembly, has never attained the participation of Western States.

The 1998 Rome Statute prescribes in its Article 29 that: “The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations”. At the same time, according to its Articles 11 and 24, its own jurisdiction *ratione temporis* is limited to the crimes committed after its entry into force for each of its particular State parties. By this, Article 29 will remain without effect in the foreseeable future.

De lege ferenda it seems justified that on the most heinous crimes such as genocide or atrocious forms of crimes against humanity and war crimes, statutes of limitation do not apply. This, however, depends on the sovereign will of most States forming parts of the international community. In any case, the 1968 Convention is as a treaty in force applicable to all its parties. Among them are all the successor States to the former SFRY.

(e) The general international law imposes an *erga omnes* obligation on all the States not to be in breach of the norms prohibiting international crimes. The result of this is that provisions from universal codification conventions defining these crimes (such as piracy, slavery and slave trade, genocide, etc) transform into general customary international law in a short period of time, binding even on the States not parties

⁷² Cf., *Reports of International Arbitral Awards*, vol.II, p. 1026.

⁷³ See Article 6(4) of this resolution, Institut de Droit international, *Tableau général des Résolutions* (1873-1956), Bâle 1957, p. 169.

to them. However, as already stressed, this does not apply to conventions which an important group of States refuses to ratify or to accede to.

Finally, in case of establishment of any new international criminal court or tribunal, the principle of non-retroactivity will not be disobeyed if the prosecution of past international crimes that have already been recognized as part of positive international law is within their competence. Under such circumstances in respect of these crimes the principle *nullum crimen sine lege* will not be affected⁷⁴.

3. Other peremptory norms within the meaning of Articles 53, 64 and 71 of the 1969 Vienna Convention

However, even in the sphere of human rights and humanitarian law, *jus cogens* within the meaning of the 1969 Vienna Convention does not exhaust in the rules prohibiting international crimes only.

There is a norm of *jus cogens* prohibiting all the measures of discrimination of human beings, even if they do not consist of international crimes, either in the execution of municipal laws in force or committed in a State through an unlawful practice. There is no doubt that the principle of non-discrimination has become a peremptory norm of general international law. It has already been declared in the Preamble and in Articles 1(3), 13(1) and 55(c) of the UN Charter. It has been subsequently reinforced in Articles 1 and 2 of the 1948 Universal Declaration of Human Rights, and virtually in all the human rights conventions which followed.

Of the same character seem to be all the norms prohibiting breaches of the civil and political rights of individuals which are couched in respective multilateral conventions in terms of *jus cogens*, allowing no exceptions or attenuation in their observance. To this class belong first of all human rights that cannot be derogated in any circumstances such as war, public danger or other emergency. Different conventions provide somewhat different lists of these non-derogable rights, though they are essentially the same⁷⁵.

⁷⁴ On this ground the ICTY is competent to punish the crimes committed in the territory of the former Yugoslavia since 1991, although it was itself established by the UN Security Council resolution 827 of 25 May 1993. Nevertheless, as already said above, Articles 11 and 24 of the Rome Statute exclude the jurisdiction of the ICC in respect of the crimes committed before its entry into force.

⁷⁵ Hence, Article 4 of the 1966 International Covenant on Civil and Political Rights, defines its following provisions as non-derogable: Article 6 (right to life); Article 7 (right to human treatment); Article 8, paragraphs 1 and 2 (freedom from slavery and servitude); Article 11 (freedom from imprisonment for debt); Article 15 (freedom from *ex post facto* laws); Article 16 (right to juridical personality); and Article 18 (freedom of thought, conscience and religion). Article 15(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, is in that respect more restrictive, providing as non-derogable the following rights: right to life, right to human treatment, freedom from slavery or servitude, and freedom from *ex post facto* laws. The most extensive is, however, Article 27 of the American Convention of 1969. In addition to all the foregoing, it provides as non-derogable -- right of the family, right to name, rights of the child, right to nationality, right to participate in government, as well as juridical guarantees essential for the protection of these rights.

To this list certain other fundamental rights of individuals should be added that perhaps may be derogated in public emergency for a short period of time. Nevertheless, their violation justifies strong measures of intervention by the international community if committed for a longer period of time and on a large scale and systematic basis. According to the text of the aforesaid 1966 International Covenant, these are the rights as provided in its Article 9 (right to personal liberty); in Article 10 (right to human treatment of imprisoned persons); and in Article 14 (right to a fair trial).

States parties to the conventions providing these rights and freedoms cannot rebut their nature of *jus cogens* in their own respect. Even if the customary process has not already been accomplished in respect of all the above mentioned rights, it seems most likely that all of them will in the foreseeable future transform into peremptory norms of general customary international law.

It also seems highly probable that the above list of *jus cogens* within the meaning of Article 53 of the 1969 Vienna Convention will in the future expand further by way of new norms with the general approval of the international community of States as a whole⁷⁶.

Any such new peremptory norm of this kind will have effects *ex nunc* on the existing treaties, on particular customary rules if any, and on any legal situations of States that were created either by treaties, by prescription, or by other kinds of unilateral acts.

4. Some other peremptory (mandatory) rules of general international law

The qualification of *jus cogens* in Articles 53, 64 and 71 of the 1969 Vienna Convention is, however, too restrictive to encompass some other classes of mandatory or peremptory norms of general international law. There are important classes of customary rules of general international law which are definitely not *jus dispositivum*, but neither they do strictly correspond to *jus cogens* within the above meaning of the 1969 Vienna Convention⁷⁷. However, there is not the slightest doubt that all of them constitute *erga omnes* obligations.

Three different classes of these mandatory rules will be discussed, but not enumerated, here.

(i) There are first certain civil and political rights of individuals in respect of which the conventional provisions allow to their States parties a large choice of measures, or even considerable restrictions in their implementation, in order to ensure such loose

⁷⁶ One of the reasons for the general condemnation of these grave breaches of human rights are movements of masses of refugees and displaced persons. That creates tremendous financial and social problems to the neighbouring and other States, as well as to the international community at large.

⁷⁷ It seems that this kind of *jus cogens* was also identified in Oppenheim's *International Law*, Volume I, Parts 2 to 4, Ninth Edition, London 1992, pp. 704-705.

objectives as “national security”, “public order”, “morality”, etc.⁷⁸. Hence, these human rights are not absolute.

According to the 1966 International Covenant on Civil and Political Rights, the question is of the freedom of movement and residence (Article 12); right to privacy (Article 17); right of expression (Article 19); freedom of association in trade unions (Article 22 and Article 8 of the 1966 International Covenant on Economic, Social and Cultural Rights); right of the family (Article 23); special rights of child (Article 24); and right to participate in government (Article 25).

It is perhaps essential that in States in which the full respect of these rights is avoided by abusive restrictions in law and practice, this in the long run leads to the disintegration of the political and economic order. As the examples of former Socialist régimes in Central and Eastern Europe show, that has dangerous consequences for all the citizens.

(ii) In general customary international law there are a plenty of other mandatory norms which prohibit the conduct contrary to them so far as they do not undergo modification or abrogation. However, unlike peremptory norms provided in the 1969 Vienna Convention, these norms do not make void—but respect—all the acquired rights of States based on prescription, historic title or particular customary law already in force. On the same ground these mandatory rules respect a persistent objector’s special rights as described by the Hague Court in *Anglo-Norwegian Fisheries* case of 1951⁷⁹.

In the law of the sea the peremptory norms of this kind are, *inter alia*, the general provisions on bays forming parts of the internal waters of a coastal State. In both provisions codifying these customary rules i.e. Article 7(6) of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, and Article 10(6) of the 1982 UN Law of the Sea Convention, it is expressly stipulated that they do not apply to the so-called “historic” bays. It is similar with most freedoms valid *erga omnes* and based on general customary law, like the freedoms of the high seas or the right of innocent passage through the territorial sea, archipelagic waters, or straits used for international navigation. They all imply the duty of all the States to respect their enjoyment and exercise by others. The legal obligations to respect the rights in favour of all, are of peremptory character. Subject to specific rights of coastal and other States, no State can impede any other State in exercising the rights and freedom *erga omnes*. These rules are, therefore, not *jus dispositivum* but can hardly be subsumed to *jus cogens* in terms of the 1969 Vienna Convention. That is perhaps because the law of the sea has rapidly evolved in favour of the rights of coastal States.

(iii) Among these mandatory rules the most important are the so-called “fundamental principles of international law” or “principles of the United Nations”. They are of an axiomatic character, accepted virtually by all the States as being prerequisite to

⁷⁸ Cf., R. Higgins: “Derogation under Human Rights Treaties”, *British Year Book of International Law* 1976-77, pp. 281-300.

⁷⁹ Cf., *I.C.J. Reports* 1951, pp. 131, 139.

the existence and functioning of the present world political order and to the maintenance of international peace and security⁸⁰.

The originally naturalist idea of fundamental rights and duties of States was displayed in the principles of the United Nations, laid down in Article 2 and in Article 1(2) of the 1945 UN Charter. These principles were elaborated in the “Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations”. It was approved by consensus in the General Assembly on 24 October 1970.

That Declaration announces and elaborates the following seven principles: (i) The principle that States 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; (ii) The principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered; (iii) The principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter; (iv) The duty of States to co-operate with one another in accordance with the Charter⁸¹; (v) The principle of equal rights and self-determination of peoples; (vi) The principle of sovereign equality of States; and (vii) The principle that States shall fulfil in good faith the obligations assumed by them in accordance with the Charter⁸².

There are no other rules of general international law which limit to such an extent the freedom of action of all sovereign States, which as a result are probably the most often violated legal rules in international practice. However, just because of their ultimate goal which is the maintenance of international peace and security, even frequent violations of these principles cannot substantially modify their content and legal character.

The reason why this set of fundamental legal principles cannot be categorized as *jus cogens* within the meaning of the 1969 Vienna Convention, is not their frequent disrespect, but the derogatory character of some of them.

The 1986 Judgment in the *Nicaragua* case was perhaps the most important verdict that the Hague Court has ever rendered. That is because of its precise description of

⁸⁰ On the evolution of this concept see - V.D. Degan: *Sources of International Law*, The Hague 1997, pp. 83-89.

⁸¹ Because its breach does not produce international responsibility, this “duty” is formulated here rather as an aim than as a precise legal obligation. States are, for instance, not legally obliged to establish and maintain diplomatic and consular relations with one another. Their economic, social, cultural, technical and other co-operation depends on their mutual agreements, which they are not bound to conclude.

⁸² In a similar way the Helsinki Final Act of 1975 in its “Declaration on Principles Guiding Relations between Participating States” restates the Principles of the United Nations, and endorses three principles as separate. They are: (III) inviolability of frontiers; (IV) territorial integrity of States; and (VII) respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief.

the content and scope of application of the principles of non-use of force and non-intervention as rules of general customary international law. The Court has, however, established that the general rule prohibiting force allows certain exceptions, first of all by the “inherent right” of all States of individual and collective self-defence, confirmed by Article 51 of the UN Charter⁸³. It further explained in precise way the conditions for the use of that right⁸⁴.

In respect of the principle of non-intervention, after defining its content⁸⁵, the Court found that its breach does not allow collective counter-measures analogous to collective self-defence in case of armed attack⁸⁶.

However, the large-scale commission of international crimes discussed above, with all their inhuman consequences including masses of refugees, which resulted in the constitution of two criminal tribunals *ad hoc*, imposes the need, when indispensable, for strong humanitarian armed intervention to stop them. Hence, in such disastrous situations it is not the question anymore of the full respect of the principle of non-intervention as *jus cogens* in absolute terms, but of organized international intervention which is quite contrary to that principle.

5. *Jus dispositivum* in general international law

Jus dispositivum has a quite different scope of validity in international law than any peremptory or mandatory norms described above. General customary rules of this character apply only in the absence of a contrary treaty or particular customary rule. Their application is therefore subject to the general principle of law: *lex specialis derogat legi generali*. This means that all States are in their mutual relations free to regulate a matter differently than such a general customary rule provides. They can do that at any time and for whatever period they decide.

However, in the absence of such a special legal relationship, every State is entitled to request from other States to respect these general customary rules. In these circumstances they are obligatory like all other legal rules and their violation entails international responsibility. As such, they also have an *erga omnes* effect, unless previously derogated by a particular rule.

Again, as an example in the domain of the law of the sea the rule on delimitation of the territorial sea between States with opposite or adjacent coasts can be mentioned. Because the same norm is stipulated in Article 12(1) of the 1958 Geneva Convention and again in Article 15 of the 1982 Convention, there is a strong presumption that the matter is of a rule accepted and recognized by the international community of States as a whole. That rule provides, failing an agreement to the contrary, the median line as the criterion of delimitation. But it adds two further possible exceptions:

⁸³ *I.C.J. Reports* 1986, pp. 102-103, para.193.

⁸⁴ *Ibid.*, pp. 103-106, paras 194 to 201.

⁸⁵ *Ibid.*, 106-110, paras 207 to 209.

⁸⁶ *Ibid.*, pp. 110-111, paras 210 and 211.

“...The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith”.

Hence, the general customary rule of dispositive character providing the median line does not apply in case of a contrary agreement between respective coastal States, or if any of them claims historic title or invokes some other special circumstances in favour of a different delimitation. But whenever a bordering State does not invoke or cannot prove any one of these exceptions, each of them can delimit the territorial sea with another State by the median line, even by its unilateral enactment.

Although the person of a diplomatic envoy is inviolable and that constitutes a *jus cogens*, dispositive rules of general customary law are most numerous in matters regulating diplomatic and consular privileges and immunities in detail. They are provided as such in the texts of the two Vienna Conventions of 1961 and 1963.

On the basis of the general customary law States enjoy their legal rights with which they can dispose of at will. For example, according to the general customary law of the seas, coastal States enjoy their rights for the purpose of exploring and exploiting natural resources in their internal waters, territorial sea, and continental shelf, and subject to specific restrictions in archipelagic waters and the exclusive economic zone. But every coastal State can by its free will cede these subjective rights to third States, or to physical or legal persons of third States, subject to compensation or free of any charge. The rules of the general customary law do not impose any restriction in this respect.

We shall here invoke a norm of *jus dispositivum* which proved to be of the utmost importance for the stability of international relations.

The principle of *uti possidetis*, applied especially in delimitations between new States, is precisely of this character. In the absence of an agreement on new frontiers freely arrived at (which in practice is almost impossible to reach), “the former boundaries become frontiers protected by international law”.

This principle is of the essential importance especially in cases of decolonization, or of the dissolution of former federal States such as the former USSR, Yugoslavia (SFRY) and Czecho-Slovakia.

Referring to the important Judgment by the ICJ between Burkina Faso and Mali of 1986, the (Badinter) Arbitration Commission of the Conference on Yugoslavia decided on the claims by Serbia aimed at changing the existing boundaries with the federal republics which proclaimed their independence.

In its Opinion No.3 of 11 January 1992 the Commission resolved all the issues of frontiers of the successor States to the former SFRY in four points, deciding on the allegation of Serbia that its “internal boundaries” with Croatia and Bosnia-Herzegovina were allegedly not frontiers in terms of public international law:

“First.— All external frontiers must be respected in line with the principle stated in the United Nations Charter, in the Declaration on Principles of International Law concerning

Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations [General Assembly resolution 2625 (XXV)] and in the Helsinki Final Act, a principle which also underlines Article 11 of the Vienna Convention of 23 August 1978 on the Succession of States in Respect of Treaties⁸⁷.

Second.– The boundaries between Croatia and Serbia, between Bosnia-Herzegovina and Serbia, and possibly between other adjacent independent States may not be altered except by agreement freely arrived at⁸⁸.

Third.– Except where otherwise agreed, the former boundaries become frontiers protected by international law. This conclusion follows from the principle of respect for the territorial status quo and, in particular, from the principle of *uti possidetis*. *Uti possidetis*, though initially applied in settling decolonization issues in America and Africa, is today recognized as a general principle, as stated by the International Court of Justice in its Judgment of 22 December 1986 in the case between Burkina Faso and Mali (*Frontier Dispute*, (1986) ICJ Reports 554 at 565): “Nevertheless the principle is not a special rule which pertains solely to one specific system of international law. It is a general principle, which is logically connected with the phenomenon of obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power.”.

Fourth.– According to a well established principle of international law the alteration of existing frontiers or boundaries by force is not capable of producing any legal effect. This principle is to be found, for instance, in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations [General Assembly resolution 2625 (XXV)] and in the Helsinki Final Act...⁸⁹.

The question is how in the light of the above quoted legal rules can the right of self-determination of peoples operate, which the Hague Court in the *East Timor* case in 1995 proclaimed as an essential principle of contemporary international law, having an *erga omnes* character. It is important to stress that the relevant international instruments, including the UN Charter, recognize this right to self-determination to “peoples”, or to the population of a territory, rather than to an entire ethnic group (or “nation”) wherever it can be settled.

Hence, in its Opinion No.2 of the same date the Commission stated that:

“...it is well established that, whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (*uti possidetis juris*) except where the States concerned agree otherwise.”

⁸⁷ This also means that all the neighbouring States, namely Italy, Austria, Hungary, Rumania, Bulgaria, Greece and Albania, must respect these frontiers with all the successor States to the former SFRY. This in fact is the obligation of all of them assumed in the principle under (III) on the inviolability of frontiers in the Declaration on Principles of the Helsinki Final Act of 1975.

⁸⁸ In the above Declaration on Principles it was nevertheless confirmed under (I) that the existing frontiers can be changed “in accordance with international law, by peaceful means and by agreement”. Hence, even the existing States can modify their common frontiers subject to these conditions, but not unilaterally and using force.

⁸⁹ Cf., *International Legal Materials* 1992, No.6, pp. 1499-1500.

The Commission further found: “Where there are one or more groups within a State constituting one or more ethnic, religious or language communities, they have the right to recognition of their identity under international law”, and they are “entitled to all the rights accorded to minorities and ethnic groups under international law”. These minority rights and other human rights are a *jus cogens* for respective States⁹⁰.

The above proves that, unlike the definitions of international crimes and some other norms of *jus cogens* which prohibit certain practices as unlawful in absolute terms, the principles of the United Nations including the right of peoples to self-determination, are not in the same sense absolute. They apply in correlation with other legal principles, among which that of *uti possidetis* can have an important role. In all this it cannot be asserted that there exists a strict hierarchy between the primary rules on State Responsibility explained above, concerning especially the principles of the United Nations. But all of them are generally understood as constituting *erga omnes* obligations.

The dictum of the Opinion No.3 further proves how important certain declarations of the UN General Assembly and the Helsinki Final Act are as material sources and documentary evidence of peremptory norms, all having *erga omnes* character.

6. Conclusion

When dealing with *erga omnes* obligations most Judgments of the ICJ, and other international instruments quoted above, assimilate them more or less into international crimes giving rise at the same time to personal criminal responsibility of their perpetrators. This is not the full meaning of *erga omnes* obligations because they include a larger part of other rules of general international law, including some having the scope of *jus dispositivum*.

Nonetheless, our previous analysis proves that the replacement of the concept of international crimes with that of “serious breaches of obligations under peremptory norms of general international law” is not a happy one. In this respect paragraph 2 of Article 40 on State Responsibility of 2001, adds a precision: “A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation”.

James Crawford, the Special Rapporteur of the International Law Commission, offered the following comment of this specification: “To be regarded as systematic, a violation would have to be carried out in an organized and deliberate way. In contrast, the term “gross” refers to the intensity of the violation or its effects; it denotes violations of a flagrant nature, amounting to a direct and outright assault on the values protected by the rule. The terms are not of course mutually exclusive; serious breaches will usually be both systematic and gross...”.

⁹⁰ *Ibid.*, pp. 1497-1499.

His explanation that follows is certainly right, but it is associated with the responsibility of individuals rather than to that of States: "...Factors which may establish the seriousness of a violation would include the intent to violate the norm; the scope and number of individual violations, and the gravity of consequences for the victims..."⁹¹.

It could be imagined in another way that a serious breach of the peremptory norm prohibiting discrimination of human beings could result in its most extreme form of genocide, or of *apartheid*, and that perhaps other forms of discrimination do not consist of its "serious breaches". Or that "serious breaches" of the peremptory norm imposing the respect of human rights can have the forms of slavery, trafficking in slaves, or torture, or even of a gross and systematic violation of the right of individuals to a fair trial, etc.⁹².

If this is the correct interpretation of that idea, it introduces uncertainty in international relations. We tried to explain above the different categories of *jus cogens*. But other authors could imagine even more categories. And for decision-makers in States all these doctrinal classifications can be irrelevant altogether. This only proves that the basic concept of peremptory norms of general international law (*jus cogens*) is diffused. If so, it cannot be different from the "serious breaches" of these same norms.

It seems, therefore, to be much better to take all international crimes as a single category again, giving rise to State responsibility and to criminal responsibility of their perpetrators at the same time. As it occurred before, codification conventions should provide the definition of each of new international crimes. They can provide, in addition, various forms of cooperation between their States parties in the prevention, suppression and prosecution of such a crime. By the accrual of the number of States parties to such a convention, the prohibition of the respective crime, according to its definition, will give rise to a new *erga omnes* obligation.

The situation created by the elimination of international crimes in the final Draft Articles on State Responsibility of 2001 only encourages the most powerful States to try to achieve the objectives of their policy unilaterally, outside the legal restrictions. Such a unilateralism will in the long run prove disastrous to the States in question.

V. ERGA OMNES OBLIGATIONS AND CRIMINAL PROCEDURES

1. Preliminaries

From now until the end of this explanation our attention will be focused on various aspects of personal responsibility of individuals in criminal law only.

⁹¹ Cf., J. Crawford: *The International Law Commission's Articles on State Responsibility*, Cambridge University Press 2002, p. 247.

⁹² This interpretation should be corroborated by the text of paragraph 3 of Article 19, originally proposed by Roberto Ago. See above.

There is no doubt about the existence of the *erga omnes* obligation of all international persons not to commit universally agreed international crimes. This obligation, like all other obligations of this kind, is based on general customary international law. If a State commits an international crime, it is not criminally responsible. It is said that criminal responsibility proper is reserved for wrongful acts of individual perpetrators in their personal capacity. This should mean that all States (and other international persons as well) have an *erga omnes* obligation to prevent, suppress and punish the commission of any universally recognized international crimes by any persons under their jurisdiction. Otherwise, this obligation is of little use.

We have already signalled that in criminal procedures of all kinds, the rules of customary international law cannot have the same importance as in general international law relating to States and other international persons. Therefore, the matter is not so simple as some international lawyers would have it.

There is a requisite principle in all the criminal trials that *law must be the same for all, whether it protects or punishes*. This principle was consecrated in the 1789 French Declaration of the Rights of Man and of the Citizen.

It is precisely for this reason that criminal justice can hardly go hand in hand with international diplomacy. The first goal of international diplomats can be to stop atrocities in an ongoing conflict and to assure lasting peace in the region affected by it. They sometimes bargained with the suspects of international crimes, who are still leaders of their countries, about their possible prosecution or pardon in exchange for far-reaching political concessions by the suspects, in order to reach nobler goals.

Third States, which send their troops on enforcement and peace-keeping missions abroad, are not ready to impartially apply the legal rules on armed conflicts against their own commanding officers and soldiers. That is because they imperil their lives in such missions far from their homes.

Generally, every party to a conflict is sometimes eager to punish the crimes inflicted by the enemy on its population or soldiers. But their own perpetrators of crimes and their commanders are regarded by the public as national heroes, who as such are untouchable. This is part of the complex problem of exercising national criminal jurisdiction for the prosecution of international crimes.

The establishment of international criminal courts and tribunals should be a remedy to these imperfections in human behaviour. These tribunals should sue all suspects for all international crimes within their jurisdiction, so that none can escape their responsibility and that all, regardless of their nationality or official position, should, if convicted, be punished accordingly.

Therefore the problem of *erga omnes* obligations in this particular subject-matter has three different aspects which will be discussed below.

The first aspect is the prosecution of international crimes by domestic judicial organs of States. How can States fulfil this *erga omnes* obligation, and what are the legal consequences if one of them fails to abide by this obligation?

The second aspect is that of the two *ad hoc* international criminal tribunals (the ICTY and ICTR), both established by the UN Security Council resolutions under Chapter VII of the UN Charter. The Statutes of these Tribunals are obligatory for all the member States of the UN. How do the Prosecution and the Tribunals themselves fulfil their responsibilities in this respect? Which were other advantages and shortcomings of this experiment?

The third and last aspect is that of the permanent International Criminal Court (the ICC), which was established by the 1998 Rome Statute. It is a matter of an open multilateral convention which has not yet attained universal participation by States.

We shall discuss all the above problems in order to establish the legal scope of *erga omnes* obligations in the domain of international crimes in general.

2. The principles of territorial validity of national criminal laws

We must begin this subject-matter discussion with an explanation of some basic concepts of criminal law which are not known in detail by all the students of public international law.

Today, international criminal law in its broad sense is understood as the law encompassing all the criminal offences with extraterritorial effects that a State can prohibit and provide the penalties for them in its national legislation⁹³.

The extraterritorial (or trans-frontier) effect is mostly present in transnational organized crimes, such as drug-trafficking, trafficking in arms, participation in organized criminal groups, money-laundering, smuggling of migrants, etc. However, most other criminal offence such as murder, racket, theft, kidnapping, forced prostitution etc. can have trans-frontier effects too.

When it comes to criminal offences of this kind the first problem is that of the territorial validity of national criminal laws which every State regulates for itself in its legislation. Let us here briefly explain various grounds of the jurisdiction of national judges in criminal matters.

First of all, it should be noted that the territorial and the national (i.e. that of “active nationality”) principle, directly emanate from the territorial and personal sovereignty of all the existing States, where as the second is always subsidiary to the first.

The *territorial principle* is provided as primary in the legislation of all States. On behalf of it, even when it comes to trans-frontier effects of a crime in more than one State, criminal jurisdiction can be exercised on the territory of each of them. Domestic

⁹³ Some French and other authors call this law in a broader sense: “criminal international law” (*droit pénal international*), in order to distinguish it from “international criminal Law” proper (*droit international pénal*), embracing only the crimes under international law. This distinction in appellation is difficult to grasp and is not universally accepted.

courts, whenever they establish their jurisdiction, apply criminal laws of their State only, including international agreements to which it is a party⁹⁴.

On the basis of *the principle of active personality* every State is entitled to sue its citizens for the crimes they committed in another State, but it has no right to apprehend them there. A State will exercise this jurisdiction in cases when its citizen escaped justice in the State in which he committed the crime. By its use, the impunity of such persons is precluded, and by this States indirectly strengthen their national legal order as well.

Many States do not extradite their citizens to other States for criminal prosecution. By the application of the principle *aut dedere, aut adjudicare*, especially if it is a conventional obligation, in such situations a State is bound to submit its citizen to its own criminal procedure for the commission of crimes abroad. This obligation exists whenever and for whatever reasons a person is not extradited to another State.

In addition, all States have appropriated *the real or protective jurisdiction*, if a foreigner has grossly violated some of their national interests abroad, such as assaults on their diplomatic agents or premises, counterfeiting the national currency, acts of espionage, etc. Because it is universally admitted and exercised in practice, it can be said that it relies on customary international law.

For a long time, there was no such agreement on *the principle of "passive nationality"*, i.e. for the crimes committed abroad against domestic nationals, if the foreign perpetrator was not properly punished by the territorial State. Since the dispute with Mexico on *Cutting* in 1886, the United States and a number of other countries have strongly opposed it⁹⁵.

But in the application of the above jurisdictions, there is a strict rule that the State in question cannot capture suspects abroad because that would constitute the violation of territorial sovereignty of the States in which the suspect is present. They can be sued only if apprehended in the domestic territory. Their extradition from the State of their residence is not frequent because it can involve political offences.

⁹⁴ The territorial principle is inapplicable to the crime committed on board of ships on the high seas, as well as on aircraft in flight over several States. Because no State has exclusive jurisdiction on the high seas, criminal jurisdiction belonging to the flag State of the ship, except in cases of pirate ships or ships without nationality. For all the offences committed on board of a warship the jurisdiction lies only to the flag State, even if it enters a foreign port with the permission of the coastal State. Warships and ships used on government non-commercial service only, enjoy immunity wherever situated. On the contrary, merchant ships in foreign ports are subject to the criminal jurisdiction of the coastal State. Nevertheless, such a State has no interest in exercising it unless the crime disturbs the peace and order of the port. Jurisdiction for the crimes committed on board of merchant ships in other parts of the sea belongs, according to the rules of the law of the sea and depending of the nature of the offences, either to the coastal State or to the flag State.

⁹⁵ Nevertheless, provisions of some sectorial anti-terrorist conventions, such as Article 5(3) of the 1970 Hague Convention on unlawful seizure of aircraft, or Article 6-(2)-(b) of the 1988 Rome Convention on the safety of maritime navigation, admit the exercising of this jurisdiction as an additional ground for States which have provided it in their legislation. This means that this ground of jurisdiction is optional today.

Finally, a territorial State in which a crime was committed can delegate its criminal jurisdiction to another State, subject to its acceptance. Such a delegation can be provided as an option either in domestic legislation or in treaties, with regard to minor traffic and similar offences, or of some transnational organized crimes. It is justified in particular when the suspect is a citizen of the receiving State, or has permanent residence in it.

3. Universal jurisdiction for the prosecution of international crimes

All the above mentioned grounds of domestic criminal jurisdiction are exercised in the national interest of each State, in order to protect its own values and domestic legal order.

Unlike that, universal criminal jurisdiction is expected to be exercised in the interest of the international community as a whole, in order to prevent impunity of international and transnational crimes. However, because every judicial process is costly, States are generally unwilling to give full effect to it, even when they assumed such an obligation by a treaty. Belgium was, in one period, an exception to that, but many difficulties were revealed in its operation.

The first well-known case of exercising this type of criminal jurisdiction was that of *Adolf Eichmann*. That Nazi war criminal, born in Austria, organized large-scale transportation of Jews captured throughout the occupied Europe to the Nazi extermination camps in Poland. After he was illegally kidnapped in Argentina and brought to Israeli justice, he claimed that courts of that State lacked jurisdiction over his alleged crimes, because there was no territorial or personal link between these crimes and Israel. In its judgment of 29 May 1962, the Supreme Court of Israel dismissed the submissions of the appellant for the following reasons:

“Not only do all the crimes attributed to the appellant bear an international character, but their harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundations. The State of Israel therefore was entitled, pursuant to the principle of universal jurisdiction, and in the capacity of a guardian of international law and an agent for its enforcement, to try the appellant. That being the case, no importance attaches to the fact that the State of Israel did not exist when the offences were committed”⁹⁶.

Neither of the two German States, nor Austria or Poland, protested against that trial. The universal criminal jurisdiction in that particular case was universally received. It must, however, be noted that Israel was the home of Jews. Many relatives of the victims of the crimes were its actual citizens. Hence, a sort of passive nationality *de facto* could be an alternative basis for jurisdiction. Certainly, the State of Israel could not have interest in exercising this kind of jurisdiction for the crimes committed in other parts of the world and regardless of the nationality of their victims.

⁹⁶ Cf., 36 *International Law Reports*, at p. 304.

After World War II a few multilateral conventions, defining some international crimes, provided the universal jurisdiction as a conventional obligation of their States Parties. They will be quoted below. In application of these obligations a number of States provided universal criminal jurisdiction in their national laws. However, its exercise is in most cases restricted to the persons apprehended in the territorial States (*forum deprehensionis*). Some legislations exceeded this limit. From that arose claims for the extradition of suspects from third States.

The best known case of this kind was that of *Pinochet*. The former dictator from Chile came to the United Kingdom for a medical treatment, where he was put under house custody. Several other States claimed his extradition on the basis of universal jurisdiction, in order to sue him for the crimes committed under his responsibility in Chile. The British authorities only took into serious consideration the claim of Spain. At the time of his dictatorship more than fifty Spanish citizens were killed or disappeared there. Hence, like in Eichmann's case, that claim for extradition could be partly justified by the principle of passive nationality, too.

The case came before the British House of Lords. Each of the five Law Lords issued a disparate opinion in some details. Finally, the British authorities allowed the suspect to return to Chile and his case there is still pending. Obviously, the claims for his extradition did not succeed.

The most radical step in exercising universal jurisdiction, on the basis of Belgian laws then in force, was the international arrest warrant issued on 11 April 2002 by the Belgian investigating magistrate against the acting Minister for Foreign Affairs of the Democratic Republic of Congo (ex-Zaire). The Minister was charged with international crimes committed in the Congolese territory against Congolese citizens.

Congo brought that case before the ICJ. In its Judgment of 14 February 2002, it was stated *inter alia*:

"54. The Court... concludes that the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protects the individual concerned against any act of authority of another State which would hinder him or her in performance of his or her duties"⁹⁷.

This, however, does not exclude the prosecution of such a person on the basis of universal jurisdiction after the termination of his or her functions. Nevertheless, issuing arrest warrants on this basis was later precluded by changes in Belgian law.

We shall deal with this problem in commenting on the text of the Resolution on "Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes" that was adopted by the Institute of International Law at its Krakow Session on 26 August 2005⁹⁸. Its definition was proposed in its paragraph 1:

⁹⁷ Cf., *I.C.J. Reports 2002*, para.54.

⁹⁸ See, "Universal Criminal Jurisdiction With Respect to the Crime of Genocide, Crimes against Humanity and War Crimes", *Annuaire de l'Institut de droit international*, Session de Cracovie, Vol.71-I,

“1. Universal jurisdiction in criminal matters, as an additional ground of jurisdiction, means the competence of a State to prosecute alleged offenders and to punish them if convicted, irrespective of the place of commission of the crime and regardless of any link of active or passive nationality, or other grounds of jurisdiction recognized by international law”.

Historically, the oldest example of exercising this ground of jurisdiction was that against the crimes of piracy on the high seas, where no State can enjoy exclusive territorial jurisdiction. Pirates were treated as “*hostes humani generis*” from time immemorial⁹⁹.

In modern times the exercise of universal jurisdiction is aimed at preventing the impunity of perpetrators of the most odious international crimes. It is sought to be exercised regardless of any other grounds explained above. As a subsidiary ground it can be especially justified if the judicial system in the territorial State in which these crimes were committed on a large or systematic scale, suffered a collapse in a civil war. On the other hand, in cases where the commission of these crimes is part of the national policy of a Government, its judicial organs in most cases cannot operate independently and impartially. They will shield their politicians and superior officers from responsibility, as well as direct perpetrators of crimes, or will at least unreasonably delay the proceedings.

Side by side with the establishment and future operation of the ICC, universal criminal jurisdiction exercised by other States in the above mentioned situations could cure these imperfections in the international legal order. In displaying it, the respective States operate in fact in the name of the international community as a whole and substitute themselves to it.

Paragraph 2 of the said Resolution further provides:

“2. Universal jurisdiction is primarily based on customary international law. It can also be established under a multilateral treaty in the relations between the contracting parties, in particular by virtue of clauses which provide that a State party in the territory of which an alleged offender is found shall either extradite or try that person”.

The first sentence of this paragraph can be misleading. If positive rules of customary international law are at stake, on which universal jurisdiction is allegedly based, that could mean that there is an *erga omnes* obligation, as part of this law, which imposes on all States a legal obligation to establish it in their legislation. Or this could mean even more: the duty to prosecute the alleged offenders in direct application of this customary law, independently of any rules that should otherwise be provided in their domestic legislation. However, if it is just conceived as a clause *de lege ferenda*, faced

Paris 2005, pp. 215-338. See in particular reports by Christian Tomuschat and the literature indicated therein, pp. 215-265.

⁹⁹ Nevertheless, this rule of customary law can only be fully honoured by a few powerful States possessing navies that navigate in all oceans and seas. Universal jurisdiction against pirates cannot be exercised by land-locked States, or those with symbolic navies or coastal guards, suitable to maintain the order in their territorial sea.

with the principle *nullum crimen, nulla poena, sine lege*, it is useless in this context. We shall try to offer our answer to these questions at the end of this explanation.

Nevertheless, universal jurisdiction was actually established in multilateral treaties prohibiting some international crimes as a conventional obligation of all their parties. It is worth quoting these clauses here, which are not numerous¹⁰⁰.

The original text of Article VI of the 1948 Genocide Convention even excludes this kind of jurisdiction:

“Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to these Contracting Parties which shall have accepted its jurisdiction”.

It was already said that the 1996 Judgment of the ICJ on Preliminary Objections in the case between Bosnia-Herzegovina and F.R. of Yugoslavia (actually, Serbia and Montenegro) stated that: “the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*. The Court notes that the obligation each State thus has to prevent and to punish the crime of genocide is not territorially limited by the Convention.”. In this light we should now read the above cited provisions.

The common paragraph 2 in the respective articles set out in all the four 1949 Geneva Conventions of humanitarian law¹⁰¹, provides a far reaching obligation:

“Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches (*of the present Convention*, italics added), and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case”¹⁰².

Subject to the above exception of extradition, the universal criminal jurisdiction was provided here as a primary obligation, thus exceeding even the territorial principle. Some authors take this provision as an expression of the general customary international law because practically all States are now parties to all four 1949 Conventions.

Nevertheless, one cannot forget that this far reaching conventional obligation remained a dead letter in its practical application. The States parties simply do not

¹⁰⁰ The clause *aut dedere, aut adjudicare* is provided in many bilateral and multilateral treaties prohibiting in particular transnational organized crimes. It can also be found in sectorial conventions against some forms of terrorism. There is a certain progress in the formulation of these clauses, which is beyond our examination here.

¹⁰¹ Article 49 of the Convention for the amelioration of the conditions of the wounded and sick in armed forces in the field; Article 50 of the Convention for the amelioration of the conditions of the wounded, sick and shipwrecked members of armed forces at sea; Article 129 of the Convention relative to the treatment of prisoners of war; and Article 146 of the Convention relative to the protection of civilian persons in time of war.

¹⁰² In the French, equally binding text the last part is formulated in a more precise way: “...pour autant que cette Partie contractante ait retenu contre lesdites personnes des charges suffisantes”.

apply this provision, and not only in respect of their own members of armed forces, but also of the enemy soldiers who committed grave breaches.

After the conflict in Bosnia-Herzegovina began in 1992, only a few Serbian perpetrators of war crimes against Bosnian civilians (*Djajić, Jorgić and Sokolović*) were brought to justice in Germany, where they had tried to find shelter. Among them, the first convict by the ICTY, Duško Tadić, was surrendered to it. In Denmark there was the case of *Refik Šarić* concerning the crimes committed against Serbs in a Croatian camp. And that was, practically, all. In France the Court of Appeals prevented the trial against *Javor and others* under the pretext that the Geneva Conventions have no “self-executing” force.

From this aspect the non-existence of practice in the application of that provision does not allow the allegation that this is a matter of general customary law. Where there is no practice, there can be no customary law.

The clause on universal jurisdiction was even more perfectly formulated in Article IV(b) of the 1973 International Convention on the Suppression and Punishment of the Crime of *Apartheid*. The States Parties have undertaken:

“(b) To adopt legislative, judicial and administrative measures to prosecute, bring to trial and punish in accordance with their jurisdiction persons responsible for, or accused of, the acts defined in Article II of the present Convention, whether or not such persons reside in the territory of the State in which the acts are committed or are nationals of that State or of some other State or are stateless persons.”

However, as already said, this Convention has never attained universal participation by States. Not even all its States parties did abide by this obligation in respect of the practices of *apartheid* in the Middle East and the Serbian seized parts of the former Yugoslavia, mostly Kosovo.

On the other hand, the Slavery Conventions of 1926 and 1956 do not contain the obligation of universal jurisdiction. For obvious reasons it is not provided in the 1998 Rome Statute as well. It would be, however, useful for it to find its place in the future conventions prohibiting the crimes of aggression and all forms of international terrorism, if any.

Paragraph 3 of the Resolution of the Institute of International Law in its subparagraph a) provides the following:

“3. Unless otherwise lawfully agreed, the exercise of universal jurisdiction shall be subject to the following provisions:

a) Universal jurisdiction may be exercised over international crimes identified by international law as falling within that jurisdiction in matters such as genocide, crimes against humanity, grave breaches of the 1949 Geneva Conventions for the protection of war victims or other serious violations of international humanitarian law committed in international or internal armed conflict”.

The permissive language of the above text suggests that it is the matter of a recommendation addressed to States. As such, universal jurisdiction might lawfully be

exercised over other crimes under international law, such as piracy on the high seas, slavery and slave trade, or terrorist acts in general. It is a tricky question whether it could be exercised over the supreme crime of aggression. As a treaty obligation it is already provided in a number of conventions prohibiting some specific kinds of international terrorism and other transnational organized crimes.

It seems that other parts of this Resolution faithfully reflect positive international law in this subject-matter.

“b) Apart from acts of investigation and requests for extradition, the exercise of universal jurisdiction requires the presence of the alleged offender in the territory of the prosecuting State or on board a vessel flying its flag or an aircraft which is registered under its laws, or other lawful forms of control over the alleged offender”.

It was already proved that issuing arrest warrants or claims for the extradition from third States, solely on the ground of universal criminal jurisdiction, are of dubious legal value. They will most often not be successful in practice.

“c) Any State having custody over an alleged offender should, before commencing a trial on the basis of universal jurisdiction, ask the State where the crime was committed or the State of nationality of the person concerned whether it is prepared to prosecute that person, unless these States are manifestly unwilling or unable to do so. It shall also take into account the jurisdiction of international criminal courts.”.

This text reflects the subsidiary nature of universal jurisdiction. Subject to the above exceptions of unwillingness or inability of domestic fora, the territorial principle and the principle of active nationality have obvious preference over it. It is, therefore, wise to offer the transfer of the suspect to these States. The same is in respect of the jurisdiction of the ICC.

“d) Any State having custody over an alleged offender, to the extent that it relies solely on universal jurisdiction, should carefully consider and, as appropriate, grant any extradition request addressed to it by a State having significant link, such as primarily territoriality or nationality, with the crime, the offender, or the victim, provided such State is clearly able and willing to prosecute the alleged offender”.

This text reflects again the subsidiary character of universal jurisdiction. A State will extradite a suspect to another State which has a “significant link” with him, including the passive nationality principle. But again, extradition should only take place if the requesting State is “clearly able and willing to prosecute the alleged offender”.

Paragraph 4 of the Resolution confirms a peremptory norm of general international law:

“4. Any State prosecuting an alleged offender on the basis of universal jurisdiction is bound to comply with the generally recognized standards of human rights and international humanitarian law”.

Paragraph 5 provides a recommendation of cooperation which is also embodied in conventions on judicial assistance:

“5. States should, where appropriate, assist and cooperate with each other in detecting, investigating, gathering evidence, arresting and bringing to trial persons suspected of having committed international crimes, and take adequate measures for that purpose”.

Finally, the last paragraph provides that:

“6. The above provisions are without prejudice to the immunities established by international law”.

In this respect the above-quoted statement of the ICJ in its Judgment on the *Arrest Warrant* of 2002, is a *jus cogens*.

Conclusion. There is no *erga omnes* obligation of all States to exercise universal criminal jurisdiction through their domestic judicial organs. After all, it was not explicitly asserted in the text of the above Resolution of the Institute of International Law¹⁰³. Unless assumed as a treaty obligation, it remains an option. Hence, no State could lawfully complain about its exercise by another State when it is a matter of the prosecution of generally recognized international crimes, subject however to other requirements formulated in that Resolution.

For the exercise of universal criminal jurisdiction on an optional basis it is even not necessary that the respective State has previously provided it in its national legislation. However, in order to make the job of its judicial organs easier, it is advisable that it does so in advance. Otherwise, it cannot be expected that it will be exercised at all.

The State practice indicates general unwillingness to exercise universal jurisdiction even as an obligation under the conventions codifying international crimes. There is no reason to believe that this unwillingness will radically change some time in the future. There is, consequently, no reason to believe that universal jurisdiction will become an “effective means to prevent impunity for international crimes”, as noted in the preamble of the Resolution. For this reason all partisans of international criminal justice should lend their full support to the International Criminal Court in The Hague.

4. Prosecution of international crimes by domestic judicial organs

We have repeatedly quoted the statement of the ICJ from its 1996 Judgment on *Application of the 1948 Genocide Convention* that: “the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*. The Court notes that the obligation each State thus has to prevent and to punish the crime of genocide is not territorially limited by the Convention.”.

What does this statement mean in terms of international criminal law? Does it mean that all the States members of the international community are obliged directly

¹⁰³ Nevertheless, as already said, such an inaccurate interpretation could be implied from the first sentence of paragraph 2 of the Resolution, that: “Universal jurisdiction is primarily based on customary international law”.

to apply the Genocide Convention and bring to justice all the perpetrators of this crime and punish them adequately? Or is there only an *erga omnes* obligation to provide this international crime in national legislation, even if the State in question is not a formal party to it? Or could it be interpreted as a kind of appeal to all third States to become parties to that Convention and to assume all obligations prescribed in it? What are the legal consequences for the States which do not abide by such an alleged obligation? Scholars in public international law could easily imagine some of the above consequences of that judicial pronouncement.

It seems to this author, however, that in that Judgment the Court only said that the territorial principle, as originally provided in Article VI of this Convention, cannot be the only basis of national jurisdiction, and not that the *erga omnes* obligation to suppress genocide is directly applicable to States without the need for them to enact the necessary national legislation to this end.

Because all *erga omnes* obligations rely on customary law and the customary rules are of little use in criminal proceedings, the goal of the international community to prevent, suppress and punish international crimes can hardly be accomplished outside the obligations that States can assume by conventions.

Related to this subject-matter the most useful are conventions codifying particular international crimes. In addition to the definition of the crime in question, these conventions usually provide more specific obligations of their States parties to harmonize their national legislation with them, the obligation on mutual cooperation in suppressing the crime, etc.

Nevertheless, it does not mean that an international crime will remain unpunished if a State did not ratify one of these Conventions. For instance, the United States acceded to the Genocide Convention, which was adopted on 10 December 1948, forty years later, on 25 November 1988. In the meantime, its judges could punish killing members of a group, or causing serious bodily or mental harm to them, as common crimes. It is no different with most crimes against humanity and war crimes, because penal legislation of all States prohibits murder, mutilation, torture, rape, pillaging, extermination, enslavement, etc.

However, it is in the interest of the international community as a whole that all States assume the sum of obligations from these conventions as their parties, including their definitions and any particular acts they provide as criminal offences. But as with the 1998 Rome Statute, that can only be done through the participation in the conventions in question *qua* treaty obligations. The proclamation of *erga omnes* obligations in these domains can hardly satisfy anybody's wishes.

In order that a domestic court could establish its jurisdiction for prosecuting the offences which constitute crimes under international law, it is not even sufficient that the respective State became a party to the convention in question. Even in the States which recognize the supremacy of international law in municipal sphere, or whose constitutions provide primacy of treaties over national legislative acts, an independent judge can proclaim his lack of competence if such an offence is not also expressly provided in its criminal law.

As stressed, the courts shall strictly apply the general principle of law, which was confirmed in human rights conventions, that no one shall be convicted of any act or omission that did not constitute a criminal offence, under the applicable law, at the time it was committed. And although constitutions and other national laws in modern times prescribe that an offence can be provided by international law as well, general international law and the conventions in force do not provide penalties for the prohibited crimes. It is otherwise not wise to leave it to the discretion of domestic judges to establish and interpret rules of international law, because that can produce contradictory judicial practice in this subject-matter even within one State.

In order to prevent such situations, the respective conventions provide themselves the obligation of their States parties to adjust their criminal legislation to their provision, or to enact new laws to this end necessary for the prosecution (or for extradition to other States) of perpetrators of the offences in question.

These clauses are now regularly provided in all the multilateral conventions in the larger sphere of criminal law. There is a certain progress in their formulation. For our purposes we shall only quote the provisions from the conventions codifying generally recognized international crimes.

The first in this sequence is Article 6 of the 1926 Slavery Convention:

“Those of the High Contracting Parties whose laws do not at present make adequate provision for punishment of infractions of laws and regulations enacted with a view to giving effect to the purposes of the present Convention undertake to adopt the necessary measures in order that severe penalties may be imposed in respect of such infractions.”

The 1956 Supplementary Convention does not contain a clause of this kind. Therefore, the above Article 6 is applicable to new obligations agreed by it.

The 1948 Convention for the Prevention and Punishment of the Crime of Genocide, provides in its Article V the following:

“The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article III”.

The common paragraph 1 in the above quoted provisions of all the four 1949 Geneva Conventions states:

“The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention...”.

Paragraph 3 provides in addition:

“Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article”.

For such acts, mostly of disciplinary nature, a State can adopt the necessary instructions to its military and other competent organs.

Finally, the last paragraph provides an obligation which is now a *jus cogens*:

“In all circumstances, the accused person shall benefit by safeguards of proper trial and defence...”.

It is, however, interesting that Article 80 of the Additional Protocol of 1977 to these four Geneva Conventions on the “Measures for execution”, contains the obligation in more general terms:

“1. The High Contracting Parties and the Parties to the conflict shall without delay take all necessary measures for the execution of their obligations under the Conventions and this Protocol.

2. The High Contracting Parties and Parties to the conflict shall give orders and instructions to ensure observance of the Conventions and this Protocol, and shall supervise their execution”.

A people fighting in the exercise of its right to self-determination can be a Party to a conflict other than a State. It can happen that it has not yet adopted its criminal code. Besides that, grave breaches provided in Article 85 of this Protocol are defined on a large scale so that all of them can hardly be embodied as criminal offences in the national legislation.

Just for curiosity, Article IV(a) of the 1973 *Apartheid* Convention shall also be quoted here:

“The States Parties to the present Convention undertake:

(a) To adopt any legislative or other measures necessary to suppress as well as to prevent any encouragement of the crime of *apartheid* and similar segregationist policies or their manifestations and to punish persons guilty of that crime;...”.

Here not only the commission, but the encouragement of *apartheid*, too are provided as criminal offences. In addition, legislative measures should have the prevention of this crime as their objective.

It seems somewhat curious that, until the 1998 Rome Statute, crimes against humanity were not the subject-matter of a convention. They were only defined in statutes of *ad hoc* international criminal tribunals. For this very reason they did not figure as criminal offences in domestic criminal legislation of most States¹⁰⁴.

It is perhaps a pity that the Rome Statute itself does not provide an obligation of this kind for its States parties. But many of them undertook efforts to adjust their criminal laws with the crimes defined in its Articles 6, 7, 8, and 28.

¹⁰⁴ Thus, in all criminal laws of the former Yugoslavia and its successor States, one chapter was titled: “Criminal offences against humanity and international law”, but specific crimes against humanity did not find place there. Amendments followed only after the ratification of the Rome Statute in these States.

If a State becomes a party to any of the above Conventions, as long as its legislator does not enact the new crime in its penal law, its judicial organs will be unable to give full effect to their State's international commitment.

Obligations of this kind are *erga omnes partes*, which implies that all other States parties to such a convention are entitled to take action against its breaches by omission. Usually, nothing will happen if between the ratification and the new legislative act does not pass a long period of time. However, if it becomes evident to other States parties that the wrongdoing State is not willing to abide by its obligations, actions against it would be justified.

In this respect a classical distinction between *traités-lois* and *traités-contrats* should be mentioned, which is more appropriate for various provisions set out in one treaty. All the above quoted stipulations belong to the first category. Usually, other States parties will not care enough that each one of them correctly adjusts its legislation to the crime defined in the convention.

It actually happens that some States have never adopted legislation to implement the convention they ratified, or have not properly published it in its Official Gazette, or that the definition of the crime in the national legislation is incomplete, or that the obligation of universal jurisdiction is missing, etc.¹⁰⁵.

On the other hand, all the stipulations in these conventions providing various kinds of mutual legal assistance, including extradition, are of a contractual nature. If one State party refused to comply with a lawful request by another party in these domains, it can expect reciprocal practice. However, the conventions codifying universally recognized international crimes are as yet scarce of the obligations of this kind.

A State party will perform its obligation only if the criminal offence it provides in municipal law is couched in the same or similar way as in the convention itself, or even more extensively. In no case should its definition be narrower.

In all the cases of failure to adopt the necessary implementing legislation there appear situations to which the dualistic doctrine of relationship between international and municipal law offers the most adequate solution. Domestic judicial organs are unable to prosecute persons for new crimes provided in a convention, but that does not release the respective State as an international person from its responsibility under international law for its internationally wrongful act of omission.

It sometimes happens that a State enacts an international crime from a convention to which it is not a party. In such situations domestic judges are obliged to give effect to these municipal provisions, but their failure to do so do not involve international responsibility of their State.

As with exercising universal criminal jurisdiction, there are very few cases in which members of national armed forces were adequately punished by domestic courts

¹⁰⁵ See some concrete examples of that unlawful practice - A. Cassese: *International Criminal Law*, Oxford 2003, pp. 305-306.

for the commission of international crimes in the application of the above mentioned provisions. Sometimes a genuine international crime is qualified as a minor disciplinary offence, and sometime not even that. It is curious that the same thing is observed in many cases of international crimes committed by enemy forces, probably for the fear of reciprocity.

This scarcity of actual practice strongly indicates that in including international crimes in their penal laws, States in fact pay lipservice to their international obligations assumed. National courts are perhaps ready to prosecute individuals for international crimes which they commit in their own interests, such as that of drug trafficking. However, if a criminal act might even indirectly involve the international responsibility of the respective State, persons responsible most frequently remain unpunished, or get symbolic punishment.

The former Socialist Federal Republic of Yugoslavia had one of the most advanced legislations in full conformity with its obligations from the conventions on humanitarian law. It dully ratified all of them. Upon the proclamation of independence by its successor States, they all enacted the former legislation as their own. There was not one day that in all these States all international crimes, except the crimes against humanity, were not prohibited as criminal offences.

However, when it became necessary to apply all these rules of criminal law, the Prosecution and martial courts of the former “Yugoslav People’s Army” simply did not act. It was more or less the same with the judicial organs of new States. There was not a political will to stop and to suppress international crimes by all sides, in which the lion’s share are related to Serbian side. For that reason the establishment of the ICTY in 1993 became a necessity.

By a contrary practice, i.e. by consistent measures of punishment in fair trials of its own perpetrators of international crimes, the State in question will avert or diminish its own responsibility under international law. Denouncing such crimes and distancing itself from criminal practices, such a State will gain moral credibility and will be in the position to pressure other States to do the same. That would be an important measure for the prevention of the most serious and the most brutal violations of human rights.

If perpetrators of crimes remain anonymous and as such unpunished, the responsibility falls on the entire “nations”, which is the seed of future conflicts. The experience of prolonged wars between Britain and France, and between France and Germany, throughout centuries indicate that it is very difficult to stop this vicious cycle of evil.

5. The applicable law and practice of the ICTY

5.1. Introduction

All the previously explained can hardly support the existence of the *erga omnes* obligation to prosecute all suspect perpetrators of international crimes in domestic

criminal procedures. There is perhaps only the *erga omnes* wish to prevent their impunity.

To this end two *ad hoc* international criminal tribunals were established by Security Council resolutions under Chapter VII of the UN Charter. By this, the Statutes of these Tribunals became legally binding on all the member States of the UN. This actually means all the sovereign States of the world, with the one exception of the State of Vatican, if it can itself be considered a genuine State and not a body in the function of the Catholic Church, a transnational religious organization. We shall primarily deal here with the ICTY, which is to this author more familiar than the ICTR¹⁰⁶.

Hence, according to Articles 2 to 5 of its Statute, the ICTY has competence *ratione materiae* for the four international crimes (Grave breaches of the Geneva Conventions of 1949, Violations of the Laws or Customs of War, Genocide, and Crimes against humanity). According to its Article 1, its competence *ratione loci* encompasses the territory of the former Yugoslavia, and that *ratione temporis* since 1991. It has, however, an *erga omnes* jurisdiction *ratione personae*. Whoever is suspect of the commission of a crime within its competence falls within the jurisdiction of its Prosecutor.

The continuous practice of the ICTY of more than ten years has revealed some important flaws (*lacunae*) in its Statute, as well as in the actual practice of its Chambers and the Prosecution. The text of the Statute was hastily prepared, mostly by experts in public international law. These persons are familiar with the procedural rules of the ICJ and international arbitration rather than with all the problems of criminal proceedings.

These flaws become more manifest when compared with the 1998 Rome Statute of the ICC, its Rules of Procedure and Evidence and Elements of Crimes. In many aspects these new instruments are aimed at preventing wrong practices by *ad hoc* Tribunals.

5.2. We shall concentrate first on the deficiencies in the Statute of the ICTY itself

Pursuant to its Article 9(2), the ICTY has primacy over national courts. At any stage of the procedure, the Tribunal may formally request national courts to defer to its competence any case under its jurisdiction. Further, according to Article 29(2), States shall comply “without undue delay” with any request for assistance or with an order issued by a Trial Chamber, including in particular the identification and location of persons, their arrest or detention and the surrender or the transfer of the accused to the Tribunal.

On the other hand, the Statute does not provide any form of intervention in the proceedings, including the above mentioned requests for assistance, by interested States. There is an obvious lack of balance in this respect.

¹⁰⁶ However, with the only exception of the crimes within their jurisdiction, the provisions of their statutes and rules of procedure and evidence are identical.

According to the Statute, the Prosecutor is invested with very broad powers in pre-trial investigations. He/she not only has the absolute freedom to decide whether or not to initiate the investigation, and against whom, but carries it outside any judicial scrutiny. Only at the end of the investigation does the reviewing judge admit or dismiss the indictment. But even in that judicial phase the suspect and his counsel have no right to assist in the proceedings. For this reason the confirmation of an indictment is more often than not a simple formality¹⁰⁷.

Due to the large-scale and gravity of the crimes that happened on the territory of the former Yugoslavia, there should perhaps be no serious complaints against these large powers, subject to the condition that the Prosecutor carries out these powers impartially in case of any crimes provided within his or her jurisdiction, even if the suspects belong to international forces. All the UN members States, including the five permanent members of the Security Council, should acquiesce to the same obligations.

Unlike Article 85 of the Rome Statute, this Statute does not provide any compensation to the victims of unlawful arrests and detention by the Tribunal¹⁰⁸. It would be even more justified to provide a scheme for the reparation of the victims of crimes, including restitution, compensation and rehabilitation, as provided in Article 75 of the Rome Statute.

In respect to the applicable law by the Tribunal in Articles 2 to 5 of its Statute, we have already noticed a big *lacuna* created by not providing the supreme crime of aggression to its jurisdiction, obviously for political reasons. We also discussed the incomplete set of written rules applicable to non-international armed conflicts.

Now we shall deal in particular with the problems of the general principles of criminal law, and of the procedure in international criminal trials in general.

Already the 1789 French Declaration confirmed some general principles, such as that law must be the same for all whether it protects or punishes; the principle *nullum crimen sine lege*, including the non-retroactivity of criminal laws; and the principle that limits to human liberties can only be determined by law. Later on, important legal

¹⁰⁷ The UN Security Council conferred such an extensive power to the Prosecutor in 1993 and 1994 probably in the belief that his or her vigorous action will prevent the commission of further large-scale crimes on both territories, of the former Yugoslavia and Rwanda. That, however, did not happen. In both instances it probably also wanted to diminish its primary responsibility for the maintenance and restoration of international peace under Article 24(1) of the UN Charter. Instead of undertaking enforcement actions against the violators of the peace by armed forces whenever it was really necessary, the Security Council settled for the activities of the Prosecutors of these two Tribunals which it itself had established.

¹⁰⁸ After four years spent in the Hague prison the three Kupreškić brothers from Vitez are entitled to no compensations. They were acquitted in October 2001. See some other cases of arrest of wrong persons, or keeping in detention of persons which were acquitted by the final judgment - Salvatore Zappalà: "Compensation to an arrested or convicted person", in A.Cassese, P.Gaeta, J.R.W.D.Jones: *The Rome Statute of the International Criminal Court*, A Commentary, Oxford 2002, Volume II pp. 1579-1582. If this problem were regulated in full accordance with the human right to compensation for anyone who has been the victim of unlawful arrest or detention, the Prosecution would be much more careful in the initiation of indictments and in issuing orders of arrest.

rules were aggregated, concerning the personal criminal responsibility of an individual, the definitions of different forms of perpetration and participation in a crime, the mental (psychological) element of a crime (*mens rea*), grounds for excluding criminal responsibility, mistakes of fact and mistakes of law.

In the countries with codified law the sum of detailed rules of this character is provided in the “general part” of criminal codes. They bind every judge in all criminal proceedings. A judge cannot ignore them or modify them by creating new legal rules. However, the essential role in these proceedings is performed by professional judges (*juge d’instruction* and judges in the *grand jury*). Even if lay assessors form a majority in criminal chambers, they cannot independently decide on the guilt of the accused.

It is now important to outline how the procedure of international criminal tribunals developed since 1945. The London Agreement on the Nürnberg Military Tribunal adopted mainly the Anglo-Saxon procedure but without any jury of laymen. Since then, all the *ad hoc* tribunals have consisted of professional judges only.

It should be noted that the Anglo-American adversarial model with a jury has the advantage of releasing professional judges of some responsibilities and helping them avoid the mistakes they can otherwise commit. On the contrary, the correctness of this model deprived of the jury depends almost exclusively on the professional skill, consciousness, impartiality and independence of judges¹⁰⁹. If they are incapable of handling their responsibilities such a procedure can degenerate into its opposite - the one prevalent in the inquisitions until the end of the 18th century. Hence the contrast between the quality of the Nürnberg Judgment of 1946 and that of the Tokyo Judgment of 1948.

Nevertheless, for a number of practical reasons a jury in international criminal proceedings seems unrealistic. However, the adversarial model of the procedure without a jury results in very long and expensive trials, each lasting several years and usually with little effect. This actually occurred in the practice of both the ICTY and ICTR. Protracted and exorbitant procedures allow the defence of the accused to manipulate the rules and postpone the proceedings, if it finds interest in it. The unfinished trial against Slobodan Milošević until his death in 2006 revealed all these deficiencies. To a certain extent it compromised the international criminal justice in general.

For this very reason, perhaps the European inquisitorial model with a *juge d’instruction* and trials by chambers of professional judges on the basis of a file (“*dossier*”) formed by the investigating judge, could have been speedier and more efficient. Yet in such a case, and in all the other cases in which international criminal tribunals consist of professional judges, the general principles of criminal law should

¹⁰⁹ A jury within the trial chambers of the ICTY would probably release Dražen Erdemović from his responsibility for the crimes he committed. It would perhaps also release General Tihomir Blaškić for most of the crimes for which the Trial Chamber of the ICTY sentenced him, in 2000, to 45 years of imprisonment. In these two cases it could probably not have happened that juries of laymen make miscarriage of justice in respect of the accused.

have been codified in advance by the statute of the tribunal, exactly as it was done in Part 3 of the Rome Statute of 1998.

The Statute of the ICTY is poorly drafted. It does not provide the most important general principles of criminal law. However, its Article 15 provides the following:

“The judges of the International Tribunal shall adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters.”

The general principles of criminal law are not even mentioned. They probably fall into the category of “other appropriate matters.” It is a usual practice in inter-State arbitrations that their parties empower the arbitrators, appointed by their agreement, to adopt the procedural rules before the proceedings. They then just adopt and transcribe the established general principles of law in that subject-matter either from the 1907 Hague Convention, or from the Model Rules of Arbitral Procedure drafted by the International Law Commission in 1958. There is no disagreement on the content of these basic procedural principles at all.

On the other hand, it did not seem appropriate to confer on the judges of the *ad hoc* criminal tribunals, who were elected by the UN General Assembly from a list proposed by the Security Council, to adopt rules of international criminal procedures in the domains in which prior to the 1998 Rome Statute there were no such codified rules.

5.3. *Now we shall discuss some deficiencies in the practice of the ICTY itself*

In the situation described above which actually happened, the first concern of conscientious criminal judges should have been to provide in advance detailed provisions of personal criminal responsibility of the accused in the Rules of Procedure and Evidence, including those on *actus reus* and *mens rea*, different forms of perpetration and participation in a crime, the grounds for excluding criminal responsibility, and mistakes of fact or law.

A less favourable option seems to be to provide in these Rules a general clause according to which, for all the issues not regulated by the Statute, the relevant rules of the criminal law of the State in which the crime was committed shall apply, provided that these rules are not inconsistent with the norms of international law. In both instances, international judges should apply the general principles of criminal law as having already been available in written form.

However, from the very beginning the ICTY adopted another option which was reflected in the Judgment of the Trial Chamber in the *Kupreškić* case, of 14 January 2000 (IT-95-16-T):

“...any time the Statute does not regulate a specific matter, and the Report of the Secretary-General does not prove to be of assistance in the interpretation of the Statute, it falls to the Tribunal to draw upon (i) rules of customary international law or (ii) general principles of international criminal law; or lacking such principles, (iii) general principles of

criminal law common to major legal systems of the world; or, lacking such principles, (iv) general principles of law consonant with the basic requirements of international justice.” (para.591).

Here it is, therefore, not the matter of observing the established general principles of criminal law, but mainly of their ascertainment apparently through a comparative analysis. The rules of customary international law were even mentioned before the general principles of “international criminal law” (*sic!*). In this respect, the two *ad hoc* Tribunals sharply differ from the approach of the Rome Statute, the Elements of Crimes, and the Rules of Procedure and Evidence of the International Criminal Court.

This lack of the general principles of criminal law in written form, fixed in advance, can in practice jeopardize the presumption of innocence of the accused, the principle that law must be the same for all whether it protects or punishes, and the principle of “equality of arms”.

Besides, throughout its practice the Tribunal frequently makes use of the terms “customary law” and “general principles of law” as synonyms. That is probably the reflection of its view that it can create itself new “customary law”, by its decisions, like the above quote from the *Kupreškić* Judgment¹¹⁰. To the confuses of these two distinct sources is added that of the judicial practice as a source of international criminal law of itself.

The Tribunal starts from the postulate that the international criminal proceedings are different from the procedures before national courts. It seems hard to support this position. For sure, international tribunals have within their jurisdiction the prosecution of the most serious international crimes, while municipal courts have in their competence a large spectrum of human misdeeds of very unequal social consequences. But the greater the gravity of a crime imputed to an accused, the higher the risk of miscarriage of justice.

In respect of the relationship between customary law and judicial practice in criminal matters one should notice that there are legal terms in general use on whose exact meaning there is no general agreement. Some authors usually resort to some of these terms in order to assert some facts or legal rules which they are otherwise unable to support by stronger legal arguments¹¹¹.

In the practice of *ad hoc* tribunals and in the writings of some publicists on international criminal law, the same frequently occurs with the term “customary law”.

¹¹⁰ It seems, however, controversial that the statements in the judgments by a trial chamber which were subsequently repealed by the Appeals Chamber and all the convicted released, have the force of precedents and fall as such within the scope of rules of “customary law”. Statements like this are not applicable under the doctrine of *stare decisis* in the States in which it is obligatory.

¹¹¹ For such purposes they sometimes use the terms of equity, natural law, even sources of international law in general and, as shown above, the general principles of law. The author of this paper confronted these misunderstandings trying to reveal the exact meaning and content of some of these notions including, when necessary, their historic developments. See - V.D. Degan: *L'équité et le droit international*, La Haye 1970, 264 pages; and with respect to other above terms, including that of natural law, - *Sources of International Law*, The Hague 1997, 564 pages.

Their notion of this term has substantially different features than those that appeared in the long practice of the two Hague Courts since 1922.

The ICTY does not refer in its decisions to the former practice and *opinio juris* by States as the only, or even as the main evidence of existence of customary law. It rather relies on the former practice of *ad hoc* military tribunals for the prosecution of war crimes established by Allied Powers after World War II in occupied Germany and in the Far East, as well as to its own practice¹¹². It thus calls that former judicial practice, as a whole “customary law”.

However, considering itself an immediate organ of the international community, this *ad hoc* tribunal does not hesitate even to create new “customary rules” deducing them directly from “elementary considerations of humanity”, as presumably being its own *opinio juris sive necessitatis*. The borderline between *lex lata* and *lex ferenda* is by that almost completely blurred. Still, it expects that States will conform their practices in the warfare to that “judge-made law” in the future international and non-international armed conflicts.

It could perhaps even achieve some desirable results in these efforts to humanize the warfare, had not it taken an almost unlimited freedom in this law-creating. By that it betrayed its judicial function, without simultaneously efficiently protecting the victims of the future armed conflicts.

It must be stressed that normative statements in judicial decisions should be considered only as *emerging customary law*, and not as positive legal rules as yet. They can transform into genuine customary law subsequently, if a majority of States confirm them in their actual practice coupled with the *communis opinio juris*. Nonetheless this legislative process is generally inappropriate for criminal courts because of a constant risk of punishing the indicted for some acts which were not criminal at the time of their commission.

In respect of the new “customary rules” established especially in the *Furundžija* Judgment¹¹³, the developments seem to go in the opposite direction. The judicial findings by the ICTY did not compel the parties to the actual conflicts in Chechenya, in Afghanistan, at the Guantanamo base, and recently at the Abu Ghraib prison in Baghdad, to abide by them. It seems therefore more productive in criminal proceedings to insist on the rigorous respect of the minimum legal obligations of all the parties in international and internal armed conflicts, than to create new “customary rules”¹¹⁴.

¹¹² Even if these military tribunals, which acted in the post-war period, were organs of respective States, there is no proof that they were willing to prosecute, on the basis of the same principles, the same misdeeds by members of their own armed forces.

¹¹³ This relates in particular to the determination of objective elements of torture and rape, as well as the *actus reus* and *mens rea* of aiders and abettors of these international crimes. See the judgment by the Trial Chamber of 10 December 1998, paragraphs 134-256, especially paras. 162 and 185.

¹¹⁴ This is, however, not to say that even widespread practices of torture, rape, or organized prostitution, can lead to the appearance of opposite customary rules by which all these mischiefs could become lawful. Such a development is opposed even by the rare convictions by State tribunals of individual perpetrators of these crimes, although only with symbolic penalties so far. However, in a situation

Nevertheless, these embellishments in material law have no harmful effect if the responsibility of the presumed perpetrator was established concerning the commission of the original crime which is in the competence of the Tribunal according to its Statute. Much more delicate in this respect is the question of the interpretation of the command responsibility under Article 7(3) of the Statute of the ICTY.

It must be finally stated that the *opinio juris* is definitely not equivalent to simple “legal opinions” either by judges or by legal experts in their collective works. In both cases these “opinions” do not amount to international custom in the meaning of sub-paragraph b. of the Article 38(1) of the ICJ Statute as the source of positive legal rules. Being “judicial decisions and the teachings of the most highly qualified publicists of the various nations”, they are but “subsidiary means for the determination of the rules of law” under sub-paragraph d. of that same Article.

To the power to legislate, self-appointed missions were aggregated by both the Prosecutor and the Tribunal to act as organs of the prosecution in the name of the international community¹¹⁵.

In performing that supposed common mission the Judges acquiesced to some practices for making the life of the Prosecution easier. Hence the strong insistence on the “equality of arms” between the Prosecution and the accused at the stage of trial proceedings did not foster the presumption of innocence of the latter throughout the process. We can here note some practices which do not seem to be fully in accordance with the sum of general principles of criminal law.

Although the Statute does not provide the competence of the ICTY to condemn an organization as criminal, the Prosecutor is allowed by the Tribunal to indict a group of persons for a “joint criminal enterprise”, in spite of the fact that the Statute of the ICTY does not provide this form of perpetration or participation in a crime. Can a criminal tribunal create such a far reaching rule on itself?

Besides that, unlike Article 25-(3)-(d) of the Rome Statute, the matter here is not of a form of furthering criminal action by principal perpetrators, but of a presumed act of co-perpetration of a crime. In such a way, if the Tribunal does not strongly insist on the intent and knowledge of each member of such a supposed group, the crime can be imputed to any executioner of an order issued by his political superior who was

in which States either fail to exercise effective control over their troops, or they themselves organize concentration camps for suspects who are deprived of judicial guarantees, it seems to be vain to create in judicial practice rules stricter than those proceeding from treaties.

¹¹⁵ The full title of that body: “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”, should not mislead anybody. As the Nürnberg Tribunal stated in its Judgment of 1946 concerning its discretionary power under Article 9 of its Charter to declare a group or organization as criminal: “This discretion is a judiciary one and does not permit arbitrary action, but should be exercised in accordance with well-established legal principles, one of the most important of which is that criminal guilt is personal, and the mass punishment should be avoided.” *Cf.*, *AJIL* 1947, pp. 250-251. Hence, even if the UN Security Council had the bare prosecution, i.e. punishment of all the suspects for the crimes committed in mind in 1993, a judicial body cannot exercise its functions beyond the above mentioned limits.

perhaps the unique perpetrator. The *actus reus* and *mens rea* can then be attributed to the accused on indirect evidence, or even from factual circumstances. This notion is therefore highly controversial.

The Tribunal admits, in addition, the acts of indictment against a person at the same time for: “planning, instigation, ordering, committing, or otherwise aiding and abetting in the planning, preparation, or execution” of a crime. This is the full formula from paragraph 1 of Article 7 of the Statute¹¹⁶. However, had the reviewing judge from the outset forced the Prosecutor to specify the acts he imputed to the accused, that could only assure the prestige of both the Tribunal and its Prosecutor as impartial organs at large. That could facilitate the cooperation of Governments of all the successor States to the former Yugoslavia.

Similar to that is the practice allowed by the Tribunal, without rational restrictions, of the indictment of a person for a single act or transaction, as alternatively having been in breach of several paragraphs of Article 3 on Violations of the Laws or Customs of War, and again under several paragraphs of Article 5 on the Crimes against Humanity. This is admitted as a precaution that in case that the Prosecutor does not prove in the proceedings the specific requirements of one crime, that the accused could be punished for another. There is here nothing like the equality of arms between the two parties during the proceedings.

When it comes to the command responsibility under Article 7 of the Statute, the Trial Chamber sometimes condemned a person cumulatively for ordering or planning a crime under its paragraph 1, and at the same time for not preventing his subordinates to actually commit it under paragraph 3¹¹⁷.

Especially in the early phase of its activities, the Tribunal overburdened itself with other self-appointed duties which are not appropriate to any criminal court: establishing historical truth and involvement in the problems of responsibility of States in the conflicts in the former Yugoslavia. If it is not about some facts established by a judgment, historical truth in general terms belongs to historians, not to judges.

In respect of the issues of State responsibility, good administration of justice requires from the Tribunal strictly to limit its activities to the prosecution of individuals within its jurisdiction, including heads of State and Government¹¹⁸.

¹¹⁶ These unqualified statements in the acts of indictment are abusively interpreted by some groups in Croatia which resist cooperation with the ICTY. They impute to the Tribunal and its Prosecutor the condemnation of the actions of liberation of the Croatian territory between 1992 and 1995 as allegedly criminal acts. The liberation itself was a perfectly lawful action, but some crimes against unarmed civilians during it were nevertheless committed which fall within the jurisdiction of the ICTY.

¹¹⁷ It seems that the Appeals Chamber has stopped this unlawful practice. Referring to some of its former decisions, it stated the following in the *Blaškić* Judgment of 2004: “Where both Article 7(1) and Article 7(3) responsibility are alleged under the same count, and where legal requirements pertaining to both of these heads of responsibility are met, a Trial Chamber should enter a conviction on the basis of Article 7(1) only, and consider the accused’s superior position as an aggravating factor in sentencing.” (para.91).

¹¹⁸ The Tribunal cannot avoid the assessment of the existence of an international armed conflict in a region in order to establish whether Article 2 of its Statute is applicable to the crimes committed there or

Governments change in democratic procedures or otherwise, but all issues of State responsibility should be resolved in other procedures. Not all citizens of a State, nor all members of an ethnic group, are collectively responsible for the acts of their Government. Especially new generations cannot be held responsible for the crimes of the former governments of their State. International criminal courts and tribunals are being instituted precisely in order to individualize personal responsibility for the crimes committed.

Because the ICTY was not created by the will of sovereign States, it has no competence to make declarations concerning the responsibility of any State. That is the duty of the International Court of Justice and of international arbitrators within their competencies, but not of criminal tribunals. Just like the Hague Court cannot condemn any person for breaching the rules of international law, it is not for the ICTY to encroach upon the competence and activities of the Hague Court discussing even *obiter dicta* the issues of responsibility of any State (or nation)¹¹⁹.

This does not even fall within the competence of the UN Security Council. It is true that this political organ can, pursuant to Chapter VII designate a State as an aggressor, which it rarely does even when imposing sanctions against a particular party to a conflict. But this principal organ of the UN could not, and actually did not, transfer this power to the ICTY when adopting its Statute. For the rest, it is obvious that this Tribunal cannot have any more powers than the Security Council itself, the organ which created it. It cannot settle actual disputes between States, part of which are the issues of the State responsibility for internationally wrongful acts¹²⁰.

Many of the above mischiefs could probably be avoided by experienced judges with a better knowledge of various sources of international law and of the peculiarities of criminal proceedings.

Nevertheless, the Tribunal confirmed its importance in its main task. Just as in the *Pinochet case*, the future political and military leaders must know that their policies

not. But a wise judicial body should restrain its deliberations on these specific questions only, respecting all the rules of international law on these conflicts and strictly in the function of the applicability of crimes within its jurisdiction. It is not good for its own prestige to reprove the acts of aggression committed by a conflicting party, because the Tribunal has not the jurisdiction over this international crime. Neither it has the jurisdiction to condemn acts of unlawful intervention by the neighbouring States in the conflict, beyond the above mentioned competence.

¹¹⁹ This is *a fortiori* valid because the Statute does not provide any form of intervention by States in the proceedings. A supposed competence of the Tribunal to this effect should require, not only the participation of agents of interested parties in the proceedings, but also their nomination of judges *ad hoc* to the chambers of the Tribunal.

¹²⁰ According to Chapter VI of the UN Charter which relates to pacific settlement of disputes, the competence of the Security Council (or alternatively of the General Assembly) is reduced to offering good offices to the parties to the disputes "the continuance of which is likely to endanger the maintenance of international peace and security" (Article 33). It may investigate such disputes or situations, but it can only "recommend appropriate procedures or methods of adjustment" [Article 36(1)]. In no case can it impose a solution to the parties and hence decide on their international responsibility for their acts or omission.

of ethnic cleansing for changing State frontiers, the acts of genocide, rape, forced prostitution, etc, will perhaps not remain unpunished.

5.4. Now, we shall concentrate on the activities of the Prosecutor of the ICTY

In criminal proceedings, whether adversarial or inquisitory, the role of the prosecution cannot be more important than that of the defence. Prosecution has always more personnel and financial resources at its disposal than the defence. It was only the mark of dictatorial regimes, especially in the Nazi Germany and Soviet Union, that the prosecution has been in a privileged position, allegedly representing the highest interests of the society.

However, international criminal courts and tribunals have no police of their own that could identify the location of suspects, arrest and transfer them to their seat. In the case of the ICTY there is a tremendous task of the Office of Prosecution to induce the respective UN member States to give necessary assistance to it to this end. If the Tribunal has not the major suspects of crimes arrested and transferred to The Hague, due to the enormous financial resources it spends trials of persons of minor importance in the hierarchy are not sufficient to fulfil its mission.

It is, however, to the credit of the Prosecution of the ICTY that it marked the locations of the biggest crimes and identified their victims. These tragic facts are not easy to deny, not even in a judicial procedure. But this only relates to the crimes committed by the conflicting parties in the former Yugoslavia and to their victims.

The Prosecution failed in its mission to exercise its *erga omnes* jurisdiction *ratione personae* against any suspect for the commission of crimes within its competence *ratione materiae*.

In respect of the NATO action against Serbia in 1999 this author tried to formulate the circumstances of a lawful humanitarian intervention, even without the authorization of the Security Council under Chapter VII of the UN Charter.

Among these stringent conditions there is one that no State participating in the intervention of this kind should gain for itself a benefit in the promotion of its own political goals. Another condition is that in the enforcement action undertaken no international crimes must be committed, especially not against civilians and other protected persons. Such action must not, in particular, serve the intervening States to test new arms and ammunition, or devices, or methods and means of warfare. If international crimes were the cause of the humanitarian intervention in the first place, the intervening States must not do the same¹²¹.

¹²¹ Cf., V.D. Degan: "Humanitarian intervention (NATO action against the Federal Republic of Yugoslavia in 1999)", L.C. Vohrah *et al.* (eds): *Man's Inhumanity to Man*, Essays on International Law in Honour of Antonio Cassese, Kluwer Law International 2003, pp. 233-259, at pages 248-250.

We found that the policy of the then Serbian Government in Kosovo against the Albanian population called for the NATO bombing action in order to stop the crimes on a very large scale. However, during that action, some acts were committed that are not even denied by NATO itself.

(i) The use of weapons containing depleted uranium would not be forbidden if their radiation were not harmful to human health¹²². In any case its legality should be a matter of judicial deliberations.

(ii) The use of cluster bombs, which are weapons calculated to cause unnecessary suffering.

(iii) Attacks on oil refineries and chemical plants have had serious effects on the contamination of the air, soil and water.

(iv) The question was, finally, whether for instance the premises of a Belgrade TV were a legitimate military target or not. It continued to disseminate aggressive and intolerant propaganda even after the bombardment.

It can be reasonably alleged that these acts fall within the jurisdiction of the ICTY *ratione materiae* pursuant to Articles 2 and 3 of its Statute. There is no doubt that the Tribunal has the competence *ratione loci* and *ratione temporis*, because the above mentioned acts were committed in the territory of the former Yugoslavia since 1991. Finally, the Tribunal has *erga omnes* competence *ratione personae*, because no provision of the Statute denies it, and the Statute itself was adopted by a Security Council resolution under Chapter VII of the UN Charter. That *erga omnes* competence should be in fact the main advantage of its jurisdiction.

The Prosecutor of the ICTY was therefore bound to initiate an impartial investigation ex-officio for all the above mentioned facts and in respect of the persons alleged to be responsible. Instead of that she appointed her own committee whose composition has never been revealed. Its learned experts thus remained anonymous so far. And on the basis of a report by this “Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia”, the Prosecutor decided not to commence any investigation in this subject-matter.

In respect of depleted uranium projectiles and cluster bombs, the main argument in favour of not commencing an investigation was the lack of specific treaty provisions prohibiting or restricting their use¹²³. That would amount to the conclusion that the use of any weapon is permitted until a treaty specifically prohibits it.

Such a simplified conclusion militates against an old rule of all humanitarian law that: “/t/he right of belligerents to adopt means of injuring the enemy is not unlimited” (Article 22 of the 1907 Regulations Respecting the Laws and Customs of War on Land). Article 35(2) of the 1977 Protocol I is more specific stating that: “It is prohibited to employ weapons, projectiles and materials and methods of warfare of a

¹²² However, their use against Iraq in 1992 suggests the opposite conclusion. Perhaps their poisonous effects are more harmful than radiation.

¹²³ See the text of this Final Report - *International Legal Materials* 2000, No.5, pp. 1257-1283, in particular its paras 26 and 27 at pp. 1264-1265.

nature to cause superfluous injury or unnecessary suffering”. That prohibition relates *a fortiori* to all the weapons which indiscriminately affect the civilian population, especially children. This elementary consideration of humanity obliges even States non-parties to that Protocol.

In addition, the above-mentioned allegation by the Committee of experts goes directly against the Martens Clause which was provided in the Preamble of both Hague Conventions of 1899 and 1907 respecting the laws and customs of war on land¹²⁴. As is well known, it states that: “Until a more complete code of the laws of war has been issued... in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of public conscience”.

Infringements of this peremptory norm constitute substance of international crimes as provided in Articles 2(c) and 3(a) of the Statute of the ICTY¹²⁵. Hence, even if a specific weapon is not prohibited by treaty provisions, it is the duty of the Prosecutor to undertake an impartial investigation concerning the consequences of its use.

Finally, it belongs to the competence of the Tribunal, not of the Prosecutor, to decide in an adversarial procedure on the facts, on the question whether these devices were permitted or prohibited in general international law, and on the possible responsibility of the accused. However, by not intervening against this unlawful attitude of its Prosecutor, the Tribunal was itself responsible for its “culpable negligence”¹²⁶.

Hence, by that unlawful practice of the Prosecution with the complicity of the Tribunal itself, to the *erga omnes* jurisdiction *ratione personae*, to which the ICTY is entitled, it was denied any effect. All the involved persons should be conscious of the fact that selective justice always leads to its perversion, which can be harmful to the very idea of international criminal judiciary.

5.5. *We shall close this section by explaining some problems of cooperation with the ICTY by the States affected by the armed conflicts in the former Yugoslavia*

As suggested above, all the international crimes within the jurisdiction of the ICTY indirectly tackle the State responsibility. In such situations all States are willing

¹²⁴ As a rule of positive international law it was for the last time confirmed in Article 1(2) of the 1977 Protocol I.

¹²⁵ The Commission was right in concluding that: “if one accepts the figures... of approximately 495 civilians killed and 820 civilians wounded... there is simply no evidence of the necessary crime base for charges of genocide or crimes against humanity” (para.90). That does not, however, exclude the responsibility for the other just mentioned crimes under the Statute.

¹²⁶ This form of responsibility, which in fact covers the unconscious negligence (*culpa gravis*), is not recognized in criminal law because it can lead to strict liability. Its partisan was however the first President of the ICTY - A. Cassese: *International Criminal Law*, Oxford 2003, pp. 168-175. It can be observed that in order to perform their duties properly, judges should first apply their theories to their own deeds within their responsibilities.

to conceal the crimes committed and hide the persons responsible for them. That makes their cooperation with the ICTY extremely difficult, because the permanent members of the UN Security Council do not give them any better example.

However, if a State which considers itself the victim of an outside aggression, had in an early phase of a conflict properly tried the perpetrators of crimes in its ranks, the number of crimes within the jurisdiction of the ICTY would have been considerably reduced.

Even now, more than fifteen years after the outbreak of these conflicts, it seems wise for the Prosecution in those States to identify the perpetrators of these crimes established by the Prosecution of the ICTY, and their immediate commanders, and to put them to trial. It cannot be proved that the crimes did not happen at all. Many of the highest political and military leaders have died in the meantime while others are still in hiding.

Some lower ranking officers in the hierarchy, if indicted only on the basis of Article 7(3) of the Statute, and as presumed members of a “joint criminal enterprise”, could be punished by the Tribunal on a very dubious legal basis, merely as symbols of the crimes ordered and committed by others, and without their personal guilt¹²⁷.

As an illustration of the attempt to escape the jurisdiction of the ICTY allegations by some Croatian lawyers in the Government service can be mentioned here. They asserted that the “Operation Storm” in the Summer of 1995, in which the quasi-totality of the Croatian territory was liberated, was only a “police action”, or a “military-police operation”, for which the Tribunal was allegedly not competent¹²⁸.

That operation, which lasted only a few days, was perfectly legitimate. As a UN member State Croatia was entitled to liberate its territory from Serbian insurgents who from the outset were supported and financed by the Belgrade Government. However, during and after that operation several hundred elderly persons of Serbian origin who did not escape, were murdered and plundered in their homes in remote villages by Croatian criminals. It is no an excuse that the same happened in 1991 and later to Croats and other non-Serbs on the Croatian territory seized by the Serbs.

The Storm operation was still a part of the non-international armed conflict, which in Croatia started in 1991. According to Article 1(1) of the Additional Protocol II, it took place on the Croatian territory between its armed forces “and dissident armed

¹²⁷ Article 7(3) reads: “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* (italics added) that the subordinate was about to commit such act 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”. According to Article 28 of the Rome Statute, the military commander can get rid of his responsibility if he submits the matter “to the competent authorities for investigation and prosecution”.

¹²⁸ They were obviously inspired by Article 1(2) of the Additional Protocol II of 1977, which reads: “This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts”.

forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.”. The “militia” of the so-called “Republika Srpska Krajina” fulfilled all these requirements and it was not a matter of a simple riot. Croatia is itself a party to Protocol II, and on behalf of Article 134 of its Constitution Article 1(1) of this Protocol has the force superior to its laws.

Besides, it was illusory to expect that the ICTY, which according to Article 9(2) of its Statute has the primacy over national courts, should agree on these quasi-arguments and proclaim its incompetence. Hence, for all the crimes that could have been committed by whatever side during that Operation the Tribunal’s jurisdiction cannot be denied. The above argumentation probably served as a pretext for the refusal of Croatia’s cooperation with the ICTY, which did not happen.

6. The 1998 Rome Statute of the ICC

Unlike the Statute of the ICTY, the Rome Statute was drafted with much more care. On that job both experts of public international law and of criminal law were engaged. It is in fact intended to prevent most of the practices by the ICTY which were criticized above.

In respect of the jurisdiction of the ICC *ratione materiae*, which is the most complex, we shall quote with brief comments the text of Article 21 of its Statute concerning the applicable law¹²⁹.

In paragraph (1a) of that provision it is stated that the Court shall apply:

“In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;...”

The Rome Statute is the constitutive instrument of the ICC in the same way as the Charter is for the United Nations Organization. It sets out the organizational provisions of the Court, which is not an organ of the UN. It functions as a separate international organization and like specialized agencies is in relationship with the UN.

More important than that is the fact that, for the first time in the entire practice of international criminal tribunals, the Rome Statute provides in its Part 3 the General Principles of Criminal Law in written form and in advance. Among these principles are those on individual criminal responsibility and on the various forms of perpetration of and participation in a crime (Article 25), on *mens rea* (Article 30), on the grounds for excluding criminal responsibility (Article 31), on the mistakes of fact or law (Article 32), etc. This is in fact what constitutes the substantial provisions in the “general part” of criminal laws of many States, which judges must not disregard or interpret at will.

¹²⁹ It must be kept in mind that Article 21 does not only provide sources of the material law on international crimes within the jurisdictions of the ICC. It relates to all law that can be applied by it.

The Statute contains an extensive enumeration of definitions of all the crimes within the jurisdiction of the Court. As already stated, they are: Genocide (Article 6), Crimes against Humanity (Article 7) and War Crimes (Article 8). All these written definitions are sufficient to provide that any responsible person might be punished, so that the problem of *non liquet* will not arise in practice.

However, because these definitions were adopted from codification conventions of humanitarian law, they sometimes miss the description of *actus reus* and *mens rea* of the perpetrators or participants in a crime. For that purpose, the Elements of Crimes are appended to the Statute which, according to Article 9, “shall assist the Court in the interpretation and application of Articles 6, 7 and 8”. They must be consistent with the Statute but can be amended in a simpler procedure than the Statute itself.

The Statute itself provides detailed procedural provisions. It is also appended by even more detailed Rules of Procedure and Evidence. They are also adopted as an instrument in the application of the Statute. These Rules and all their subsequent amendments must be consistent with the Statute. In the event of a conflict, the Statute will always prevail (Article 51).

It seems important to stress that both the Elements of Crimes and the Rules of Procedure and Evidence were not adopted by judges, but by a two-thirds majority of the members of the Assembly of States Parties. However, the Prosecutor and judges acting by an absolute majority may propose amendments to them. Judges adopt, by an absolute majority, only the Regulations of the Court for its routine functioning which can be commented on by States parties. All this finally brought the legislative function of judges to an end.

In paragraph (1b) of Article 21 of the Statute it is provided that the Court shall apply, furthermore:

“In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;...”

Several sources of international law are in this hierarchical order provided here as supplementary. Among the applicable treaties (other than the Rome Statute itself), they may be, for instance, human rights conventions. The provisions of these applicable treaties concerning the fair trial and similar problems that were perhaps not entirely regulated by the Statute and the Rules of Procedure and Evidence of the ICC can be of special importance.

Under the “principles and rules of international law” customary rules of general international law should be understood. Probably because of the frequent misuse of this term in the past they were not referred to as such. But this less precise wording has the advantage that the Court will not need to prove the customary character of the “principles and rules” it wishes to apply, especially not the *communis opinio juris*.

Established principles of the international law of armed conflicts consist most often of customary legal rules confirmed in codification conventions. Hence, they

enclose numerous provisions from the four 1949 Geneva Conventions and the two 1977 Protocols, but not the definitions of their “grave breaches” anymore. This matter may include rules concerning the proper qualification of armed conflicts; specific prohibitions of reprisals against protected persons, buildings or equipment; localities and zones under special protection and on demilitarized zones; conditions to be fulfilled for belligerent occupation; neutrality in a conflict; or rules of the warfare at sea when there is room for their application. These rules are in their form most often conventional, but can also proceed from the practice of warfare.

All the above sources under paragraph (1b) cannot replace, amend or extend either the general principles of criminal law set forth in the Statute, or the definitions of crimes within the jurisdiction of the Court. They are of lower legal force than even the Elements of Crimes and the Rules on Procedure and Evidence.

Paragraph (1c) provides that the Court shall apply furthermore:

“Failing that, general principles of law derived by the Court from national laws and legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.”

Hence, in the absence of any applicable law under (1a) and (1b), the Court can resort to the general principles of law in their narrow sense as explained above. National laws and legal systems of the world (continental, Anglo-Saxon and, possibly, islamic) do not require an analysis of laws of a great many of States. It is sufficient to consider a few representative samples. When appropriate, the Court will take into account the national laws of States “that would normally exercise jurisdiction over the crime” either by the application of the principle of territoriality, or of that of active personality, or perhaps according to the law of the State which arrested the suspect and surrendered him to the Court.

Paragraph (1c) stresses that all these derived general principles of law must be consistent with the Statute and with international law and “internationally recognized norms and standards” (having probably in mind human rights and fundamental freedoms). The emphasis is here once again on the rules of positive international law and not of *lex ferenda* by judges.

The short text of paragraph 2 in Article 21 provides the following:

“2. The Court may apply principles and rules of law as interpreted in its previous decisions”.

This means that the ICC is not bound to follow even its own precedents. The *stare decisis* doctrine is therefore not obligatory for it. The previous practice of State military tribunals and of *ad hoc* international tribunals is not mentioned in this provision at all. It is, therefore, obvious that it does not consist of “customary law”.

However, on that ground the Court “may apply” its own previous practice. It is sure that in this respect it will follow the practice of the ICJ. In order to support its

new decisions it will not hesitate to refer to its previous judgments, first of all those by its Appeals Chamber. Nevertheless, when, subject to the circumstances of a new case, it decides otherwise, it will expose legal arguments for having declined from its former practice.

Finally, Article 21(3) states the following:

“3. *The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender, as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status*”.

It is here a matter of confirmation of peremptory norms of general international law in that domain, including the principle of non-discrimination. These norms are obligatory for judges in any national or international criminal proceedings, even if they were not expressly provided.

Having exposed the jurisdiction *ratione materiae*, it is time to explain other grounds of the jurisdiction of the ICC.

According to Article 11, the Court has jurisdiction *ratione temporis* “only with respect to crimes committed after the entry into force of this Statute”. Further on: “If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction of this Statute for that State”, unless that State has made a declaration accepting its jurisdiction under Article 12(3). The non-retroactivity *ratione personae* is confirmed in Article 24. By this its Article 29 on non-applicability of the statute of limitations remained illusory.

Pursuant to Article 4(2) the Court may exercise its functions and powers *ratione loci* “on the territory of any State Party and, by special agreement, on the territory of any other State”.

In the situations in which a State Party refers a crime to the Prosecutor, or the Prosecutor himself has initiated an investigation, the Court has no jurisdiction for the crimes committed on the territory of the States that are not parties to the Rome Statute without their permission. However, if such a situation is referred to the Prosecutor by the Security Council acting under Chapter VII of the UN Charter, this restriction *ratione loci* does not apply. The crime can then be committed in the territory of any State. Nevertheless, any of its permanent members can by their veto prevent such a referral.

The jurisdiction of the Court *ratione loci*, in cases when the crimes were committed on the territory of a State Party, extends to all the persons, whether nationals or non-nationals, of the States Parties or the persons without nationality. It is understood that by this encompasses members of the armed forces that the Security Council can send to a peace-keeping mission or in enforcement operations¹³⁰.

¹³⁰ Having these situations in mind, the United States imposes on some States Parties to the Rome Statute bilateral agreements in order to exclude its own citizens from the jurisdiction of the Court altogether.

In conformity with Article 12-(2)-(b) of the Statute the jurisdiction of the Court *ratione personae* extends to the nationals of all its States Parties excluding, however, any person who was under the age of 18 at the time of the alleged commission of a crime (Article 26). Nevertheless, the Court can determine that a case is inadmissible where the case is being investigated or prosecuted by a State which has the jurisdiction over it, “unless the State is unwilling or unable genuinely to carry out the investigation or prosecution” (Article 17). According to the Preamble and Article 1 of the Statute, the Court is complementary with national criminal jurisdictions.

The wishes of the drafters of the Rome Statute will be fulfilled once all the States, including all the permanent members of the UN Security Council, become parties to it. Then the Court will exercise its *erga omnes* jurisdiction in respect of all the suspects for international crimes provided for by its Statute. Until then, this only remains a desire.

All this does not mean that the Rome Statute itself is free from any criticism, especially in respect of the general principles of criminal law on personal criminal responsibility of suspects under its Articles 25 to 33.

The main *lacuna* in its regulations is related to the total absence of a general provision concerning “the commission by omission”¹³¹. The omission as a criminal act is only provided in its Article 28 on the responsibility of commanders and other superiors. A commander is responsible for a crime committed by the forces under his effective command and control “as a result of his or her failure to exercise control properly over such forces”. For the rest, there is no general provision on the omission which is otherwise found in most municipal criminal laws.

It seems that this *lacuna* was deliberate, especially with respect to the armed forces sent to peace-keeping missions in the areas affected by conflicts. In case of the crimes of genocide, such as those committed in Rwanda in 1994 and at Srebrenica in Bosnia in 1995, only direct perpetrators and their commanders are responsible.

Responsibility of representatives of member States of the UN Security Council, and of commanders of peace-keeping troops for not averting these crimes, is thereby excluded. In all these situations none of them had the special intent “to destroy, in whole or in part, a national, ethnical, racial or religious group”. None of them can therefore be indicted for omission under Article 25(3) of the Rome Statute. But bearing in mind the huge tragical consequences of such omissions, this does not seem to be entirely justified.

This belongs to the problems of international responsibility of international organizations which is now on the agenda of the International Law Commission.

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¹³¹ However, such a general rule is provided in Article 86(1) of the Protocol I of 1977 to four Geneva Conventions of 1949.

In spite of that flaw, the careful codification of these general principles in Part 3 of the Rome Statute, as well as the submission of the powers of the Prosecutor to the judicial authority of the ICC, will probably diminish the unwelcome practice by the ICTY indicated above.

VI. CONCLUSIÓN

Erga omnes obligations derive from general customary international law. By this only the positive rules of this law which are confirmed in the State practice and “accepted as law” by States (*opinio juris sive necessitatis*) are understood. Therefore, it is not a matter of “judge made law”, i.e. of the “customary law” created by judges or legal experts, unless they were confirmed in practice and by *opinio juris* of States.

Erga omnes obligations derive from all the peremptory norms of general international law (*jus cogens*) in their broad sense. In this paper we tried to distinguish between several patterns of these norms, which proves that their general concept is rather diffused. The same applies to the concept of their “serious breaches”. This can allow States to pick and choose among them at their will. However, some norms of general international law do not consist of *jus cogens*, but of *jus dispositivum*, such as the principle of *uti possidetis*. They also have the *erga omnes* effect, unless respective States did agree on the delimitation of their frontiers otherwise.

Among different patterns of *erga omnes* obligations the most important, and the most frequently invoked in the judgments of the ICJ and other international instruments, are the obligations prohibiting international crimes. In comparison with all the other norms of *jus cogens* they are the best defined in international instruments.

It is useless to deny the responsibility of States for international crimes for which individuals bear criminal responsibility, only because State responsibility is not of a criminal nature. It is a matter of the same internationally wrongful acts, producing the same harmful consequences to their victims. Most of them are defined in multi-lateral conventions which provide obligations for their States parties, as well as their obligation to enact the necessary legislation for prosecuting individual perpetrators of these crimes.

We have found that it is not possible to define the consequences for a State responsible for commission of international crimes in general terms. Among other reasons for it, it is not possible to establish a tribunal for prosecution of sovereign States for such acts.

On the other hand, political reactions by other States in the cases of the commission of these crimes on a large scale, is disorganized. These reactions can be individual or collective. The actions by the UN Security Council are imperfect, because this organ is unable to impose sanctions against its own permanent members, or against other States acting under their protection, if they commit international crimes themselves.

However, in order to prevent abusive reactions, it seems highly desirable now to define all the forms of international terrorism in one multilateral convention, or amend with such a definition the 1996 Rome Statute of the ICC. To the same effect, it is necessary to amend the Rome Statute with the definition of the crime of aggression.

A large part of this paper was dedicated to criminal proceedings, national or international, against the perpetrators of international crimes.

The *erga omnes* obligations of all States to prohibit international crimes have not the immediate effect on the prosecution of these crimes, either by national organs, or by international criminal courts and tribunals. Customary rules, even peremptory, cannot have a straightforward impact on criminal proceedings.

Hence, multilateral conventions, defining international crimes and providing other obligations of their States parties for the prevention, suppression and punishment of these crimes, including various kinds of judicial assistance, cannot be substituted by any peremptory norms of general international law as such.

We find that the ICTY, which was established by a resolutions of the Security Council under Chapter VII of the UN Charter, was endowed with the *erga omnes* jurisdiction *ratione personae* for the crimes committed within its competence in the territory of the former Yugoslavia. However, the Prosecutor with the complicity of the Tribunal itself, did not have the courage to put this jurisdiction into effect.

With the *erga omnes* jurisdiction *ratione personae* and *ratione loci* the ICC in the Hague will be empowered for all the crimes within its jurisdiction, if some day most of the States, including all the permanent members of the Security Council, become parties to the Rome Statute.

JORGE CARDONA LLORENS
Director

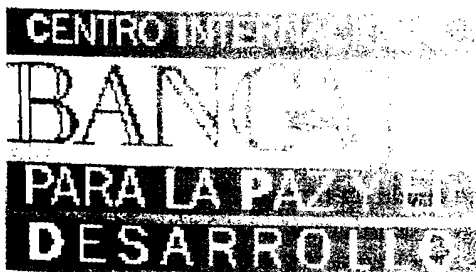
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