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## INTERNATIONAL CRIMINAL COURT: AN EFFECTIVE MECHANISM AGAINST MASS MASSACRES AND TERRORISM?

April 2002 witnessed final ratifications of Rome Statute, adopted on the 7th of July 1998 at a Diplomatic Conference on the Establishment of an International Criminal Court. Sixty ratifications were required for the Statute's entry into force, this significant number of ratifications was needed in order to ensure the widespread acceptance and cooperation of States «necessary for the Court's effective operation»<sup>1</sup>.

Attempts to regulate the conduct of belligerents in an armed conflict date thousands of years. Certain laws of war were already developing in the Middle Ages, and early writers (Belli, Grotius) considered hostility in international relations in their work<sup>2</sup>.

During the American Civil War, Abraham Lincoln issued the Lieber Code (Instructions for the Government of Armies of the United States in the Field) which was the first attempt to codify the laws of war. However, there was no international typification of war crimes, nothing provided for tribunals and international procedure. Individuals were not regarded as answerable under international law. The only thing that «ensured that the laws and customs of war would be internationally observed was good faith»<sup>3</sup>.

The twentieth century was the century of development of treaties concerning individual responsibility for war crimes. After the First World War, the Treaty of Versailles of 28 June 1919 – proposed to try Kaiser Wilhelm II and other Germans for «acts in violation of the laws and customs of war», for «supreme offence against morality and the sanctity of treaties». Inter-Allied Commission was formed to establish the responsibility of «war criminals», the term «war criminals» was used for the first time. The Treaty proposed to set up an international court of justice and national courts, to try war criminals. «In its decision the tribunal will be guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality»<sup>4</sup>.

It was after the Second World War when a movement started within the international community in order to bring to justice those responsible for serious violations of the laws of war, which led to the London agreement and its Charter, the most important provisions of which were to establish of Nuremberg and Tokyo International Military Tribunals. These Tribunals, though accused of retroactivity and victors' justice (the victorious powers were not tried for offenses they committed), nevertheless, were significant precedents in the efforts to establish an effective system of international criminal justice<sup>5</sup>.

On 9 December 1948, an important development of the concept of crimes led to the adoption of the Convention on the Prevention and Punishment of the

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<sup>1</sup> Roberts A., Guelffr. Documents on the Laws of War. Oxford: UP, 2000. P. 668.

<sup>2</sup> Roberts A., Guelffr. P. 3.

<sup>3</sup> Flores J. L. F. Repression of Breaches of the Low of War Committed by Individuals // Review of the Red Cross. 1991. May-June. № 282. P. 249.

<sup>4</sup> The Versailles Treaty, June 28, 1919, at: <http://history.acusd.edu/geiVtext/versaillestreaty/vercontents.html>.

<sup>5</sup> Cherif Bassiouni M. International Criminal Law. Enforcement. N.-Y., 1998. Vol. III. P. 606.

Crime of Genocide. The Convention classifies genocide, whether committed in time of peace or in time of war, as a crime under international law. The four Geneva Conventions of 12 August 1949 reshaped the entire treaty-based system dealing with the protection of war victims. «The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances»<sup>6</sup>. The Conventions establish the responsibility of the direct authors of those breaches and that of their superiors. The two 1977 Protocols additional to the Geneva Conventions of 1949 added more precise rules to what has become an extensive legal system. In particular, Article 11 deals with the protection of individuals as far as their physical and mental health and integrity are concerned by stating that serious violations constitute a grave breach of international humanitarian law.

The *ad hoc* Tribunals in the former Yugoslavia (ICTFY) and in Rwanda (ICTR) were also accused of being created after the crimes had occurred. The Tribunals, however, constitute a significant step forward towards the institution of permanent jurisdiction. They also provide clarification as regards the substance of what is becoming a sort of international criminal code, in the sense envisaged by the UN General Assembly in its Resolution 95 (I). The principle to which subject-matter jurisdiction of the Tribunal adheres, is *nullum crimen sine lege*.

Finally, in 1995 a preparatory committee was established to present a final draft of a Statute, and in 1998 at the UN Conference in Rome, the Rome Statute was adopted and open for signature. The Rome Statute is a comprehensive document that deals with the establishment of the International Criminal Court, jurisdiction, admissibility, applicable law and general principles of criminal law. It transcends the sensitive issue of state sovereignty and proclaims in the

M. Cherif Bassiouni (ed.) *International Criminal Law*. Second Edition. Volume III. Enforcement. Transnational Publishers, Inc. Ardsley, New York, 1998, p 606

Preamble that «the most serious crimes of concern to the international community must not go unpunished and that their effective protection must be ensured by taking measures at the national level and by enhancing international cooperation».

There have been a lot of debates from the moment the Statute was open for ratification: will the Court be an effective mechanism to punish the criminals by means of an impartial trial and to prevent further atrocities? What is International Criminal Court? A permanent court that will ensure fair procedures for everyone without any distinction, a noble attempt not to let horrors happen again, or just another of the already big number of ineffective international organizations? There are many more questions attached to the creation of the ICC, and probably the most important of those is whether the effectiveness of the Court can be maintained even if three influential powers of the United Nations Security Council: Russia, China and the United States did not ratify the Rome Statute and are not likely to do so in the nearest future? Will the military aggressors still get away with imposing their will on less powerful, causing plight and destruction and exercising their own «might makes right» justice?

In principle, it can be possible to try nationals of states non-parties to the Statute (though it is hardly probable) when the non-party accepts the Courts' jurisdiction on an *ad hoc* basis (Article 12(3)) or when the Security Council reaches an appropriate decision. Ironically, but not surprisingly, the USA, a proponent of ICTFY and ICTR, views this as one of the obstacles to ratification. It fears that its citizens who are concentrated in many places of the world can find themselves «under microscope» and thus the Court can be a weapon against the United States.

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<sup>6</sup> Convention (I) for the Amelioration of the Wounded and Sick in Armed Forces in the Field. U.N.T.S. N 970. Vol.75. P.31-83 (1950): <http://www.asocietv.com/geneval.html>.

Another concern of the USA is that ecological crimes, as well as embargo can fall within the definition of aggression, a crime not yet defined in the Statute. They also put forward the argument that it is very unlikely that the ICC will deter anyone from offenses (and indeed, the experience of ICTFY has shown that many crimes were committed after the Tribunal was established, as well as Nuremberg did not dissuade Milosevic). The ICC does not have policing powers and is complementary to national criminal jurisdiction. It will depend on the good faith of States to bring perpetrators to justice. But it does constitute a challenge to the international regime in which interests of military aggressors are top priority, that is what the mighty powers are so afraid of.

Not only the state which claimed to be the one promoting democracy refuses to ratify the Statute, its ally in «anti-terrorist» war: Russia, fails to do it as well, obviously not because of the fear that the ICC will be ineffective like many domestic courts are, but because it can be too effective and will apply to its citizens, questioning its on-going military activities.

Americans are sure they are untouchable. Russians boast no one would ever undertake any military intervention against Russia even if crimes committed in Chechnya (the term «anti-terrorist operation is not even convincing any more) are comparable to those that Serbia committed in Kosovo. The UN reform, negotiated for more than 10 years already shows no signs of progress: the five powers victorious in World War II are still permanent members of the Security Council and are still able to veto any substantive decision of the Organization.

Terrorism is a crime, the crime with a purpose to «spread terror among the civilian population», but war on terrorism is not a fairy tale where the noble Prince kills the evil monster. Russian war on terrorism was based on guesses. The USA, when calling for justice for the September attacks knew for sure about the perpetrators of the attacks that they all died, among the 226 passengers and crew in the four hijacked aircraft. None was Afghani. All had been resident in the United States<sup>7</sup>. The justification for bombing originating from Washington was based on three pillars: the best guess was that Osama bin Laden and al-Qaeda group were responsible for the terrorist attacks on September 11, «second, that both were being «sheltered» by the Taliban regime in Afghanistan; third that the rest of the world could be bribed or browbeaten into accepting a de facto but undeclared war on the people of Afghanistan»<sup>8</sup>.

Terrorism is meant to spread terror among civilian population, but it seems that war on terrorism is to spread even more terror among civilians, to condemn them to death and starvation, to something that the Preamble of the Rome Statute refers to as «unimaginable atrocities that deeply shock the conscience of humanity». And it is not surprising that the key players in recent military operations do not view the creating of international criminal justice system an utmost priority.

The question, however, is not to convince Russians or Americans to ratify the treaty immediately (though it would be highly desirable). The question is how to make this Court beneficial to the international community, able to challenge the notion of state sovereignty and impunity of certain individuals. The experience of two World Wars, the Holocaust, East Timor, Rwanda, Bosnia and Chechnya and other examples of mass massacres does show that the creation of the International Criminal Court was justified by historical necessity and the interests of the humanity. «Never again» will be achieved only by means of effective and impartial mechanism, by UN reform, and not by fruitless expectations that one day

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<sup>7</sup> 11 September. American Aftermath. New Internationalist. Issue 342. January/February 2002. P. 40.

<sup>8</sup> Afghanistan. Ancient Modern War. № 1. D. 43.

governments will change and start protecting human rights and freedoms of its citizens and citizens-rights and freedoms of other citizens. Peter Singer, in considering a role for the United Nations and ways to improve its activities in intervention and prevention of mass murders, remarks that, «picture of a possible future does not require us to dream of a world in which everyone is good and noone commits crimes. It is a vision of a global governance by a world with human beings in it who are much like human beings today»<sup>9</sup>.

The view that ICC can significantly contribute to global governance and play its role in punishing offenders and deterring future atrocities is not unrealistic. What we have is the law. What we need is an effective mechanism to be able to show that the concept of state sovereignty is no longer an excuse for mass massacres and no citizen is above the law, regardless of his/her nationality and status.

### АННОТАЦИЯ

В статье анализируются правовые основы деятельности Международного трибунала как возможного механизма будущего глобального управления, возвышающегося над государственным суверенитетом, если этот суверенитет допускает массовые нарушения прав человека, геноцид и терроризм.

<sup>9</sup> Singer P. Might or Right. № 1. P. 26-2.