

The Obligation to Prosecute International Law Crimes

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In this presentation, I will reflect on the question whether and to what extent States are under an international legal obligation to prosecute international law crimes. Such reflection compels, first of all, an analysis of the exact meaning and scope of the concept “international law crimes”. After looking into the latter concept and its uncertainties, attention will be turned in a second part to some reflections about the impact the 1998 Rome Statute of the International Criminal Court could have on the “obligation to prosecute”. The remainder of the presentation will use these building bricks to delve into the main issues: the third part will assess the actual substance of the “obligation to prosecute” violations of International Humanitarian Law (IHL), while the fourth part will analyse this obligation for other violations of international law, more specifically of human rights law.

From the outset, I should stress that the central issue turns around the question as to whether the decision of a State’s authorities not to prosecute an “international law crime” violates international law. Intrinsically and to a large extent in parallel, this issue maintains close ties with the (il)legality under international law of granting amnesties for international law crimes, a theme which the following speaker will address.

Before reflecting on the notion and scope of “international law crimes”, let me recall that these crimes are just the tip of the iceberg. Indeed, though even more in need of conceptual refinement and categorization¹, one could equally try to analyse the precise contours of the international legal obligation to prosecute “ordinary” acts of a criminal nature which, though a violation of international law, do not cross the threshold of an international law crime. Generally, it can be said here that the international duty to prosecute only applies to the State on whose territory the “ordinary” crime has been committed. However, once the threshold of an international law crime has been crossed, States have an international legal obligation to prosecute not only those crimes committed on their own territory, but also those crimes committed on another State’s territory. The precise contours and scope of the latter obligation will have to be analysed further on. In any event, it goes without saying that the latter duty does not derogate from the limitations imposed by international law on a State’s exercise of extraterritorial jurisdiction.

I. SOME REFLECTIONS ON THE CONCEPT OF ‘INTERNATIONAL LAW CRIMES’

It is vital to clearly identify the level we are talking about: while this presentation’s overall scope concerns the obligation for States to prosecute international law crimes, the latter

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¹ See, for instance, the ranking and classification by M. C. Bassiouni of “international crimes”, “international delicts” and “international infractions”: *Introduction to International Criminal Law* (Transnational, 2003), 118-133.

concept – at least in its present understanding – applies to crimes committed by individuals.

There is no such thing as an explicit, universally agreed definition of “international law crimes” in treaty law. Therefore, in order to assess its meaning and specific applications, one will need to look at customary international law, to be distilled – as is well-known – from both State practice and States’ acting with the conviction that the said practice amounts to an international legal obligation. However, the fact that the concept of “international law crimes” *as such* has not been codified in treaty law must be clearly distinguished from the fact that certain examples of international law crimes can indeed be found in international legal definitions. Examples thereof are war crimes, some of which have been laid down as “grave breaches” in the 1949 Geneva Conventions, and the prohibition against torture, enshrined in the 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

At this point, mention can be made of both Antonio Cassese’s and M. Cherif Bassiouni’s doctrinal opinions. In Cassese’s view², before being in a position to qualify a given crime as an international law crime, one should ask what *values* are to be protected by a given legal rule and whether those values are considered important by the whole international community. Obviously, once one starts speaking about fundamental values, one comes close to the notion of *jus cogens* in international law.³ However, through the taking into account of values as a necessary but insufficient precondition of an international law crime, one implicitly and *a priori* limits the kinds of crimes that possibly qualify as international law crimes. For example, consistent with this theory, Cassese argues that the crime of piracy – one of the most cited and centuries old examples of an international law crime - cannot be considered as a crime of an international legal nature as the prohibition of piracy would not protect a real, fundamental value of the international *community*, even though it is undeniable that it is a specific value that *States* have an interest in that it be protected. M. Cherif Bassiouni, from his side, sees international crimes more broadly as “those international criminal law normative proscriptions whose violation is likely to affect the peace and security of humankind or is contrary to fundamental humanitarian values, or which is the product of state action or a state-favoring policy.”⁴ This author, too, lists the crime of piracy not in this category, but in the one of “international delicts”, i.e. “those international criminal law law normative prescriptions that affect an international protected interest, and whose commission involves more than one state or harms victims from more than one state.”⁵

As these two examples learn, there may be many nuances and different classifications to be found in legal writings. However, as will become obvious in this presentation’s following parts, certain crimes are virtually unanimously considered as international law crimes. The question then arises: does this qualification confer upon State authorities a right, or even a duty, to exercise universal jurisdiction, *i.e.* an exercise of jurisdiction vis-à-vis crimes that have neither been committed on the prosecuting State’s territory (principle of territoriality) nor by or against nationals of the prosecuting State (principles

² A. Cassese, *International Criminal Law* (OUP, 2003), 23-25.

³ See *inter alia*, with regard to genocide, J. Wouters and S. Verhoeven, “The Prohibition of Genocide as a Norm of *Ius Cogens* and Its Implications for the Enforcement of the Law of Genocide”, Institute for International Law, Working Paper No 69, www.internationalallaw.be, forthcoming in *International Criminal Law Review* (2005/3).

⁴ M.C. Bassiouni, *supra* note 1, at 24.

⁵ M.C. Bassiouni, *supra* note 1, at 122.

of active and passive personality, respectively)?⁶ To put it in Cassese's terms: is the protected value of such a nature as to empower every State to repress the crime, even if it has no link whatsoever to the crime in question? In all fairness, the answer to this question cannot be given in a uniform manner for all international law crimes. It rather depends, many controversies notwithstanding, on the specific international law crime one is talking about.⁷

It should be pointed out that, where it applies, a State's obligation to prosecute certain international crimes may sit uneasily with that State's international obligations relating to international immunities. Without going into this subject here, the least one can say is that the judgment which the International Court of Justice rendered on 14 February 2002 in the *Arrest Warrant of 11 April 2000 Case* can hardly be seen as the last word on this problem.⁸

II. THE 1998 ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT AND ITS POSSIBLE IMPACT ON THE OBLIGATION TO PROSECUTE INTERNATIONAL LAW CRIMES

The International Criminal Court (ICC), whose Rome Statute entered into force on 1 July 2002, has currently⁹ jurisdiction for genocide, crimes against humanity (the first time ever this notion was consecrated in a treaty text) and war crimes. It is safe to assert that all three of these crimes are recognized as the most 'classic' international law crimes.

As is known, the ICC has been designed as a reserve Court in case States are "unable or unwilling" to prosecute. The Rome Statute's fundamental principle of complementarity being designed to leave the primary responsibility for prosecuting international law crimes to national courts, this part of the presentation will focus on the possible impact which the Statute's entry into force could have on the obligation for States to prosecute international law crimes. In other words: do the Statute's provisions indicate a growing trend towards a customary international law obligation applicable to *all* States – whether or not they are a party to the Rome Statute - to prosecute the crimes over which the ICC has jurisdiction?

As the Rome Statute is laid down in a multilateral treaty, it is firmly rooted in consensualism. Hence, it is not binding on the States that have refused to become a party to it. Thus, it is radically different from the statutes of both the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), both of which are based on a resolution of the UN Security Council acting under Chapter VII of the UN Charter. Still, the Rome Statute's consensual nature has not prevented it from contributing to the formation of new customary international

⁶ The ICTY made a rather generalising *obiter dictum* on this in *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 62, where it referred to « universal jurisdiction being nowadays acknowledged in the case of international crimes ».

⁷ See, for instance, for a variety of treaty regimes, G.S. Goodwin-Gill, "Crime in International Law: Obligations *Erga Omnes* and the Duty to Prosecute", in G.S. Goodwin-Gill and S. Talmon (eds.), *The Reality of International Law: Essays in Honour of Ian Brownlie* (Clarendon, 1999), 199, at 206-214.

⁸ For some critical considerations on this judgment, see *inter alia* J. Wouters, "The Judgement of the International Court of Justice in the *Arrest Warrant Case*: Some Critical Remarks", 16 *Leiden Journal of International Law* (2003), 253-267.

⁹ In the future this jurisdiction may be extended to the crime of 'aggression': see Article 5(2) ICC Statute.

law or the crystallisation and refinement of previously existing customary norms. The crucial question, though, is to what extent and on which specific points the Rome Statute has contributed thereto.

The sixth recital of the Rome Statute's Preamble recalls that "*it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.*" Much thought has been given to this paragraph's precise scope and meaning, leading to a variety of views, as can be demonstrated by the following two opposing views.

On the one hand, a rather progressive conclusion was drawn from this recital by the *Chambre d'accusation* of the Paris Court of Appeal in its judgment of 20 October 2000 in the *Qadafi case*¹⁰, which was later on reversed by the Court of Cassation¹¹ on other grounds. Citing the Preamble's sixth recital, the Court of Appeal considered it as evidence of the obligation resting on States to prosecute perpetrators of international law crimes. Leaving aside the discussion as to whether this decision was too bold and whether its outcome should be welcomed, some authors have analysed it as demonstrating the judge's intent to see the Preamble's recital as compelling every State to prosecute international law crimes on the strength of its own grounds for the exercise of criminal jurisdiction. Thus, in this view, the Rome Statute as such does not grant any supplementary basis of jurisdiction to States. This leaves open the search for a categorical answer to the question whether States can claim universal jurisdiction vis-à-vis all international law crimes.

On the other hand, distinguished authors such as Christian Tomuschat¹² do not read in the Preamble's recital an implicit obligation to prosecute, reasoning that one cannot impose any duty upon States unless it has been explicitly laid down and agreed upon by them. A mere reference in the Preamble would not suffice to derive any *legally binding* duty. To corroborate their point of view, these authors cite the grounds of jurisdiction the ICC has been empowered with, which is indeed limited to a recognition of territorial jurisdiction and jurisdiction of an active personality nature, thus excluding any recognition of universal jurisdiction for the ICC. Thus, they conclude, one cannot deduce an overall obligation to prosecute international law crimes from the Rome Statute as States have been unwilling to accept the idea of universal jurisdiction for the ICC.

There may be scope for a middle ground position. As stated by Antonio Cassese, Paola Gaeta and John R.W.D. Jones in their monumental commentary on the Rome Statute, the said recital addresses itself primarily to the State on whose territory international crimes have been committed and to the State of nationality of the alleged offender. However, they add: "At the same time, it is possible that the Statute also provides an impetus for other States to prosecute an alleged offender on the basis of other jurisdictional principles, in particular the universality principle."¹³ These authors rightly caution, though, for the many practical difficulties to which the exercise of universal jurisdiction gives rise.

¹⁰ Cour d'appel Paris, 20 October 2000, *Revue Générale de Droit International Public* (2001), 475.

¹¹ Cour de cassation, 13 March 2001, *Revue Générale de Droit International Public* (2001), 474.

¹² C. Tomuschat, "The duty to prosecute international crimes committed by individuals", in H.-J. Cremer and H. Steinberger (eds.), *Tradition und Weltoffenheit des Rechts* (Springer, 2002), 315-349.

¹³ A. Cassese, P. Gaeta and J.R.W.D. Jones, "The Rome Statute : a tentative assessment", in A. Cassese, P. Gaeta and J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court : A Commentary* (OUP, 2002, II), 1901, at 1906.

III. THE OBLIGATION TO PROSECUTE AND PUNISH CERTAIN VIOLATIONS OF IHL

a. International armed conflicts

Common Article 49 / 50 / 129 and 146 to the 1949 Geneva Conventions compels all High Contracting Parties, *i.e.* virtually the entirety of the community of States, to enact criminal legislation for all individuals having (ordered to) commit(ed) those crimes which qualify as “grave breaches” under the Conventions. In respect of these individuals, “*each High Contracting Party shall be under the obligation to search for (them) and shall bring such persons, regardless of their nationality, before its own courts.*” Thus, States have been made responsible for upholding and enforcing the principle of individual criminal responsibility for “grave breaches” of IHL in international armed conflicts. Clearly, the mere adoption of a law satisfying the Conventions’ requirements does not suffice, as States have an active duty to *search* for and *prosecute* these individuals. However, the turn from theory to practice is not always easy and uncontested, as is *inter alia* demonstrated by Belgium’s experience in implementing and enforcing the requirement to incriminate, to search and to prosecute through its so-called “universal jurisdiction law” of 1993/1999 (meanwhile repealed and replaced by a Law of 5 August 2003).

A State, however, is not necessarily compelled to bring these individuals before its own courts in order to comply with the Conventions. Indeed, the same article goes on to say that a State “*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.*” This is an application of the “*aut dedere, aut judicare*” principle, which equally applies to States which are in no way involved in the armed conflict. Hence, this clearly is a form of universal jurisdiction. However, also here the turn from theory to practice has been far from smooth. Indeed, notwithstanding the aforementioned provisions of the Geneva Conventions, prosecution was virtually always exclusively initiated by either the State of which the perpetrator was a national or by the State which had physically captured that person. In more recent years, though, some States have started to enact domestic legislation empowering their authorities to exercise universal jurisdiction, sometimes even *vis-à-vis* individuals they have not captured or which are not on their territory. In these instances, the State is trying to exercise universal jurisdiction *in absentia*, a very contested notion in international law.

However this may be, it is certain that the Geneva Conventions impose certain active duties on the Contracting Parties, which are reinforced by the obligation of common Article 1, pursuant to which “*the High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances*”, the interpretation of which has been expanded through some recent evolutions and judicial construction even though its geographical scope remains unclear. As stated above, the duty to search for and prosecute those suspected of having committed grave breaches of the Geneva Conventions will have to abide by other rules of international law restricting the scope of extraterritorial jurisdiction.

While time and space prevent us from further elaborating this point, it must be spelled out that the same common Article 49 etc. provides in its third paragraph for the obligation that “*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 (...). (emphasis added) This paragraph speaks of “*tak(ing) measures*”, but it does not specify exactly what is meant by that. Does the obligation go as far as requiring a State to incriminate, search and prosecute? The Commentaries to the Geneva Conventions, conceding the paragraph is “*open to various interpretations*”, state that it “*covers everything a state can do to prevent the commission, or the repetition, of acts contrary to the Convention.*”, and stipulate that States should “*insert in their legislation a general clause providing for the punishment of other breaches*”.¹⁴ Despite these interpretations of the Commentaries, the paragraph’s precise scope is to be further explored, just as the duty imposed by human rights treaties to take certain measures needs to be assessed, as will be done in the fourth part of this presentation. To conclude, it can be said that, notwithstanding the fact that in 1977 the First Additional Protocol to the Geneva Conventions enlarged the number of conflicts being qualified as “international armed conflicts”, States were for a long time not making substantial efforts to live up to their treaty obligations.

b. Non - international armed conflicts

As far as the obligation to prosecute and punish violations of IHL in non-international armed conflicts is concerned, there have been quite some significant changes in recent years. Indeed, under the Geneva Conventions, there simply is no obligation to prosecute for non-international armed conflicts, such conflicts being only cursorily dealt with in their common Article III. Nor was there a system of “grave breaches”, while the decision to prosecute was entirely left to national criminal law. Thus, impunity prevailed almost always when the non-state actor eventually won the civil war or when an amnesty was part of the consideration underlying parties’ consenting to a peace agreement. Particularly disturbing from an “obligation to prosecute” perspective is Article 6, paragraph 5, of the Second Additional Protocol to the Geneva Conventions: while this article, entitled “penal prosecutions”, mostly contains provisions of a human rights / fair trial nature, the said paragraph provides that “*at the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.*” (emphasis added) If anything, the Rome Statute has drastically reversed this pattern of condoning impunity: indeed, war crimes can now also be committed in a context of a non-international armed conflict, even though the list of war crimes in the latter context is less expanded than the list which has been provided for international armed conflicts. Thus, without explicitly saying so, the Rome Statute declares applicable to non-international armed conflicts what has traditionally been referred to as “international crimes”: the nature of the crime, rather than the context in which it is being perpetrated, becomes the defining criterion qualifying States’ obligations. Over the last years, a number of national courts have tried several persons for war crimes committed in non-international armed conflicts on the basis of universal jurisdiction, prompting the ICRC in its impressive *Customary International Humanitarian Law* study to conclude that the right of States to vest universal jurisdiction in their national courts for war crimes committed in non-international armed conflicts is now established as a norm of customary international law.¹⁵ However, these evolutions do not provide sufficient evidence for arguing that there

¹⁴ See the Commentary to the 1949 Geneva Conventions, common article 49 / 50 / 126 / 149, accessible via www.icrc.org/ihl

¹⁵ ICRC, *Customary International Humanitarian Law* (Cambridge University Press, 2005), 603.

is an unqualified duty under international law, applicable to other States than the one involved in the non-international armed conflict, to prosecute violations of IHL committed in non-international armed conflicts.

c. Genocide and Crimes against Humanity

While, as previously mentioned, the ICC has been given jurisdiction over both genocide and crimes against humanity (CAH), this leaves unanswered the question whether States are under an international legal obligation to prosecute genocide and CAH, committed in or outside their territory and by their or by foreign nationals respectively.

In respect of genocide, the answer to the question raised is less controversial than in respect of CAH. Indeed, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide confirms, in its Article I, that “*genocide, whether committed in time of peace or in time of war, is a crime under international law which they (the Contracting Parties) undertake to prevent and to punish*” (emphasis added) This undertaking to punish individuals having committed genocide is repeated in Article IV. Pursuant to Article V, all Contracting Parties have the obligation to enact, *inter alia*, criminal legislation applicable to perpetrators of genocide. The crux of the matter for determining the scope of application of the undeniably applicable duty to prosecute genocide, however, lies in Article VI, which stipulates that “[p]ersons charged with genocide [...] 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 those Contracting Parties which shall have accepted its jurisdiction.” Clearly, the basic duty to prosecute exclusively rests, according to the treaty text, on the State on whose territory the genocide has been committed, thus excluding any universal jurisdiction, as is confirmed in the Convention’s *travaux préparatoires*.¹⁶

The “international penal tribunal”, already envisaged in this 1948 text, only materialized in 2002. Of the first few decades after the Convention’s adoption, apart from the famous Eichmann-trial in Israel and some other prosecutions, no real practice had developed under which it could be affirmed that States regarded it as a customary international law duty, irrespective of the restrictions imposed by the Convention’s text, to prosecute in their national courts individuals having perpetrated genocide on another State’s territory. Some courts, however, had gone in this direction by interpreting Article VI as allowing for universal jurisdiction, thus corroborating the submission of a number of commentators that customary international law had evolved towards a recognition of allowing universal jurisdiction for genocide.¹⁷ This situation of paralysis – absence of an international criminal court and most often a lack of willingness of the State on whose territory the genocide had been committed to prosecute its perpetrators – started to change in the early 1990s, when both the ICC started to become a realistic option, the ICTY and the ICTR were created and some States prosecuted individuals having committed a genocide with which they had, strictly speaking, no link. This changing climate may explain why the International Court of Justice, in the case *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, noted that “*the obligation each State thus has to prevent and to punish the crime of genocide is not territorially*

¹⁶ See W.A. Schabas, *Genocide in International Law* (Cambridge, 2000), 355-360.

¹⁷ See *inter alia* T. Meron, «International Criminalization of Internal Atrocities », 89 *American Journal of International Law* (1995), 554, at 569; *Id.*, *War Crimes Law Comes of Age* (OUP, 1998), 249-250.

*limited by the Convention*¹⁸, a view which was equally confirmed by the ICTR in the *Ntuyahaga* case.¹⁹ As previously indicated, it remains to be seen in the coming years what influence the Rome Statute will exercise upon this practice.

The existence of a duty to prosecute CAH is a different story: indeed, apart from their definition in the International Law Commission's « *Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal* » (1950), no international treaty defined the concept until recently. Even though a substantial amount of authors seem to agree there exists a duty to prosecute CAH for the State on whose territory the CAH were committed, it is uncertain to what extent actual State practice confirms the doctrinal point of view that, as international crimes, they should be sanctioned with universal jurisdiction.²⁰ Indeed, many States which did provide for domestic legislation over CAH committed abroad included requirements in terms of links with the State prosecuting the crimes, thus remaining below true universal jurisdiction. In this respect too, it is to be hoped that the coming years, benefiting from a definition agreed upon in the Rome Statute, will provide further guidance of the extent to which States consider they are bound by a customary international law duty to prosecute CAH committed abroad.

IV. THE OBLIGATION TO PROSECUTE AND PUNISH OTHER VIOLATIONS OF INTERNATIONAL LAW, IN PARTICULAR OF HUMAN RIGHTS LAW

Treaty law in this area contains some examples of an obligation to prosecute, for example in the 1984 Convention against Torture (which contains an application of *aut dedere, aut judicare* in Article 5, paragraph 2). However, human rights treaties are by no means always that explicit. The 1966 International Covenant on Civil and Political Rights (ICCPR), for instance, is silent on the question whether a duty to prosecute applies to violations of the Covenant. Leaving aside the controversial question of the extent to which the Covenant applies to relations between non-state actors, Article 2, paragraph 1, requires each State party “to ensure to all individuals (...) the rights” recognized in the Covenant. Some authors have interpreted this provision as to entail a duty to prosecute, thereby invoking certain hints in this direction enshrined in statements of the Human Rights Committee. However, as the latter does not have any authority to issue binding interpretations of the ICCPR, it remains unclear, leaving aside other aspects of enforcement of the Covenant, whether a “hard” international legal duty to prosecute the Covenant’s violations applies.

¹⁸ International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections, 11 July 1996, para. 31 *in fine*.

¹⁹ *Prosecutor v. Ntuyahaga*, Case No. ICTR-90-40-T, Decision on the Prosecutor's Motion to Withdraw the Indictment, 18 March 1999, where the Tribunal « encourages all States, in application of the principle of universal jurisdiction, to prosecute and judge those responsible for serious crimes such as genocide, crimes against humanity and other grave violations of international humanitarian law ».

²⁰ See *inter alia*, with reference to the Belgian Universal Jurisdiction Law of 1993/1999, E. David, *Principes de droit des conflits armés* (Bruylant, 2002, 3rd ed.), 814-816; T. Meron, *War Crimes Law Comes of Age*, *supra* note 17, 249-250.

V. CONCLUSION

Time and space did not permit this presentation to go into great depths about the question whether, to what extent and for what crimes there exists an obligation to prosecute international law crimes. To a large extent, uncertainty abounds, to start with the precise contours of the concept “international law crimes” itself. Even if one day one were to reach a consensus on conceptually clear legal definitions and obligations, the major obstacle might well turn out to be States’ being often politically unwilling to implement in practice their duty to prosecute international law crimes. In order to overcome this, attention needs to be turned to assess the factors which induce States to prosecute international law crimes. Even more fundamentally, no effort should be spared to look for appropriate fora in which to challenge a State’s decision not to prosecute in spite of an international obligation to do so.