



Università
Ca' Foscari
Venezia

Corso di Laurea Magistrale
in Relazioni Internazionali Comparete –
International Relations

Tesi di Laurea

—
Ca' Foscari
Dorsoduro 3246
30123 Venezia

On the Notion of International
Crime: a Comparative Analysis
of the Eichmann, Pinochet and
Assange Cases

Relatore

Ch. Prof. Fabrizio Marrella

Correlatrice

Ch.ma Prof.ssa Sara De Vido

Laureanda

Paola Crosetta
Matricola 823225

Anno Accademico

2012 / 2013

Ai miei genitori

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ABSTRACT

Il Diritto penale internazionale, uno dei rami più importanti del Diritto internazionale pubblico, ha subito un forte impulso a seguito degli sviluppi della Seconda Guerra Mondiale, che ha segnato non solo la storia dell'umanità ma più specificamente ha posto le basi per l'evoluzione in questo campo. Secondo il Diritto internazionale tradizionale infatti, solamente gli Stati prima, ed in seguito le organizzazioni internazionali, erano considerati membri della comunità internazionale e quindi soggetti attivi e passivi di norme e accordi che venivano posti in essere a livello internazionale. Solamente con la fine del secondo conflitto mondiale, infatti, gli individui divennero anch'essi soggetto del Diritto internazionale, grazie al riconoscimento dell'esistenza di una loro responsabilità penale che venne stabilita ufficialmente per la prima volta nello Statuto del Tribunale Militare Internazionale di Norimberga. Quasi in contemporanea, la comunità internazionale riconobbe anche una serie di diritti umani inviolabili che vennero stabiliti in vari trattati internazionali e regionali permettendo agli individui di far valere i loro diritti anche contro gli Stati stessi. Questa duplice evoluzione permise quindi all'individuo di entrare nell'arena internazionale con diritti e privilegi ma anche doveri e responsabilità indipendenti dai dettami degli Stati stessi, erodendo in tal modo le barriere della sovranità statale che un tempo concedeva agli Stati un potere esclusivo sui cittadini e non cittadini nel proprio territorio (a ciò è legato anche lo sviluppo del concetto di giurisdizione universale che è stato a lungo dibattuto e applicato a volte in maniera non uniforme). Tuttavia, lo sviluppo di questa disciplina fu influenzato dagli avvenimenti della Guerra Fredda che ritardarono la sua completa ed uniforme codificazione, nonché la creazione di una corte penale internazionale (lo Statuto di Roma che diede origine a quest'ultima venne redatto nel 1998 ed entrò in vigore nel 2002). Solamente all'inizio degli anni Novanta, inoltre, venne ripetuto l'esperimento delle corti internazionali sul modello del Tribunale di Norimberga.

Il Diritto penale internazionale non si limita però solo al riconoscimento della responsabilità penale individuale, identificando, specie nei trattati, obblighi anche agli Stati parte che sono ad esempio tenuti a estradare o perseguire gli individui colpevoli. Inoltre impone ad essi di riconoscere anche nei propri codici penali nazionali alcune

obbligazioni quali ad esempio la non-applicabilità dell'immunità ai Capi di Stato o il rigetto del ricorso alla difesa basata sull'obbedienza ad ordini superiori, in caso di gravi violazioni al Diritto internazionale. Esso si pose inoltre lo scopo di identificare ciò che doveva essere considerato crimine internazionale, le sue caratteristiche e i fattori di esclusione di una possibile responsabilità penale internazionale.

È importante tuttavia sottolineare che il Diritto penale internazionale è stato anche condizionato dalla recente evoluzione verso un mondo sempre più globalizzato che ha imposto nuove sfide a questa disciplina quali l'incremento della criminalità organizzata transnazionale o l'emergere di nuovi teatri per la commissione di nuovi crimini come ad esempio internet. Tutto ciò ha evidenziato anche le debolezze insite in questo campo e che richiedono nuove risposte e nuovi approcci per migliorare la collaborazione internazionale nonché il perfezionamento dei metodi di investigazione, punizione e dei meccanismi per trattare i crimini internazionali.

Questa tesi ha lo scopo di esaminare l'evoluzione e i principi fondamentali del Diritto penale internazionale, da un punto di vista teorico e pratico indagando le caratteristiche teoriche e l'applicazione concreta di alcune nozioni-cardine in alcuni casi-studio di rilevante importanza per questo ramo del Diritto internazionale pubblico.

L'analisi si sviluppa infatti principalmente in due fasi, la prima delle quali si focalizza sull'evoluzione storico-giuridica di questa disciplina definendone gli sviluppi, le fonti, i protagonisti e i principi che la caratterizzano, affrontando, attraverso un'analisi teorica, alcuni concetti principali come ad esempio quelli di crimine internazionale, giurisdizione universale, immunità ed estradizione. Il primo capitolo si concentra sulla relazione tra Stato ed individuo dal punto di vista del Diritto penale internazionale, sul concetto di responsabilità penale individuale e sulla nozione di crimine internazionale, i suoi elementi caratterizzanti e su ciò che è considerato condotta criminale nonché sui casi di esclusione di responsabilità penale individuale. Inoltre si analizza il concetto di giurisdizione, le diverse tipologie e le nozioni di territorialità ed extraterritorialità (quest'ultima strettamente connessa alla giurisdizione universale). Il secondo capitolo indaga alcuni meccanismi fondamentali che caratterizzano questa disciplina quali la massima *ne bis in idem* (un accusato non può essere giudicato due volte per lo stesso reato) e il principio *aut dedere aut judicare* (o estradare o punire) il quale è strettamente collegato al meccanismo dell'extradizione che ha favorito l'applicazione del Diritto penale internazionale a livello interstatale e ha

dimostrato la possibilità di collaborazione in materia penale fra gli Stati nella comunità internazionale (avvalorata anche dall'esistenza di numerose convenzioni a riguardo). Il ricorso all'immunità come scudo contro l'insorgere di una possibile responsabilità penale è stato spesso considerato un ostacolo all'avvio di procedimenti penali ad individui (specialmente Capi di Stato) colpevoli di crimini internazionali. In questa trattazione sono analizzati le tipologie di immunità, i soggetti e le occasioni in cui si può ricorrervi, nonché l'entità e le condotte a cui si può applicare. Infine si indaga uno strumento delle relazioni internazionali, l'asilo territoriale e diplomatico, che è tornato prepotentemente alla ribalta nella stretta attualità grazie soprattutto ai casi di Assange e Snowden.

La seconda parte è dedicata invece ad un'analisi comparativa di alcuni casi che hanno segnato tappe fondamentali nell'evoluzione di questa materia e allo studio di come i concetti sopraindicati sono stati applicati dalle corti chiamate a giudicarli. Ci si focalizzerà nello specifico sui casi Eichmann e Pinochet, già conclusi, e sul caso Assange, di cui si presenteranno scenari e implicazioni anche future.

Il terzo capitolo infatti è dedicato all'analisi di due casi saldamente legati fra loro: il *Processo ai Principali Criminali di Guerra davanti al Tribunale Militare Internazionale di Norimberga* e il processo ad Adolf Eichmann. Il primo ebbe grande influenza sullo sviluppo del Diritto penale internazionale, sia per quanto riguarda la corte stessa, che divenne il modello per successive esperienze come ad esempio il Tribunale Penale Internazionale per l'ex-Jugoslavia o il Tribunale Penale Internazionale per il Ruanda, sia per il suo Statuto che rappresenta, tra le altre cose, la prima espressione del Diritto penale internazionale, annoverando i principali crimini internazionali ed enunciando l'esistenza della responsabilità penale individuale. Il successivo rapporto della Commissione di Diritto Internazionale che elenca i Principi di Diritto Internazionale riconosciuti dallo Statuto e dalla Sentenza del Tribunale di Norimberga è inoltre divenuto parte del nucleo del Diritto penale internazionale. Il caso Eichmann è connesso ad esso in quanto rappresenta un'ulteriore conferma di quanto stabilito al Processo di Norimberga, per quanto riguarda i crimini di cui egli era stato imputato oltre all'esclusione del ricorso all'immunità o all'obbedienza ad ordini superiori o alla dottrina dell'Act of State, dimostrando ancora una volta l'esistenza della responsabilità penale individuale internazionale. Esso inoltre pone l'accento anche sulla

validità della nozione di giurisdizione universale oltre a sollevare il problema del cosiddetto sequestro di Stato, il lato oscuro dell'extradizione.

Il quarto capitolo ha lo scopo di analizzare il caso Pinochet, un'epopea giuridica che attraversa due continenti e che vede l'ex dittatore cileno accusato di crimini contro l'umanità, in particolare tortura, rapimento e uccisione. Esso rappresenta uno dei primi casi in cui un ex Capo di Stato viene chiamato a rispondere della condotta tenuta durante il proprio mandato. La complessità di questo caso risiede nel fatto che implica un'analisi incrociata non solo del Diritto internazionale ma anche della legislazione interna di Regno Unito (sede dei tre processi in questione), Spagna (Stato che ha richiesto l'extradizione per processare Pinochet per i suddetti crimini) e Cile (luogo di commissione degli stessi) vigente sia all'epoca dei processi che all'epoca dei fatti. Inoltre le conclusioni dei tre processi sono state divergenti e anche la decisione finale della Camera dei Lord è stata caratterizzata dalla mancata uniformità di giudizio dei componenti della stessa e l'accoglimento della richiesta di estradizione da parte della Spagna non è stata infine nemmeno implementata. Tali incongruenze e i dibattiti legali, sociali e politici che si sono sviluppati attorno a questa vicenda, hanno certamente indebolito le conclusioni di questo caso che rappresenta comunque una tappa fondamentale per il Diritto penale internazionale in quanto affronta tematiche quali l'immunità di un ex Capo di Stato, l'extradizione, la giurisdizione universale (considerata qui anche come una minaccia per la sovranità statale del Cile in questo caso), la riaffermazione della responsabilità penale individuale e l'ulteriore specificazione di alcuni crimini internazionali (quali ad esempio la tortura o la sparizione forzata) e l'universalizzazione dei diritti umani.

Il terzo caso oggetto di analisi, nel quinto capitolo, è quello che vede protagonista Assange, personaggio salito agli onori della cronaca per le sue attività connesse a WikiLeaks, ma i cui problemi giudiziari sono in gran parte legati alle accuse di violenza sessuale mosse nei suoi confronti in Svezia e per le quali è stata richiesta l'extradizione al Regno Unito, paese in cui si trovava e si trova tutt'ora, seppur confinato nella sede dell'ambasciata ecuadoregna a Knightsbridge. Per quanto riguarda le informazioni segrete rilasciate dal sito internet che riguardavano soprattutto violazioni perpetrate dagli Stati Uniti durante le guerre in Afghanistan ed Iraq e comunicazioni diplomatiche, è da sottolineare anche l'implicazione di Bradley (Chelsea) Manning, analista informatico dell'esercito statunitense che fece trapelare le

informazioni e i documenti confidenziali poi divulgati dal sito WikiLeaks. Nel caso di Assange si analizzano tre tematiche principali: l'estradizione (quella chiesta dalla Svezia e concessa dal Regno Unito ma anche il rischio di una possibile richiesta di estradizione da parte degli Stati Uniti), l'asilo concesso dall'Ecuador ad Assange e, connesso a ciò, l'immunità di cui godono le sedi diplomatiche in uno Stato straniero.

L'analisi che si sviluppa in questa tesi tende a dimostrare l'esistenza di alcuni principi e concetti cardine di Diritto penale internazionale e come essi siano stati applicati, in maniera congrua o meno, nel corso dell'evoluzione di questa disciplina. I casi scelti, considerati tappe fondamentali nel consolidamento di questo ramo, ne mettono in luce forze e debolezze e sottolineano da un lato la volontà di punire i responsabili di gravi violazioni del Diritto internazionale, e dall'altro la necessità di migliorare l'implementazione e i meccanismi per raggiungere questo risultato. Inoltre l'influenza di altri rami quali quello dei diritti umani o del Diritto penale interno dei vari Stati ad esempio, dimostrano la possibilità di crescita di una disciplina che al giorno d'oggi sta assumendo sempre più importanza nell'ambito delle relazioni internazionali.

INTRODUCTION

The need to understand what is right and what is wrong has always been part of the human nature. Dividing the good and the evil and punishing the culprits have always been one of the aims as well as the precondition of civil coexistence. Moral and legal considerations guide the decisions of what is considered right and what is considered wrong. However, in the international arena, things appear to be more complicated. First, there was the need to understand who were the members of this international community and according to traditional international law States were the main characters of this system. Norms, treaties and in general the events that took place at the international level have been considered a matter of States. Only in a second stage also international organizations were included. But it was basically at the beginning of the 20th century that individuals began to be considered as part of this international system. They enjoyed not only rights but also duties. If it was claimed in several human rights treaties that their final aim was to protect people around the world, it was with the Second World War that also individuals have become accountable for their actions. For the first time in fact, individual criminal responsibility was taken into consideration while considering what was right and wrong, legal or illegal and the subsequent punishment for the crimes committed. It has not been an easy process as various aspects had to be taken into account.

International criminal law in fact is a broad field of public international law in which various interests of different actors must be considered. Moreover, it had to define what was considered wrong, that is what should be considered an international crime. Then it had to define who had the authority to judge it and the perpetrators of those offence and on which grounds this should have been based. For these reasons, international conventions and agreements were signed and implemented to identify first the crimes (such as the Convention against Torture that defined which conducts were considered criminal and originating torture) and then who had to judge them. At the beginning national courts had this task but with the creation of the first international tribunal to judge the crimes committed during the Second World War, the international community understood that a second way was possible. It became the model for the

following international tribunals as well as the cornerstone of individual criminal responsibility and the definition of international crimes.

The development of international criminal law was affected by the evolution of the Cold War which delayed the efforts to codify it and to establish a permanent international court. It was only at the beginning of the 1990s that international criminal justice gained momentum with the UN Security Council's establishment of the Commission of Experts to investigate the violations of international humanitarian law in the conflict in former Yugoslavia which led to the creation of the International Criminal Tribunal for Yugoslavia (ICTY) in 1993. The following year, the UN Security Council established also the International Criminal Tribunal for Rwanda (ICTR) and later a number of hybrid or mixed international/national tribunals in Sierra Leone, Kosovo, East Timor and Cambodia. However, it was with the establishment of the International Criminal Court in 1998 that the expectations of the international community grew. International Criminal law became reality in practice and not only because it was taught in law schools or appeared in the writings of scholars and experts.

Nevertheless, there was also a dark side, as these developments shed light on the weaknesses of this subject. For example globalization affected international criminal law because domestic and transnational criminality increased, as well as the possibility to travel for people (they can escape the violations of human rights that they could face during an armed conflict or under a dictatorship and request asylum for example) or the development of internet which provided a new environment for the commission of new crimes¹.

This new situation requires a new approach to this discipline and the better way could be the improvement of international collaboration in the conduct of investigations, prosecutions and adjudications of domestic, transnational and international crimes as well as a new development of the legal mechanisms to address them.

In this thesis some of these preliminary aspects are analyzed considering international criminal law from a theoretical and practical point of view.

The first part deals with the evolution of this discipline summarizing its development and the main sources, concepts and tools that characterize it. The relation

¹ M. CHERIF BASSIOUNI, *International Criminal Law: Sources, Subjects, and Contents*, volume I, III Edition, Martinus Nijhoff Publishers, Leiden, 2008, p. xi

between individuals and States and their responsibility according to international criminal law are discussed in the first chapter, together with the notion of international crime and its elements and what is considered as criminal conduct. Furthermore it is developed also the concept of jurisdiction, the different typologies and the notion of territoriality and extraterritoriality.

In the second chapter the analysis is focused on some concepts and tools that form part of international criminal law. The first one to be considered is the principle *aut dedere aut judicare* (to extradite or prosecute) which is strictly related to the extradition and we can claim that the application of these principles represents a demonstration of the ability of States to cooperate in the criminal field. Immunity has often been considered as a shield against criminal prosecution and here it is studied describing the different typologies and in which occasions and who can resort to it and to what extent and for which conducts it is applicable. The development of the practice to seek and grant asylum is strictly related with international crimes and globalization and the protection of refugees has become a relevant concern for the international community and recently it has been debated also by mass media due to the events related to Assange and Snowden which have called the attention to this instrument of international relations.

The second part of this thesis is focused on the analysis (also in a comparative way when possible) of some relevant cases of the international jurisprudence that have favoured the development of international criminal law.

The first case actually deals with two events strictly connected between them: the Nuremberg Trial and the Eichmann trial. Even if they took place in different years and in different places, they have a lot in common. The Statute of the International Military Tribunal at Nuremberg, the following judgment and the Nuremberg Principles stated by the International Law Commission represented in fact a cornerstone for this discipline as they provide a model for other similar courts, they have codified for the first time in an organic way the conducts that are considered crimes against peace, crimes against humanity and war crimes and various fundamental principles such as the existence of universal jurisdiction, the rejection of the claim of superior orders and Act of State as ways to avoid criminal responsibility and most important, the existence on an individual criminal responsibility. All these and others conclusions were reaffirmed during the trial against Eichmann in Israel, in front of a domestic court that had to deal with the prosecution of international crimes.

The second case referred to Pinochet, the former Chilean dictator. It is a complex case for many reasons. It implies the analysis not only of international law but also of the Spanish and British domestic legal systems. Moreover, the three trials he had to face in the UK led to conflicting sentences (as regards the immunity issue or the application of double criminality and the universal jurisdiction), all of them were not supported by the unanimity of the Lords and also the final decision was characterized by different opinions of the Lords who composed the majority that approved that decision. Finally, the House of Lords' sentence which allowed extradition to Spain was not implemented due to decision of the Home Secretary to allow the return of Pinochet to Chile because of his health condition. This case arose also political and social debates across Europe where other proceeding began against Pinochet (for example in Belgium) and in Chile itself where the legacy of the Pinochet regime was still alive. It was considered the demonstration of the globalization of human rights law although he never stood trial for his conduct and this case has been weakened by the incongruences that characterized it.

The third case to be object of analysis is the one related to Assange. It deals with slightly different topics compared with the other cases debated but it is interesting anyway because it rises legal, political and humanitarian concerns. Although he became famous worldwide for the activity of the website he created in 2006, his legal troubles are linked with sexual allegations in Sweden. This country requested extradition to the UK where there was Assange at that time. The UK allowed extradition but in the meantime he resorted to a fundamental tool of international law, that is, he sought asylum at the Ecuadorean Embassy in London that decided to grant it. It has been more than a year that he has been living there like a refugee. However, we could not avoid to make reference to the activity of WikiLeaks that, by releasing secret documents mainly of the US government, had shed light on some violations the US perpetrated in the wars in Afghanistan and Iraq as well as diplomatic cables that risked to harm the diplomatic relations of the US with their allies. Linked with this case there is in fact the implication and the proceeding against Bradley Manning in the US, an intelligence analyst of the US army who leaked the information to WikiLeaks. He was sentenced to thirty-five years of jail avoiding only at the end the risk of death penalty for the charge of aiding the enemy for which he was acquitted (and after human rights organizations strongly criticized the detention he suffered before the trial).

PART 1:

THE EVOLUTION OF INTERNATIONAL LAW IN THE FIELD OF INTERNATIONAL CRIMINAL LAW

International criminal law analyses what kinds of conduct are considered against the law and makes the perpetrators criminally liable for their actions. Bassiouni, who is considered the Godfather of this discipline, defines it as

“a complex legal discipline that consists of several components bound by their functional relationship in the pursuit of its value-oriented goals. These goals include the prevention and suppression of international criminality, enhancement of accountability and reduction of impunity, and the establishment of international criminal justice”².

It consists, of a body of international rules aimed at criminalizing certain conducts and providing penalties. It is made up of substantive law, a set of rules that defines what acts should be treated as international crimes and of procedural criminal law that regulates international proceedings³. International criminal law presents some unique characteristics as the sources derives from international law but often the consequences are criminal sanctions addressing individuals. Furthermore, it is considered a relatively new branch of public international law, which has undergone an important evolution mainly after the Second World War, when new typologies of crimes have developed (crimes against humanity, crimes against peace, genocide...) and new criminal courts have been established (the most important would be the International Military Tribunal at Nuremberg and later the International Criminal Court).⁴ International criminal law is also considered a rudimentary branch of law as the broadening of this sector has been a complex process and various elements have remained unclear for long time (for example the criminal consequences of prohibited acts, or the indeterminacy of some rules, or again, the role of national courts in judging international crimes..). All these things

² M. CHERIF BASSIOUNI, *International Criminal Law: Sources, Subjects, and Contents*, volume I, III Edition, Martinus Nijhoff Publishers, Leiden, 2008, p. 3

³A. CASSESE, *International Criminal Law*, New York, Oxford University Press, 2003, p. 15

⁴ *ivi*, p.16

considered, it is also important to underline the fact that a coherent legal system is far from being created and also the recently created international courts usually rely on customary rules or unwritten general principles. International criminal law is based on three other fields all interconnected among them⁵.

International humanitarian law deals with the regulations of warfare and, at the beginning, the concerns of international criminal law were upon the “offences committed during armed hostilities in times of war”⁶ and those violations only generated State responsibility. Only gradually it began to involve also individual criminal liability.

Human rights law regulates the fundamental individual rights restricting States’ authority over individuals. However, it deals with the rights of both victims and suspected perpetrators, as it granted the right of a fair trial for example.

The third field that is involved in the origins of international criminal law, is national criminal law that consists in the “transposition on to the international level of rules and legal construct proper to national criminal law or to national trial proceedings”⁷. It is worth noting that according to their domestic legal system, States can be divided into common law countries such as the Anglo-Saxon’s, many Asian and African countries and civil law countries based on the ancient Romano-Germanic legal system, such as most Europe, Latin America, Arab and Asian States.

One particular engine of evolution in the field of international criminal law is represented by the creation of international criminal tribunals that favors the development of a proper body of rules for this area. The most important are undoubtedly the Nuremburg International Military Tribunal, the International Military Tribunal for the Far East, the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Court (ICC), whose statutes represented milestones in the evolution of this branch (in addition, mixed courts composed by international and local judges were set up in East Timor and Kosovo).

As regards the sources of international criminal law, it is possible to state that they derive from the same as international law. According to Cassese they are:

- Primary sources: customary laws and treaties;

⁵A. CASSESE, G.ACQUAVIVA, M. FAN, A. WHITING, *International Criminal Law: Cases and Commentary*, Gosport, Oxford University Press, 2011, p. 1.

⁶ *ibidem*

⁷ *ivi*, p. 2

- Secondary sources: law-making processes and rules produced by sources that appear in primary sources provisions (for example UNSC resolutions);
- General principles of law: “general principles of criminal law, general principles of international law and general principles of criminal law recognized by the community of States or common to most countries of the world”⁸.

Those sources must be taken into account in a hierarchical order. As far as international criminal law is concerned, this is codified in Article 21 of the ICC Statute⁹ in which in first place puts its “Statute, Elements of Crimes and its Rules of Procedure and Evidence”¹⁰. Finally, as regards judicial decisions and the opinion of scholars, they are not considered as sources of international criminal law but they can be treated as “subsidiary means for the determination of international rules of law”¹¹. So, the most important sources of law and means to determine the law are the Statute of the various tribunals (ICC, ICTY, ICTR, the Nuremberg and Tokyo Charters), the Hague Regulations of 1907, the Genocide Convention of 1948, the Geneva Conventions of 1949 with the Additional Protocols, the decisions of international courts, the resolutions of the UN General Assembly and the UN Security Council while the reports of the UN Secretary General, the reports, drafts and comments of the United Nations International Law Commission and of private international scholarly associations (such as the *Association Internationale de Droit Pénal*, the International Law Association and the *Institut de Droit International*), military manuals and the various interpretations of provisions and norms are not binding but can provide an insight on the status of international criminal law. What is important to take into account when talking about international criminal law is the fact that it can be described and considered from different perspectives. Its history was obviously well linked with the facts of international history and it has undergone an important development following the atrocities of the Second World War when the need to enforce the punishments of the culpable of those crimes allow the field to reach other dimensions and to gain relevance in the international law agenda. This was in part the result of the failure to find a proper way to punish wrongful conducts and also nowadays

⁸ Ivi, p. 34

⁹ Article 21 of the ICC Statute, from the official website of the ICC: http://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf (accessed 15 November 2013)

¹⁰ ibidem

¹¹ A. CASSESE, *International Criminal Law*, New York, Oxford University Press, 2003, p. 37

in my personal opinion there is a lack in the way in which international community deals with States and individuals' responsibility of atrocities around the world. At the beginning in fact international crimes were punished at a domestic level and only in a later stage thanks to the creation of the international courts, the issue of individual criminal responsibility began to be considered as well as the role of individuals in the international system.

1. STATES AND INDIVIDUALS' RESPONSIBILITY AND THE CRIMINAL CONDUCT

Contents - 1.States and Individuals in International Law and the Development of the Individual Criminal Responsibility; 2. International Crimes; 3. Elements of International Crimes and the Exclusion of Individual Criminal Responsibility. -

1. States and Individuals in International Law and the Development of the Individual Criminal Responsibility

As international criminal law concern lies upon the punishment of criminal conduct, one of the main point to take into account is the concept of responsibility. As it was stated before, international criminal law establishes the individual criminal responsibility under international law and aims at guarantying the protection of the fundamental values of the community that, at the beginning, comprised "only" international peace and security. Only later, it has involved also the protection of internationally recognized human rights⁰¹².One important aspect to take into account talking about international criminal law is, in fact, the link with the protection of human rights.

One of the main differences that is possible to underline between human rights regime and international criminal law is that the first one addresses the States as the main

¹² C. KRESS, *International Criminal Law* in *Max Planck Encyclopedia of Public International Law*, [online encyclopedia], available through: the University of Cambridge website http://www.squire.law.cam.ac.uk/electronic_resources/legal_databases.php (Accessed 04 July 2013)

violators, while the second reaches the individual itself. Human rights treaties contained prohibitions that are addressed to States, while there are other subjects that can bear responsibility for committing depredations, such as non-State entities (for example paramilitary groups) or private actors (as for the organized crime). According to international law in fact, although private individuals can be responsible for committing international offences, “they cannot assume international responsibility for violating international human rights, as the obligations arising from this legal regime are addressed exclusively to States”¹³. However, it is possible to affirm that also other subjects can bear criminal responsibility for the violations of human rights. So, with the evolution of those fields, there was a move forward from the state-centered international law, and international criminal law and human rights soon become the two sides of the same coin (especially after the Second World War). Then, individual rights (based upon human rights) and duties (including criminal liability and based upon the individual responsibility underlined by international criminal law) started to address the individual human being. Reading this from another perspective, international criminal law can be now considered an instrument to protect human rights. This is especially evident for the particular categories of crimes against humanity, such as the rights to life and human dignity, and the crimes against peace. However, not all human rights violations can be judged under international law as it is only possible as a last step, when all national or international protective measures have failed.¹⁴

On the other side, the influence of the human rights field affects also the criminal procedure. Its power of limiting the application of international criminal law is clear for example in the right of a fair trial to the accused of a crime in a reasonable time, the prohibition of retroactive legislation, the respect of the doctrine *ne bis in idem* and so on, (even if some argues that some domestic anti-terrorism measures are reducing those freedoms¹⁵).

As regard the legal status of individuals in international law, it is still a controversial topic, as traditionally only States (and later international organizations)

¹³ I. BANTEKAS, S. NASH, *International Criminal Law*, II Edition, London, Cavendish Publishing Limited, 2003, p. 14

¹⁴ G. WERLE, *Principles of International Criminal Law*, II edition, The Hague, T.M.C. Asser Press, 2009, p. 46

¹⁵ I. BANTEKAS, S. NASH, *International Criminal Law*, II Edition, London, Cavendish Publishing Limited, 2003, p. 15

were considered subjects of international law. However, thanks to the developments in this field, they became to be entitled of rights (from the human rights doctrine) and duties (from international criminal law perspective). There are, in addition, no specific definitions of the term ‘individual’ in international law treaties so there are narrow and broader acceptations that can include or exclude for example groups (companies, corporations, all non-State actors..) or other entities different from the mere natural human being.¹⁶ “Generally, a literal interpretation supports the narrow view of the term ‘individuals’, but the meaning and purpose is more in line with the broader view.”¹⁷ Usually an entity can be considered a subject of public international law if it has rights and duties under this regime and currently it considers individual as an entity with limited rights and obligations, in order to make international law functioning as it is applied between States nowadays. As I have already mentioned some of the rights talking about human rights, it is now the moment to focus on the duties an individual has.

Referring strictly to the concept of individual criminal responsibility in contrast to the regime of State responsibility, it is possible to affirm that it entails two main ideas. First, individuals bear responsibility for committing wrongful acts. Second, they can be considered responsible only for acts in which there is the element of personal responsibility. “As stated in the Nuremberg judgment ‘crimes are committed by men and not by abstract entities. It is only by punishing individuals who commit such crimes that international law can be effectively enforced’”.¹⁸ The aim of both the law of state responsibility and international criminal law is to enforce international law but they use different methods. In fact, international criminal law distances from the traditional notion of international law and the rules of State responsibility which state that the consequences of a wrongful conduct against international law affect only the State and not the individual. In other words, individuals commit crimes under international law but violations of international law that can create a State responsibility are committed by States.

¹⁶ S. GORSKI, *Individuals in International Law* in *Max Planck Encyclopedia of Public International Law*, [online encyclopedia], available through: the University of Cambridge website http://www.squire.law.cam.ac.uk/electronic_resources/legal_databases.php (Accessed 04 July 2013)

¹⁷ *ibidem*

¹⁸ A. O’SHEA, *Individual Criminal Responsibility* in *Max Planck Encyclopedia of Public International Law*, [online encyclopedia], available through: the University of Cambridge website http://www.squire.law.cam.ac.uk/electronic_resources/legal_databases.php (Accessed 04 July 2013)

International criminal law started from the principle that every wrongful act against international law can be attributed to an individual person that cannot hide itself behind the shield of State sovereignty. On the other side, the notion of State responsibility can be used only in relation to structured subjects of international law. As regards the sanctions, they also are different: under international criminal law, they have a preventive and punitive nature, while the restoration of the situation as it was before the offence and conformed to international law is the aim of the consequences under the law of State responsibility. It is worth noting that usually crimes under international law entail State participation.¹⁹ In fact, most of international violations are committed by people acting under the guise or under the will of the State apparatus (overtly or covertly). Furthermore, usually more than one person cooperates to commit crimes under international law, typically organizing themselves in a network (often part of the State or of the military). However, it is important to determine and balance individual criminal responsibility also in a collective action²⁰. One of the most important documents that deals with State responsibility is the International Law Commission's (ILC) Draft Articles on State Responsibility of 2001, in which the State's internationally wrongful acts are stated as well as, for example, the concepts of organs of a State, wrongful conduct, breaches of international obligations, circumstances precluding wrongfulness, the consequences, reparations, the implementation of the international responsibility of a State and its invocation, the countermeasures²¹. ICC Statute, on the other side, explained fairly well the notion of individual criminal responsibility in Article 25.²²

Of course, individual criminal responsibility must be based on norms recognized under international or national legal provisions. For this reason, it is of paramount importance the principle of *nulla poena nullum crimen sine lege*. It states that "an act can be punished only if, at the time of its commission, the act was the object of a valid, sufficiently precise, written criminal law to which a sufficiently certain sanction was

¹⁹ G. WERLE, *Principles of International Criminal Law*, II edition, The Hague, T.M.C. Asser Press, 2009, p. 41

²⁰ Ivi, p. 166

²¹ For a specific list check the (ILC) Draft Articles on State Responsibility for Internationally Wrongful Acts of 2001 in the UN official website: http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf

²² Article 25 of the International Criminal Court Statute, from the official website of the ICC: http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf (accessed 15 November 2013),

attached”²³. In other words, it affirms the need for a pre-existent law before an individual may be held responsible for a crime; so it denies retroactivity and analogy as it is stated in articles 22, 23 and 24 of the ICC Statute.

2. International Crimes

As regards strictly the crimes that are considered under international law regime, there are basically three categories of crimes that attract individual criminal responsibility.

Looking back at the origins of the norms establishing international criminal responsibility, they started to appear in treaties on the laws of war from the end of the 19th century (for example the Hague Conventions of 1899 and 1907 that first codified these customs), even if the responsibility of individuals as opposed to States for crimes committed in the name of the State had already been entrenched in State practice. The customary right to try enemy combatants was already established and it was only restated in the Geneva Conventions and the two Additional Protocols in 1949 in which it was reaffirmed the duty for States to prosecute individuals responsible for grave violations of these treaties.

Another category outside the laws of war regards violations considered under customary law, that are piracy (*jure gentium*), crimes against peace and crimes against humanity (for example torture, sexual violence, persecution..) followed by the institution of the specific crime of genocide (crime of crimes in contemporary international criminal law for its *dolus specialis* or genocidal intent to destroy a whole group) with the Convention on the Prevention and Punishment of the Crime of Genocide (‘Genocide Convention’) of 1948. Later on, also the protection of human rights in times of peace and war was established in a number of treaties. In addition, other specific treaties impose the obligation upon States to prosecute individuals responsible of crimes of apartheid, slavery, torture, and other degrading treatments and punishments while only since the

²³ C. KRESS, *Nulla poena nullum crimen sine lege* in *Max Planck Encyclopedia of Public International Law*, [online encyclopedia], available through: the University of Cambridge website http://www.squire.law.cam.ac.uk/electronic_resources/legal_databases.php (Accessed 04 July 2013)

United Nations General Assembly Resolution (33/173) of 1978²⁴ the problem of enforced or involuntary disappearances received international attention.

A third category of crimes comprises specific offences against the international community of States, for example against diplomatic agents and offences relating to nuclear material. Other crimes such as terrorism, money laundering and drug trafficking led to the sign of treaties to enhance international co-operation, but they are still considered as national crimes without an independent status in international law and, according to one author, they do not establish individual criminal responsibility under international law²⁵.

According to Bassiouni, it is possible to identify 28 international crimes (based on 267 conventions that include some penal characteristics of a prohibited conduct) and they can be organized in a hierarchical order (genocide causes more significant harm than counterfeiting for example). The first category comprises international crimes that are part of *jus cogens* and they are usually committed with State action or State-favouring policy (apart from slavery, piracy and trafficking in human beings perhaps). They are piracy, war crimes, slavery and trafficking in human beings, crimes against humanity, aggression, genocide, torture and other forms of cruel, inhuman or degrading treatment or punishment, unlawful human experimentation, apartheid and mercenarism. The second category includes crimes that in the future may be considered as *jus cogens* such as nuclear terrorism, unlawful acts against certain internationally protected elements of the environment, unlawful traffic in drugs and related drug offences, destruction and theft of national treasures, aircraft hijacking and unlawful acts of international air safety, unlawful use of the mail, threat and use of force against internationally protected persons, taking of civilian hostages, theft of nuclear materials, unlawful acts against the safety of maritime navigation and the safety of platforms on the high seas, crimes against the United Nations and associated personnel, use of explosives, financing of terrorism and organized crime. A third category comprises other crimes of lesser international interest as the unlawful interference with international submarine cables, international traffic in

²⁴ UNGA 33/173 of 1978 in the United Nations official website: <http://www.un.org/documents/ga/res/33/ares33r173.pdf> (accessed 15 November 2013)

²⁵ A. O'SHEA, *Individual Criminal Responsibility* in *Max Planck Encyclopedia of Public International Law*, [online encyclopedia], available through: the University of Cambridge website http://www.squire.law.cam.ac.uk/electronic_resources/legal_databases.php (Accessed 04 July 2013)

obscene materials, falsification and counterfeiting and bribery of foreign public officials²⁶.

A proper codification of crimes could be found in the Nuremberg and Tokyo Charters while a more comprehensive list is present in the ICC Statute, specifically in the Article 5, 6, 7 and 8. In fact, the Rome Statute of the International Criminal Court is particularly important because it establishes a new category of crime: the crime of aggression (even if not all the participants agreed on the definition). Nowadays, the ICC Statute represents the most important document of international criminal law.

One of the elements that characterizes all those crimes against international law is the “international” element, that is, “a context of systematic or large-scale use of force”²⁷.

As regards the forms of responsibility, Article 25 (3) of the ICC Statute states the modalities of individual responsibility, providing various modes of participation. Talking about commission, it distinguishes three forms: commission as an individual, joint commission (people acting together in committing a crime, where each one is responsible), and commission through another person, the so-called “perpetrator behind the perpetrator”²⁸(the perpetrator uses another person to commit the crime, it usually happens in a hierarchical structure)²⁹. According to the ICC Statute, a person bears criminal responsibility if it encourages another one to commit a crime against international law, without execute the crime directly. The encouragement can have the form of instigation, that happens when a person solicits or induces another to commit the crime, or the form of order, that usually implies the existence of a relationship of subordination between the one giving the order which uses his authority to force the other person (who receives the order) to commit the crime.³⁰ It is worth mentioning that “both inducing and ordering are accessory modes of participation”³¹. Also planning a crime

²⁶ M. CHERIF BASSIOUNI, *International Criminal Law: Sources, Subjects, and Contents*, volume I, III Edition, Martinus Nijhoff Publishers, Leiden, 2008, p. 138-139

²⁷ G.WERLE, *Principles of International Criminal Law*, II edition, The Hague, T.M.C. Asser Press, 2009, p. 32

²⁸ Ivi, p. 179

²⁹ Article 25(3)(a) of the ICC Statute, from the official website of the ICC: http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf (accessed 15 November 2013),

³⁰ Article 25(3)(b) of the ICC Statute, from the official website of the ICC: http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf (accessed 15 November 2013),

³¹ G. WERLE, *Principles of International Criminal Law*, II edition, The Hague, T.M.C. Asser Press, 2009, p. 180

(even if not explicitly included in the ICC Statute) could generate criminal liability as a co-perpetrator under Article 25(3)(a) of the ICC Statute³². Also assistance is recognized as a source of criminal responsibility. In fact, anyone who facilitates the commission of a crime, “aids, abets or otherwise assists in its commission or its attempted commission”³³ is considered criminally liable, and the assistance (by providing means as the most common way) can be rendered before, during or after the crime’s execution. Moreover, Article 25(3)(d) of the ICC Statute makes reference to the contribution to the commission of a crime, or its attempt, by a group that can also generate criminal liability. Article 28 deals with another form of responsibility called superior responsibility under which “military commanders or civilian superiors can be made criminally liable for crimes under international law committed by their subordinates”³⁴. It is considered a subsidiary mode of participation because it derives from the failure to act even if there was a legal duty to do so and it is not considered a specific crime of omission³⁵. The Article states four elements to determine superior responsibility: there should be a superior-subordinate relationship, the superior knew or failed to know that a subordinate was committing a crime (mental element), the superior did not take all necessary and reasonable countermeasures to prevent or repress the crime or to punish the perpetrator, and finally the superior failed to control properly his/her subordinate (violation of the duty of control)³⁶.

3. Elements of International Crimes and the Exclusion of Individual Criminal Responsibility

To establish if there is individual criminal responsibility under international law three steps should be taken into account. The first one is the material elements of a crime,

³²A. CASSESE, G. ACQUAVIVA, M. FAN, A. WHITING, *International Criminal Law: Cases and Commentary*, Gosport, Oxford University Press, 2011, p. 363

³³ Article 25(3)(c) of the ICC Statute, from the official website of the ICC: http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf (accessed 15 November 2013),

³⁴ G. WERLE, *Principles of International Criminal Law*, II edition, The Hague, T.M.C. Asser Press, 2009, p. 187

³⁵ Ivi, p. 189

³⁶ Article 28(a)(b) of the ICC Statute, from the official website of the ICC: http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf (accessed 15 November 2013),

that is for example the conduct, consequences and circumstances and they are proper of every type of crime. Those ones are also the center points for the mental element, the second step that implies the intent and knowledge of the perpetrator to commit the material act (ICC Statute, Article 30). This element, also called *mens rea* or subjective element, implies that the perpetrator has an intent as regard the criminal conduct, intent and knowledge about the consequences, and knowledge of the circumstances of the crime. The third step consists in analyzing whether or not there are circumstances that exclude individual criminal responsibility. If they are present, the individual is not criminally responsible for that crime (ICC Statute, Article 31)³⁷.

As regards the circumstances excluding criminal liability, they can be distinguished between justifications and excuses (however, so far we cannot find a practical distinction in national legal systems³⁸). Both lead to the non-punishment of the perpetrator of the act but there are some differences.

When referring to defences classified as *justifications*, law and society consider that action, which ordinarily would be considered contrary to law as it created harm and damages to people, as lawful because of larger interests. In this case, the act itself is not considered a crime. Basically *lawful punishment* (for example the execution of death penalty or imprisonment) of enemy combatants or civilians guilty of international crimes, *lawful belligerent reprisals* (for example the use of prohibited weapons) in order to stop gross breaches of international law and *self-defence* (for example the killing of someone in self-defence is considered lesser evil than the death of the person firstly unlawfully attacked) are considered as justifications because the wrongdoer is aware of the result he is going to have but there is not a culpable *mens rea* as mental element and actions are considered to be legally authorized.

By contrast, under the category of *excuses* it can be classified those acts that are considered unlawful as they cause harm and they are contrary to a criminal norm but the culpable is not punished. Here there is a more negative appraisal of the conduct as the act is still considered unlawful but the agent is not punished as special circumstances are taken into account. Moreover the subjective element is usually lacking. Excuses are more numerous than justifications and they embrace mental disorder, involuntary intoxication,

³⁷ G. WERLE, *Principles of International Criminal Law*, II edition, The Hague, T.M.C. Asser Press, 2009, p. 142

³⁸ A. CASSESE, *International Criminal Law*, New York, Oxford University Press, 2003, p. 222.

physical compulsion, mistake of fact, mistake of law, duress, necessity, superior orders, and *force majeure* (even if it is still doubtful)³⁹. Some authors include also *tu quoque* in the category of excuses (a defendant asks not to be prosecuted as other participants behaved in the same way; usually he argues that as one side has committed the same crimes, the other has no right to punish him for similar actions)⁴⁰.

All things considered, society and law-making bodies have to judge the action (according to customary law and treaties) to find the appropriate legal characterization of a defence as a justification or an excuse.

Another possible obstacle to the prosecution of wrongdoers in international criminal law is represented by rules that protect the culpable and grant him immunity from criminal prosecution (see *infra*, 2.2).

1.1. THE CONCEPTS OF TERRITORIALITY AND UNIVERSAL JURISDICTION IN INTERNATIONAL LAW

“Jurisdiction refers to the power of each State under international law to prescribe and enforce its municipal laws with regard to persons and property”⁴¹. It can be exercised in three forms that refer to the branches of government: legislative or prescriptive jurisdiction (the competence of establishing rules), judicial jurisdiction (the competence of establishing procedures to deal with crimes and the application of laws by courts) and enforcement jurisdiction (the power to impose consequences on its citizens and this cannot assume an extra-territorial character like the other two). Nowadays, conflicts of concurrent criminal jurisdiction have risen with the development of international relations, the movement of people and goods across international borders, and there is not a common agreement to deal with those problems (treaties can help regulating such issues but they do not cover all the aspects). Moreover, there is no hierarchy of criminal jurisdiction in any international criminal law treaty and, also for this reason, criminal jurisdiction still represents a disputed area of inter-States relations⁴².

³⁹ Ivi, p. 219-274 and A. CASSESE, G. ACQUAVIVA, M. FAN, A. WHITING, *International Criminal Law: Cases and Commentary*, Gosport, Oxford University Press, 2011, p. 459-516

⁴⁰ Ivi, p. 516

⁴¹ I. BANTEKAS, S. NASH, *International Criminal Law*, II Edition, London, Cavendish Publishing Limited, 2003, p. 143

⁴² Ivi, p. 144

According to international law, States have both sovereign independence (power to take action) and the sovereign equality among States (their power is restricted and limited and cannot affect the independence of other States).

In order to try authors of international crimes, States need legal provisions that allow courts to prosecute and eventually punish the perpetrators. Normally some sort of link should exist between the State and either the offence, the author or the victim. So States can bring wrongdoers to trial before their courts on the basis of even one of three (perhaps four) principles although a State can have more than one of these to exercise the jurisdiction in a matter and more than one State can present the basis for the jurisdiction over the same issue.

The basic principle is the principle of *territoriality* that affirms that an offence committed in a State's territory can be justiciable in that State. However, it can be subdivided into two categories. It is called *subjective territoriality* when the crime commences on the territory of a State that can exercise its jurisdiction, even if the consequences develop in the territory of a third State. Also this State can have the interest to exercise its jurisdiction on the basis of so-called *objective territoriality* which develops when it suffers the effects of that criminal conduct⁴³.

Nevertheless, States possess also a competence called *extraterritoriality* or *extraterritorial jurisdiction*, that is, the power to "make, apply and enforce rules of conduct in respect of persons, property or events beyond its territory"⁴⁴. Basically it implies two principles: the *active personality principle*, or *nationality*, is based on the nationality of the perpetrator. It allows the State to subject its nationals (including natural persons, companies, ships and aircraft) to its jurisdiction for crimes committed abroad (the Nottebohm Case can help clarifying this issue). The other one is the *passive personality*, or *nationality*, that makes reference to the nationality of the victim. The State may exercise its jurisdiction over crimes committed abroad against its own citizens. This one has long been considered controversial and with a less strong link to the State than the others.

⁴³ I. BANTEKAS, *Criminal Jurisdiction of States under International Law* in *Max Planck Encyclopedia of Public International Law*, [online encyclopedia], available through: the University of Cambridge website http://www.squire.law.cam.ac.uk/electronic_resources/legal_databases.php (Accessed 04 July 2013)

⁴⁴ M.T. KAMMINGA, *Extraterritoriality* in *Max Planck Encyclopedia of Public International Law*, [online encyclopedia], available through: the University of Cambridge website http://www.squire.law.cam.ac.uk/electronic_resources/legal_databases.php (Accessed 04 July 2013)

Some authors⁴⁵ include also the *protective principle* among the extraterritorial principles to complement the principle of territoriality. It affirms the right for the State to exercise its jurisdiction in respect of persons, property or events abroad that could represent a threat to its essential interests, as well as acts against national security (coups d'état, terrorist acts, counterfeiting currency and forging passports). It is in fact undoubtful that every country can take measures to preserve its national interests (according to law).

More complex to define is the *universality principle* or *universal jurisdiction*. Unlike the other principles above mentioned, in fact, it does not require any link or connection with the prosecuting State (territory, nationality, threat to State's interests). It allows States to bring to trial persons accused of some serious crimes regardless the place of commission, or the nationality of the perpetrator or the victim. Any State may exert its authority over offences that have been made subject to universal jurisdiction (under customary international law or by a multilateral treaty) even if the application of this principle is allowed only to a very limited number of crimes. The first time this principle was stated was in the 17th century in relation to piracy (piracy *jure gentium*). It authorized any State to capture and try people engaging in piracy irrespective of their nationality or the location of the crime. As it was a crime perpetrated usually where there was no criminal jurisdiction of any State (the high seas) and by stateless pirate vessels, piracy was subjected to universal jurisdiction under customary international law and later under Article 105 of the UN Convention on the Law of the Sea (On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest

⁴⁵ I. BANTEKAS, *Criminal Jurisdiction of States under International Law* in *Max Planck Encyclopedia of Public International Law*, [online encyclopedia], available through: the University of Cambridge website http://www.squire.law.cam.ac.uk/electronic_resources/legal_databases.php (Accessed 04 July 2013) and I. BANTEKAS, S. NASH, *International Criminal Law*, II Edition, London, Cavendish Publishing Limited, 2003, p. 154 and M.T. KAMMINGA, *Extraterritoriality* in *Max Planck Encyclopedia of Public International Law*, [online encyclopedia], available through: the University of Cambridge website http://www.squire.law.cam.ac.uk/electronic_resources/legal_databases.php (Accessed 04 July 2013) and I. CAMERON, *International Criminal Jurisdiction, Protective Principle* in *Max Planck Encyclopedia of Public International Law*, [online encyclopedia], available through: the University of Cambridge website http://www.squire.law.cam.ac.uk/electronic_resources/legal_databases.php (Accessed 04 July 2013)

the persons and seize the property on board.[...] ⁴⁶). The need of the States to fight jointly against this kind of crime that was affecting all the States gave birth to this exceptional authorization. Other categories of crimes subjected to universal jurisdiction are war crimes, genocide, torture, crimes against humanity and perhaps also terrorism. Unlike the protective principle, the interests protected are those of the international community as a whole, not only those of the prosecuting State. Normally, international crimes have attracted universal jurisdiction on two different bases: the scale and the nature of the offence and the inadequacy of national enforcement legislation. ⁴⁷

According to Cassese, there are two versions of universality: the narrow notion (based on the so-called *forum deprehensionis*) that affirms that only the State in which the accused is in custody may prosecute him/her as the presence of the wrongdoer in the territory of the State is considered a condition for the jurisdiction. The broader version envisages a trial *in absentia* as it authorizes a State to prosecute the accused whether or not he/she is in custody or present in the territory of the prosecuting State. It is worth noting that it is useful for national authorities to begin investigation of serious breaches of international law without the presence of the accused in the country but many legal systems do not permit trial *in absentia*.

Two basic criticisms have been posed to the notion of universality. First, national tribunals could interfere in the internal affairs of other States violating international relations and the principle of sovereignty. Secondly, State courts could obstruct international diplomatic relations if the accused is a State agent in office (worse if he is for example a Head of State or a minister) ⁴⁸. It will be interesting to analyze the exercise of universal jurisdiction in the cases of Eichmann and Pinochet (see *infra* 3 and 4).

Linked to this issue, it is worth analyzing the notion of *aut dedere aut judicare* and the conflict that undoubtedly would rise between international and national jurisdiction and the problem of the concurrent jurisdiction (see *infra* 2.1 and 3.2).

⁴⁶ UN Convention on the Law of the Sea of 1982 in the United Nations official website: http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf (accessed 20 November 2013)

⁴⁷ Ibidem and A. CASSESE, *International Criminal Law*, New York, Oxford University Press, 2003, p. 284

⁴⁸ Ivi, p. 284-293

2- THE CONCEPTS OF EXTRADITION, IMMUNITY AND ASYLUM IN INTERNATIONAL LAW

Contents - 4. Introduction; 5. Enforcement of international criminal law; 6. The principle *Aut Dedere Aut Judicare*; 7. Extradition: general process and current application; 8. Double criminality, Specialty and the Political Offence exception; 9. Typologies of Immunity; 10. Immunity from International Criminal Jurisdiction; 11. Aliens In International Law; 12. Refugees And Asylum Seekers; 13. Territorial Asylum; 14. Diplomatic Asylum and Diplomatic Missions; 15. Diplomatic Protection. –

International criminal law lays upon some fundamental principles that make it possible to apply it. The maxim *ne bis in idem*, that means not twice for the same, implies that a person should not be tried twice for the same crime. It can be related with the notion of *res judicata* which states that a final adjudication is binding. Especially in common law countries, it is referred as the prohibition of double jeopardy⁴⁹. Looking back at its origins, it derives from the Roman law maxim *bis de eadem re ne sit action*. It is comprised in the right of fair trial principle, as it support the claim that repeated prosecutions could damage the individual with respect to the more powerful figure of States, increasing also the possibility of conviction. The most important things to analyze about this principle are the meaning of *bis* and *idem* as they must be evaluated in each situation. In fact, they are considered the reference points to understand if an individual is being prosecuted again (*bis*) for the same reason (*idem*)⁵⁰. It is possible to find this principle in the Statutes of some of the most important courts as in the Statutes of the two ad hoc International Criminal Tribunals for the former Yugoslavia and Rwanda Tribunals and also in Article 20 of the ICC Statute that claims that

⁴⁹ A. CASSESE, G. ACQUAVIVA, M. FAN, A. WHITING, *International Criminal Law: Cases and Commentary*, Gosport, Oxford University Press, 2011, p.99

⁵⁰ R. GEISS, *Ne bis in idem* in *Max Planck Encyclopedia of Public International Law*, [online encyclopedia], available through: the University of Cambridge website http://www.squire.law.cam.ac.uk/electronic_resources/legal_databases.php (Accessed 04 July 2013)

“1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.

2. No person shall be tried by another court for a crime referred to in article 5 [and also article 6, 7 or 8] for which that person has already been convicted or acquitted by the Court. [...]”⁵¹.

Moreover, this principle is stated also in some humanitarian law treaties as for example in the Third and Fourth Geneva Convention and in some human rights treaties such as the Arab Charter on Human Rights of 2004, as well as in Art. 50 of the Charter of Fundamental Rights of the European Union. We may find *ne bis in idem* principle also in some extradition treaties as of the Art. 9 European Convention on Extradition or the United Nations Model Treaty on Extradition⁵². Normally, this principle is applied as a ground for refusing extradition where the accused has already been prosecuted in the tribunals of the requested State.

Another important principle that is usually applied by national and international courts is *in dubio pro reo* (when in doubt, for the accused) also referred as presumption of innocence⁵³. Specifically, the first term explains the concept that if there are doubts about the guilt of an individual, he or she should not be convicted (actually proofs of culpability should exist beyond all reasonable doubt). The second one refers to a situation in which more than one interpretations of a criminal statute could be possible and it suggests to choose the one that favours the defendant.

Another principle already mentioned is the principle of legality or *nullum crimen, nulla poena sine lege* that regards a criminal conduct which is prohibited (*nullum crimen sine lege*) and the sanctions for it (*nulla poena sine lege*).

⁵¹ Article 20 (1)(2) of the Rome Statute of the International Criminal Court (ICC) (1998): http://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf

⁵² European Convention on Extradition (1957): <http://conventions.coe.int/Treaty/en/Treaties/Html/024.htm> and The United Nations Model Treaty on Extradition (A/RES/45/116) (1990): <http://www.un.org/documents/ga/res/45/a45r116.htm>

⁵³ A. ZAHAR, G. SLUITER, *International Criminal Law: a Critical Introduction*, New York, Oxford University Press, 2008, p. 399

2.1 *AUT DEDERE AUT JUDICARE* AND THE CURRENT APPLICATION OF EXTRADITION

4. Introduction

International community, as it does not present an established hierarchical order, has to lay on the principle of equality among States that entails a framework of mutual interdependence and cooperation. This is noticeable also in international enforcement actions undertaken against individuals accused of criminal conduct.

However, a relevant remark should be made about the concept of international community. In fact during the history, various interpretations of this concepts have spread. Starting from the argument of the existence of a common or social order shared by all States or all the humankind (this is one of the basis of the universal jurisdiction as well), the first idea of a single community of mankind could be found in the Stoic philosophy which claimed the existence of a sense of human solidarity and common values and moral imperatives shared by the whole humanity and that drove States to collaborate and cooperate for the common good of all the members of such community. In the 18th Century, Christian Wolff called it *civitas maxima*, a sort of supreme State that comprised all humanity. This idea is sometimes related also to the concept of world government and from this perspective, the fact that crimes committed in any country can be considered as a concern for every other country finds a link with this notion of *civitas maxima*. This helps also to find a ground for the scope of criminal law of every State, that should aim at securing this common order.⁵⁴

Nonetheless, this is not the only paradigm developed to describe international relations. A diametrical opposite image sees the international system as anarchical, without rules and in a condition of perennial conflict. This view recalled the Hobbesian “state of nature” where every individual/State pursues its own interests disregarding moral and legal rules depicting the international system as a vacuum⁵⁵.

The third idea of international system describes it as a “society of States”, where States and not the individuals are the leading actors. They pursue their own aims but they are constrained by prescriptions to allow a (peaceful) coexistence as society. This vision

⁵⁴ M. C. BASSIOUNI, E. M. WISE, *Aut Dedere Aut Judicare: the Duty to Extradite or Prosecute in International Law*, Dordrecht, 1995, p. 28

⁵⁵ Ivi, p. 31

distances itself from the state of nature idea as there is not a total anarchy, and it differs also from the universal community paradigm as there is not such a strong cohesion. This third idea is considered strictly connected with traditional international law that has been relied on the same idea of society of States and it was strongly support also by Grotius. It must be concluded that all these three paradigms keep existing in some ways in international relations⁵⁶.

This premise is useful to understand why States should respect the principle *aut dedere aut judicare* and why they should engage in extradition.

5. Enforcement of international criminal law

Crimes against international law are considered to be also against the interests and values of the international community and for this reason it is has the power to prosecute and punish the wrongdoers, regardless of who, where and against whom the crime was committed. In fact, every country is allowed to prosecute a criminal on the part of the international community and according to the concept of universal jurisdiction it is not important the existence of any link (for example the presence of the perpetrator in the State that exercises jurisdiction) with the prosecuting State as the right to punish comes from the crime itself and such crimes against the society of States are not limited to the domestic territory of the State where they were committed. The principle of the prohibition on interference seems to limit the national criminal jurisdiction but, on the other hand, States may require to extend it according to the duty under international law to prosecute⁵⁷. According to the Preamble of the ICC Statute, in fact,

“the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation [...]it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes [...]”⁵⁸

⁵⁶ Ivi, p. 34

⁵⁷ G. WERLE, *Principles of International Criminal Law*, II edition, The Hague, T.M.C. Asser Press, 2009, p. 65

⁵⁸ Preamble (4) and (6) of the International Criminal Court Statute, from the official website of the ICC: http://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf (accessed 15 November 2013)

Also the Geneva Conventions underline the authority and the duty for the contracting States to prosecute grave breaches themselves or to “hand such persons over for trial to another High Contracting Party”⁵⁹. The aim of such provisions is to grant the prosecution of wrongdoers and any State that has the perpetrator in custody is obligated to try them or hand them over a State that is willing to prosecute them according to the principle *aut dedere aut judicare*⁶⁰.

6. The principle *Aut Dedere Aut Judicare*

According to the non-hierarchical characteristic of the international community, international enforcement actions for violation of international criminal law have to be laid on two forms: the first one is a direct enforcement through international criminal tribunals (the first established international forum were the Nuremberg and Tokyo tribunals after the Second World War) or domestic criminal courts that can exercise extraterritorial and universal jurisdiction especially over piracy *jure gentium*, war crimes and crimes against humanity, acting as international tribunals protecting the interests of the whole community of States⁶¹. As the International Court of Justice underlined in the *Barcelona Traction* case, “all States have a legal interest in the protection of fundamental rights worldwide”⁶². The second form is the indirect enforcement. In fact, without international tribunal and the willingness to exercise universal jurisdiction, States were forced to find an agreement on international cooperation in criminal matters to prevent impunity. One way was to include broad jurisdictional competence in the majority of international criminal treaties. However, one of the most important measures was to insert a provision in international law treaties called *aut dedere aut judicare*⁶³. This expression is referred to the alternative obligation to extradite or prosecute persons accused of having committed crimes and it first appeared in the work of Grotius (*aut dedere aut punire*). Extradition supplements indirect enforcement processes as this

⁵⁹ Article 146, Geneva Conventions and their Additional Protocols (1949): <http://www.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp>

⁶⁰ G. WERLE, *Principles of International Criminal Law*, II edition, The Hague, T.M.C. Asser Press, 2009, p. 70

⁶¹ I. BANTEKAS, S. NASH, *International Criminal Law*, II Edition, London, Cavendish Publishing Limited, 2003, p. 8- 9

⁶² Ivi, p. 9 and *Belgium v Spain (Barcelona Traction Light and Power House Co Ltd)* (1970) ICJ Reports 3, Second Phase, p.32

⁶³ *ibidem*

mechanism allows better-equipped and more willing States to investigate a particular case. This obligation to prosecute or extradite appears often in various multilateral treaties to bind States to act in order to bring to justice individuals who harm the fundamental interests of the international community. There are various categories of agreements that include this alternative obligation such as extradition treaties or the Geneva Conventions and in most of the treaties that require the repression of international offences. This principle aims at avoiding the resort to safe havens for criminals in order to escape their punishment and it starts from the assumption that crime is evil wherever it is committed.

According to Bassiouni, there are three hypothetical ideas of how to consider the international community whose existence is at the basis of the application of this principle as crimes committed in any country are concerns for people of every other country. The first idea is linked with the idea of a “community of mankind” proper of the Stoics. It is characterized by cooperation, moral human solidarity for the common good of the whole community. In the eighteenth century it was recalled by Christian Wolff with the name *civitas maxima* describing it as supreme state or body politic. However, other two different interpretations of the international system. The first one is linked with the Hobbesian “state of nature” and described the international community as anarchical, in conflict and without moral or legal rules to guide the behavior of the members. Basically the international society does not exist. The second one described the international system as “society of States” in which there is not a strong cohesion but neither a total moral and legal vacuum. This last one includes many of the premises of traditional international law⁶⁴.

7. Extradition: general process and current application

Related to the principle of *aut dedere aut judicare* is of course the notion of extradition that is “the formal process whereby a fugitive offender is surrendered to the State in which an offence was allegedly committed in order to stand trial or serve a sentence of imprisonment”⁶⁵. This is considered a way to improve the mutual legal assistance as nowadays suspects have more facility in traveling and escaping to find a

⁶⁴ M. C. BASSIOUNI, E. M. WISE, *Aut Dedere Aut Judicare: the Duty to Extradite or Prosecute in International Law*, Dordrecht, 1995, p. 26-36

⁶⁵ I. BANTEKAS, S. NASH, *International Criminal Law*, II Edition, London, Cavendish Publishing Limited, 2003, p. 179

safe haven. It also helps enforcing international cooperation in criminal justice and national criminal law. Extradition law is a branch of international criminal law that relies upon the assumption that the requesting State will granting the fugitive a fair trial. As regards strictly the principle of *aut dedere aut judicare*, it is possible to notice that civil law countries usually apply extraterritorial jurisdiction and prosecute individual that committed the criminal act in other jurisdictions where their citizens are the victim or the offender. Most of European States choose to refuse to extradite their nationals and common law States (as the UK) cannot usually prosecute crimes committed outside the jurisdiction⁶⁶.

Normally the extradition requests are made through diplomatic channels, while extradition proceeding usually involve the participation of both the judiciary and the executive creating a sort of hybrid system. In the United Kingdom, for example, extradition is made up of two stages: first a judge or a magistrate evaluates whether the requesting State has complied with the legal formalities but the last decision to surrender the fugitive is up to the executive discretion in the person of the Secretary of State (also in the United States happens the same). Extradition law is a procedural law and the procedure is subjected to national law and lies to national courts. As a consequence, States have developed different rules regarding for example the evidence required before agreeing to a request for extradition. In some cases, States may refuse a request for extradition in an attempt to balance judicial cooperation against crime and the necessity to protect individual's fundamental rights (protecting for example the fugitive from the risk of an unfair process in the requesting State). Nonetheless, exemption is sometimes linked to the consideration of extradition as a sovereign act⁶⁷.

8. Double criminality, Specialty and the Political Offence exception

Most extradition treaties demand the satisfaction of the double criminality rule which claims that a State usually grants extradition if the fugitive's conduct is considered a crime in both the requesting and requested State (it is linked also with the principle of reciprocity). However, a point of discussion seems to be whether a crime is considered an extradition crime. European extradition treaties usually describe it by making reference to the minimum level of punishment in both States while the United Kingdom and the

⁶⁶ *ibidem*

⁶⁷ Ivi, p. 180-181

United States usually provide a list of extradition crimes in their extradition treaties. This method created some problems as extradition would only be considered for the offences in the list requiring a constant upload for the new offences. Therefore, to avoid such drawbacks, latest treaties makes reference to a minimum level of punishment to define extradition offences. In this way, to determine if the double criminality has been satisfied, the requested State would only consider the seriousness of the penalty without the need to examine if the conduct is considered a crime in both jurisdictions. A problem (addressed by each domestic legislation) could rise with respect of extraterritorial and transnational offences for the States that exercise jurisdiction on the basis of territoriality such as common law States (civil law States usually prosecute regardless of the place where the criminal conduct took place)⁶⁸.

When requesting extradition, the requesting State is responsible for the evidences that it places before the requested State courts which have not the power to seek further evidences. Generally speaking, extradition procedure is based on the law and practice of the requested State so the requesting State has to satisfy the domestic extradition legislation in order to have its request for extradition granted as the requested State apply its national rules while considering the admissibility of evidence⁶⁹.

The rule of specialty is usually contained in most extradition treaties and imposes the requesting State to prosecute the suspect only for the crimes for which he or she is extradited in order to protect the fugitive against unfair trials in the requesting State. Historically this provision is linked to the political offence exception which is a universally recognized principle of extradition law related also to the principle of sovereignty. According to this principle, a State is not forced to hand over individuals wanted in connection with an offence that it considers to be of a political nature, granting to the State its right to give asylum to political refugees. Nonetheless, it may result difficult to define what constitute a political offence: usually it is not described in extradition treaties but it could be considered an opposition made by the fugitive against the requesting State. Therefore the requested State should consider both the reasons of the requesting State and the suspect before evaluating the *bona fides* of the request for extradition. However, with the spread of international terrorism, States have begun to limit this exception that is generally no longer available for crimes against international

⁶⁸ Ivi, p.181-182

⁶⁹ Ivi, p.183

law⁷⁰. The principle of specialty could also be linked with the problem of re-extradition to a third State. The requesting State is usually not allowed to re-extradite the suspect to a third State without the consent of the requested State as it is mentioned in Article 15 of the 1957 European Convention on Extradition⁷¹. On the contrary, the European arrest Warrant⁷² admits the surrender of the fugitive to another EU State without consent in some cases.⁷³

It is worth mentioning the fact that many States do not extradite persons to States which enforce death penalty, unless the requesting State assures not to implement it. This condition is comprised in some international treaties, such as the 1957 European Convention on Extradition⁷⁴. There is also a guarantee against torture as it is provided in the 1984 Torture Convention⁷⁵.

Another important point to take into account is the preference of many States (generally civil law countries) to exercise criminal jurisdiction over their nationals for violations committed both on their territory or abroad, prohibiting the extradition of their own nationals. This behavior is historically linked to the citizens protection, the principle of sovereignty and a widespread distrust of foreign legal systems⁷⁶. This preference is

⁷⁰ Ivi, p. 184, 186

⁷¹ "Except as provided for in Article 14, paragraph 1.b, the requesting Party shall not, without the consent of the requested Party, surrender to another Party or to a third State a person surrendered to the requesting Party and sought by the said other Party or third State in respect of offences committed before his surrender. The requested Party may request the production of the documents mentioned in Article 12, paragraph 2". European Convention on Extradition (1957): <http://conventions.coe.int/Treaty/en/Treaties/Html/024.htm>

⁷² "Each Member State may notify the General Secretariat of the Council that, in its relations with other Member States which have given the same notification, the consent for the surrender of a person to a Member State other than the executing Member State pursuant to a European arrest warrant issued for an offence committed prior to his or her surrender is presumed to have been given, unless in a particular case the executing judicial authority states otherwise in its decision on surrender[...]". Art 28 The Framework Decision on the European Arrest Warrant (2002): http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_criminal_matters/l33167_en.htm

⁷³ R. CRYER, H. FRIMAN, D. ROBINSON, E. WILMSHURST, *An Introduction to International Criminal Law and Procedure*, New York, Cambridge University Press, 2007, p. 84

⁷⁴ Art 11 of the European Convention on Extradition (1957): <http://conventions.coe.int/Treaty/en/Treaties/Html/024.htm>

⁷⁵ Art 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture, CAT) (1984): <http://legal.un.org/avl/ha/catcidtp/catcidtp.html>

⁷⁶ R. CRYER, H. FRIMAN, D. ROBINSON, E. WILMSHURST, *An Introduction to International Criminal Law and Procedure*, New York, Cambridge University Press, 2007, p. 82 and I. BANTEKAS, S. NASH, *International Criminal Law*, II Edition, London, Cavendish Publishing Limited, 2003, p. 190

acknowledged for example in the already mentioned European Convention on Extradition⁷⁷.

Some international initiatives aiming at simplifying extradition procedures have developed to provide more efficient cooperation and law enforcement (nowadays mainly through multilateral treaties) as well as a countermeasure to the escalation of both transnational and national crime. The most important treaty is the UN Model Treaty on Extradition, while at European level the 1957 European Convention on Extradition, the 1995 Convention on Simplified Extradition Procedure, the 1996 Convention Relating to Extradition, the Council Framework Decision on the European Arrest Warrant and in the UK specifically the 1992 UK Extradition Bill.

Where extradition arrangements are inapplicable (as the case of the political offence exception), ineffective or do not exist, some States may resort to other methods to get the fugitive: abduction or “irregular rendition” (as it happened in the Eichmann case). Such measures can violate international law as well as some human rights of the fugitive such as the right to liberty and to security. Traditionally, national courts have acted accordingly with the maxim *male captus, bene detentus*, and have long be prepared to try accused individuals regardless of how they were produced for prosecution under the jurisdiction of the court, even if the arrest and surrender were unlawful according to national or international law⁷⁸.

2.2 IMMUNITIES FROM CRIMINAL JURISDICTION

Immunities are sometimes considered as a possible obstacle to international prosecution of international crimes as they protect the wrongdoer and grant him to avoid prosecution before foreign courts. They ensure some degree of freedom to official representatives of States, limiting in this way the sovereignty of the receiving State that cannot apply its jurisdiction on those subjects.⁷⁹

The bases for immunity under international law are essentially two: the principle *par in parem non habet iudicium* which affirms the equality of all States and that “one

⁷⁷ Art 6 see *supra*

⁷⁸ R. CRYER, H. FRIMAN, D. ROBINSON, E. WILMSHURST, *An Introduction to International Criminal Law and Procedure*, New York, Cambridge University Press, 2007, p. 85

⁷⁹ G. WERLE, *Principles of International Criminal Law*, II edition, The Hague, T.M.C. Asser Press, 2009, p. 165

sovereign power cannot exercise jurisdiction over another sovereign power. It is the basis of the act of state doctrine and sovereign immunity”⁸⁰. The second one is that for the functioning of interstate relations is fundamental the existence of some trans-border actions.

9. Typologies of Immunity

There are various typologies of immunity. A basic distinction should be drawn between domestic immunities and international immunities: the first ones are only applied within one’s national legal system, while immunities under international law can be invoked by State officials before foreign courts. It is worth noting that regarding national immunities, they can be seen as a sort of protection of State organs from the interference of other State organs such as the courts, in an attempt to preserve the separation of powers and the independence of political action⁸¹ (recently, there was a long debate about this topic also in Italy, regarding parliamentary immunities). These national immunities usually cover the acts of individuals and involve exemption from jurisdiction and often comprise also the immunity from prosecution for ordinary crimes committed before or during the period of exercise of the function but end when the functions finish (even if the individual usually remains immune for any official act he or she made during the exercise of his or her function). It is worth noting that these immunities usually are applied to ordinary crimes while an exception of this practice seems to come to light in relation with international crimes⁸². As regards the specific notion of national personal immunities, this issue seemed to be related to each particular national legal system. In fact, a conflict between any national legislation giving immunity and the obligation to prosecute the authors of international crimes granted by treaty rules, appeared to exist before the entry into force and the national implementation of the ICC Statute. It imposed the removal of such immunities for international crimes that fall under the court jurisdiction⁸³.

⁸⁰ The Oxford Reference website: <http://www.oxfordreference.com/view/10.1093/oi/authority.20110803100306400> (accessed 28 November 2013)

⁸¹ A. CASSESE, G. ACQUAVIVA, M. FAN, A. WHITING, *International Criminal Law: Cases and Commentary*, Gosport, Oxford University Press, 2011,

⁸² A. CASSESE, *International Criminal Law*, New York, Oxford University Press, 2003, p. 264

⁸³ *Ivi*, p. 273-274

However, the most important distinction is between functional immunity or *ratione materiae* and personal immunity or *ratione personae* and it is made according to scope and effects⁸⁴.

Immunity *ratione materiae* deals with all official acts that can be ascribed to the State and for which it is the only entity to bear responsibility under international law, preventing the individual (minister or soldier of the State for example) acting in an official capacity, from any liability under international criminal law⁸⁵. In other words, according to the Act of State doctrine⁸⁶, an individual that is acting on behalf of a State cannot be considered responsible for any violation he could have made while acting in an official function, being the State the only responsible on the international level. This category of immunity is of particular importance because it permits the respect of the internal organization of a State preventing any interference by a foreign State⁸⁷. This kind of immunity covers the official acts of *de facto* and *de jure* State agents and it is *erga omnes* as it can be invoked towards any other nation⁸⁸. Moreover it has no temporal limits in contrast with the immunity *ratione personae*.

10. Immunity from International Criminal Jurisdiction

It is important to clarify that the responsibility under international criminal law for the acts of a wrongdoer in his or her official capacity remains because immunity *ratione materiae* does not affect the perpetration of crimes under international law. Indeed, often the commission of a crime in the exercise of sovereign functions is considered as an aggravating circumstance. Article 7 of the Charter of the international Military Tribunal at Nuremberg rejected the invocation of the official status as follows: “the official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating

⁸⁴ G. WERLE, *Principles of International Criminal Law*, II edition, The Hague, T.M.C. Asser Press, 2009, p. 235

⁸⁵ Ivi, p.236

⁸⁶ “This doctrine says that a nation is sovereign within its own borders, and its domestic actions may not be questioned in the courts of another nation. Each sovereign State has complete control over the laws within its own borders and its acts cannot be questioned in the courts of another State”. Definition available at <http://definitions.uslegal.com/a/act-of-state-doctrine/> [last accessed 07.12.2013].

⁸⁷ A. CASSESE, *International Criminal Law*, New York, Oxford University Press, 2003, p. 264-265

⁸⁸ Ivi, p.266

punishment”⁸⁹. The exclusion and the irrelevance of functional immunity is further stated by the Nuremberg Tribunal itself:

“The principle of international law, which under certain circumstances, protects the representatives of a State, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings...[I]ndividuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law.”⁹⁰

However, Article 6 of the Charter of the International Military Tribunal for the Far East affirmed that the official position could not be used as a defence but it could provide a mitigation of punishment:

“Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the tribunal determines that justice so requires”.⁹¹

Both Article 7 of the Charter of the International Military Tribunal at Nuremberg and Article 6 of the Charter of the International Military Tribunal for the Far East were stated again by the International Law Commission in 1950 becoming the third Nuremberg Principle⁹² (see *infra* 3).

Moreover, the ICC Statute deals with this issue reaffirming that official capacity does not constitute a shield from criminal responsibility and cannot be used for reduction of sentence. While listing some (not all) State officials that are granted immunity *ratione*

⁸⁹ Article 7 of the Charter of the international Military Tribunal at Nuremberg, available at <http://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=87B0BB4A50A64DEAC12563CD002D6AAE>

⁹⁰ IMT, judgment of 1 October 1946 in *The Trial of German Major War Criminals, Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany*, part 22 (1950), p. 447

⁹¹ Article 6, Charter of the international military tribunal for the Far East available at <http://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=87B0BB4A50A64DEAC12563CD002D6AAE&action=openDocument>

⁹² G. WERLE, *Principles of International Criminal Law*, II edition, The Hague, T.M.C. Asser Press, 2009, p. 237

materiae, it states also that those immunities cannot be applicable to trials before this international court (and others) and also *vis-à-vis* State judiciaries⁹³ (this topic would have gained importance as a result of the development of the Pinochet Case and the final appeal of the British House of Lords⁹⁴, see *infra* 4.2) as we can understand from Article 27 (1)(2):

“1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person”⁹⁵.

It was only after the Second World War that the “shield” of functional immunities was significantly undermined as it no longer protected the senior State official accused of crimes against peace, crimes against humanity and war crimes (later also torture and other international crimes). State military officials cannot invoke their official capacity as a defence. Moreover it can be affirmed that functional immunity cannot excuse international crimes.⁹⁶

Another class of immunities granted by international customary or treaty rules includes the personal immunities or immunities *ratione personae*. These immunities from municipal courts are related not to the nature of the act but to the status of certain individuals. In fact, they are granted to some categories of individuals of a limited group of State officials, protecting both their private and public life to give them the freedom of action they need during international intercourse by rendering them inviolable while in office in order to allow the good functioning of the State apparatus. In fact in this way,

⁹³ Ivi, p.238

⁹⁴ Ibidem

⁹⁵ Article 27 of the International Criminal Court Statute, from the official website of the ICC: http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf (accessed 15 November 2013)

⁹⁶ A. CASSESE, *International Criminal Law*, New York, Oxford University Press, 2003, p. 268

they are free from any interference but this kind of immunity ends with the cessation of the individual's official duties so a former official can be try for private acts also in other countries even if he or she made such acts during his or her tenure in office while for official acts immunity *ratione materiae* remains valid⁹⁷. Individuals that can join this kind of immunity are "Heads of State, senior members of cabinet, diplomatic agents, high-ranking agents of international organizations"⁹⁸. Talking about diplomats, the Vienna Convention on Diplomatic Relations of 1961 gives an insight on this issue especially in Article 31:

"A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction [...]"⁹⁹ with some exceptions and "the immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State"¹⁰⁰;

and in Article 39:

"Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving State on proceeding to take up his post or, if already in its territory, from the moment when his appointment is notified to the Ministry for Foreign Affairs or such other ministry as may be agreed. When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist"¹⁰¹.

Also the Vienna Convention on Consular Relations helps explaining this topic, especially in Article 41:

⁹⁷ G. WERLE, *Principles of International Criminal Law*, II edition, The Hague, T.M.C. Asser Press, 2009, p. 236 and A. CASSESE, *International Criminal Law*, New York, Oxford University Press, 2003, p. 264

⁹⁸ Ibidem

⁹⁹ Article 31 (1) of the Vienna Convention on Diplomatic Relations of 1961 available at [http://www.unog.ch/80256EDD006B8954/\(httpAssets\)/7F83006DA90AAE7FC1256F260034B806/\\$file/Vienna%20Convention%20\(1961\)%20-%20E.pdf](http://www.unog.ch/80256EDD006B8954/(httpAssets)/7F83006DA90AAE7FC1256F260034B806/$file/Vienna%20Convention%20(1961)%20-%20E.pdf) (accessed on 07 December 2013)

¹⁰⁰ Ivi, Article 31 (4)

¹⁰¹ Ivi, Article 39 (1)(2)

“1. Consular officers shall not be liable to arrest or detention pending trial, except in the case of a grave crime and pursuant to a decision by the competent judicial authority.

2. Except in the case specified in paragraph 1 of this Article, consular officers shall not be committed to prison or liable to any other form of restriction on their personal freedom save in execution of a judicial decision of final effect”¹⁰².

and in Article 43:

“1. Consular officers and consular employees shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of consular functions.”¹⁰³

Personal immunity is described as “only” an obstacle to prosecution because it does not prevent criminal liability. It is also considered non *erga omnes* as, for example in the case of diplomatic officials, it can be applied only for acts “performed as between the receiving and the sending State, plus third States through whose territory the diplomat may pass while proceeding to take up, or to return to, his post, or when returning to his own country: so called *jus transitus innoxii*”¹⁰⁴.

The most important thing to remember about immunity *ratione personae* is that it lasts only until the end of the official charge of the individual so after that period the obstacle to prosecution falls becoming former Heads of State, foreign ministers and diplomats indictable. However, while in charge, they enjoy personal immunity only for crimes under international law before State criminal courts, in fact the effects of immunity on trials disappear in case of prosecution by an international tribunal¹⁰⁵, as it is possible to notice also in Article 27 (2) of the ICC Statute:

“1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

¹⁰² Article 41 (1)(2) of the Vienna Convention on Consular Relations available at: <http://treaties.un.org/doc/Publication/UNTS/Volume%20596/volume-596-I-8638-English.pdf>

¹⁰³ Article 43 (1) *ibidem*

¹⁰⁴ A. CASSESE, *International Criminal Law*, New York, Oxford University Press, 2003, p. 266

¹⁰⁵ G. WERLE, *Principles of International Criminal Law*, II edition, The Hague, T.M.C. Asser Press, 2009, p. 239

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.”¹⁰⁶

In conclusion, we can claim that immunity *ratione materiae* and immunity *ratione personae* can coexist and overlap if the State official invoke personal or functional immunity while in office. During the duration of his or her office, in fact, the individual enjoys personal immunity and also the functional one, with the only exception of the perpetration of international crimes. However, personal immunity prevails also in this case as the State official can be prosecuted only after leaving his or her office. As regard prosecution, it is always possible by international courts, while prosecution by States is only prevented by immunity *ratione personae* enjoyed by State official while in office. In all other cases, immunities do not prevent prosecution of crimes under international law.¹⁰⁷

2.3 POLITICAL ASYLUM AND POLITICAL REFUGEES

11. Aliens In International Law

It must preliminarily defined the role and the definition of alien in international law. If we have already mentioned how an individual is considered under international law and specifically under international criminal law, it is also important to understand the concept of alien to allow further remarks related to its status. The human being and particularly its protection is considered the last aim of international law which derived this idea from the ancient *jus naturae*. Although nowadays the norms of this field seem to regulate the “behaviour” and the relations among States rather than the conduct towards individuals, this system is lastly related to the safeguard of the global political structure.

Legal status and law related to aliens have been traditionally an issue in international law. Specific norms used to protect individuals during the period between 16th and 19th century and those ones were specifically focused on individuals of another

¹⁰⁶ Article 27 (1)(2) of the ICC Statute from the official website of the ICC: http://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf (accessed 15 November 2013)

¹⁰⁷ G. WERLE, *Principles of International Criminal Law*, II edition, The Hague, T.M.C. Asser Press, 2009, p. 241

State, that is, aliens. Nowadays, however, the protection of aliens is granted regardless their nationality. This development was facilitated by the rise of human rights that granted universal protection for any person¹⁰⁸.

In order to understand who is classified as an alien, its qualification as a foreign national must be taken into account. The concept of nationality is a matter of domestic legislation and it should be recognized by the legal order of other States. However, it is worth noting that a Stateless person (person who is not considered a national by any State) should not be treated like an alien. Generally speaking, an alien is a person who lives within the borders of a State but is not a citizen or subject of that country. Historically, aliens who were visiting or residing abroad could only depend upon the diplomatic protection of their home State to seek compensation for any wrongs. Vattel introduced the issue of aliens rights as a particular area of international law, comparing an injury to an alien as equivalent to an injury to the State¹⁰⁹.

A controversial point regards the standard of customary law that a State should apply to foreigners in its territory. There are two concepts to bear in mind: the international minimum standards and the national treatment standard. The first one grants the aliens some rights and obligations regardless the treatment of the State's nationals (it is usually invoked by the most developed States). The second one that was supported mainly by Latin American countries (in order to avoid the possibility to give more rights to foreign persons than to their citizens and to try to stop Western influence exercised by aliens) affirms that aliens should be treated as the nationals of a State¹¹⁰. A support to this statement was given by the Argentinean jurist Carlos Calvo and his famous *Calvo Doctrine*. It basically asserts that aliens should not have any rights or privileges that is not accorded also to nationals. It implies for example the fact that as nationals have to resort to local authorities to seek redress, also aliens have to do resort to them and not to turn to the State of which they are nationals to seek diplomatic protection. A corollary was added to this doctrine and it was usually inserted in contracts between aliens and States, and

¹⁰⁸ C. FOCARELLI, *Lezioni di Diritto Internazionale: Il Sistema degli Stati e i Valori Comuni dell'Umanità*, vol. 1, Milano, Cedam, 2012, p. 325-326

¹⁰⁹ H. DICKERSON, *Minimum Standards* in *Max Planck Encyclopedia of Public International Law*, [online encyclopedia], available through: the University of Cambridge website http://www.squire.law.cam.ac.uk/electronic_resources/legal_databases.php (Accessed 04 July 2013)

¹¹⁰ K. HAILBRONNER – J. GOGOLIN, 2009. *Aliens* in *Max Planck Encyclopedia of Public International Law*, [online encyclopedia], available through: the University of Cambridge website http://www.squire.law.cam.ac.uk/electronic_resources/legal_databases.php (Accessed 04 July 2013)

specifically, in concession agreements. The *Calvo Clause* imposes to aliens not to seek diplomatic protection from their own State against the Contracting State if this one causes them any damage. In this way it tries to find a settlement of disputes between aliens and States but it works like a waiver of the right of diplomatic protection¹¹¹.

On the contrary, international minimum standard is a principle of international customary law that regulates the treatment of aliens on the basis that States have some obligations towards aliens that are independent of any other obligation they have under international human rights law. It represents an opposite position with respect to the *Calvo Doctrine* as it derives from the doctrine of State responsibility for injuries to aliens. Only the State of nationality in fact could espouse a claim for diplomatic protection. Nowadays, international minimum standard seems to be the preferable opinion as its use has been extended to various areas such as

“the right to be free from a denial of justice; the right of aliens to protection of life and against bodily harm; and the right of both alien individuals and corporations to have their juridical personality recognized by the receiving State [and] procedural rights to aliens, including freedom of access to courts, the right to unbiased hearings, the right to participate in hearings, and the right to a judgment in accordance with the law of the State within a reasonable time”¹¹².

However, today the two main fields of application of the minimum standard are expropriations and foreign investment and trade as the raising of international human rights have narrowed the area of application to international economic law¹¹³.

The current situation of aliens and individuals is more and more regulated by public international law, international criminal law and human rights law. However, the most important rules relating to aliens (nationality, property, extradition, expulsion, admission and residence for example) are still part of the domestic realm and vary in relation to States practice. But it is worth noting the fact that this sphere is being limited by the internationalization of some domestic matters and the fact that some legal matters

¹¹¹ P. JUILLARD, *Calvo Doctrine-Calvo Clause* in *Max Planck Encyclopedia of Public International Law*, [online encyclopedia], available through: the University of Cambridge website http://www.squire.law.cam.ac.uk/electronic_resources/legal_databases.php (Accessed 04 July 2013)

¹¹² H. DICKERSON, *Minimum Standards* in *Max Planck Encyclopedia of Public International Law*, [online encyclopedia], available through: the University of Cambridge website http://www.squire.law.cam.ac.uk/electronic_resources/legal_databases.php (Accessed 04 July 2013)

¹¹³ *ibidem*

such as human rights are now regulated by public international law that is on the other side still lacking of the proper legal enforcement mechanisms for individuals as some major issues such as the refugees problems could only be solved on the level of international law¹¹⁴.

12. Refugees And Asylum Seekers

A particular category of aliens is represented by asylum seekers and refugees. Often the two terms are confused and used as synonyms but they refer to different ideas.

According to the United Nations High Commissioner for Refugees website “an asylum-seeker is someone who says he or she is a refugee, but whose claim has not yet been definitively evaluated”¹¹⁵.

The 1951 Convention Relating to the Status of Refugees (and its 1967 Protocol), which is considered the most important legal instrument for the protection of refugees, defines a refugee as

“Any person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his/her nationality and is unable, or owing to such fear, is unwilling to avail himself/herself of the protection of that country”¹¹⁶.

This definition is the basis for the humanitarian assistance on a worldwide basis and provides a minimum standard for the status of a person as refugee and a ground to give rise to State obligations towards that individual. Furthermore, it provides a standard for the treatment of refugees. Analyzing the Refugee Convention, one of the most significant points to discuss is the notion of persecution. Actually this represents the discriminating factor thanks to which we can understand who can be considered a refugee.

In general, in this convention, a person is considered persecuted if his or her life, freedom or other substantial rights are threatened by a State or a State-like entity.

¹¹⁴ K. HAILBRONNER – J. GOGOLIN, 2009. *Aliens* in *Max Planck Encyclopedia of Public International Law*, [online encyclopedia], available through: the University of Cambridge website http://www.squire.law.cam.ac.uk/electronic_resources/legal_databases.php (Accessed 04 July 2013)

¹¹⁵ <http://www.unhcr.org/pages/49c3646c137.html>

¹¹⁶ Convention Relating to the Status of Refugees (Refugee Convention) <http://www.unhcr.org/3b66c2aa10.html>

Normally, the persecution is intentional although violations of refugee's sphere could derive also from a situation that does not present intentional measures against him or her.

This article lists some possible causes of persecution, that are better explained in other conventions. Article 7 (2) lit. g of the Rome Statute of the International Criminal Court described persecution as “the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity”¹¹⁷ and it is included in the definition of crimes against humanity, while in the Refugee Convention the notion of persecution implies a wider meaning. The five grounds of persecution in some ways limit the notion of persecution and it is possible to resort to other legal instruments to explain those terms. As regard the race for example, racial discrimination could be based on “race, colour, descent, or national ethnic origin” as mentioned in Article 1 (1) of the International Convention on the Elimination of all Forms of Racial Discrimination¹¹⁸. Another example could be the persecution based on religion which has a long history and whose formulation was included in Article 18 of the International Covenant on Civil and Political Rights of 1966¹¹⁹. The violation to this Article would lead to the qualification of the victim as a refugee under the Refugee Convention. To conclude with the persecution based on political opinions, it protects a right already mentioned in Article 19 of the Universal Declaration of Human Rights of 1948¹²⁰ relating to the freedom of opinion and expression. Usually, persecution refers to State persecution but nowadays also to non-State actors that can be responsible for

¹¹⁷ Rome Statute of the International Criminal Court, from the official website of the ICC: http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf (accessed 15 November 2013)

¹¹⁸ “In this Convention, the term “racial discrimination” shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.” International Convention on the Elimination of all Forms of Racial Discrimination <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>

¹¹⁹ “Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.” International Covenant on Civil and Political Rights (1966) (‘ICCPR’) <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

¹²⁰ “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.” Universal Declaration of Human Rights (1948) <http://www.un.org/en/documents/udhr/>

causing any danger to individual integrity and dignity which can result in the lack of protection in the territory the refugees are forced to leave to seek refuge elsewhere¹²¹.

Going back to the distinction between asylum seekers and refugees, the protection of asylum seekers is a concept which is included in refugee law but the relation between them is not easy determinable.

The two terms refer to different immigration processes. Asylum is granted by a sovereign State in order to protect a foreign national against the jurisdiction of another State, as asylum seekers need protection due to an individual fear of persecution. Moreover, asylum implies a long-term stay and usually, together with the acceptance of the asylum, also a set of rights are granted to the asylee. Even if a State can deny asylum to an asylum seeker, it has still to grant protection under refugee law. In addition, it must be noticed that asylum is considered a more extensive and intensive concept than the protection of refugees as asylum implies more obligations for the State that grants it to individuals. In none of the non-binding international instruments the reasons for granted asylum are detailed while the Refugee Convention provides grounds of persecution and a highly complex regime as regards the position of the refugee¹²².

A final remark should be made about the political refugees. They are individuals who seek protection from persecution based on their political opinions that can be actual political opinion (for example they are member of human rights groups in a dictatorship) or a political opinion that is imputed to them (for example their parents were political activists, or the individuals are from a particular rebellious region).

13. Territorial Asylum

The practice of granting asylum to people escaping from persecution in foreign lands is one of the earliest forms of civilization. It was a widespread practice adopted since the Ancient Age (Egyptians, Greeks, Hebrews) and was often granted also by churches and sanctuaries especially during the Middle Age. It derives from the Greek word *asylon*, which means something not subject to seizure. In the past, also some famous thinkers resorted to asylum such as Descartes, Voltaire and Hobbes for example.

¹²¹ D. KUGELMANN, *Refugees* in *Max Planck Encyclopedia of Public International Law*, [online encyclopedia], available through: the University of Cambridge website http://www.squire.law.cam.ac.uk/electronic_resources/legal_databases.php (Accessed 04 July 2013)

¹²² *ibidem*

After the Second World War, it started to be much more politically-based, even if there are various grounds to get asylum. Asylum or political asylum is usually accorded by a State to an individual who is persecuted by his or her own country. Its aim is to provide protection to those people who are unable or unwilling to go back to their country because of a well-founded fear of persecution. However, they must be able to prove that they are being or have been persecuted in order to qualify for protection. A State can grant asylum implicitly or explicitly or avoiding extradition to another country even though it does not necessarily imply the right of residence or the right to remain in the territory¹²³.

According to Article 14 of the Universal Declaration of Human Rights “everyone has the right to seek and to enjoy in other countries asylum from persecution. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations”¹²⁴. The concept of asylum is laid down also in the 1967 Declaration on Territorial Asylum (these principles are still part of the current legal framework, even if with some refinements arisen in accordance with the practice of States and international organizations) which states that “asylum granted by a State, in the exercise of its sovereignty, to persons entitled to invoke Article 14 of the Universal Declaration of Human Rights, including persons struggling against colonialism, shall be respected by all other States”¹²⁵. It is worth underlying that granting asylum is an act of domestic legislation in the exercise of State sovereignty that other States should respect and it is important to notice the reference to colonialism that was still perceived as a problematic topic during that period. The Article continues affirming that “the right to seek and to enjoy asylum may not be invoked by any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes.”¹²⁶. This aspect is of paramount importance because it suggests that asylum should not be granted to people who are criminally responsible for such acts against

¹²³ K. HAILBRONNER– J. GOGOLIN, 2009. *Asylum, Territorial* in *Max Planck Encyclopedia of Public International Law*, [online encyclopedia], available through: the University of Cambridge website http://www.squire.law.cam.ac.uk/electronic_resources/legal_databases.php (Accessed 04 July 2013)

¹²⁴ Universal Declaration of Human Rights (1948) <http://www.un.org/en/documents/udhr/>

¹²⁵ Declaration on Territorial Asylum
[http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/2312\(XXII\)](http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/2312(XXII))

¹²⁶ *ibidem*

international law. As these instruments do not explicitly detail the grounds for granting asylum and the kind of protection of asylum seekers, the decision to grant asylum or not rest with the State that will evaluate the conditions and the grounds to grant it to people claiming for it.

It is interesting to analyze the two ways in which the right to asylum can be understood. In fact it is possible to talk about the State's right to grant asylum, which is the traditional point of view but in the modern sense we can also refer to the individual's right of asylum. In the first meaning, this right of a State to grant asylum is only one expression of the exercise of the territorial sovereignty as a State (according also to customary international law) has the freedom to offer asylum in its territory to any person at its own discretion without harming the friendly relations between States as it is usually not considered an unfriendly act¹²⁷. The only restrictions to the right of a State to grant asylum are represented by the provisions included in conventions and treaties to which it is party as those related to crimes against humanity (encompassing crimes against peace and war crimes), alliance agreements usually related to the status of military forces abroad and those concerning ordinary offences (encompassing extradition treaties).¹²⁸

In recent years the fear of terrorism has led to the sign of some conventions and treaties that contain provisions affecting asylum (usually in the form *aut dedere, aut judicare*).

The other way to understand the right of asylum comes from the point of view of the individual, as it can also be considered as an individual right to seek asylum in another State, although all the attempts to establish an individual right to be granted asylum on a universal level have largely failed. However, one important principle has emerged in various treaties and presumably it can be now considered as part of customary international law¹²⁹. It is the principle of non-refoulement, which prohibits return,

¹²⁷ "The grant of asylum by a State...is a peaceful and humanitarian act and that, as such, it cannot be regarded as unfriendly by any other State" Preamble to the Declaration on Territorial Asylum of 1967 [http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/2312\(XXII\)](http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/2312(XXII))

¹²⁸ K. HAILBRONNER– J. GOGOLIN, 2009. *Asylum, Territorial* in *Max Planck Encyclopedia of Public International Law*, [online encyclopedia], available through: the University of Cambridge website http://www.squire.law.cam.ac.uk/electronic_resources/legal_databases.php (Accessed 04 July 2013)

¹²⁹ *ibidem*

extradition, or expulsion to a country of persecution. It was first stated in Article 33 of the Geneva Refugee Convention¹³⁰.

14. Diplomatic Asylum and Diplomatic Missions

The main difference between territorial asylum and diplomatic asylum is that the first one is asylum provided by a State in its own territory while the second one is asylum in other places, mainly on the premises of an embassy or a legation. Better explained, the diplomatic mission of a sending State can offer protection to refugees present in the premises of the mission. This idea entails a derogation to the sovereignty of the State in which there is the diplomatic mission. In international law there is no general right to grant diplomatic asylum, and there is like a “collision” between the right of a State (to grant asylum) against the sovereignty of another country. In this case, individuals seek protection in the persecuting State (or in a third one) and the diplomatic mission provides legal or physical protection (the individual is not in the State of refuge). The right to grant diplomatic asylum is exercised by diplomatic personnel in their capacity as privileged aliens¹³¹.

Today this concept is generally accepted in international law and its development could be linked with the principle of inviolability of diplomatic missions in Europe during the Middle Age (nowadays this principle is granted under Article 22 of the Vienna Convention on Diplomatic Relations of 1961¹³²). It was a common practice since the 15th century to grant asylum within the premises of diplomatic missions. Such claim was based on the fact that such premises were enjoying extraterritoriality as they were part of the home State of the diplomatic envoy. During the 16th and 17th centuries, there was an increase in the number of as political and religious dissent in Europe and foreign embassies soon became places where dissidents frequently fled, as they knew the heads

¹³⁰ “No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”. Refugee convention <http://www.unhcr.org/3b66c2aa10.html>

¹³¹ P. SHAH, 2007. *Asylum, Diplomatic* in *Max Planck Encyclopedia of Public International Law*, [online encyclopedia], available through: the University of Cambridge website http://www.squire.law.cam.ac.uk/electronic_resources/legal_databases.php (Accessed 04 July 2013)

¹³² “ The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission”. Article 22 of the Vienna Convention on Diplomatic Relations of 1961 [http://www.unog.ch/80256EDD006B8954/\(httpAssets\)/7F83006DA90AAE7FC1256F260034B806/\\$file/Vienna%20Convention%20\(1961\)%20-%20E.pdf](http://www.unog.ch/80256EDD006B8954/(httpAssets)/7F83006DA90AAE7FC1256F260034B806/$file/Vienna%20Convention%20(1961)%20-%20E.pdf)

of diplomatic missions would have denied local officials the right to enter their premises. The so-called *franchise du quartier* (the right against local officials entering the area surrounding the embassy premises) helped reinforcing the diplomatic right to grant asylum even if often local police of the receiving sovereign State entered premises to arrest wanted persons¹³³.

The general position of international law today was stated by the International Court of Justice in the famous Haya de la Torre Cases.

After an unsuccessful military rebellion in Peru on 3 October 1948, criminal proceedings against the culprits of the military revolution were initiated in Peru, among them the leader Victor Raul Haya de la Torre for the crime of military rebellion. Following some months in hiding, he sought and obtained asylum in the Colombian Embassy in Lima (the receiving State) on 3 January 1949. Peru and Colombia, after months of failed attempts to solve the issue, agreed to refer the dispute to the International Court of Justice (ICJ) to clarify the circumstances under which diplomatic asylum may be granted and to get explanations regarding the Convention on Asylum signed at Havana on 20 February 1928 ('Havana Convention'). The ICJ delivered three judgments: the first two under the name Asylum Case (Colombia/Peru) ('Asylum Case') and the third one under the name Haya de la Torre Case (Colombia/Peru). The Court stated that The ICJ stated that:

“In the case of diplomatic asylum, the refugee is within the territory of the State where the offence was committed. A decision to grant diplomatic asylum involves a derogation from the sovereignty of that State. It withdraws the offender from the jurisdiction of the territorial State and constitutes an intervention in matters which are exclusively within the competence of that State. Such a derogation from territorial sovereignty cannot be recognized unless its legal basis is established in each particular case”. (Asylum Case 274–75)¹³⁴

This statement confirmed the fact that there was not a general rule of international law permitting a grant of asylum and every case had to be analyzed. Colombia was asking if the State granting asylum had the competence to characterize by unilateral decision that the person given asylum was accused of a political and not a common

¹³³ P. SHAH, 2007. *Asylum, Diplomatic* in *Max Planck Encyclopedia of Public International Law*, [online encyclopedia], available through: the University of Cambridge website http://www.squire.law.cam.ac.uk/electronic_resources/legal_databases.php (Accessed 04 July 2013)

¹³⁴ *ibidem*

crime. The Court affirmed that such qualification of the offence by this State would involve an intrusion on the sovereignty of the territorial State because it removed the refugee from the jurisdiction of the territorial State intervening unacceptably in the competence of the territorial State. Moreover, Colombia was not able to prove the existence of a regional or local custom or a general rule of customary international law with respect to unilateral and definitive qualification. On the other side, Peru failed to prove that Haya de la Torre was responsible for common crimes (to which a State should not grant asylum to the culprits) as military rebellion, was a political offence (even if it is not Colombia the one that had to qualify it). In addition, Peru was not obliged to grant a safe-conduct for the departure of Haya de la Torre from Peru.

In the third judgment, Colombia asked the Court if it should surrender Haya de la Torre to Peru. It found that the asylum should be terminated as soon as possible, even if Colombia was not obliged to surrender Haya de la Torre to Peru. According also to the Havana Convention, in fact, it was not required to the State granting asylum (even if granted irregularly) to hand over the refugee as it provided only for the surrender of common criminals, not for that of political offenders. As surrendering the refugee was not the only option to terminate asylum, the Court suggested that the parties should have found a solution based on courtesy. At the end he remained in the Colombian Embassy before leaving Peru in 1954¹³⁵.

Although practice has been inconsistent, it has been claimed that the right of diplomatic asylum exists as a norm of regional international law among Latin American States and it is important to notice that the Haya de la Torre cases took place in Latin America demonstrating also the need to a uniform and consistent practice. These cases represent a cornerstone for diplomatic asylum even if it appeared a narrower concept than territorial asylum because the first one arose concerns related to the interference in the territorial sovereignty of the territorial State. Moreover, it was proved that States granting diplomatic asylum do not have the right to unilateral qualification of the offence. Finally, they made clear that asylum may not be abused in order to avoid the administration of domestic justice. This notion was also stated in Article 41 of the Vienna Convention on

¹³⁵ K. HAILBRONNER, M. POHLMANN, *Haya de la Torre Cases* in *Max Planck Encyclopedia of Public International Law*, [online encyclopedia], available through: the University of Cambridge website http://www.squire.law.cam.ac.uk/electronic_resources/legal_databases.php (Accessed 04 July 2013)

Diplomatic Relations of 1961¹³⁶. However, the current tendency seems to favour the return to the State if the refugee is accused of a criminal charge and if the competent authorities of the receiving State have issued a warrant for his arrest. On the other side, a head of a diplomatic mission does not have the duty to refuse entry to persons who wish to take refuge in the embassy, as this could be accepted for humanitarian reasons and to save lives (this is what happened for example when diplomatic missions of Western countries in the East bloc States granted refuge and safe passage to Eastern Germans during the Cold War)¹³⁷.

A final point to analyze regards the diplomatic missions. There are various types of diplomatic missions in a foreign State and they can be classified according to the functions and the representatives that work there. Basically, a diplomatic mission is a link as it represents the home country in the host country protecting the interests of the home country and its citizens. Moreover, it has the task of negotiating with the host government and promoting and developing political, economic, commercial, scientific and cultural relations as well as to issue passports, visas and travel documents. In a country we can find different types of diplomatic mission but the most important (and also the only one that has the right to grant asylum) is the Embassy which is usually located in the capital city of the host country and offers a wide range of services including consular services. Then there is the Consulate General which is located major city different from the capital and the Consulate which is similar to the Consulate General but offers less services and finally the Consulate headed by Honorary Consul which offers only a limited number of services. There is also the Permanent Mission that is a diplomatic mission to a major international organization¹³⁸.

To conclude, perhaps it is possible to draw a link between asylum and the Responsibility to Protect (R2P) which entails the duty for the international community to protect populations from mass atrocities. It is an initiative, a norm not a law, established by the United Nations in 2005 claiming that sovereignty includes not only rights but also

¹³⁶ “[...]it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of that State”. Article 41 of the Vienna Convention on Diplomatic Relations of 1961 [http://www.unog.ch/80256EDD006B8954/\(httpAssets\)/7F83006DA90AAE7FC1256F260034B806/\\$file/Vienna%20Convention%20\(1961\)%20-%20E.pdf](http://www.unog.ch/80256EDD006B8954/(httpAssets)/7F83006DA90AAE7FC1256F260034B806/$file/Vienna%20Convention%20(1961)%20-%20E.pdf)

¹³⁷ P. SHAH, 2007. *Asylum, Diplomatic* in *Max Planck Encyclopedia of Public International Law*, [online encyclopedia], available through: the University of Cambridge website http://www.squire.law.cam.ac.uk/electronic_resources/legal_databases.php (Accessed 04 July 2013)

¹³⁸ http://www.ediplomat.com/nd/mission_types.htm

duties and responsibilities for States to protect their populations. It is based on three pillars: the first one entails the “responsibility of the State to protect its populations, whether nationals or not, from genocide, war crimes, ethnic cleansing and crimes against humanity, and from their incitement”¹³⁹; the second one provides for “the commitment of the international community to assist States in meeting those obligations”¹⁴⁰ while the third pillar regards the “responsibility of Member States to respond collectively in a timely and decisive manner when a State is manifestly failing to provide such protection”¹⁴¹. In a broader sense, it could be possibly be linked with the institution of asylum in the sense that when a State fails to protect its own citizens from mass atrocities, their nationals can find support and protection in another State willing to get them asylum. It can be considered as a short-term measure to help people especially in the zones of war where they could face genocide, ethnic cleansing, war crimes and crimes against humanity or other human rights atrocities and where the number of refugees is often very high. Asylum could help to fill the gap in the system of refugee protection and also avoid a direct humanitarian intrusion or intervention as well as the obstacle represented by the fact that in order to help victims, international agencies need governmental approval often by the same authorities that are responsible for the abuses¹⁴².

15. Diplomatic Protection

The principle of diplomatic protection is applied by the sending State if the receiving State violates international rules that regard the treatment of aliens. It is a State’s right to assist and support its citizens through its diplomatic and consular organs in a foreign State and its citizens are “only” the recipients of this exercise of sovereignty of the sending State over its nationals. It is based on the assumption that an offence made against a citizen of a sending State is equivalent to an offence made directly against the same State although its final aim is to protect the individual rights of the citizens. The

¹³⁹ Secretary-General's 2009 Report (A/63/677) on Implementing the Responsibility to Protect http://www.un.org/en/ga/search/view_doc.asp?symbol=A/63/677

¹⁴⁰ *ibidem*

¹⁴¹ *ibidem*

¹⁴² <http://www.responsibilitytoprotect.org/index.php/component/content/article/35-r2pcs-topics/1763-unhcr-embracing-the-esponsibility-to-protect-a-repertoire-of-measures-including-asylum-for-potential-victims>

principles of diplomatic protection are laid down in the Vienna Convention on Consular Relations of 1963 which well explained that a State is not compelled to exercise diplomatic protection but on the other side it has to allow the exercise of this right by other States for the benefit of their nationals. Article 36 is very important as it enables free communication between the national in distress and its sending State and the right to visit and organize his or her legal representation¹⁴³. In Europe it is important to underline the presence in Article 23 of the TFEU that every Member State can provide diplomatic protection to any national of another Member State.

Conclusion

The institution of asylum is still considered an important feature in international community, although the individuals entitled to protection and the exclusion from protection of the most dangerous international criminals have developed with the consolidation of international criminal law. Each State has to evaluate the bases to grant the asylum but this freedom is nowadays more qualified, due to the rising recognition of individual rights and the fact that these rules have been reinforced by States' practice. To testify the fact that refugees continue to be a matter of international concern, States began to collaborate to each other and with the Office of the United Nations High Commissioner for Refugees, in order to improve their protection, even if the fears of interference in domestic affair and the preference to act individually are still present in States conduct. Regional cooperation is another evidence of this process.

However, it must be noticed that a gap between people that seek asylum and the grant of asylum continues to exist and the fact that there is not a clear definition of asylum does not help to cover this disjuncture. As said before, it can be considered as the grant of protection to a non-citizen by a territorial State or by a diplomatic mission and it remains of paramount importance in international law and to provide the individual to whom it is granted the basic individual human rights that he cannot have in his own country.

¹⁴³ Vienna Convention on Consular Relations of 1963
<http://treaties.un.org/doc/Publication/UNTS/Volume%20596/volume-596-I-8638-English.pdf>

PART 2:

CASE-STUDIES: THE APPLICATION OF INTERNATIONAL CRIMINAL LAW IN SOME RELEVANT TRIALS

The second part of this dissertation deals with the comparative analysis of some of the most important international trials that represented milestones in the field of international criminal law. In fact, they helped to configure the current situation of this area of study and they are of paramount importance in presenting how concretely some of the theoretical concepts before mentioned are applied by courts all over the world and during the time.

3- EICHMANN AND THE NUREMBERG PRINCIPLES

Contents - 16. Introduction; 17. The Background And The Establishment Of The International Military Tribunal At Nuremberg; 18. The Judges, The Defendants And The Crimes; 19. Charge One: Conspiracy; 20. Charge Two: Crimes Against Peace; 21. Charge Three: War Crimes; 22. Charge Four: Crimes Against Humanity; 23. Criticism and Assessment; 24. The Nuremberg Principles; 25. The Nuremberg Legacy; 26. Factual Background; 27. National prosecution of international crimes, abduction and universal jurisdiction; 28. Criminal defences: superior orders and act of state doctrine; 29. Conclusion. –

The Second World War represented a watershed under many points of view. It changed the course of the history in the most dramatic way marking the routes for great changes in the international equilibrium that would be characterized by the development of the Cold War and the opposition of two totally different ideologies. Moreover, the years after the end of the war favoured the maturation of the idea that cooperation and collaboration among States could save the world from another tragedy like the two World

Wars that had marked the first half of the 20th century. For this reasons the aftermath of the fall of the Third Reich represented the most active period for politics, economy and also international law. The reconstruction of the States and their economy under the two different ideologies that were dominating the world (communism and capitalism) led to a rebirth of international exchanges and an economic boom in several countries. Also politics bear the weight of the evolution of the Cold War and to underline the willingness to cooperate also under this point of view, many States joined together under the Warsaw Pact or the North Atlantic Treaty Organization (NATO). Also the field of international law underwent notable changes, the most important represented by the creation of the United Nations that should have represented a forum of discussion, a place to explain the global problems and to find solutions in a peaceful way. It was the beginning of a new era, in which treaties and agreements were supposed to be signed in order to avoid wars and destruction and not to prepare conflicts. One of the earliest signs of this new trend was the creation of the International Military Tribunal at Nuremberg to try the Axis war criminals stating officially for the first time the notion of individual criminal responsibility. Especially before that moment, in fact, only States had been considered the main responsible for criminal conduct under public international law. Moreover, the desire to punish the culprits of the devastation of the war and the perpetrators of crimes against humanity, against peace and war crimes was too strong not to do something. What happened in Nuremberg marked the history of international criminal law and was a milestone for this discipline and further trials related or not with the Second World War. An important example of the legacy of these events is represented by the Eichmann case, which is strictly linked with the Nuremberg judgment.

3.1 INTERNATIONAL CRIMINAL TRIBUNALS: THE CREATION OF THE INTERNATIONAL MILITARY TRIBUNAL AT NUREMBERG

16. Introduction

Three main milestones characterize the development of international criminal law. In the mid-1990s the United Nations created *ad hoc* Tribunals for former Yugoslavia and Rwanda underlining once again the importance of international criminal law as customary law. The most important effort was the constitution of the International Criminal Court in the Hague with the Rome Statute that came into force in 2002. It

represented the last step of the crystallization of international criminal law and provided the first codification of this subject. However, the first stage was represented by the creation of the International Military Tribunal at Nuremberg in the aftermath of the horrors of the Second World War. The Charter of this court was considered in fact the origin of international criminal law as for the first time persons were held criminally accountable under international law¹⁴⁴.

Before the creation of the Nuremberg and Tokyo tribunals, in fact, there had been rare attempts to bring individuals to account for the commission of international crimes. The most notable effort in modern era was the trial of Peter von Hagenbach in 1474 for crimes such as sexual offences, rape and murder and the international tribunal comprised judges from Alsace, Austria, Germany and Switzerland¹⁴⁵.

In more recent times, at the end of the First World War, the preliminary Paris Peace Conference in 1919, set up by the Allies, established the Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties for Violations of the Laws and Customs of War (*Commission des Responsabilités des Auteurs de la Guerre et Sanctions*), a fifteen-member commission with the aim to investigate the responsibility for the war and the various violations of laws. Its preparatory work was useful to decide the creation of an international tribunal to try the Kaiser as it was contained in Article 227 of the Versailles Peace Treaty of 28 June 1919 which stated that

“The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties. A special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defence. It will be composed of five judges, one appointed by each of the following Powers: namely, the United States of America, Great Britain, France, Italy and Japan. [...]The Allied and Associated Powers will address a request to the Government of the Netherlands for the surrender to them of the ex- Emperor in order that he may be put on trial”¹⁴⁶.

¹⁴⁴ G. WERLE, *Principles of International Criminal Law*, II edition, The Hague, T.M.C. Asser Press, 2009, p. 3

¹⁴⁵ I. BANTEKAS, S. NASH, *International Criminal Law*, II Edition, London, Cavendish Publishing Limited, 2003, p. 326

¹⁴⁶ The Peace Treaty of Versailles (1919) available at <http://net.lib.byu.edu/~rdh7/wwi/versailles.html>

However, these provisions were never become concrete, as no international tribunal was created. Furthermore, the former Kaiser was granted asylum in the Netherlands avoiding trial before any criminal court¹⁴⁷. The Netherlands, in fact, refused to accept the extradition request made by the Allied powers claiming that Dutch legislation only provided for extradition to a sovereign State, not a coalition. According to the Versailles Peace Treaty (Articles 228 and 229)¹⁴⁸, Germany should have surrendered German nationals to the Allied to start their prosecution for war crimes but it refused to hand over all the persons named by the Allies imposing its veto that came from the fact that German capitulation was not unconditional. The compromise was reached on the basis of a trial of some suspects before the German Reich Supreme Court (*Reichsgericht*), specifically the Criminal Senate of the Imperial Court Justice in Leipzig. However, only a small number of cases was considered and none of the sentences was fully executed¹⁴⁹.

For all these reasons we can claim that the Leipzig War Crimes Trials should not be considered as a success as they had only an indirect impact on the evolution of international criminal law (the basis for the trials was German criminal law and there was not criminal prosecution of international crimes carried out by German nationals in the First World War) but they cannot be underestimated too. In fact for the first time the concept of individual criminal responsibility was officially stated in an international treaty¹⁵⁰.

¹⁴⁷ G. WERLE, *Principles of International Criminal Law*, II edition, The Hague, T.M.C. Asser Press, 2009, p. 4-5 and R. CRYER, H. FRIMAN, D. ROBINSON, E. WILMSHURST, *An Introduction to International Criminal Law and Procedure*, New York, Cambridge University Press, 2007, p. 91

¹⁴⁸ “The German Government recognises the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. [...]The German Government shall hand over to the Allied and Associated Powers, [...], all persons accused of having committed an act in violation of the laws and customs of war [...]” Article 228; “Persons guilty of criminal acts against the nationals of one of the Allied and Associated Powers will be brought before the military tribunals of that Power [...]”, Article 229 of the Peace Treaty of Versailles (1919) available at <http://net.lib.byu.edu/~rdh7/wwi/versailles.html>

¹⁴⁹ I. BANTEKAS, S. NASH, *International Criminal Law*, II Edition, London, Cavendish Publishing Limited, 2003, p. 326

¹⁵⁰ G. WERLE, *Principles of International Criminal Law*, II edition, The Hague, T.M.C. Asser Press, 2009, p. 6

3.2 - THE FACTS

After the First World War, the situation in Germany was dramatic. It was economically devastated, as the Treaty of Versailles by placing the full responsibility for the war on Germany, demanded heavy reparations in return, that the country was never able to pay totally. Moreover, also the German pride was humiliated and a full recovery and the efforts to rebuild the country were not facilitated by the hostile international community. To make the situation worse, the worldwide Great Depression started in the US in 1929 hit Germany with the most terrible consequences for a nation already affected by numerous economic, political and social problems. All these factors fostered the growth of feelings such as desperation, resentment and desire of revenge, creating the grounds for the rise to power of Adolf Hitler. During difficult and hard periods in fact radical political parties have usually gained popularity and the same happened in Germany (where they ranged from Communist to right-wing parties). Among the more extreme right-wing activists, there was Adolf Hitler, who joined and transformed the National Socialist German Workers' Party (the Nazi Party) starting from 1920-1921. It grew very rapidly due to the widespread dissatisfaction that the population was feeling in those years. Hitler became chancellor in 1933 and was able to consolidate his power very rapidly. Since 1935 he started to ignore the terms of the Treaty of Versailles, rebuilding Germany's military forces and annexing neighboring countries' territories as happened with all of Austria (justified by his doctrine of Anschluss, that implied a natural political unification of Germany and Austria) and most of Czechoslovakia (starting with the Sudetenland, a territory along the German-Czech border). The Second World War officially began when Germany invaded Poland on 1 September 1939. Hitler openly spoke of his aim to conquer territories in order to satisfy Germany's need for lebensraum, or "living space." Hitler political strategy often imply to ignore agreements and treaties (as the German-Soviet Nonaggression Pact) and he was favoured by the policy of appeasement of Hitler's demands carried on by the Allies.

The internal policy of the Nazi was characterized also by a strong anti-Semitism that was first developed by imposing racial law against Jews and other minorities and then from about 1941 by internalizing them in concentration camps in Poland, Czechoslovakia, Lithuania, Latvia, Ukraine, and western Russia. At the beginning the prisoners were used as slaves and then systematically murdered. During the Wannsee Conference in 1942 some Nazi officials gathered to solve the so-called "Jewish question"

and although they talked about all of mandatory sterilization and mass emigration the result was the idea to implement the Endlösung or Final Solution by mass killing and when the process speeded up, they found that the better method of killing was to use gas chambers, although many of them died by disease, overwork, or starvation. German camps were basically of two types: labor camps throughout Europe and extermination camps which were created appositely to kill Jews, other minorities, sick people, homosexuals and prisoners of war and they continued to work until the Allied liberated them.

Regarding the organization of German government, there was a strict hierarchy whose leader was Hitler (also called the Führer) that was characterized by his strong charismatic power. Every decision came from him or was approved by him (his great influence was often used by other officials as an excuse to relieve their position during the trials). He surrounded himself with men he knew and trusted creating like an inner circle in the hierarchy. The second most powerful man was Hermann Goering who established the Gestapo, the Nazi secret police (later led by Heinrich Himmler from 1934) and commanded the Luftwaffe, Germany's air force. Joseph Goebbles was the Minister for Public Enlightenment and Propaganda. He regulated all German media organizing the anti-Semitism propaganda also by producing Nazi propaganda films and Hitler's public speaking events. Apart from controlling the Gestapo, Heinrich Himmler presided various concentration camps while Martin Bormann by becoming Hitler's secretary gained a lot of power as he controlled Hitler's appointments.

17. The background and the establishment of the International Military Tribunal at Nuremberg

Already during the occurrences of the conflict, the Allies understood the need and the importance to try the Axis war criminals and they issued a declaration in Moscow in 1943 promising the punishment of the major criminals¹⁵¹. Churchill, Stalin and Roosevelt

¹⁵¹ "At the time of granting of any armistice to any government which may be set up in Germany, those German officers and men and members of the Nazi party who have been responsible for or have taken a consenting part in the above atrocities, massacres and executions will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the

agreed on the fact that German criminals would be returned to the countries where they committed the crimes and judged on the spot by the peoples whom they have harmed. Even if later Churchill proposed to consider the major war criminals as world outlaws and be shot without trial the United States and the URSS persuaded him that a trial would be preferable to a summary execution. The final meeting among France, the UK, the US and the URSS took place in London in 1945 to draft the charter of the international tribunal that would have this task. After some discussion, mainly between the US and the URSS, on 8 August 1945 the four Allied signed the London Agreement which gave origin to the Nuremberg International Military Tribunal¹⁵². The Nuremberg Charter was included as an appendix to the London Agreement that provided the basis “for the trial of war criminals whose offences have no particular geographical location”¹⁵³. Also nineteen other States adhered to the charter that provided for the trials of “major war criminals of the European Axis”¹⁵⁴. The Allies had created the first international court.

Concerning other war criminals, they were tried by single allied powers responsible for the administration of the different zones of the occupied Germany (accordingly with Allied Control Council Law No. 10 that provided for domestic prosecution of crimes against peace, crimes against humanity and war crimes). The Allied powers occupying Germany prosecuted crimes in their occupation zones. ‘Subsequent proceedings’ took place in Nuremberg by the US and one of the most important was the trial of Nazi doctors. Other trials took place in British, Soviet and

laws of these liberated countries and of free governments which will be erected therein.” Declaration of Moscow (1943) available at <http://avalon.law.yale.edu/wwii/moscow.asp>

¹⁵² R. CRYER, H. FRIMAN, D. ROBINSON, E. WILMSHURST, *An Introduction to International Criminal Law and Procedure*, New York, Cambridge University Press, 2007, p. 93

¹⁵³ “Article 1. There shall be established after consultation with the Control Council for Germany an International Military Tribunal for the trial of war criminals whose offences have no particular geographical location whether they be accused individually or in their capacity as members of organizations or groups or in both capacities.” Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (“London Agreement”) (1945): <http://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=87B0BB4A50A64DEAC12563CD002D6AAE&action=openDocument>

¹⁵⁴ “Article 1: In pursuance of the Agreement signed on 8 August 1945, by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Union of Soviet Socialist Republics, there shall be established an International Military Tribunal (hereinafter called “the Tribunal”) for the just and prompt trial and punishment of the major war criminals of the European Axis”. Charter of the International Military Tribunal at Nuremberg - Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (“London Agreement”) (1945): <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=3ae6b39614>

French zones¹⁵⁵. Other individuals were to be prosecuted by other countries on the basis of the territorial principle of jurisdiction (that is, where the offences were committed). Furthermore, in order to try the major Japanese war criminals, in 1946 General Douglas MacArthur, the Allied Supreme Commander of the Pacific Theatre of Operations ordered the establishment of an International Military Tribunal for the Far East (IMTFE) sitting in Tokyo¹⁵⁶. The decision to conduct the trial in Nuremberg was a symbolic choice: although the city was destroyed by the airstrikes during the war, it had been the preferred stage for the Nazi meetings during the Thirties and the Allies wanted to underline the connection with the dishonourable anti-Semitic laws introduced by Nazi Party in 1935 and become famous as the Nuremberg Laws.

18. The judges, the defendants and the crimes

The opening session of the trial took place in Berlin on 18 October 1945. The Tribunal received the indictment on 10 October 1945 but the hearings began on the 18 November 1945 in the Palace of Justice of Nuremberg, a town closely related with Nazism. The trial lasted over ten months with 403 open sessions and finally closed on 1 October 1946.

Twenty-four defendants were indicted before the tribunal: Hermann Goring, Rudolf Hess, Joachim von Ribbentrop, Wilhelm Keitel, Ernst Kaltenbrunner, Alfred Rosenberg, Hans Frank, Wilhelm Frick, Julius Streicher, Walter Funk, Hjalmar Schacht, Karl Donitz, Willem Raeder, Baldur von Schirach, Fritz Saukel, Alfred Jodl, Franz von Papen, Arthur Seyss-Inquart, Albert Speer, Konstantin von Neurath and Hans Fritzsche. Robert Ley committed suicide while in custody before the trial; Gustav Krupp was declared mentally incapable of standing trial and Martin Bormann was judged *in absentia*. Also six criminal organizations were prosecuted.

In the end, three of the defendant (Hjalmar Schacht, Hans Fritzsche and Franz von Papen) were acquitted together with three of the six organizations (the SA –*Sturm Abteilungen*- , High Command and Reich Cabinet). Twelve defendants were sentenced to death (Hermann Goring, Joachim von Ribbentrop, Wilhelm Keitel, Ernst Kaltenbrunner,

¹⁵⁵ R. CRYER, H. FRIMAN, D. ROBINSON, E. WILMSHURST, *An Introduction to International Criminal Law and Procedure*, New York, Cambridge University Press, 2007, p. 100

¹⁵⁶ I. BANTEKAS, S. NASH, *International Criminal Law*, II Edition, London, Cavendish Publishing Limited, 2003, p. 327

Alfred Rosenberg, Hans Frank, Wilhelm Frick, Julius Streicher, Fritz Saukel, Alfred Jodl, Arthur Seyss-Inquart and Martin Bormann), three sentenced to life imprisonment (Rudolf Hess, Walter Funk and Willem Raeder) and four condemned to periods of imprisonment ranging from ten to twenty years (Karl Donitz, Albert Speer, Konstantin von Neurath and Baldur von Schirach) while the judges declared three groups criminal organizations: the Gestapo (German Secret State Police), the SS (*Schutz-Staffel*) –and Waffen SS- and the SD, (*Sicherheitsdienst*)¹⁵⁷.

Regarding the judges, the tribunal was composed by eight judges, four majors (one from each victorious country, France, the UK, the US and the URSS) and four alternates¹⁵⁸. The decisions of the Court required the majority of the votes, so a majority of three votes was necessary for a guilty verdict and no appeal was allowed from the decision of the Court¹⁵⁹. The President of the Tribunal was the British Lord Justice Geoffrey Lawrence while the defence was carried out by a number of German lawyers. The accusation system was based on the Anglo-American legal tradition. Each of the Allies had to appoint a chief prosecutor. The indictment contained four main charges accordingly to Article 6 of the IMT's Charter:

“The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there

shall be individual responsibility:

(a) Crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) War crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to Wave 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

¹⁵⁷ G. WERLE, *Principles of International Criminal Law*, II edition, The Hague, T.M.C. Asser Press, 2009, p. 9

¹⁵⁸ “Article 2: The Tribunal shall consist of four members, each with an alternate. One member and one alternate shall be appointed by each of the Signatories. The alternates shall, so far as they are able, be present at all sessions of the Tribunal. In case of illness of any member of the Tribunal or his incapacity for some other reason to fulfil his functions, his alternate shall take his place”. Charter of the International Military Tribunal at Nuremberg - Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis ("London Agreement") (1945): <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=3ae6b39614>

¹⁵⁹ “Article 26: The judgment of the Tribunal as to the guilt or the innocence of any Defendant shall give the reasons on which it is based, and shall be final and not subject to review.” *ibidem*

of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

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

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.¹⁶⁰

Count one dealt with overall conspiracy and it was handled by the US prosecution team. Count two was about crimes against peace and it was handled by the UK prosecutors. Count three concerned war crimes and count four charged crimes against humanity and these last two were prosecuted by the French (as regards the western zone of the conflict) and the Soviet prosecutors for the eastern zone.

19. Charge one: conspiracy

One of the more problematic aspects of this trial (and also in the Tokyo one) concerned the issue of conspiracy. The prosecution gave importance to this crime as it presented it as an enterprise whose scope was to plan wars of aggression that would have led to the commission of the other crimes. Instead of focusing on the main protagonist of those events, that is Hitler, the indictment moved away from this popular view relegating him to the background and paid specific attention to the collectives. British law provided the legal roots of the charge of conspiracy. In its acceptance, it is made of two elements: an agreement (that is, a meeting of minds) and a common plan (the achievement of a common goal), even if it seemed that only the first one alone could be sufficient to support criminal charges as a criminal enterprise was considered more dangerous if it was a result of joint effort of several individuals. Two aggravating circumstances were to be considered: premeditation and collaboration. However, the French notion of conspiracy was finally adopted: it does not require active participation in the commission of the crime as it is sufficient the commission of preparatory acts such as provocation, orders

¹⁶⁰ Article 6, *ibidem*

and means¹⁶¹. For this reasons not only the Nazi High Command, but also the involvement of other perpetrators members of other Nazi organizations was analyzed. However, the prosecution of individuals according only to their membership in a criminal organization would have been considered a violation of the presumption of innocence. Skepticism was increased also by the fact that the Nuremberg Tribunal was applying law retroactively. The Allied powers agreed on the fact that the organizations had to be prosecuted as it would have been difficult to find out evidence against each individual and the result was the presence of the conspiracy as a crime punishable *per se* as it was established in Article 9 of the Nuremberg Chart¹⁶². Following , Article 10¹⁶³ provided that once the Tribunal declared a group or an organization criminal, national authorities could have prosecuted individuals for being members. Related to this, it is worth noting that Article 12¹⁶⁴ allowed trial *in absentia*, that is usually seen as a violation of the basic right of a fair trial¹⁶⁵.

On the other side is important to analyze the defence against this charge. The main argument was of course the negation of a conspiracy and it was based on some considerations. First of all, it was underlined the incompatibility between the conspiracy and the so-called *Fuhrerprinzip* that means leadership principle and that was at the basis of political authority in the Third Reich. Hitler's words were considered above all written laws. In fact Hitler held all powers and all legal provisions represented the will of one man that imposed his view. He was surrounded by consultative bodies but with only a formal role. Secondly, Hitler used to lock his colleagues in their respective assignments

¹⁶¹ G. METTRAUX, *Perspectives on the Nuremberg Trial*, New York, Oxford University Press, 2008, p. 243

¹⁶² "Article 9: At the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization." Charter of the International Military Tribunal at Nuremberg - Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis ("London Agreement") (1945): <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=3ae6b39614>

¹⁶³ "Article 10: In cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organization is considered proved and shall not be questioned." ,ibidem

¹⁶⁴ "Article 12: The Tribunal shall have the right to take proceedings against a person charged with crimes set out in Article 6 of this Charter in his absence, if he has not been found or if the Tribunal, for any reason, finds it necessary, in the interests of justice, to conduct the hearing in his absence", ibidem

¹⁶⁵ L. S., SUNGA, *The Emerging System of International Criminal Law*, The Hague, Kluwer Law International, 1997, p. 310-312

imposing secrecy among his associates that knew only one aspect of the plan: only Hitler had the full image, only he knew all about it made it difficult to talk of a concerted plan. Finally, a concerted plan envisaged some degree of unity and continuity in its execution but Hitler's strategy was often altered by the course of events¹⁶⁶.

We may underline the fact that the Charter provided only three categories of crimes: crimes against peace, war crimes and crimes against humanity and the idea of conspiracy only appeared as a form of participation in crimes against peace. Article 6 mentioned conspiracy but not to create a distinct crime but only to identify the categories of persons responsible. At the end the result was that the charge of conspiracy was extended to all the indicted but in the judgment it was only admitted against those who worked for a particular war of aggression and it seemed that the main criterion to establish participation was the presence at meetings where Hitler stated his criminal plans¹⁶⁷.

20. Charge two: crimes against peace

The second category of charges was represented by crimes against peace and we can affirm that they met the strongest objections. It was placed in second position probably because the Court preferred to analyze conspiracy first to follow a sort of chronological order. Crimes against peace is a broad field that consisted of a lot of acts. However, this category is very much related with the concept of aggression. In the Charter there was not a definition of aggression. War of aggression was only an element, even if it can be considered the core, of crimes against peace which also lacked of a proper definition. Hitler's policies included a series of wars of aggression that started with the armed invasion of Poland in 1939 (it must be mentioned however that also the URSS invaded Poland violating its non-aggression pact with Germany) even if various acts of aggression had preceded it (such as the occupation of Bohemia and Moravia prior that year and the remilitarization of Rhineland in 1936). It could be draw a distinction between act of aggression and war of aggression as the first one could simply constitute a preparatory act without involving necessarily the use of armed force¹⁶⁸. One of the bases of the prosecution was the existence of numerous pacts and treaties of non-aggression

¹⁶⁶ G. METTRAUX, *Perspectives on the Nuremberg Trial*, New York, Oxford University Press, 2008, p. 245-249

¹⁶⁷ Ivi, p. 251

¹⁶⁸ Ivi, p. 218

concluded by Germany before and during the rise of the Third Reich. However, the violation of such obligations did not constitute a penal offence, and moreover Hitler withdrew Germany from the League of Nations even if it kept being linked to The Hague Conventions and other treaties. The most important treaty on which the prosecution relied was the 1928 General Treaty for the Renunciation of War as an Instrument of National Policy, also known as the Kellogg-Briand Treaty or Pact of Paris. It imposed the renunciation of war as an instrument of national policy outlawing the resort to war. However, even if it seemed that aggression could have been considered illegal before 1939, it would at best raised State responsibility, rather than personal criminal responsibility¹⁶⁹.

The defence pointed out that in the provisions of the Kellogg-Briand Pact it was not stated that a war of aggression constituted a crime and that they gave no authority to States or tribunals to try individuals. Furthermore, it claimed that the Tribunal was not competent in judging this issue as the crime against peace category was not established law, and mentioning the fact that it was being applied retroactively, offending also the principle of *nullum crimen sine lege, nulla poena sine lege*.

Among the various acknowledgements, the Tribunal replied that a war of aggression could have only be carried out by individuals and this implied individual criminal liability. It also acknowledged the fact that neither the Kellogg-Briand Pact, nor the Hague Conventions expressed criminal responsibility but the renunciation of war made it illegal in international law. Moreover, it affirmed that the principle of *nullum crimen sine lege, nulla poena sine lege* was a general principle of justice and that it should not apply when the defendants must have known that they were acting wrong¹⁷⁰.

21. Charge Three: War Crimes

War crimes is a traditional charge as it is historically connected to the development of traditional public international laws. In fact, it is possible to state that it existed even before a system of collective security was created, that is, when there war was considered a legitimate way to settle international disputes. It was also quite common to prosecute before military courts officers and soldiers from the enemy side that

¹⁶⁹ Ivi, p. 22 and I. BANTEKAS, S. NASH, *International Criminal Law*, II Edition, London, Cavendish Publishing Limited, 2003, p. 329

¹⁷⁰ L. S. SUNGA, *The Emerging System of International Criminal Law*, The Hague, Kluwer Law International, 1997, p. 43-46

transgressed the rules of war. The fact that prosecutions against aliens had a long history was one of the main points of the Nuremberg Tribunal to reject the assumption of the defence that the Court had no jurisdiction for violation of the laws or customs of war. As any nation had the possibility to initiate criminal proceedings it was therefore possible for a group of nations such as the Allies. Codification and enforcement of this law were delineated in customary law and treaties, starting from the adoption in 1864 of the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. However, the most important codification of the *jus in bello* was represented by the 1907 Hague Convention IV on Respecting the Laws and Customs of War on Land and the annexed regulations. In the Charter of the Nuremberg Tribunal, Article 6 (b) included a number of acts considered as war crimes, adopting a broader definition of war crimes¹⁷¹. By doing so the Allies distanced themselves from the concept of war crimes *strictu sensu* and the previous preference for a strict enumeration of specific criminal acts, allowing in this way a subsequent development of the norms prohibiting war crimes. The Tribunal also rejected any possibility of defence related to superior orders: most of the defendants in fact were part of the cupola that emanated the orders and the fact that they were so high in the Third Reich structure implied that a moral choice should have been possible (while the same is not always true for example for the soldiers in the battlefield where the punishment for disobedience would be certain)¹⁷².

22. Charge four: Crimes Against Humanity

Crimes against humanity are strictly linked with war crimes, there is not a rigid barrier between them, even if they are very different. First of all, while war crimes was a traditional charge, crimes against humanity was a new one and entered into judicial practice with the Nuremberg trial. Moreover, the origin of this second category derived from the indignation aroused by the brutalities and the excesses of racism perpetrated by the Third Reich (by the SS, the SA, the Gestapo, the existence of concentration camps..). It was common knowledge that the Nazi regime carried out atrocities against Jewish and other minorities, as well against political opponents but crimes against a State's own citizens or acts committed outside the context of war were not covered by established

¹⁷¹ See *supra*

¹⁷² I. BANTEKAS, S. NASH, *International Criminal Law*, II Edition, London, Cavendish Publishing Limited, 2003, p. 331

international laws, while for example atrocities against civilians of other States during war or occupation might have been covered by already established international laws on war crimes and aggression. For this reasons, during the meetings to draft the Nuremberg Charter, it was decided to include crimes against humanity as a legal category separated from war crimes to punish atrocities perpetrated by a government against its own civilian population¹⁷³. Article 6 (c) described crimes against humanity as:

“namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.”¹⁷⁴

As it is possible to notice, Article 6 required a link between crimes against humanity and crimes against peace or war crimes, ensuring that only those acts related to the war would considered as crimes against humanity under the competence of the Tribunal. As regards acts that could have been considered both war crimes and crimes against humanity, the latter prevailed when such acts were committed before or during the war if they were committed within German jurisdiction. However, it must be underlined the fact that (also thanks to the Control Council Law No 10 that did not required a direct and strong nexus between crimes against humanity and other crimes in the IMT Charter) US military courts later prosecuted Nazi soldiers and officials without limiting their analysis of post-1939 events but taking into account also crimes committed before the beginning of the war¹⁷⁵.

Finally it is worth analyzing briefly the notion of genocide that gained a particular attention after the events of the Second World War and the Nazi atrocities. The term derives from the Greek *genos* that means race or tribe and the Latin *cide* meaning killing. A proper Convention was adopted only in 1948 and prior to it, international law did not explicitly prohibit genocide in peace-time. Accordingly to what stated early in this paragraph, specific laws protecting population against these atrocities outside the context of the war did not exist and even the Nuremberg Charter required a link with other crimes. So before 1948 international legal norms did not cover mass extermination

¹⁷³ Ivi, p. 330

¹⁷⁴ Article 6 (c) of the Charter of the International Military Tribunal at Nuremberg, see *supra*

¹⁷⁵ L. S. SUNGA, *The Emerging System of International Criminal Law*, The Hague, Kluwer Law International, 1997, p. 106

committed in peace-time and the destruction (or the attempted destruction) of a group by any government in situations not classifiable as war were not expressly prohibited by international law. So in order to cover this gap, General Assembly resolution 96 (I) declared genocide a crime under international law (it was adopted the same day as the Nuremberg Principles)¹⁷⁶. Later the General Assembly adopted the UN Genocide Convention in 1948 and entered into force on 12 January 1951 affirming that “genocide, whether committed in time of peace or in time of war, is a crime under international law”¹⁷⁷.

23. Criticism and Assessment

Even if it is not in question the importance and the role that this experience of the International Military Tribunal at Nuremberg had and the influence it exercised in the development of international criminal law, some final considerations, critics and assessments should be mentioned.

Different opinions stem from the definition of the legal character of the Tribunal. Although it is commonly regarded as the first ‘international’ criminal tribunal, it can be argued that it could have been considered rather an ‘occupation’ institution, a municipal court operated by the occupying powers together. In fact the Allies had actually occupied Germany and only twenty-two statements from the international community supported the creation of the Tribunal (although no country objected). The treaty that established the Court has been used as a proof of its international status and also as a proof of its separate legal personality¹⁷⁸.

Furthermore, the Tribunal has often been accused of being an example of the so-called “victor’s justice” undermining its political legitimacy. Similar acts committed by the Allies were not prosecuted (i.e. a plea of *tu quoque*), the defence was not allowed to

¹⁷⁶ Ivi, p.105, 107

¹⁷⁷ 1948 Convention On The Prevention And Punishment Of The Crime Of Genocide (Genocide Convention):
<http://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=1507EE9200C58C5EC12563F6005FB3E5>

¹⁷⁸ I. BANTEKAS, S. NASH, *International Criminal Law*, II Edition, London, Cavendish Publishing Limited, 2003, p. 333, and A. ZAHAR, G. SLUITER, *International Criminal Law: a Critical Introduction*, New York, Oxford University Press, 2008, p. 5

raise the issue of crimes perpetrated by the Allied powers and the absence of a neutral or German judge were some of the arguments to support this criticism¹⁷⁹.

Another point of discussion regards its legal foundations. It was affirmed that the procedure was simplistic and the procedure imperfect and inadequate. For example the accused had the right of legal representation but he could only meet him only immediately before or the same day of the trial and there was a disparity in resources between the defence and the prosecution. Moreover, the Tribunal was accused of violating the prohibition on retroactive punishment and of applying *post facto* laws. It must be noticed that the law on crimes against humanity and crimes against peace was defined in London by the Allies with the recent horrors of the Nazi in mind¹⁸⁰.

24. The Nuremberg Principles

Although in the judgment's statement aggression was considered the supreme international crime, the Tribunal would be mainly remembered as a trial of atrocities against humanity and principles of the IMT's Charter and judgment were soon affirmed by the General Assembly Resolution 95 (I) becoming influential in international law. The experience of the International Military Tribunal at Nuremberg defined some useful parameters for individual criminal responsibility helping the evolution of this branch and representing a starting point for other conventions (for example the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and the 1949 Geneva Conventions). The Nuremberg Principles are now firmly established as customary international law and this Tribunal accomplished what was the failure of the proceedings after the First World War¹⁸¹.

The Nuremberg Principles were in fact later confirmed by the UN General Assembly through the resolution 95 (I) which represented the further affirmation of the principles stated in the Statute of the International Military Tribunal and in the subsequent judgment of the 30 September 1946 as principles of international law. Today in fact they form the nucleus of substantive international criminal law. The report of the International Law Commission on the Nuremberg Principles highlighted their recognition

¹⁷⁹ R. CRYER, H. FRIMAN, D. ROBINSON, E. WILMSHURST, *An Introduction to International Criminal Law and Procedure*, New York, Cambridge University Press, 2007, p. 95

¹⁸⁰ I. BANTEKAS, S. NASH, *International Criminal Law*, II Edition, London, Cavendish Publishing Limited, 2003, p. 333

¹⁸¹ Ivi, p. 334

as customary international law. They are seven principles that became the cornerstone of international criminal law. The first principle stated that “any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment”¹⁸². It confirmed officially the existence of an individual criminal responsibility that imply the right to prosecute the authors of the crimes. The second one by affirming that “the fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law”¹⁸³ implies that even if there is no internal penalty for an act against international law, the responsibility for the commission of that crime still remains under international law. The third principle affirms claims that “the fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law”¹⁸⁴ is of paramount importance as it underlines the existence of criminal responsibility also for Heads of State or responsible Government officials acting in behalf of a State who commit crimes and in this way it eliminates a possible shield represented by the assumption that only States were responsible for crimes under international law (the Act of State doctrine). The fourth principle is a little be controversial in its later developments. It states that “the fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him”¹⁸⁵. Article 33 of the ICC in fact details it in this way:

“1.The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:

- (a) The person was under a legal obligation to obey orders of the Government or the superior in question;
- (b) The person did not know that the order was unlawful; and
- (c) The order was not manifestly unlawful.

¹⁸² International Law Commission Yearbook (1950) - *Principles of International Law Recognized in the Charter of the Nüremberg Tribunal and in the Judgment of the Tribunal*, (1950): <http://www.icrc.org/ihl/INTRO/390>

¹⁸³ *ibidem*

¹⁸⁴ *ibidem*

¹⁸⁵ *ibidem*

2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful”¹⁸⁶.

According to Article 33 (2) a possible interpretation could be that it is possible to use superior orders as a defence against charges of war crimes. Moreover, it should be discuss also the difference between moral choice and the legal obligation to obey orders as it is not clear in which situations the moral choice can be present. The fifth principle presented the right for any person to have a fair trial as it said that “Any person charged with a crime under international law has the right to a fair trial on the facts and law”¹⁸⁷. This was one of the most important issues that was discussed by the Allied powers to decide how to deal with the Nazi criminals. If the UK and the Soviet Union supported a radical solution by killing them without a trial or organizing a spectacular trial with exemplar sentences, in the end the US position won and the legal Nuremberg trial was organized. The US wanted a fair trial making sure that it was a real trial with the right of defence for the accused people giving in this way a high profile to the trial. Moreover, Truman believed that it was an important opportunity to promulgate international laws against acts of aggression. He appointed the president of the US Supreme Court as the leader of prosecutors. The sixth principle summarizes the acts punishable as crimes under international law. They were basically crimes against peace (including aggression), war crimes and crimes against humanity (including genocide) while the seventh principle underlines the important of complicity as a crime by claiming that “complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law”¹⁸⁸.

25. The Nuremberg Legacy

The Nuremberg trial was an event that changed the world, and left strong footsteps in the field of international law. It gave the opportunity to explain and understand the war and all the dark sides presented in it and not only as it also shed the light on the atrocities committed by the Third Reich during its short but dramatic

¹⁸⁶ Rome Statute of the International Criminal Court (ICC) (1998): http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf

¹⁸⁷ International Law Commission Yearbook (1950) - *Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal*, (1950): <http://www.icrc.org/ihl/INTRO/390>

¹⁸⁸ *ibidem*

existence. The first international court provided an example for the following ones (for Yugoslavia and Rwanda trials for example) and it provided the grounds for further developments of international law whose example are the United Nations Charter, the Universal Declaration of Human Rights, the European Convention on Human Rights or the Convention on the Prevention and Punishment of the Crime of Genocide, one of the so-called Geneva Conventions, or the Rome Statute of the International Criminal Court. Unfortunately, the atrocities of the Second World War were not an isolated case during the 20th century as the international community often witnessed passively to other grave breaches of international law for example in Russia, Cambodia, Vietnam, Sierra Leone, Chile, the Philippines, the Congo, Bangladesh, Uganda, Iraq, Indonesia, East Timor, El Salvador, Burundi, Argentina, Somalia, Chad, Yugoslavia and Rwanda.

However a broader analysis is possible, also related to the situation in post-war Germany that once again faced the problems of rebuilding economy, society and politics after the destructions of the Second World War and the Nazi rule. In fact it is undoubtful that the international Nuremberg trial and the Subsequent Proceedings have left a strong legacy in the field of international law but also in history in general.

It was of leading importance in fact, to reestablish a peaceful international legal regime that contained the threat of future major wars and to reach a full democratization of Germany (also through a process of denazification and re-education). It was important to offer evidences of Nazi atrocities and try to explain how they could had occurred in a sort of pedagogical effort. The historical truth had to be assess in order to prevent the resurgence of the threats the world had faced in the last two decades. Those are some of the reasons why the focus on those trials and on other ones that took place later in front of national courts of State different from the Allied powers remained. The Nuremberg Military Tribunal tried to reach those goals: it tried to separate guilty from innocents, to give the right punishment and to provide an example to be followed also in future occasions. It tried to create an historical record of the crimes of the Third Reich and exposing it to the world and to German people first, in an effort to “teach a lesson” of the Second World War¹⁸⁹.

¹⁸⁹ K. C. PRIEMEL, A. STILLER, *Reassessing the Nuremberg Military Tribunals: Transnational Justice, Trial Narratives, and Historiography*, London, Berghahn Books, 2012, p. 249

responsibility, and also conspiracy which reached the level of independent crime (they are all mentioned for example in the ICC Statute)¹⁹¹.

A broader influence was represented by the fact that the main trials and the Subsequent Proceedings were useful to make Germans understand that their present misery was not only the result of the superiority of the Allied powers but also of the criminal folly of the Third Reich that shaped Germans life for more than ten years. The prosecution of the leading figures of the regime during the trials tried to demonstrate also the deep Nazism's impact on Germany society, as one of the main goals of trials is determining the truth even if is not unanimously the reaction. In fact, most German people rejected the Nuremberg Trials considering them an example of "victor's justice" (see *supra*) at least till the 1960s. Probably this reaction was guided also by the Allied reorientation policies, that included the Subsequent Proceedings, the other trials for Nazi crimes taking place in German courts and the denazification process¹⁹².

3.3- THE EICHMANN CASE

The criminal proceedings in the Eichmann case can be considered in many ways as a sort of appendix to the Nuremberg trials. In addition, it provides a useful example of how some of the principles of international criminal law mentioned so far are applied by a national court during a trial that concern the prosecution of international crimes.

Scholars tend to believe that the judges in Jerusalem aimed at consolidating the legacy of the Nuremberg judgments but without setting a precedent for further prosecutions of international crimes in a different context with respect of Second World War. In this way we can affirm that the Eichmann case relied strongly on the Nuremberg precedent.

¹⁹¹ Ivi, p. 377-388

¹⁹² K. C. PRIEMEL, A. STILLER, *Reassessing the Nuremberg Military Tribunals: Transnational Justice, Trial Narratives, and Historiography*, London, Berghahn Books, 2012, p. 250

26. Factual Background

During the Second World War, Otto Adolf Eichmann (1906-1962) was a Lieutenant Colonel (SS Obersturmbannführer) in the German Secret State Police dealing with 'Jewish Affairs and Emigration', that is, the Head of the Jewish Office of the Gestapo in the Nazi Government. During his office, he was first in charge of concentrating Jews in ghettos with the aim to later transporting them abroad. After the reversal of the outcome of the war for Germany in 1941, Nazi policy towards the Jewish issue changed from emigration to extermination and his mission became to implement the 'Final Solution of the Jewish Question' facilitating and organizing mass deportation of Jews to extermination camps in German-occupied Eastern Europe. After the end of the war, he was captured by the American forces that were not able to identify him, so he fled Germany and spent some years across Europe (also Austria and Italy) to finally reach Argentina in 1950 where he settled under the name of Ricardo Klement near Buenos Aires. However, on 11 May 1960 he was abducted from Buenos Aires in a planned operation conducted by the Israeli Secret Services and clandestinely transferred to Israel where he faced a trial for his implication in the Final Solution, war crimes and crimes against humanity. The trial began on 11 April 1961 and finished on 14 August 1961. On 11 December 1961, Eichmann was declared guilty on all counts (with certain minor restrictions) and, on 14 of the same month, he was sentenced to death. The defence appealed both the conviction and the sentence but on 29 May 1962, the Supreme Court rejected the appeal and confirmed the sentence and, after also the rejection of the last appeal to the President of Israel for clemency, he was executed by hanging on 1 June 1962¹⁹³.

27. National prosecution of international crimes, abduction and universal jurisdiction

This trial is considered an example of trial by national courts that refers to international criminal law. It addressed important issues of jurisdiction as the Israeli jurisdiction was exercised upon the abduction of the accused from another State.

¹⁹³ S. M., VILLALPANDO, *Eichmann Case* in *Max Planck Encyclopedia of Public International Law*, [online encyclopedia], available through: the University of Cambridge website http://www.squire.law.cam.ac.uk/electronic_resources/legal_databases.php (Accessed 04 July 2013)

The first aspect to analyze is the abduction. Already mentioned prior in this dissertation, this practice was used to secure the presence of the suspect in the State that wants to prosecute him. This case illustrates particularly well all the aspects linked to this method, the practical as well as the legal and diplomatic issues related to the State-sponsored kidnapping of a criminal suspect from a foreign territory without the consent of that territorial State. In fact, the government of Argentina had not been informed in advance of the Israeli plan to abduct Eichmann. Although Argentine formally protested against this act, the District Court of Jerusalem did not consider the lack of a regular request as an obstacle to trying the accused, in accordance with the maxim *male captus, bene detentus* (wrongly captured, properly detained). Argentina supported its protests considering the unlawful arrest made by Israeli agents (probably by Mossad, the Israeli Security Service, although Israel affirmed that private citizens committed the act) as a violation of Argentinean sovereignty and requested not only the return of Eichmann, but also the punishment of the persons responsible of the operation¹⁹⁴. Following the Israel's apology for any violation of Argentinean sovereignty but also the refusal to accomplish with the demands, Argentina brought the dispute to the attention of the United Nations Security Council, under Articles 34 and 35 (1) of the United Nations Charter¹⁹⁵. Israel objected arguing that the matter went beyond the competence of the UNSC. After a vote in which Argentina did not participate (according to Article 27 (3) of the UN Charter¹⁹⁶), Resolution 138 was adopted on 23 June 1960 declaring that

“acts such as that under consideration, which affect the sovereignty of a Member State and therefore cause international friction, may, if repeated, endanger international peace and security” [and requested] “the Government of Israel to make appropriate reparation in accordance with the Charter of the United Nations and the rules of international law”¹⁹⁷.

However, such reparation was not specified, neither if the return of Eichmann was feasible. In August 1960, after weeks of negotiations, Israeli and Argentinean governments to release a joint statement declaring the incident closed but underlying the

¹⁹⁴ L. S. SUNGA, *The Emerging System of International Criminal Law*, The Hague, Kluwer Law International, 1997, p. 263

¹⁹⁵ The United Nations Charter (1945): <https://www.un.org/en/documents/charter/>

¹⁹⁶ *ibidem*

¹⁹⁷ UNSC Res 138 [1960] (23 June 1960): <http://www.refworld.org/docid/3b00f1cc74.html>

fact that the action taken by citizens of Israel had infringed the fundamental rights of the State of Argentina¹⁹⁸.

Although both governments considered the dispute closed at a diplomatic level and Argentina no longer requested the return of Eichmann, it was not clarified if the abduction of Eichmann to Israel vitiated its criminal jurisdiction over the suspect. The Argentina Government in fact, considered the Israel's recognition of the violation of its fundamental rights made in the form of satisfaction as a sufficient reparation, leaving to the District Court of Jerusalem the question of Israeli criminal jurisdiction over Eichmann¹⁹⁹. One of the main reasons why abduction and universal jurisdiction exist and are sometimes accepted is to avoid the existence of safe havens where suspects could find a shelter in order to escape prosecution and Argentina has long been considered a place like this, where a lot of ex-Nazi militants escaped after the end of Second World War. The international community, in fact, has become less tolerant towards a State that harbor an individual suspected of having committed crimes, and it is generally expected from such State to either prosecute or extradite the criminal. However, according to Bassiouni:

“normally a State will not incur international responsibility for giving asylum to fugitives from another country. [...] State practice does not support a general obligation to extradite or alternatively to punish offenders who have committed crimes abroad. No rule of current international law requires States generally to deny a safe haven to those who have committed crimes elsewhere. Thus, arguments in favour of an obligation to extradite (or prosecute) have had to turn instead to the postulate of a communal interest in the repression at least of international offences”.²⁰⁰

Going back to the trial, the defence argued that the State-sponsored kidnapping negated the Court's jurisdiction over the accused but this argument was rejected relying on the fact that for example also the UK, the US courts did not take into consideration

¹⁹⁸ *Attorney-General of the Government of Israel v Adolf Eichmann (Judgment)* District Court of Jerusalem (11 December 1961) para. 40: http://www.trial-ch.org/fileadmin/user_upload/documents/trialwatch/eichmann_district.pdf

¹⁹⁹ L. S. SUNGA, *The Emerging System of International Criminal Law*, The Hague, Kluwer Law International, 1997, p. 264

²⁰⁰ M. C. BASSIOUNI, E. M. WISE, *Aut Dedere Aut Judicare: the Duty to Extradite or Prosecute in International Law*, Dordrecht, 1995, p. 42

breaches of international law (see unlawful arrest) when deciding whether to try an accused²⁰¹.

The defendant made reference also to Article 16 of the Harvard Research Draft Convention on Jurisdiction with Respect to Crime of 1935 entitled *Apprehension in Violation of International Law* which provides that

“In exercising jurisdiction under this convention, no State shall prosecute or punish any person who has been brought within its territory or a place subject to its authority by recourse to measures in violation of international law or international convention without first obtaining the consent of the State whose rights have been violated by such measures”²⁰².

However, the District Court affirmed that this Article was not representing the established judicial practice of many States and that it had the authority to try Eichmann. This decision was reaffirmed by the Supreme Court that added that the violation of international law was related to the rights of Argentina not those of the person. This trial has become an example for the maxim *male captus bene detentus* even if it was made clear that abduction or State-sponsored kidnapping was a practice that violated the territorial sovereignty of one country to another²⁰³.

The Eichmann Case arose also another controversial topic, the exercise of universal jurisdiction. It is one of the sporadic cases in which this principle have been applied by a domestic court, as usually national courts prefer not to exercise their jurisdiction without a clear link between the crime and the State. According to the District Court, Israel had the right to prosecute him as

“The abhorrent crimes defined under this Law are not crimes under Israeli law alone. These crimes, which struck at the whole of mankind and shocked the conscience of nations, are grave offences against the law of nations itself (*delicta*

²⁰¹ The Court found that “It is an established rule of law that a person being tried for an offence against the laws of a State may not oppose his trial by reason of the illegality of his arrest or of the means whereby he was brought within the jurisdiction of that State. The courts in England, the United States and Israel have constantly held that the circumstances of the arrest and the mode of bringing of the accused into the territory of the State have no relevance to his trial, and they have consistently refused in all instances to enter upon an examination of these circumstances.” From SUNGA, L. S., *The Emerging System of International Criminal Law*, The Hague, Kluwer Law International, 1997, p. 265

²⁰² L. S. SUNGA, *The Emerging System of International Criminal Law*, The Hague, Kluwer Law International, 1997, p. 267 from 29 American Journal of International Law 433 Supp. (1935) at 635

²⁰³ *Ibidem*

juris gentium). Therefore, so far from international law negating or limiting the jurisdiction of countries with respect to such crimes, international law is, in the absence of an international court, in need of the judicial and legislative organs of every country to give effect to its criminal interdictions and to bring the criminals to trial. The jurisdiction to try crimes under international law is universal²⁰⁴.

This statement appeared a clear affirmation of the need and the obligation to establish universal jurisdiction over international crimes²⁰⁵. The Israeli authority to try Eichmann derived from the 1950 Nazis and Nazi Collaborators (Punishment) Law ('1950 Law'). It stated that a person who committed a crime against the Jewish people (acts committed with intent to destroy the Jewish people in whole or in part), a crime against humanity or a war crime, can be sentenced to death penalty. Moreover, it enumerated those acts considered under those categories and it compared one act committed in a foreign country to the same act committed in the Israeli territory, allowing the same kind of punishment²⁰⁶. Obviously the defence rejected it affirming that Israeli jurisdiction was against international law²⁰⁷. The Court rejected the objection stating that it was an obligation to apply its municipal legislation, and it confirmed the universal character of those crimes and in particular the crime of genocide basing its statement also on Article VI of the Convention on the Prevention and Punishment of the Crime of Genocide ('Genocide Convention')²⁰⁸.

²⁰⁴ R. CRYER, H. FRIMAN, D. ROBINSON, E. WILMSHURST, *An Introduction to International Criminal Law and Procedure*, New York, Cambridge University Press, 2007, p. 46 from (1968) 36 ILR 5 at para. 12 (DC)

²⁰⁵ After this case the most important development was the Pinochet litigation throughout Europe, representing a globalization of human rights and a reaffirmation of a universal jurisdiction over gross violations, regardless the place of commission or the nationality of victims and perpetrators, see *infra*, 4.

²⁰⁶ the 1950 Nazis and Nazi Collaborators (Punishment) Law ('1950 Law'), available from the International Committee of the Red Cross: <http://www.icrc.org/ihl-nat.nsf/0/9D6164171FA43DE7C12575AE0034A437>

²⁰⁷ "(a) that the Israeli Law, by inflicting punishment for acts committed outside the boundaries of the state and before its establishment, against persons who were not Israeli citizens, and by a person who acted in the course of duty on behalf of a foreign country ("Act of State") conflicts with international law and exceeds the powers of the Israeli legislator"; from *Attorney-General of the Government of Israel v Adolf Eichmann (Judgment) District Court of Jerusalem* (11 December 1961), para. 8, available at http://www.trial-ch.org/fileadmin/user_upload/documents/trialwatch/eichmann_district.pdf

²⁰⁸ "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 those Contracting Parties which shall have accepted its jurisdiction". The 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) available at

Apart from the principle of universal criminal jurisdiction, also the passive personality principle and the protective principle were used to support the Israeli right to try Eichmann. The first one was related to the fact that most of the victims were Jewish but it could be not accepted in connection with victims who were not Israeli nationals during the Eichmann's offences.

Regarding the protective principle, it was used by the Israeli Court to justify its jurisdiction claiming that the implementation of the 'Final Solution' led by Eichmann had harmed its vital interests and a State whose interests were threatened had the right to assume jurisdiction to try the culprits. In both the assumptions, Israel was supporting the thesis that it (instead of Germany for example) was the *forum conveniens* (appropriate forum) where to try Eichmann, regardless the *locus delicti*²⁰⁹. This assertion was criticized on the basis that the State of Israel did not exist at the time in which the Holocaust happened²¹⁰. However, in its final remarks the Court explained, underlying once again its exercise of the universal jurisdiction (even without territorial or personal links between Israel and those crimes) that

“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.”²¹¹

28. Criminal defences: superior orders and act of state doctrine

The defence counsel of Eichmann tried to invoke the “Act of State” doctrine as a possible justification, affirming that only Germany could have bear responsibility for the

<http://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=1507EE9200C58C5EC12563F6005FB3E5> (last access 23 December 2013)

²⁰⁹ *Attorney-General of the Government of Israel v Adolf Eichmann (Judgment) District Court of Jerusalem* (11 December 1961), para. 23-27, available at http://www.trial-ch.org/fileadmin/user_upload/documents/trialwatch/eichmann_district.pdf

²¹⁰ I. BANTEKAS, S. NASH, *International Criminal Law*, II Edition, London, Cavendish Publishing Limited, 2003, p. 155

²¹¹ A.CASSESE, *International Criminal Justice: Is it Really so Needed in the Present World Community?*, article taken from the London School of Economics and Political Science official website, specifically at <http://www.lse.ac.uk/humanrights/articlesandtranscripts/Casseselse.doc> [last access 23 December 2013]

crimes in question. According to this theory in fact, the acts performed by an individual as an organ of the State must be considered as acts of the State only, and the latter becomes the only one to be accountable for those acts. Following this assumption, another State cannot punish the person who committed the offence without interfering in the internal affairs of the other, going in this way against the principle *par in parem non habet iudicium* (an equal cannot judge an equal, that is, the conception of equality based on States' sovereignty as equals do not have authority over one another). By doing so, the defence was invoking the application of the immunity of a State official from foreign criminal jurisdiction, challenging Israeli jurisdiction. However, this plea was rejected by the District Court which stated instead that the concept of sovereignty link to the "Act of State" doctrine was not considered an absolute concept and that the particular category of the crimes against humanity went well beyond the sovereign jurisdiction of the State that ordered them because they were of such a gravity that it was a duty for the international community (in this case Israel was acting as an organ of this community) to prosecute the authors. Moreover, the concept of international crime itself made it clear that a person who took part in the commission of such crimes should bear responsibility for them²¹². Basically, the Court was repudiating the Act of State doctrine confirming what had been already stated during the Nuremberg trial. In fact, the Court recalled Article 7²¹³ of the International Military Tribunal at Nuremberg affirming that

“[...] The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings. [...] The very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law.”²¹⁴

Regarding the crimes and the criminal responsibility, it must be noticed that a lot of people can cooperate in committing crimes under international law, creating like a network in which usually someone gives the order and others commit the action. The

²¹² A. CASSESE, G. ACQUAVIVA, M. FAN, A. WHITING, *International Criminal Law: Cases and Commentary*, Gosport, Oxford University Press, 2011, p. 78

²¹³ “The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment”.

²¹⁴ A. CASSESE, G. ACQUAVIVA, M. FAN, A. WHITING, *International Criminal Law: Cases and Commentary*, Gosport, Oxford University Press, 2011, p. 79

“armchair killer” Eichmann was a typical example in which, although he did not directly kill a single victim himself, he sent thousands to die. For this reason, as it was affirmed under Article 6(c) of the Nuremberg Charter, “leaders, organizers, instigators and accomplices” who participate in the formulation or execution of a crime, should be considered responsible²¹⁵. This assumption was confirmed in the International Law Commission’s Nuremberg Principles, specifically in the Nuremberg Principle IV²¹⁶ that made complicity a crime against international law itself. The excuse of the superior orders (Eichmann only obeyed to Hitler’s plans) was rejected according to the same principle and to the Nuremberg Tribunal judgment.

Talking about crimes, Eichmann was sentenced to death for crimes against humanity, crimes against the Jewish people, war crimes and membership in enemy organizations (SS, SD, Gestapo). An additional remark should be made regarding the difference between ethnic cleansing and genocide. The District Court of Jerusalem acquitted Eichmann for acts of genocide committed before 1941 as it found that before that year, Nazi persecution of Jews did not have a specific intent to exterminate them but was “only” aimed at “persuading” them to leave Germany²¹⁷. However, later this policy developed into an attempt to destruct them. This proposition made it clear that ethnic cleansing did not constitute genocide and it differed from it as long as the aim of a forced migration is to remove a group from a territory²¹⁸.

The indictment against Eichmann contained fifteen counts under the 1950 Law. The first four dealt with ‘crimes against the Jewish people’ and was in part inspired by the Genocide Convention as this was considered a specific crime of genocide against Jews people. He was convicted under counts 1, 2, and 3 for actions started on 31 August 1941, as well as under the fourth count for the period 1943–1944. Furthermore, he was accused of crimes against humanity for his participation in numerous actions against Jews (from count 5 to 7) for the deportation of Polish civilians from 1940 to 1942 (count 9),

²¹⁵ G. WERLE, *Principles of International Criminal Law*, II edition, The Hague, T.M.C. Asser Press, 2009, p. 167

²¹⁶ International Law Commission Yearbook (1950) - *Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal*, (1950): <http://www.icrc.org/ihl/INTRO/390>

²¹⁷ *Attorney-General of the Government of Israel v Adolf Eichmann (Judgment) District Court of Jerusalem* (11 December 1961), para. 182-183, available at http://www.trial-ch.org/fileadmin/user_upload/documents/trialwatch/eichmann_district.pdf

²¹⁸ R. CRYER, H. FRIMAN, D. ROBINSON, E. WILMSHURST, *An Introduction to International Criminal Law and Procedure*, New York, Cambridge University Press, 2007, p. 176

Slovenes in 1941 (count 10), gipsies (count 11), and 100 children from Lidice in Czechoslovakia (count 12). As regards crimes against humanity, he was accused of murder, extermination, enslavement, starvation or deportation and other atrocities against any population and discrimination and persecution. In contrast with the Charter of the Nuremberg Tribunal, this definition did not require a connection between these acts and a crime against peace or war crime as the Court considered that this connection did not pertain the intrinsic nature of a crime against humanity. Eichmann was convicted for these acts considered from March 1938. Moreover, he was convicted for war crimes (under count 8) and for his membership in the SS, SD, and Gestapo (counts 13 to 15) that had been considered enemy organizations during the Nuremberg Judgment. The obedience to superior orders, which was his main legal defence was not taken into account by the Court as it did not remove the criminal responsibility for those crimes, even if it was accepted as a ground of mitigation of the sentence. It considered the orders Eichmann received as manifestly unlawful and demonstrated that he had performed his duties with conviction and devotion rejecting also the plea of necessity, as he was not coerced to act unlawfully²¹⁹.

29. Conclusion

Although it seems that this case has a limited significance today mainly due to the more elaborated jurisprudence of international criminal tribunals and the refusal to analyze the circumstances of the abduction of the accused, it is important not to underestimate the importance of the Eichmann case. It represented a challenge for international law to try various years later a perpetrator of international crimes during the Nazi rule in Europe in a national tribunal. It represented a milestone in international criminal law as it dealt with issues still relevant by reinforcing notions and principles already stated before. First of all the principle of universal jurisdiction was once again confirmed and the prosecution in fact was based on it. Secondly, an official of a foreign State in his capacity was tried and convicted by a national court for international crimes.

²¹⁹ S. M., VILLALPANDO, *Eichmann Case* in *Max Planck Encyclopedia of Public International Law*, [online encyclopedia], available through: the University of Cambridge website http://www.squire.law.cam.ac.uk/electronic_resources/legal_databases.php (Accessed 04 July 2013)

4- AUGUSTO PINOCHET UGARTE AND THE FUNCTIONAL IMMUNITY

Contents - 30. Introduction; 31. The Spanish Involvement; 32. Pinochet No. 1 and the immunity issue; 33. Pinochet No. 2 and the Court Bias; 34. Pinochet No. 3 and the Final Decision. –

30. Introduction

The Pinochet case represents a cornerstone in the field of international criminal law as it arose international appeal for the fact that it was one of the first times that a former dictator was formally accused for his crimes and breaches in international law. Although in Chile, the country he ruled under a bloody right-wing dictatorship following the golpe in 1973, passed the Amnesty Decree Law in 1978 to exclude all individuals who committed human rights violations from 1973 to 1978 from criminal responsibility, his crimes and his violations of human rights could not be forgotten. It was a Spanish judge, Baltazar Garzón who provided the grounds for a trial against him that took place in the United Kingdom.

Those trials were very interesting under various points of view as they analyzed very relevant topics under international law, such as the role of immunity for a former head of State, the existence of universal jurisdiction, the concept of international crime, in particular the crime of torture, before and after the New York Convention of 1984 and the extradition.

4.1 THE FACTS

In the context of the Cold War, in 1973 Chile was being ruled by the world's first democratically elected socialist president, Salvador Allende, who was planning to start an extensive program of nationalization and social reforms. On 11 September of that year, a right-wing military coup (*golpe de estado*) supported by the United States' Central Intelligence Agency overthrew the government. President Allende decided to remain in the Presidential palace, La Moneda that was bombarded by the army and it was claimed that he committed suicide in the palace. During the following months the military

abolished civilian government and established a *junta* led by General Augusto José Ramón Pinochet Ugarte (in August 1973 Allende had promoted him Commander-in-Chief of the army) who arose to supreme power and the presidency in 1974.

The new order in Chile promoted economic reforms that distanced the country from Marxism but the regime was mainly characterized by brutal repression of the left-wing political activists and under Pinochet rule a huge number of people were imprisoned and tortured and over three thousand people are estimated to have been killed or disappearing during his 17 years in charge. In addition, during the 1970s Operation Condor (*Operativo Condor*) a concerted campaign by the military governments in Chile, Argentina, Paraguay, Bolivia, Uruguay led to kidnapping, torture, murder and terrorist acts. Although there are no direct evidence that he carried out personally any acts of torture, it is supposed that Pinochet instigated and knew them. In 1988 a plebiscite on whether Pinochet should remain in power or not removed him from power leading to democratic elections in the following year. Christian Democrat Patricio Aylwin won presidential election and in 1990 Pinochet resigned as head of State but remained Commander-in-Chief of the army. Only under the next President Eduardo Frei the influence of the Army began to be reduced and in 1998 Pinochet retired from the army and was made senator for life. In the same year, while he was in London for medical treatment he was arrested at the request of Spain (it had issued an international arrest warrant and requested the extradition) on murder charges. After contrasting decisions, in 2000 British Home Secretary Jack Straw finally claimed that Pinochet was not fit to be extradited so he returned to Chile where the courts revoked his immunity in order to prosecute him for alleged human rights offences. However, those attempts always failed mainly for concerns related to his health. When he died in 2006 at the age of 91, there were more than three hundreds criminal charges pending against him most of them for human rights violations, tax evasion and embezzlement²²⁰.

²²⁰ *Timeline of Augusto Pinochet's dictatorship*, 01 June 2011, <http://www.telegraph.co.uk/news/worldnews/southamerica/chile/8549199/Timeline-of-Augusto-Pinochets-dictatorship.html> and *The 1973 Chilean Military Coup: Remembering the Other September 11* By Michael Welch, Prof Michel Chossudovsky, and Peter Kornbluh, 15 September 2013, <http://www.globalresearch.ca/the-1973-chilean-military-coup-remembering-the-other-september-11/5348672>

4.2 TRIALS IN THE UNITED KINGDOM: PINOCHET N. 1, PINOCHET N. 2, PINOCHET N. 3

31. The Spanish Involvement

It is possible to claim that everything began in Spain. The international arrest warrant issued by Spain in 1998 was the result of a long and meticulous investigation that two Spanish investigating magistrates started two years before against the military regimes of Chile and Argentina. The idea of a prosecution in Spain was first the result of a collaboration between human rights activists and Spanish victims of the two dictatorships. However, the possibility of a trial in Spain was very unlikely as Spanish law does not allow trial in absentia and it was improbable that any military leader would voluntarily come to Spain to stand a trial. In Argentina and Chile general amnesties had been granted. One of the aim of a litigation on these crimes, was to allow people involved to tell their stories in a protected environment (a lot of witnesses testified in the *Audiencia Nacional*, a special national court sitting only in Madrid with jurisdiction over international crimes committed outside the Spanish territory). Another objective was to create a legal precedent to be applied in similar situations in the future. However, victims and activists were also aware of the fact that they would have face pressure, a lot of attention and hard work to prepare a carefully constructed legal and political case.

On 1 July 1996 an association of Spanish prosecutors, acting in their private capacity, filed criminal charges of genocide and terrorism against Augusto Pinochet and other Chilean military junta leaders for actions committed from 1973 to 1989. In fact it was believed that more than 3000 people died according to official count. When the action began only seven victims of Spanish descent had been killed or disappeared in Chile. Later, Investigating Magistrates Baltasar Garzón and Manuel Garcia Castellón took over these two investigations in separate courtrooms of the *Audiencia Nacional*. The two actions against Chile and Argentina were filed by the Association of Progressive Prosecutors of Spain that was acting as private complainants with particular expertise to judge the merits of the cases, not as agents of State. The lawyers of the victims then took over the private prosecution of these claims using the procedural devise known as *acción popular* (popular action) that could be brought by any Spanish citizen. Then the Spanish

public prosecutor's office can, at its own choice, choose to participate in supporting a popular action²²¹.

Moreover, according to a 1958 Spanish-Chilean convention on dual citizenship any Chilean has the right to file suit in Spanish court with the same rights as any Spanish citizen and this favoured the approval of the litigation by the public prosecutors. When the actions were filed they were against the highest ranking military leaders of Argentina and Chile for the commission of kidnapping, torture, murder, or disappearance of Spanish nationals and their families. Although in both countries the military enjoyed domestic protection from prosecution thanks to the amnesty, in Spain various laws recognize the existence of universal jurisdiction and the Spanish criminal code included also the crimes of genocide, terrorism, and torture but it did not codify the offence of "forced disappearance". But the kidnapping, illegal detention, torture, and murder that were part of the Spanish complaints, were also the components of forced disappearance²²².

On 16 October 1998 judge Baltasar Garzón issued an international arrest warrant and extradition request for Pinochet who at the time was in the UK for business and medical treatment with a diplomatic passport. It charged him for crimes of genocide, terrorism and torture and for the murder of Spanish citizens in Chile during the military regime. On 18 October he was arrested in London, and on 22 October judge Garzón issued a second and more detailed arrest warrant charging Pinochet with torture and conspiracy to torture, hostage-taking and conspiracy to hostage-taking, murder and conspiracy to murder. The grounds for the extradition request were the European Convention on Extradition and the Extradition Act 1989 (UK) which gave him effect in the UK. Furthermore in November the Spanish Court confirmed its jurisdiction to investigate those acts as the concept of universal jurisdiction for acts of genocide, terrorism and torture existed in Spanish law and the court also mentioned (without using) the passive personality principle, as various Spanish citizens, that is the victims, had disappeared in Chile under Pinochet rule. Another consideration to make is that Spanish courts did not find any problem regarding the retroactivity (the conventions on genocide

²²¹ R. J. WILSON, 1999. *Prosecuting Pinochet: International Crimes in Spanish Domestic Law*. *Human Rights Quarterly*, [e-journal], 21(4), pp. 927-979. Published by: The Johns Hopkins University Press. Available through <http://www.jstor.org/stable/762753> (Accessed 07 August 2013 through the King's College London subscription)

²²² *ibidem*

and torture had not been signed at the time of the events) and that they considered the amnesty void as the courts stated that it was contrary to international law²²³.

32. Pinochet No. 1 and the immunity issue

After Bow Street Magistrates at the instance of the Spanish judge, Baltasar Garzón issued the two arrest warrant, on 28 October 1998 a panel of three judges of the Divisional Court of England and Wales (Lord Bingham CJ, sitting with Collins and Richards JJ) upheld Pinochet's claim to State immunity (*Re Augusto Pinochet Ugarte*). This was in fact the preliminary issue to consider, as the interpretation of the immunity from proceedings and extradition enjoyed by a former head of State for acts committed while he was head of State was of paramount importance to decide whether to allow the extradition request to Spain or not.

In the first hearing of the immunity issue, these three judges upheld Pinochet's claims rejecting the warrant. They established in fact that although the personal immunity for personal and private acts ceased, the functional immunity for public acts performed by a former head of State was still enjoyed by him. In addition, they explained that the charges against him of torture, murder and kidnapping formed part of his function as head of State, that is, they were committed with government authority, describing them as official acts, not private. Moreover, he was not charged with personally torturing or murdering the victims but with using the State power of which he was the head to achieve that result and they underlined that immunity from criminal jurisdiction existed also for criminal acts otherwise it would be pointless. They recalled article 31 ("a diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction"²²⁴) and article 39 (2) ("when the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by

²²³ C. DE THAN, - E. SHOTS, *International Criminal Law and Human Rights*, London, Sweet&Maxwell Limited, 2003, p. 54

²²⁴ The Vienna Convention on Diplomatic Relations of 18 April 1961: http://treaties.un.org/doc/Treaties/1964/06/19640624%2002-10%20AM/Ch_III_3p.pdf

such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist”²²⁵) of the 1961 Vienna Convention on Diplomatic Relations²²⁶.

Subsequently, Pinochet was released from custody on bail, but the Commissioner of Police and the Spanish Government (which had formally requested extradition in the meantime) appealed to the House of Lords. The House of Lords exceptionally agreed to hear submissions from Amnesty International and Human Rights Watch as *amici curiae* and a judgment was given on 25 November. The House of Lords ruled by three to two (Lord Nicholls of Birkenhead, Lord Steyn, and Lord Hoffmann concurring, Lord Slynn of Hadley and Lord Lloyd of Berwick dissenting) that a former head of State did not enjoy immunity for acts of torture made crimes by section 134(1) of the Criminal Justice Act 1988 (that were the first two counts of the second warrant) or of acts of hostage-taking made a UK criminal offence by the Taking of Hostages Act 1982 (counts 3 and 4 of the second warrant). They drew a distinction between a current head of State that had the immunity and a former one which had only a limited one that could not be applied to charges of hostage-taking and torture. In fact they considered that immunity could not be applied to actions illegal under international law. Those serious crimes that were contrary to *ius cogens* were in effect condemned by all States and could be not protected by international as an “official function” and considered acts performed in the exercise of the functions of head of State. Torturing political opponents or taking hostages were not considered legitimate exercise of his official functions. However, the claim that acts of torture could not be regarded by international law as making part of the functions of a Head of State does not mean that those same acts could not be official acts. Lord Steyn affirmed that the charges against Pinochet were established crimes under international law long before he committed them and also before the sign of the Torture Convention for example. According to Lords Nicholls

“international law recognizes, of course, that the functions of a head of State might include activities which are wrongful, even illegal, by the law of his own State or by the law of other States. However, international law has made it plain that certain types of conduct, including torture and hostage-taking, are not acceptable conduct on the part of anyone. That applies as much to heads of State,

²²⁵ *ibidem*

²²⁶ R. CRYER, H. FRIMAN, D. ROBINSON, E. WILMSHURST, *An Introduction to International Criminal Law and Procedure*, New York, Cambridge University Press, 2007

or even more so, as it does to everyone else; the contrary conclusion would make a mockery of international law...²²⁷

The two dissenting judges had different opinions on why they should grant immunity to Pinochet. While Lord Lloyd believed that as those crimes were committed by almost all who lead revolutions, immunity should remain or fall for all of them. Moreover, judging the extradition, a British court would be also giving its opinion on the validity of the amnesty accorded in Chile, interfering in this way with Chilean State sovereignty. Lord Slynn believed on the other hand that immunity did apply to any case brought in a British court and those allegations should be judged by a Chilean court or an international court²²⁸.

All those things considered, the Home Secretary authorized extradition to Spain.

33. Pinochet No. 2 and the Court Bias

This case is considered less significant than the other two as it was basically about procedure. On 17 December 1998, the House of Lords decision, was set aside after a House of Lords Committee found a disqualification of one of the judges, Lord Hoffmann. He failed to disclose that he had been the director and chairperson of Amnesty International Charity Ltd, the research and educational branch of Amnesty International, which had intervened as *amicus curiae* in the Pinochet No.1. This resulted in a not properly court constitution and rose doubts of a potential conflict of interest or bias although there were no suggestions that he was biased. But, if there is even an appearance of bias and a doubt about the impartiality of a judge, the appearance is important like the reality, and this is the reason why for the first time, the House of Lords had set aside one of its own decisions²²⁹. This decision was taken based also on the rule against bias summarized in the phrase “*nemo iudex in causa sua*” which affirms that a person cannot be a judge in his own cause and judicial impartiality and neutrality was too important and a value to protect without any reasonable doubt.

²²⁷ Lords Nicholls [1998] 4 All E. R. 897 at 939-40 in C. THAN, - E. SHOTS, *International Criminal Law and Human Rights*, London, Sweet&Maxwell Limited, 2003, p. 56

²²⁸ Ivi, p. 57

²²⁹ A. GATTINI, *Pinochet Cases* in *Max Planck Encyclopedia of Public International Law*, [online encyclopedia], available through: the University of Cambridge website http://www.squire.law.cam.ac.uk/electronic_resources/legal_databases.php (Accessed 04 July 2013)

34. Pinochet No. 3 and the Final Decision

This case is the most important and the most complete of all the three cases before the British courts. It analyzed a lot of issues and recalled the ones already judged in Pinochet No. 1.

On 24 March 1999 at the third and final House of Lords hearing, the second appeal hearing on the immunity issue, a majority of six to one Law Lords (Lord Browne-Wilkinson, Lord Hope of Craighead, Lord Hutton, Lord Saville of Newdigate, Lord Millett, Lord Phillips of Worth Matravers, with Lord Goff of Chieveley dissenting) rejected once again Pinochet's claims to immunity. Moreover, a majority of five Law Lords stated that British courts did not have jurisdiction over crimes of torture performed by foreigners abroad before the enactment of Section 134 of the Criminal Justice Act of 1988 (UK) that implemented the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

In addition, with a majority of five to two they claimed that Pinochet was entitled to immunity in respect of the charges of murder and conspiracy to murder as they were not considered extradition crimes (the charges of murder of which Pinochet was accused were committed in France, Portugal and the US but they were not considered extradition crimes as they took place before the enforcement of the Suppression of Terrorism Act of 1978²³⁰). On 14 April 1999 the Home Secretary granted authority for the extradition to proceed and on 8 October 1999 the Deputy Chief Metropolitan Stipendiary Magistrate ruled in *Kingdom of Spain v Augusto Pinochet Ugarte* that he should be extradited to Spain for 34 charges of torture and one charge of conspiracy to commit torture. However, on 14 October 1999 the Chilean government requested to the Home Secretary, Jack Straw, the release of Pinochet on medical grounds. The medical examination of January 2000 established that Pinochet was unfit to stand trial so on 2 March 2000 the Home Secretary ordered the release of Pinochet who immediately returned to Chile.

There are various aspects to analyze about this third proceeding. What makes it difficult to evaluate this judgment is that every judge issued a separate opinion so it is not always clear the *ratio decidendi*.

As regards immunity, it must be noticed that it should be widely recognized that the functional immunity does not represent a shield for prosecution for serious

²³⁰ I. BANTEKAS, S. NASH, *International Criminal Law*, II Edition, London, Cavendish Publishing Limited, 2003, p. 228

international crimes as it was affirmed several times²³¹. Moreover, the request of functional immunity is very similar to the notion of Act of State, that was rejected several times. The defence of Act of State was based on the fact that in committing the offences, the accused had acted as an organ of the State. Article 7 of the Nuremberg Charter²³² explained this point and it had been considered as having become part of the law of nations. For example, in the Nuremberg Judgment already analyzed it had been observed that

“The principle of international law which, under certain circumstances, protects the representative of a State cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment. [...] Individuals have duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State, if the State in authorizing action moves outside its competence under international law”²³³

Moreover, it was confirmed also by the Israeli Supreme Court while rejecting the plea of official activities by Eichmann:

“there is no basis for the doctrine when the matter pertains to acts prohibited by the law of nations, especially when they are international crimes of the class of ‘crimes against humanity’ (in the wide sense). Such acts [...] are completely outside the ‘sovereign’ jurisdiction of the State that ordered or ratified their commission, and therefore those who participated in such acts must personally account for them and cannot shelter behind the official character of their task or mission [...]”²³⁴

²³¹ [At the end of the office with the exception of the ICC].

²³² “Article 7: The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.”, Charter of the International Military Tribunal at Nuremberg - Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis ("London Agreement") (1945): <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=3ae6b39614>

²³³ See *supra* 2.2 and IMT, judgment of 1 October 1946 in The Trial of German Major War Criminals, Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany, part 22 (1950), p. 447

²³⁴ *Attorney-General of the Government of Israel v Adolf Eichmann* (Judgment) District Court of Jerusalem in R. CRYER, H. FRIMAN, D. ROBINSON, E. WILMSHURST, *An Introduction to International Criminal Law and Procedure*, New York, Cambridge University Press, 2007, p. 433

The incongruence of international law between the protection and the condemn as international crimes of the same conduct should be outdated and the fact that international law itself imposes a duty to disobey to acts authorized by a State but contrary to international law should be attested. However, the fact that during the Pinochet proceedings in the UK many of the Law Lords confined themselves to a narrower basis, seems to suggest that those claims are not universally accepted or clear²³⁵.

The court was sometimes criticized for having relied too much on Section 20 of the State Immunity Act of 1978 (UK) by equating the immunities of a Head of State with those enjoyed by the heads of diplomatic missions. In fact it granted to a Head of State immunity from all prosecutions but it is silent regarding the position of former heads of State. It stated that

“(1)Subject to the provisions of this section and to any necessary modifications, the M6Diplomatic Privileges Act 1964 shall apply to—

- (a) a sovereign or other head of State;
- (b) members of his family forming part of his household; and
- (c) his private servants,

as it applies to the head of a diplomatic mission, to members of his family forming part of his household and to his private servants”²³⁶.

So the majority of the House of Lords held that

“the immunity of a former head of State persists only with respect to acts performed in the exercise of the functions of the head of State, that is official acts, whether at home or abroad. The determination of an official act must be made in accordance with international law. International crimes in the highest sense, such as torture, can never be deemed official acts of State”²³⁷.

Furthermore, most of the judges of the majority held that the immunity in civil proceedings to the individual agent or to the State remained unaffected.

Another point must be taken into account and this is the double criminality aspect. According to the Section 2 (1) (b) of the Extradition Act of 1989 (UK), to qualify an act

²³⁵ R. CRYER, H. FRIMAN, D. ROBINSON, E. WILMSHURST, *An Introduction to International Criminal Law and Procedure*, New York, Cambridge University Press, 2007, p. 432

²³⁶ State Immunity Act of 1978 (UK): <http://www.legislation.gov.uk/ukpga/1978/33>

²³⁷ C. DE THAN, - E. SHOTS, *International Criminal Law and Human Rights*, London, Sweet&Maxwell Limited, 2003, p. 58

as an extradition crime, it was necessary that it was considered a crime under UK law at the time it was committed, and not merely at the time of the extradition request (in general, the conduct must be an offence in the extraditing and the receiving State, so both in Spain and the UK). In fact it stated that

“(1) In this Act ... "extradition crime" means-

- (a) conduct in the territory of a foreign state ... which, if it occurred in the United Kingdom, would constitute an offence punishable with imprisonment for a term of 12 months, or any greater punishment and which, however described in the law of the foreign state ... is so punishable under that law;
- (b) an extra-territorial offence against the law of a foreign state ... which is [similarly punishable] and which satisfies-

- (i) the condition specified in subsection (2) below ...

(2) The condition mentioned in subsection (1)(b)(i) above is that in corresponding circumstances equivalent conduct would constitute an extraterritorial offence against the law of the United Kingdom [punishable similarly] ...²³⁸

The problem was to understand when this had to be determined. For this reason the Law Lords concluded that the date to take into consideration was the date of the implementation of the Convention against Torture through the Criminal Justice Act of 1988 as prior to this year torture offences committed outside UK territory were not crimes punishable under UK law²³⁹. Strictly related to this topic is the issue of universal jurisdiction. The majority in fact believed that torture was not to be considered a crime of universal jurisdiction prior to the promulgation of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and even if it was, it was not extraditable in the UK before the Criminal Justice Act of 1988 as the jurisdiction had to be based on the English incorporation of the torture as a criminal offence. However,

²³⁸ Section 2 of the Extradition Act 1989 in C. WARBRICK, – D. MCGOLDRICK, 1999. *Extradition Law Aspects of Pinochet 3. The International and Comparative Law Quarterly*, [e-journal], 48(4), pp. 958-965. Published by: Cambridge University Press on behalf of the British Institute of International and Comparative Law. Available through <http://www.jstor.org/stable/761744> (Accessed 07 August 2013 through the King's College London subscription)

²³⁹ A. GATTINI, *Pinochet Cases* in *Max Planck Encyclopedia of Public International Law*, [online encyclopedia], available through: the University of Cambridge website http://www.squire.law.cam.ac.uk/electronic_resources/legal_databases.php (Accessed 04 July 2013)

this position seemed to be in contrast with the idea of torture as a universal crime or a crime that permitted universal jurisdiction and the House of Lords apparently did not support the customary international law claim about the existence of universal jurisdiction over heads of State and former heads of State for torture or other crimes against humanity²⁴⁰.

On the contrary, Lord Millet, one of the judges, by recalling the Eichmann case, underlined the fact that it had demonstrated that there was “no rule in international law which prohibits a State from exercising extraterritorial criminal jurisdiction in respect of crimes committed by foreign nationals abroad. War crimes and other atrocities [...] are crimes of universal jurisdiction under customary international law.”²⁴¹ He mentioned also the existence of international instruments (such as Article 5 of the Universal Declaration of Human Rights of 1948 or Article 7 of the International Covenant on Civil and Political Rights of 1966) that had made the resort to torture by State authorities prohibited by international law, with the character of *jus cogens* and obligation *erga omnes* already in 1973 when Pinochet overthrew the Chilean government. For these reasons he concluded affirming that

“in my opinion, the systematic use of torture on a large scale and as an instrument of State policy had joined piracy, war crimes and crimes against peace as an international crime of universal jurisdiction well before 1984. I consider that it had done so by 1973. For my own part, therefore, I would hold that the courts of this country already possessed extraterritorial jurisdiction in respect of torture and conspiracy to torture on the scale of the charges in the present case and did not require the authority of statute to exercise it.”²⁴²

However, this was not the point of view of the majority.

It is interesting to mention the Chilean point of view of this matter which emphasized the struggle between the right of universal jurisdiction versus territorial jurisdiction. In a

²⁴⁰ C. L. BLAKESLEY, 2000. *Autumn of the Patriarch: The Pinochet Extradition Debacle and beyond: Human Rights Clauses Compared to Traditional Derivative Protections Such as Double Criminality*. *The Journal of Criminal Law and Criminology*, [e-journal], 91(1), pp. 1-98. Published by: Northwestern University. Available through <http://www.jstor.org/stable/1144146> (Accessed 07 August 2013 through the King's College London subscription)

²⁴¹ A. CASSESE, G. ACQUAVIVA, M. FAN, A. WHITING, *International Criminal Law: Cases and Commentary*, Gosport, Oxford University Press, 2011, p. 84

²⁴² *ibidem*

letter addressed to the United Nations General Secretary Kofi Annan on 22 December 1998, Chilean foreign minister denounced

“una situación que importa un desconocimiento del Derecho internacional en vigor y de los Propósitos y Principios de la Carta de las Naciones Unidas”²⁴³ [a situation that involves the repudiation of international law in force and of the scopes and principles of the UN Charter]

accusing the judges of other countries to claim

“una competencia que el Derecho internacional no les ha conferido y movido únicamente –según decía- por la necesidad de defender ciertos principios básicos de Derecho internacional”²⁴⁴ [a competence that international law did not give them and driven by the need to protect some basic principles of international law]

and he claimed that

“la tendencia hacia la universalización de la justicia y los derechos humanos (...) no puede llevarse adelante en detrimento de la soberanía de los Estados y su igualdad jurídica”²⁴⁵ [the tendency towards the universalization of justice and human rights cannot continue at the expense of States sovereignty and their juridical equality]

and warning that

“de vulnerarse esos principios con acciones unilaterales, la universalidad de la jurisdicción penal se convertiría en un factor de anarquía internacional”²⁴⁶ [by undermining those principles through unilateral actions, universal criminal jurisdiction would become a cause of international anarchy].

However, the Pinochet litigation throughout Europe could be interpreted also as the globalization of human right law in the sense that the consequences and the jurisdiction over offences against human rights are not confined in the territory of the

²⁴³ A. REMIRO BROTONS, *El Caso Pinochet: Los Límites de la Impunidad*, Política Exterior, Madrid, Biblioteca Nueva, 1999, p. 46

²⁴⁴ *ibidem*

²⁴⁵ *ibidem*

²⁴⁶ *Ibidem* [my translation]

State in which they took place, regardless also the nationality of the perpetrators and the victims²⁴⁷.

Having said that, it must be noticed that the claims of immunity were rejected and the extradition was allowed but he never stood a trial in Spain. The final decision of the Home Secretary, Jack Straw, in fact, was to release Pinochet as he was found unfit to stand trial due to medical reasons. This decision was disputed and humanitarian grounds were applied to refuse extradition. To test if a person could stand a trial laid on the capacity of the accused to understand the charges and to participate in his defence and Straw's decision was based on the supposed Pinochet's mental incapacity and his physical deterioration, however this seems not to be sufficient to deny extradition or prosecution. According to one important human right value that is also considered a basic criminal law principle, an individual without mental capacity to understand the proceedings against him and the aim of his punishment should not be prosecuted. However, doubts still remain on his real incompetence to stand trials²⁴⁸. In fact according to Roger Burbach, this was a political decision that arrived after a secret meeting that took place in Rio de Janeiro in June 1999 between the British Foreign Secretary Robin Cook and the Spanish Foreign Minister Abel Matutes who began to arrange Pinochet's return to Chile. British, Spanish and Chilean governments decided to play the "medical card" to rescue him and to end this legal and human-rights drama²⁴⁹.

However, it is interesting to analyze the events that took place after the UK events. When he returned in Chile in fact, dozens of cases were presented in Chilean courts against him. The 'Rettig Report' of 1991 stated that almost the totality of the 3000 persons disappeared during the Pinochet regime had been killed and in July 1999 the Chilean Supreme Court decided that the Amnesty Law of 1978 could not be applicable in cases of enforced disappearances and the following year it decided to lift Senator Pinochet's parliamentary immunity and allow prosecution for torture of political

²⁴⁷ C. DE THAN - E. SHOTS, *International Criminal Law and Human Rights*, London, Sweet&Maxwell Limited, 2003, p. 55

²⁴⁸ C. L. BLAKESLEY, 2000. *Autumn of the Patriarch: The Pinochet Extradition Debacle and beyond: Human Rights Clauses Compared to Traditional Derivative Protections Such as Double Criminality*. *The Journal of Criminal Law and Criminology*, [e-journal], 91(1), pp. 1-98. Published by: Northwestern University. Available through <http://www.jstor.org/stable/1144146> (Accessed 07 August 2013 through the King's College London subscription)

²⁴⁹ R. BURBACH, *The Pinochet Affair: State Terrorism and Global Justice*, London, Zed Books, 2003, p. 121

opponents. In 2002 he was able to escape arrest due to his alleged senile dementia that made him unfit to stand trial. In 2004 the Supreme Court denied Pinochet's parliamentary immunity, that he still enjoyed even after having resigned from Senate in 2002. This case was related to 'Operation Condor'. Moreover, he was accused of tax evasion and placed under house arrest and in 2006 another house arrest was again issued for the murder of two bodyguards of Allende in 1973 but he died before having faced trial for his crimes²⁵⁰.

4.3 POLITICAL, SOCIAL AND HUMANITARIAN CONCERNS

This case has been surrounded by a lot of media attention and political, social and humanitarian concerns. As regards politics, it focused on a former head of State who at that time was still supported by part of the Chilean population. Moreover, the repercussions of the case were reflected on the political economic and diplomatic relations among Chile, Spain and the UK and the fact that it was said that an alleged political intrigue was led by them to allow the return of Pinochet to Chile has left some doubts. In addition, it was the Home Secretary of the UK which finally interpreted the medical report and did not allow the extradition of Pinochet to Spain or a trial in the UK (avoiding in this way also the application of the principle of *aut dedere aut judicare*). As regards the social concerns, this case arose a lot of public attention and it could have led to important and perhaps not positive consequences in a country that was still dealing with the legacy of Pinochet regime. The humanitarian concerns were linked with the health of the former dictator, who could avoid extradition and trial for this reason as the Home Secretary Straw decided he was unfit to stand trial anywhere, applying on of the principles of the humanitarian law. On the other side, this case strengthened the hope in the international community and in the human rights organizations that it was really possible to prosecute the perpetrators of human rights violations, regardless the place of commission, the nationality of the culprits or the victims and the ranking of the wrongdoer.

The Pinochet case represented also a landmark in international law. For the first time a dictator, a former head of State was brought before a court to be accountable for his crimes and this could represent the beginning of the end of impunity for the highest

²⁵⁰ A. GATTINI, *Pinochet Cases* in *Max Planck Encyclopedia of Public International Law*, [online encyclopedia], available through: the University of Cambridge website http://www.squire.law.cam.ac.uk/electronic_resources/legal_databases.php (Accessed 04 July 2013)

offices in the State. However it must be underlined that those crimes allegedly committed during the worst period of repression, (that is, from 1973 to 1976) were not considered extraditable offences or offences liable to prosecution in the United Kingdom demonstrating the gap between individual criminal responsibility for offences against international law and the imposition of that criminal accountability in domestic law (at least in the UK). In fact the development of the case showed some of the problems that national courts have to face when they have to deal with serious human rights abuses at the international level. Moreover, also in the final judgment, the decision was not unanimous and this fact can weaken the legacy of this case. Furthermore, the extradition issue was demonstrated to be a political as much as a legal question as it was of fundamental importance the final decision of the Home Secretary to deny extradition.

The fact that Pinochet was arrested and his claims for immunity were rejected, seemed to have challenge the dictators' status around the world. For example in 2000 former Chadian dictator, Hissain Habre was indicted by a Senegalese judge for torture offences while it is believed that former president of Indonesia, Suharto decided not go abroad for medical treatment because of the fear to be prosecuted²⁵¹. Other proceedings regarding extra-territorial cases began in Spain (for example against Fidel Castro) and in Belgium and in Chile itself some officials of the Pinochet dictatorship were criminally prosecuted. On the other side, to save the principle of immunity resulted of particular importance especially for the most powerful States. The use of immunity resulted particularly useful in the transition process that Chile underwent at the beginning of the 1990s. The Chilean Amnesty Decree Law of 1978 and the fact that Pinochet was still enjoying a partial immunity as Senator for life are in opposition with the universal jurisdiction that could endangered the balance struck between prosecution and amnesty in the newborn democracy.

Behind the legal development of the Pinochet there was also a rising tension among the governments of Spain and Chile. During the period of the proceedings in London about the extradition request issued by Spain in fact, diplomatic and economic relations between the two countries deteriorated. At the end of December 1998 Chile suspended official visits to Spain and the ambassador was recalled in Chile for consultations. Spanish foreign minister also requested protection for the embassy in

²⁵¹ R. BURBACH, *The Pinochet Affair: State Terrorism and Global Justice*, London, Zed Books, 2003, p. 121

Santiago after some Spanish flags were burnt as a reaction to the evolution of the proceedings. Spain conduct was criticized by some countries in Latin America too. Under the economic point of view, Spain and the UK were two of the major investors in Chile and several menaces were directed towards Spanish companies in Chile²⁵².

This highly charged atmosphere represented the fact that in Chile a third of the population still supported Pinochet, namely the army, influential sectors of the financial and economic world, important mass media and the richest social classes.

Sergio Bitar, former Secretary of State during the governments of Allende and Bachelet, underlined the debate surrounding the truth that Chile faced after the Pinochet rule and the long and slow transition process which took place in a peaceful way. The condemn by the courts for the violations of human rights perpetrated during his rule represented an ethical support to help this country to deal with those tragic years. However, it opened once again the grief related to those terrible years and the fact that a large part of the population was still supporting Pinochet represented a challenge of avoid to harm the peaceful transition that had led to a democratic government at the beginning of the 1990s²⁵³.

²⁵² M.a ISABEL SERRANO MAILLO, *Prensa, Derecho y Poder Político: el Caso Pinochet en España*, Madrid, Dykinson, 2002, p. 116-128

²⁵³ On 22 October 2013, I had the pleasure to attend the public lecture of Sergio Bitar “Looking Back: 40 years on from the 1973 Coup” at the London School of Economics and Political Science.

5- JULIAN ASSANGE, THE WIKILEAKS CASE AND THE POLITICAL ASYLUM

Contents - 35. Introduction; 36. The implication of Bradley Manning; 37. The legal dispute between Assange and Sweden; 38. Conclusion. –

35. Introduction

Julian Assange is one of the most controversial persons of the recent times as he challenged the way to use internet. Although he is facing rape and sexual assault allegations by Sweden, he became famous for the activity of WikiLeaks, the website he created in 2006 to expose the secrets of the world governance especially of the US government. In fact the most shocking revelations dealt with secret files regarding the wars in Afghanistan and Iraq as well as secret diplomatic correspondences. The Assange case is probably one of the most interesting under international law as the situation has reached a deadlock: after Sweden issued an international arrest warrant and an extradition warrant in order to try him for sexual molestation and illegal coercion, Ecuador granted him political asylum but he is still in the Ecuadorian Embassy in London as the United Kingdom has refused to give him the safe-conduct to leave the UK and finally reach South America. It is more than a year that Assange has been living in the Ecuadorian Embassy and there is still no solution to this situation that has risen a lot of concerns. There are in fact not only legal but also political considerations to make in order to fully understand the issue. Two of the reasons the Assange defense underlined were first the risk not to have a fair trial for him in Sweden and second that in Sweden he could later face extradition or illegal rendition to the United States where he could face a long period detention in a high-security prison and face the death penalty under the Espionage Act of 1917.

Extradition, inviolability of diplomatic correspondence, inviolability of diplomatic missions and political asylum are some of the issues this case includes and for this reason it can become a cornerstone in the development of international law. However, the activity of Assange related to WikiLeaks has risen questions about privacy, the use of new technologies and the behavior of some of the leading actors of the international community, in primis, the United States and the financial giants.

It is important to make reference also to the involvement of Bradley Manning, whose activity was strictly related with Assange and WikiLeaks although his destiny seems to be different.

In addition, during this period other similar cases have developed, starting with Edward Snowden who is following the footsteps of Assange as he escaped from the US after revealing and finally found temporary asylum in Russia²⁵⁴.

5.1 THE FACTS AND THE IMPLICATION OF BRADLEY MANNING

Julian Assange was born in Australia in 1971. He soon showed his cleverness and his mathematic skills that he applied in the growing sector of internet starting hacking activities. He faced accuses and had to pay to escaping a prison term in 1995. He also worked for three years with an academic, Suelette Dreyfus, researching and writing a book related to the emerging and subversive side of internet. He became also a prominent member of a mathematic society after a course in physic and maths at Melbourne University.

He founded WikiLeaks in 2006 with a group of like-minded people across the web. He run WikiLeaks from temporary, shifting locations as he had adopted a nomadic lifestyle²⁵⁵.

The aim of the website was to provide a platform to post anonymously sensitive and political documents. The site came to prominence for the first time in 2008 when it published internal documents of the Swiss Bank showing activities of money laundering via the Cayman Islands. This became only the first of many legal charges against WikiLeaks. The following year it released an archive of messages recorded in the US on 11 September 2001 the day of the terroristic attacks against the World Trade Center in New York and the Pentagon in Washington. In July and again in October 2010 WikiLeaks started to release video and documents of the US. First a video of 2007 in which a military helicopter stroke on Baghdad causing twelve casualties. An American soldier, Bradley Manning was charged and arrested for leaking the information. In the same period WikiLeaks released also classified US military documents about the war in

²⁵⁴ *Profile: Wikileaks founder Julian Assange*, BBC Article of 17 August 2012 from <http://www.bbc.co.uk/news/world-11047811> [accessed 30 December 2013]

²⁵⁵ *ibidem*

Afghanistan and probable links between Pakistan and the Taliban. In October it also released 400,000 accounts of American soldiers in the period 2004-2009 that revealed that the US had decided to ignore cases of torture by Iraqi authorities on civilians. In the meantime in August of the same year, a Swedish court issued an arrest warrant for Assange on charges of rape made by two Swedish women also former employees of Wikileaks. However the Court decided to postpone the case until November when after the European arrest warrant for Assange was re-issued, the site released classified US diplomatic cables, showing assessments of American officials on a range of issues, including views of other governments. The legal battle with Sweden had begun.

In October 2011 in the middle of his dispute with Sweden, Assange announced that WikiLeaks would stop publishing classified US diplomatic files in order to concentrate on fundraising activity to support the website as a financial blockade by credit card companies (such as Visa and MasterCard) had harmed the survival of the site.

36. The implication of Bradley Manning

Bradley (now Chelsea) Manning is a key figure in the history of WikiLeaks as he was recognized to be one of the most important whistleblowers of the website. For this reason he had to face a trial before a US Martial Court in which he was found guilty and sentenced to thirty-five years in jail.

He was born in 1987 and as Assange, soon had shown an aptitude for computers. In 2007 he joined the army and he was deployed in Iraq in 2009. During this period (apart of the fact that he was feeling frustrated and isolated) as intelligence analyst of the US army, Private First Class Manning was given access to a large amount of information, especially classified database. It was in this time that the contacts with WikiLeaks started. In early 2010, the site released US documents and records he had stolen. In May, he contacted hacker Adrian Lamo online, affirming that he is the source of the leaks. Lamo recorded the chats and hands them over to the US defence department and Wired.com and twenty days later he was arrested in Kuwait. In June he was charged with leaking classified information and later in that month the Guardian, the New York Times and other media groups published a series of reports on the Afghan war, based on US military internal logs. At the end of July, he was moved in a solitary cell in Quantico, while again in October, Iraq war logs showing civilian deaths, torture, summary executions and war

crimes were published and in November US embassy cables about the opinion of diplomats about their postings were released²⁵⁶.

In general, he provided four categories of documents: videos, incident reports from the Afghanistan and Iraq wars, information on detainees at Guantanamo and thousands of State Department cables. As regards the videos, the most important was the one released in April 2010 showing Iraqi civilians and journalists being killed by a US Apache helicopter gunship in July 2007 and edited by WikiLeaks under the name "Collateral Murder". Incident reports from Afghanistan and Iraq were the second category of documents provided by Manning and published by WikiLeaks calling them "War Logs" and without redacting the names of people mentioned in the incident reports (putting the supporters of the American military mentioned at risk and in the following releases, the names were redacted). The third category related to the Guantanamo detainees received little attention as the majority of information had already been released by the government itself. However, the largest amount of stolen documents that Manning provided to WikiLeaks, was State Department cables which according to US officials represented the most damaging leak by Manning as they made some States more hesitant to share intelligence with the US. The defence pointed out that for example the video had been already made public and that the reports regarding the wars in Iraq and Afghanistan were low-level reports that could not have damaged ongoing operations but as well as for the diplomatic cables, they were useful to provide the public with important information and a better understanding of the war and international affairs, helping also the democratic movements in the Middle East. However, prosecutors and the army considered them as damaging and secret-revealers²⁵⁷.

Going back to development of the situation of Manning, in January 2011 Amnesty International denounced the treatment Manning was suffering in Quantico and in March Manning's charges updated to twenty-two violations for the unauthorized disclosure of classified information, the most serious of them was "aiding the enemy", which could carry a life sentence. In the meantime the release of documents continued while Manning was still detained. His imprisonment rose concerns over possible violations of human rights and in March 2012, the UN special rapporteur on torture formally accused the US

²⁵⁶ *Bradley Manning – timeline*, 30 July 2013, from <http://www.theguardian.com/world/2013/jul/30/bradley-manning-timeline>

²⁵⁷ *What Bradley Manning Leaked*, by Julian E. Barnes, 21 August 2013, from <http://blogs.wsj.com/washwire/2013/08/21/what-bradley-manning-leaked/>

government of “cruel, inhuman and degrading treatment” towards him during the period of detention in Quantico (in April 2011 he was transferred from Quantico to the Joint Regional Correctional Facility at Fort Leavenworth). In fact, after a 14-month investigation into the treatment of Manning since the arrest at a US military base in May 2010, Juan Mendez concluded that that the US military was at least culpable of cruel and inhumane treatment as it kept Manning locked up alone for 23 hours a day for period of eleven months in conditions that might have constituted torture. In his report he affirmed that

“[d]epending on the specific reason for its application, conditions, length, effects and other circumstances, solitary confinement can amount to a breach of article 7 of the International Covenant on Civil and Political Rights, and to an act defined in article 1 or article 16 of the Convention against Torture. [...] Imposing seriously punitive conditions of detention on someone who has not been found guilty of any crime is a violation of his right to physical and psychological integrity as well as of his presumption of innocence”.²⁵⁸

At the end of February 2013 he pled guilty to leaking military information and in June Court martial began. He was accused of violating Articles of the Uniform Code of Military Justice. Article 104 is about aiding the enemy, Article 92 deals with the failure to obey a lawful order or regulation, and specifically he was charged with bypassing security, installing unauthorized software and storing classified information. Under Article 134 of Computer Fraud and Abuse Act he was accused of having stolen US State Department records and classified cables while under Article 134 included in the Espionage Act he was accused of having leaked Iraq airstrike video, classified memos, military records, database files, Afghan airstrike video and army records. He was accused of having violated Article 134 regarding stealing government property, in this case military records, database files, US State Department records and server address lists as well as Article 134 of wanton publication of intelligence on the Internet²⁵⁹.

²⁵⁸ A/HRC/19/61/Add.4 General Assembly, Human Rights Council, Nineteenth session, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez 29 February 2012 http://image.guardian.co.uk/sys-files/Guardian/documents/2012/03/12/A_HRC_19_61_Add.4_EFSONly-2.pdf

²⁵⁹ *Verdict in Bradley Manning case*, by Ernesto Londono, Rebecca Rolfe and Julie Tate, Published: 30 July 2013, Updated August 21, 2013 <http://www.washingtonpost.com/wp-srv/special/national/manning-verdict/?hpid=z1>

On 30 July 2013 he was cleared of "aiding the enemy" but found guilty of seven out of eight espionage charges, five theft charges, two computer fraud charges, five military counts of violating a lawful general regulation, one of wanton publication of intelligence on the internet. The most important thing to underline is that he was acquitted of most serious 'aiding the enemy' charge and also of unauthorized possession of information relating to national defence. He would have faced a possible maximum sentence of 136 years in military jail after the conviction of most charges on which he stood trial. The reactions to the verdict were very different: if there was relief in evaluating the acquittal of the charge related to aiding the enemy as it showed that he did not want to help America's enemies in any way, the fact that he was found guilty of twenty charges demonstrated however the condemnation of his acts (he was found guilty of all eight offences under the 1917 Espionage Act) and increased the fear of decades of imprisonment. The Manning's trial was at the center of Obama's war on whistleblowers and the press. In fact it can be considered as an important precedent as it was the first time that a whistleblower had been convicted of espionage. Moreover, it could be considered as a message about the future US intentions toward WikiLeaks and Julian Assange (and also other similar cases such as the one of Edward Snowden). According to Assange himself, this verdict must be considered a dangerous precedent and a national security extremism. Moreover, he added that it was not a fair trial and that Manning is an hero who only wanted transparency and exposing the world to the American government's crimes²⁶⁰.

All things considered, the defence evaluated in a positive way this verdict affirming that it was like winning a battle²⁶¹. In the following weeks the possible sentence was discussed. Prosecutors asked for sixty years in order also to send a message to future leakers and the final 35-year sentence to be served at Fort Leavenworth in Kansas of 21 August 2013 was once again considered a significant strategic victory. Moreover, Judge Denise Lind sentenced Manning to be demoted to private and dishonourably discharged from the US Army, and to forfeit his pay²⁶².

²⁶⁰ *Manning verdicts are 'dangerous precedent'*, 31 July 2013, <http://www.bbc.co.uk/news/world-us-canada-23512954>

²⁶¹ *Bradley Manning verdict brings anger, disappointment – and relief*, by Ed Pilkington, 30 July 2013, <http://www.theguardian.com/world/2013/jul/30/bradley-manning-verdict-anger-relief>

The situations of Manning and Assange are different other various points of view, even if they both are embroiled in the development of WikiLeaks. First of all, they had different roles in the website as the first one was “simply” a whistleblower while the second was the creator and the editor-in-chief if we can use this term. Secondly, Manning was a military who stole database, video, military records, diplomatic cables from the US archive thanks to his position in the army that allowed him to get access to all these classified information. He was accused of high treason, espionage and aiding the enemy which could have led on to the death penalty if confirmed. The situation of Assange is different for the moment. He is facing proceedings not related to WikiLeaks but to sexual accusations (he considered them political motivated) although the risk of being extradite to the US sooner or later could not be excluded. Manning’s behavior can be read from two opposite perspectives: he could be considered as a traitor of the US as he stole and rendered public classified documents revealing evidences of US unlawful behavior and probably risking to help the enemy with the publication of those information; or he could be considered as a hero who tried to reveal America’s secret information in order to open a debate about its behavior and to shed light on some unknown details of the wars in Iraq and Afghanistan without the intent of personal gain. Despite all these considerations, it is undoubtful that he caused significant embarrassment to the US government.

37. The legal dispute between Assange and Sweden

It was 11 August 2010 when Assange arrived in Sweden for a series of speeches arranged among the others by a woman who later would accuse him. The 17 he met also the other woman who would accuse him. Moreover, the following he applied for a residence permit to live and work in Sweden in order to create there a WikiLeaks base (he thought the legal environment was opportune, thanks to laws protecting whistleblowers). On 20 of August, the Swedish Prosecutor's Office issued an arrest warrant for Julian Assange with two separate allegations: one of rape and one of molestation as both women claimed that what started as consensual sex became non-consensual. Assange said that the accusations were without basis and the following day the arrest warrant was withdrawn as the prosecutor thought that there were no reasons to suspect him of rape although the investigation into the molestation allegation continued without requiring an arrest warrant as the crime was less serious. However, ten days later he was questioned by police and he denied all the allegations. The following day the Swedish Director of

Prosecution reopened the rape investigation against Assange as she believed the crime of rape had actually been committed.

On 18 October Sweden denied residence to Assange as he did not fulfill the requirements. One month later, Stockholm District Court requested to detain him for questioning on suspicion of rape, sexual molestation and unlawful coercion as he was not available for questioning. He was already in London. On 20 of the same month Swedish police issued an international arrest warrant for Assange via Interpol which issued a “red notice” asking people to contact police if they had any information.

On 8 December he handed him over to London police who take him to an extradition hearing at a Westminster court that put him in custody until the second hearing on 14 December. In this occasion, judges awarded bail to Assange who was freed after his supporters had paid £240,000 in cash and sureties.

In another extradition hearing that took place on 7 February 2011 Assange lawyers underlined the risk of denial of justice if he would have been tried in Sweden, also because according to them prosecutors did not follow a proper procedure while investigating the rape. On 24 of the same month the Belmarsh Magistrates' Court in London ruled in favour of the extradition of Assange to Sweden, but a week later the defence appealed against extradition. In July the lawyers asked to block Assange's extradition to Sweden and the following day the High Court decided to postpone the decision on this matter. At an appeal hearing at the beginning November, the High Court confirmed the first decision to extradite Assange over the sex crimes allegations. In December he won the right to petition the UK Supreme Court but in May it ruled that he should have been extradited to Sweden in order to face questioning over the allegations against him. After the Supreme Court refused to reopen his appeal against extradition, Assange applied for the political asylum at the Ecuadorian Embassy in London on 19 June 2012. In August, the tension began to rise as the foreign minister of Ecuador told that the UK had issued a "threat" to enter the Ecuadorean embassy to arrest Assange as the UK had a legal obligation to extradite him. The following day, that is on 16 August 2012, Ecuador announced that it had decide to grant asylum to Assange as he would probably have faced a violation of his human rights if he had been extradited. This decision was presented as an act of loyalty towards Ecuadorean own traditions of

protection of vulnerable people and as a victory of Assange, although the UK government expressed its disappointment²⁶³.

Assange decided to turn to Ecuador's president Rafael Correa for help because he had expressed similar views on freedom in the past and he granted him asylum perhaps because he wanted WikiLeaks to investigate US activities in South America and publish the related documents.

However, this was the timeline of the facts that lead Assange to live in Knightsbridge but as a refugee in an Embassy, raising also concerns related to the violation of human rights. Two seems to be the options at the moment: he will remain in the Ecuadorean Embassy until he will be extradite or allow him to go to South America²⁶⁴.

5.2 JURIDICAL EVOLUTION AND FUTURE PERSPECTIVES

The development of the Assange case remains dominated by Sweden's efforts to question him over the sexual allegations although he claimed that they are politically motivated as a part of a campaign against him and his whistle-blowing website. However, the Assange case is of paramount importance under various points of view. The first aspect to analyze is the request of extradition by Sweden. When the British Courts had to judge the claim of Assange that asked not to allow extradition, the judges always ruled refusing the claims of Assange and confirming the right to extradite him to Sweden to face questioning over sexual allegations. One of the concerns of the creator of WikiLeaks was the risk to face an unfair trial in Sweden but this was not taken into consideration by British courts. In fact according to Assange lawyer Geoffrey Robertson the comments of Sweden Prime Minister Fredrik Reinfeldt's made Assange "public enemy number one" in Sweden, ruined in this way the chances for a fair trial of his client in that country²⁶⁵. It is worth remembering that the right of a fair trial is considered a principle of international

²⁶³ *Timeline: sexual allegations against Assange in Sweden*, 16 August 2012, from <http://www.bbc.co.uk/news/world-europe-11949341>

²⁶⁴ *Profile: Wikileaks founder Julian Assange*, BBC Article, 17 August 2012, from <http://www.bbc.co.uk/news/world-11047811> [accessed 30 December 2013]

²⁶⁵ *Lawyer: WikiLeaks Founder Cannot Get Fair Trial in Sweden*, from <http://www.voanews.com/content/lawyer-wikileaks-founder-cannot-get-fair-trial-in-sweden-115938559/170482.html>

law and in fact it is proclaimed in various declarations, conventions (such as Article 6 of the European Convention of Human Rights²⁶⁶) and constitutions (for example the Sixth Amendment to the United States Constitution²⁶⁷) throughout the world. However, as procedures can vary from State to State, there is not a binding definition under international law of what constitute a fair trial. The most important article to mention is Article 10 of the Universal Declaration of Human Rights that states that “everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him”²⁶⁸.

In the extradition hearings Assange defence stated various points in his argument against extradition: the European arrest warrant (EAW) is not valid, because the Swedish director of public prosecutions is not the authorised issuing authority and that as there is only a suspicion, it is not a sufficient ground to request the extradition; there has been "abuse of process" as all documents relating to the case were not fully disclosed; the "conduct" of the Swedish prosecutor can be considered as abuse of process because rape allegations were first dismissed and then reopened by a second prosecutor; the prosecutor has refused Assange's offers of interview; not every document was made available in English; the offences he is accused would not be considered crimes in the UK and in the

²⁶⁶ “1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law”. Article 6 (1)(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms http://www.echr.coe.int/Documents/Convention_ENG.pdf

²⁶⁷ “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence”. the Sixth Amendment to the United States Constitution, from the US Constitution <http://www.usconstitution.net/const.html>

²⁶⁸ Article 10 of the Universal Declaration of Human Rights (1948) <http://www.un.org/en/documents/udhr/>

end, the allegations are politically motivated, prejudicing the trial²⁶⁹. However, British court ruled against Assange and his claims.

Another problem that Assange could face is the further extradition from Sweden to the US. If sent to the US in fact, he could face the death penalty for the massive releases of classified US military documents. Although the US did not make an extradition request, there is a very likely possibility of a criminal investigation into the matter. Moreover, there is also to take into account the precedent represented by the Manning case which is strictly related to the accusations the US government could rise against Assange²⁷⁰.

However, a possible extradition to the US and prosecution there could overcome various obstacles.

First of all, even if judges allow extradition in accordance to Swedish law, they would need also the UK's approval. Moreover, it had been already asked Sweden to guarantee that it would not extradite him to the US but officials said they could not legally do it. However, Swedish Foreign Minister Carl Bildt said that Sweden would not extradite a suspect to a country in which he would face the death penalty. In fact, the founder of WikiLeaks, could be at risk of the death penalty or detention in Guantánamo Bay if he is extradited²⁷¹. According to Article 33 (1) of the Refugee Convention, “no Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”²⁷².

Secondly, no US extradition treaty considers espionage as extraditable offence. Furthermore, it is considered a political crime, and political offences are not subject to extradition under the US-UK, US-Sweden and UK-Sweden treaties.

²⁶⁹ *WikiLeaks: Julian Assange 'faces execution or Guantánamo detention'* by Esther Addley, 11 January 2011, from <http://www.theguardian.com/media/2011/jan/11/julian-assange-wikileaks-execution-gantanamo>

²⁷⁰ *Q&A: Julian Assange and the law*, 9 October 2012, from <http://www.bbc.co.uk/news/world-europe-19426382>

²⁷¹ *WikiLeaks: Julian Assange 'faces execution or Guantánamo detention'* by Esther Addley, 11 January 2011, from <http://www.theguardian.com/media/2011/jan/11/julian-assange-wikileaks-execution-gantanamo>

²⁷² Article 33 (1) of the Convention Relating to the Status of Refugees (Refugee Convention) <http://www.unhcr.org/3b66c2aa10.html>

Also a possible prosecution in the US could face various legal and diplomatic obstacles. We must take into account that Assange is an Australian citizen that described himself as a journalist. He did not work for the US government neither had links to other foreign governments and he operated on the internet and not in the US soil. In the past in fact only US officials who provided secrets to foreign governments or foreign spies who pursued US secrets were prosecuted under the US espionage law. The disclosure of classified documents is not considered a crime under any single US law and past case law do not clearly apply to this case. Furthermore, if the US want to accuse Assange of espionage they should prove that he was aware the leaks could harm US national security, they have to demonstrate the aim of harming US security, although he could argue that he was acting as a journalist. However, it was the Secretary of Defence Robert Gates himself that affirmed the leaked diplomatic cables were embarrassing but would have only "modest" consequences for US foreign policy. Apart from the espionage charge that appears to be not so feasible, the US could seek to indict him on charges of conspiracy, related to the initial theft of documents from US government computers with Private First Class Manning. US prosecutors should demonstrate that Assange colluded with Manning, encouraging or aiding him in the initial leak. If they prove this, he could be liable as a conspirator under statutes criminalising the taking of government secrets, records or property, rather than only a recipient or publisher. However, it is possible that they try to find something more than only an encouragement as the act of encouraging sources to provide secret information is what journalists do every day. They want to find evidence of technical help or other substantive aid that Assange gave to Manning. It must be underlined the fact that leaks of classified documents to the press have only rarely been punished as crime and in addition, there are no cases where a publisher has been prosecuted because he had revealed information obtained through unauthorized disclosure by a government employee. It is also possible to say that usually the Espionage Act does not apply to foreign nationals who acted outside of US territory. If Assange was arrested, he would probably argue also that he is a journalist who could have free speech protections under the US constitution²⁷³.

After British courts allowed extradition to Sweden rejecting all the claims of the defence, the UK tried to carry out this legal duty to extradite him to Sweden. However,

²⁷³ *Wikileaks: Barriers to possible US Assange prosecution*, by Daniel Nasaw, 17 December 2010, from <http://www.bbc.co.uk/news/world-us-canada-11952817>

Assange claimed asylum to the Embassy of Ecuador in London where he took refuge in June to avoid extradition to Sweden. But why did he choose Ecuador? During that period the President of Ecuador often spoke in favour of Assange praising WikiLeaks and its work even if at the beginning he was critical about the website. In 2011, after the release of a leaked cable in which US Ambassador in Ecuador Heather Hodges said that the President of Ecuador Correa knew the corruption allegations against a senior policeman that he made commander of the national police force, the government expelled her and the US responded by expelling the Ecuadorean ambassador even if later the diplomatic relations have been re-established. President Correa had also some problems with private local media often accused of serving the interests of the economic elites of Ecuador. Moreover, in 2013 he was reelected as President and some analysts saw in his support to Assange a way to gain political popularity and to clear his image by protecting what it was considered a symbol of the freedom of speech²⁷⁴. However, his move could be seen also from another point of view. At that time, Ecuador was trying to conclude a commercial agreement with European Union and a fight with the UK and Sweden was not the best way to support the agreement as well as antagonizing with the US with which Ecuador had preferential trade agreement. Moreover, it was considered also as a fight against any form of colonialism. Despite that, the official statements after the granting of asylum to Assange, two months after the request, dealt with shared feelings towards his concerns of political persecution, probable retaliations, unfair trials and the possible consequences of an eventual extradition to the US (such as cruel and degrading treatment and life imprisonment or even capital punishment)²⁷⁵.

Although asylum should not be granted to an individual who “has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee”²⁷⁶ (Assange is accused of sexual assault and rape that is a serious non-political crime), Ecuador decided to grant it because of the fear he could face persecution for his political opinions and Australia, his own country, had failed to protect him.

²⁷⁴ *Why Julian Assange turned to Ecuador for help*, by Irene Caselli, 20 June 2012, from <http://www.bbc.co.uk/news/world-latin-america-18518464>

²⁷⁵ *Julian Assange: Why Ecuador is offering asylum*, by Arturo Wallace, 16 August 2012, from <http://www.bbc.co.uk/news/world-europe-19289649>

²⁷⁶ Article 1 of the Convention Relating to the Status of Refugees (Refugee Convention) <http://www.unhcr.org/3b66c2aa10.html>

Furthermore, Assange violated the UK law when he entered the Embassy because British judges granted him bail on strict conditions while the case was being considered after the issue of the European Arrest Warrant by Sweden in June when the UK's Supreme Court refused to reopen his appeal against extradition and gave him a two-week grace period before extradition proceedings could start. It was in this period, while on bail, that he sought refuge to the Ecuadorean Embassy breaching the bail. Police is waiting outside the Embassy as it has the power and the right to arrest him for this reason (and also to extradite him). There have been speculations about the existence of any form of protection against arrest. It was said that Ecuador could give him a diplomatic or UN representative status that could provide him with immunity but police have already arrested diplomats for example for drink-driving although they could escape prosecution thanks to general diplomatic immunity.

A possible way to avoid arrest, while getting out the Embassy, could be the use of a diplomatic car that enjoys protection under international law from search, requisition, attachment and execution even if the police can still stop the car but not search it for Assange. However, he could face the risk of arrest when he gets out the car into an aircraft. Another possible method to take him out of the Embassy avoiding the arrest could be the use of the so-called “diplomatic bags”. They are usually for official material and are used to bring documents in and out of a host country as they cannot be opened or detained (according to Article 27 of the Vienna Convention on Diplomatic Relations of 1961). They can be any size but it is not really feasible to put Assange in a container send him away, also because the British authorities could understand the content of the box.

One of the most controversial issues however, is represented by the possibility that British authorities could enter the Ecuadorean Embassy to arrest him. As said already, the principle of the inviolability of diplomatic missions is well established under international law. The situation in this specific case is complicated. It is necessary the permission of the ambassador to allow local security forces to enter an embassy even though the embassy remains part of the territory of the host country. This concept is widely respected and it is also codified in the 1961 Vienna Convention on Diplomatic Relations²⁷⁷ (it is useful for all the States to observe it in order to avoid risks of similar

²⁷⁷ “The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission”. Article 22 of the Vienna Convention on Diplomatic

acts elsewhere against their own embassies abroad). However, on 15 August 2012 the Foreign Office underlined the fact that it has the power to revoke the diplomatic status of the Embassy according to the Diplomatic and Consular Premises Act of 1987 (it was passed by Parliament after the Libyan embassy crisis in 1984, when Yvonne Fletcher, a British police officer was killed with a bullet fired from inside the embassy) which could potentially allow police to enter the Embassy to arrest him²⁷⁸.

This act allow ministers to withdraw recognition from diplomatic premises. As Section 1(3) says:

"In no case is land to be regarded as a state's diplomatic or consular premises for the purposes of any enactment or rule of law unless it has been so accepted or the secretary of state has given that state consent under this section in relation to it; and if —

(a) a state ceases to use land for the purposes of its mission or exclusively for the purposes of a consular post; or

(b) the secretary of state withdraws his acceptance or consent in relation to land,

it thereupon ceases to be diplomatic or consular premises for the purposes of all enactments and rules of law."²⁷⁹

If the foreign office minister withdraws consent, police would be free to make the arrest. However, there are other details to take into account as Section 1(4) says that "the secretary of state shall only give or withdraw consent or withdraw acceptance if he is satisfied that to do so is permissible under international law"²⁸⁰ and in addition in Section 1(5), in deciding whether to withdraw consent, the minister:

" ... shall have regard to all material considerations, and in particular, but without prejudice to the generality of this subsection —

(a) to the safety of the public;

(b) to national security; and

Relations of 1961
[http://www.unog.ch/80256EDD006B8954/\(httpAssets\)/7F83006DA90AAE7FC1256F260034B806/\\$file/Vienna%20Convention%20\(1961\)%20-%20E.pdf](http://www.unog.ch/80256EDD006B8954/(httpAssets)/7F83006DA90AAE7FC1256F260034B806/$file/Vienna%20Convention%20(1961)%20-%20E.pdf)

²⁷⁸ Q&A: *Julian Assange and asylum*, by Dominic Casciani, 16 August 2012, from <http://www.bbc.co.uk/news/uk-18521881>

²⁷⁹ Diplomatic and Consular Premises Act 1987 (Chapter 46) available at <http://www.legislation.gov.uk/ukpga/1987/46> [accessed 04 January 2014]

²⁸⁰ *ibidem*

(c) to town and country planning."²⁸¹

Here the compliance with international law is made difficult by the existence of Article 21 of the Vienna Convention on Diplomatic Relations which requires that the territorial State (the UK in this case) facilitate the acquisition by the sending State (Ecuador in this case) of the necessary premises for its mission or assist it in obtaining accommodation²⁸².

Furthermore, Section 5 lists some concerns that should drive ministers' considerations and according to them it is difficult to justify the withdrawal affirming that Assange permanence in the Embassy constitutes a threat to the safety of the public, national security or the town and country planning (at the end we may argue that he has violated his bail conditions, but he is a mere suspect before charges that have not been formally proved. In addition, his offences could hardly been qualified as matters of terrorist import, and for these reasons it would be questionable the use of the Diplomatic and Consular Premises Act which was intended only for exceptional circumstances, when the mission was not being used for purposes connected to diplomacy and in support of terrorist activity for example)²⁸³. If Ecuador challenged the revocation allowed by the Diplomatic and Consular Premises Act, ministers should prove that harbouring Assange was beyond diplomatic purposes and they had the right to take action. But if the High Court ruled confirming this decision, Ecuador should respect the decision but arousing in this way diplomatic tensions. According to the Vienna Convention on Diplomatic Relations of 1961 in fact missions and its members must respect local laws and do not interfere in the host nation's internal affairs²⁸⁴.

A way would be to close the Embassy and arrest Assange but doing so would mean to cut off diplomatic relations with Ecuador and this could imply dangerous and unpredictable consequences.

²⁸¹ *ibidem*

²⁸² "The receiving State shall either facilitate the acquisition on its territory, in accordance with its laws, by the sending State of premises necessary for its mission or assist the latter in obtaining accommodation in some other way". Article 21 (1) of the Vienna Convention on Diplomatic Relations of 1961 [http://www.unog.ch/80256EDD006B8954/\(httpAssets\)/7F83006DA90AAE7FC1256F260034B806/\\$file/Vienna%20Convention%20\(1961\)%20-%20E.pdf](http://www.unog.ch/80256EDD006B8954/(httpAssets)/7F83006DA90AAE7FC1256F260034B806/$file/Vienna%20Convention%20(1961)%20-%20E.pdf)

²⁸³ *Q&A: Julian Assange and asylum*, by Dominic Casciani, 16 August 2012, from <http://www.bbc.co.uk/news/uk-18521881>

²⁸⁴ Article 41 (1) of the Vienna Convention on Diplomatic Relations of 1961 [http://www.unog.ch/80256EDD006B8954/\(httpAssets\)/7F83006DA90AAE7FC1256F260034B806/\\$file/Vienna%20Convention%20\(1961\)%20-%20E.pdf](http://www.unog.ch/80256EDD006B8954/(httpAssets)/7F83006DA90AAE7FC1256F260034B806/$file/Vienna%20Convention%20(1961)%20-%20E.pdf)

He remains a wanted man in the UK outside the Embassy and it is very unlikely that the UK would give him a safe-conduct to leave the country to go to South America. However, it is also difficult to imagine Assange living for a long period in the Ecuadorean Embassy, although there have been cases of people living a lot of time within embassy compounds. The longest-known case is that of Cardinal Jozsef Mindszenty who spent fifteen years in the US embassy in Budapest after the Soviet crackdown in Hungary in 1956 and who finally reach Austria²⁸⁵.

38. Conclusion

At the moment there is not a defined exit strategy as there is still a situation of impasse although diplomatic talks are going on between the UK and Ecuador to find a feasible diplomatic solution. The real problem, in my opinion, is the concerns that still remain related to a possible extradition to the US where Assange could face a trial (fair or not fair) for the release of classified documents of the US government. In fact his main preoccupation is the possibility to face cruel treatment and a long detention as it happens for Manning. In fact Assange himself said in June 2013 that he would continue to stay at the Embassy even if sex claims are dropped, because of the fact that there are a sealed indictment and an ongoing investigation against him in the US that could lead to arrest and extradition²⁸⁶. On the other side, Ecuador has already confirmed that it would continue to provide him political asylum to protect his life, his personal integrity, and also his freedom of expression. The Ecuadorean government claimed that the reasons why it granted asylum were still present as the circumstances did not change²⁸⁷.

It is interesting to notice that in 2012 Assange hired famous Spain's former human rights judge, Baltasar Garzon to lead his legal team, the same that issued an international arrest warrant for Pinochet providing the basis for his historical trial in the UK. It seems that he is taking a contradictory position: resisting Assange's extradition from the UK to Sweden when he was the first to push for Pinochet's extradition from the UK to Spain. However, Pinochet was wanted for human rights violations, while Assange

²⁸⁵ *Q&A: Julian Assange and asylum*, by Dominic Casciani, 16 August 2012, from <http://www.bbc.co.uk/news/uk-18521881>

²⁸⁶ *Assange 'to stay in embassy even if sex claims are dropped'*, 19 June 2013, from <http://www.bbc.co.uk/news/uk-22962786>

²⁸⁷ *Julian Assange: Ecuador will continue to grant asylum*, 17 June 2013, from <http://www.bbc.co.uk/news/uk-22937293>

can be maybe considered a victim of human rights violations (such as the right to free expression).

If under the legal point of view Assange and Manning are facing allegations and trials, on the other side they received also support and positive statements. WikiLeaks (in 2011) and Manning (in 2012 and 2013) in fact both received Nobel Peace Prize nominees. WikiLeaks, by disclosing classified documents, promoted world peace, transparency and democracy, by exposing torture, war crimes and corruption all over the world. According to Mairead Corrigan-Maguire, a former Nobel Peace Prize winner and a supporter of Manning's nomination, the responsible of the biggest leak of secret documents of the US government "helped end the Iraq War, and may have helped prevent further conflicts elsewhere. [...] Some activists of what has come to be known as the Arab Spring have even directly credited Bradley Manning, and the information he disclosed, as an inspiration for their struggles"²⁸⁸.

Another nominee to the Nobel Peace Prize was Edward Snowden, a man whose story was very similar to the ones of Assange and Manning. Like Manning, he was working for the US when he stole information and like Assange sought asylum abroad namely in Russia.

It is interesting to notice that the worldwide popularity of Assange was confirmed also by the release of a film entitled "The Fifth Estate" whose poster said "you can't expose the world's secrets...without exposing your own" which can in some ways summarize the situation of Assange who is facing legal problems for "private illegal acts" after having exposed the secrets of one of the most powerful countries in the world. Another contradiction can be underlined by the fact that he used to work in the unlimited space represented by internet, while now he is forced to live in a relatively small and limited place like the building of the Ecuadorean Embassy in London.

²⁸⁸ *Bradley Manning should win the Nobel Peace Prize*, by Mairead Corrigan-Maguire, 30 June 2013, from <http://www.theguardian.com/commentisfree/2013/jun/30/bradley-manning-nobel-peace-prize-candidate>

6. CONCLUSION

Contents - 39. Extradition; 40. Immunity and Asylum; 41. Universal Jurisdiction; 42. International Crimes and Human Rights; 43. Individual Criminal Responsibility. –

International criminal law is a broader discipline that has grown especially after the Second World War. States practice together with the sign of treaties and the affirmation of new customs have allowed an intense development of this branch of public international law that demonstrates the willingness to come to terms with the perpetrators of international crimes against the law of nations. If the traditional view imply mainly a State responsibility for the offences that take place in the international community, thanks to the first international tribunal created in the aftermaths of the fall of the Third Reich, the existence of an individual criminal responsibility was clearly affirmed and implemented in the judgments.

This thesis, through the analysis of the most important general concepts of this field and their application in some of the most relevant cases of the jurisprudence wanted to demonstrate the congruencies and incongruences in the evolution of international criminal law.

The decision to analyze these cases in particular was due to the fact that they demonstrate quite clearly how in the real arena of a court these notions that are the bases of this branch are actually applied by the judges. Even if they appear to be so different and not related to each other, they actually have a lot in common.

The most relevant in my opinion is the first one that deals with the International Military Tribunal at Nuremberg. As said before, for the first time it allows the prosecution of individuals for the commission of international crimes. The Eichmann case is strictly related to it as the crimes are the same that the tribunal had to prosecute and it represents a further affirmation of the Nuremberg Principles that were stated at the end of the proceedings of 1945-1946. The Pinochet litigation that developed throughout Europe at the end of the 20th century represented a challenge for the British courts and the still uncompleted Assange case leaves space for further debates and discussions.

Some concepts more than others have come out as the most relevant in all these trials.

39. Extradition

Talking about extradition for example, in the first case we analyzed its “dark side”. In fact Israel did not request the extradition of Eichmann to Argentina but it used the method of the abduction, that was generally considered against international law putting at risk the diplomatic relations with the Latin American country. Although they reached a diplomatic agreement, during the trial the Israeli court did not take into account the protests related to the unlawful arrest applying the maxim *male captus, bene detentus* (wrongly captured, properly detained) and becoming in this way an example of its application in a trial.

However, problems have risen also when extradition was regularly requested.

As we understood from the second case taken into consideration in fact, there are several considerations to make before deciding whether to allow it or not. The particular position of Pinochet moreover, made the things more difficult as the judges had first to deal with the problem of the immunity enjoyed by a former head of State. Moreover, they had to analyze which crimes were considered extradition crimes. After considering in fact that he could be extradited, as he only enjoyed functional immunity and not the personal one and the acts of which he was accused could not be considered official acts (removing in this way also the functional immunity), the court finally allowed extradition only for those torture offences committed after 1988 (year in which the Convention against Torture was implemented in the UK making torture offences committed abroad by foreigners a crime, rising the problem of the double criminality). In the end, although the extradition was allowed, it did not take place due to his health problems that made him unfit to stand trial anywhere.

Talking about Assange, this case deals with extradition and we can say, also with the fear of extradition. Sweden requested extradition to try him for sexual allegations and the UK courts allowed it but as he was granted political asylum by the Ecuadorean Embassy in London, Metropolitan Police cannot implement the sentence. It is interesting to underline that his real fear is the risk to be extradited to Sweden but above all from there to the US where he could face more serious proceedings for his activity with WikiLeaks. In fact he affirmed that even if the accusations in Sweden would be withdrawn, he would remain in the Ecuadorean Embassy as he fears to be prosecuted in the US. Although in international law (Article 33 (1) of the Refugee Convention) a person should not be

extradite to a country in which his life would be in danger, Sweden said that it could not guarantee the non-extradition to the US.

40. Immunity and Asylum

Another important topic that is present in various ways in the cases analyzed is the immunity issue. When it was recalled as an exclusion of individual criminal responsibility it was usually linked with the doctrine of the Act of State. Since the International Military Tribunal at Nuremberg on, there has been the tendency to exclude it as a way to avoid criminal responsibility. Article 7 of the Nuremberg Charter in fact stated that “the official position of the defendants, whether as Heads of State or responsible officials in the Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment”²⁸⁹. And the subsequent judgment confirmed this:

“The principle of international law which, under certain circumstances, protects the representative of a State cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment. [...] Individuals have duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State, if the State in authorizing action moves outside its competence under international law.”²⁹⁰

It was also reaffirmed in the Eichmann case by the Israeli Supreme Court which rejected his claims. However, in the first Pinochet hearing on the immunity issue, the judges accepted the claims of functional immunity enjoyed by Pinochet as they affirmed that the acts for which he was accused were official acts performed with governmental authority and that he was not charged for personally committing those offences. They relied on Articles 31 and 39 of the 1961 Vienna Convention on Diplomatic Relations. However, in the second hearing of the first case and in the third case against him in the UK, the House of Lords contrarily stated that he could not enjoy functional immunity for those acts as they could not be considered official acts.

²⁸⁹ See supra 3

²⁹⁰ See supra 2.2 and IMT, judgment of 1 October 1946 in The Trial of German Major War Criminals, Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany, part 22 (1950), p. 447

The immunity issue related to Assange is slightly different as here we are referring to the immunity that a diplomatic mission enjoys in a foreign territorial State. It must be noticed that this is one of the reasons while he has not been extradited yet. In fact, according to international law, British officials and police could not enter the Ecuadorean Embassy without the permission of the ambassador (we must remember the case of the Iran hostage crisis in 1979 when a group of Iranian students took over the American Embassy in Teheran for 444 days but it was a violent act considered against international law). However, UK legislation includes the Diplomatic and Consular Premises Act of 1987 that could allow the government to revoke the diplomatic status of the Embassy but its application is very unlikely as it would be contrary to international law and would harm the diplomatic relations between Ecuador and the UK.

Often and especially in the past, immunity has been considered a shield to exclude criminal responsibility and an obstacle to international prosecution of international crimes. In the Assange case we can notice that also the request of asylum to the Ecuadorean Embassy represents an obstacle to prosecute him by UK and Swedish authorities. Furthermore, asylum is generally not granted to individuals accused of serious non-political crimes and in this case (in Sweden Assange is charged with sexual assault and rape) Ecuador decided to grant it due to the fear he could face persecution for his opinions, considering him a political refugee.

41. Universal Jurisdiction

The evolution of the principle of universal jurisdiction could be seen under two different perspectives. Its application could favour the punishment of the perpetrators of international crimes as it does not require any particular link with the place of commission, the nationality of the victims or the perpetrators or the interests to protect of a particular State as the interests to protect are the interests of the international community as a whole. However, on the contrary point of view, it could be seen as a danger for States sovereignty as the declarations of Chile during the Pinochet cases demonstrate. The Eichmann case represents the paradigm of the application of this principle as a national court in Israel tried a German criminal for offences committed in Europe and against Jews (it is doubtful whether the link of passive personality should be used as the State of Israel did not exist during the Second World War) but also against victims of other nationalities.

In the Pinochet cases, Spain was the first one to affirm its right to prosecute the dictator's crimes as Spanish legislation recognized the existence of universal jurisdiction over the crimes ascribed to him. There was a dispute on whether torture should be considered a crime that attracts universal jurisdiction before the implementation of the Convention against Torture during the third case. The position of the judges differed a lot and Chile underlined also the contrast between universal jurisdiction and territorial jurisdiction affirming that the first was harming the second.

The Assange case apparently does not involve universal jurisdiction but better, transnational justice and the evidence that international cooperation in penal matters between States is possible.

42. International Crimes and human rights

With the establishment of the International Military Tribunal at Nuremberg, the Allied powers codified also in a coherent way, the definition of the most despicable crimes against international law. To be more precise, they provide the explication of aggression, crimes against humanity and crimes against peace as well as conspiracy and many of them were later developed in proper conventions and treaties. Both the Axis criminals in Nuremberg and Eichmann later, but also Pinochet, were tried for the commission of such atrocities that were considered so great wrongs that even the immunity is not applicable to protect the perpetrators of such international crimes from criminal prosecution. They can be related also to the more and more important field of human rights law, as the proper definition of these international crimes can help the international community to improve the protection of individuals developing coherent diplomatic answers and defining the grounds for their prosecution.

We must take into account the great stimulus that the Second World War represented. Eichmann, whose main task in the Third Reich was to implement the 'Final Solution of the Jewish Question' was sentenced to death for crimes against humanity, crimes against the Jewish people, war crimes and membership in enemy organizations. This case was useful also to draw a distinction between ethnic cleansing and genocide.

The main charges against Pinochet were related to the crime of torture which was specifically codified with the Convention against Torture in 1984. Here, one of the dispute was linked to the need to understand if torture was considered an international

crime in the customary law or if the right to prosecute the perpetrators derived only from the convention. The opinion of the court was contrasting.

When we talk about international crimes, it is natural to link them with the protection of human rights. This is a risky link to make but during the Manning case, the US were accused by many human rights organizations for having violated Manning rights, inflicting him an unequal treatment (some commentators referred to it also as torture) while in jail waiting for the trial. The prosecutions against Assange have also risen the topic of the notion of freedom of expression, which is considered a fundamental human right but whose extent is still not clear.

The crimes allegedly committed by Assange are different but we had the opportunity to analyze the relativity of the notion of crime itself²⁹¹.

43. Individual Criminal Responsibility

One of the most important developments that international law has undergone is linked with the notion of criminal responsibility. The watershed is represented by the recognition of an individual criminal responsibility and the fact that individuals enjoy not only rights but also duties under international law. While in the past only States were accountable for the breaches against international law, basically with the Second World War the individual criminal liability became recognized and implemented. Moreover, the shield represented by the resort to the Act of State to avoid criminal responsibility was seriously “damaged” by the Nuremberg judgment. The same concept was reaffirmed also in the Eichmann case and under another perspective also in the Pinochet case.

All things considered we can claim that international criminal law is a discipline still in evolution. The challenges that it has to face are even more relevant in the 21st century as the globalization implies new aspects to take into account (new crimes, new environments where commit them, new organizations, new relationships among States and between them and the individuals...). International community needs to develop this

²⁹¹ [When I was explaining the topic of my thesis to some colleagues and customers at the American Embassy where I am working, they remained surprised for the combination of the cases I chose. A lot of them told me that they did not consider Assange a criminal, but according to US legislation he could face death penalty for his activity of WikiLeaks. This demonstrates the relativity and the different points of view on the same topic, as well as the fact that Manning, Assange and Snowden had been candidates for the Nobel Peace Prize.]

broader and even more important branch of public international law. I have tried to analyze its evolution, the main concepts that characterize it and how some of them have been actually implemented by the courts who have to provide judgments but also opinions that can help to develop, modify or remove some of them. International criminal law, as we have seen, has been subjected to different influences (international humanitarian law, human rights law, national criminal law) and it can influence all of them. In a world where it is more and more difficult to understand the right and the wrong, the good and the evil and where every single action can be considered positive or negative, the role of international criminal law and its procedure to come term with the perpetrators of international crimes is of paramount importance. The choice to establish the International Criminal Court and other hybrid or mixed international/national tribunals demonstrates the willingness of States to collaborate to develop this discipline, although some disputes still remain unsolved (the issue of universal jurisdiction, for example, as some States consider it as a danger for their territorial jurisdiction. In my opinion, in a more and more globalized world where quite everybody can know what happens in the other side of the world, the resort to universal jurisdiction can be a positive tool also for the elimination of possible safe havens for the perpetrators of international crimes).

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Acknowledgements

First of all, I would like to thank my tutors, Professor Fabrizio Marrella and Professor Sara De Vido for helping me with their precious suggestions and all the Professors that I had the pleasure to meet during these five years at Ca' Foscari University. Then I would like to thank my family, especially my mother who gave me unconditional support and my friends and university colleagues. Another important appreciation is for my friends in London, all my current and former flatmates and my coworkers that supported me during the writing of this thesis, giving me precious advices and opinions. Finally, I would like to thank Ca' Foscari University in Venice, The London School of Economics and Political Science and King's College in London and the Squire Law Library at the Cambridge University for having allowed me to consult their precious documents and books.