

# NORMAS INTERNACIONAIS E COMPETÊNCIA DE RESPONSABILIDADE DE ACORDO COM O TRIBUNAL PENAL INTERNACIONAL: ANATOMIA, INTERPRETAÇÃO, PROPOSTAS

*International Standards and Responsibility Competition According to the International Criminal Court: Anatomy, Interpretation, Proposals*

**DIMITRIS LIAKOPOULOS**

Full Professor of European Union Law at the Fletcher School-Tufts University (MA in international law and MA of Arts in Law and diplomacy). Full Professor of International and European Criminal and Procedural Law at the De Haagse Hogeschool-The Hague. Attorney at Law a New York and Bruxelles.

**Resumo:** O direito penal internacional, por suas características intrínsecas, o lugar da pluralidade e da pluralidade, em que a resposta de normas e crimes encontra sua manifestação mais natural e lógica. No presente trabalho com o aparente competição de Normas no direito internacional penal e, em particular, as hipóteses de convergências normativas estabelecidas entre o crime de genocídio, crimes contra a humanidade e crimes de guerra, tal como definido pelo Estatuto de Roma e Aplicada do Tribunal Penal Internacional . A análise distingue os casos de concorrência intra-categórico, que incluem as convergências que ocorrem dentro da mesma categoria de crime, e as hipóteses de concorrência inter-categórico, convergências que ocorrem relativas às diferentes categorias de Entre os crimes. No fundo, o caminho tomado qualquer Essa consciência para a racionalização e simplificação da competição de padrões deve chegar a um acordo com a impossibilidade de eliminar ou destruir o fenômeno da convergência a priori, como é inevitável.

**Palavras-chave:** competição de regras, ICC, ICTY, ICTR, SCSL, ECCC, crimes contra a humanidade, genocídio, crimes de guerra, justiça criminal internacional

**Abstract:** International criminal law constitutes, by its intrinsic characteristics, the place of the multiple and the plurality, in which the contest of norms and crimes finds its most natural and logical manifestation. The present paper deals with the apparent competition of norms in international criminal law and, in particular, the hypotheses of normative convergences established between the crime of genocide, crimes against humanity and war crimes as defined by the Statute of Rome and applied of International Criminal Court. The analysis distinguishes the cases of intra-categorical competition, which include the convergences that occur within the same category of crime, and the hypotheses of inter-categorical competition, concerning the convergences that occur between the different categories of crimes. In the background, the awareness that any path taken towards rationalization and simplification of the competition of standards must come to terms with the impossibility of eliminating or destroying the phenomenon of convergence *a priori*, as it is inevitable.

**Keywords:** Competition of rules, ICC, ICTY, ICTR, SCSL, ECCC, crimes against humanity, genocide, crimes in war, international criminal justice.

## 1 INTRODUCTION

Although international criminal law is still far from the elaboration of a general theory of crime<sup>1</sup>, from the analysis of the texts governing the activities of the various international jurisdictions (special and permanent) and the jurisprudence emerges the adoption of a bipartite conception of crime, inspired by the dichotomy of the Anglo-Saxon tradition between *actus reus* and *mens rea*<sup>2</sup>. Thus the murder qualified as a crime against humanity is constituted by the objective elements of active or omitted conduct, by the death event, by the causal link, and by the subjective element of intentional malice.

Alongside this bipartite structure, which recalls the distinction between physical strength and moral force, international crime presents an additional and peculiar element of context, capable of describing at a normative level the collective scope in which crimes are committed (Contextual Element in English, *Chapeau* in French or *Gesamtat* in German): it will therefore be necessary to ascertain that the murder took place in the context of an armed conflict (war crime), an extensive or systematic attack on the civilian population (crime against humanity) or with intent to destroy in whole or in part a national, racial, ethnic or religious group (crime of genocide).

The reason for the presence of this requirement is justified by the collective nature of international crimes<sup>3</sup>, being set up by states or by parastatals that explicitly direct, order,

---

<sup>1</sup>ESER, A. The need for a general part, in M. CHERIF BASSIOUNI (a cura di), **Commentaries on the International Law Commission's 1991 Draft Code of Crimes Against the Peace and Security of Mankind**, ed. AIDP, Toulouse, 1993, pp. 43-61. AMBOS, K. **Remarks on the general part of international criminal law**, in *Journal of International Criminal Justice*, 4 (4), 2006, pp. 660-673. MANTOVANI, F. **The general principles of international criminal law: The viewpoint of a national criminal lawyer**, in *Journal of International Criminal Justice*, 1 (1), 2003, pp. 26-38. AMBOS, K. **La parte general del derecho penal internacional. Bases para una elaboración dogmática**, ed. Duncker & Humblot, Berlin, 2005.

<sup>2</sup>KEITH, K.M.F., **The mens rea of superior responsibility as developed by ICTY jurisprudence**, in *Leiden Journal of International Law*, 14 (4), 2001, pp. 618ss. AMBOS, K. **Treatise on international criminal law. Foundations and general part**, Oxford University Press, Oxford, 2013, pp. 97ss.

<sup>3</sup>"(...) the heart of international criminal law remains collective in nature (...)", according to the author: FLETCHER, G.P., **The stories lectures. Liberals and romantics at war: The problem of collective guilt**, in *Yale Law Journal*, 111, pp. 2002ss. According to the author: "(...) there is no term fraught with greater ambiguity than that venerable phrase that haunts Anglo-American criminal law: *mens rea*". The confusion over the meaning of the term continues to exist in modern criminal law, which is fuelled by the perpetual theoretical debates on the

promote<sup>4</sup> or tolerate their commission (the so-called system criminality)<sup>5</sup>. One thinks of the extermination of six million Jews during the Holocaust, or of the genocide committed in Rwanda<sup>6</sup>: in both scenarios crimes were part of a broader context of collective, organized and systemic violence. The element of context that allows to qualify some typical behaviors as offenses to legal assets belonging to the international community (incriminating function)<sup>7</sup>. A murder, rape or theft, which are already in itself a crime within the state legal systems, they harm or threaten "the peace, security and welfare of the world"<sup>8</sup> if committed in a context of systematic force and organized, and in this way justify their criminalization within the

---

nature of various *mens rea* standards and the principle of culpability (...)"'. See also: GAETA, P. The history and the evolution of the notion of international crimes, in BELLELLI, R. (a cura di), **International criminal justice. Law and practice from the Rome statute to its review**, Ashgate Publishing, Farnham, 2010, pp. 169-180. CASSESE, A. GAETA, P. **Cassese's international criminal law**, Oxford University Press, Oxford, 2013, pp. 37ss. For the *Makrokriminalität* see also: Art 6 Abs. 1 Statute of the Special Court for Sierra Leone, SCSL-Agreement v. 16.1.2002 (SCSL-Statut); Art. 29 Abs. 1 Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, ECCC-Agreement v. 6.6.2003 (ECCC-Statute). In argument: JÄGER, H. **Makrokriminalität. Studien zur Kriminologie kollektiver Gewalt**, ed. Suhrkamp, Berlin, 1989. JOECKS, W. MIEBACH, K. (Hrsg.), **Münchener Kommentar zum Strafgesetzbuch**, C.H. Bech, München, 2017. BURKHARDT, S.U. **Vergewaltigung als Verbrechen gegen die Menschlichkeit Sexualisierte Gewalt, Makrokriminalität und Völkerstrafrecht**, LIT Verlag, Berlin, 2005. MURMANN, U. **Problems of causation with regard to (potential) actions of multiple protagonist**, in Journal of International Criminal Justice, 12 (2), 2014, pp. 284ss. TRIFFTERER, O. AMBOS, K. (a cura di), **The Rome Statute of the International Criminal Court. A Commentary**, C.H.Beck-Hart-Nomos, München, Oxford, Baden-Baden, 2016. BOCK, S. **Zurechnung im Völkerstrafrecht**, in Zeitschrift für Internationale Strafrechtsdogmatik, 7-8, 2017, pp. 414ss. STUCKENBERG, C.F. **Vorstudien zu Vorsatz und Irrtum im Völkerstrafrecht: Versuch einer Elementarstrafrecht für eine übernationale Vorsatzdogmatik**, ed. De Gruyter Recht, Berlin, 2011, pp. 6ss. KONLE, K. **Makrokriminalität im Rahmen der jugoslawischen Sezessionskriege**, Herbert Utz Verlag, 2010, pp. 49ss. GLOBKE, C. **Die Auslieferung an den Internationalen Strafgerichtshof**, Mohr Siebeck, Tübingen, 2009.

<sup>4</sup>O'KEEFE, R. **International criminal law**, Oxford University Press, Oxford, 2015, pp. 59ss.

<sup>5</sup>The concept of system criminality has a double meaning: on the one hand, it refers to the organized context in which crimes are committed; on the other, it underlines the collective nature of crimes and the ways in which they are committed. See for more details: VAN SLIEDREGT, E. **Individual criminal responsibility in international law**, Oxford University Press, Oxford, 2012, pp. 20ss. GROSSI, L.M. GREEN, D. **An international perspective on criminal responsibility and mental illness**, in *Practice Innovations*, 2(1), 2017, pp. 4ss. XAVIER, I. **The incongruity of the Rome statute insanity defence and international crime**, in Journal of International Criminal Justice, 14 (4), 2016, pp. 795ss. VAN DER WILT, H. NOLLKAEMPER, A. (a cura di), **System criminality in international law**, Cambridge University Press, Cambridge, 2009. Part of the doctrine has used the expression "crimes of obedience" to identify criminal conduct that conforms to orders imposed by authority but considered illegal or immoral by most of the community. KELMAN, H.C. HAMILTON, V.L. **Crimes of obedience: Toward a social psychology of authority and responsibility**, Yale University Press, New Haven-London, 1989, pp. 46.

<sup>6</sup>SULLO, P. **Beyond genocide: Transitional justice and Gacaca Courts in Rwanda**, ed. Springer, Berlin, 2018.

<sup>7</sup>WERLE, G. JESSBERGER, F. **Principles of international criminal law**, Oxford University Press, Oxford, 2014, pp. 35ss.

<sup>8</sup>MACULAN, E. LIÑÁN LAFUENTE, A. Relaciones concursales, in GIL GIL, A. MACULAN, E. (a cura di), **Derecho penal internacional**, ed. Dykinson S.L., Madrid, 2016, pp. 312ss.

international system.

International criminal law therefore plays a role in protecting and preventing offenses against the fundamental collective and universal juridical assets that can be traced back to humanity as such<sup>9</sup>. The collective element complicates the classical model of attribution of a fact to the offender, since it introduces a further level of imputation that has as object the interaction of individual conduct with the systemic, collective, massive component<sup>10</sup>. In international criminal law, therefore, the double level of potential overlaps and interferences gives the subject of the competition a level of greater complexity<sup>11</sup>. One wonders if, in the face of this peculiar manifestation of the convergence of norms, the classical criteria of solution of the question-specialty, consumption and subsidiarity-are directly applicable internationally or if, on the contrary, it is opportune to create new ones<sup>12</sup>.

## 2 THE STRUCTURAL RELATIONSHIP BETWEEN THE CASE IN POINT AS A STARTING POINT FOR A DOGMATIC OF THE COMPETITION RULES.

The construction of a dogmatic system in the field of the competition of norms capable of conferring systematic coherence and resolute predictability must necessarily abandon the

<sup>9</sup>MAY, L. **Crimes against humanity. A normative account**, Cambridge University Press, Cambridge, 2005, pp. 80-95. The author resorts to the principle of offensiveness in order to delimit the area of intervention of the criminal instrument, proposing the following formulation: serious harm to the international community occurs whenever victims become targets of criminal conduct because belonging to a particular group and not because of some individual characteristics, or in all cases where crimes are committed by a state or another collective entity (cd. group-based harm approach).

<sup>10</sup>MARCHUK, I. **The fundamental concept of crime in international criminal law. A comparative analysis**, ed. Springer, London, 2014, pp. 113ss.

<sup>11</sup>REED, A. BOHLANDER, M. (a cura di), **General defences in criminal law. Domestic and comparative perspectives**, Ashgate Publishing, Farnham, 2014. Finally, other authors still prefer to remain anchored to the quadripartite structure of crime and composed of the *actus reus* ("l'ensemble des éléments descriptifs qui caractérisent l'action ou l'omission prohibées"), from *mens rea* ("l'élément mental ou intérieur au perpétreur"), from the reasons for the exclusion of criminal responsibility and the objective conditions for the persecution of the crime (*ne bis in idem*, age of the defendant, immunity and extinction prescription). See in argument: KOLB, R. SCALIA, D. **Droit international pénal. Précis**, Helbing Lichtanhan, Bâle, 2012, pp. 65-67. According to our opinion, this last approach can not be accepted because it confuses the constitutive elements of the crime with factors external to the typical fact, such as the causes of exclusion of the penalty (immunity), or that intervene after the crime is already perfect, as the causes of extinction of the crime (prescription). PEAY, J. **Mental incapacity and criminal liability: redrawing the fault lines?**, in *International Journal of Law and Psychiatry*, 2015, pp. 4ss.

<sup>12</sup>ERDEI, I. **Cumulative convictions in international criminal law: Reconsideration of a seemingly settled Issue**, in *Suffolk Transnational Law Review*, 34, 2001, pp. 3ss. KELT, M. VON HEBEL, H. General principles of criminal law and the elements of crimes, in LEE, R.S. (a cura di), **The International Criminal Court. Elements of crimes and rules of procedure and evidence**, Transnational Publishers, New York, 2001, pp. 28ss.

casuistic approach adopted so far by the international courts<sup>13</sup>. On the one hand the identity is defined as a mere theoretical assumption or in any case a relation devoid of practical consequences-and incompatibility, which does not give rise to any convergence<sup>14</sup>. On the other hand the inclusion relation<sup>15</sup>, is placed, which occurs whenever the elements of a provision are entirely included in the definition of another case (unilateral specialty), and the interference relation, including both the hypotheses of reciprocal specialty and that of interference for the only conduct<sup>16</sup>. According to a theoretical reconstruction, it is necessary to distinguish the hypotheses of apparent competition from those of the actual competition of norms, placing within the two categories the abstract relations that give rise to convergence. The class of the so-called merger or apparent concurrence-also defined as fallacious or illusory competition (false or fake concurrence)-includes both the unilateral specialty reports, solvable according to the principle *lex specialis derogat legi generali*, and the relations of mutual specialty and interference, provided that they can be solved according to the *maius delictum absorbet minus principle*. The class of the so-called true concurrence, on the other hand, includes the hypotheses of interference by mere conduct, which give rise to a formal, homogeneous or heterogeneous competition. Although there are some differences between the approaches mentioned in relation to the number and type of relations between situations that can be established at an abstract level, it is undeniable that all the settings share a fundamental concern: conferring legality on the subject of the rules competition through (previous) abstract analysis of the possible interactions between cases and the (subsequent) placement of overlaps in the identified convergence classes.

In this regard, it is believed that international experience can offer an important methodological insight in the solution of the problem of convergence, allowing to enrich and expand the depth of the analysis to identify the ontological assumptions of the phenomenon of convergence. It is possible to state that in cases of incompatibility and heterogeneity no

<sup>13</sup>MACULAN, E. LIÑÁN LAFUENTE, A. Relaciones concursales, in GIL GIL, A. MACULAN, E. (a cura di), **Derecho penal internacional**, op. cit., pag. 310: "(...) las decisiones de los Tribunales ad hoc se han centrado estrictamente en los casos concretos (...) sin pretensión de formular unas reglas concursales generales y aplicables en vía cuasi-automática para los demás casos (...)".

<sup>14</sup>STUCKENBERG, C.F. Multiplicity of offences: Concursus delictorum, in FISCHER, H. KRESS, C. LÜDER, S.R. (a cura di), **International and national prosecution of crimes under international law, current developments**, ed. Nomos, Baden Baden, 2001, pp. 563ss.

<sup>15</sup>AMBOS, K. **Internationales Strafrecht**, C.H. Beck, München, 2014, par. 4.

<sup>16</sup>STUCKENBERG, C.F. Cumulative charges and cumulative convictions, in STAHN, C. (a cura di), **The law and practice of the International Criminal Court**, Oxford University Press, Oxford, 2015, pp. 843ss.

normative overlap can occur. Lacking one of the ontological assumptions of convergence, these relations between the cases remain excluded-in the beginning-from the problem of competition<sup>17</sup>.

On the other hand, in cases of interference, defined as that relationship between cases in which the common nucleus does not produce legal effects for both standards, if not following the completion of the additional and heterogeneous elements, the competition will necessarily be real and will give rise to a formal competition of crimes. As a result, the potentially apparent competition between norms is reduced only to unilateral and mutual relations. In this place we must include the reflection on the legal principles that underlie the solution of the problem<sup>18</sup>.

It is appropriate to return to the choice of introducing a dichotomy necessary for the purpose of a better approach and solution of the problem. The reference is to the distinction between the intra-categorical contest hypothesis and the inter-categorical competition hypothesis. Being the structural approach due to a rigid and formal idea of legality, its adoption for the purposes of setting the issue of the competition in a context-such as the one outlined in the Rome Statute-where the definition of crimes does not respond exactly to the same a function and the same principles that support the category of typicality in national laws, results in need of a more careful motivation<sup>19</sup>. In this regard, the logical-structural approach seems preferable because: a) in addition to giving rationality to the system, the choice to set the problem on a rigid structural basis attributes a high degree of predictability of the solutions and, consequently, control over regulatory summaries, reducing the area of discretion that inevitably accompanies the judgments of value made by the judges in applying evaluation criteria; b) the study of comparative law has highlighted the universal appeal to logical criteria for the solution of the competition, also by the legal systems that do not provide for an *ad hoc* provision on the matter; c) the study of comparative law has also stressed that the logical-formal criteria prevail over the substantive evaluative criteria, or that

---

<sup>17</sup>ICTY, Prosecutor v. Kordić and Čerkez, Judgment, TC, IT-95-14/2-T, 26 February 2001, par. 1032. ICTY, Prosecutor v. Momčilo Perišić, Judgment, TC, IT-04-81-T, 6 September 2011, par. 387. ICTY, Prosecutor v. Prlić et al., Judgment, TC-III, IT-04-74-T, 29 May 2013, par. 1254. SCSL, Prosecutor v. Sesay et al. (RUF), Judgment, TC, SCSL-04-15-T, 2 March 2009, par. 1191.

<sup>18</sup>KWIECIEN, R. **General principles of law: The gentle guardians of systemic integration of international law**, in Polish Yearbook of International Law, n. 37, 2017.

<sup>19</sup>LIAKOPOULOS, D. **Die Hypothese des Rechts auf ein faires Verfahren internationalen Strafgericht**, in International and European Union Legal Matters, 2012.

the latter take the place of a subsidiary if it is not possible to resolve the issue by making exclusive reference to criteria of a logical nature<sup>20</sup>. Although the structural approach owes a formal conception of legality that seems distant compared to the technique of definition of crimes adopted by the Rome Statute<sup>21</sup>, it seems to us that its adoption does not contradict the spirit of the Statute; on the contrary, it ends up supporting the efforts made during the drafting of the Statute aimed at constructing a system based on a strong idea of legality to migrate from a substantive conception-adopted by the previous international criminal tribunals and too often approached the labels of "justice of the winners"<sup>22</sup> or "of the strongest"<sup>23</sup>-to a more formal<sup>24</sup>. Proof is the first codification in a Statute of an International Criminal Court (ICC)-of the principle of legality<sup>25</sup>.

The first class includes all the hypotheses of competition of rules that occur within the same category of crime<sup>26</sup>: think of the regulatory overlaps between the various behaviors

<sup>20</sup>AMBOS, K. **General principles of criminal law in the Rome statute**, in Criminal Law Forum, 10 (1), 1999, pp. 4-6. JESCHECK, H.H. **The general principles of international criminal law set out in Nuremberg, as mirrored in the ICC statute**, in Journal of International Criminal Justice, 2 (1), 2004, pp. 40-42. NOVAK, A. **The International Criminal Court: An Introduction**, ed. Springer, Berlin, 2015. MELLOH, F. **Einheitliche Strafzumessung in den Rechtsquellen des ICC-Statuts**, Duncker & Humblot, Berlin, 2010.

<sup>21</sup>VAN SCHAACK, B. **The principle of legality in international criminal law**, in Santa Clara Law Review, 51, 2011, pp. 104ss. CHERIF BASSIOUNI, M. Principles of legality in international and comparative criminal law, in CHERIF BASSIOUNI, M. (ed.), **International criminal law, vol. I: Sources, subjects and contents**, Martinus Nijhoff Publishers, The Hague, 2008, pp. 73-105.

<sup>22</sup>SIKKINK, K. **The justice cascade: How human rights prosecutions are changing world politics**, ed. W.W. Norton, New York, 2011.

<sup>23</sup>ROTHE, R. MEEMIK, J. INGADÖTTIR, T. **The realities of international criminal justice**, ed. Brill, The Hague, 2013.

<sup>24</sup>AMBOS, K. **Treatise on international criminal law. Volume II: The crimes and sentencing**, Oxford University Press, Oxford, 2014, pp. 257ss. MACULAN, E. LIÑÁN LAFUENTE, A. Relaciones concursales, in GIL GIL, A. MACULAN, E. (a cura di), **Derecho penal internacional**, op. cit., pp. 311ss. ERDEI, I. **Cumulative convictions in international criminal law: Reconsideration of a seemingly settled issue**, op. cit., pp. 15ss. METTRAUX, G. **International crimes and the ad hoc Tribunals**, Oxford University Press, Oxford, 2005.

<sup>25</sup>VAN SCHAACK, B. **The principle of legality in international criminal law**, op. cit., pp. 106ss. CHERIF BASSIOUNI, M. Principles of legality in international and comparative criminal law, in CHERIF BASSIOUNI, M. (ed.), **International criminal law, vol. I: Sources, subjects and contents**, op. cit., pp. 92ss. GALLANT, K.S. **The principle of legality in international and comparative criminal law**, Cambridge University Press, Cambridge, 2009. BARZEGARZADEH, A. JALALI KARVEH, M. RAISI, L. **Principle of legality and its relation with customary law in international criminal law**, in Mediterranean Journal of Social Science, 6, 2015, pp. 400ss. KASHKOULIAN, E.M. REZA A., **The principle of legality of crimes of international criminal law perspectives**, in International Journal of Science and Research, 5, 2016, pp. 42ss. BARBERO, N. **La ¿relativa? aplicación del principio de legalidad en Derecho Penal Internacional**, in Revista Nuevo Foro Penal, 13, 2017, pp. 124ss. LLEDÓ, R. **El principio de legalidad en el derecho penal internacional**, in Eunomia. Revista en Cultura de la Legadidad, 11, 2016, pp. 249ss.

<sup>26</sup>BOAS, G. BISCHOFF, J.L. REID, N.L. **Elements of crimes under international law. Volume II**, Cambridge University Press, Cambridge, 2008. BURCHARD, C. **Torture in the Jurisprudence of the ad hoc Tribunals. A critical assessment**, in Journal of International Criminal Justice, 6, 2008, pp. 173ss. ERDEI, I. **Cumulative**

governed by art. 7 of the Statute of the International Criminal Court (StICC) (crimes against humanity)<sup>27</sup> or art. 8 (StICC) (crimes of war)<sup>28</sup>.

The second class, on the other hand, includes the hypotheses for the competition of rules that occur between different categories of crimes<sup>29</sup>: is the case of the overlap between torture as a crime against humanity<sup>30</sup> and rape as a war crime<sup>31</sup>, or of murder as crime of

---

**convictions in international criminal law: Reconsideration of a seemingly settled issue**, op. cit., pp. 19ss.

<sup>27</sup>APONTE, A. **Persecución penal de los crímenes internacionales**, ed. Ibáñez, Bogotá, 2010, pp. 23ss. LBAN, D.J. **Una teoría de los crímenes contra la humanidad**, Bogotá, Temis, 2011.

<sup>28</sup>BOAS, G. BISCHOFF, J.L. REID, N.L. **Elements of crimes under international law**, op. cit.,

<sup>29</sup>Defined also as inter-Article cumulative convictions from ERDEI, I. **Cumulative convictions in international criminal law: Reconsideration of a seemingly settled issue**, op. cit., pp. 15ss. BOAS, G. BISCHOFF, J.L. REID, N.L. **Elements of crimes under international law**, op. cit., pp. 331ss.

<sup>30</sup>TOFAN, C. **Torture in international criminal law**, Wolf Legal Publishers, The Netherlands, 2011.

<sup>31</sup>See the Policy paper on sexual and gender based crimes of the Office of Procurator of June 2014. HAYES, N. Creating a definition of rape in international law: The contribution of the international criminal Tribunals, in DARCY, S. POWDERLY, J. **Judicial creativity at the international criminal Tribunals**, Oxford University Press, 2010, pp. 130ss. BRAMMERTZ, S. MICHELLE, J. Lessons learned in prosecuting gender crimes under international law: Experiences from the ICTY, in EBOE-OSUJI, C. **Protecting humanity: Essays in international law and policy in honour of Navanethem Pillay**, Martinus Nijhoff Publishers, The Hague, 2010, pp. 97ss. DUBLER SC, R. KALYK, M., **Crimes against humanity in the 2<sup>st</sup> century**, ed. Brill, The Hague, 2018. HELLER, K.J. The Rome Statute of the International Criminal Court, in HELLER, K.J. DUBBER, D. (eds.), **The handbook of comparative criminal law**, Stanford Law Books, Stanford, 2011, pp. 597ss. LEATHERMAN, J.L. **Sexual violence and armed conflict**, Polity Press, London, 2011, pp. 10ss. KOLB, R. HYDE, R. **An introduction to the international law of armed conflicts**, Edward Elgar Publishing, Cheltenham, 2008. DE BROUWER, A.M. KU, C. RÖMKENS, R. VAN DEN HERIK, L. **Sexual violence as an international crime: Interdisciplinary approaches**, ed. Intersentia, Antwerp, Oxford, 2013, pp. 123ss. SHAHADUDDIN, M. **International criminal justice at the Yugoslav Tribunal. A judge's recollections**, Oxford University Press, Oxford, 2012. EBOE-OSUJI, C. **International law and sexual violence in armed conflicts**, ed. Brill, The Hague, 2012, pp. 146ss. MIBENGE, C.S. **Sex and international Tribunals: The erasure of gender from the war narrative**, University of Pennsylvania Press, 2013. BEIGBEDER, Y. **International Criminal Tribunals**, ed. Palgrave, London & New York, 2011. GIORGETTI, C. **The rules, practice and jurisprudence of international Courts and Tribunals**, ed. Brill, The Hague, 2012, pp. 194ss. WATERROW, J. SCHUMACHER, J. **War crimes trials and investigation. A multi-disciplinary introduction**, Oxford University Press, Oxford, 2018. KOENIG, K. LINCOLN, A. GROWTH, R. **The jurisprudence of sexual violence-Sexual violence & accountability project, working paper series**, Human Rights Center, University of California, Berkeley, May 2011, pp. 4ss. MCCAUSLAND, C. **From tolerance to tactic: Understanding rape in armed conflict as genocide**, in Michigan State International Law Review, 26, 2017, pp. 158ss. WEITZ, Y. **Rwandan genocide: Taking notes from the holocaust reparations movement**, in Cardozo Journal of Law & Gender, 17, 2009, pp. 370ss, according to the author: "(...) the Akayesu Court ultimately characterized rape and similar crimes of sexual violence as both genocide and as crimes against humanity. This expanded definition, along with the subsequent prosecution of rape, is a significant step forward for women's rights and has contributed to the development of international humanitarian law as a whole (...)". See, LIAKOPOULOS, D. **L'ingerenza umanitaria nel diritto internazionale e comunitario**, ed. Cedam, 2007. CROWE, J. WESTON-SCEUBER, K. **Principles of international humanitarian law**, Edward Elgar Publishing, Cheltenham, 2013, pp. 8ss. GREENWOOD, C. Scope of application of humanitarian law, in FLECK, D. (ed), **The Handbook of international humanitarian law**, Oxford University Press, Oxford, 2008, pp. 45ss. DEUITCH, S.T. **Putting the spotlight on "the terminator": How the ICC prosecution of Bosco Ntaganda could reduce sexual violence during conflict**, in William & Mary Journal of Women & Law, 23, 2016, pp. 656ss. POWELL, C. **You have no God: An analysis of the prosecution of genocidal rape in international criminal law**, in Richmond Public Interest Law Review, 20, 2017, pp. 26ss. DEUITCH, S.T. **Putting the spotlight on "the**

genocide<sup>32</sup> and persecution as a crime against humanity<sup>33</sup>. The introduction of this dichotomy is necessary to satisfy a felt need. In fact, the two contest hypotheses present a substantial

**terminator”: How the ICC prosecution of Bosco Ntaganda could reduce sexual violence during conflict**, op. cit., pp. 656ss. GREY, R. SHEPHERD, L.J. **Stop rape now?: Masculinity, responsibility, and conflict-related sexual violence**, in *Men & Masculinities*, 15, 2012, pp. 117ss. VOJDIK, V.K. **Sexual violence against men and women in war: A masculinities approach**, in *Nevada Law Journal*, 15, 2014-2015, pp. 925ss.

<sup>32</sup>For the criminal liability see also the next cases from the SCSL: *The Prosecutor v. Sam Bockarie (Withdrawal of Indictment)* (Special Court for Sierra Leone, Case No. SCSL-03-04-I-022, 8 December 2003); *The Prosecutor v Sesay, Kallon & Gbao (RUF Case) (Trial judgment)* (Special Court for Sierra Leone, Case No. SCSL 04-15-T, 25 February 2009); *The Prosecutor v Sesay, Kallon & Gbao (RUF Case) (Appeal judgment)* (Special Court for Sierra Leone, Case No. SCSL 04-15-A, 26 October 2009); *The Prosecutor v Brima, Kamara & Kanu (AFRC Case) (Trial judgment)* (Special Court for Sierra Leone, Case No. SCSL 04-16-T, 20 June 2007); *The Prosecutor v Brima, Kamara & Kanu (AFRC Case) (Appeal judgment)* (Special Court for Sierra Leone, Case No. SCSL 04-16-A, 22 February 2008); *The Prosecutor v Johnny Paul Koroma (Indictment)* (Special Court for Sierra Leone, Case No. SCSL-03-I, 7 March 2003); *The Prosecutor v Fofana and Kondewa (CDF Case) (Trial judgment)* (Special Court- xxii - for Sierra Leone, Case No. SCSL 04-14-T, 2 August 2007); *The Prosecutor v Fofana and Kondewa (CDF Case) (Appeal Judgment)* (Special Court for Sierra Leone, Case No. SCSL 04-14-T, 28 May 2008); *The Prosecutor v Foday Saybana Sankoh (Withdrawal of Indictment)* (Special Court for Sierra Leone, Case No. SCSL-03-02-PT-054, 8 December 2003); *The Prosecutor v Charles Ghankay Taylor (Indictment)* (Special Court for Sierra Leone, Case No. SCSL-03-01-T, 29 May 2007). KELLY, M.J. The parameters of vicarious corporate criminal liability for genocide under international law, in BYRNES, A. HAYASHI-MICHAELSEN, C. **International law in the age of globalization**, ed. Brill, The Hague, 2013. BEHRENS, R. HENHAM, J. **Elements of genocide**, ed. Routledge, Taylor & Francis, Glass House Book, New York, 2013, pp. 194ss. BEIGBEDER, Y. **International Criminal Tribunals**, op. cit., KELLY, M.J. **The debate or genocide in Darfur, Sudan**, in *University of California, Davis Journal of International Law & Policy*, 19, 2012, pp. 208ss. LINGAAS, C. **Imagined identities: Defining the racial group in the crime of genocide**, in *Genocide Studies and Prevention: An International Journal*, 9, 2016, pp. 80ss. BETTWY, D.S. **The genocide Convention and unprotected groups: Is the scope of protection expanding under customary international law?**, in *Notre Dame Journal of International and Comparative Law*, 2011, pp. 102ss. MOUTHAN, S. **Sexual violence against men and international law. Criminalising the unmentionable**, in *International Criminal Law Review*, 13 (4), 2013, pp. 668ss. KIRBY, P. **How is rape a weapon of war?, Feminist international relations, modes of critical explanation and the study of wartime sexual violence**, in *European Journal of International Relations*, 18, 2012. MCHENRY, J.R. **The prosecution of rape under international law: Justice that is long overdue**, in *Vanderbilt Journal of Transnational Law*, 35, 2002, pp. 1310ss. LAVIOLETTE, N. **Commanding rape: Sexual violence, command responsibility and the prosecution of superiors by the international criminal Tribunals for the Former Yugoslavia and Rwanda**, in *The Canadian Yearbook of International Law*, 36, 1998, pp. 94ss. WILLIAMSON, J.A. **Some consideration on command responsibility and criminal liability**, in *International Review of the Red Cross*, 90, 2008, pp. 306ss. NEBESAR, D.A. **Gender-based violence as a weapon of war**, in *University of California, Davis Journal of International Law and Policy*, 4, 1998, pp. 148ss. PICCOLO, I. **The crime of rape in international criminal law**, ed. International Courts Association, 2013.

<sup>33</sup>JACKSON, M. **A conspiracy to commit genocide. Anti-fertility research in apartheid’s chemical and biological weapons programme**, in *Journal of International Criminal Justice*, 13 (4), 2015, pp. 933-950. BEHRENS, P. HENHAM, R. **Elements of genocide**, op. cit., pp. 194ss. BEIGBEDER, Y. **International Criminal Tribunals**, op. cit., SÁNCHEZ REVERTE, R.S. **Referencia al crimen de genocidio aproximación genocide crime**, in *Revista de Estudios Jurídicos*, 16, 2016. KELLY, M.J. **The debate or genocide in Darfur, Sudan**, op. cit., pp. 208ss. LINGAAS, C. **Imagined identities: Defining the racial group in the crime of genocide**, op. cit., pp. 80ss. MAISSON, R. **Justice pénale internationale**, ed. PUF, Paris, 2017. BETTWY, D.S. **The genocide Convention and unprotected groups: Is the scope of protection expanding under customary international law?**, in *Notre Dame Journal of International and Comparative Law*, 2011, pp. 102ss. HALLING, M. **Push the envelope: Watch it bend: Removing the policy requirement and extending crimes against humanity**, in *Leiden Journal of International Law*, 23 (4), 2010, pp. 828ss. ROBERTS, C. **On the definition of crimes against humanity and other widespread or systematic human rights violations**, in *University of Pennsylvania Journal of Law and Social Change*, 20, 2017, pp. 4ss.

difference: only in the case of inter-categorical competition is the so-called element of context in the structural analysis of abstract facts. The collective component conditions the relationship between norms because it makes it possible—at least at the abstract level—the legal qualification of the same conduct and the same event as different provisions: think of the emblematic case of the murder of a group of people, the which can be a genocide<sup>34</sup>, a crime against humanity<sup>35</sup> and a war crime if all contextual elements are present<sup>36</sup>. The same situation can not come true, for obvious reasons, in the cases of intra-categorical competition, since the element of context is identical for all crimes<sup>37</sup>.

Having said that, it should be noted that for both the hypotheses of the competition the same method of analysis will be followed: a) identification of the overlapping area; b) application of the legal principles that guarantee the solution of the competition in the sense of appearance or reality.

### 3 THE INCOMPATIBLE RULES. THE HYPOTHESES OF INTRA CATEGORIAL COMPETITION.

The relations of incompatibility and heterogeneity exclude any normative interference from the start. The Statute of Rome contains, as may be expected, numerous hypotheses of heterogeneity, which is superfluous to report here. More interesting, however, is the incompatibility relationship that may arise in the light of some provisions. A first example can be found in articles 8 (2) (b) (xxvi) and 8 (2) (e) (vii) of the StICC<sup>38</sup>, which regulate the

<sup>34</sup>BOSLY, H.D. VANDERMEERSCH, D. *Gènocide, crimes contre l'humanité et crimes de guerre face à la justice*, ed. Bruylant, Bruxelles, 2012.

<sup>35</sup>DAVIDSON, C. **How to read international criminal law: Strict construction and the Rome Statute of the International Criminal Court**, in *St. John's Law Review*, 91, 2017, pp. 4ss. BOESTEN, J. WILDING, P. **Transformative gender justice: Setting an agenda**, in *Women's Studies International Forum*, 49, 2015, pp. 77ss.

<sup>36</sup>DÍAZ SOTO, J.M. **Una aproximación al concepto de crímenes contra la humanidad**, in *Revista Derecho Penal y Criminología*, 95, 2015, pp. 123ss.

<sup>37</sup>HEFENDEHL, R. **Grenzenlose Vorverlagerung des Strafrechts?**, BWV Berliner Wissenschafts Verlag, Berlin, 2010, pp. 24ss. SWART, B. ZAHAR, A. **The legacy of the international criminal Tribunal for the Former Yugoslavia**, Oxford University Press, Oxford, 2011, pp. 298ss. OLÀSOLO, A.H. **International criminal law, transnational criminal organizations and transitional justice**, ed. Brill/Martinus Nijhoff Publishers, The Hague, 2018.

<sup>38</sup>AMBOS, K. **Treatise on international criminal law**, op. cit., pp. 120. WERLE, G. JESSBERGER, F. **International criminal justice is coming home: The new German Code of crimes against international law**, in *Criminal Law Forum*, 13, 2002, pp. 207ss. The double codification within the statute of the ICC presents, in truth, an important difference: while in the case of internal conflicts the recruitment can take place within armed forces or groups, in the case of international conflict the enlistment is limited to the “national” armed forces. The

enrollment and use of children under the age of 15 in active participation in hostilities<sup>39</sup>. This crime, which is expressly provided in several previous legal texts<sup>40</sup>, provides for three different behaviors suitable for integrating the case, namely conscription, enlisting and 15-year-old employment.

Regulatory incompatibility occurs in the relationship between conscription and enrollment. The ICC has affirmed that what differentiates the two behaviors is the presence of the element of coercion (compulsion)<sup>41</sup>, confirming the international judicial practice on the matter: conscription is identified with forced recruitment, forced, implemented through coercion<sup>42</sup>; on the other hand, recruitment takes place on a voluntary basis<sup>43</sup>. From the

---

adjective seems to suggest protection only against the government army, leaving out all the irregular groups of fighters. The ICC Preliminary Chamber, in the Lubanga Dyilo case, stated that the term "national" does not limit the application of the law to governmental forces alone: ICC, Prosecutor v. Thomas Lubanga Dyilo, Decision on the confirmation of charges, P-TC, ICC-01/04-01/06, 29 January 2007, par. 277. See also, VON HEBEL, H. ROBINSON, D. Crimes within the jurisdiction of the court, in LEE, R.S. (a cura di), **The International Criminal Court. Elements of crimes. The making of the Rome statute. Issues, negotiations, results**, Kluwer Law International, The Hague, 1999, pp. 118ss.

<sup>39</sup>GROVER, L. **Child soldier victims of genocidal forcible transfer. Exonerating child soldiers charged with grave conflict-related international crimes**, ed. Springer, Berlin, 2014. SLUITER, G. FRIMAN, H. LINTON, S. VASILIEV, S. ZAPPALÁ, S. **International criminal procedure. Rules and principles**, Oxford University Press, Oxford, 2013, pp. 1576ss. BELLELO, R. (ed.), **International criminal justice**, Ashgate Publishing, Farnham, 2010, pp. 461ss.

<sup>40</sup>Art. 77(2) of the First additional Protocol and art. 4(3)(c) of the second additional Protocol of the Geneva Convention of 1977; art. 38 of the Convention of the rights of child's. MARIE-CLAUDE, J.B. **Cracking the toughest nut: Colombia's endeavour with amnesty for political crimes under Additional Protocol II to the Geneva Conventions**, in Notre Dame Journal of International & Comparative Law, 17, 2017, pp. 8ss. NEAL, K.N. **Child protection in times of conflict and children and international criminal justice**, in Georgia Journal of International and Comparative Law, 43, 2015, pp. 634ss.

<sup>41</sup>See, ICC, Prosecutor v. Thomas Lubanga Dyilo, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006, AC, ICC-01/04-01/06-772, 14 December 2006, par. 293. For details: AMBOS, K. **The first judgment of the International Criminal Court (Prosecutor v. Lubanga): A comprehensive analysis of the legal issues**, in International Criminal Law Review, 12, 2012, pp. 136ss.

<sup>42</sup>SAINZ-PARD, P.V. **Is child recruitment as a war crime part of customary international law?**, in The International Journal of Human Rights, 12, 2008, pp. 594ss. WILLIAMS, J. **The international campaign to prohibit child soldiers: A critical evaluation**, in The International Journal of Human Rights, 15, 2011, pp. 1072, 1075-1077. WEISSBRODT, D. HANSEN, J. NESBITT, N. **The role of the Committee on the Rights of the Child in interpreting and developing international humanitarian law**, in Harvard Human Rights Journal, 24, 2011, pp. 116ss.

<sup>43</sup>ICC, Prosecutor v. Thomas Lubanga Dyilo, Appeal Judgment, op. cit., para. 278ss. You can see another confirmation from the jurisprudence according to the SCSL, The Prosecutor v. Charles Ghankay Taylor, Judgment, TC-II, SCSL-03-01-T, 18 May 2012, par. 442. In the same spirit see: GRAF, R. **The International Criminal Court and child soldiers. An appraisal of the Lubanga Judgment**, in Journal of International Criminal Justice, 10 (4), 2012, pp. 957ss. CRYER, R. et al., **An introduction to international criminal law and procedure**, Cambridge University Press, Cambridge, 2014, pp. 310ss. COTTIER, M. GRIGNON, J. Art. 8(2)(b)(xxvi), in TRIFFTERER, O. AMBOS, K. (a cura di), **The Rome Statute of the International Criminal Court. A Commentary**, op. cit., pp. 524ss. SAFFERLING, C. **International criminal procedure**, Oxford University Press, Oxford, 2012, pp. 97ss. ROSE, S.J. **Prosecutor v. Taylor: The implications for Bashar Al-**

ontological difference existing between the conscription and enlisting behaviors, one can easily deduce that even the infra-fifteen-year-old voluntary entry into the armed group's files integrates the crime in question, since it is necessary to prove the coercive nature of the recruitment only for the hypothesis of the conscription<sup>44</sup> but not, instead, for that of enlisting<sup>45</sup>.

The compulsion element allows to draw a sharp line of demarcation between the (forced) recruitment and the (voluntary) recruitment<sup>46</sup>. The presence of coercion defines the

---

**Assad**, in *Boston College International & Comparative Law Review*, 37, 2014, pp. 12ss. **HELLER, K.J. The Taylor sentencing judgment: A critical analysis**, in *Journal of International Criminal Justice*, 11, 2013, pp. 838ss. **SVÁČEK, O. Brothers and sisters in arms as victims of war crimes. Ntagada case before the ICC**, in *Czech Yearbook of Public & Private International Law*, 9, 2018. **SÁCOUTO, S. Victim participation at the international Criminal Court and the Extraordinary Chambers in the Courts of Cambodia: A feminist project**, in *Michigan Journal of Gender & Law*, 19, 2012, pp. 298ss. **PALMER, E. WILLIAMS, S.J. A "shift in attitude"? Institutional change and sexual and gender-based crimes at the Extraordinary Chambers in the Courts of Cambodia**, in *International Feminist Journal of Politics*, 20, 2017. **DEFALCO, R.C. Accounting for famine at the Extraordinary Chambers in the Courts of Cambodia. The crimes against humanity of extermination, inhumane acts and persecution**, in *The International Journal of Transitional Justice*, 5, 2011. **DEGUZMAN, M. How serious are international crimes? The gravity problem in international criminal law**, in *Columbia Journal of Transnational Law*, 51, 2012, pp. 20ss. **WAUGH, C. Charles Taylor and Liberia: Ambition and atrocity in Africa's lone star State**, ed. Zed Books, New York, 2011.

<sup>44</sup>See in particular: **WAGNER, N. A critical assessment of using children to participate actively in hostilities in Lubanga: Child soldiers and direct participation**, in *Criminal Law Forum*, 24, 2013, pp. 182ss. **JENKS, C. Law as shield, law as sword: The ICC's Lubanga decision, child soldiers and the perverse mutualism of direct participation in hostilities**, in *University of Miami National Security and Armed Conflict Law Review*, 3, 2013, pp. 106, 122ss. **HAPPOLD, M. The protection of children against recruitment and participation in hostilities: International humanitarian law and human rights law as complementary legal frameworks**, in *Collegium*, 44, 2014, pp. 99, 105ss.

<sup>45</sup>**WERLE, G. JESSBERGER, F. International criminal justice is coming home: The new German Code of crimes against international law**, op. cit., pp. 202ss. And from the jurisprudence, see: SCSL, Prosecutor v. Hinga Norman, Decision on Preliminary Motion based on Lack of Jurisdiction (Child Recruitment), AC, SCSL-2004-14-AR72(E), 31 May 2004, par. 53. SCSL, Prosecutor v. Fofana and Kondewa, Trial Judgment, Judgment, TC, SCSL-04-14-T, 2 August 2007, para. 189. SCSL, Prosecutor v. Sesay, Kallon and Gbao, Trial Judgment, AC, SCSL-04-15-A, 26 October 2009, par. 184. SCSL, Charles Ghankay Taylor, Judgment, TC-II, SCSL-03-01-T, 18 May 2012, par. 6987. ECCC, Prosecutor v. Chea and Samphan (002), Judgment, TC, 002/19-09-2007/ECCC/TC, 7 August 2014, par. 1055. EAC, Ministère Public v. Hissein Habré, Jugement, Chambre Africaine Extraordinaire d'Assises, 30 May 2016, par. SCSL, Prosecutor v. Charles Ghankay Taylor, Judgment, AC, SCSL-03-01-A, 26 September 2013, par. 577. See also the dissenting opinion of judge Robertson: SCSL, Prosecutor v. Hinga Norman, Dissenting Opinion of Justice Robertson, AC, SCSL-2004-14-AR72(E), 31 May 2004, para. 47. **SMITH, A. Child recruitment and the Special Court of Sierra Leone**, in *Journal of International Criminal Justice*, 2, 2004, pp. 1141ss. **CHERNOR JALLOH, C. MEISNER, S. The law reports of the Special Court of Sierra Leone, vol. III**, ed. Brill/Martinus Nijhoff Publishers, The Hague, 2015, pp. 366ss. **VAN SLIEDREGT, E. VASILIEV, S. Pluralism in international criminal law**, Oxford University Press, Oxford, 2014, pp. 285ss. **CHERNOR JALLOH, C. The Sierra Leone Special Court and its legacy: The impact for Africa and international criminal law**, Cambridge University Press, Cambridge, 2013, pp. 234ss. **NMEHIELLE, V.O.O. Africa and the future of international criminal justice**, Eleven International Publishing, The Netherlands, 2012. **CHERNOR JALLOH, C. MORGAN, A. International criminal justice processes in Rwanda and Sierra Leone: Lessons for Liberia**, in **CHERNOR JALLOH, C. OLUFEMI, E. Shielding humanity. Essays in international law in honour of judge Abdul G. Koroma**, ed. Brill, The Hague, 2015.

<sup>46</sup>**LEVEAU, F. Liability of child soldiers under international criminal law**, in *Osgoode Hall Review of Law*

conduct of the conscription, while its absence defines the conduct of enlisting: the incompatibility relationship is therefore evident, since the forced recruitment of a minor can not take place, at the same time, on a voluntary basis of the minor himself.

Another example of incompatibility occurs between deportation and forced displacement, both provided for in art. 7 (1) (d) of the StICC<sup>47</sup>. The difference between these two crimes lies solely in the spatial dimension of the transfer of the population: while deportation requires that the movement takes place from one state to the territory of another State, forced displacement occurs within national borders<sup>48</sup>. The incompatibility is therefore

---

and Policy, 4, 2014, pp. 36-66. DRUMBL, M.A. **Unlawful recruitment and use of children: From proscription to prevention: Reimagining child soldiers in international law and policy**, Oxford University Press, Oxford, 2012, pp. 16ss. MIANO, S.M. **Toward a child-oriented approach to reparations: Reflecting on the rights and needs of child victims of armed conflict**, in *The Fletcher Journal of Human Security*, 28, 2013, pp. 30ss. HOLLING, J. **Internationaler Strafgerichtshof und Verbrechens prävention**, LIT Verlag, Münster, 2016, pp. 148ss.

<sup>47</sup>HALL, C.K. STAHN, C. Article 7, in TRIFFTERER, O. AMBOS, K. (a cura di), **The Rome Statute of the International Criminal Court**, op. cit., pp. 193ss. AMBOS, K. **Treatise on international criminal law**, op. cit., pp. 86ss. For the codification of the statute of ICC, see: T.L.H. MCCORMACK, **Crimes against humanity**, in D. MCGOLDRICK, P. ROWE, E. DONNELLY (a cura di), **The Permanent International Criminal Court. Legal and policy issues**, Hart Publishing, Oxford & Portland, Oregon, 2004, pp. 192ss. DUBLER SC, R. KALYK, M. **Crimes against humanity in the 21<sup>st</sup> century**, op. cit., KELLER, L.M. **The continuing peace and with justice debate. Recent events in Uganda and the ICC**, in *The University of the Pacific Law Review*, 48, 2017, pp. 265ss.

<sup>48</sup>See in particular from the jurisprudence: ICTY, *Prosecutor v. Radislav Krstić*, Judgment, AC, IT-98-33-A, 19 April 2004, par. 521. ICTY, *Prosecutor v. Milorad Krnojelac*, Judgment, AC, IT-97-25-A, 17 September 2003, par. 474. ICTY, *Prosecutor v. Radoslav Brđanin*, Trial Judgment, TC-II, IT-99-36-T, 1 September 2004, par. 1087, par. 540. ICTY, *Prosecutor v. Naletilić and Martinović*, Trial Judgment, TC, IT-98-34-T, 31 March 2003, par. 670. ICTY, *Prosecutor v. Prlić et al.*, Trial Judgment, TC-III, IT-04-74-T, 29 May 2013, par. 55. Against this approach, see: ICTY, *Prosecutor v. Milomir Stakić*, Trial Judgment, TC-II, IT-97-24-T, 31 July 2003, par. 679. See also in argument, CHERIF BASSIOUNI, M. **Crimes against humanity, Volume I: Sources, subjects and contents**, Oxford University Press, Oxford, 1998, pp. 381ss. HALL, C.K. STAHN, C. Article 7, in TRIFFTERER, O. AMBOS, K. (a cura di), **The Rome statute of the International Criminal Court. A commentary**, op. cit., pp. 196ss. HENCKAERTS, J.M. **Deportation and transfer of civilians in time of war**, in *Vanderbilt Journal of Transnational Law*, 26, 1993, pp. 472ss. ICC, *Prosecutor v. Ruto, Kosgey and Sang*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, P-TC II, ICC-01/09-01/11, 23 January 2012, par. 244. On the customary nature of the crime of forced transfer already starting in 1975, and therefore applicable by the Extraordinary Chambers in the Courts in Cambodia, see: QUICK, N. **Forced transfer and customary international law: Bridging the gap between Nuremberg and the ICTY**, in MEISENBERG, S.M. STEGMILLER, I. (a cura di), **The Extraordinary Chambers in the Courts of Cambodia. Assessing their contribution to international criminal law**, ed. Springer, The Hague, 2016, pp. 291-319. KUCZYŃSKA, H. **Changing evidentiary rules to the detriment of the accused? The Ruto and Sang decision of the ICC Appeals Chamber**, in *Polish Yearbook of International Law*, n. 37, 2017. MARXSEN, C. **What do different theories of customary international law have to say about the individual right to reparation under international humanitarian law?**, in *Zeitschrift für ausländisches öffentliches Recht*, n. 78 (3), 2018. MEISENBERG, S. **The extraordinary Chambers in the Courts in Cambodia. Assessing their contribution to international criminal law**, ed. Springer, Berlin, 2016. CHIEDU MOGHALU, K. **International humanitarian law from Nuremberg to Rome: The weighty precedents of the international criminal Tribunal for Rwanda**, in *Pace International Law Review*, 14, 2002, pp. 285ss. SIVAKUMARAN, S. **Re-envisioning the international law of internal armed conflict**, in *European Journal of International Law*, 22,

clear: the law punishes any acquisition of minors within the armed group and the presence of the consent of the minor, although not constituting a defense<sup>49</sup>, is not entirely irrelevant, being able to play an important role in determining the penalty.

#### 4 THE CRIME OF ENLISTMENT AND USE OF CHILD SOLDIERS: MORE RULES IN MORE CASES.

The Rome Statute contains numerous hypotheses of mixed criminal law. With this expression alludes to those provisions that contain-under more numbers, more letters, more or less in a single proposition-more distinct regulatory provisions. For example, consider art. 7 (1) (g) of the StICC which provides, in a single sub-paragraph, the conduct of rape<sup>50</sup>, reduction in sexual slavery<sup>51</sup>, forced prostitution, forced pregnancy and forced sterilization<sup>52</sup>;

---

2011, pp. 240, 240-242. DIRNSTEIN, Y. **Non-international armed conflicts in international law**, Cambridge University Press, Cambridge, 2014, pp. 186ss.

<sup>49</sup>DARCY, S. Defences to international crimes, in SCHABAS, W.A. BERNAZ, N. **Handbook of international criminal law**, ed. Routledge, London & New York, 2011, pp. 231-245. AMBOS, K. Defences in international criminal law, in BETRAM, S. BROWN, S. **Research handbook on international criminal law**, Edward Elgar Publishers, Cheltenham, 2011.

<sup>50</sup>HALLEY, J. **Rape in Berlin: Reconsidering the criminalisation of rape in the international law of armed conflict**, in Melbourne Journal of International Law, 12, 2008, pp. 80ss. STEWART, G.P. The International Criminal Court, in MAIER, C.N.B. **The crime of rape under the Rome statute of the ICC: with a special emphasis on the jurisprudence of the ad hoc criminal Tribunals**, in Amsterdam Law Forum, 11, 2011. O'CONNELL, S. **Gender based crimes at the International Court**, in Plymouth Law and Criminal Justice Review, 3, 2010, pp. 72ss. KIRAN, G. **The protection of sexual autonomy under international criminal law: The International Criminal Court and the challenge of defining rape**, in Journal of International Criminal Justice, 10, 2012, pp. 376ss. AGIRRE ARANBURU, X.A. **Sexual violence beyond reasonable doubt: Using pattern evidence and analysis for international cases**, in Leiden Journal of International Law, 23, 2010, pp. 612ss. MAIER, N.B. **The crime of rape under the Rome statute of the ICC: With a special emphasis on the jurisprudence of the ad hoc criminal Tribunals**, in Amsterdam Law Forum, 11, 2011, pp. 148ss. FULFORD, A. **The reflections of a trial judge**, in Criminal Law Forum, 22, 2011, pp. 216ss. BELTZ, A. **Prosecuting rape in International Criminal Tribunals: The need to balance victim's rights with the due process rights of the accused**, in Journal of Civil Rights and Economic Development, 20, 2012. SÁNCHEZ REVERTE, R.S. **Referencia al crimen de genocidio aproximación genocide crime**, in Revista de Estudios Jurídicos (Segunda Época), 16, 2016. HELLER, K.J. **What is an international crime?**, in Harvard International Law Journal, 49, 2018. STEPAKOFF, S. **When we wanted to talk about rape: Silencing sexual violence at the Special Court for Sierra Leone**, in International Journal of Transitional Justice, 1, 2007. DANA, S. **The sentencing legacy of the Special Court for Sierra Leone**, in Georgia Journal of International and Comparative Law, 43, 2014, pp. 620ss. MAROCHKIN, S.Y. NELAEVA, G.A. **Rape and sexual violence as torture and genocide in the decisions of international Tribunals: Trans-judicial networks and the development of international criminal law**, in Human Rights Review, 15, 2014, pp. 474ss.

<sup>51</sup>MARTÍN, M. LIROLA, I. **Sexual crimes in international humanitarian law**, Institut Català Internacional per la Pau, Barcelona, 2013. DUBLER SC, R. KALYK, M. **Crimes against humanity in the 21st century**, op. cit., HAGAY-FREY, A. **Sex and gender crimes in the new international law: Past, present, future**, Martinus Nijhoff Publishers, The Hague, 2011. CLARK, P. **Rape, sexual violence and transitional justice challenges. Lessons from Bosnia Herzegovina**, ed. Routledge, London & New York, 2018. BOISTER, N. CURRIE, R.J. **Routledge handbook of transnational criminal law**, ed. Routledge, London & New York, 2015.

or, again, art. 8 (1) (a) (ii) of the StICC which refers to both torture and inhumane treatment, including biological experiments<sup>53</sup>. It is therefore necessary to distinguish the hypotheses of mixed cumulative rules (or provisions with several standards) by mixed alternative rules (or norms with more specific provisions): only the former can give rise to the phenomenon of convergence, since they contain as many incriminating rules as the foreseen cases.

In the *Lubanga Dyilo* case the ICC had to determine whether the provision referred to in art. 8 (2) (e) (vii) of the StICC<sup>54</sup>, which incriminates enlistment (forced or voluntary) and the use of child-soldiers<sup>55</sup> during hostilities, is a mixed cumulative or alternative rule<sup>56</sup>. The judges of the first instance considered the conscription, the enlistment and the using as three distinct criminal offenses and not as three different modes of conduct that integrate a single crime, with the consequence that the recruitment of a minor followed by his employment

---

GRESCHKOW, A. *Feindbilder der Nachkriegsgeneration in Bosnien und Herzegowina: Bosniens Jugend zwischen Hoftung und den Schatten der Vergangenheit*, Diplomica Verlag GmbH, Hamburg, 2014. CASSESE, A. JESSBERGER, F. CRYER, R. DÉ, U. *International criminal law*, ed. Routledge, London & New York, 2016. BIKUNDO, E. *International criminal law using or abusing legality?*, ed. Routledge, London & New York, 2014. EBBE, O.N.I. *Comparative justice systems. Policing, judiciary and corrections*, ed. Palgrave, London, 2013. ESER, A. *Comparative criminal law*, ed. Nomos & Hart Publishing, München, 2017. MACKINNON, C.A. *Defining rape internationally: A comment on Akayesu*, in Columbia Journal of International Law, 45, 2006, pp. 944ss. HAJAJEE, R.L. *Prosecuting crimes of rape and sexual violence at the ICTR: The application of joint criminal enterprise theory*, in Harvard Journal of Law and Gender, 29, 2006, pp. 206ss. DEREYMAEKER, G. MUNTIGH, L. *Sexual violence and torture in international criminal law*. Amnesty International. *Rape and sexual violence: Human rights law and standards in the International Criminal Court*, in Journal of Human Rights Practice, 3, 2011, pp. 48ss.

<sup>52</sup>GEKKER, E. *Rape, sexual slavery, and forced marriage at the international criminal Court: How Katanga utilizes a ten-year-old rule but overlooks new jurisprudence*, in Hastings Women's Law Journal, 25, 2014, pp. 107ss.

<sup>53</sup>HAHD AL-KASASIBAH, F. *Torture as crime under international law and torture victims' rights*, in Journal of Law Policy and Globalization, 42, 2015, pp. 146ss. COLLARD, M. *Torture as State crime. A criminological analysis of the transnational institutional torturer*, ed. Routledge, London & New York, 2018.

<sup>54</sup>ICC, Prosecutor v. Thomas Lubanga Dyilo, Decision on Sentence pursuant to Article 76 of the Statute, TC, ICC-01/04-01/06, 10 July 2012, par. 98-99

<sup>55</sup>MCBRIDE, J. *Child soldiers at the International criminal Court*, in MCBRIDE, J. *The war crime of child soldier recruitment*, T.M.C. Asser Press, The Hague, 2013. GRAF, R. *The International Criminal Court and child soldiers: An appraisal of the Lubanga judgment*, op. cit., pp. 948ss. YUVARAJ, Y. *When does a child "participate actively in hostilities" under the Rome statute? Protecting children from use in hostilities after Lubanga*, in Utrecht Journal of International and European Law, 32, 2011, pp. 84ss. WASCHENFORT, G. *International law and child soldiers*, Hart Publishing, Oxford & Portland, Oregon, 2015, pp. 5ss.

<sup>56</sup>SCHMITT, M.N. *Deconstructing direct participation in hostilities: The constitutive elements*, in New York University Journal of International Law and Politics, 42, 2010, pp. 698ss. BOOTHBY, B. *And for such time as: The time dimension to direct participation in hostilities*, in New York University Journal of International Law and Politics, 42, 2010, pp. 742ss. HAYS PARKS, W. *Part IX of the ICRC direct participation in hostilities study: No mandate, no expertise, and legally incorrect*, in New York University Journal of International Law and Politics, 42, 2010, pp. 770ss. MELZER, N. *Keeping the balance between military necessity and humanity: A response to four critiques of the ICRC's interpretive guidance on the notion of direct participation in hostilities*, in New York University Journal of International Law and Politics, 42, 2010, pp. 832ss.

during a conflict gives rise to a criminal offense<sup>57</sup>. Since this point was not the subject of the grounds for appeal either on the part of the defense or on the part of the prosecution, the Appeals Chamber did not deem it appropriate to dwell on this profile. In his partially dissenting opinion, judge Sang-Hyun Song stressed the importance of the profile under consideration and came to opposite conclusions<sup>58</sup>. According to *Song*, in fact, art. 8 (2) (e) (vii) StICC regulates three different behaviors that integrate a single crime. This conclusion is deduced both from a literal interpretation of the Statute<sup>59</sup>, and from the purpose of protection of the norm, both from the preparatory work of the Rome Statute and from the jurisprudence of the Special Court for Sierra Leone (SCSL)<sup>60</sup>.

In particular, it is noted that in the provision in question we use the disjunctive particle "or", while in the articles that regulate more criminal cases we use the particle "and"<sup>61</sup>. As for the reasons of protection, the different behaviors all have the same objective, that is to keep children under 15 years of age away from the sufferings typically associated with the conduct of hostilities<sup>62</sup>. Furthermore, the preparatory works show how the initial formulation of the standard referred to recruitment only and, consequently, to a single crime<sup>63</sup>.

According to our opinion it is possible to make a clarification and propose a further, partly different, solution according to which art. 8 (2) (e) (vii) of the StICC regulates two

<sup>57</sup>ICC, Prosecutor v. Thomas Lubanga Dyilo, Trial Judgment, op. cit., par. 609. ELLIS, M.S. CHERNOR JALLOH, C. **The International Criminal Court in an effective global justice system**, Edward Elgar Publishing, Cheltenham, 2016. CARTER, L. MULGREW, R. ABELS, D. **Research handbook on the international penal system**, Edward Elgar Publishing, Cheltenham, 2016. SCHABAS, W.A. **International criminal law**, Edward Elgar Publishing, Cheltenham, 2012.

<sup>58</sup>ICC, Prosecutor v. Thomas Lubanga Dyilo, Partly dissenting opinion of Judge Sang-Hyun Song, AC, ICC-01/04-01/06 A 5, 1 December 2014.

<sup>59</sup>GRABERT, A. **Dynamic interpretation in international criminal law. Striking a balance between stability and change**, ed. C.H. Beck, München, 2015, pp. 68-73.

<sup>60</sup>ICC, Prosecutor v. Thomas Lubanga Dyilo, Partly Dissenting Opinion of Judge Sang-Hyun Song, AC, ICC-01/04-01/06 A 4 A 6, 1 December 2014, par. 3ss. ICC, Prosecutor v. Thomas Lubanga Dyilo, Separate and Dissenting Opinion of Judge Odio Benito, TC, ICC-01/04-01/06, 14 March 2012, par. 6.

<sup>61</sup>ICC, Prosecutor v. Thomas Lubanga Dyilo, Partly dissenting opinion of Judge Sang-Hyun Song, AC, ICC-01/04-01/06 A 5, op. cit., par. 6.

<sup>62</sup>ICC, Prosecutor v. Thomas Lubanga Dyilo, Partly Dissenting Opinion of Judge Sang-Hyun Song, AC, ICC-01/04-01/06 A 5, op. cit., par. 4-5.

<sup>63</sup>ALFONSO, C. El crimen de reclutamiento y utilizacion de ninos soldados en el primero fallo de la Corte Penal Internacional, in AMBOS, K. MALARINO, E. STEINER, C. (a cura di), **Analisis de la primera sentencia de la Corte Penal Internacional. El Caso Lubanga**, Konrad Adenauer Stiftung, Berlin, 2014, pp. 164ss. ICC, The Prosecutor v. Thomas Lubanga Dyilo, Appeals Judgment, op. cit., par. 332, 333 and 335. In relation on "active participation" see: WAGNER, N. **A critical assessment of using children to participate actively in hostilities in Lubanga. Child soldiers and direct participation**, op. cit., pp. 145-203.

distinct crimes, one of which can be committed through two modes of conduct<sup>64</sup>. On the one hand there is the recruitment behavior that can result in forced enlistment or on a voluntary basis: the incompatibility relationship between these two behaviors prevents the establishment of a situation of normative convergence. On the other hand there is the conduct of use, which can certainly compete with the crime of recruitment. In this regard, however, the situation in which the use of the child soldier occurs at the same time or at a later date than necessary and prior to enrollment<sup>65</sup> must be clearly distinguished. In the first case only the crime of use will be applied, and this regardless of the dogmatic question about the nature of art. 8 (2) (e) (vii) of the StICC<sup>66</sup> as an alternative or cumulative mixed standard. In the second case, on the other hand, there would be a material competition of crimes (and not an apparent competition of rules), even if connected temporally and teleologically: since no similar institution is envisaged for the continued crime, the interpreter could apply both the rules or opt for the application of the single worst case<sup>67</sup>.

## 5 The domain of the one-sided specialty as a simple case.

The simplest case that can be presented to the interpreter concerns the unilateral specialty relationship that exists between several cases. In all these cases it is clear and peaceful that only one norm is intended to be applied, and it coincides with the more specific provision. The international jurisprudence has, since the beginning, identified this structural relationship with the concept of "specialty" used in the countries of civil law tradition and with the concept of "lesser included offense"<sup>68</sup> with reference to the area of common law<sup>69</sup>. The specialty principle was explicitly referred to by the ICTY Appeals Chamber in the

<sup>64</sup>HEIKILLÄ, M. **Coping with international atrocities through criminal law: A study into the typical features of international criminality and the reflection of these traits in international law**, Åbo Akademis förlag, Åbo Akademi University Press, Finland, 2013.

<sup>65</sup>YOGENDRAN, S. **Did the International Criminal Court fail child victims in the Lubanga reparations order?**, in Amsterdam Law Forum, 9, 2017, pp. 68ss. DURAJ, E. **Protecting children rights under international criminal justice**, in Academic Journal of Business, Administration, Law and Social Sciences, 1, 2015, pp. 94ss. STEINL, L. **Child soldiers as agents of war and peace: A restorative transitional justice approach to accountability for crimes under international law**, ed. Springer & T.M.C. Asser Press, Berlin, 2017, pp. 124ss.

<sup>66</sup>BOAS, G. BISCHOFF, J.L. REID, N.L. **Elements of crimes under international law**, op. cit.,

<sup>67</sup>OLÁSULO, A.H. **Derecho internacional penal y humanitario**, ed. Tirant Lo Blanch, Valencia, 2016.

<sup>68</sup>Kupreškić et al., Judgment, Trial Chamber, IT-95-16-T, 14 January 2000.

<sup>69</sup>WAGNER, N. **A critical assessment of using children to participate actively in hostilities in Lubanga. Child soldiers and direct participation**, op. cit.

formulation of the Čelebići test<sup>70</sup>, when it was stated that in the case of regulatory convergence "(...) the conviction under the more specific provision should be upheld"<sup>71</sup>. The application of both norms- the special and the general-would be "tautological" and not necessary for the purposes of the full legal assessment of the fact. In addition, the specialty can act as an "interpretive canon"<sup>72</sup>: in the case of rules, it is preferable to choose the norm that focuses more closely on the conduct of the author, being able to grasp the nuances of the illicit behavior in a more direct and precise way<sup>73</sup>.

Finally, if we consider its constant application-although wrong on numerous occasions<sup>74</sup>-by international tribunals, as well as the fact that it is recognized, explicitly or implicitly<sup>75</sup>, by most of the world's legal systems, it is possible to affirm that the principle of specialty is now part of the international criminal law system<sup>76</sup>. The unilateral specialty report

<sup>70</sup>FERNÁNDEZ-PACHECO ESTRADA, C. **The international criminal Court and the Čelebići test: Cumulative convictions based on the same set of fact's from a comparative perspective**, in Journal of International Criminal Justice, 15, 2017, pp. 692ss. ALIÑÁN, A. OLLÉ SESÉ, M. **Estudios sobre derecho penal internacional**, ed. Marcial Pons, Madrid, 2018. JARVIS, M. **The practice of international criminal law. Some reflections from an ICTY Prosecutor**, in International Criminal Law Review, 17, 2017, pp. 400ss. ZAKERIAN, A. ALIKHANI, M. **International Criminal Tribunal for the former Yugoslavia, activities and achievements**, in Quarterly of Foreign Policy, 2013, pp. 7ss. MARGETTS, K. KAPPOS, K.I. **Current developments at the ad hoc International Criminal Tribunals**, in Journal of International Criminal Justice, 10, 2012, 448ss.

<sup>71</sup>ICTY, Prosecutor v. Delalić et al., Appeals Chamber, IT-96-21-A, 20 February 2001, par. 412. ICTY, Prosecutor v. Milomir Stakić, Appeals Judgment, AC, IT-97-24-A, 22 March 2006, par. 357. ICTY, Prosecutor v. Pavle Strugar, Judgment, AC, IT-01-42-A, 17 July 2008, par. 454. ICTY, Prosecutor v. Popović et al., Trial Judgment, TC-II, IT-05-88-T, 10 giugno 2010, par. 2117-2127.

<sup>72</sup>MAISSON, R. **Justice pénale internationale**, op. cit., BLAISE NGAMENI, H. **La diffusion du droit international pénal dans les ordres juridiques africaines**, ed. L'Harmattan, Paris, 2017. CALVO-GOLLER, K. **La procédure et la jurisprudence de la Cour pénale internationale**, ed. Lextenso, Montchrestien, 2012.

<sup>73</sup>ZEEGERS, K. OVERY, A. **International Criminal Tribunals and human rights law. Adherence and contextualization**, T.M.C. Asser Press, The Hague, 2016, pp. 18ss. ROHAN, C. ZYBERI, Z. **Defense perspective on international criminal justice**, Cambridge University Press, Cambridge, 2017.

<sup>74</sup>STUCKENBERG, C.F. Cumulative charges and cumulative convictions, in STAHN, C. (a cura di), **The law and practice of the International Criminal Court**, Oxford University Press, Oxford, 2015, pp. 847ss.

<sup>75</sup>We could take in consideration art. 15 of italian criminal code and art. 55 of dutch criminal code and for the english version see: ICTY, Prosecutor v. Kupreškić et al., Trial Judgment, op. cit., par. 683; and art. 8 no. 1 of spanish criminal code which states that: "(...) el precepto especial se aplicará con preferencia al general (...)". For details see: WAKE, M.N. SMITH, E. (eds.), **General defences in criminal law. Domestic and comparative perspectives**, ed. Routledge, London & New York, 2016, pp. 255-272.

<sup>76</sup>CASSESE, A. **International criminal law**, Oxford University Press, Oxford, 2008, pp. 182ss. STUCKENBERG, C.F. Multiplicity of offences, concursus delictorum, op. cit., pp. 588ss, which is noted that: "(...) the *lex specialis* rule can be said to be part of international criminal law (...)". See also: JEUTNER, V. **Irresolvable norm conflicts in International Law. The concept of a legal dilemma**, Oxford University Press, Oxford, 2017, pp. 57ss. LINDROOS, A. **Addressing norm conflicts in a fragmented legal system: The doctrine of *lex specialis***, in Nordic Journal of International Law, 74, 2005, pp. 38ss. MILANOVIC, M. The lost origins of *lex specialis*: Rethinking the relationship between human rights and international humanitarian law, in OHLIN, J.D. (a cura di), **Theoretical boundaries of armed conflict and human rights**, Cambridge University

is the simplest hypothesis of regulatory convergence. The immediate recognition of the applicable standard should guarantee, in fact, the highest degree of predictability of a solution as well as a unitary and consistent outcome whenever the interpreter is faced with the same hypotheses of regulatory overlaps. However, despite the simplicity offered by the criterion of the unilateral specialty, few cases can be solved according to it, and its application has generated a certain degree of confusion even in cases of easy solution, as evidenced by the paradigmatic example of the competition between homicide<sup>77</sup> and extermination, both qualified as crimes against humanity<sup>78</sup>.

## 6 THE EXCEPTION OF THE CASES *STAKIĆ* AND *AL BASHIR* IN CASES OF EXTERMINATION AS CRIMES AGAINST HUMANITY.

An example of an intra-categorical unilateral specialty relationship is represented by the homicide (article 7 (1) (a) of the StICC) and by the extermination (article 7 (1) (b) StICC) qualified as crimes against humanity<sup>79</sup>. It has always been included in the statutes of International Criminal Tribunals and defined as the "archetype" of crimes against humanity<sup>80</sup>, the conduct of murder consists in causing the death of one or more persons through action or omission<sup>81</sup>. No premeditation is necessary for the integration of the case<sup>82</sup>. Even the crime of

Press, Cambridge, 2016, pp. 30ss. PAUWELYN, J. **Conflict of norms in public international law**, Cambridge University Press, Cambridge, 2003, pp. 385ss. CONWAY, G. **Conflicts of competence norms in EU Law and the legal reasoning of the ECJ**, in German Law Journal, 11, 2010, pp. 985ss. See also the case: ICTY, Prosecutor v. Kunarac et al., Appeals Judgment, TC, IT-96-23-T, 22 February 2001, par. 170-171.

<sup>77</sup>NEHA, J. **Judicial lawmaking and general principles of law in international criminal law**, in Harvard International Law Journal, 57, 2016, pp. 111, 114ss.

<sup>78</sup>OLÁSULO, A.H. **Ensayos de derecho penal y procesal internacional**, ed. Diké, Bogotá. 2011.

<sup>79</sup>RENZO, M. **Crimes against humanity and the limits of international criminal law**, in Law and Philosophy, 31, 2012, pp. 444ss.

<sup>80</sup>CRYER, R. FRIMAN, H. ROBINSON, D. WILMSHURST, E. **An introduction to international criminal law and procedure**, Cambridge University Press, Cambridge, 2014, pp. 231ss. See also the case: ICTR, Prosecutor v. Kayishema and Ruzindana, Trial Judgment, TC-II, ICTR-95-1-T, 21 May 1999, par. 138-140. For more details and analysis see: KNOOPS, J. **An introduction to the law of international criminal Tribunals. A comparative study**, ed. Brill. The Hague, 2014. NICHOLSON, J. **Strengthening the validity of international criminal Tribunals**, ed. Brill, The Hague, 2018. VAN DER WILT, H. PAULUSSEN, C. **Legal responses to transnational and international crimes**, Edward Elgar Publishers, Cheltenham, 2017. BOAS, G. CHIFFLET, P. **International criminal justice**, Edward Elgar Publishers, Cheltenham, 2017.

<sup>81</sup>ICTR, Prosecutor v. Jean-Paul Akayesu, Trial Judgment, Judgment, AC, ICTR-96-4-A, 1 June 2001, par. 588. BOAS, G. BISCHOFF, J.L. REID, N.L. **Elements of crimes under international law**, op. cit., pp. 59ss. HALL, K. STAHN, C. Article 7, in TRIFFTERER, O. AMBOS, K. (a cura di), **The Rome statute of the International Criminal Court. A commentary**, op. cit., pp. 181ss. HOGANDOGAN, J. **Murder as a crime under international law and the statute of the International Criminal Tribunal for the Former Yugoslavia: Of law, legal language, and a comparative approach to legal meaning**, in Leiden Journal of International Law,

extermination, like murder, has been codified starting from the Statute of Nuremberg<sup>83</sup>. It consists in the killing of large-scale people-differentiating themselves from the crime of murder only by its massive size<sup>84</sup>-relying on the favorable interpretation to the accused, in another judgment the Tribunal preferred to use the english version because it corresponds to the right customary, stating that the French has suffered from a translation defect in the drafting of the Statute: or, as specified in the art. 7 (2) (b) StICC, in the inflation of living conditions that lead to the destruction of part of the population (ie indirect extermination)<sup>85</sup>. The structural relationship established between the crime of murder<sup>86</sup> and that of extermination coincides with the one-sided specialty by addition: the extermination is a special rule because it contains homicide, and adds an element of quantitative nature that coincides with the massive dimension of the killings<sup>87</sup>. One of the first judgments on the

---

11, 1998, pp. 165-181. VAN DER WOLF, W.J. DE RUITER, D. (a cura di), **Crimes against humanity and international criminal law**, Wolf Publishers, The Netherlands, 2011, pp. 96 ss. and 246ss. ICC, Prosecutor v. Katanga and Ngudjolo-Chui, Decision on the Confirmation of Charges, PTC-I, ICC-01/04-01/07, 30 September, 2008, par. 287. ICC, Prosecutor v. Bemba Gombo, Decision Pursuant to Article 61(7)(a) and (b), TC III, ICC-01/05-01/08, 21 June 2016, par. 132. ICTY, Prosecutor v. Milorad Krnojelac, Trial Judgment, TC-II, IT-97-25, 24 February 1999, par. 329. K. AMBOS, **Treatise on international criminal law**, op. cit., pp. 79ss.

<sup>82</sup>ICC, Prosecutor v. Bemba Gombo, Decision Pursuant to Article 61(7)(a) and (b), op. cit., par. 135 e 138. CHESTERMAN, S. **An altogether different order, defining the elements of crimes against humanity**, in Duke Journal of Comparative and International Law, 10, 2002, pp. 332ss. HEINE, G. VEST, H. Murder/wilful killing, in MCDONALD, G.K. SWAAK-GOLDMAN, O. (a cura di), **Substantive and procedural aspects of international criminal law. Volume I: Commentary**, Kluwer law International, The Hague, 2000, pp. 175ss. In the same spirit see also from the jurisprudence from the Special Panels for Serious Crimes in Timor Est: SPSC, Prosecutor v. Marques (Los Palos), Judgment, 09/2000, 11 December 2001, par. 649 and SPSC, Prosecutor v. Agostinho Cloe, Judgment, 4/2003, 16 November 2004, par. 15.

<sup>83</sup>See, Art. 6(c) of statute of the International Military Tribunal, art. II par. 1(c) of Control Council Law n. 10, art. 5(c) statute of the International Military Tribunal for the Far East (IMTFE), art. 5(b) statute of the ICTY, art. 3(b) of the statute of ICTR, art. 2(b) of the statute of the SCSL, art. 5 of the Extraordinary Chambers in the Courts of Cambodia (ECCC).

<sup>84</sup>ICTY, Prosecutor v. Stanišić and Župljanin, Trial Judgment, TC-II, IT-08-91-T, 27 March 2013, par. 219. ICTY, Prosecutor v. Mitar Vasiljević, Trial Judgment, TC-II, IT-98-32-T, 29 November 2002, par. 227, which is noted that: "(...) responsibility for one or for a limited number of such killings is insufficient (...). against this position see: BOAS, G. BISCHOFF, J.L. REID, N.L. **Elements of crimes under international law, International criminal law practitioner library series**, op. cit., pp. 62ss.

<sup>85</sup>ICTR, Prosecutor v. Kayishema and Ruzindana, Trial Judgment, First Amended Indictment, ICTR-95-1-I, 11 April, 1997, par. 144, and confirmed also in case: ICTR, Prosecutor v. Ntakirutimana and Ntakirutimana, Appeals Judgment, AC, ICTR-96-10-A, 13 December 2004, par. 522; ICTR, Prosecutor v. Paul Bisengimana, Judgment and Sentence ,TC-II, ICTR-00-60-T, 13 April 2006, par. 72. See, MARCUS, D. **Famine crimes in international law**, in American Journal of International Law, 97, 2003, pp. 271ss. DEFALCO, R.C. **Accounting for famine at the Extraordinary Chambers in the Courts of Cambodia. The crimes against humanity of extermination, inhumane acts and persecution**, op. cit., pp. 148ss.

<sup>86</sup>NEHA, J. **Judicial lawmaking and general principles of law in international criminal law**, op. cit., 118ss.

<sup>87</sup>See, ICC, Prosecutor v. Katanga and Ngudjolo Chui, Decision on the Confirmation of Charges, op. cit., par. 430 and SCSL, Prosecutor v. Charles Ghankay Taylor, Trial Judgment, op. cit., par. 419 ss. E/CN.4/Sub.2/1998/13, Final Report on Contemporary Forms of Slavery. Systematic Rape, Sexual Slavery and

matter said that the crime of extermination can only be proven through evidence of large-scale killings and, if the prosecutor does not show that part of the killings fall outside the massive event, only one provision must to be applied<sup>88</sup>. International jurisprudence considered the contest between murder and extermination to be apparent, applying only the latter provision as *lex specialis*.

One exception is formed by the sentence *Stakić* of the Chamber of First Instance for the International Criminal Tribunal for the Former Yugoslavia (ICTY), in which the judge courts applied both provisions because it was considered that only the accumulation of qualifications could lead to a full legal assessment of the negative fact: disvalue expressed by the fact that the crime of humanity, of murder is directed against individuals while the crime of extermination has as a victim a group of people<sup>89</sup>. Similarly, the Pre-Trial Chamber of the ICC, in the decision adopted when the arrest warrant was confirmed in the case of *Al Bashir*, preferred to keep both charges without considering the murder involved in the crime of extermination. Since the attacks perpetrated against the Fur, Masalit and Zaghawa groups in the Darfur region were part of a massive kill against the civilian population, the judges conferred a dual legal status on the same criminal events<sup>90</sup>.

The approach taken in the *Stakić* and *Al Bashir* cases does not appear convincing. The extermination, in fact, is composed-by definition-of two elements: the voluntary homicide and the massive dimension of the death event<sup>91</sup>. It is therefore clear and indisputable that the two cases are related to a unilateral specialty by addition, in which the massive dimension

Slavery-like Practices during Armed Conflict, 22 June 1998, par. 30.

<sup>88</sup>ICTR, Prosecutor v. Kayishema and Ruzindana, Trial Judgment, op. cit., par. 645 and 650.

<sup>89</sup>ICTY, Prosecutor v. Milomir Stakić, Trial Judgment, op. cit., par. 877.

<sup>90</sup>ICC, Prosecutor v. Omar Al Bashir, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, P-TC, ICC-02/05-01/09, 4 March 2009, par. 95-97. See for details: VALIANI, S. **Genocide left unchecked: Assessing the ICC's difficulties detaining Omar al-Bashir**, in Berkeley Journal of International Law, 35, 2017, pp. 152ss.

<sup>91</sup>ICTR, Prosecutor v. Ntakirutimana and Ntakirutimana, Appeals Judgment, AC, ICTR-96-10-A, 13 December 2004, par. 516. ICTY, Prosecutor v. Milomir Stakić, Appeals Judgment, op. cit., par. 259ss. ICTR, Prosecutor v. Emmanuel Nindabahizi, Judgment, AC, ICTR-01-71-A, 16 January 2007, par. 135. ICTR, Prosecutor v. Athanase Seromba, Judgment, AC, ICTR-2001-66-A, 12 March 2008, par. 189. ICTY, Prosecutor v. Momčilo Perišić, Trial Judgment, TC, IT-04-81-T, 6 September 2011, par. 106; ICTR, Prosecutor v. Grégoire Ndahimana, Judgment and Sentence, TC-II, ICTR-01-68-T, 30 December 2011, par. 839. ICTY, Prosecutor v. Lukić and Lukić, Judgment, AC, IT-98-32/1-A, 4 December 2012, par. 536. ICTY, Prosecutor v. Zdravko Tolimir, Trial Judgment, AC, IT-05-88/2-A, 8 April 2015, par. 724. ICTY, Prosecutor v. Stanišić and Župljanin, Trial Judgment, TC-II, IT-08-91-T, 27 March 2013, par. 44.

constitutes the specific and further element<sup>92</sup>. The joint application of both cases is in contrast with the unilateral specialty principle: in cases of competition only the crime of extermination must be applied as *lex specialis*<sup>93</sup>.

## 7 MUTUAL SPECIALTY AND POSSIBLY COMPLEX CRIME: DIFFICULT CASES OF JUDICIAL ARBITRATION?

Beyond the boundaries of the unilateral specialty, the doors of uncertainty open up, which risks turning into judicial arbitrariness. This is true both in reference to the relationship of mutual skill that may arise between two or more cases than the interference relationship for the conduct alone. In these cases the solution in favor of the crime unit is more complex. The solutions inspired by logical-structural criteria proposed by majority at national level in the hypothesis of mutual specialties are not easily transplanted to the normative body of international criminal law: in this field, in fact, there is almost never a specialty between subjects-not even torture it is classified as a crime in the Rome Statute-and, above all, the absence of edict frames for the individual categories of crimes make it impossible to determine the severity index based on the sanction response<sup>94</sup>. The only criterion that can still be used is the balancing of the specializing elements, with the prevalence of the norm that presents a higher number: but it is also destined to find a reduced space, given that often the norms are equivalent or present only one element of further specificity. In addition, resolving the competition with a mere quantitative comparison between elements of the case could constitute a superficial operation because there is a risk of not exploiting the reasons for

<sup>92</sup>BOAS, G. BISCHOFF, J.L. REID, N.L. **Elements of crimes under international law. International criminal law practitioner library series**, op. cit., pp. 61ss.

<sup>93</sup>See, ICTY, Blagojević and Jokić, Trial Judgment (par. 803); Lukić and Lukić, Trial Judgment (par. 1045); Popović et al., Trial Judgment (par. 2114); Tolimir, Trial Judgment (par. 1204); Karadžić, Trial Judgment (par. 6020), Mladić, Trial Judgment (par. 5175). ICTR, see: Ntakirutimana and Ntakirutimana, Appeals Judgment (par. 542); Bisengimana, Judgment and Sentence (par. 103); Nchamihigo, Judgment and Sentence (par. 344); Gatete, Trial Judgment (par. 665); Ndindiliyimana et al., Trial Judgment (par. 2037); Bagosora and Nsengiyumva, Appeals Judgment (par. 416); Ntabakuze, Appeals Judgment (par. 261); Nzabonimana, Judgment and Sentence (par. 1794); Nizeyimana, Judgment and Sentence (par. 1553). See, for the above cases: WERLE, G. JESSBERGER, F. **Principles of international criminal law**, op. cit., pp. 389ss.

<sup>94</sup>VOGT, S.M. **As a matter of fact, No: Appellate jurisdiction to review denials of deferral of removal under the Convention against torture**, in American University Journal of Gender, Social Policy & The Law, 25, 2017, pp. 92ss. SIMON, T.W. **Genocide, torture and terrorism: Ranking international crimes and justifying humanitarian intervention**, ed. Palgrave Macmillan, London, 2016. WEISSBRODT, D. HEILMAN, C. **Defining torture and cruel inhuman and degrading treatment**, in Law & Inequality: A Journal of Theory and Practice, 35, 2017.

protection that led to the criminalization of conduct that violates international games of competition<sup>95</sup>. Next to the logical-structural criterion, the use of which must not be anticipated and abandoned in any case, it is necessary to add one of a value nature to it. Alongside the unilateral specialty, the principle of consumption becomes part of international criminal law, at least in its "beating heart"<sup>96</sup> identified in the prevalence of the norm that expresses a greater injury or greater value than a fact compared to another law to protect of the same (or similar) injured legal entity in a less offensive manner.

The principle of consumption is known and applied both in the civil law systems and in the common law<sup>97</sup>. For this reason the jurisprudence of the *ad hoc* Tribunals has, since the beginning, resorted to the concept of consumption, defining it following an analysis of comparative law and the jurisprudence of regional courts<sup>98</sup>. The first tests elaborated by the

<sup>95</sup>JACKSON, M. **Complicity in international law**, Oxford University Press, Oxford, 2015.

<sup>96</sup>STUCKENBERG, C.F. Multiplicity of offences, *concursum delictorum*, in FISCHER, H. KRESS, C. LÜDER, S.R. (a cura di), **International and national prosecution of crimes under international law. Current developments**, op. cit., pp. 594, which is stated that: "(...) it seems that at least the core of the concept of consumption is part of international criminal law (...)".

<sup>97</sup>The reference to a criminal positive law regarding the Model Penal Code, art. 1, sez. 1.07, entitled: Method of prosecution when conduct constitutes more than one offence. The different of inclusion its found in sez. 1.07(4), which is noted that: "(...) an offence is so included when: a) it is established by proof of the same or less than all the facts required to establish the commission of the offence charge; or (...) c) it differs from the offence charged only in respect that a less serious injury or risk of injury to the same person, property or public interest or a lesser kind of culpability suffices to establish its commission (...)". The rule thus envisaged has been included in numerous codifications, including those of the Arkansas, Colorado, Delaware, Georgia, Kentucky, Maine, Missouri, Montana and New Jersey: See, STUCKENBERG, C.F. Multiplicity of offences, *concursum delictorum*, op. cit., pp. 592ss. STUCKENBERG, C.F. Cumulative charges and cumulative convictions, in STAHN, C. (a cura di), **The law and practice of the International Criminal Court**, Oxford University Press, Oxford, 2015, pp. 84ss.

<sup>98</sup>ICTY, Prosecutor v. Kupreškić et al., Judgment, Trial Chamber, IT-95-16-T, 14 January 2000. ICTY, Prosecutor v. Kupreškić et al., Appeal Judgment, AC, IT-95-16-A, 23 October 2001, par. 686. In the same argument see also from the American Court of Human Rights the next cases: IACtHR, Caballero Delgado y Santana vs. Colombia, Voto Disidente del Juez Nieto Navia, 8 December 1995, 99. From the inter-American Court see the next cases in relation on crimes against humanity: Almonacid Arellano v. Chile, excepciones preliminares, fondo, reparaciones y costas, 26.09.2006 ; Bámaca Velásquez v. Guatemala, fondo, 25.11.2000 Barrios Altos v. Perú, fondo, 14.03.2001; Bueno Alves v. Argentina, fondo, reparaciones y costas, 11.05.2007; Bulacio v. Argentina, sentencia de fondo, reparaciones y costas, 18.09.2003; Castillo Páez v. Perú, fondo, 03.11.1997; Comunidad Moiwana v. Surinam, excepciones preliminares, fondo, reparaciones y costas, 15.06.2005; García Asto y Ramírez Rojas v. Perú, excepciones preliminares, fondo, reparaciones y costas, 25.11.2005; Gelman v. Uruguay, fondo y reparaciones, 24.02.2011; Godínez Cruz v. Honduras, fondo, 20.01.1989; Goiburú y otros v. Paraguay, fondo, reparaciones y costas, 22.09.2006; Gomes Lund y otros v. Brasil (Guerrilha do Araguaia), excepciones preliminares, fondo, reparaciones y costas, 24.11.2010; Heliodoro Portugal v. Panamá, excepciones preliminares, fondo, reparaciones y costas, 12.08.2008; Ticona Estrada y otros v. Bolivia, fondo, reparaciones y costas, 12.08.2008; Trujillo Oroza v. Bolivia, reparaciones y costas, 27.02.2002; Velásquez Rodríguez v. Honduras, fondo, 29.07.1988. From the European Court of Human Rights in particular the next cases: Aksoy v. Turkey of 18 December 1996, par. 64; Al Adsani v. United Kingdom of 21 November 2001; Dikme v. Turkey of 11 July 2000; Ilham v. Turkey of 27 June 2000, Akkoc v. Turkey of 10 April 2000; Tanli v. Turkey of 10 April 2001; Bati

judges to solve the problem of the competition of rules referred to the consumption explicitly, using the broad concept of crime (*Strafrechtliche Systembildung*)<sup>99</sup> used by the interpreter in the solution of cases of normative convergence. After the specialty principle (Article 1) and the reference to subsidiarity in express and tacit way (art. 2), of the Spanish criminal code (Article 3) states that "*el precepto penal más amplio o complejo absorberá a los que castiguen las infracciones consumidas en aquél*", (lesser included offense)<sup>100</sup>, or implicitly,

---

and others of 3 June 2004; Said v. The Netherlands of 5 July 2005; Rohde v. Denmark of 21 July 2005; N. v. Finland of 26 July 2005; Menesheva v. Russia of 9 March 2006; Danelia v. Russia of 9 March 2006; Critayev v. Georgia of 17 October 2007; Gioerey v. Moldova of 19 June 2007; Teren Aksakal v. Turkey of 11 April 2007; Ismoilov and others v. Russia of 24 April 2008; Gäfgen v. Germany of 1 June 2010; Bekirski v. Bulgaria of 2 September 2010; Gisayev v. Russia of 14 December 2011; Buntov v. Russia of 4 December 2012; Lenev v. Bulgaria of 4 December 2012; Belousov v. Ukraine of 7 November 2013; Lyepin v. Russia of 25 July 2014; Razzakov v. Russia of 5 February 2015; Lolayev v. Russia of 15 January 2015; Stoykov v. Ukraine of 19 February 2015; Myumyun v. Bulgaria of 3 November 2015; Bono v. France of 15 December 2015; Zuakun v. Russia of 25 February 2017; Mukayev v. Russia of 28 March 2017; Shestopalov v. Russia of 28 March 2017; Mindadze and Nemsitsveridze v. Georgia of 21 June 2017; Zolotov v. Russia of 19 September 2017; Bambayev v. Russia of 7 January 2017; Fortu Iuanevea and Sarasola Yarzabal v. Spain of 13 February 2018; Abdulkadyrov and Dakatayev v. Russia of 10 July 2018. For the analysis of the above cases see: SMET, S. The "absolute" prohibition of torture and inhuman or degrading treatment in article 3 ECHR: Truly a question of scope only?, in BREMS, E. GRARADS, J. (eds), **Shaping rights in the ECHR: The role of the European Court of Human Rights in determining the scope of human rights**, Cambridge University Press, Cambridge, 2013. SCHABAS, W.A. **The European Convention on Human Rights: A commentary**, Oxford University Press, Oxford, 2015. L. DOSWALD BECK, **Human rights in times of conflict and terrorism**, Oxford University Press, Oxford, 2011. REID, K. **A practitioner's guide to the European Convention on Human Rights**, ed. Sweet Maxwell, London, 2011. HUNEEUS, A. **International criminal law by other means: The quasi-criminal jurisdiction of the human rights court**, in American Journal of International Law, 107, 2013, pp. 6ss. KIRCHENHAST, T. **Victims and the criminal trial**, ed. Palgrave & Macmillan, London, 2016. HANNA MORAWSKA, E.R. **The complex structure of the absolute prohibition of torture. Comments in the light of the regulation of article 3 of the European Convention on Human Rights**, in Espaço Jurídico Journal of Law, 17, 2016, pp. 769ss. GREER, S. **Is the prohibition against torture, cruel, inhuman and degrading treatment really "absolute" in international human rights law?**, in Human Rights Law Review, 15, 2015, pp. 5ss. RAINEY, B. WICKS, W. OVEY, C. **Jacos, White and Ovey: The European Convention on Human Rights**, Oxford University Press, Oxford, 2017. COSTA, J.P. **La Cour européenne des droits de l'homme. Des juges pour la liberté**, ed. Dalloz, Paris, 2017. TIMMERMANS, T. **Fundamental rights protection in Europe before and after accession of the European Union to the European Convention on Human Rights**, in Liber amicorum Pieter Van Dijk, M. Van Rosmalen and others (eds.), Intersentia, Antwerp, Oxford, 2013, pp. 225ss. HARRIS, D. O'BOYLE, M. WARBRICK, C. **Law of the European Convention on Human rights**, Oxford University Press, Oxford, 2014, pp. 372ss. SEIBERT-FOHR, A. VILLIGER, M.E. **Judgments of the European Convention of Human Rights. Effects and implementation**, ed. Nomos, Baden-Baden, 2017. GRABENWARTER, C. **European Convention on human rights: ECHR**, C.H. Beck, München, 2014. MARCHADIER, F. **Convention européenne des droits de l'homme et des libertés fondamentales**, in Revue Critique de Droit International Privé, 193 (49, 2014, pp. 679-694. TEITGEN, C. **La Convention européenne des droits de l'homme: 60 ans et après?**, ed. LGDJ, Paris, 2013.

<sup>99</sup>LIAKOPOULOS, D. **Schutz des angeklagten im Strafverfahren**, op. cit.

<sup>100</sup>ICTR, Prosecutor v. Jean-Paul Akayesu, Trial Judgment, op. cit., par. 468. ICTR, Prosecutor v. Kayishema and Ruzindana, Trial Judgment, op. cit., par. 627; ICTY, Prosecutor v. Kupreškić et al., Trial Judgment, op. cit., par. 695. See also in argument: BURBER, M.D. HÖRNLE, T. **The Oxford handbook of criminal law**, Oxford University Press, 2014. ALMEVIST, J. ESPOSITO, C. **The role of courts in transitional justice. Voices from Latin America and Spain**, ed. Routledge, London & New York, 2013, pp. 177ss. BOSTER, V. **An introduction**

using the vague concept (and never defined by the judges) of a legal good (so-called different interests test)<sup>101</sup>. Despite some contrary voices<sup>102</sup>, the principle of consumption has found constant application by international jurisprudence, and this approach appears to conform to those national tendencies which drive towards the unity of crime even in the most complex cases of structural relations having the form of mutual specialty<sup>103</sup>. Two types of regulatory overlaps that seem to generate-at least *prima facie*-a relationship of mutual skill that deserve to be analyzed. Before resorting to the principle of consumption for the purpose of the unit of

to transnational criminal law, Oxford University Press, Oxford, 2012, pp. 24ss.

<sup>101</sup>See in particular the criminal offence in German criminal law, irrespective of whether it constitutes *Verbrechen* or *Vergehen*, has the three-layered (tripartite) structure: (a) *Tatbestandsmäßigkeit*-a cumulative term for the objective and subjective elements of a crime; (b) *Rechtswidrigkeit*-unlawfulness unless there is a presence of a justificatory defence; (c) *Schuld*-culpability unless there is a presence of a valid excuse. The criminal offence involves prohibited behaviour that meets the description of the statutory elements of a crime (*tatbestandsmäßig*), is unlawful (*rechtswidrig*) and culpable (*schuldhaft*). The subjective element of a particular crime (*Tatvorsatz*) is distinct from culpability (*Schuld*) pertinent to the tripartite structure of a crime.

<sup>102</sup>ICTY, Prosecutor v. Milomir Stakić, Appeals Judgment, op. cit., par. 357.

<sup>103</sup>Torture was not contemplated as a crime against humanity according to the statute of the International Military Tribunal of Nuremberg and Tokyo. Governed starting from art. II(1)(c) Control Council Law (CCL) n. 10, presented also according art. 5(f) of the statute of the ICTY, art. 3(f) of the statute of the ICTR, art. 2(f) of the statute of the SLCL, art. 5 of the ECCC. See from the Nuremberg jurisprudence the next cases: Nuremberg and Post Second World War Judgments and Decisions IMT, The Trial of German Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany, Part I, 20th November 1945 to 1<sup>st</sup> December 1945, London, 1946; The Peleus Trial, Trial of Kapitänleutnant Heinz Eck and Four Others for the Killing of Members of the Crew of the Greek Steamship Peleus, Sunk on the High Seas, British Military Court for the Trial of War Criminals Held at the War Crimes Court, Hamburg, 17th-20th October 1945; Trial of Bruno Tesch and Two Others (The Zyklon B Case), British Military Court, reprinted in Law Reports of Trials of War Criminals, Selected and Prepared by the United Nations War Crimes Commission, Vol. I, London: HMSO, 1947; Trial of General Tomoyuki Yamashita, United States Military Commission, Manila (8th October-7th December 1945), and the Supreme Court of the United States, judgment, 4th February 1946 (327 US 1, 66 S.Ct. 340, 90 L.ed. 499 (1946)), reprinted in Law Reports of Trials of War Criminals, Selected and Prepared by the United Nations War Crimes Commission, Vol. IV, London: HMSO, 1948; The United States v. Otto Ohlendorf et al. (The Einsatzgruppen case), Nuremberg Military Tribunals under Control Council Law No. 10, Law Reports of Trials of War Criminals, Volume IV, Nuremberg October 1946-April 1949; United States v. List and Others (Hostage case), United States Military Tribunal, reprinted in Law Reports of Trials of War Criminals, Selected and Prepared by the United Nations War Crimes Commission, Vol. VIII, London: HMSO, 1949; United States v. Krauch and Twenty Two Others (The I.G. Farben Trial), United States Military Tribunal, reprinted in Law Reports of Trials of War Criminals, Selected and Prepared by the United Nations War Crimes Commission, Volume X, London: HMSO, 1949; Trial of Max Wielen and 17 Others (The Stalag Luft III Case), British Military Court, reprinted in Law Reports of Trials of War Criminals, Selected and Prepared by the United Nations War Crimes Commission, Vol. XI, London: HMSO, 1949; United States v. Wilhelm von Leeb et al., (High Command Case), United States Military Tribunal, reprinted in Law Reports of Trials of War Criminals, Selected and Prepared by the United Nations War Crimes Commission, Vol. XII, London: HMSO, 1949. See also from the doctrine in argument: CROCO, S.E. **The decider's dilemma: Leader culpability, war outcomes, and domestic punishment**, in American Political Science Review, 105 (3), 2011, pp. 458ss. AMBOS, K. **May a state torture suspects to save the life of innocents?**, in Journal of International Criminal Justice, 6, 2008, pp. 265ss. RYER, R. **The Tokyo IMTR and crimes against peace (aggression) is there anything to learn?**, in SADAT, N.L. **Seeking accountability for the unlawful use of force**, Cambridge University Press, Cambridge, 2018. SFEKAS, S.J. **A court pure and unsullied: Justice in the justice trial at Nuremberg**, in University of Baltimore Law Review, 46, 2017, pp. 462ss.

crime, however, we will try to follow the surest route marked by the logical-structural criterion of the specialty; only if the latter is not able to confer predictability and homogeneity of solutions will be resorted, in an auxiliary way, to the value criterion of consumption.

## 8 THE *BEMBA GOMBO* CASE. CASE OF TORTURE COMMITTED THROUGH RAPE.

Torture as a crime against humanity is governed by art. 7 (1) (f) of the StICC and is defined as the intentional influx of severe pain or suffering, both physical and mental, to a person who is in his custody or control<sup>104</sup>. The objective element of the crime consists in the

<sup>104</sup>See for the crimes against humanity and in war: Criminal Code for Armenia (adopted on April 18, 2003). It provides for the prosecution of crimes against humanity and war crimes, placing relevant provisions in specific sections of the Code (Chapter 34, arts. 384-397); Criminal Code for Azerbaijan (adopted Sept. 30, 1999). It provides for the prosecution of crimes against humanity and war crimes, placing relevant provisions in specific sections of the Code (Chapter 16, arts. 100-113). Belgium, of June 16, 1993, as amended in August 2003, on the Punishment of Serious Violations of International Humanitarian Law. In Bosnia-Herzegovina the Law has been incorporated into the Penal Code under Articles 136bis to 136octies. Article 136bis defines genocide; Criminal Code for Bosnia-Herzegovina (entered into force on Mar. 1, 2003). It provides for the prosecution of crimes against humanity and war crimes, placing relevant provisions in specific sections of the Code (Chapter 17, arts. 171-172). Criminal Code of the Republic of Bulgaria (adopted in April 1968, amended as of May 2005). It provides for the prosecution of crimes against humanity and war crimes, placing relevant provisions in specific sections of the Code (Chapter 14, arts. 407-418); In Cambodia, April 17, 1975, to January 6, 1979. (Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, NS/RKM/0801/12 (2001), as amended by NS/RKM/1004/006 (2004). Although Colombia has not adopted any specific law implementing the Rome Statute, the following provisions of the Criminal Code are applicable to crimes against humanity: Genocide: arts. 101-102; Forced disappearance: arts. 165-167; Kidnapping: arts. 168-171; Arbitrary detention: arts. 174-177; Torture: arts. 178-179; Forced displacement: arts. 180-181; Crimes against people and assets protected by international humanitarian law: arts.135-164; Crimes of terrorism: arts. 340-348; Code Penal Congolais, of November, 30, 2004. Denmark also has a statute on genocide, Danish Law No. 132 of 29 of April 1955 (Law Concerning Punishment of Genocide [Lov nr. 132 af 29.04.1955 om straf for folkedrab]; Criminal Code of Estonia (entered into force on Sept. 1, 2003, amended as of March 15, 2007); Finnish Penal Code, amended to include Law 212/2008, Laki rikoslain muuttamisesta (Law Amending the Criminal Code) of May 1, 2008, The original provisions were enacted in December 1964; they were last amended by Law 2004-800 of August 6, 2004. Subtitle I specifically addresses crimes against humanity: genocide (art. 211-1); other crimes against humanity, including deportation, enslavement, systematic practice of summary executions, and other additional offenses (arts. 212-1 to 212-3); and common provisions (arts. 213-1 to 213-5). Subtitle II governs eugenic practices and human reproductive cloning (arts. 214-1 to 214-4 and 215-1 to 215-4); German Code of Crimes Against International Law (of June 26, 2002) (Gesetz zur Einführung des Völkerstrafrechtsgesetzbuches, June 26, 2001, Bundesgesetzblatt (BGBl.) I at 1842. The Penal Code of the Ivory Coast was adopted in 1981 as Law No. 81-640 and was modified by Laws 95-522, of July 6, 1995; 96-764 of October 3, 1996; 97-398 of July 11, 1997; and 98-756 of December 23, 1998; The Penal Code of Mali: Law No. 01-079 of August 20, 2001; Mexico's Federal Criminal Code includes a chapter entitled "Delitos Contra la Humanidad," which can be roughly translated as Crimes against Humanity. This chapter comprises two legal provisions: Articles 149 and 149-Bis. Article 149 describes a crime called "Violación de los deberes de humanidad," which can be roughly translated as "Violation of the Duties of Humanity." Article 149-Bis describes the crime of genocide. Articles 149 and 149-Bis do not appear to include statements on the extent of jurisdiction. Time constraints prevented a determination of whether

infliction of a severe physical or psychological pain or suffering<sup>105</sup>, although it is not required that the damage caused to the victim be permanent<sup>106</sup>. The definition adopted by the Rome Statute differs significantly from that contained in the Convention against Torture or Other Cruel<sup>107</sup>, Inhuman or Degrading Treatment of 1984<sup>108</sup>: on the one hand, it does not require the

other provisions of the Federal Criminal Code address this issue. Mexico's Federal Criminal Code. the Netherlands International Crimes Act 270, Act of 19 June 2003 Containing Rules Concerning Serious Violations of International Humanitarian Law (International Crimes Act). Norwegian law on crimes against humanity are contained in Law No. 4 of March 7, 2008, Act Amending the Penal Code 20 May 2005 No. 28, etc.; The Polish Criminal Code, adopted on July 6, 1997, Chapter XVI: Offenses Against Peace, Humanity and War Offenses, art. 118, With the Law No. 31 of July 22, 2004, was adopted the Portuguese Penal Law to the Rome Statute of the International Criminal Court, to criminalize conduct that constitutes a crime against humanity. (Lei No. 31/2004, de 22 de Julho (in Portuguese); Slovakia's Criminal Code (adopted in July 2005) Articles 4-7 of the Code establish jurisdiction over all crimes committed by anyone in the territory of the Slovak Republic Chapter 12 of the Code provides for the prosecution of crimes against peace, humanity, and war crimes. Article 418 prosecutes genocide, which is defined as the intentional elimination of a group of people because of their national, ethnic, racial, or religious origin; The applicable law in South Africa concerning crimes against humanity is the Implementation of the Rome Statute of the International Criminal Court, Act No. 27 of 2002 South African courts assume jurisdiction over a crime of genocide, a crime against humanity, or a war crime if: The crime was committed in South African territory; The suspect is a South African citizen; The suspect is a resident of South Africa; The suspect, after having committed the alleged crime, is present in South African territory; or The alleged crime was committed against a South African citizen or resident. (Id. par. 4(3); Systematische Sammlung des Bundesrechts (SR) Switzerland cooperates with the International Criminal Court under a Federal Act on Cooperation with the ICC (Bundesgesetz über die Zusammenarbeit mit dem Internationalen Strafgerichtshof, June 22, 2001, 351.6; Trinidad and Tobago: the International Criminal Court Act 2006, 2006 Trinidad and Tobago Laws, No. 4, par. 10; The relevant provisions on crimes against humanity under United Kingdom law are contained in the International Criminal Court Act 2001, par. 17; Northern Ireland is also included in the scope of the Act's jurisdiction by virtue of section 58; Scotland has separate legislation-the International Criminal Court (Scotland) Act 2001, ASP (Act of Scottish Parliament) 13; Uruguay: Law 18026 of September 25, 2006. From the European Union see also: Council Framework Decision 2008/913/JHA of 28 November 2008 on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law (2008 Official Journal of the European Union [OJ] (L328) 55; Council Decision 2003/335/JHA of 8 May 2003 on the Investigation and Prosecution of Crimes of Genocide, Crimes Against Humanity and War Crimes (2003 OJ (L118) 12; Council Decision 2002/494/JHA of 13 June 2002 Setting Up a European Network of Contact Points in Respect of Persons Responsible for Genocide, Crimes Against Humanity and War Crimes (2002 OJ (L167) 1).

<sup>105</sup>See, ICTY, Prosecutor v. Radoslav Brđanin, Trial Judgment, op. cit., par. 484ss. ICTY, Prosecutor v. Naletilić and Martinović, Appeals Judgment, AC, IT-98-34-A, 3 May 2006, par. 299. ICTY, Prosecutor v. Limaj et al., Trial Judgment, TC-II, IT-03-66-T, 30 November 2005, par. 237. ICTY, Prosecutor v. Milan Martić, Trial Judgment, IT-95-11-T, 12 June 2007, par. 75. See for details: NSEREKO, D.N. Commentary on Prosecutor v. Naletilić and Martinović, in KLIP, A. SLUITER, G. (a cura di), **Annotated leading cases of international criminal tribunals. Volume IV: The International Criminal Tribunal for the Former Yugoslavia 1999-2000**, Intersentia, Antwerp-Oxford- New York, 2002, pp. 66ss.

<sup>106</sup>ICTY, Prosecutor v. Kvočka et al., Trial Judgment, TC, IT-98-30/1-T, 2 November 2001, par. 148; ICTY, Prosecutor v. Limaj et al., Trial Judgment, op. cit., par. 236. ICTY, Prosecutor v. Radoslav Brđanin, Appeals Judgment, op. cit., par. 249ss. ICTY, Prosecutor v. Mrkšić et al., Trial Judgment, AC, IT-95-13/1-A, 5 May 2009, par. 514.

<sup>107</sup>INNES, B. **History and methods of torture crime and detection**, ed. Mason Crest, Pennsylvania, 2002.

<sup>108</sup>UNTS 1465, A/RES/39/46, 10 December 1984. For analysis see: BURCHARD, C. **Torture in the jurisprudence of the ad hoc tribunal. A critical assessment**, in Journal of International Criminal Justice, 6 (1), 2008, pp. 175ss. WAUTERS, J.M. **Torture and related crimes-A discussion of the crimes before the International Criminal Tribunal for the Former Yugoslavia**, in Leiden Journal of International Law, 11, 1998,

participation of a public official, since it can be also by non-state actors or private citizens<sup>109</sup>; on the other hand, no particular finalistic direction of the proceedings is required<sup>110</sup>. What must be proven is the custody status or the control situation exercised by the author on the victim, defined as the creation of a status. The *ad hoc* tribunals have always made constant reference to the rulings of regional courts, in particular those of the European Court of Human Rights (ECtHR): alongside a small group of behaviors that *per se* constitute torture (such as mutilations of parts of the body and simulated executions)<sup>111</sup>, there are a series of acts that must be undergoes an assessment that takes into account all the concrete circumstances.

Pursuant to the Rome Statute, torture as a crime against humanity is stripped of the specific malice and of the official qualification of the author, becoming a case of broader applicative scope than that applied by the *ad hoc* tribunals and the notion of torture contained in the 1984 Convention. Rape as a crime against humanity, on the other hand, is envisaged as an autonomous case in art. 7 (1) (g) of the StICC<sup>112</sup>. It is characterized by two elements: on the one hand the penetration of a part of the victim's body<sup>113</sup> with a part of the body of the active subject or with an object<sup>114</sup>; on the other hand, the invasion of the sexual sphere must

---

pp. 155-164.

<sup>109</sup>ICTY, Prosecutor v. Kunarac et al., Trial Judgment, op. cit., par. 465ss. GAETA, P. **When is the involvement of State Officials a requirement for the crime of torture**, in Journal of International Criminal Justice, 6, 2008, pp. 190ss.

<sup>110</sup>The elements for the crimes precised that: "(...) no specific purpose must be proved (...)". The absence of specific fraud is another peculiarity that characterizes the provision contained in the art. 7(1)(f) of the statute of the ICC. See, CRYER, R. **Prosecuting international crimes. Selectivity and the international criminal law regime**, Cambridge University Press, Cambridge, 2005, pp. 257ss. From the jurisprudence see: ICTY, Prosecutor v. Kunarac et al., Trial Judgment, op. cit., par. 497. ICTY, Prosecutor v. Kvočka et al., Trial Judgment, op. cit., par. 141. ICTY, Prosecutor v. Milorad Krnojelac, Trial Judgment, op. cit., par. 179. ICTY, Prosecutor v. Stanišić and Župljanin, Trial Judgment, op. cit., par. 47. ICTY, Prosecutor v. Anto Furundžija, Judgment, TC, IT- 95-17/1-T, 10 December 1998, par. 162. In argument see also: CRYER, R. FRIMAN, H. ROBINSON, D. WILMSHURST, E. **An introduction to international criminal law and procedure**, op. cit., pp. 252ss.

<sup>111</sup>ICTY, Prosecutor v. Kvočka et al., Trial Judgment, op. cit., par. 144-149.

<sup>112</sup>The crime was disciplined from art. 5(g) of the statute of the ICTY, art. 3(g) of the statute of the ICTR, art. 2(g) of the statute of the SCSL, art. 5 of the statute of the ECCC, art. 6(a) of the statute of the Extraordinary African Chambers (EAC). See also: LA HAYE, S. The elements of war crimes-Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, and sexual violence, in LEE, R.S. (a cura di), **The International Criminal Court. Elements of crimes and rules of procedure and evidence**, Transnational Publishers, New York, 2001, pp. 184ss.

<sup>113</sup>DE BROUWER, A.M. **The importance of understanding sexual violence in conflict for investigation and prosecution purposes**, in Cornell International Law Journal, 48, 2015.

<sup>114</sup>BENSOUDA, F. Gender and sexual violence under the Rome Statute, in DECAUX, E. DIENG, A. SOW, M. (a cura di), **From human rights to international criminal law. Studies in Honour of an African Jurist, the Late Judge Laïty Kama**, ed. Brill/Martinus Nijhoff Publishers, The Hague, 2007, pp. 401. MOUTHAN, S. **The prosecution of gender-based crimes at the ICC. Challenges and opportunities**, in International Criminal Law Review, 11, 2011, pp. 775ss. ASKIN, K.D. **Sexual violence in decisions and indictments of the Yugoslav**

take place by force<sup>115</sup>, or through the threat of the use of force<sup>116</sup>, or in a coercive way, or to the detriment of a person incapable of expressing a genuine consensus<sup>117</sup>.

The particular configuration of torture adopted by the Rome Statute makes it possible to qualify the competition between this case and that of rape<sup>118</sup> as a relationship of mutual specialty in part by addition and in part by specification: sexual violence<sup>119</sup> is a specializing

**and Rwandan Tribunals. Current status**, in *American Journal of International Law*, 93, 1999, pp. 97ss.

<sup>115</sup>LIAKOPOULOS, D. **Male rape and sexual crimes in international criminal law jurisprudence: A critical appraisal**, in *Revista de Estudios Juridicos*, 18, 2018.

<sup>116</sup>VENTURA, M.J. GILLET, M. **The fog of war: Prosecuting illegal uses of force as crimes against humanity**, in *Washington University of Global Studies Law Review*, 12, 2013, pp. 526ss.

<sup>117</sup>GREWAL, K. **The protection of sexual autonomy under international criminal law. The International Criminal Court and the challenge of defining rape**, in *Journal of International Criminal Justice*, 10, 2012, pp. 373ss. O'BYRNE, K. **Beyond consent. Conceptualising sexual assault in international criminal law**, in *International Criminal Law Review*, 11, 2011, pp. 495ss. SCHOMBURG, W. PETERSON, I. **Genuine consent to sexual violence under international criminal Law**, in *American Journal of International Law*, 101, 2007, pp. 121ss.

<sup>118</sup>LIAKOPOULOS, D. **Il crimine dello stupro nel diritto internazionale penale**, in *Rivista Strumentario Avvocati. Rivista di Diritto e Procedura Penale*, 4, 2009.

<sup>119</sup>In case: Kunarac we have a description, rectius definition of rape as: "(...) the trial panel found that the actus reus of the crime of rape in international law is constituted by: sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances. The mens rea is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim (...)" In particular the Tribunal has affirmed that: "(...) the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the contents of the surrounding circumstances. The mens rea is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim (...). See also in argument for details: CHERIF BASSIOUNI, M. MANIKAS, P. **The law of the International Criminal Tribunal for the Former Yugoslavia**, Transnational Publishers 1996, pp. 555ss. ASKIN, K.D. **War crimes against women: prosecution in international war crimes Tribunals**, Martinus Nijhoff Publishers, The Hague, 1997, pp. 380-382. See also the case: Prosecutor v. Furundžija, Case No. IT-95-17/1-A, Appeal Judgment, par. 207 (ICTY, July 21, 2000): "(...) the actus reus of the crime of rape in international law is constituted by: the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances. The mens rea is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim (...)" WEINER, P. **The evolving jurisprudence of the crime of rape in international criminal law**, in *Boston College Law Review*, 54, 2013, pp. 1210ss. HAGAY-FREY, A. **Sex and gender crimes in the new international law: Past, present, future**, op. cit., pp. 80ss. See in the same spirit also: Case No. SCSL-04-15-T, Trial Judgment, parr. 146-148. The second element of the actus reus of rape refers to the circumstances; "(...) which would render the sexual act in the first element criminal. The essence of this element is that it describes those circumstances in which the person could not be said to have voluntarily and genuinely consented to the act. The use or threat of force provides clear evidence of non consent, but it is not required (...) true consent will not be possible (...) the last part of this element refers to those situations where, even in the absence of force or coercion, a person cannot be said to genuinely have consented to the act may not, for instance, be capable of genuinely consenting if he or she is too

element with respect to inflation of severe physical or psychological suffering<sup>120</sup>, while the custody or control status is a typical element of the only crime of torture. Which standard must be applied? Should it be concluded for the unit or for the plurality of crimes? The first road that can be used is that indicated by the principle of specialty and leads to the application of the norm with more specialized elements. The interpreter who followed this first approach should conclude for the application of the only crime of rape, since only this last case contains a specializing element: the invasion of the sexual sphere with a part of one's body or with an object constitutes a species compared to the wider genus of serious suffering. The particular control relationship that must be established between the author and the victim in order to integrate the case of torture is not specific<sup>121</sup>, on the other hand, there is no general element present in the offense of sexual violence<sup>122</sup>. The same conclusion can be reached through the

---

young, under the influence of some substance, or suffering from an illness or disability (...)”. In particular Paragraph 147 of the decision refers to the Kunarac appeal judgment as describing circumstances relating to “lack of consent”. The definition derives from the ICC elements of the crime of rape, where “lack of consent” was rejected as an element adopted, in the area was generally very difficult. It is unclear what this reasoning in Sesay (Prosecutor v. Sesay, Kallon & Gbao, Case No. SCSL-04-15-A, Appeal Judgment, parr. 85-92 (Oct. 26, 2009)) was intended to accomplish. According to the Court: it may be deemed proven: “(...) if the Prosecution establishes beyond reasonable doubt that the accused was aware, or had reason to be aware, of the coercive circumstances that undermined the possibility of genuine consent (...)”. MOUTHAN, S. **Sexual violence against men and international law criminalising the unmentionable**, op. cit., pp. 667ss. REVERTE, R.S. **Referencia al crimen de genocidio aproximación genocidio crime**, in Revista de Estudios Jurídicos, 16, 2016. RAMJI-NOGALES, J. **Questioning hierarchies of harm: Women, forced migration and international criminal law**, in International Criminal Law Review, 11, 2011. DE BROUWER, A.M. **The importance of understanding sexual violence in conflict for investigation and prosecution purposes**, op. cit., CAGGIOLI, G. **Sexual violence in armed conflicts: A violation of international humanitarian law and human rights law**, in International Review of the Red Cross, 96, 2014, pp. 506ss. AYAT, M. **Quelques apports des tribunaux pénaux internationaux ad hoc et notamment le TPIR, à la lutte contre les violences sexuelles subies par les femmes durant les génocides et les conflits armés**, in International Criminal Law Review, 10, 2010, pp. 789ss. SELLERS, P.V. **War-time female slavery: enslavement?**, in Cornell International Law Journal, 44, 2011, pp. 116ss. AGIRRE ARANBURU, X.A. **Sexual violence beyond reasonable doubt: Using pattern evidence and analysis for international cases**, in Leiden Journal of International Law, 23, 2010, pp. 610ss.

<sup>120</sup>AMBOS, K. Sexual offenses in international criminal law, with a special focus on the Rome Statute of the International Criminal Court (July 3, 2012), in BERGSMO, M. BUTENSCHØN SKRE, A. WOOD, E.J. (eds.), **Understanding and providing international sex crimes**, Torkel Opsahl Academic Epubliher, Beijing, 2012, pp. 144ss. COLE, A. International criminal law and sexual violence, in MCGLYNN, C. MUNRO, V. **Rethinking rape law. International and comparative perspectives**, ed. Routledge, London & New York, 2010, pp. 49ss. BACHAROVA, T. **The standing of victims in the procedural design of the ICC**, ed. Brill, The Hague, 2017.

<sup>121</sup>LIAKOPOULOS, D. ZAGER, U. **Victim-perpetrator and individual criminal responsibility in international criminal law**, in International and European Union Legal Matters, 2014.

<sup>122</sup>BERGSMO, M. **Thematic prosecution of international sex crimes some critical comments from a theoretical and comparative perspectives**, ed. Torkel Opsahl Academic Epubliher, Beijing, Beijing, 2012, pp. 294ss. KILLEAN, R. **An incomplete narrative: Prosecuting sexual violence crimes at the extraordinary Chambers in the Courts of Cambodia**, in Journal of International Criminal Justice, 13 (3), 2015, pp. 335ss. SCULLY, S. **Judging the successes and failures of the Extraordinary Chambers of the Courts of Cambodia**, in Asian Pacific Law & Policy Journal, 13, 2011, pp. 14ss. WILLIAMS, S. PALMER, E. **The**

application of the principle of consumption. Given that both rules are intended to protect the physical and psychological integrity of a subject, and provided that art. 7 (1) (f) of the StICC does not require any specific purpose, the application of the only crime of rape is sufficient for the purposes of the full legal assessment of the fact<sup>123</sup>. The state of custody or control, in fact, is destined to lose importance in the qualification of the fact with respect to the element of the sexual invasion of the victim. In the cases of normative convergence we find ourselves, by definition, in front of a rape of a victim who is under the control of the author: the additional value of the conduct is therefore conferred by sexual assault, while the state of particular vulnerability of the victim may be considered as an aggravating circumstance or at the time of commensurate sentence<sup>124</sup>.

The Pre-Trial Chamber of the ICC in the *Bemba Gombo* case<sup>125</sup> has arrived at the same conclusions. The judges, after having recourse to a brief structural comparison between the cases, said that, compared to torture, the crime of rape contains the specializing element of sexual penetration. The presence of this last requirement makes it possible to consider rape "(...) the most appropriate legal characterization in this particular case (...)"<sup>126</sup>, and the value of the torture offense is considered entirely absorbed by the rape accusation<sup>127</sup>. It should be noted that a different structural relationship occurs when the torture is defined as a crime of its own and to specific malice. In this case two distinct types of structural relationships could be hypothesized. The first would be based on a mutual specialty by double specification, given that the official qualification of the active subject and the finalistic direction of the acts would

---

**extraordinary Chambers in the Courts of Cambodia: Developing the law on sexual violence?**, in *International Criminal Law Review*, 15, 2015, pp. 454ss. FOUNTAIN CALEB, C.J. **Sexual violence, the ad hoc Tribunals and the International Criminal Court: Reconciling Akayesu and Kunarac**, in *ILSA Journal of International & Comparative Law*, 20, 2013, pp. 4ss.

<sup>123</sup>SQUATRITO, T. YOUNG, O.R. FOLLESDAL, A. ULSTEIN, G. **The performance of international Courts and Tribunals**, op. cit.

<sup>124</sup>AHLBRECHT, A. BÖHMEER, K.M. **Internationales Strafrecht**, C.F. Müller, 2018.

<sup>125</sup>*Bemba Gombo* Jean-Pierre, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, PTC-II, ICC-01/05-01/08, 15 June 2009.

<sup>126</sup>ICC, Prosecutor v. Bemba Gombo, Decision Pursuant to Article 61(7)(a) and (b), op. cit., par. 204.

<sup>127</sup>ICC, Prosecutor v. Bemba Gombo, Decision Pursuant to Article 61(7)(a) and (b), op. cit., par. 205. In support of this conclusion, two judgments of the ad hoc Tribunals are mentioned: ICTR, Prosecutor v. Kayishema and Ruzindana, Trial Judgment, op. cit., par. 577, 625-650 and ICTY, Prosecutor v. Pavle Strugar, Decision on Defence Preliminary Motion Concerning the Form of the Indictment, TC, IT- 01-42-PT, 28 June 2002. See in argument: LIAKOPOULOS, D. **La sentenza "Pavle Strugar" per i danni alla città di Dubrovnik del Tribunale penale internazionale per la ex Jugoslavia**, in *Rivista Gazzetta Ambiente*, 3, 2005, pp. 154-167.

configure specificity-respectively-the elements of "anyone"<sup>128</sup> and the general malice of rape. Applying the criterion of prevalence of the norm with more specializing elements, one would be forced to conclude for the sole application of torture, with a result therefore contrary to what was proposed above.

## 9 THE PERSECUTION AS AN "UMBRELLA" CASE.

The crime of persecution has found constant codification within the statutes of international tribunals<sup>129</sup>. Expected in art. 7 (1) (h) of the StICC<sup>130</sup>, it is defined as the intentional and serious deprivation of fundamental human rights in contrast with international law, for reasons of group or collective identity. The case presents numerous problems regarding the accuracy of the penal precept given the triple blank reference to the conduct and the modalities of the commission, the identification of the victim groups and the identification of the fundamental human rights violated<sup>131</sup>.

A first corrective, suitable to give the situation in this case, is constituted by the severity threshold of the punishable conduct. Not all violations of fundamental rights are relevant for the purpose of persecution, but only those considered as the specializing element

<sup>128</sup>SQUATRITO, T. YOUNG, O.R. FOLLESDAL, A. ULSTEIN, G. **The performance of international Courts and Tribunals**, Cambridge University Press, Cambridge, 2018.

<sup>129</sup>Art. 5(c) of the statute of the IMTFE, art. II(1)(c) of the CCL n. 10, art. 5(h) of the statute of the ICTY, art. 3(h) of the statute of the ICTR. In the Nuremberg Statute (art. 6 (c) StMT) the case of persecution-type from the other conduits was kept separate denominate murder-type.

<sup>130</sup>BOAS, G. BISCHOFF, J.L. REID, N.L. **Elements of crimes under international law**, op. cit., SQUATRITO, T. YOUNG, O.R. FOLLESDAL, A. ULSTEIN, G. **The performance of international Courts and Tribunals**, op. cit.

<sup>131</sup>ICTY, Prosecutor v. Kupreškić et al., Trial Judgment, op. cit., par. 621, as: "gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity as the other acts prohibited in Article 5 (of the ICTY Statute)". K. ROBERTS, **The law of persecution before the International Criminal Tribunal for the Former Yugoslavia**, in Leiden Journal of International Law, 15, 2002, pp. 623-639. ICTY, Prosecutor v. Milorad Krnojelac, Judgment, AC, IT-97-25-A, 17 September 2003, par. 185. ICTY, Prosecutor v. Zdravko Tolimir, Trial Judgment, TC-II, IT-05-88/2-T, 12 December 2012, par. 846. For the form of persecution in ad hoc Tribunals see: FENRICK, W.J. **The Crime Against Humanity of Persecution in the Jurisprudence of the ICTY**, in Netherlands Yearbook of International Law, 31, 2001, 89 ss. ROBERTS, K. Striving for Definition. The Law of Persecution from its Origins to the ICTY, in ABTAHI, H. BOAS, G. (a cura di), **The dynamics of international criminal justice. Essays in Honour of Sir Richard May**, Martinus Nijhoff Publishers, The Hague, 2006, pp. 257ss. SWAAK-GOLDMAN, O. **The crime of persecution in international criminal law**, in Leiden Journal of International Law, 11, 1998, pp. 145-154. See also: ICTY, Prosecutor v. Tihomir Blaškić, Trial Judgment, TC, IT-95-14-T, 3 March 2000, par. 220. UN Doc. CCPR/21/Rev.1/Add.6, General Comment adopted by the Human Rights Committee under article 40, para. 4, of the ICCPR, No. 24, 11 November 1994, par. 8. VAN ROOSMALE, M. et al., (eds), **Fundamental rights and principles, Liber amicorum Pieter van Dijk**, ed. Intersentia, Antwerp, Oxford, 2013, pp. 49-71.

of generic malice, but as a further and heterogeneous element. In this case it should be concluded for the formal competition of crimes<sup>132</sup>. The solutions analyzed with reference to the French legal system, however, could suggest a solution in favor of the unit of crime: if we consider torture as a crime-end (given the presence of a specific purpose) and rape as a crime-half, only the first case should apply, and the sexual nature of the offense to physical integrity could be considered as an aggravating circumstance or during the determination of the sentence.

Gravity is not related to the persecutory conduct itself, but to the character and nature of the deprivation of fundamental rights<sup>133</sup>. A second corrective-introduced by the Rome Statute-is represented by the requirement of the (necessary and) objective connection<sup>134</sup> with one of the crimes on which the ICC has jurisdiction (crimes against humanity, genocide<sup>135</sup>, war crimes<sup>136</sup> and, finally, crime of aggression)<sup>137</sup>. This implies that the persecutory conduct

<sup>132</sup>ICTY, Prosecutor v. Anto Furundžija, Trial Judgment, op. cit., par. 112. ICTY, Prosecutor v. Kunarac et al., Appeals Judgment, op. cit., par. 174.

<sup>133</sup>AMBOS, K. **Treatise on international criminal law**, op. cit., pp. 106ss. BADAR, M.E. **From the Nuremberg Charter to the Rome Statute: Defining the elements of crimes against humanity**, in San Diego International Law Journal, 5, 2004, pp. 128-131. HALL, C.K. POWDERLY, J. Article 7, in TRIFFTERER, O. AMBOS, K. (a cura di), **The Rome Statute of the International Criminal Court, a commentary**, op. cit., pp. 277-280. ICTR, Prosecutor v. Nahimana et al., Appeals Judgment, ICTR-99-52-A, 28 November 2007, par. 986ss. GORDON, G.S. **Hate speech and persecution. A contextual approach**, in Vanderbilt Journal of Transnational Law, 46, 2013, pp. 332ss.

<sup>134</sup>DE HEMPTINNE, J. **Controverses relatives à la définition du crime de persécution**, in Revue Trimestrielle des Droits de l'Homme, 53, 2003, pp. 35ss.

<sup>135</sup>The JCE-doctrine has been introduced by the Appeals Chamber of the ICTY in Prosecutor v. Tadić, Judgment, Case No. ICTY-94-1-A, 15 July 1999, par. 185-229 as customary international law and has subsequently been applied in numerous cases, including ICTY, Prosecutor v. Krajišnik, Judgment, Case No. ICTY-00-39/40, 27 September 2006; Id, Prosecutor v. Brđanin, Judgment, Case No. ICTY- 99-36-A, 3 April 2007 and Id, Prosecutor v. Popović et al., Judgment, Case No. ICTY-05-88-T, 10 June 2010. See for details, BLAISE NGAMENI, H. **La diffusion du droit international pénal dans les ordres juridiques africaines**, ed. L'Harmattan, Paris, 2017. CALVO-GOLLER, K. **La procédure et la jurisprudence de la Cour pénale internationale**, op. cit., DRUMBL, M.A. **Rule of law amid lawlessness: Counseling the accused in Rwanda's domestic genocide trials**, in Columbia Human Rights Law Review, 29, 1998. ALONSO, H. Current trends on modes of liability for genocide, crimes against humanity and war crimes, in STAHN, C. VAN DEN HERIK, L. (eds.), **Future perspectives on international criminal justice**, T.M.C. Asser Press, The Hague, 2010, pp. 522-524. MANACORDA, S. MELONI, C. **Indirect perpetration versus Joint Criminal Enterprise: Concurring approaches in the practice of international criminal law?**, in Journal of International Criminal Justice, 9 (1), 2011, pp. 165ss. In the Kvočka et al. case, the Appeals Chamber emphasized that it is the accused person's knowledge that is central, that is, what was natural and foreseeable to this person. More specifically, the Appeals Chamber held that: "(...) participation in a systemic joint criminal enterprise does not necessarily entail criminal responsibility for all crimes which, though not within the common purpose of the enterprise, were a natural or foreseeable consequence of the enterprise. A participant may be responsible for such crimes only if the Prosecution proves that the accused had sufficient knowledge such that the additional crimes were a natural and foreseeable consequence to him (...)". Kvočka et al., judgment, AC, ICTY, 28 February 2005, para. 86, in the same spirit: Limaj et al., judgment, TC, ICTY, 30 November 2005, par. 512.

<sup>136</sup>BALCELLS, L. KALYVAS, S.N. **Does warfare matter? Severity, duration, and outcomes of civil wars**, in

must be carried out in connection with one of the crimes provided for in Articles 6-8bis of the StICC. According to some authors none of these two corrections is suitable to restrict significantly the *actus reus* of persecution<sup>138</sup>. The delimitation of the notion of persecution would instead be guaranteed by the presence of the specific malice, given that the crime must be committed for discriminatory reasons based on race, nationality, political belief, ethnic or cultural affiliation, religion, gender or other discriminatory reasons universally recognized as inadmissible under international law. The author must therefore act with the specific intention

---

Journal of Conflict Resolution, 58 (8), 2014, pp. 6ss.

<sup>137</sup>WERLE, G. JESSBERGER, F. **Principles of international criminal law**, op. cit., pp. 377ss. During the preparatory work for the Rome Statute, some delegations insisted on the introduction of the connection with the other crimes pertaining to the Court in order to limit an otherwise too elastic notion of persecution. See in argument: ROBINSON, D. **Defining "crimes against humanity" at the Rome Conference**, in American Journal of International Law, 93, 1999, pp. 55ss. KEMP, G. **Individual criminal liability for the international crime of aggression**, Cambridge University Press, Cambridge, 2017. KNOOPS, G.J.A. **An introduction to the law of international criminal Tribunals: A comparative study**, ed. Brill, The Hague, 2014, pp. 234ss. KONATÉ, D. **La Cour Pénale Internationale: Entre nécessité de justice et impératif de pax**, ed. L'Harmattan, Paris, 2018. The jurisprudence of the ad hoc Tribunals has denied the customary nature of this requirement: ICTY, Prosecutor v. Kupreškić et al., Trial Judgment, op. cit., par. 580. For some authors the connection requirement has the objective of circumscribing the jurisdiction of the Court to the only forms of persecution which present a high degree of objective danger: AMBOS, K. **Treatise on international criminal law**, op. cit., pp. 106ss. EINARSEN, T. Prosecuting aggression through other universal core crimes at the International Criminal Court, in SADAT, N.L. **Seeking accountability for the unlawful use of force**, Cambridge University Press, Cambridge, 2018. VENTURA, M.J. GILLET, M. **The fog of war: Prosecuting illegal uses of force as crimes against humanity**, op. cit., pp. 532ss.

<sup>138</sup>For the *actus reus* see from the next cases from the Special Tribunal for Lebanon: Akhbar Beirut S.A.L. Ibrahim Mohamed Ali Al Amin, Case. No. STL-14-06/T/CJ, Trial Chamber judgment, 15 July 2016 (Akhbar, Trial Chamber judgment) the Court: "(...) stressed that in order to see the differences in the assessment of corporate criminal liability across nations, there is a need to look beyond the systems of common law nations. By finding that the notion of corporate criminal liability is of such divergent nature in the international domain of domestic practices that there is a lack of consensus on it, the Court re-affirmed the Defence's argument stating that the corporate accused not have been expected to know that its acts would result in a violation of international law (...) held that the mens rea can only be fulfilled if the natural accused has knowingly and wilfully interfered with the administration of justice and that the act has been committed merely knowingly and wilfully in order to show culpability (...) the Amicus had to prove that the accused "(1) deliberately published information on purported confidential witnesses, and (2) in doing so, they knew that their conduct was objectively likely to undermine public confidence in the Tribunal's ability to protect the confidentiality of information about, provided by, witnesses or potential witnesses (...) actual knowledge that the disclosure poses a threat to the public's confidence in the Tribunals work can be inferred from various circumstances (...) if only wilful blindness is established, that alone suffices knowledge which gives reason to impute criminal liability (...). See also: Akhbar Beirut S.A.L. Ibrahim Mohamed Ali Al Amin, Case. No. STL-14-06/S/CJ, Reasons for Sentencing judgment, 5 September 2016, para. 2. (Akhbar, Sentencing judgment) the STL established: "(...) the actus reus and mens rea of corporate entities and found a corporate body criminally liable for contempt of court (...) references made to the case-law of this Court might seem misleading as the corporate body did not commit atrocity crimes. However, this case has been carefully chosen to stress that domestic practices lay the necessary foundation for the development of international criminal law to include corporate criminal liability (...). See also in argument: EBY, C.P. **Aid "specifically directed" to facilitate war crimes. The ICTY's anomalous actus reus standard for aiding and abetting**, in Chicago Journal of International Law, 115, 2014.

to discriminate a group or a community<sup>139</sup>.

Despite the definition efforts made by the Rome Statute, persecution remains a vague concept, "artificially located between crimes against humanity and genocide and confusingly overlapping with war crimes"<sup>140</sup>. The persecution has been defined as an "umbrella" case<sup>141</sup> since it does not constitute a crime in itself but requires-for the purpose of its realization-the fulfillment of an action or omission that results in a serious violation of human rights<sup>142</sup>. As can be understood, among the serious violations of human rights suitable for integrating the persecution there are also the behaviors already sanctioned autonomously by the Statute such as murder, torture, sexual violence<sup>143</sup> or deportation<sup>144</sup>.

<sup>139</sup>CHERIF BASSIOUNI, M. **Crimes against humanity. Historical evolution and contemporary application**, Cambridge University Press, Cambridge, 2011, pp. 400ss. BERGSMO, M. WUI LING, C. PING, Y. (a cura di), **Historical origins of international criminal law**. Vol. 1-3, ed. TOAEP, Brussels, 2014. ROBERTS, K. **The law of persecution before the International Criminal Tribunal for the Former Yugoslavia**, in Leiden Journal of International Law, 15, 2002, pp. 636ss. From the jurisprudence see: ICTY, Prosecutor v. Kordić and Čerkez, Trial Judgment, op. cit., par. 202 and 217. ICTY, Prosecutor v. Tihomir Blaškić, Trial Judgment, op. cit., par. 235. ICTY, Prosecutor v. Kvočka et al., Trial Judgment, op. cit., par. 185. ICTY, Prosecutor v. Milorad Krnojelac, Trial Judgment, op. cit., par. 435. ICTY, Prosecutor v. Zdravko Tolimir, Trial Judgment, op. cit., par. 849-850. ICTY, Prosecutor v. Momčilo Perišić, Trial Judgment, op. cit., par. 121-122. ICTY, Prosecutor v. Gotovina et al., Judgment, TC, IT-06-90-T, 15 April 2011, par. 1803. See for details: J. SUBOTIĆ, Legitimacy, scope, and conflicting claims on the ICTY: In the aftermath of Gotovina, Haradinaj and Perišić, in Journal of Human Rights, 13(2), 2014, pp. 172ss. For details see: OSTOJIC, M. **Between justice and stability: The politics of war crimes prosecutions**, Ashgate Publishing, Farnham, 2014. ORENTLICHER, D.F. **Some kind of justice, the ICTY's impact in Bosnia and Serbia**, Oxford University Press, Oxford, 2018. GOW, J. KERR, R. PAJIC, Z. **Prosecuting war crimes, lessons and legacies of the International Criminal Tribunal for the Former Yugoslavia**, ed. Routledge, Abington & New York, 2014.

<sup>140</sup>FOURNET, C. PÉGORIER, C. **"Only one step away from genocide". The crime of persecution in international criminal law**, in International Criminal Law Review, 10, 2010, pp. 714ss. MAY, L. HOSKINS, Z. **The extraordinary Chambers in the Courts of Cambodia. Assessing their contribution to international criminal law**, ed. Springer, Berlin, 2016.

<sup>141</sup>AMBOS, K. **Treatise on international criminal law**, op. cit., pp. 105ss. ICTY, Prosecutor v. Predrag Banović, Sentencing Judgment, TC, IT-02-65/1-S, 28 October 2003, par. 38. ICTY, Prosecutor v. Popović et al., Trial Judgment, TC-II, IT-05-88-T, 10 June 2010, par. 965. ICTY, Prosecutor v. Vlastimir Đorđević, Trial Judgment, TC-II, IT-05-87/1-T, 23 February 2011, par. 1756. ICTY, Prosecutor v. Stanišić and Župljanin, Trial Judgment, TC-II, IT-08-91-T, 27 March 2013, par. 67.

<sup>142</sup>GOSNELL, C. **Damned if you don't liability for omissions in international criminal law**, Ashgate Publishing, Farnham, 2013.

<sup>143</sup>CHESNEY-LIND, M. MERLÓ, A.V. **Global war on girls? Policing girl's sexuality and criminalizing their victimization**, in Women and Criminal Justice, 25, 2015. ADAMS, A. **The first rape prosecution before the ICC: Are the elements of crimes based on a source of international law?**, in International Criminal Law Review, 15, 2015, pp. 1100ss. KARKERA, T.R. **International Criminal Court's protection of women: The hands of justice at work**, in American University Journal of Gender, Social Policy & the Law, 12, 2004, pp. 202ss. RUSSELL-BROWN, S.L. **Rape as an act of genocide**, in Berkeley Journal of International Law, 21, 2003, pp. 362ss. SELLERS, P.V. **Sexual violence and peremptory norms: The legal value of rape**, in Case Western Reserve Journal of International Law, 34, 2002, pp. 290ss.

<sup>144</sup>DDAMULIRA MYJUZI, J. **Prosecution and punishing torture in South Africa as a discrete crime and as a crime against humanity**, in African Journal of International and Comparative Law, 23, 2015, pp. 342ss. CLARKE, K.M. KNOTNERU, A.S. DE VOLDER, E. **Africa and the ICC**, Cambridge University Press,

The express provision of the connection requirement makes it possible to configure the persecution as a crime that can only be achieved if it is linked to conduct that constitutes a crime in itself according to the Rome Statute. As a result, there are three possible scenarios that can be imagined. The first concerns a non-codified discriminatory conduct within the Statute (for example: the issue of a law on citizenship) connected to a crime on which the Court has jurisdiction (for example: forced transfer of a minority). The second concerns the case in which the persecutory conduct is carried out only through conduct that constitutes, already in itself, a codified crime within the Statute (for example: persecution committed only through acts of sexual violence or looting<sup>145</sup>). Finally, the third is defined by the sum of the first two scenarios: persecution is committed either through conduits that integrate a crime of the Statute, or through other untyped conduct but connected to a crime pertaining to the ICC. A particular hypothesis of normative convergence is configured in the second (and, by way of reflection, in the third) scenario. In this hypothesis the peculiarity of the rules contest derives from the fact that we are faced with an umbrella situation-persecution-whose concrete implementation necessarily and exclusively passes through the creation of a conduct already autonomously sanctioned by the Statute. The relevance of this normative overlap is accentuated by the fact that, to date, in the face of the ICC the crime of persecution has always had as its object conduits that have been imputed (cumulatively) even on an autonomous basis as crimes against humanity<sup>146</sup>. At first glance the relationship established between the persecution and the connected crime seems to recall the figure of the complex crime. The study of the competition established between the persecution and the murder, already dealt with by the *ad hoc* Tribunals, can represent an example for the solution of the other cases of convergence that occur between an umbrella case and a case that constitutes, in

---

Cambridge, 2016.

<sup>145</sup>RANDALL, M. VENKATESH, V. **The right to no: The crime of marital rape, women's human rights and international law**, in Brooklyn Journal of International Law, 41, 2015.

<sup>146</sup>ICC, Prosecutor v. Muthaura et al., Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, P-TC II, ICC-01/09-02/11, 23 January 2012, par. 283, in which reference is made to murder, forced relocation, sexual violence and injuries to physical and mental integrity. ICC, Prosecutor v. Ruto, Kosgey and Sang, Decision on the Confirmation of Charges, P-TC II, ICC-01/09-01/11, 23 January 2012, par. 271, which states that the persecution was carried out through the conduct of murder and deportation or forced transfer. ICC, Prosecutor v. Laurent Gbagbo, Decision on the confirmation of charges against Laurent Gbagbo, P-TC, ICC-02/11-01/11, 12 June 2014, par. 204, which refers to crimes of murder, sexual violence and injury; these last crimes are also imputed as a crime of persecution in the ICC, Prosecutor v. Charles Blé Gaudé, Decision on the confirmation of charges against Charles Blé Gaudé, P-TC, ICC- 02/11-02/11, 11 December 2014, par. 122.

itself, a crime in accordance with the Rome Statute.

## 10 FROM THE *KRSTIĆ* CASE TO THE *BLÉ GUADÉ* CASE: PERSECUTION COMMITTED THROUGH MURDER.

The first jurisprudence of the ICTY which ruled on the competition between persecution and murder concluded in favor of appearance<sup>147</sup>. The accumulation of qualifications was considered "cumulative impermissible"<sup>148</sup> because the persecution appears to be *lex specialis* with respect to the crime of murder: on the one hand, it requires the proof of a further element that identifies itself in the discriminatory intent towards a group- victim; on the other hand, the evidence that a defendant committed the crime of persecution through the conduct of homicide necessarily assumes that all the elements of the murder crime have been tried<sup>149</sup>. The absorption of the murder in the persecution is therefore deduced both from the structural relationship between the facts and from the probative report that is established, among them, in the judgment. Having detected the incorrect application of the *Čelebići* criterion, with the appeal ruling in the *Kordić* and *Čerkez* case<sup>150</sup> the ICTY adopted a diametrically opposed solution, concluding in favor of the criminal offense<sup>151</sup>. The accumulation of legal qualifications has been considered legitimate due to the fact that both norms each have a distinct and additional element with respect to the other<sup>152</sup>: while

<sup>147</sup>ICTY, Prosecutor v. Radislav Krstić, Trial Judgment, op. cit., par. 675. ICTY, Prosecutor v. Kvočka et al., Trial Judgment, op. cit., par. 220. ICTY, Prosecutor v. Milorad Krnojelac, Trial Judgment, op. cit., par. 503. ICTY, Prosecutor v. Mitar Vasiljević, Trial Judgment, TC-II, IT-98-32-T, 29 November 2002, par. 267. ICTY, Prosecutor v. Naletilić and Martinović, Trial Judgment, op. cit., par. 724. ICTY, Prosecutor v. Milomir Stakić, Trial Judgment, op. cit., par. 879. ICTY, Prosecutor v. Simić et al., Trial Judgment, op. cit., par. 1058. ICTY, Prosecutor v. Mitar Vasiljević, Appeals Judgment, op. cit., par. 146. ICTY, Prosecutor v. Radislav Krstić, Appeals Judgment, op. cit., par. 231. ICTY, Prosecutor v. Radoslav Brđanin, Trial Judgment, op. cit., par. 1085.

<sup>148</sup>ICTY, Prosecutor v. Radislav Krstić, Appeals Judgment, op. cit., par. 231.

<sup>149</sup>NEHA, J. **Judicial lawmaking and general principles of law in international criminal law**, op. cit., 122ss.

<sup>150</sup>Kordić and Čerkez, Judgment, AC, IT-95-14/2-A, 17 December 2004.

<sup>151</sup>ICTY, Prosecutor v. Kordić and Čerkez, Appeals Judgment, op. cit., par. 1040.

<sup>152</sup>In the same conclusion see the position from the Chamber of Appeal in case: ICTY, Prosecutor v. Milorad Krnojelac, Appeals Judgment, op. cit., par. 188. Unlike the Krstić and Vasiljević judgments, in the Krnojelac case the judges did not motivate the choice in favor of appearance. A dissenting opinion was expressed by Judge Shahabuddeen in the Krstić case, in which the latter declared to comply with the conclusion reached by the majority of the Chamber of Appeal only because of the existence of two precedents (the aforementioned cases Vasiljević and Krnojelac) which affirmed the appearance of the competition. It is interesting to report a significant passage of the partially dissenting opinion in which, after having said that the two cases present distinct elements, the judge affirmed that: "(...) were it otherwise, the legal elements of the crime of persecution would vary according to the legal elements of the particular crime on which the persecution is based. The legal elements of the crime of persecution would include the legal elements of the crime of enslavement if

persecution does not require the presence of an action or omission that causes the death of an individual, murder does not require a discriminatory act and intent. The same reasoning is extended "(...) as discriminatory intent and is therefore more specific than murder as a crime against humanity"<sup>153</sup> also to the other hypotheses of competition between persecution and crimes pertaining to the Court, such as imprisonment and inhuman deeds<sup>154</sup>. This conclusion was not shared by the judges Schomburg and Güney<sup>155</sup>. In their dissenting opinion, the persecution is defined as an "empty shell"<sup>156</sup> designed to contain within it all the possible violations of fundamental human rights that reach a certain threshold of gravity and are put in place with discriminatory motives. It is interesting to report a passage from the dissenting opinion, which states: "(...) one has to ask: what is the fundamental right that has been denied (?) in the present case, the answer is: the fundamental right to life. It is only by incorporating this element in persecutions that the empty hull amounts to (...) a crime against humanity (...)"<sup>157</sup>.

Paraphrasing what has been deduced by the judges, the particular structure of the crime of persecution requires the interpreter to consider what concrete conduct is put in place

---

enslavement were alleged to be the basis of the persecution charged. Similarly with respect to deportation, imprisonment, torture and rape. The legal elements of a charge for persecution would thus vary from case to case; in the present case, they would include the legal elements of all the crimes on which the persecution is alleged to have been based. That variability is not reconcilable with the stability, definitiveness and certainty with which the legal elements of a crime should be known. Those elements must not depend on accidents of prosecution; they must clearly appear once and for all from a reading of the provision defining the crime (...)": ICTY, Prosecutor v. Radislav Krstić, Partial Dissenting Opinion of Judge Shahabuddeen, AC, IT-98-33-A, 19 April 2004, par. 91. In our opinion, the suggestion proposed by Judge Shahabuddeen does not take due account of the peculiar normative construction of the persecution. As mentioned above, persecution presents itself as a complex crime in which alongside some typical elements of its own-the discriminatory intent and the victim group-can be added to the objective and subjective elements of other cases already codified within of the Statute. Consequently, the configuration of the persecution necessarily depends on the modality of the conduct with which it is carried out and imputed to the author. In the same opinion see also: BOAS, G. BISCHOFF, J.L. REID, N.L. **Elements of crimes under international law. International criminal law practitioner library series**, op. cit., pp. 340ss.

<sup>153</sup>ESTUPIÑAN SILVA, R. **Principios que rigen la responsabilidad internacional penal por crímenes internacionales**, in Anuario Mexicano de Derecho Internacional, 2012, pp. 136ss.

<sup>154</sup>ICTY, Prosecutor v. Kordić and Čerkez, Appeals Judgment, op. cit., par. 1042-1043.

<sup>155</sup>Kordić and Čerkez, Joint Dissenting Opinion of Judge Schomburg and Judge Güney on Cumulative Convictions, AC, IT-95-14/2-A, 17 December 2004

<sup>156</sup>ICTY, Prosecutor v. Kordić and Čerkez, Joint Dissenting Opinion of Judge Schomburg and Judge Güney, AC, IT-95-14/2-A, 17 December 2004, par. 6.

<sup>157</sup>ICTY, Prosecutor v. Kordić and Čerkez, Joint Dissenting Opinion of Judge Schomburg and Judge Güney, op. cit., par. 6. The same conclusions were re-proposed by the judges themselves Schomburg e Güney in ICTY, Prosecutor v. Naletilić and Martinović, Opinion Dissidente Conjointe des Juges Güney et Schomburg sur le Cumul de Déclarations de Culpabilité, AC, IT-98-34-A, 3 May 2006. See also in the same spirit: ECCC, Prosecutor v. Kaing Guev Eav alias Duch (001), Trial Judgment, TC, 011/18-07-2007/ECCC/TC, 26 July 2010, par. 565.

to integrate the persecution. This question is not so much useful to answer the question: "how was the crime of persecution committed?"<sup>158</sup>, But rather to understand what is the crime that is imputed to the author: without a concrete conduct there would be only a discriminatory intent towards a victim group, but not yet a typical case according to the Statute. This means that whenever the persecution is committed through one or more murders, the normative overlap must result in an apparent competition because the violation of the right to life, constituting one of the elements of the persecution, is absorbed by the latter case. The restrictive approach, favorable to the apparent competition, turned into an exception from the appeal decision in the *Kordić and Čerkez* case and the opposite solution, favorable to the crime offense, was adopted by the subsequent jurisprudence of the *ad hoc* Tribunals<sup>159</sup>. With reference to the ICC, to date no judgments of first or second degree have been pronounced on the elements of the crime of persecution or on the problem of the competition between it and another crime pertaining to the Statute. Yet, by analyzing the decisions to confirm the indictments of the Pre-Trial Chamber, one has the distinct sensation that the ICC can adopt the approach inaugurated by the *Kordić and Čerkez* ruling, favoring the formal competition of crimes to the detriment of the unit of crime<sup>160</sup>.

As a paradigmatic example of this trend we can mention the decision on the *Blé Gaudé* case<sup>161</sup>, the last in chronological order to have dealt with persecution. The accused was

<sup>158</sup>ICTY, Prosecutor v. Kordić and Čerkez, Joint Dissenting Opinion of Judge Schomburg and Judge Güney, op. cit.,

<sup>159</sup>Favorable for the prosecution of crimes between persecution and other crimes pertaining to the court: ICTR, Prosecutor v. Nahimana et al., Judgment and Sentence, AC, ICTR-99-52-A, 28 November 2007, par. 1090. ICTY, Prosecutor v. Blagojević and Jokić, Trial Judgment, TC, IT-02-60-T, 17 January 2005, par. 810. ICTY, Prosecutor v. Milomir Stakić, Appeals Judgment, op. cit., par. 359. ICTY, Prosecutor v. Naletilić and Martinović, Appeals Judgment, op. cit., par. 590. ICTY, Prosecutor v. Momčilo Krajišnik, Trial Judgment, TC, IT-00-39-T, 27 September 2006, par. 1130. ICTY, Prosecutor v. Milan Martić, Trial Judgment, IT-95-11-T, 12 June 2007, par. 475. ICTR, Prosecutor v. Nahimana et al., Appeals Judgment, cit., op. par. 1027. ICTY, Prosecutor v. Momčilo Krajišnik, Appeals Judgment, op. cit., par. 389. ICTY, Prosecutor v. Lukić and Lukić, Trial Judgment, AC, IT-98-32/1-A, 4 December 2012, par. 1042. ICTY, Prosecutor v. Popović et al., Trial Judgment, op. cit., par. 2113. ICTY, Prosecutor v. Vlastimir Đorđević, Trial Judgment, op. cit., par. 2198-2200. ICTY, Prosecutor v. Momčilo Perišić, Trial Judgment, op. cit., par. 1790. ICTR, Prosecutor v. Bagosora and Nsengiyumva, Appeals Judgment, AC, ICTR-98-41-A, 14 December 2011, par. 414. ICTY, Prosecutor v. Zdravko Tolimir, Trial Judgment, op. cit., par. 1202. ICTY, Prosecutor v. Vlastimir Đorđević, Appeals Judgment, op. cit., par. 842. ICTY, Prosecutor v. Radovan Karadžić, Trial Judgment, TC, IT-95-5/18-T, 24 March 2016, par. 6018. ICTY, Prosecutor v. Ratko Mladić, Trial Judgment, op. cit., par. 5174. The only exception (favorable to the apparent competition of rules) is found in ICTY, Prosecutor v. Stanišić and Župljanin, Trial Judgment, op. cit., par. 910-912.

<sup>160</sup>GLESS, S. *Internationales Strafrecht. Grundriss für Studium und Praxis*, Helbing Lichtenhahn, Basel, 2015.

<sup>161</sup>Prosecutor v. Charles Blé Gaudé, Decision on the confirmation of charges against Charles Blé Gaudé, P-TC, ICC- 02/11-02/11, 11 December 2014, par. 122

accused of committing the following crimes against humanity: murder, rape, other inhumane acts (in this case: serious injuries to physical integrity) and, finally, persecution on political, national, ethnic and religious grounds. The Pre-Trial Chamber, in the paragraph dedicated to the persecution, said that at least victims of murder, rape and injuries were affected because of their national, ethnic, religious or political orientation<sup>162</sup>.

Despite the decision on the *Blé Gaudé* case-placing itself in a preliminary phase to the trial-does not prevent a future solution, in the judgment, in favor of the appearance. The approach adopted by the judges still seems to be open to criticism. And this for the reasons already stated above: the principles governing the competition of rules must be taken into account by the Prosecutor and the judges of the preliminary Chamber already in the process of confirming the accusations in order to avoid the useless proliferation of appropriate cumulative charges to lengthen the times and costs of the process.

## 11 THE COMPLEXITY OF PERSECUTION AS A CRIME.

The solution in favor of the unit of crime, with the sole application of the crime of persecution, is justified by the application of the principle of specialty. The same case before the *Kordić and Čerkez* case stated that: "(...) the offense of persecution is more specific than the offences of murder and inhumane acts as crime against humanity because, in addition to the facts necessary to prove murder and inhumane acts, persecution requires the proof of a materially distinct element of a discriminatory intent in the commission of the act (...) "<sup>163</sup>.

The element of discriminatory intent confers specialties to the crime of persecution. While agreeing with the conclusion of the judges-both with reference to the criterion of solution applied (the specialty) and with the final outcome of the comparison (application of persecution only)-he wants to propose a further argument in support of the unit of crime<sup>164</sup>.

The peculiar complex structure of the crime of persecution can take two forms. On the one hand, persecution can be considered as the sum of a conduct that already constitutes, in itself, a crime pertaining to the Statute, and of discriminatory intent. The suggestion proposed

<sup>162</sup>ICC, Prosecutor v. Charles Blé Gaudé, Decision on the confirmation of charges, op. cit., par. 194.

<sup>163</sup>ICTY, Prosecutor v. Radislav Krstić, Appeals Judgment, op. cit., par. 231.

<sup>164</sup>AKSENOVA, M. **Symbolism as a constraint on international criminal law**, in Leiden Journal of International Law, 30, 2017, pp. 478ss. MULGREW, R. **Towards the development of the international penal system**, Cambridge University Press, Cambridge, 2013.

in this scenario is to qualify the crime of persecution as a complex crime, that is as an autonomous and unitary case in point, the result of the synthesis and legislative unification between a crime identified with one of the concrete conduits through which persecution can be carried out-and an aggravating circumstance, identified as discriminatory intent<sup>165</sup>.

The persecution can be considered as the sum of a conduct that is not already punishable under the Statute and the discriminatory fraud. In the latter scenario, art. 7 (1) (h) of the StICC has the function of expanding the punishment conferring typicality to a whole series of serious violations of fundamental human rights that would not, in themselves, be punishable<sup>166</sup>. Consequently, when persecution takes on such structural features, no phenomenon of normative convergence can occur.

In the first scenario, on the other hand, the competition that takes place between the persecution and the crime through which it manifests must be resolved in the sense of appearance, with the application of persecution alone as *lex specialis*<sup>167</sup>. The complex nature of persecution dictates this conclusion because: a) for the purposes of its verification, it

<sup>165</sup>HOLÁ, B. SMEULERS, A. BIJLEVELD, C. **International sentencing facts and figures. Sentencing practice at the ICTY and ICTR**, in Journal of International Criminal Justice, 9, 2011, pp. 425ss. MEERNIK, J. KING, K. **The sentencing determinants of the International Criminal Tribunal for the Former Yugoslavia: An empirical and doctrinal analysis**, in Leiden Journal of International Law, 16, 2003, pp. 740-741. BOOK, J.P. **Appeal and sentence in international criminal law**, BWV Berliner Wissenschafts Verlag, Berlin, 2011, pp. 99ss. MELLOH, F. **Einheitliche Strafzumessung in den Rechtsquellen des ICC-Statuts**, op. cit., pp. 378. OLUSANYA, O. **Sentencing war crimes and crimes against humanity under the International Criminal Tribunal for the Former Yugoslavia**, ed. Europa Law, Groningen, 2005, according to which crimes committed with discriminatory intent must be punished more severely than those committed on an arbitrary basis. On the need to give systematicity and organicity to the phase of sentencing. See also, OHLIN, J.D. **Targeting and the concept of intent**, in Cornell Law Faculty Publications, paper 774, 2013, pp. 84ss. BAGARIC, M. MORSS, J. **International sentencing law: In search of a justification and coherent framework**, in International Criminal Law Review, 6, 2006, pp. 191-255. CHIFFLET, P. BOAS, G. **Sentencing coherence in international criminal law: The cases of Biljana Plavšić and Miroslav Bralo**, in Criminal Law Forum, 23, 2012, pp. 158. AMBOS, K. **Treatise on international criminal law**, op. cit., pp. 302ss. D'ASCOLI, S. **Sentencing in international criminal law: The UN ad hoc Tribunals and future perspectives for the ICC**, Hart Publishing, Oxford & Portland, Oregon, 2011. DUBINSKY, A. **An examination of international sentencing guidelines and a proposal for amendments to the International Criminal Court's sentencing structure**, in New England Journal on Criminal and Civil Confinement, 33, 2007, pp. 609-637. SLOANE, R.D. **Sentencing for the "crime of crimes". The evolving "common law" of sentencing of the International Criminal Tribunal for Rwanda**, in Journal of International Criminal Justice, 5, 2007, pp. 729ss.

<sup>166</sup>SQUATRITO, T. YOUNG, O.R. FOLLESDAL, A. ULSTEIN, G. **The performance of international Courts and Tribunals**, op. cit.

<sup>167</sup>LINDROOS, A. **Addressing norm conflicts in a fragmented legal system: The doctrine of lex specialis**, op. cit., MILANOVIC, M. **The lost origins of lex specialis: Rethinking the relationship between human rights and international humanitarian law**, in OHLIN, J.D. (a cura di), **Theoretical boundaries of armed conflict and human rights**, op. cit., pp. 32ss. PAUWELYN, J. **Conflict of norms in public international law**, op. cit., pp. 386ss. CONWAY, G. **Conflicts of competence norms in EU law and the legal reasoning of the ECJ**, op. cit., pp. 987ss.

requires the fulfillment of another case; b) the persecution is a broader case because it requires proof of the specific intent; c) having a broader scope, but necessitating the accomplishment of another crime, it entirely includes within it the other case; d) by requesting proof of a further and different element (discriminatory intent), persecution can be qualified as a special law. In this way the solution of the competition is based solely on a logical criterion-the specialty-and does not require any use of value criteria<sup>168</sup>. In fact, the jurisprudential approach favorable to the crimes competition-inaugurated with the appeal sentence *Kordić and Čerkez* and adopted by the ICC in confirming the accusations-does not seem worthy of acceptance.

## 12 APARTHEID AND PERSECUTION CAN COMPETE?

A particular hypothesis of normative convergence is established between the crime of persecution and the crime of apartheid<sup>169</sup> codified for the first time within the Rome Statute. Art. 7 (2) (h) of the StICC defines apartheid as a series of inhuman acts of gravity similar to the conduct constituting a crime against humanity under the Statute<sup>170</sup> committed in the context of an institutionalized regime of systematic oppression and domination of a racial group against another group (or groups) and put in place with the intention of keeping that regime alive. Apartheid also presents itself as an "umbrella" case<sup>171</sup> capable of encompassing a multitude of behaviors-already punished autonomously by the Statute or of equal offensive scope-if set up within a context can itself integrate a specific one: that of an institutionalized regime of segregation and domination of one race over the other<sup>172</sup>. In other words, it too can

<sup>168</sup>BOAS, G. BISCHOFF, J.L. REID, N.L. **Elements of crimes under international law. International criminal law practitioner library series**, op. cit., pp. 347ss.

<sup>169</sup>See the UN Doc. A/CONF.183/C.1/SR3, Third Meeting of the Committee for the Whole, 17 June 1998. EDEN, P. **The role of the Rome Statute in the criminalization of apartheid**, in *Journal of International Criminal Justice*, 12, 2014, pp. 184-185. BOOYSEN, H. **Convention on the Crime of Apartheid**, in *South African Yearbook of International Law*, 2, 1976, pp. 56-96. TOMUSCHAT, C. **Universal criminal jurisdiction. Jurisdiction with respect to the crime of genocide, crimes against humanity and war crimes**, in *Yearbook of the Institute of International Law*, 71, 2005, pp. 246ss. LETT, A. **The meaningless existence of universal jurisdiction**, in *Michigan State International Law Review*, 23, 2015, pp. 547ss. LANGER, M. **The diplomacy of universal jurisdiction: The political branches and the transnational prosecution of international crimes**, in *American Journal of International Law*, 105, 2011, pp. 1, 42ss.

<sup>170</sup>SERNÍN RODRÍGUEZ, C.A. **La evolución del crimen de lesa humanidad en el derecho penal internacional**, in *Boletín Mexicano de Derecho Comparado*, 47, 2017, pp. 210ss.

<sup>171</sup>WERLE, G. JESSBERGER, F. **International criminal justice is coming home. The new German Code of crimes against international law**, op. cit., pp. 206ss.

<sup>172</sup>HALL, C.K. VAN DEN HERIK, L. Article 7, in TRIFFTERER, O. AMBOS, K. (a cura di), **The Rome Statute of the International Criminal Court**, op. cit., pp. 283ss. AMBOS, K. **Treatise on international**

present itself as a complex crime<sup>173</sup>. In the event that the conduct integrating the crime of apartheid is committed with a discriminatory intent, there is a competition between the crime of persecution and the crime of apartheid<sup>174</sup>. How does the competition between these two complex crimes resolve? First of all we can say that the structural similarity between the two cases is emphasized and the competition in favor of appearance is resolved. This conclusion is justified by the fact that apartheid deals only with racial discrimination, while persecution includes discriminatory reasons based on religious, ethnic, national, etc., factors: the first crime is more specific than the second and, consequently, is destined to find solitary application in the cases of competition<sup>175</sup>.

According to our opinion, the solution in favor of the crime unit-with the application of the apartheid standard-turns out to be correct. However, the argument that justifies this choice can best be argued. On the one hand, apartheid does not seem to require, from the point of view of typicality, that conduct should come into being with discriminatory motives: the same authors who support the specificity of apartheid affirm that, despite the similarities with the crime of persecution, only the latter case requires that the conduct be discriminatory. The specific malice of apartheid concerns, if anything, the will, on the crime side against humanity already typified by the Statute. Furthermore, the institutionalized regime of oppression is maintained in life through the fulfillment of that specific conduct. On the other hand, even wanting to admit that apartheid should be committed with a discriminatory conduct based on racism, the problem of the competition could find a more complex solution. Indeed, the racial nature of discriminatory motives would not be the criterion of solution but the presupposition for convergence<sup>176</sup>. If, within an institutionalized regime of oppression, a person commits a

---

**criminal law**, op. cit., pp. 114ss. JACKSON, M. **A conspiracy to commit genocide. Anti-fertility research in apartheid's chemical and biological weapons programme**, op. cit., pp. 933-950.

<sup>173</sup>HALL, C.K. Article 7-Crimes against humanity, in TRIFFTERER, O. (a cura di), **Commentary on the Rome Statute of the International Criminal Court. Observers' Notes, Article by Article**, C.H. Beck/Hart/Nomos, Oxford & Oregon, Portland, Baden-Baden, München, 2008, pp. 122ss. BYRON, C. **War crimes and crimes against humanity in the Rome Statute of the International Criminal Court**, Manchester University Press, Manchester, 2009, pp. 242ss. BULTZ, A. **Redefining apartheid in international criminal law**, in Criminal Law Forum, 24, 2013, pp. 224-225.

<sup>174</sup>LINGAAS, C. **The crime against humanity of apartheid in a post apartheid world**, in Oslo Law Review, 2, 2015.

<sup>175</sup>HÜNERBEIN, I. **Straftatkonkurrenzen im Völkerstrafrecht**, Duncker & Humblot, Berlin, 2005, pp. 130ss.

<sup>176</sup>KOVÁCS, P. Racial groups, in SHELTON, D.L. (a cura di), **Encyclopedia of genocide and crimes against humanity**. Volume I (I-S), ed. Thomson Gale, Farmington Hills, 2005, pp. 855-857. BOAS, F. **The mind of primitive man**, ed. Praeger, Santa Barbara, 1983. BALIBAR, E. WALLERSTEIN, I. **Race, nation, classe. Les identités ambiguës**, La Découverte, Paris, 2007. BENEDICT, R. **Race and racism**, ed. Routledge, London &

serious violation of human rights against a religious minority as such, it would not be between persecution and apartheid because the religious nature of discrimination is not a typical element of crime of apartheid. By definition, apartheid and persecution concur only where a serious inhuman act is committed in an organized regime of oppression and racial domination. In other words, the mere presence of racial discrimination-admitted that it represents a typical requirement of the crime of apartheid-is not suitable to give specificity to this case, presenting itself, on the contrary, as an ontological premise to the overlap between apartheid and persecution<sup>177</sup>. It therefore seems hasty to conclude for the application of apartheid by comparing only the nature of the discriminatory grounds<sup>178</sup>.

### 13 A NEW FORM OF CONVERGENCE: THE HYPOTHESES OF INTER-CATEGORICAL COMPETITION.

The inter-categorical contest (or inter-crime) occurs whenever one or more cases included in a criminal category converges with one or more cases belonging to another criminal category. Think of the case in which murder as a crime against humanity is committed through the use of warlike means or methods that constitute a war crime under international humanitarian law.

The phenomenon, from an ontological point of view, is identical to the intra-category competition or to the competition of rules that occurs within national laws: it is always the convergence of two or more provisions on the same fact. It is believed that the hypothesis of inter-categorical competition deserves a separate study compared to the intra-categorical one. The assumption of this differentiated solution rests on the relevance that the element of context plays in the structural comparison between cases. The two hypotheses of intra-and inter-categorical competition present a substantial difference: only in the second form of convergence, the element of context is taken into consideration-because of its distinctive

---

New York, 1983. TAGUIEFF, P.A. *La force du préjugé. Essai sur le racism et ses doubles*, ed. La Découverte, Paris, 1988.

<sup>177</sup>DUGARD, J. L'apartheid, in ASCENSIO, H. DECAUX, E. PELLET, A. (a cura di), *Droit international pénal*, ed. Pedone, Paris, 2012, pp. 203ss.

<sup>178</sup>EDEN, P. *The role of the Rome Statute in the criminalization of apartheid*, op. cit., pp. 185ss. MACULAN, E. LIÑÁN LAFUENTE, A. Relaciones concursales, concursus delictorum, in FISCHER, H. KRESS, C. LÜDER, S.R. (a cura di), *International and national prosecution of crimes under international law. Current developments*, ed. Nomos, Baden-Baden, 2001, pp. 315ss, who refer both to the racial reasons and to the context of commission of crimes to infer the greater specificity of apartheid from the persecution.

function-in the structural analysis between the case. While in the intra-categorical convergence it would not make sense to consider the contextual element in that all the cases in competition share the objective and subjective elements, in the inter-categorical convergence the element of context is among the constitutive elements that differentiate the case, so as to be able to intersect or conflict with other context elements. The collective component expressed by the context element conditions and widens the area of normative convergence. The reference is to the possibility of assigning multiple legal qualifications to the same conduct and the same harmful event. In international criminal law-in the broad sense-it is therefore abstractly configurable the competition between several rules that regulate the murder, or torture, or sexual violence, as these cases are provided for within the categories of genocide crimes<sup>179</sup>, crimes against humanity and war crimes. At first sight, murder can compete with itself. The apparent paradox of the (non-ontologically configurable) contest of a norm with itself is easily overcome if one keeps in mind that each category of crimes provides a peculiar context element.

#### 14 THE BACKGROUND ELEMENT OF WAR CRIMES (ARTICLE 8 OF THE STICC).

The fundamental premise for the application of war crimes is the existence of armed conflict. According to the definition proposed by the ICTY, in order to have an armed conflict it is necessary to have recourse to military force<sup>180</sup>. In addition to this essential requirement, in

<sup>179</sup>CASSESE, A. **The nexus requirement for war crimes**, in *Journal of International Criminal Justice*, 10, 2012. DON TAYLOR III, B. **Crimes against humanity in the Former Yugoslavia**, in BELLELLI, R. (a cura di), **International criminal justice. Law and practice from the Rome Statute to its review**, ed. Ashgate Publishing, Farnham, 2010, pp. 285-294. CARSON, K.E. **Reconsidering the theoretical accuracy and prosecutorial effectiveness of international Tribunals ad hoc approaches to conceptualizing crimes of sexual violence as war crimes, crimes against humanity and acts of genocide**, in *Fordham Urban Law Journal*, 39, 2012, pp. 1250ss. CHAZAL, N. **Beyond borders? The International Criminal Court and the geopolitics of international criminal justice**, in *Griffiths Law Review*, 22, 2013, pp. 715ss. CHAZAL, N. **The International Criminal Court and global social control: International Criminal Justice in late modernity**, ed. Routledge, London & New York, 2015.

<sup>180</sup>The first definition is referred: ICTY, *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, IT-94-1, 2 October 1995, par. 70. And have found it confirmation in the next cases from the ICTY: ICTY, *Prosecutor v. Boškoski and Tarčulovski*, Judgment, AC, IT-04-82-A, 19 May 2010, par. 21. ICTY, *Prosecutor v. Momčilo Perišić*, Trial Judgment, op. cit., par. 72. ICTY, *Prosecutor v. Zdravko Tolimir*, Trial Judgment, op. cit., par. 682. ICTY, *Prosecutor v. Stanišić and Župljanin*, Trial Judgment, Judgment, TC-II, IT-08-91-T, 27 March 2013, par. 32. The same definition from the ICC in the next cases: ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Trial Judgment, op. cit., par. 533. ICC, *Prosecutor v. Germain Katanga*, Décision relative à la peine (article 76 du Statut), TC II, ICC-01/04-01/07, 23 May 2014, par.

the case of non-international armed conflicts<sup>181</sup>, the violent situation must last for a significant period of time (intensity requirement) and the groups involved in the conflict must possess a certain degree of organization<sup>182</sup>.

The mere presence of armed conflict is not sufficient, in itself, to describe as crimes of war all the crimes that are committed during the context of violence. It is therefore necessary to verify that there is a functional link between the criminal conduct and the armed conflict<sup>183</sup>. And it is precisely the presence of such a connection that makes it possible to distinguish war

---

1173. ICC, Prosecutor v. Bemba Gombo, Trial Judgment, op. cit., par. 128. the definition was accepted also from the Committee of the International Red Cross: ICRC, Opinion Paper: How is the Term "Armed Conflict" Defined in International Humanitarian Law?, March 2008. See also for details: FLECK, D. **The handbook of humanitarian law in armed conflicts**, Oxford University Press, Oxford, 1995, pp. 40ss. DAVID, E. **Principes de droit des conflits armés**, ed. ULB, Bruxelles, 2002, pp. 109. GASSER, H.P. International humanitarian law: An introduction, in HAUG, H. (a cura di), **Humanity for all. The International Red Cross and red crescent movement**, Paul Haupt, Berne, 1993, pp. 510ss. SCHINDLER, D. **The different types of armed conflicts according to the Geneva Conventions and Protocols**, in Recueil des Cours de l'Académie de Droit International, 163, 1979, pp. 131ss. A.A.V.V., **Commentary on the second Geneva Convention**, Cambridge University Press, Cambridge, 2017.

<sup>181</sup>SIVAKUMARAN, S. **The law of non-International armed conflict**, Oxford University Press, Oxford, 2012. MERON, T. **International criminalization of internal atrocities**, in American Journal of International Law, 89, 1995, pp. 554-577 KRESS, C. **War crimes committed in non-international armed conflict and the emerging system of international criminal justice**, in Israeli Yearbook on Human Rights, 30, 2001. BOED, R. **Individual criminal responsibility for violations of article 3 common to the Geneva Convention of 1949 and of Additional Protocol II thereto in the case law of the International Criminal Tribunal for Rwanda**, in Criminal Law Forum, 13, 2002. CULLEN, A. **Definition of non-international armed conflict in the Rome Statute of the International Criminal Court: An analysis of the threshold of application contained in Article 8(2)(f)**, in Journal of Conflict and Security Law, 12, 2008. SIVAKUMARAN, S. Identifying an armed conflict not of an international character, in STAHN, C. SLUITER, G. (a cura di), **The emerging practice of the International Criminal Court**, Martinus Nijhoff Publishers, Leiden-Boston, 2009, 363-380. KRETZMER, D. **Rethinking the application of international humanitarian law in non-international armed conflicts**, in Israel Law Review, 42, 2009. An internal conflict can take on international dimensions if one of the parties to the conflict is assisted and supported by another state entity. The jurisprudence, however, is divided with reference to the degree of involvement of the third State. On the one hand, the International Court of Justice stated that it is necessary to prove that the third State has issued specific military orders or has directed a specific operation or military (c.d. test of effective control): See, ICJ, Nicaragua v. USA (Case Concerning Military and Paramilitary Activities in and Against Nicaragua), Judgment, 27 June 1986, par. 115, confirmed in case ICJ, Bosnia and Herzegovina v. Serbia and Montenegro (Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide), Judgment, 26 February 2007, par. 400ss. A lower degree of involvement is required, however, by the jurisprudence of ad hoc Tribunals, according to which it is sufficient to demonstrate that the third State played a significant role in the organization, coordination and planning of military operations (c.d. test dell'overall control): ICTY, Prosecutor v. Duško Tadić, Appeals Judgment, op. cit., par. 137. The International Criminal Court has, until now, adopted the least restrictive approach of overall control: ICC, Prosecutor v. Thomas Lubanga Dyilo, Trial Judgment, op. cit., par. 541. DAMNJANOVIC, V. **Die Beteiligungensformen im deutschen und serbischen Stafrecht sowie in der ICTY-Rechtsprechung**, BWN Berliner Wissenschafts Verlag, Berlin, 2013, pp. 246ss.

<sup>182</sup>COTTIER, M. Article 8, in TRIFFTERER, O. AMBOS, K. (a cura di), **The Rome Statute of the International Criminal Court**, op. cit., pp. 313ss.

<sup>183</sup>ROBERTS, K. **The contribution of the ICTY to the grave breaches regime**, in Journal of International Criminal Justice, 7, 2009, pp. 750ss. BOED, R. **Judgment of a Trial Chamber in the case of The Prosecutor v. Laurent Semanza**, in International Criminal Law Review, 3, 2003, pp. 406ss.

crimes from other international crimes and from common crimes committed in wartime<sup>184</sup>, playing a fundamental role in possible normative overlaps. The requirement of the link has been the subject of two different interpretations, one extensive and the other restrictive.

The jurisprudence of the *ad hoc* Tribunals has developed, according to a case-by-case approach, some indicator criteria that allow to establish the connection between the conduct and the armed conflict. A (relative) presumption of connection will occur whenever conduct is put in place during hostilities, that is during and in the place of a fight between the parties in conflict. However, a war crime can also be committed in an earlier (or later) time to a battle: the minimum requirement is that the context of armed conflict has had a substantial effect on the decision to commit the crime, on the modalities of commission or on objectives or goals that have moved the author<sup>185</sup>. In other words, the presence of the war context must have played a substantial role in the commission of the crime by the author.

Next to this reading there is a more restrictive one. The concern related to the adoption of a broad concept of the requirement of the link lies, on the one hand, in the consequent qualification as war crimes of all those crimes committed in the context of the conflict only to take advantage of the criminal opportunities provided by the situation of chaos and disorder; on the other hand, in the downsizing of the distinctive function that the war crimes context element faces towards other international crimes and common crimes<sup>186</sup>. It is necessary to demonstrate that the author has acted in agreement with-or at least in respect of the military campaign: the author must be part of (or closely linked to) the military apparatus and must have the ability to use the means and methods of war<sup>187</sup>: therefore, the same crime could not have been committed in peacetime because it is precisely the presence of armed conflict that makes it possible or facilitates the realization of the crime. This restrictive reading deserves to be accepted in view of a better distinction between war crimes and other international cases.

<sup>184</sup>VAN DER WILT, H. **War crimes and the requirement of a nexus with an armed conflict**, in Journal of International Criminal Justice, 10, 2012, pp. 1116ss. METTRAUX, G. Nexus with armed conflict, in CASSESE, A. et al., (a cura di), **Oxford Companion to International Criminal Justice**, Oxford University Press, Oxford, 2009, pp. 435ss.

<sup>185</sup>ICTY, Prosecutor v. Kunarac et al., Appeals Judgment, op. cit., par. 58-60. DÖRMANN, K. LA HAYE, E. VON HEBEL, H. The context of war crimes, in LEE, R.S. (a cura di), **The International Criminal Court. Elements of crimes and rules of procedure and evidence**, Transnational Publishers, New York, 2001, pp. 121ss.

<sup>186</sup>VAN DER WILT, H. **War crimes and the requirement of a nexus with an armed conflict**, op. cit., pp. 1127ss. AMBOS, K. **Treatise on international criminal law**, op. cit., pp. 143ss.

<sup>187</sup>CASSESE, A. **The nexus requirement for war crimes**, op. cit., pp. 1414ss, when he states that: "the armed conflict must also have created the "situation" (...)".

Finally, from the subjective point of view, it is necessary for the author to be aware of acting in the context of an armed conflict, although no knowledge and/or evaluation about the international or internal nature of the conflict is required<sup>188</sup> (operation, however, of not easy and immediate realization) <sup>5</sup><sup>189</sup>. Article 8 (1) of the StICC seems to have introduced a novelty in the context of war crimes context when it foresees that the Court has jurisdiction to judge war crimes when committed, in particular, as part of a political plan or design or as part of a series of similar crimes committed on a large scale (as a part of a plan or as a part of a large-scale commission)<sup>190</sup>. However, the doctrine has proved unanimous in considering this element as a mere jurisdictional requirement, suitable to direct the activity of the Prosecutor to the most serious cases, also in light of the principle of complementarity<sup>191</sup>.

<sup>188</sup>DÖRMANN, K. **Preparatory Commission for the International Criminal Court: The elements of war crimes**, in *International Review of the Red Cross*, 82, 2000, pp. 780ss. ESER, A. Article 31, in TRIFFTERER, O. AMBOS, K. (a cura di), **The Rome Statute of the International Criminal Court**, op. cit., pp. 929ss. An exception to this rule applies to all those conduct that integrate a war crime only in the presence of an international conflict: in these cases it is necessary for the author to be aware of acting in the context of an international conflict. See, AMBOS, K. **Treatise on international criminal law**, op. cit., pp. 287ss. From the jurisprudence see: ICTY, *Prosecutor v. Naletilić and Martinović*, Appeals Judgment, op. cit., par. 109ss.

<sup>189</sup>KRESS, C. **Some reflections on the international legal framework governing transnational armed conflict**, in *Journal of Conflict and Security Law*, 15, 2010, pp. 245ss. PAULUS, A. VASHAKMADZE, M. **Asymmetrical war and the notion of armed conflict. A tentative conceptualization**, in *International Review of the Red Cross*, 91, 2009, pp. 110ss. AKANDE, D. Classification of armed conflicts: Relevant legal concept, in WILMSHURTS, E. (a cura di), **International law and the classification of conflicts**, Oxford University Press, Oxford, 2012. CORN, G.S. et al., **The war on terror and the laws of war. A military perspectives**, Oxford University Press, Oxford, 2015. GASSER, H.P. **Acts of terror, "terrorism" and international humanitarian law**, in *International Review of the Red Cross*, 95, 2013. For the practice of targeted killings and the use of drones see: MELONI, C. State and individual responsibility for targeted killings by drones, in SANTONI DE SIO, F. DI NUCCI, E. (a cura di), **Drones and responsibility: Legal, philosophical and socio-technical perspectives on the use of remotely controlled weapons**, Ashgate Publishing, Farnham, 2016, pp. 47-64. and for the private contractors see: FRANCIONI, F. RONZITTI, N. **War by contract. Human rights, humanitarian law, and private contractors**, Oxford University Press, Oxford, 2011. OHLIN, J.D. FINKELSTEIN, C. GOVERN, K. (a cura di), **Cyber war. Law and ethics for virtual conflicts**, Oxford University Press, Oxford, 2015. DROEGE, C. **Get off my cloud: Cyber warfare, international humanitarian law, and the protection of civilians**, in *International Review of the Red Cross*, 92, 2012. LIN, H. **Cyber conflict and international humanitarian law**, in *International Review of the Red Cross*, 92, 2012. SCHMITT, M.N. The use of cyber force and international law, in WELLER, M. (a cura di), **The Oxford Handbook of the use of force in international law**, Oxford University Press, Oxford, 2015, pp. 1110ss. WOLTAG, J.C. **Cyber warfare: Military cross-border computer network operations under international law**, Cambridge University Press, Cambridge, 2014. VENTURA, M.J. The illegal use of armed force (other inhuman act) as a crime against humanity an assessment of the case for a new crime at the International Criminal Court, in SADAT, N.L. **Seeking accountability for the unlawful use of force**, Cambridge University Press, Cambridge, 2018. KURU, H. **Prohibition of use of force and cyber operations as "force"**, in *Journal of Learning and Teaching in Digital Age*, 2, 2017, pp. 48ss. ROSCINI, M. TRUST, L. **Cyber operations and contemporary international law**, Oxford University Press, Oxford, 2014.

<sup>190</sup>WELLER, M. (a cura di), **The Oxford Handbook of the use of force in international law**, op. cit., pp. 112ss.

<sup>191</sup>See in particular: ROBINSON, D. **Three theories of complementarity: Charge, sentence or process?**, in

## 15 THE CONTEXTUAL ELEMENT OF CRIMES AGAINST HUMANITY (ARTICLE 7 OF THE STICC).

The cases listed in art. 7 of the StICC constitute crimes against humanity if committed in an extended or systematic attack directed against any civilian population and aware of the attack. The attack must not necessarily be identified with a military action, well being able to include any harassment against the civilian population<sup>192</sup>. It must be extended or systematic<sup>193</sup>. The first requirement is quantitative-spatial in nature and relates to the extent of the attack; the second requirement is qualitative and temporal in nature and refers to the degree of organization of violence<sup>194</sup>. The attack must be directed against any civilian population, defined-in positive-as a collectivity of people united by some requirements (*Strafbarkeitsvoraussetzungen*) by virtue of which they become targets of the attack and-in negative-as the whole of the subjects that do not belong to the armed forces or who are not qualifiable as legitimate fighters<sup>195</sup>. It is sufficient that the civilian population is the main

---

Harvard International Law Journal, 53, 2012, pp. 87ss. TRAHAN, J. **Is complementarity the right approach for the International Criminal Court's crime of aggression-Considering the problem of overzealous National Court prosecutions**, in Cornell International Law Journal, 45, 2012, pp. 576ss. HELLER, K.J. **A sentence-based theory of complementarity**, in Harvard International Law Journal, 53, 2011, pp. 208ss. ZAWATI, M.H. **The International Criminal Court and complementarity**, in Journal of International Law and International Relations, 12, 2016, pp. 208-228. CARTER, L.E. **The future of the International Criminal Court: Complementarity as a strength or a weakness?**, in Washington University Global Studies Law Review, 12, 2013, pp. 454ss. ROBINSON, D. **The mysterious mysteriousness of complementarity**, in Criminal Law Forum, 21, 2010, pp. 6ss. STAHN, C. **One step forward, two steps back? Second thoughts on a "sentence-based" theory of complementarity**, in Harvard International Law Journal, 53, 2012, pp. 183-196. DAZA GONZÁLEZ, A. **El principio de complementariedad en el derecho penal internacional**, ed. Universidad Católica de Colombia, Bogotá, D.C., 2015. SASCHA, D. BACHMANN, D. EDA NWIBO, L. **Pull and push- Implementing the complementarity principle of the Rome Statute of the ICC within the AU: Opportunities and challenges**, in Brooklyn Journal of International Law, 43, 2018, pp. 464ss.

<sup>192</sup>SLUITER, G. "Chapeau elements" of crimes against humanity in the jurisprudence of the UN ad hoc Tribunals, in SADAT, N.L. (a cura di), **Forging a Convention for Crimes Against Humanity**, Cambridge University Press, Cambridge, 2011, pp. 102-141. CHESTERMAN, S. **An altogether different order: Defining the elements of crimes against humanity**, op. cit., pp. 316ss.

<sup>193</sup>VON HEBEL, H. ROBINSON, D. Crimes within the jurisdiction of the court, op. cit., pp. 94ss. KOLB, R. SCALIA, D. **Droit international penal**, op. cit., pp. 99-105. According to some authors, the presence of both requirements identifies the "ideal model" of crime against humanity: L. MAY, **Crimes against humanity. A normative account**, Cambridge University Press, Cambridge, 2005.

<sup>194</sup>AMBOS, K. WIRTH, S. **The current law of crimes against humanity. An analysis of UNTAET Regulation 15/2000**, in Criminal Law Forum, 13, 2002, pp. 18ss.

<sup>195</sup>ICTR, Ndindilyimana et al, case no. ICTR-00-56-T of 30 June 2014. See, DE HEMPTINNE, J. **La définition de la notion de "population civile" dans le cadre du crime contre l'humanité. Commentaire critique de l'arrêt Martić**, in Revue Général de Droit International Public, 114, 2010, pp. 93-104. MESEKE, S. **La contribution de la jurisprudence des tribunaux pénaux internationaux pour l'ex-Yugoslavie et le Rwanda à la**

target of the attack: the reduced presence of soldiers and other combatants does not, therefore, undermine the civil character of the population<sup>196</sup>.

Article 7 (2) (a) of the StICC introduces a further typical element, not contemplated by the other statutes of international tribunals, when it states that the attack must be carried out in implementation or execution of the political design of a State or an organization (policy element)<sup>197</sup>. The political plan does not necessarily have to be expressed in an express and/or formalized program, since it is possible to infer its existence from certain circumstantial elements<sup>198</sup>. Furthermore, active conduct by the State or the organization is not required, as it

---

concretisation de l'incrimination du crime contre l'humanité, in CHIAVARIO M. (a cura di), **La justice pénale internationale entre passé et avenir**, ed. Dalloz, Paris, 2003, pp. 173-222. OOSTERVELD, V. Gender-sensitive justice and the International Criminal Tribunal for Rwanda, in *New England Journal of International and Comparative Law*, 12, 2005, pp. 119, 128ss. TROUILLE, H. **How far has the international criminal Tribunal for Rwanda really core since Akayesu in the prosecution and investigation of sexual offenses committed against women? An analysis of Ndindilyimana et al**, in *International Criminal Law Review*, 13, 2013, pp. 750ss. KIRBY, P. **How is rape a weapon of war? Feminist International Relations, modes of critical explanation and the study of wartime sexual violence**, op. cit., pp. 802ss.

<sup>196</sup>ICTY, Prosecutor v. Mrkšić et al., Judgment, AC, IT-95-13/1-A, 5 May 2009, par. 31-32.

<sup>197</sup>METTRAUX, G. The definition of crimes against humanity and the question of a "policy" element, in SADAT, N.L. (a cura di), **Forging a Convention for Crimes Against Humanity**, Cambridge University Press, Cambridge, 2011, pp. 142-176. CUPIDO, M. **The policy underlying crimes against humanity. Practical reflections on a theoretical debate**, in *Criminal Law Forum*, 22, 2011, pp. 294ss. HANSEN, T.P. **The policy requirement in crimes against humanity: Lessons from and for the Case of Kenya**, in *George Washington International Law Review*, 43, 2001, pp. 1-42. CHERNOR JALLOH, C. **What makes crimes against humanity crimes against humanity?**, in *American University International Law Review*, 28, 2013, pp. 408ss. CLARK, R.S. Crimes against humanity and the Rome Statute of the International Criminal Court, in POLITI, M. NESI, G. (a cura di), **The Rome Statute of the International Criminal Court: A challenge to impunity**, Ashgate Publishing, Aldershot, 2001. HWANG, P. **Defining crimes against humanity in the Rome Statute of the International Criminal Court**, in *Fordham International Law Journal*, 22, 1998, pp. 502 ss. For the policy element see: PÉREZ CABALLERO, K. **El elemento político en los crímenes contra la humanidad. La expansión de la figura al crimen organizado transnacional y el caso de las organizaciones de narcotraficantes mexicanas en el sexenio 2006-2012**, Dykinson S.L., Madrid, 2015, pp. 72ss. SCHABAS, W.A. **State policy as an element of international crimes**, in *Journal of Criminal Law and Criminology*, 98, 2008, pp. 953-982. METTRAUX, G. **Crimes against humanity in the jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda**, in *Harvard International Law Journal*, 43, 2002, pp. 237-316. In national implementation of the Statute some countries-above all those that have used an adjustment model based on the technique of the legislative reference-have maintained the requirement of the policy element: among these we want to mention the case of Malta (art. 2 of the International Criminal Court Act, n. 24, 13 December 2003) and the Sud Africa (part. 2 of the Implementation of the Rome Statute of the International Criminal Court Act, n. 27/2002). See, DU PLESSIS, M. **South Africa's implementation of the ICC Statute. An african example**, in *Journal of International Criminal Justice*, 5, 2007, pp. 460-479. KEMP, G. The Implementation of the Rome Statute in Africa, in WERLE, G. FERNANDEZ, L. VORMBAUM, M. (a cura di), **Africa and the International Criminal Court**, ed. Springer, The Hague, 2014. LIAKOPOULOS, D. **International Criminal Court: Impunity status and the situation in Kenya**, in *International and European Union Legal Matters*, 2014. On the other hand, other systems have not resorted to the policy element in the national definition of crimes against humanity: among these, Germany (sez. 7 VStGB), Republic of Belgium (art. 136-ter of criminal code, introduced from the law n. 32/2003) and the Georgia (art. 408 of criminal code).

<sup>198</sup>ICTY, Prosecutor v. Tihomir Blaškić, Trial Judgment, op. cit., par. 204. ICC, Prosecutor v. Germain Katanga, Trial Judgment, op. cit., par. 1109. ICC, Prosecutor v. Katanga and Ngudjolo Chui, Decision on the Confirmation

is sufficient to demonstrate a conscious omissive conduct<sup>199</sup>. Even an organization that possesses characteristics that are equivalent or comparable to those of a state can integrate the element of context<sup>200</sup>. Finally, from a subjective point of view, it is necessary for the author to have the (knowledge) awareness of acting in the context of an extensive or systematic attack against the civilian population. As for war crimes, crimes against humanity must also be supported by the will of the element of context<sup>201</sup>

## 16 THE CONTEXT ELEMENT OF THE CRIME OF GENOCIDE (ARTICLE 6 OF THE STICC).

Unlike war crimes and crimes against humanity, the crime of genocide does not provide a contextual element on an objective level: it is not required that conduct be carried

---

of Charges, op. cit., 396; ICC, Prosecutor v. Bemba Gombo, Decision Pursuant to Article 61(7)(a) and (b), op. cit., par. 81.

<sup>199</sup>AMBOS, K. WIRTH, S. **The current law of crimes against humanity**, op. cit., pp. 32-33. See also the solution from the author: K. AMBOS, *Treatise on international criminal law*, op. cit., pp. 72ss.

<sup>200</sup>See the art. 7 of the statute of the ICC. See, WERLE, G. BURGHARDT, B. **Do crimes against humanity require the participation of a State or a "State-like" Organization?**, in *Journal of International Criminal Justice*, 10, 2012, pp. 1151-1170. SADAT, N.L. **Crimes against humanity in the modern age**, in *American Journal of International Law*, 107, 2013, pp. 376ss. DELMAS-MARTY, M. **Violence and massacres-Towards a criminal law of inhumanity?**, in *Journal of International Criminal Justice*, 7, 2009, pp. 8ss. From the jurisprudence see also: ICC, Prosecutor v. Germain Katanga, Trial Judgment, op. cit., par. 1119 and the restrictive interpretation with the art. 22 of the statute of the ICC. In argument see also: KRESS, C. **On the outer limits of crimes against humanity: The concept of organization within the policy requirement: Some reflections on the March 2010 ICC Kenya decision**, in *Leiden Journal of International Law*, 23, 2010, pp. 863ss. See also: ICC, Prosecutor v. Ruto, Kosgey and Sang, Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II's "Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, P-TC II, ICC-01/09-01/11, 15 March 2011, par. 21-70. In our opinion it is necessary to consider the extension of the sphere of application of crimes against humanity resulting from the adoption of an extensive approach. If by organization we mean any entity capable of carrying out an extensive or systematic attack, it should be concluded that a whole series of non-State actors-such as those belonging to organized crime-can commit crimes against humanity. A restrictive reading of the concept of organization seems therefore preferable in order to prevent excessive dilation of the category of crimes against humanity. In a consistent sense. See, CHERIF BASSIOUNI, M. **The legislative history of the International Criminal Court: Introduction, analysis and integrated text**. Volume I, ed. Brill/Martinus Nijhoff Publishers, New York, 2005, pp. 151ss. PÉREZ CABALLERO, J. **El elemento político en los crímenes contra la humanidad**, op. cit., pp. 195ss. LUBELL, N. **Extraterritorial use of force against non-State actors**, Oxford University Press, Oxford, 2010.

<sup>201</sup>ICC, Prosecutor v. Katanga and Ngudjolo Chui, Decision on the Confirmation of Charges, op. cit., par. 401. ICC, Prosecutor v. Omar al Bashir, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, PTC, ICC-02/05-01/09-3, 4 March 2009, par. 86ss. In critical sense, see, S. KIRSCH, Two kinds of wrong: On the context element of crimes against humanity, in *Leiden Journal of International Law*, 22, 2009, pp. 539ss. With the exception of persecution and apartheid, it is not required that the author acts with a discriminatory intent as was instead foreseen by articles of the statute of the ICTR.

out during an armed conflict or in the context of an extended attack or systematic<sup>202</sup>. The elements of crimes seem to suggest the need to prove the existence of a genocide plan when they say that the conduct must fit within a manifest design of similar conduct directed against a group. However, the prevailing doctrine and the first jurisprudence of the ICC agree that this element does not change the typical configuration of the crime of genocide<sup>203</sup>. The presence of a policy plays, if anything, a relevant function in the test of the specific fraud. The absence of an element of context on the objective level could be partly misleading, if one thinks of the so-called incriminating and distinctive functions carried out by the context element. The presence of an armed conflict or an extensive or systematic attack against the civilian population allows to qualify some conduct as international crimes because they are likely to harm or endanger values of international importance<sup>204</sup>. How to justify, then, the incrimination of genocide, even more if we think that it is defined as "the crime of crimes"? A distinctive and characteristic feature of the structure of crime is the specific intention to destroy, in whole or in part, an ethnic, national, racial or religious group as such<sup>205</sup>. The proof of the specific

<sup>202</sup>KRESS, C. **The International Court of Justice and the elements of the crime of genocide**, in *European Journal of International Law*, 18, 2007, pp. 619-629. KRESS, C. **The crime of genocide under international law**, in *Leiden Journal of International Law*, 6, 2006, pp. 461-502.

<sup>203</sup>ICC, Prosecutor v. Omar al Bashir, Decision on the Prosecution's Application for a Warrant of Arrest, against Omar Hassan Ahmad Al Bashir, PTC, ICC-02/05-01/09-3, 4 March 2009, par. 133. See, CRYER, R. **The definitions of international crimes in the Al Bashir arrest warrant decision**, in *Journal of International Criminal Justice*, 7, 2009, pp. 290ss. KRESS, C. **The crime of genocide under international law**, op. cit., pp. 471ss.

<sup>204</sup>KRESS, C. **The crime of genocide and contextual elements**, op. cit., pp. 302, which it stated that: "(...) it would hardly be convincing to construe the crime of genocide in a manner that would legitimize international intervention through criminal law without the need to pass a similarly high threshold (...)".

<sup>205</sup>See, BEHRENS, P. **Genocide and the question of motives**, in *Journal of International Criminal Justice*, 10, 2012, pp. 501ss. JONES, J.R.W.D. **Whose intent is it anyway?—Genocide and the intent to destroy a group**, in VOHRAH, L.C. et al. (a cura di), **Man's inhumanity to man**, ed. Brill/Martinus Nijhoff Publishers, The Hague, 2003, pp. 467ss. TRIFFTERER, O. **Genocide, its particular intent to destroy in whole or in part the group as such**, in *Leiden Journal of International Law*, 14, 2001, pp. 399ss. NERSESSIAN, D.L. **The contours of genocide intent. Troubling jurisprudence from the International Criminal Tribunals**, in *Texas International Law Journal*, 37, 2002, pp. 231. According to another approach it would be sufficient to act in the awareness that one's conduct contributes to the total or partial destruction of the victim group (knowledge-based approach): "(...) the requirement of genocidal intent should be satisfied if the perpetrator acted in furtherance of a campaign targeting members of a protected group and knew that the goal or manifest effect of the campaign was the destruction of the group in whole or in part (...)". (GREENAWALT, A.K.A. **Rethinking genocidal intent: The case for a knowledge-based interpretation**, in *Columbia Law Review*, 99, 1999, pp. 2259ss). This approach enhances the cognitive element of malice to the detriment of the volitional, and opens the door to eventual fraud. See in argument: JESSBERGER, F. **The definition and the elements of the crime of genocide**, in GAETA, P. (a cura di), **The UN Genocide Convention**, Oxford University Press, Oxford, 2009, pp. 106ss. CLARK, R.S. **Does the Genocide Convention go far enough? Some thoughts on the nature of criminal genocide in the context of Indonesia's invasion of East Timor**, in *Ohio Northern University Law Review*, 8, 1981, pp. 327ss. KIRSCH, S. **The two notions of genocide. Distinguishing macro phenomena and individual misconduct**, in Creighton

intention can be inferred both from elements of responsibility for genocide in circumstantial international criminal law and from objective schemes of conduct<sup>206</sup>.

The presence of the genocidal plan, if on the one hand does not constitute a typical element of crime, on the other hand plays an important function of probation<sup>207</sup>. The conduct must be directed against one of the groups listed in an exhaustive way by art. 6 of the StICC. In the identification of the protected group the jurisprudence has it would be sufficient to demonstrate the awareness of contributing to the total or partial destruction of a protected group, for the so-called mid-level and high-level perpetrators it is necessary to try specific punishment<sup>208</sup>, adopting a mixed objective-subjective approach, referring both to the intrinsic characteristics of the victim-group and to the stigmatization performed by the author or the group itself<sup>209</sup>. Partial destruction is sufficient to integrate the case<sup>210</sup>. In this regard, it is not

---

Law Review, 42, 2009, pp. 352ss. SAFFERLING, C.J.M. The special intent requirement in the crime of genocide, in SAFFERLING, C.J.M. CONZE, E. (a cura di), **The Genocide Convention sixty year after its adoption**, ed. Springer, The Hague, 2010, pp. 172ss. APTEL, C. **The intent to commit genocide in the case law of the International Criminal Tribunal for Rwanda**, in Criminal Law Forum, 13, 2002, pp. 277ss.

<sup>206</sup>ICTY, Prosecutor v. Radovan Karadžić, Trial Judgment, TC, IT-95-5/18-T, 24 March 2016, par. 5829ss. ICTY, Prosecutor v. Zdravko Tolimir, Trial Judgment, op. cit., par. 745. ICTY, Prosecutor v. Popović et al., Trial Judgment, op. cit., par. 823. From the international law see: ICJ, Croatia v. Serbia (Application of the Convention on the Prevention and Punishment of the Crime of Genocide), Judgment, 2 February 2015, par. 148.

<sup>207</sup>SCHABAS, W.A. **Darfur and the "odious scourge": The Commission of Inquiry's findings on genocide**, in Leiden Journal of International Law, 18, 2005, pp. 877ss.

<sup>208</sup>VAN SCHAACK, B. **The crime of political genocide. Repairing the Genocide Convention's blind spot**, in Yale Law Journal, 106, 1997, pp. 2259 ss. LEBLANC, L.J. **The United Nation Genocide Convention and political groups: Should the United States propose an amendment?**, in Yale Journal of International Law, 13, 1988, pp. 268ss. See also: Among these, they extended protection to political groups Panama (art. 431 of criminal code), Costa Rica (art. 375 of criminal code), Colombia (art. 101 of criminal code), Ivory Coast (art. 137 of criminal law), Ethiopia (art. 269 of criminal code) and some states of sud Europe: Poland (art. 118 of criminal code), Lithuania (art. 99 of criminal code), Estonia (art. 90 of criminal code), Switzerland (art. 264 of criminal law), Peru (art. 319 of criminal code), has extended in social groups, too; Slovenia (art. 100 of criminal code). See in argument: BEKOU, O. **Crimes at crossroads. Incorporating international crimes at the national level**, in Journal of International Criminal Justice, 10, 2012, pp. 677-691. See for analysis, SAUL, B. The implementation of the Genocide Convention at the national level, in GAETA P. (a cura di), **The UN Genocide Convention**, op. cit., pp. 59ss. SANTALLA VARGAS, E. **An overview of the crime of genocide in Latin American jurisdiction**, in International Criminal Review, 10, 2010, pp. 441ss.

<sup>209</sup>ICTR, Prosecutor v. Jean-Paul Akayesu, Trial Judgment, op. cit., par. 701ss. ICTR, Prosecutor v. Kayishema and Ruzindana, Trial Judgment, op. cit., par. 98. AKHAVAN, P. **The crime of genocide in the ICTR jurisprudence**, in Journal of International Criminal Justice, 3, 2005, pp. 989ss. SZPAK, A. **National, ethnic, racial and religious groups protected against genocide in the jurisprudence of the ad hoc International Criminal Tribunals**, in European Journal of International Law, 23, 2012, pp. 155-173. METTRAUX, G. **International crimes and the ad hoc Tribunals**, op. cit., pp. 227ss. PLANZER, A. **Le crime de génocide**, Freiburg, 1956, pp. 97. For the ethnic groups see: WIESSNER, S. Ethnic groups, in SHELTON, D.L. (a cura di), **Encyclopedia of genocide and crimes against humanity**. Volume I, Thomson Gale, Farmington Hills, 2005, pp. 304ss. LIPPMANN, M. **The Convention on the Prevention and Punishment of the Crime of Genocide**, in Arizona Journal of International and Comparative Law, 15, 1998, pp. 456ss.

<sup>210</sup>ICC, Prosecutor v. Omar al Bashir, Decision on the Prosecution's Application for a Warrant of Arrest, op. cit.,

necessary to exceed a certain numerical threshold of victims: the elimination of some emblematic personalities or of some places essential for the survival of the group can constitute genocide<sup>211</sup>. The crime of genocide therefore has a structure that is partially different from other international crimes, and its particular negative value emerges from the specific intention to destroy, in whole or in part, one or more victim groups identified in the Statute.

## 17 THE PARADIGMATIC CASE OF HOMICIDE: CONVERGENCE ASSUMPTIONS.

The diversity of contextual elements makes possible the intercategory contest based on the same conduct and on the same harmful event. If, on the one hand, the incriminating function of the context element is the cause of the enlargement of the regulatory convergence area that can be abstractly configured, on the other, the distinctive function that it likewise carries out can provide some criteria for the solution to the competition. Despite the convergence assumes a new and peculiar form of manifestation in the inter-category contest hypotheses, the juridical principles that guide the interpreter are still those already identified for the intra-category contest hypotheses. The analysis structure of the inter-category competition is therefore modeled on the paradigm already proposed in the intra-category contest. And the first operation to be performed concerns the identification of the ontological assumptions of inter-category convergence. Each structural comparison between categories presupposes that the factbase is always identified in the voluntary homicide. This approach is dictated by reasons aimed at simplifying an already complex subject. The inter-category competition is more problematic than the intra-category one, unequivocally because of the presence of the context element. Consequently, the structural comparison must have as its object the latter peculiar element, and not the individual conduct<sup>212</sup>. Since the nature of the fact-base is irrelevant in this first phase of comparison, it seems easier to hypothesize that the

---

par. 124. KRESS, C. **The crime of genocide and contextual elements**, cit., pp. 306ss.

<sup>211</sup>DE CASADEVANTE ROMANI, C.F. **International law of victims**, ed. Springer, Berlin, 2012. BONACKER, T. SAFFERLING, C. **Victims of international crimes: An interdisciplinary discourse**, T.M.C. Asser Press, The Hague, 2013.

<sup>212</sup>METTRAUX, G. **International crimes and the ad hoc tribunals**, op. cit., 324, which stated that: "(...) involves the comparison of the chapeau elements of the relevant statutory provisions; the specific facts of the case play no role in this determination (...)".

cases in competition identify themselves with the same damaging event. In other words, whether it is a contest between murder as a war crime and murder as a crime against humanity, or torture as a war crime and rape as a crime against humanity, the substance does not change: on an inter-categorical level the first step in resolving the rules competition must deal with the different elements of context and regardless of material conduct.

Only in a second moment it becomes fundamental to question the nature of the basic fact. However, with reference to this second step, the same solutions already proposed in the intra-categorical contest can be used, given that the element of context does not have any function at this stage. Once the convergence at the contextual level is resolved, the competition between torture as a war crime and rape as a crime against humanity does not appear at all different from the competition between torture and rape, both qualified only as one criminal category. The hypothesis of inter-categorical convergence that will be analyzed will therefore have as its object the murder as a crime of genocide, a crime against humanity and a crime of war. In the Rome Statute, all three categories of crimes can abstractly converge. After delineating the contextual elements for each category, it is possible to summarize in a table the ontological assumptions that must exist for there to be a normative overlap between two or all three categories of crimes.

## **18 PROPOSALS FOR SOLUTION IN CASES OF INTER-CATEGORICAL CRIMES.**

The greatest difficulty in resolving the inter-categorical contest does not lie, as has been said, in the search for further decisive criteria, but rather in the consideration that no inter-categorical superposition follows the one-sided specialty scheme. With reference to crimes against humanity and war crimes, the requirement of armed conflict appears to be more specific than the corresponding extended or systematic attack. On the other hand, the civilian population restricts the scope of the recipients to war crimes, since the latter can also be committed to the detriment of the combatants. Finally, the implementation or execution of a political design of a state or an organization is an exclusive requirement of crimes against humanity alone. Therefore, the two criminal categories seem to be in a mutual relation, partly

by specification (bilaterally) and partly by addition<sup>213</sup>.

The distance and diversity between the typical elements increases with reference to the competition between genocide and war crimes<sup>214</sup>. The former does not require any attack or policy, while for the latter it is not necessary to demonstrate the presence of the specific intention to destroy a protected group as such in whole or in part<sup>215</sup>. The two categories seem to generate an interference relationship: beyond the common nucleus, each norm contains typical elements that are further and heterogeneous with respect to the other. A similar structural relationship can be identified with reference to the convergence of crimes against humanity and the crime of genocide: the extended or systematic attack is a typical requirement of only crimes against humanity, while the specific malice belongs only to genocide<sup>216</sup>. The peculiar fact is that in all the hypotheses of inter-categorical competition the common nucleus can be substantiated not so much in some elements of the typical fact, but in a typical conduct and in an injurious event, as in the case of the multiple legal qualification of homicide. The uncommon elements-which can specify each other or stand in relation to heterogeneity-involve only the contextual element. According to our opinion, four alternative proposals can be formulated for the solution of this peculiar hypothesis of competition of norms. Two of these hypotheses appear to be strongly criticizable (the context element theory as an objective condition of punishment and the so-called importance of the motive for action), while another theoretical approach appears to be inapplicable because it is based on a deeply changed normative framework (theory of the hierarchy of sources)<sup>217</sup>. Only one hypothesis-among those identified here-provides a clear and coherent solution on the subject (theory of the hierarchy of crimes). Each hypothesis will be presented critically with the intention of highlighting both strengths and weaknesses.

---

<sup>213</sup>METTRAUX, G. **International crimes and the ad hoc tribunals**, op. cit., pp. 321-324.

<sup>214</sup>GREEN, L.C. **The contemporary law of armed conflict**, Manchester University Press, Manchester, 2000.

<sup>215</sup>METTRAUX, G. **International crimes and the ad hoc tribunals**, op. cit., pp. 325-328. The author identifies five differences: a) the protected legal assets; b) the necessary presence of an armed conflict (exclusive of war crimes); c) the specific fraud (exclusive of genocide); d) groups protected as offended persons (exclusive to genocide); e) the different severity threshold of the pipelines. KEMP, G. **South Africa's (possible) withdrawal from the ICC and the future of the criminalization and prosecution of crimes against humanity, war crimes and genocide under domestic law: A submission informed by historical, normative and policy considerations**, in Washington University Global Studies Law Review, 14, 2017, pp. 414ss.

<sup>216</sup>AMBOS, K. **Treatise on international criminal law**, op. cit., pp. 259ss, which considered the crime of genocide as *lex specialis* compared to persecution.

<sup>217</sup>MELLOH, F. **Einheitliche Strafzumessung in den Rechtsquellen des ICC-Statuts**, op. cit.,

## 19 THE CONTEXT ELEMENT AS AN OBJECTIVE CONDITION OF PUNISHMENT.

If the presence of the element of context significantly influences the inter-categorical convergence conferring it a peculiar (and more complex) form of manifestation, a first solution hypothesis could lie in the attempt to subtract the context element from the structural comparison between case. For these purposes it is necessary to start from a doctrinal position developed outside the reflection on the competition of norms and aimed at qualifying the element of context as a mere jurisdictional requirement, extraneous to the structure of the fact typical and functional only to the attribution of a competence of the international judge.

Wanting to use the paradigm of crimes against humanity, the necessary presence of an extensive or systematic attack against the civilian population does not contribute to increasing the degree of offensiveness of an offense either on the objective or subjective level, but translates into a pre-essential requirement for the exercise of jurisdiction by an international body<sup>218</sup>.

This particular configuration of the context element makes it possible to consider international crimes as cases characterized by two different levels of offensiveness, one referring to the conduct and the other to the criminal category as a whole. The first level coincides with the individual conduct and is exhausted by the commission of one or more typological cases in a criminal category<sup>219</sup>; the second level has a collective nature and is identified in the context element. Only this last level of offense expresses the injury or endangering of goods of international importance and justifies, as a consequence, the jurisdiction of an international organ<sup>220</sup>.

From a penalistic point of view, this qualification ends up-in term of effects-the element of context to an objective condition of extrinsic punishability, incapable of increasing the negative value of the individual conduct, but whose realization is the necessary prerequisite for purposes of the punishment of the fact<sup>221</sup>. The equation may seem, at first

<sup>218</sup>KIRSCH, S. *Der Begehungszusammenhang der Verbrechen gegen die Menschlichkeit*, Frankfurter kriminalwissenschaftliche Studien, Frankfurt am Main, 2009.

<sup>219</sup>LIAKOPOULOS, D. *Responsabilità internazionale penale individuale e statale*, in Rivista Strumentario Avvocati. Rivista di Diritto e Procedura Penale, 4(2), 2009. LIAKOPOULOS, D. ZAGER, U. **Victim-perpetrator and individual criminal responsibility in international criminal law**, op. cit.,

<sup>220</sup>A.A.V.V., *Jurisdicción universal. Sobre crímenes internacionales*, ed. Comares, Granada, 2013.

<sup>221</sup>VON AHLBRECHT, H. *Geschichte der völkerrechtlichen Strafgerichtsbarkeit im 20. Jahrhundert*, ed.

sight, forced. The presence of a jurisdictional element, in fact, performs a function of division between different jurisdictions, allowing the activation of a body of international character to the detriment of an internal court (vertical distribution) or of a single body among many of the same nature but with distinct competences or functions (horizontal division). On the other hand, the objective conditions of punishment respond to a substantial logic of delimitation of punishment for reasons of "need" or "opportunity"<sup>222</sup>, conditioning it when certain events occur. However, the equation seems possible, but above all because the classification of the element of context as a mere jurisdictional requirement risks, on the one hand, to cancel the incriminating function<sup>223</sup> and, secondly, to delimit the "need" or "opportunity" of punishment upon the occurrence of a particular objective condition, identified from time to time by the respective chapeau-existence of an armed conflict, an extended or systematic attack the civilian population or the desire to destroy a protected group in whole or in part-and capable of attributing jurisdiction to an international organization<sup>224</sup>.

With reference to the subject of the competition of norms, the adoption of this objectivist theory leads to a constant accumulation of legal qualifications whenever an inter-categorical normative overlap occurs. The expansive effect occurs because, once any typing function carried out by the context element is eliminated, it is subtracted from the analysis of the structural relationship between the case: the game will be played only at the level of the

---

Nomos, Baden-Baden, 1999, pp. 312ss. AMBOS, K. **Treatise on international criminal law**, op. cit., pp. 280ss, which translates the objective conditions of punishment as "objective conditions of punishability". For a definition of the objective conditions of punishment as concurrent or subsequent events (but not antecedents) with respect to the agent's conduct.

<sup>222</sup>SCHRAMM, E. **Internationales Strafrecht**, C.H. Beck, München, 2018.

<sup>223</sup>SMEULERS, A. HOLA, B. ICTY and the culpability of different types of perpetrators of international crimes, in SMEULERS, A. (ed.) **Collective violence and international criminal justice**, ed. Intersentia, Antwerp, Oxford, pp. 175-206.

<sup>224</sup>HALL, C.K. AMBOS, K. Article 7, in TRIFFTERER, O. AMBOS, K. (a cura di), **The Rome Statute of the International Criminal Court**, op. cit., pp. 176ss. ICC, Prosecutor v. Katanga and Ngudjolo Chui, Decision on the Confirmation of Charges, op. cit., par. 401. ICC, Prosecutor v. Omar al Bashir, Decision on the Prosecution's Application for a Warrant of Arrest, op. cit., par. 86ss. From the jurisprudence of the ad hoc tribunals see: ICTY, Prosecutor v. Kordić and Čerkez, Appeals Judgment, op. cit., para. 99. ICTY, Prosecutor v. Tihomir Blaškić, Appeals Judgment, op. cit., para. 124. ICTY, Prosecutor v. Kunarac et al., Appeals Judgment, op. cit., par. 99 and 102. ICTR, Prosecutor v. Alfred Musema. Judgment and Sentence, TC, ICTR-96-13-A, 27 January 2000, par. 206. ICTR, Prosecutor v. Kayishema and Ruzindana, Trial Judgment, op. cit., par. 134. ICTR, Prosecutor v. Laurent Semanza, Judgment and Sentence, ICTR-97-20-T, 15 May 2003, par. 332. ICTR, Prosecutor v. Ntakirutimana and Ntakirutimana, Judgment and Sentence, TC, ICTR-96-10-T, 21 February 2003, par. 803. See, METTRAUX, G. **International crimes and the ad hoc Tribunals**, op. cit., pp. 161, 164, 170, 173. CRYER, R. et al., **An introduction to international criminal law and Procedure**, op. cit., pp. 229 and 243.

single "bare" cases<sup>225</sup>, stripped of the contextual requirement. The contest of murder as a crime against humanity and murder as a war crime thus resolves into a double qualification if the same harmful event occurs in the presence of two objective conditions of punishment. The theory under examination does not seem to convince for three reasons. Firstly, the literal interpretation of the Rome Statute does not allow the element of context to be classified as an objective condition of punishment<sup>226</sup>. On the one hand, art. 7 of the StICC expressly provides that the conduct constituting a crime against political-criminal of the objective conditions of punishment. On the other hand, the elements of the crimes provide for each conduct the need to demonstrate that the author had the awareness of acting in the context of an armed conflict or an extensive or systematic attack against the civilian population: the element of context falls within therefore, in the object of malice. Finally, even in the absence of an explicit reference to art. 7 of the StICC<sup>227</sup> or the text of the elements of crimes, the awareness of acting in a particular context would be imposed by art. 30 of the StICC<sup>228</sup>. The theory of objective conditions of punishment does not convince with respect to a further profile. Every element of the case capable of enriching the sphere of offense must be the object of malice, under penalty of violation of the principle of guilt<sup>229</sup>. The element of context contributes to increasing the value of the fact and it is precisely this so-called wrong-increasing effect that prevents us from qualifying it as a mere jurisdictional requirement. According to our opinion it is possible to go further and to maintain that the element of context not only increases the value of the offense, but also establishes it. It must be qualified as a constitutive element of the case because "it concentrates in itself the offensiveness of the fact and, therefore, the reason itself of the incrimination"<sup>230</sup>, founded on a peculiar offensive disvalue that emerges

<sup>225</sup>KIRSCH, S. **Two kinds of wrong. On the context element of crimes against humanity**, op. cit., pp. 540ss. ROBERTS, C. **On the definition of crimes against humanity and other widespread or systematic human rights violations**, op. cit., pp. 4ss.

<sup>226</sup>SATZGER, H. SCHLÜCKEBIER, W. WIDMAIER, G. **Strafprozessordnung (StPO)**, Carl Heymanns Verlag, Köln, 2017.

<sup>227</sup>SQUATRITO, T. YOUNG, O.R. FOLLESDAL, A. ULSTEIN, G. **The performance of international Courts and Tribunals**, op. cit.

<sup>228</sup>AMBOS, K. **Treatise on international criminal law**, op. cit., pp. 280ss.

<sup>229</sup>KADISH, S.H. **Fifty years of criminal law: An opinionated review**, in California Law Review, 87, 1999, pp. 954ss. GEISLER, C. **Zur Vereinbarkeit objektiver Bedingungen der Strafbarkeit mit dem Schuldprinzip: Zugleich ein Beitrag zum Freiheitsbegriff des modernen Schuldstrafrechts**, Duncker & Humblot, Berlin, 1998, pp. 130ss.

<sup>230</sup>See, Preparatory Commission, Working Group on Elements of Crimes, Outcome of an intersessional meeting of the Preparatory Commission for the International Criminal Court held in Siracusa from 31 January to 6 February 2000, PCNICC/2000/WGEC/INF/1; See for details, ZIMMERMANN, A. Article 5, in TRIFFTERER,

from the collective nature of the crimes expressed in the element of context. In this way, both the incriminating and the distinctive functions are recovered: the first one concerns the indictment - at the international level-of some conduct deemed particularly damaging to (or dangerous for) the international community; the second one allows to distinguish between ordinary offenses and international crimes, even at the level of offense<sup>231</sup>.

And *a fortiori*, it seems to us that the qualification of the element of context as an objective condition of punishment may not be capable of offering an univocal solution to the problem of the competition of rules. We have already said how it should be concluded for the accumulation of qualifications once it has been proved that the harmful event occurred in the presence of two or more objective conditions of punishment<sup>232</sup>. However, the inverse solution in favor of appearance could also be sustained.

The alleged jurisdictional nature of the element of context deprives it of any typing function: once the jurisdiction of the ICC is activated, the contextual element exhausts its function. How to distinguish the individual cases in competition at the time? If the element of context serves only to attribute jurisdiction to an international judge, how can a murder be distinguished under art. 7 (1) (a) of the StICC<sup>233</sup> from a homicide pursuant to art. 6 (a) of the StICC? The rules would be in an identity relationship, and not a violation of the principle of

---

O. (a cura di), **Commentary on the Rome Statute of the International Criminal Court. Observers' notes, article by article**, op. cit. par. 9.

<sup>231</sup>ZAKERHOSSEIN, M.H. **Situation selection regime at the International Criminal Court**, ed. Intersentia, Antwerp, Oxford, 2018.

<sup>232</sup>See the Vienna Convention on the Law of Treaties, 1155 UNTS 331, 1969; UN Doc. A/Conf.129/15, Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, 1986. The same definition was accepted and reconfirmed from the Commission of the International Law in UN Doc., A/35/10, Report of the International Law Commission on the Work of its Thirty-Second Session, 1980. For analysis see: FITZMAURICE, M. ELIAS, O. MERKOURIS, P. (eds), **Treaty interpretation and the Vienna Convention on the Law of Treaties, 30 years on**, Martinus Nijhoff, The Hague, 2010, pp. 9ss. NOUËT, G. **Treaties and subsequent practice**, Oxford University Press, Oxford, 2013, pp. 224ss. BJORGE, E. **The evolutionary interpretation of treaties**, Oxford University Press, Oxford, 2014. CORTEN, O. KLEIN, P. **The Vienna Conventions on the law of treaties. A commentary**, Oxford University Press, Oxford, 2011. DÖRR, O. Article 31. General rule of interpretation, in DÖRR, O. SCHMALENBACH, K. (a cura di), **Vienna Convention on the Law of Treaties. A commentary**, Springer, Heidelberg-New York 2012, pp. 536ss. SAMSO, M. **High hopes, scant resources: A word of scepticism about the anti-fragmentation function of article 31(3)(c) of the Vienna Convention on the Law of Treaties**, in *Leiden Journal of International Law*, 24, 2011, pp. 5ss.

<sup>233</sup>TUNKIN, G. **Is general international law customary law only?**, in *European Journal of International Law*, 4, 1993, pp. 534-542. GOODMAN, R. **Human rights treaties, invalid reservations, and State consent**, in *American Journal of International Law*, 96, 2002, pp. 537ss. LOSCHIN, L. **The persistent objector and customary human rights law: A proposed analytical framework**, in *University of California, Davis Journal of International Law and Policy*, 2, 1996, pp. 147ss.

ne bis in idem should apply only one rule. But once the element of context has been transformed into an objective condition of punishment, there is no longer any criterion capable of indicating which is the prevailing norm. Given the critical issues highlighted, the first proposal for a solution to the inter-sectoral competition is not considered worthy of acceptance.

## 20 THE HIERARCHY OF SOURCES AS A SECOND SOLUTION PROPOSAL.

In attempting to formulate a conclusive criterion consistent with the competition of norms it is necessary to formulate a hierarchy of international crimes in terms of gravity basing it on a further hierarchical classification: that provided for in art. 38 (1) of the Statute of the International Court of Justice (StICJ) and concerning the sources of international law<sup>234</sup> place the rules defined as "protocollars": the definition of this broad category is extremely formal and coincides with all instruments (even informal) which are not classified as "treaties" or "conventions". Once a hierarchy of sources has been outlined, the theoretical approach shown here is concerned with placing the different categories of crimes within each type of source.

The law governing the crime of genocide is *ius cogens* and this justifies the classification of genocide as the most serious international crime<sup>235</sup>. The serious violations of the 1949 Geneva Conventions are classified as customary law, while the other violations of war laws and customs-including war crimes committed in armed conflicts of an internal

<sup>234</sup>SHELTON, D.L. **Human rights and the hierarchy of international law sources and norms**, in Saskatchewan Law Review, 65, 2002, pp. 299-335.

<sup>235</sup>HARRIS, D.J. **Cases and materials on international law**, Sweet & Maxwell, London, 1998. DAVID, E. **Traité de droit pénal international**, ed. Bruylant, Bruxelles, 1995, pp. 266-268. LAWSON, R.A. SCHERMERS, H.G. **Leading cases of the European Court of Human Rights**, Ars Aequi Books, Nijmegen, 1997, pp. 615ss. See from the International Court of Justice. ICJ, Belgium v. Spain (Case Concerning the Barcelona Traction, Light and Power Company, Limited), Judgment, 5 February 1970, par. 33-34. ICJ, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 28 May 1951, 23. For analysis see: RANDALL, C. **Universal jurisdiction under international law**, in Texas Law Review, 66, 1988, pp. 814ss. ROBINSON, N. **The Genocide Convention. A commentary**, Institute of Jewish Affairs, New York, 1960, pp. 82-85. DROST, P.N. **The crime of State: Penal protection for fundamental freedoms of persons and peoples-Genocide**, ed. Sythoff, Leiden, 1954, pp. 100-102. PAUST, J.J. **Congress and genocide: They're not going to get away with it**, in Michigan Journal of International Law, 11, 1989, pp. 92ss. DINH, N.Q. DAILLIER, P. PELLET, A. **Droit international public**, ed. LGDJ, Paris, 1994, pp. 632ss. See from the jurisprudence *ex multis*: ICTR, Prosecutor v. Jean Kambanda, Judgment and Sentence, TC, ICTR-97-23-S, 4 September 1998, par. 16. ICTR, Prosecutor v. Omar Serushago, Sentence, TC, ICTR, 98-39-S, 5 February 1999. ICTR, Prosecutor v. Georges Ruggiu, Judgment and Sentence, TC, ICTR-97-32-I, 1 June 2000.

nature<sup>236</sup> over the bottom step of the hierarchical ladder, with the consequent division of war crimes into two sub-categories. Crimes against humanity occupy the third place in the hierarchy and coincide with conventional international law. This choice is justified by the lack of uniformity in the definition of the constituent elements of crimes against humanity, both internationally and nationally<sup>237</sup>. The theory of hierarchy of sources presents an undoubted advantage: it offers a criterion capable of resolving coherently all the hypotheses of inter-categorical normative convergence: the grave violations of the 1949 Geneva Conventions override both the other violations of the customs and of war crimes against humanity, destined to succumb in case of competition with the hard core of humanitarian law. The crime of genocide, as a rule of *ius cogens*, would prevail over all other criminal categories<sup>238</sup>. In spite of the apparent linearity, three observations can be made critical to the theory of the hierarchy of sources.

## 21 SOME CRITICISMS BASED ON ARBITRARY CLASSIFICATION.

The first defect can be called defect of arbitrariness. In the judgment of correspondence between nature of the source and criminal category one can agree with the classification of the crime of genocide as a rule of *ius cogens* and of the serious violations of the 1949 Conventions of Geneva as a customary law<sup>239</sup>. On the other hand, it does not

<sup>236</sup>NI AOLÁIN, F.D. HAYNES, D.F. CAHN, N. Gender and the forms and experiences of conflict, in NI AOLÁIN, F.D. HAYNES, D.F. CAHN, N. **On the frontlines: Gender, war, and the post-conflict process**, Oxford University Press, Oxford, 2011, pp. 42ss. KHAN, K.A.A. BUISMAN, C. GOSNELL, C. **Principles of evidence in international criminal justice**, Oxford University Press, Oxford, 2010, pp. 138ss. ROBINSON, D. WILMSHURST, E. **An introduction to international criminal law and procedure**, Cambridge University Press, Cambridge, 2010, pp. 184ss.

<sup>237</sup>OLUSANYA, O. **Double jeopardy without parameters. Re-characterisation in international criminal law**, ed. Intersentia, Antwerp-Oxford, 2004, pp. 190ss.

<sup>238</sup>OLUSANYA, O. **Double jeopardy without parameters**, op. cit., pp. 200, 208, 209, 220.

<sup>239</sup>See from the International Court of Justice the next cases: ICJ, *Bosnia and Herzegovina v. Serbia and Montenegro*, op. cit., par. 161. ICJ, *Democratic Republic of the Congo v. Rwanda (Case Concerning Armed Activities on the Territories of the Congo)*, Judgment, 3 February 2006, par. 64. See for details: WOUTERS, J. VERHOEVEN, S. **The prohibition of genocide as a norm of ius cogens and its implications for the enforcement of the law of genocide**, in *International Criminal Law Review*, 5, 2005, pp. 401ss. KRESS, C. **Universal jurisdiction over international crimes and the Institut de Droit International**, in *Journal of International Criminal Justice*, 4, 2006, pp. 561-585. O'KEEFE, R. **Universal jurisdiction: Clarifying the basic concept**, in *Journal of International Criminal Justice*, 2, 2004, pp. 735-760. VENTURA, M.J. **The duty to investigate Zimbabwe crimes against humanity (torture) allegations: The Constitutional Court of South Africa speaks on universal jurisdiction and the ICC act**, in *Journal of International Criminal Justice*, 13, 2015, pp. 861-889. MERON, T. **The Geneva Conventions as customary law**, in *American Journal of International Law*, 81, 1987, pp. 348ss.

convince the attribution of the protocollary nature of the other war crimes and the conventional nature of crimes against humanity. With reference to the former, the customary nature of a larger group of war crimes is now affirmed compared to the only serious violations of the Geneva Conventions of 1949<sup>240</sup>. With regard to the latter, it was effectively affirmed: "(...) to deny the customary law status of crimes against humanity altogether seems to throw out the baby with the bath water (...) "<sup>241</sup>. Denying the customary nature of crimes against humanity-at least in their conceptual core<sup>242</sup>-may not be legitimate. It should be added that their classification as a "conventional right" runs the risk of even being a paradox, given the absence-which characterizes, among other things, only this criminal category-of an international convention on the matter<sup>243</sup>. The hierarchical classification of international crimes in light of the rank of the source that foresees them risks assuming, in certain circumstances, the nature of an arbitrary judgment, dictated more by reasons of simplification

<sup>240</sup>FOURNET, C. **The crime of destruction and the law of genocide. Their impact on collective memory**, Ashgate Publishing, Hampshire, 2007, pp. 99-108. HENCKAERTS, J.M. DOSWALD-BECK, L. **Customary international humanitarian law**. Volume I: Rules, Cambridge University Press, Cambridge, 2009. MERON, T. **The continuing role of custom in the formation of international humanitarian law**, in American Journal of International Law, 90, 1996, pp. 238. SHAHABUDEEN, M. **Does the principle of legality stand in the way of progressive development of law?**, in Journal of International Criminal Justice, 2, 2004, pp. 1007ss. MERON, T. **Revival of customary humanitarian law**, in American Journal of International Law, 99, 2005, pp. 817ss. For the customary nature of the additional protocols of Convention of Geneva of 1977, see: CASSESE, A. **The Geneva Protocols of 1977 on the humanitarian law of armed conflict and customary international law**, in UCLA Pacific Basin Law Journal, 3, 1984, pp. 55ss. GREENWOOD, C. Customary law status of the 1997 Additional Protocols, in DELISSEN, A.J.M. TANJA, G.J. (a cura di), **Humanitarian law of armed conflict**, Martinus Nijhoff Publishers, The Hague, 1991, pp. 93ss.

<sup>241</sup>STUCKENBERG, C.F. **A cure for concursus delictorum in international criminal law?**, in Criminal Law Forum, 16, 2005, pp. 371ss.

<sup>242</sup>AMBOS, K. Treatise on international criminal law, op. cit., pp. 47ss. CHANEY, K.R. **Pitfalls and imperatives: Applying the lessons of Nuremberg to the Yugoslav war crimes trials**, in Dickinson Journal of International Law, 14, 1995, pp. 58ss. RIKHOF, J. **Crimes against humanity, customary international law and the International Tribunals for Bosnia and Rwanda**, in National Journal of Constitutional Law, 6, 1996, pp. 231ss. VAN SCHAACK, B. **The definition of crimes against humanity: Resolving the incoherence**, in Columbia Journal of Transnational Law, 37, 1999, pp. 789ss. RATNER, S.R. ABRAMS, J.S. **Accountability for human rights atrocities in international law. Beyond the Nuremberg legacy**, Oxford University Press, Oxford, 2001, pp. 46ss.

<sup>243</sup>BOGDAN, A. **Cumulative charges, convictions and sentencing at the ad hoc International Tribunals for the Former Yugoslavia and Rwanda**, in Melbourne Journal of International Law, 1, 2002, pp. 3ss. CHERIF BASSIOUNI, M. **International crimes: Jus cogens and obligatio erga omnes**, in Law and Contemporary Problems, 59, 1996, pp. 68ss. ROZAKIS, C.L. **The concept of "jus cogens" in the law of treaties**, ed. North-Holland, New York, 1976, pp. 22ss. FITZMAURICE, M. ELIAS, O. MERKOURIS, P. (eds), **Treaty interpretation and the Vienna Convention on the Law of Treaties**, Martinus Nijhoff, The Hague, 2010, pp. 5-14. SOREL, J.M. BORÉ EVENO, B. 1969 Vienna Convention: Article 31-Interpretation of treaties, in CORTEN, O. KLEIN, P. (eds), **The Vienna Conventions on the law of treaties: A commentary**, Oxford University Press, Oxford, 2011, pp. 804, 817ss.

than by a careful analysis of the evolution of international criminal law<sup>244</sup>.

## 22 CRITICS BASED ON BETRAYAL OF ASSUMPTIONS.

The second defect can be defined as defect of equivocality. The theory under examination hits the mark when it is proposed to resolve the competition based on a hierarchy of international crimes based on a criterion of gravity<sup>245</sup>. However, it ends up betraying its own presupposition, since the founding principle of the hierarchical structure does not coincide with the offensive capacity of the crimes but with the rank of the source that generated them<sup>246</sup>. The theory is based on an implicit assumption, that is, that the greater gravity of the offense is expressed by the norm that derives from the source of the highest degree. This premise has not been proven and can be refuted. In fact, there could not be a one-to-one correspondence between the highest offensive capacity of a norm and its place in the highest rung in the hierarchy of sources, since the intrinsic offensive capacity could be translated into a lower-ranking source such as those of patriotism or protocol. This could happen because the process of formation of international norms is, in part, political, conditioned by the will of the States<sup>247</sup>.

Think of the difficult path taken towards equating the protection offered in the case of international and non-international armed conflicts<sup>248</sup>: it has already been said that some conduct constitutes war crimes only if committed in the context of an international conflict. These include the use of weapons and methods of warfare suitable to cause unnecessary

<sup>244</sup>MACULAN, E. LIÑÁN LAFUENTE, A. Relaciones concursales, concursus delictorum, in FISCHER, H. KRESS, C. LÜDER, S.R. (a cura di), **International and national prosecution of crimes under international law. Current developments**, op. cit., pp. 318ss. ERDEI, I. **Cumulative convictions in international criminal law: Reconsideration of a seemingly settled issue**, op. cit., pp. 25ss.

<sup>245</sup>JIA, B.B. The differing concepts of war crimes and crimes against humanity in international criminal law, in GOODWIN-GILL, G.S. TALMON, S. **The reality of international law. Essays in Honour of Ian Brownlie**, Oxford University Press, Oxford, 2012. BOGDAN, A. **Cumulative charges, convictions and sentencing**, op. cit. CARCANO, A. **Sentencing and the gravity of the offence in international criminal law**, in International and Comparative Law Quarterly, 51, 2002, pp. 583-609. SCHABAS, W.A. **Problems of international codification-Were the atrocities in Cambodia and Kosovo genocide?**, in New England Law Review, 35, 2001, pp. 287ss.

<sup>246</sup>BROWNIE, I. **Principles of public international law**, Oxford University Press, Oxford, 2012. CRAWFORD, J. **Brownlie's principles of public international law**, Oxford University Press, Oxford, 2012.

<sup>247</sup>LIAKOPOULOS, D. **Schutz des angeklagten im Strafverfahren**, in International and European Union Legal Matters, working paper series, 2013.

<sup>248</sup>WEEKS, J. **Strongmen and straw men: Authoritarian regimes and the initiation of international conflict**, in American Political Science Review, 106 (2), 2012, pp. 329ss.

injuries, unnecessary suffering or which by their nature affect indiscriminately<sup>249</sup>. Before the changes made to the Kampala Conference, the Rome Statute prohibited the use of poisonous weapons and gases and the so-called Dumdum bullets (expanding bullets) only with reference to international conflicts<sup>250</sup>. Yet, regardless of the nature of the conflict and the rank of the source governing such prohibited methods of warfare, the use of toxic weapons is a serious conduct in and of itself. The intrinsic gravity of the conduct is not, therefore, always conditioned by the primary source (Statute) or secondary (protocol)-which incriminates it, and the introduction of a ban on the use of such weapons also with reference to armed conflicts non-international is based more on political reasons than on a judgment of offense based on the degree of the source.

## 23 CRITICAL CONSIDERATIONS ON THE NARROW SCOPE OF APPLICABILITY.

Another flaw can be defined as the lack of inapplicability. Even if we want to consider the theory of the hierarchy of sources valid, we would be faced with an embarrassment that is difficult to overcome, that is, its inapplicability within the system devised with the Rome Statute. In defining the criminal offenses, it does not make a reference outside the sources of international law but explicitly codifies the crimes of genocide, crimes against humanity and war crimes in articles 6-8 of the StICC<sup>251</sup>. Consequently it is not possible to formulate any hierarchy of the sources within it: the statutory prediction levels-on the level of the sources-the original differences generated by the historical evolution of the criminal categories. Within the Rome Statute each crime occupies the same step of the hierarchical scale of the sources as provided for in art. 21 of the StICC<sup>252</sup>: not to consider the normative dictation and to apply the

<sup>249</sup>LAWRENCE, J.C. HELLER, K.J. **The limits of Article 8(2)(b)(iv) of the Rome Statute, The first ecocentric environmental war crime**, in Georgetown International Environmental Law Review, 20, 2007, pp. 73-113.

<sup>250</sup>CLARK, R.S. The "weapons provisions" and its annex: The belgian proposals, in BELLELLI, R. (a cura di), **International criminal justice. Law and practice from the Rome statute to its review**, Ashgate Publishing, Farnham, 2010, pp. 489-495. KRESS, C. **War crimes committed in non-international armed conflict and the emerging system of international criminal justice**, op. cit., pp. 136ss. CASSESE, A. **The statute of the International Criminal Court: Some preliminary reflections**, in European Journal of International Law, 10, 1999, pp. 152ss.

<sup>251</sup>SQUATRITO, T. YOUNG, O.R. FOLLESDAL, A. ULSTEIN, G. **The performance of international Courts and Tribunals**, op. cit. LIAKOPOULOS, D. **Schutz des angeklagten im Strafverfahren**,

<sup>252</sup>ICC, Prosecutor v. Lubanga, Judgment on the Appeals against the "Decision Establishing the Principles and

hierarchy of sources theory to solve the hypotheses of inter-categorical competition risks to result in a violation of the principle of legality<sup>253</sup>. The tendency towards the formulation of a hierarchy of international crimes for the solution of the rules competition proves to be a correct intuition. However, the founding criterion can not coincide with the nature of the source, but should reside in the offensive capacity of which each criminal category is the bearer.

---

Procedures to Be Applied to Reparations” of 7 August 2012 with Amended Order for Reparations (Annex A) and Public Annexes 1 and 2, AC, 3 March 2015, par. 46. ICC, Prosecutor v. Al Bashir, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, PTC, 4 March 2009, par. 128. ICC, Prosecutor v. Lubanga, ICC A. Ch., Judgment on the Appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009, entitled “Decision Giving Notice to the Parties and Participants that the Legal Characterisation of the Facts May be Subject to Change in Accordance with Regulation 55(2) of the Regulations of the Court”, 8 December 2009, par. 66-81. ICC, Prosecutor v. Katanga and Ngudjolo Chui, ICC PT. Ch., Decision on the Confirmation of Charges, ICC-01/04-01/07-717, 30 September 2008, par. 508. ICC, Prosecutor v. Ruto et al., ICC PT. Ch. I, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the ICC Statute, 23 January 2012, par. 289. ICC, Prosecutor v. Mbarushimana, ICC A. Ch., Judgment on the Appeal of the Prosecutor against the Decision of Pre-Trial Chamber I of 16 December 2011, entitled “Decision on the Confirmation of Charges”, 30 May 2012, par. 43. See from the above cited cases: ARSANJANI, M.H. **The Rome statute of the International Criminal Court**, in American Journal of International Law, 93, 1999, pp. 22-43. BITTI, G. Article 21 of the statute of the International Criminal Court and the treatment of sources of law in the jurisprudence of the ICC, in STAHN, C. SLUITER, G. (eds.), **The emerging practice of the International Criminal Court**, Martinus Nijhoff Publishers, Leiden, 2009, pp. 285-304. DE BROUWER, A.M. HEIKKILÄ, M. Victim issues: Participation, protection, reparation and assistance, in SLUITER, G. FRIMAN, H. LINTON, S. VASILIEV, S. ZAPPALÁ, S. (eds.), **International criminal procedure: Principles and rules**, Oxford University Press, Oxford, 2013, pp. 1299-1374. HOCHMAYR, G. **Applicable law in practice and theory-Interpreting article 21 of the ICC statute**, in Journal of International Criminal Justice, 12, 2014, pp. 655-679. MILANOVIĆ, M. **Is the Rome statute binding on individuals? (And why we should care)**, in Journal of International Criminal Justice, 9, 2011, pp. 25-52. DEGUZMAN, M. **Article 21-Applicable law**, in TRIFFTERER, O. (ed.), **Commentary on the Rome Statute of the International Criminal Court: Observers’ notes, article by article**, op. cit., pp. 701-712. NERLICH, V. The status of ICTY and ICTR precedent in proceedings before the ICC, in STAHN, C. SLUITER, G. (eds.), **The emerging practice of the International Criminal Court**, Martinus Nijhoff Publishers, Leiden, 2009, pp. 305-325. SCHLÜTTER, B. **Developments in customary international law: Theory and the practice of the International Court of Justice and the International Ad Hoc Criminal Tribunals for Rwanda and Yugoslavia**, Martinus Nijhoff Publishers, Leiden, 2010. TRIFFTERER, O. Can the “elements of crimes” narrow or broaden responsibility for criminal behaviour defined in the Rome statute?, in STAHN, C. SLUITER, G. (eds.), **The emerging practice of the International Criminal Court**, op. cit., pp. 381-400. VON HEBEL, H. The decision to include elements of crimes in the Rome statute, in LEE, R.S. et al. (eds.) **The International Criminal Court: Elements of crimes and rules of procedure and evidence**, Transnational Publishers, Ardsley, NY, 2001, pp. 4-8. ZAHAR, A. SLUITER, G. **International criminal law-A critical introduction**, Oxford University Press, Oxford, 2008.

<sup>253</sup>In particular see: VON LISZT, F. **The rationale for the nullum crimen principle**, in Journal of International Criminal Justice, 5, 2007, pp. 1005-1008. PAUST, J.J. **Nullum crimen and related claims**, in Denver Journal of International Law and Politics, 25, 1997, pp. 322ss. BARCO, G.E. **Rückwirkung und die Entwicklung der internationalen Verbrechen. Elemente einer allgemeinen Konzeption des nullum-crimen-sine lege Prinzips im Völkerstrafrecht**, Duncker & Humblot, Berlin, 2018. KRESS, C. **Nulla poena nullum crimen sine lege**, in Max Planck Encyclopedia of Public International Law, 2010, pp. 4ss. COTE BARCO, G.E. **Rückwirkung und die Entwicklung der internationalen Verbrechen. Elemente einer allgemeinen Konzeption des nullum-crimen-sine-lege-Prinzips im Völkerstrafrecht**, Duncker & Humblot, Berlin, 2018.

## 24 THE IMPORTANCE OF THE REASONS FOR ACTING AS A POSSIBLE SOLUTION PROPOSAL.

Another proposed solution is to avoid the multiple legal qualification of the same fact: in comparing the subjective elements of the cases in competition it is necessary that the motivations and reasons for action be considered more important than the elements of intentionality and awareness. The theory under examination is based on the premise that the volitional element of malice does not cover the objective requisites described in the context element of international crimes, subtracting it from the structural comparison between cases. Only the use of "motives for action"<sup>254</sup> would be able to show that a person wanted to commit murder in an extended or systematic attack against the civilian population<sup>255</sup>. Only the use of "motives for action", therefore, makes it possible to make a distinction between the various categories of crimes and to avoid the multiple legal qualifications of the same fact. On the contrary, in the absence of an accurate assessment of the motivations of the conduct, it is logical to conclude for the plurality of crimes. In support of this position the example of four criminal cases is reported: rape<sup>256</sup>, deportation, ethnic cleansing and apartheid<sup>257</sup>. If considered as such, these behaviors share the same subjective element, regardless of their placement within a criminal category: sexual violence as a war crime turns out to coincide on the level of malice with sexual violence as a crime against humanity. This leads, in the case of rules, to a combination of legal qualifications, since each category has at least one additional and different element consisting of its own particular contextual element. On the other hand, if in the structural comparison we consider the reasons that led the subject to act, the final solution results in appearance and, therefore, in the unit of crime. Rape as a war crime is usually committed to demoralize the enemy, to dominate it, through the humiliation and destruction of family ties; rape as a crime against humanity, on the other hand, aims to

<sup>254</sup>LIAKOPOULOS, D. *Schutz des angeklagten im Strafverfahren*, op. cit.

<sup>255</sup>OLUSANYA, O. *Double jeopardy without parameters*, op. cit., pp. 225ss.

<sup>256</sup>BIANCHI, L. The prosecution of rape and sexual violence: Lessons from prosecutions at the ICTR, in DE BROUWER, A.M. *Sexual Violence as an international crime: Interdisciplinary approaches*, ed. Intersentia, Antwerp, Oxford, 2013, pp. 125ss. NADJ, D. *International criminal law and sexual violence against women: The interpretation of gender in the contemporary international criminal trial*, ed. Routledge, London & New York, 2018.

<sup>257</sup>JACKSON, M. *A conspiracy to commit genocide. Anti-fertility research in apartheid's chemical and biological weapons programme*, op. cit., pp. 933-950.

constitute a means of ethnic cleansing<sup>258</sup>; Finally, rape qualified as genocide has as its objective the prevention of births within one of the protected groups. Likewise, while apartheid as a crime against humanity is intended to divide the population on the basis of racial criteria, the crime of genocide aims to destroy a racial group as such<sup>259</sup>. International crimes are rethought and reconceptualised as "motives crimes"<sup>260</sup> or, if we want to slightly modify an expression entered in the Italian criminal law, "contextually motivated crimes"<sup>261</sup>. This distinctive function, carried out by the motivations of acting, allows the placing of a crime within a single criminal category, avoiding the accumulation of legal qualifications. As suggestive, in our opinion the theory meets two different criticisms. In addition, its concrete application could produce an undesirable effect.

## 25 CRITIC BASED ON TYPICALITY.

The first critical profile starts from the following observation, as a legal premise of the theory: "reliance on the intent requirement would negate the chapeau element (...)"<sup>262</sup>. This is because of the fact that the intent requirement focuses primarily on the state of mind with which crimes against humanity have been committed e.g. intention to kill, rather than what prompted a person to commit crimes against humanity e.g. "(...) committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization (...)"<sup>263</sup>.

This statement can hide two closely connected critical issues. On the one hand it seems to consider the element of context as a factor unrelated to the typicality and therefore not covered by malice. The element of context increases the disvalue of the offense and must be considered as a typical element of the crime<sup>264</sup>. Consequently, it must be taken into due

<sup>258</sup>DUGARD, J. L'apartheid, in ASCENSIO, H. DECAUX, E. PELLET, A. (a cura di), **Droit international pénal**, op. cit.

<sup>259</sup>OLUSANYA, O. **Double jeopardy without parameters**, op. cit., pp. 239ss.

<sup>260</sup>STUCKENBERG, C.F. **A cure for concursus delictorum in international criminal law**, op. cit., pp. 365ss.

<sup>261</sup>LIAKOPOULOS, D. **Schutz des angeklagten im Strafverfahren**, op. cit.

<sup>262</sup>LIAKOPOULOS, D. **Schutz des angeklagten im Strafverfahren**, op. cit.

<sup>263</sup>OLUSANYA, O. **Double jeopardy without parameters**, op. cit., pp. 224-225.

<sup>264</sup>AMBOS, K. **Der Allgemeine Teil des Völkerstrafrechts. Ansätze einer Dogmatisierung**, Duncker & Humblot, Berlin, 2002, pp. 774-778. WERLE, G. **Völkerstrafrecht**, ed. Mohr Siebeck, Tübingen, 2003, pp. 300-301. CLARK, R.S. **The mental element in international criminal law**, in Criminal Law Forum, 12, 2001, pp. 327-329. CASSESE, A. **International criminal law**, Oxford University Press, Oxford, 2003, pp. 81-82.

consideration in the analysis of the structural relationship between cases and it is not necessary to resort to the intimate motivations that led the author to act. On the other hand, it is not considered that malice is composed of a volitional and a cognitive element. Asserting that the requirement of "the intent"<sup>265</sup> focuses only on conduct, forgetting about external circumstances (such as the existence of armed conflict), is correct. We must remember how art. 30 of the StICC-dedicated to the *mens rea*<sup>266</sup>-introduce, next to the "intention"<sup>267</sup>, also the requirement of "knowledge"<sup>268</sup>. A volitional element and a representative element constitute

<sup>265</sup>BAGARIC, M. MORSS, J. **International sentencing law: In search of a justification and coherent framework**, op. cit., pp. 196ss. CHIFFLET, P. BOAS, G. **Sentencing coherence in international criminal law: The cases of Biljana Plavšić and Miroslav Bralo**, op. cit., pp. 162. AMBOS, K. **Treatise on international criminal law**, op. cit., pp. 302ss. D'ASCOLI, S. **Sentencing in international criminal law: The UN ad hoc Tribunals and future perspectives for the ICC**, op. cit. DUBINSKY, A. **An examination of international sentencing guidelines and a proposal for amendments to the International Criminal Court's sentencing structure**, op. cit., pp. 612ss. SLOANE, R.D. **Sentencing for the "crime of crimes". The evolving "common law" of sentencing of the International Criminal Tribunal for Rwanda**, op. cit., 732ss.

<sup>266</sup>The law on *mens rea* is plagued with many grey areas largely due to the vagueness and inconsistent use of terms. The utmost contribution of the Model Penal Code to the scholarship of criminal law is the introduction of a limited number of culpability terms such as "purposely", "knowingly", "recklessly" and "negligently".

<sup>267</sup>The ILC's 1996 Draft Code of Crimes Against the Peace and Security of Mankind proposes to impose criminal responsibility for genocide, crimes against humanity and war crimes (as well as other crimes) on an individual who "knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime, including providing the means for its commission". The ICTY deemed the ILC Draft Code an "authoritative international instrument" In the *Einsatzgruppen* case (Trial of Otto Ohlendorf and Others (*Einsatzgruppen*)), 4 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, 572 (William S. Hein & Co., Inc. 1997) (1949) quoted in *Furundzija*, case No. IT-95-17/1-T, par. 218), the American military court also used a knowledge test, in contrast to the aforementioned purpose test, to convict defendant Fendler; the court determined that the defendant knew that executions were taking place. The ICTY Trial Chamber in *Furundzija* adopted a knowledge test: "(...) the *mens rea* required is the knowledge that these acts assist in the commission of the offence (...)". The ILC code also adopted the knowledge test. Under the ILC code, a person can only be found guilty of aiding and abetting, or otherwise assisting if they know that their help will facilitate a crime. The ILC Code is consistent with the subsequent findings of the Appeals Chamber of the *ad hoc* tribunals. The *mens rea* of aiding and abetting is knowledge that the acts performed by an individual assist the commission of the specific crime by the principal perpetrator. Under this code, the aider and abettor need not share the *mens rea* element of the principal; but instead, must be aware of the essential elements of the crime that was ultimately committed by the principal. In crimes of specific intent, such as genocide, the aider and abettor must know of the principal perpetrator's specific intent. In particular in the case of genocide, the aider and abettors must know that the people whom they are helping intend to destroy a particular national, ethnic, religious or ethnic group. See in argument: BADAR, M.E. **The concept of mens rea in international criminal law: The case for a unified approach**, Hart Publishing, Oxford & Portland, Oregon, 2013, pp. 126ss. According to the above author: "(...) a number of theories have emerged in criminal law to distinguish between *dolus eventualis* and advertent negligence, among others, consent or approval theory (*die Billigungs-oder Einwilligungstheorie*), indifference theory (*die Gleichgültigkeitstheorie*), possibility theory (*die Vorstellung-oder Möglichkeitstheorie*), probability theory (*die Wahrscheinlichkeitstheorie*), combination theory (*Kombinationstheorien*) etc. The non-exhaustive list of theories is illustrative of the plethora of approaches in the criminal law theory (...)".

<sup>268</sup>LIKOPOULOS, D. **Schutz des angeklagten im Strafverfahren**, op. cit. BADAR, M.E. **The concept of mens rea in international criminal law: The case for a unified approach**, op. cit.

an envelope that expresses a unitary psychic datum<sup>269</sup>. The difference, if anything, lies in the diversity of the elements constituting the object of malice, which the Rome Statute identifies in conduct, consequences and circumstances<sup>270</sup>. Some requirements of the offense can only be the object of knowledge, not of volition: these include certain specific circumstances in individual cases, such as the context of an institutionalized regime of oppression and domination of a racial group in the crime of apartheid, and some elements present in the context elements, such as the existence of an armed conflict or an extensive or systematic attack on the civilian population. Such circumstances can not be desired by the agent, but must be known: proof that both the war crimes and the crimes against humanity requires that the conduct be-respectively-connected with the armed conflict and placed in be under the extended or systematic attack. In addition: on what grounds is it possible to state that crimes against humanity are motivated exclusively (or tendentially) for reasons of ethnic cleansing? Or that war crimes are committed to demoralize the enemy or gain a military advantage? An account is to establish, through a statistical survey, that such crimes are usually put in place with the aforementioned reasons, other is to include them within the typicality: the first operation is of fundamental importance for that branch of criminology and psychology that deals with studying macro-contexts of violence<sup>271</sup>, but scarcely relevant for the positive criminal law in force. The risk underlying this perspective is twofold. On the one hand, by predetermining a specific motivation as the engine of action, the theory under review tells the norm what it does not say, and leads to excluding all those typical behaviors that have not been committed with a precise (arbitrarily) determined purpose. On the other hand, the absence of an exhaustive list (*rectius*: of any type of list) capable of resolving the problem of regulatory overlapping only increases the discretionality of the accusation-in the formulation

<sup>269</sup>ICC, Prosecutor v. Thomas Lubanga Dyilo, Decision on the confirmation of charges, op. cit., par. 351.

<sup>270</sup>FINNIN, S. **Mental elements under article 30 of the Rome Statute of the International Criminal Court: A comparative analysis**, in International and Comparative Law Quarterly, 2012, pp. 336ss. BADAR, M.E. PORRO, S. Rethinking the mental elements in the jurisprudence of the ICC, in STAHN, C. (a cura di), **The law and practice of the International Criminal Court**, op. cit., pp. 651ss. ESER, A. Mental elements-Mistake of fact and mistake of law, in CASSESE, A. GAETA, P. JONES, J.R.W.D. (a cura di), **The Rome Statute of the International Criminal Court**, Oxford University Press, Oxford, 2001, pp. 907ss. AMBOS, K. **Treatise on international criminal law**, op. cit., pp. 266ss. From the jurisprudence see: ICC, Prosecutor v. Bemba Gombo, Decision Pursuant to Article 61(7)(a) and (b), op. cit., par. 357. ICC, Prosecutor v. Katanga and Ngudjolo Chui, Decision on the Confirmation of Charges, op. cit., par. 529. Against the mentioned jurisprudence see the position of: ROSSKOPF, U. **Die innere Tatseite des Völkerrechtsverbrechen. Ein Beitrag zur Auslegung des Art. 30 IStGH Statut**, BWV Berliner Wissenschafts, Berlin, 2007, pp. 90ss.

<sup>271</sup>DUTTON, F.G. **The psychology of genocide, massacres, and extreme violence**, op. cit.,

of the indictments-and of the judicial body-in the judgment-in choosing the applicable standard<sup>272</sup>.

## 26 CRITIC BASED ON POSSIBLE COEXISTENCE.

A critical issue is to question the philosophical premise on which the theory is based implicitly, or that the basis of human action is constituted by a single motivation only. To deny this premise would be to overthrow the supposed solution capacity of the theory<sup>273</sup>. Using the form of logical reasoning, one should in fact conclude that: if more than one reason can compete, then more criminal offenses can compete. Consequently, even assuming that each criminal category needs one or more specific motivations, the plurality of crimes could not be excluded. The problem of the competition of rules would remain unresolved whenever it was possible to show that the reasons that led the author to undertake the criminal path are more. In this regard, as is well known, the theory of action has always acknowledged the coexistence of several intentions, aims, purposes or motives<sup>274</sup>. The same situation can occur in international criminal law. A deportation as a means of ethnic cleansing (crime against humanity) can be committed both to eliminate multiple subjects belonging to an ethnic group with the intention of destroying the group as such (genocide) and with the intention of demoralizing the enemy (war crime). The importance of the reasons for the action, rather than to resolve the competition of rules with the risk of subjectivizing the structural comparison between cases, should be noted at the level of aggravating circumstances or as a criterion for commensurate sentence, subjecting the case, ending up replacing the questions "what crime

<sup>272</sup>In particular see the dissenting opinion of the judge Wald in case Jelisić, which has stated that: "(...) the view that there is no additional public interest in determining a genocide charge simply because the underlying killings have already been dealt with as crimes against humanity and violations of the laws or customs of war may be problematic in the development of international criminal law (...)": ICTY, Prosecutor v. Goran Jelisić, Partial Dissenting Opinion of Judge Wald, AC, IT-95-10-A, 5 July 2001, par. 13. See, METTRAUX, G. **International crimes and the ad hoc Tribunals**, op. cit., pp. 315ss.

<sup>273</sup>STUCKENBERG, C.F. **A cure for concursus delictorum in international criminal law**, op. cit., pp. 369ss.

<sup>274</sup>GOLDMAN, A.I. **A theory of human action**, Princeton Legacy Library, Princeton, 2016. FEINBERG, J. **Doing and deserving: Essays in the theory of responsibility**, Princeton University Press, Princeton, 1974, pp. 134. GOLDMAN, A.I. **The individuation of action**, in Journal of Philosophy, 68, 1971, pp. 762ss. FEINBERG, J. Action and responsibility, in BLACK, M. (a cura di), **Philosophy in America**, Cornell University Press, Ithaca, 1965, pp. 134-160. AUSTIN, J.L. A plea for excuses, in CHAPPELL, V.C. (a cura di), **Ordinary language: Essays in philosophical method**, Dover, New York, 1964, pp. 1-30. WIENER, N. **Excuses, justifications and duress at the international criminal tribunals**, in Pace International Law Review, 26, 2014, pp. 92ss. KRABE, M. **Excusable evil: An analysis of complete defenses in international criminal law**, ed. Intersentia, Antwerp, Oxford, 2014.

has been objectively committed?" and "what legal description of the fact is the most (also politically) appropriate?" with "what led the author to act?". Thus, the motivation present in the mind of the author-among other things, not easy to ascertain in court-overrides objective reality and ends up being the only guiding criterion for the prosecutor's body<sup>275</sup>.

## 27 THE RISK OF ECLIPSE OF CRIMES AGAINST HUMANITY.

In addition to the criticisms previously made, the concrete application of the theory of the reasons for action could generate an undesirable and quite peculiar effect: the eclipsing of the category of crimes against humanity. The latter can abstractly compete with the crime of genocide and war crimes. In the first case, it can be assumed that the specific intent of wanting to destroy a protected group in whole or in part prevails over the aims of ethnic cleansing; this means that in the case of regulatory convergence between the crime of genocide and crimes against humanity the appearance of the competition will always be resolved in favor of the first. In the second case it is undoubtedly simpler for a prosecutor to demonstrate that a conduct is carried out for war purposes rather than ethnic cleansing<sup>276</sup>. The categories of "military advantage" or "demoralization of the enemy" are much wider than "ethnic cleansing", which implicitly requires proof of a juxtaposition between groups and a discriminatory intent<sup>277</sup>. Consequently, even the normative convergence between war crimes and crimes against humanity seems to resolve in the majority of cases in favor of the former. The assumptions presented here seem to be confirmed by the fact that the author who proposed the theory of action motives, at the end of his volume on the competition of rules, proposes to reduce international crimes to just two categories: the crime of genocide (which it covers crimes against humanity) and war crimes. Eliminating-or subsuming-an entire criminal category is the most secure and direct path to reducing possible regulatory convergences<sup>278</sup>.

<sup>275</sup>MAY, L. HOSKINS, Z. **International criminal law and philosophy**, Cambridge University Press, Cambridge, 2014, pp. 202ss.

<sup>276</sup>DUGARD, J. L'apartheid, in ASCENSIO, H. DECAUX, E. PELLET, A. (a cura di), **Droit international pénal**, op. cit.

<sup>277</sup>SCHÜNEMANN, R. **Strafverfahrensrecht**, ed. C.H. Beck, München, 2012, pp. 439ss. SCHUON, C. **International criminal procedure: A clash of legal cultures**, T.M.C. Asser Press, The Hague, 2010. SCHUETZE-REYMAN, J. **International criminal justice on trial. The ICTY and ICTR case referral practice to national Courts and its possible relevance for the ICC**, ed. Duncker & Humblot, Berlin, 2016.

<sup>278</sup>OLUSANYA, O. **Emotions, decision-making and mass atrocities. Through the lens of the macro-micro integrated theoretical model**, Ashgate Publishing, Farnham, 2014.

But it is not the most sensitive way. The proposal (provocative) of the author offers the opportunity to question himself on a further profile: what makes each category criminal and deserving of criminal protection unique? Why is it necessary to keep them all? The search for an answer to these questions necessarily passes through the analysis of the negative value that each category expresses, and allows us to base the solution of the competition of rules on an objective parameter: offensiveness.

## 28 THE HIERARCHY OF INTERNATIONAL CRIMES AS A POSSIBLE SOLUTION PROPOSAL.

In the structural comparison between the typical elements of international crimes it has been seen that it is necessary also to cover the element of context, since the latter, thanks to its incriminating function, helps to delineate the particular disvalue of a conduct by qualifying it as an international crime<sup>279</sup>. The existence of a hierarchy of international crimes can be useful in order to resolve the competition of norms because it makes it possible to establish relations of contiguity between situations based on their greater or lesser extent offensive. The jurisprudence and the doctrine are divided and have offered contrasting opinions that have both supported and denied the existence of a hierarchy<sup>280</sup>. Despite the diversity of opinions, it

<sup>279</sup>DANNER, A.M. **Constructing a hierarchy of crimes in international criminal law sentencing**, in Virginia Law Review, 87, 2001, pp. 465ss. In jurisprudence see: ICTY, Prosecutor v. Tihomir Blaškić, Trial Judgment, op. cit., par. 803-804. ICTY, Prosecutor v. Dražen Erdemović, Judgment, AC, IT-96-22-A, 7 October 1997, par. 10.

<sup>280</sup>CARCANO, A. **Sentencing and the gravity of the offence in international criminal law**, op. cit., pp. 583-609. OLUSANYA, O. **Do crimes against humanity deserve a higher sentence than war crimes?**, in International Criminal Law Review, 4, 2004, pp. 431-473. AKHAVAN, P. **Reducing genocide to law. Definition, meaning, and the ultimate crime**, Cambridge University Press, Cambridge, 2012, pp. 58ss. VAN DEN HERIK, L.J. **The contribution of the Rwanda Tribunal to the development of international law**, Martinus Nijhoff Publishers, Leiden-Boston, 2005, pp. 199ss. AMBOS, K. **Treatise on international criminal law**, op. cit., pp. 251ss. D'ASCOLI, S. **Sentencing in international criminal law**, op. cit., pp. 307ss. MAY, L. **Crimes against humanity. A normative account**, op. cit., pp. 158-160. In jurisprudence see: ICTY, Prosecutor v. Dražen Erdemović, Appeals Judgment, op. cit., par. 27. ICTY, Prosecutor v. Dražen Erdemović, Joint Separate Opinion of Judge McDonald and Judge Vohrah, AC, IT-96-22-A, 7 October 1997. ICTY, Prosecutor v. Duško Tadić, Separate Opinion of Judge Cassese, AC, IT-94-1-A e IT-94-1-A bis, 26 January 2000, par. 16. ICTY, Prosecutor v. Anto Furundžija, Declaration of Judge Vohrah, AC, IT-95-17/1-A, 21 July 2000, par. 5. ICTR, Prosecutor v. Georges Rutaganda, Judgment and Sentence, TC, ICTR-96-3-T, 6 December 1999, par. 451. ICTR, Prosecutor v. Kayishema and Ruzindana, Judgment, TC-II, ICTR-95-1-T, 21 May 1999, and Kayishema and Ruzindana, Dissenting Opinion of Judge Tafazzal Hossain Khan, TC-II, ICTR-95-1-T, 21 May 1999, par. 9. ICTR, Prosecutor v. Omar Serushago, Sentence, TC, ICTR, 98-39-S, 5 February 1999, par. 4. ICTR, Prosecutor v. Jean Kambanda, Judgment and Sentence, op. cit., par. 16. ICTR, Prosecutor v. Alfred Musema. Judgment and Sentence, TC, ICTR-96-13-A, 27 January 2000, par. 981. Unfavorable for the formulation of a hierarchy in doctrine: BOGDAN, A. **Cumulative charges, convictions and sentencing**, op. cit., pp. 3ss. BOOK, J.P. **Appeal and sentence in international criminal law**, op. cit., In jurisprudence see also: ICTY, Prosecutor v. Dražen

is interesting to anticipate that all the voices agreed in promoting a hierarchy of international crimes end up considering genocide as the most serious case, followed by crimes against humanity and, lastly, by war crimes. The question of the hierarchy of international crimes has emerged since the first sentence of the ICTY. In Erdemović case the Appeals Chamber stated that crimes against humanity<sup>281</sup> constitute a more serious indictment of war crimes and reduced the punishment of imprisonment from one to five years<sup>282</sup>. In another opinion, the dissenting opinion of Judge Li, according to which the seriousness of a crime is determined by the intrinsic nature of the act and not by its classification within a criminal category<sup>283</sup>. In *Tadić* case the dispute was revived, but reversed: the majority affirmed that it is not possible to establish any distinction between the gravity of a crime against humanity and a war crime<sup>284</sup>, while the separate opinion of judge Cassese supported the need to impose a more severe punishment for crimes against humanity than war crimes<sup>285</sup>. Despite the many conflicting opinions, the jurisprudence of the ICTY ended up not adopting a hierarchy of crimes, as evidenced by the judgments following the *Tadić* case<sup>286</sup>. On the other hand, the International Criminal Tribunal for Rwanda (ICTR) has qualified genocide as the most serious crime ("the crime of crimes")<sup>287</sup>, followed by crimes against humanity and war crimes<sup>288</sup>. An

---

Erdemović, Separate and Dissenting Opinion of Judge Li, AC, IT-96-22-A, 7 October 1997, par. 19. ICTY, Prosecutor v. Duško Tadić, Separate Opinion of Judge Robinson, TC, IT-94-1-Tbis-R117, 11 November 1999, 2. ICTY, Prosecutor v. Duško Tadić, Judgment in Sentencing Appeals, op. cit., par. 69. ICTY, Prosecutor v. Duško Tadić, Separate Opinion of Judge Shahabuddeen, AC, IT-94-1-A e IT-94-1-A bis, 26 January 2000, 41ss. ICTY, Prosecutor v. Kunarac et al., Trial Judgment, op. cit., par. 860. ICTY, Prosecutor v. Tihomir Blaškić, Trial Judgment, op. cit., par. 801.

<sup>281</sup>ICTY, Erdemović Dražen, Judgment, AC, IT-96-22-A, op. cit.

<sup>282</sup>ICTY, Prosecutor v. Dražen Erdemović, Appeals Judgment, op. cit., par. 27. See for analysis, YEE, S. **The Erdemović sentencing judgment: A questionable milestone for the International Criminal Tribunal for the Former Yugoslavia**, in Georgia Journal of International and Comparative Law, 26, 1997, pp. 272ss.

<sup>283</sup>ICTY, Prosecutor v. Dražen Erdemović, Separate and Dissenting Opinion of Judge Li, op. cit., par. 19.

<sup>284</sup>ICTY, Prosecutor v. Duško Tadić, Judgment in Sentencing Appeals, op. cit., par. 69.

<sup>285</sup>ICTY, Prosecutor v. Duško Tadić, Separate Opinion of Judge Cassese, op. cit., par. 16.

<sup>286</sup>ICTY, Prosecutor v. Kunarac et al., Trial Judgment, op. cit., par. 860, that is affirmed: "(...) in line with recent Appeals Chamber determinations, the Trial Chamber does not consider that crimes against humanity should in principle attract a higher sentence than war crimes (...)". ICTY, Prosecutor v. Tihomir Blaškić, Trial Judgment, op. cit., par. 801. ICTY, Prosecutor v. Anto Furundžija, Judgment, AC, IT-95-17/1-A, 21 July 2000, par. 243. See also the declaration of judge Vohrah: ICTY, Prosecutor v. Anto Furundžija, Declaration of Judge Vohrah, AC, IT-95-17/1-A, 21 July 2000, par. 5.

<sup>287</sup>LÓPEZ, R. **The duty to refrain: A theory of State accomplice liability for grave crimes**, in Nebraska Law Review, 97, 2018, pp. 122ss.

<sup>288</sup>ICTR, Prosecutor v. Georges Rutaganda, Judgment and Sentence, op. cit., par. 451. ICTR, Prosecutor v. Kayishema and Ruzindana, Trial Judgment, op. cit., par. 9. ICTR, Prosecutor v. Omar Serushago, Sentence, op. cit., par. 4. ICTR, Prosecutor v. Jean Kambanda, Judgment and Sentence, op. cit., par. 16. ICTR, Prosecutor v. Alfred Musema. Judgment and Sentence, op. cit., par. 981. See also: CLARK, J.N. **The "crime of crimes"**:

analysis of the reasons in support of both the theses-the one favorable to the hierarchy of crimes and the one that considers them to be of equal gravity-arises as necessary for the purposes of the solution of the competition. As will be seen, although the ICC has not yet been expressed in the matter, a hierarchy of crimes can be considered to exist even within the system created by the Rome Statute.

## 29 VERSUS A HIERARCHY OF INTERNATIONAL CRIMES?

There are several reasons to support the existence of a hierarchy of international crimes. We can base the hierarchy on the criterion of damage (or endangerment) that criminal conduct brings to the international community<sup>289</sup>, and the legal good protected by the norm becomes the decisive factor for classifying-according to a scale of objective gravity-international crimes. Genocide is the most serious crime because it aims to protect national, ethnic, racial and religious groups from collective and discriminatory action directed towards their total or partial destruction. The crimes against humanity, being directed at preventing an extensive or systematic attack against the civilian population, are placed on the second step of the hierarchy. Finally, war crimes, by not requiring any collective action or political plan, represent the least offensive cases for the international community<sup>290</sup>, thus focusing attention

---

**genocide, criminal trials and reconciliation**, in *Journal of Genocide Research*, 14, 2012, pp. 55-77. VAN DEN HERIK, L.J. **The contribution of the Rwanda Tribunal**, op. cit., pp. 199. MAY, L. **Crimes against humanity. A normative account**, op. cit., pp. 158-160.

<sup>289</sup>CHERIF BASSIOUNI, M. The sources and content of international criminal law: A theoretical framework, in CHERIF BASSIOUNI, M. (a cura di), **International criminal law. Volume I, Sources, subjects and contents**, Martinus Nijhoff Publishers, The Hague, 2008, pp. 95-100. BOGDAN, A. **Cumulative charges, convictions and sentencing**, op. cit., pp. 4ss. Seven factors are taken into account for the purpose of assessing the offensive flow of pipelines: a) the social interest sought to be protected; b) the harm sought to be averted; c) the intrinsic seriousness of the violation; d) the dangerousness of the transgressor manifested by the commission of a given transgression; e) the degree of general deterrence sought to be manifested; f) the policy of criminalization; g) the policy choices reflected in the opportunity of criminal prosecution.

<sup>290</sup>BOGDAN, A. **Cumulative charges, convictions and sentencing**, op. cit., pp. 4, according to which: "(...) the protected social interest is greater with respect to genocide and crimes against humanity, since the scale of victimisation, and the consequences for the rest of society, and the international community, are potentially more serious (...)". In the same spirit the dissenting opinion of judge A. Cassese in case Tadić, which has stated: "(...) if classified as a crime against humanity, the murder possesses an objectively greater magnitude and reveals in the perpetrator a subjective frame of mind which may imperil fundamental values of the international community to a greater extent than in the case where that offence should instead be labelled as a war crime. The international community and the judicial bodies responsible for ensuring international criminal justice therefore have a strong societal interest in imposing a heavier penalty upon the author of such a crime against humanity, thereby also deterring similar crimes (...)". ICTY, Prosecutor v. Duško Tadić, Separate Opinion of Judge Cassese, AC, IT-94-1-A e IT-94-1-A bis, 26 January 2000, par. 16.

on the context element. In the structural comparison between cases, as is known, it plays a role of fundamental importance because it helps to determine the severity of the offense. Using the crime of murder as a paradigmatic example, it is stated that the murder described as a crime against humanity is characterized by the fact that the conduct is part of an extensive or systematic attack against the civilian population; on the other hand, murder as a war crime does not require any collective context, but only the awareness of acting in the context of an armed conflict. Consequently, the element of war crimes context expresses a degree of offensiveness that is qualitatively inferior to that of crimes against humanity<sup>291</sup>, being unable to increase neither the objective negative value of the conduct nor the degree of guilt of the author. In the same way, the crime of genocide turns out to be more serious than crimes against humanity because the specific malice that characterizes it increases the negative value-on the subjective level-of the action<sup>292</sup>. Equally important is the hierarchy of crimes by making a single reference to the *mens rea*<sup>293</sup> of the context element of each criminal category, which incorporates the notions of "collective perpetration"<sup>294</sup> and "collective victimization"<sup>295</sup>

<sup>291</sup>FRANCISCO, M.I.F. **Aspects of implementing the culpability principle both under international and national criminal law**, Wolf Legal Publishers, The Hague, 2008.

<sup>292</sup>AMBOS, K. **Treatise on international criminal law**, op. cit., pp. 252ss. CARCANO, A. **Sentencing and the gravity of the offence**, op. cit., pp. 607ss. O. OLUSANYA, **Do crimes against humanity deserve a higher sentence than war crimes?**, op. cit., pp. 431ss.

<sup>293</sup>The *mens rea* purpose test is not unique to the ICC. The provisions for complicity by aiding and abetting-which appear in the legal instruments of the East Timor Panels of Judges and the IHT955Article 15(2)(c) of the IHT Statute. A similar purpose test is applied in a number of domestic jurisdictions: Canada's Section 21(1)(b) of the Criminal Code, R.S.C. 1985, c. C-46 and New Zealand's Section 66(1) Crimes Act 1961; the Model Penal Code of the American Law Institute; Section 14(3)(c) of Regulation 2000/15. East Timor was annexed as a province to Indonesia from 1975 up until 1999 when the East Timorese population voted for their independence. Following a violent campaign allegedly perpetrated by pro-Indonesian militias against the Timorese population, East Timor gained its independence in 2002. UNTAET, the provisional authority established in East Timor in the aftermath of Indonesia's withdrawal, set up Panels of Judges with Exclusive Jurisdiction over Serious Criminal Offences Established within the East Timor District Courts to deal with the grave violations of international humanitarian law and human rights that were committed in East Timor during 1999 (see generally, United Nations Mission of Support in East Timor. Farrell's approach here seems to be in keeping with the brief observations made by the Pre-Trial Chamber in The Prosecutor v. Callixte Mbarushimana, and also the manner in which the Panels of Judges attributed accomplice liability in East Timor. See, Deputy Prosecutor General for Serious Crimes and the U.C. Berkeley War Crimes Studies Center American Law Institute, Model Penal Code: Official Draft and Explanatory Notes, Complete Text of Model Penal Code as Adopted at the 1962 Annual Meeting of the American Law Institute at Washington, D.C., May 24, 1962 (1985); The Prosecutor v. Callixte Mbarushimana (Decision on the Confirmation of Charges) (International Criminal Court, Case No ICC-01/04-01/10, 16 December 2011) (281), where the Chamber noted that: "(...) the jurisprudence of the *ad hoc* tribunals does not require the aider and abettor to share the intent of the perpetrator to commit the crime, whereas under article 25(3)(c) of the Statute the aider and abettor must act with the purpose of facilitating the commission of that crime (...)". and for the UNTAET, see, Section 14(3)(c) of Regulation 2000/15.

<sup>294</sup>WERLE, G. JESSBERGER, F. **Principles of international criminal law**, op. cit.,

<sup>295</sup>JAIN, N. **Perpetrators and accessories in international criminal law. Individual modes of responsibility**

absent in the descriptions of the individual conduct<sup>296</sup>. War crimes can also be committed by a single soldier without acting in the context of a collective action, given that the war itself is not a criminal phenomenon and the context element does not require the presence of a collective plan nor the direction of the deeds towards a particular group of individuals<sup>297</sup>.

For these reasons war crimes represent the criminal category with the least offensive disvalue. The situation is different with regard to crimes against humanity. The element of context requires, in fact, that the author is aware of acting in the context of an extensive or systematic attack (active collective dimension) against the civilian population (passive collective dimension)<sup>298</sup>. As stated by the ICTY Chamber of first instance in the Tadić case "(...) the emphasis is not on the individual victim but rather on the collective, the individual being victimised not because of his individual attributes but rather because of his membership of a targeted civilian population (...)"<sup>299</sup>. For this reason crimes against humanity express a greater offensive against war crimes. Finally, the crime of genocide constitutes the most serious crime because of the specific malice that expresses the desire to destroy a protected group in whole or in part: the greatest disvalence therefore lies in the intention to provoke collective destruction on a discriminatory basis<sup>300</sup>. Regardless of the multiple justifications put forward to support the existence of a hierarchy of crimes, it is possible to note that all the different theories are united by the fact that the greater (or least) collective influence directly affects the overall disvalue of the fact, or that the crimes international organizations have a collective nature and offend legal assets belonging to the international community<sup>301</sup>.

---

for collective crimes, Hart Publishing, Oxford & Portland, Oregon, 2014.

<sup>296</sup>DANNER, A.M. **Constructing a hierarchy of crimes**, op. cit., pp. 470-471.

<sup>297</sup>RODRÍGUEZ-VILLASANTE Y PRIETO, J.L. **La protección del niño los conflictos armados por el derecho internacional humanitario los niños soldados**, in AFDUAM: Anuario de la Facultad de Derecho de la Universidad Autónoma de Madrid, 15, 2011, pp. 220ss.

<sup>298</sup>DINSTEIN, Y. Crimes against humanity, in MAKARCZYK, J. (a cura di), **Theory of international law at the threshold of the 21st Century. Essays in Honour of Krzysztof Skubiszewski**, ed. Brill/Martinus Nijhoff Publishers, Leiden, 1996, pp. 903ss.

<sup>299</sup>ICTY, Prosecutor v. Duško Tadić, Opinion and Judgment, op. cit., par. 644.

<sup>300</sup>DANNER, A.M. **Constructing a hierarchy of crimes**, op. cit., par. 482. VERDIRAME, G. **The genocide definition in the jurisprudence of the ad hoc Tribunals**, in International and Comparative Law Quarterly, 49, 2000, pp. 588ss. This subjectivist approach, which identifies in the specific malice the most serious element of the crime of genocide, is in line with the jurisprudence of the ICTR. See, ICTR, Prosecutor v. Georges Rutaganda, Judgment and Sentence, op. cit., par. 451. ICTR, Prosecutor v. Kayishema and Ruzindana, Trial Judgment, op. cit., par. 9. ICTR, Prosecutor v. Omar Serushago, Sentence, op. cit., par. 4. ICTR, Prosecutor v. Jean Kambanda, Judgment and Sentence, op. cit., par. 16. ICTR, Prosecutor v. Alfred Musema. Judgment and Sentence, op. cit., par. 981.

<sup>301</sup>The ICTY Trial Chamber in Furundzija adopted a knowledge test for aiding and abetting, the Rome Statute of

### 30 THE EQUAL APPROACH "PLAYS" AGAINST THE DETRIMENT OF A HIERARCHY OF INTERNATIONAL CRIMES.

The formulation of a hierarchy of international crimes revolves around the same initial consideration: it is not possible-on an abstract level-to consider crimes against humanity as a category more offensive than war crimes because the gravity of a fact always depends from the modalities of commission and concrete verification of the harmful conduct and event<sup>302</sup>. A similar approach can be found in the dissenting opinion of judge Li in the *Erdemović* case<sup>303</sup>, which states that the seriousness of a conduct is determined by the intrinsic nature of the act in and of itself, and can not and must not depend on the legal qualification of the fact<sup>304</sup>. The

---

the ICC adopted a purpose test. Article 25(3)(c) of the Rome Statute makes one who, "(...) for the purpose of facilitating the commission of such a crime, aids, abets, or otherwise assists in its commission or its attempted commission, including providing the means for its commission (...) criminally responsible (...)". This phrase introduced a mental element that went beyond the ordinary *mens rea* requirement of intent and knowledge required for other crimes under the Rome Statute and from the knowledge test. See for details, VAN SLIEDREGT, E. **Individual criminal responsibility in international law**, op. cit., pp. 20ss. VAN DER WILT, H. NOLLKAEMPER, A. (a cura di), **System criminality in international law**, op. cit., STEPHENS, P.J. **Collective criminality and individual responsibility: The constraints of interpretation**, in *Fordham International Law Journal*, 2014, pp. 508ss. VIJ, V. **Individual criminal responsibility under aiding and abetting after the specific direction requirement in the Taylor and Perišić cases**, in *Die Friedens-Warte*, 2013, pp. 160ss. CCOURTNEY, J. KAOUTZANIS, C. **Proactive gatekeepers: The jurisprudence of the ICC's pre-trial Chambers**, in *Chicago Journal of International Law*, 2015, pp. 525ss. GOY, B. **Individual criminal responsibility before the International Criminal Court: A comparison with the ad hoc Tribunals**, in *International Criminal Law Review*, 2012, pp. 34ss. GRÉCIANO, P. **Justice pénale internationale**, ed. Mare & Martin, Paris, 2016. GROVER, L. **Interpreting crimes in the Rome statute of the International Criminal Court**, Oxford University Press, Oxford, 2016. KUCHER, O. PETRENKO, A. **International criminal responsibility after Katanga: Old challenges, new solutions**, in *Russian Law Journal*, 3, 2015, pp. 144ss.

<sup>302</sup>BAGARIC, M. MORSS, J. **International sentencing law in search of a justification and coherent framework**, in *International Criminal Law Review*, 6, 2006, pp. 214-217. D'ASCOLI, S. **Sentencing in international criminal law**, op. cit., pp. 148-149. BURKHARDT, S.U. **Violence à l'Égard des Femmes en Situation de Conflit armé**, in *Finnish Yearbook of International Law. Volume IX*, Brill/Martinus Nijhoff Publishers, The Hague, 1998, pp. 448ss. In giurisprudence see: ICTY, Prosecutor v. Kunarac et al., Trial Judgment, op. cit., par. 860. ICTY, Prosecutor v. Anto Furundžija, Appeals Judgment, TC, IT-95-17/1-T, 10 December 1998, par. 240-243. ICTY, Prosecutor v. Mrkšić et al., Trial Judgment, op. cit., par. 684. ICTR, Prosecutor v. Nahimana et al., Appeals Judgment, op. cit., par. 1060. See also: BOTTE-KERRISON, A. **Responsibility for bystanders in mass crimes. Towards a duty to rescue in international criminal justice**, in *International Criminal Law Review*, 17, 2017, pp. 882ss. MARTINS AMORIUM DUTRA, B. **Criminal responsibility in the crimes committed by organized structures of power: Jurisprudence analysis in the light of international criminal law**, in *Revista de Faculdade de Direito da UERJ*, 37, 2012, pp. 5ss. DEGUZMAN, M. **The International Criminal Court's gravity jurisprudence at ten**, in *Washington University Global Studies Law Review*, 12, 2013, pp. 476ss. SHANY, Y. **Assessing the effectiveness of international Courts: A goal-based approach**, in *American Journal of International Law*, 106, 2012, pp. 225ss. SHANY, Y. **How can international criminal Courts have a greater impact upon national criminal proceedings? Lessons from the first two decades of international criminal justice in operation**, in *Israel Law Review*, 46, 2013, pp. 4ss.

<sup>303</sup>ICTY, Prosecutor v. Dražen Erdemović, Separate and Dissenting Opinion of Judge Li, op. cit.,

<sup>304</sup>ICTY, Prosecutor v. Dražen Erdemović, Separate and Dissenting Opinion of Judge Li, op. cit., par. 19.

judge compares the killing of a small number of civilians (murder as a crime against humanity) with the death of a million people following the bombing of a small town (murder as a war crime): in this case we can perhaps argue that the second crime is less damaging than the first?<sup>305</sup> Given that a war crime can be "as a whole and as odious"<sup>306</sup> of a crime against humanity, setting up a hierarchy of crimes at an abstract level is an irrelevant juridical operation, even before it was wrong and dangerous. Irrelevant because, having all international crimes the same offensive capacity, are the circumstances of the specific case that determine, from time to time, what is the most serious case. The need to measure, ex post, with the concrete fact, therefore, consumes the presumed resolute capacity of the formulation of an abstract hierarchy among the criminal categories. Wrong because the offensive scope can not be determined in the abstract, but is inextricably linked to the concrete ways of expressing the action. This would be confirmed by the absence of forecasts of minimum and maximum edicts for each crime. Dangerous because there is the risk of questioning the negative value inherent in war crimes, considered ex ante as the category with less harmful capacity.

### **31 LIMITATION OF APPLICABILITY OF THE HIERARCHY TO THE CASES OF COMPETITION OF NORMS ACCORDING TO THE *CETERIS PARIBUS* CLAUSE.**

According to our opinion the debate about the existence of a hierarchy of international crimes has been animated by an initial misunderstanding that has conditioned its outcomes, namely the distinction between an abstract hierarchy and a concrete hierarchy. The criticisms made against the formulation of a hierarchy start from the consideration that it is not possible on an abstract and general level to consider a criminal category as less offensive than another. This position can be shared: the mere comparison between the legal assets protected by the rules in competition and between the objective and subjective elements of the context is not sufficient, alone, to establish which criminal conduct is more serious. International crime is a complex case based on the two poles of the context element and of the individual conduct. Accordingly, affirming that a crime against humanity is ever more serious than a war crime

<sup>305</sup>ICTY, Prosecutor v. Dražen Erdemović, Separate and Dissenting Opinion of Judge Li, op. cit., par. 20.

<sup>306</sup>ICTY, Prosecutor v. Duško Tadić, Separate Opinion of Judge Shahabuddeen, op. cit., 41.

means accepting the (paradoxical) conclusion that the limitation of certain civil rights imposed on a racial group (apartheid as a crime against humanity) has greater offensive capacity than the killing of a large number of civilians through the use of a weapon of mass destruction (murder as a war crime)<sup>307</sup>.

However, the examples reported by critics of the hierarchy are often misleading. Think of what was affirmed in the dissenting opinion of judge Li, in which he compares the killing of a small number of civilians with the death of one million people following the bombing of a town<sup>308</sup>. In this case, the comparison is flawed in its original core because the damaging events are different already at the level of typical behaviors, even before the context element: the facts are different, and the difference that they express, regardless of their classification within one of the criminal categories. A different conclusion can be reached by comparing the criminal categories *ceteris paribus*, or on the assumption of the "equality of conditions": in this way the comparison judgment no longer concerns the abstract disvalence expressed by the individual rules, but has the same conduct and/or the same damaging event<sup>309</sup>. In other words, the *ceteris paribus* clause makes it possible to confine the usefulness of the formulation of a hierarchy of international crimes to the hypothesis of inter-categorical

---

<sup>307</sup>VAN DER HAVE, N. **The prevention of gross human rights violations under international human rights law**, ed. Springer, Berlin, 2018. JALLOH CHEVROR, C. MARONG A., **Promoting accountability under international law for gross human rights violations in Africa. Essays in honour of prosecutor hasan Bubacar Jallow**, ed. Brill, The Hague, 2015. CAMARGOS, L.A. **A responsabilidade penal internacional dos indivíduos: Estudo do caso Darfur**, in Revista de Direito Brasileira, 2013, pp. 199ss. NOLLEZ-GOLDBACH, R. SAADA, J. **La justice pénale internationale face aux crimes de masse**, ed. Pedone, Paris, 2014. BOWERS, A. **International Criminal Court**, Wolf Legal Publishers, The Netherlands, 2011. WHARTON, S. **The evolution of international criminal law: prosecuting "new" crimes before the Special Court for Sierra Leone**, in International Criminal Law Review, 11, 2011, pp. 218ss. RODMAN, K.A. **Justice is interventionist: The political sources of the judicial reach of the Special Court for Sierra Leone**, in International Criminal Law Review, 13, 2013, pp. 65ss.

<sup>308</sup>ICTY, Prosecutor v. Dražen Erdemović, Separate and Dissenting Opinion of Judge Li, cit., par. 20. See in argument: STOLK, S. **Imaging scenes of mass atrocity from afar: Maps and landscapes at the International Criminal Court**, in London Review of International Law, 6, 2018. AINLEY, K. **The International Criminal Court on trial**, in Cambridge Review of International Affairs, 24, 2011. TIEMESSEN, A. **The International Criminal Court and the politics of prosecutions**, in The International Journal of Human Rights, 22, 2014. CAYLEY, A.T. **Prosecuting mass atrocities at the Extraordinary Chambers in the Courts of Cambodia (ECCC)**, in Washington University Global Studies Law Review, 11, 2012, pp. 446ss. KLABERS, J. **Just revenge? The deterrence argument in international criminal law**, in Finnish Yearbook of International Law, 12, 2012, pp. 25ss. CRONIN-FURMAN, K. **Managing expectations: International criminal trials and the prospects for deterrence of mass atrocity**, in The International Journal of Transitional Justice, 7, 2013, pp. 438ss.

<sup>309</sup>AMBOS, K. **Treatise on international criminal law**, op. cit., pp. 254ss. D'ASCOLI, S. **Sentencing in international criminal law**, op. cit., pp. 306ss. DANNER, A.M. **Constructing a hierarchy of crimes**, op. cit., pp. 477. ICTY, Prosecutor v. Dražen Erdemović, Appeals Judgment, op. cit., par. 27. ICTY, Prosecutor v. Duško Tadić, Separate Opinion of Judge Cassese, op. cit., par. 16.

competition of norms, in which criminal categories contribute to the juridical qualification of the same fact<sup>310</sup>. Since the injurious event is the same, the elements that must be taken into due consideration in the structural comparison between cases are limited to the requirements imposed by the context element. And if we agree that the intention to destroy a protected group in whole or in part brings with it greater offensive disvalence than the mere awareness of acting in the context of an attack against the civilian population or during an armed conflict, the appeal only the crime of genocide is sufficient for the purposes of the legal classification of the fact.

In the hypothesis of normative convergences, the comparison-in terms of gravity-of the offensive scope of the various criminal categories acquires a fundamental meaning and function because it allows to resolve the competition in favor of appearance and with a predetermined, predictable and, above all, immutable criterion<sup>311</sup>. One last question arises: since each criminal category is intended to protect peculiar legal assets, does not the absorption made in the name of the hierarchy of crimes run the risk of subtracting some typical fundamental elements for the purposes of the best legal assessment of the fact? Resolving the competition in favor of the genocide could give rise to the objection that by proceeding some circumstances are ignored-such as the presence of a systematic attack against the civilian population or the armed conflict-which contribute to increasing the negative value of the event. These perplexities can be answered by the fact that the existence of a hierarchy of international crimes makes it possible to resolve the competition on the same fact in favor of the unit of crimes, and at the same time allows the full extent of the offensive to be assessed. How? Thanks to the use of aggravating (or extenuating) circumstances. Once

<sup>310</sup>AMBOS, K. **Treatise on international criminal law**, op. cit., pp. 253ss. D'ASCOLI, S. **Sentencing in international criminal law**, op. cit., pp. 220 ss. MEERNIK, J. KING, K. **The sentencing determinants of the International Criminal Tribunal for the Former Yugoslavia**, op. cit., pp. 734-736. HOLÁ, B. SMEULERS, A. BIJLEVELD, C. **International sentencing facts and figures, sentencing practice at the ICTY and ICTR**, op. cit., pp. 437ss. HOLÁ, B. BIJLEVELD, C. SMEULERS, A. **Consistency of international sentencing: ICTY and ICTR case study**, in *European Journal of Criminology*, 9, 2012, pp. 546ss.

<sup>311</sup>AMBOS, K. **Treatise on international criminal law**, op. cit., pp. 250ss. ZIMMERMANN, A. Superior orders, in CASSESE, A. GAETA, JONES, J. R.W.D. (a cura di), **The Rome Statute of the International Criminal Court**, op. cit., pp. 970ss. GAETA, P. **The defence of superior orders: The Statute of the International Criminal Court versus customary international law**, in *European Journal of International Law*, 10, 1999, pp. 189ss. TRIFFTERER, O. BOCK, S. Article 33, in TRIFFTERER, O. AMBOS K. (a cura di), **The Rome Statute of the International Criminal Court**, op. cit., 1195ss. LIAKOPOULOS, D. **The defence of superior order in common law system. Approaches and influences in international criminal law**, in *Jindal Global Law Review*, 5, 2014.

the competition in favor of appearance has been resolved, in determining the sentence (seriousness of the fact and guilt of the author), the context of war or attack against the civilian population in which the crime was committed can be taken into account. On the contrary, this operation seems to be necessary if we want to guarantee an effective proportionality between the severity of the offense and the sanctioning response<sup>312</sup>.

The use of aggravating circumstances makes it possible to differentiate the pure hypotheses of unity of crime—that is when only a crime is committed—by the derived hypotheses in which unity is the result of a logical or value process of *reductio ad unum*. In this way, the greater value of a circumstantial fact (compared to a simple fact) is reflected both in the more accurate adjectival of the historical fact and in the commensuration of the sentence, guaranteeing respect for the principle of equality of treatment.

### 32 THE INTER-CATEGORICAL CONTEST AS ANOTHER TYPE OF SOLUTION.

Criminal categories (genocide, persecution, crimes against humanity and war crimes) never generate a relationship of incompatibility. This structural relationship can not occur because the typical requirements of the elements of context never arise in mutual exclusionary antagonism: they can sometimes be specified (this is the case of the specific intent of genocide with respect to that of persecution as a crime against humanity), other times diverge (this is the case of the presence of armed conflict and of the extended or systematic attack against the civilian population), but never to enter into conflict. As a result, it can be said that the crime of genocide, crimes against humanity and war crimes can compete. Their convergence may necessarily be real or potentially apparent depending on the structural relationships it generates. Consider the following example: during an armed conflict that also translates into a systematic attack against the civilian population, a high number of civilians are killed through the use of weapons prohibited by international humanitarian law. There are several regulatory overlaps that occur here, and the solutions of the inter-categorical

---

<sup>312</sup>AMBOS, K. **Treatise on international criminal law**, op. cit., pp. 254ss. NEMITZ, J.C. Sentencing in the ICTY and ICTR, in FISCHER, H. KRESS, C. LÜDER, S.R. (a cura di), **International and national prosecution of crimes under international law**, op. cit., pp. 618ss. NEMITZ, J.C. **The law of sentencing in international criminal law: The purpose of sentencing and the applicable method for the determination of the sentence**, in Yearbook of International Humanitarian Law, 4, 2001, pp. 113-114.

competition are also different. A first hypothesis of inter-categorical competition occurs between the murder (as a crime against humanity) and the use of prohibited weapons (such as war crime). These cases are in an interference relationship only for the conduct, and give rise to a plurality of crimes. A second hypothesis of inter-categorical competition occurs between the doubly-qualified murder as a crime against humanity and war crime. In this case, the existence of a hierarchy of international crimes makes it possible to resolve the competition in favor of appearance. The fact is qualified only as a crime against humanity because it is considered more serious, in cases of convergence, than the corresponding war crime. However, having committed the fact in the presence (and with the awareness of acting within) of an armed conflict is assessed as an aggravating circumstance<sup>313</sup>.

### **33 THE SOLUTIONS OF THE COMPETITION OF RULES AND THEIR RELATIONSHIP IN TERMS OF SANCTIONS AND PROCEDURES.**

It is opportune to mention the repercussions that the proposed solutions can have on the closely interrelated issues of the commutation of the sentence and of the indictments. The problem of the competition of rules intersects with other institutions of general and procedural part and must be related to the entire subsystem created by the Rome Statute. Wanting to start with the question of sanctions, it is good to remember how the dichotomy unit/plurality of crimes is likely to condition the quantification of punishment to be committed to the offender: with respect to the single violation of a provision, to multiple crimes-even if connected from a temporal point of view or teleological-or at more violations of the same incriminating law should correspond a more severe sanction, if the underlying ratio remains anchored to the principle of proportionality between illicit fact (or more illicit facts) and penalty. The proof is that the plurality of crimes is punished more severely both in some national systems and in the subsystem of the ICC. In the latter, in fact, the art. 78 (3) of the StICC<sup>314</sup>. Therefore, in case of

<sup>313</sup>CLARKE, K.M. **Refining the perpetrator culpability history and international criminal law's impunity gap**, in *The International Journal of Human Rights*, 19, 2015, pp. 594ss.

<sup>314</sup>ICTY, *Prosecutor v. Mucić*, Case No. IT-96-21-T, Trial Judgment, 16 November 1998, par. 1225. ICC, *Prosecutor v. Lubanga*, Decision on Sentence pursuant to Article 76 of the Statute, ICC-01/04-01/06-2901, 10 July 2012, par. 33. ICTY, *Prosecutor v. Bralo*, Case No. IT-95-17, Trial Judgment, 7 December 2005, par. 27. ICTY, *Prosecutor v. Brđanin*, Case No. IT-99-36, Trial Judgment, 1 September 2004, par. 1096. ICTY, *Prosecutor v. Kunarac, Kovač and Vuković*, Case No. IT-96-23&23/1, Trial Judgment, 22 February 2001, par. 847. As regards mitigating factors on the other hand, the ICTY has established that the burden of proof is on the balance of probabilities: ICTY, *Prosecutor v. Blaskić*, Case No. IT-95-14, Appeals Judgment, 29 July 2004, par.

conviction for more crimes (more than one crime) the judges are called, first, to determine a single penalty for each criminal conduct and, in a second moment, to measure an overall sentence capable of reflecting the negative value that emerges from the plurality of violations (two-steps approach). There are two corollaries of the adoption of only a possible legal cumulation. At least in an abstract way, the Rome Statute grants the judge an instrument capable of distinguishing-at the sanctioning level-the hypotheses of unity of crime from those of plurality of violations. On the other hand, the edictal framework within which (possibly) the overall sentence, established by art. 78 (3), StICC, tacitly grants a further criterion for determining the sentence in cases of crime: that of absorption. This occurs because the minimum limit of the total sentence may coincide with the amount of the single penalty punished more severely. Given that the principle of proportionality also plays the role of fundamental principle within the Rome Statute system<sup>315</sup>, is it possible to hypothesize an algorithm that takes into account, in the sentencing phase, the difference between unity and plurality of crimes? What is the impact that the solutions proposed in the field of rules competition should have in determining the sentence? Is it possible to devise a system of sanctions that takes into account the difference between unity and plurality of crimes and

---

697. ICTY, Prosecutor v. Blagojević and Jokić, Case No. IT-02-60, Trial Judgment, 17 January 2005, par. 850. ICTY, Prosecutor v. Babić, Case No. IT-03-72, Appeals Judgment, 18 July 2005, par. 43. ICTY, Prosecutor v. Furundžija, Case No. IT-95-17/1, Trial Judgment, 10 December 1998, par. 290. ICTY, Prosecutor v. Blagojević and Jokić, Case No. IT-02-60, Trial Judgment, 7 January 2005, par. 858-860. ICTY, Prosecutor v. Plavšić, Case No. IT-00-39&40/1, Sentencing Judgment, 27 February 2003, par. 85-94 and 110. ICTR, Nahimana et al., Case No. ICTR-99-52, Trial Judgment, 3 December 2003. ICTR, Kajelijeli, Case No. ICTR-98-44-A, Appeals Judgment, 23 May 2005: in stating that the violation of fundamental human rights during detention could be considered as mitigating factors. ICTY, Prosecutor v. Tadić, Case No. IT-94-1-A and IT-94-1-A bis, Judgment in Sentencing Appeals, 26 January 2000, par. 38. ICTR, Prosecutor v. Kambanda, Case No. ICTR-97-23-S, Trial Judgment and Sentence, 4 September 1998, par. 10-16. Prosecutor v. Krstić, Case No. IT-98-33-T. ICC, Prosecutor v. Lubanga, ICC T. Ch., Decision on Sentence pursuant to Article 76 of the Statute, ICC-01/04-01/06-2901, 10 July 2012: The Prosecution in Lubanga submitted harsh conditions and treatment in the camps, and the commission of sexual violence and rape as aggravating circumstances, which, they argued also showed that “the harms committed were gender based”. The Trial Chamber went on to explain that “(...) [e]lle considère que la peine a donc deux fonctions importantes: le châtiement d’une part, c’est-à-dire l’expression de la réprobation sociale qui entoure l’acte criminel et son auteur et qui est aussi une manière de reconnaître le préjudice et les souffrances causées aux victimes ; la dissuasion d’autre part, dont l’objectif est de détourner de leur projet d’éventuels candidats à la perpétration de crimes similaires (...)”. See for the above cases: KURTH, M. **The Lubanga case of the International Criminal Court: A critical analysis of the Trial Chamber’s findings on issues of active use, age and gravity**, in Goettingen Journal of International Law, 5, 2013, pp. 431-453. JENNINGS, M. Article 78-Determination of the sentence, in TRIFFTERER, O. (ed.), **Commentary on the Rome Statute of the International Criminal Court: Observers’ notes, article by article**, op. cit., pp. 1433-1437.

<sup>315</sup>KHAN, K.A.A. Article 78, in TRIFFTERER, O. AMBOS, K. (a cura di), **The Rome Statute of the International Criminal Court**, op. cit., pp. 1891ss. CARCANO, A. **Sentencing and the gravity of the offence in international criminal law**, op. cit., pp. 583-609.

appears coherent, predictable and in line with the principle of proportionality? In this regard, the starting point could consist of two premises<sup>316</sup>. The first, which will be referred to as the premise of the ontological gravity scale, is based on the assumption that the plurality of offenses deriving from a single action or from multiple connected or distinct behaviors should be subject to greater punishment than the single violation of a single incriminating rule<sup>317</sup>. This premise is based both on logical reasons, given that the quantitative ratio between a plus and a minus should continue to be reflected also at the time of the settlement, which on legal grounds, being the plurality of offenses punished in a more severe manner than to the unity of crime both in the national legal systems and - at least in an abstract way-in the Rome Statute. With reference to the latter normative text, if it is true that the use of the cumulation criterion is only possible, it is equally true that the judge is not in a position to freely choose (*rectius*: arbitrarily) whether to apply the increase or not of punishment, since the discretion is bound by other principles and criteria provided for by the same Statute, first of all the reference to the proportionality between the gravity of the fact and the sanction (article 78, StICC)<sup>318</sup>.

The second fundamental premise lies in the distinction-once again of considerable importance-between the assumptions of intra-categorical and inter-category convergence. As we have seen above, the two competition situations differ in the presence of the context element, which is taken into account in the comparison between cases only of inter-categorical competition. In terms of the narration of the fact, the solution of the intra-categorical contest does not present particular problems as all the cases are committed within the context of the same disvalue context. On the other hand, in the case of inter-categorical competition the elements of context differ, and if the theory of the hierarchy of international crimes for the purpose of resolving the convergence in favor of appearance, presents a very peculiar situation: the author will be condemned for a single crime committed, however, in the presence of several elements of context and therefore aggravated respect to the realization of more criminal cases (then reduced to unity following the application of logical-structural or value criteria) committed within a single collective context of violence. To give an example,

<sup>316</sup>JENNINGS, M. Article 78-Determination of the sentence, in TRIFFTERER, O. (ed.), **Commentary on the Rome Statute of the International Criminal Court: Observers' notes, article by article**, op. cit.,

<sup>317</sup>FRY, E. **Legal recharacterisation and the materiality of facts at the International Criminal Court: Which changes are permissible?**, in *Leiden Journal of International Law*, 29, 2016, pp. 577-597.

<sup>318</sup>JENNINGS, M. Article 78-Determination of the sentence, in TRIFFTERER, O. (ed.), **Commentary on the Rome Statute of the International Criminal Court: Observers' notes, article by article**, op. cit.,

while the contest between extermination and murder described as crimes against humanity is resolved in favor of the application of the only crime of extermination, the contest between extermination as a crime against humanity and murder as a crime of war is always resolved by the application of the only extermination situation, but it is more serious in terms of narration because it is committed not only in the context of an extensive attack against the civilian population but also in the context of an armed conflict. And, in terms of sanctions, this difference should result in differentiated treatment by resorting to aggravating circumstances. Given the circular movement that links the substantive issue of the competition of rules with the procedural one of the imputation models, the proposed conclusions should also be duly considered by the Public Prosecutor already in the initial phase of the procedure, in order to avoid the unnecessary and burdensome for the defense and for the duration of the trial-proliferation of charges<sup>319</sup>. This means that all normative overlaps resolved in favor of appearance should not be imputed cumulatively. An exception is given by the so-called inter-categorical competition, which, as we have just seen, should condition the judge in the phase of commensurate sentence through the use of aggravating circumstances. Affecting the amount of punishment, it is believed that in such cases the Prosecutor is required to impute cumulatively the cases in competition: it will be up to the judge, in the judgment phase, to proceed with the unification of the fact by using the criterion of gravity expressed by the theory of hierarchy of international crimes<sup>320</sup>.

#### 34 CONCLUDING REMARKS.

At the end of this survey some reflections are opportune to look for a synthesis and to identify some profiles to be investigated further in relation to the problem of the competition of norms. It should be remembered that the systematic or large-scale commission of international crimes does not seem to leave much room for single and isolated violations<sup>321</sup>.

International criminal law constitutes, by its intrinsic characteristics, a place of

---

<sup>319</sup>GEERT, J. KNOOPS, J. **Defenses in contemporary international law**, Martinus Nijhoff Publishers, The Hague, 2008, pp. 7ss.

<sup>320</sup>KOHEN, M.G. **La promotion de la justice des droits de l'homme et du règlement des conflits par le droit international. Liber amicorum Lucius Caflisch**, Martinus Nijhoff Publishers, The Hague, 2007.

<sup>321</sup>GRONO, N. DE COURCY WHEELER, A. The deterrent effect of the ICC on the Commission of International Crimes by government leaders, in STAHN, C. (ed), **The law and practice of the International Criminal Court**, Oxford University Press, Oxford, 2015, pp. 1228ss.

multiple and plurality, in which the contest of norms and crimes finds its most natural and logical manifestation<sup>322</sup>. Nonetheless, the rules competition is an issue that has not been studied until now. The absence of provisions relating to the solution of the rules contest constitutes a constant in the codification of international criminal law, with the exception of the noisy solitude of art. 78, StICC<sup>323</sup> which, however, is only concerned with regulating the sanctioning treatment of the criminal offense. In Nuremberg, the judges did not address the issue of rules and the reasons for this failure were identified in four different types of justifications: (a) historical, (b) legislation, (c) conceptual and (d) ontological slavery. The subsequent jurisprudence - in particular that of the ad hoc Tribunals: ICTY and ICTR-has contrasted the surprising silence of positive law by formulating some criteria for resolving the question of the competition of norms. The most important of these is represented by the Čelebići test which, inspired by the principle of unilateral specialty, has found constant application in international jurisprudence, becoming a paradigm of the so-called jurisprudential cross-fertilization. This test presents some paradoxes, criticism and weaknesses, identified in the (a) problem of transposition, (b) problem of identification and delimitation of the content, (c) problem of interpretation and concrete application, (d) paradox of the functions and (e) paradox of ambiguity. Given the critical issues and the shortcomings that accompany the test applied by international jurisprudence to resolve the hypotheses of regulatory convergence, it was considered appropriate to question the existence of alternative solutions. The attempt to give juridical and systematic character to the problem of the competition of norms concerned the subsystem of the ICC, as the only international jurisdiction with a permanent and universal vocation. With the Rome Statute the comparison becomes the method explicitly indicated to the interpreter for the purposes of the research of the applicable law in case of normative lacunae (article 21 (1) (c), StICC). Since the subject of the competition for rules is not mentioned in the Statute, a comparison has been made between the national laws in order to identify-if there are-principles and criteria for the solution of the competition. The absence of a reflection on a country belonging to the common law area is justified by the use, by international jurisprudence, of a test coming from

<sup>322</sup> ALIÑÁNI, L. OLLÉ SESÉ, M. *Estudios sobre derecho penal internacional*, ed. Marcial Pons, Madrid, 2018.

<sup>323</sup> JENNINGS, M. Article 78-Determination of the sentence, in TRIFFTERER, O. (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' notes, article by article*, op. cit.,

US law.

The structural relationships that do not constitute a convergence (relation of incompatibility and heterogeneity) from those that give rise to a necessarily real convergence (relation of identity and interference) and from those that give rise to a potentially apparent convergence have been kept separate (unilateral and reciprocal specialty relationship). Furthermore, the comparative study has highlighted the tendency: (a) to delimit the area of the accumulation of qualifications and, on the other hand, to widen the area of appearance, (b) adopt multiple criteria, both logical and value, in the resolution of the competition and, finally, (b) recover the criminal policy dimension to reach the application of value criteria, if it is not possible to resolve the question of the competition with the simple use of logical structural criteria. The analysis of the contest of the criminal offenses envisaged by the Rome Statute was conducted keeping well-divided the hypotheses of (a) intra-categorical contest, which includes the convergences that occur within the same category of crime, and the hypotheses of (b) inter-categorical competition, concerning the convergences that occur between the different categories of crimes. In particular, we have recourse to the (a) principle of unilateral specialty (example of the competition between murder and extermination as crimes against humanity), to (b) mutual specialty (example of rape and torture as crimes against humanity) and to (c) complex crime (example of persecution and apartheid as crimes against humanity). In all these convergence hypotheses, an apparent competition of standards was found. With reference to the inter-categorical competition several theories have been proposed. The first qualifies the element of context as an objective condition of punishment. It has been criticized under three different profiles, namely that (a) of the literal interpretation of the Rome Statute, (b) of the offensive scope of the context element and (c) the inability of this theory to offer a unique solution to the problem of the competition. The second solution proposed is based on the hierarchy of sources provided for in art. 38 of the SICJ<sup>324</sup>.

According to this theoretical reconstruction, the crime of genocide has the character of *ius cogens* and is therefore placed in the highest step of the hierarchical ladder; they follow the serious violations of the 1949 Geneva Conventions, considered as customary law, the crimes against humanity, qualified as a conventional right, and the other violations to the

---

<sup>324</sup>KOLB, R. **The international Court of justice**, Hart Publishing, Oxford & Portland and Oregon, 2013, pp. 1280ss.

customs and the uses of war, with a protocol character. The theory in question proposes to resolve the cases of convergence in favor of the unit of crime by qualifying the fact according to the norm provided by the highest grade source. They have been presented and defined as (a) defect of arbitrariness, (b) lack of equivocality and (c) defect of inapplicability. Another theory identifies a hierarchy of crimes in light of the importance of the motives for action. Among the criticisms of this approach is the one based on the typicality, (b) on the possible coexistence of multiple motivations of action and (c) on the risk of eclipsing of the category of crimes against humanity. Finally, another theory proposes a solution to the competition of norms in the ICC Statute establishing contenance relations between cases based on the greater or lesser offensive scope. According to this theoretical reconstruction it is possible to establish a hierarchy of international crimes in the light (a) of the damage (or endangerment) that the criminal conduct brings to the international community, (b) of the offensive scope of the context element or (c) of the 'subjective element provided by the context element for each criminal category. Regardless of the criterion used, the result is the same: genocide is considered the most serious crime, followed by crimes against humanity and war crimes. Finally, we have seen how the criticisms proposed against this theoretical reconstruction-aimed above all to demonstrate the same offensive capacity as the categories of international crimes (eg equal approach)-can be overcome thanks to the *ceteris paribus* clause (condition of the level playing field)<sup>325</sup>.

The existence of a hierarchy of international crimes allows, therefore, to resolve the inter-categorical competition in favor of appearance. The problem of the competition of rules intersects with other institutions of general and procedural part. For this reason, what emerged from this research must be related to the entire subsystem created by the Rome Statute. In particular, here we want to propose some reflections regarding the commensurate sentence, given that the (real) competition of rules constitutes the logical presupposition of the plurality (heterogeneous) of crimes and, therefore, of the punishment of multiple violations. To date, the solutions adopted by the ICC in the field of competition for standards do not seem to be satisfactory because they lead to what could be defined as the paradox of the disproportion between illicit fact and criminal consequences. In the case of multiple offenses, the judges are

<sup>325</sup>LIAKOPOULOS, D. **Parità di armi nella giustizia penale internazionale**, vol. 1, ed. Libellula University Press, Puglia, 2018.

called to determine a single penalty for each criminal conduct and, subsequently, to make a total penalty. So far, the ICC has not used the possibility-granted by art. 78 (3), StICC<sup>326</sup>-to aggravate the punishment in cases of plurality of crimes. And this did not happen even with reference to the established assumptions of the material concurrence of crimes<sup>327</sup>. The concrete effect is that of an absorption not at the level of legal qualification of the fact, but only when determining the sentence. Therefore, an excessive disproportion between plurality of crimes and punishment units occurs. This translates into the inability of the sanction to express the real disvalue of the fact and to keep distinct - from the point of view of sanctions- the hypothesis of unitary qualification of a fact from those of multiple legal qualifications of the same fact. As stated in the deed of appeal to the decision of sentencing presented by the Prosecutor in the **Bemba Gombo**<sup>328</sup>, case, the application of an overall sentence corresponding to the most serious sentence envisaged for a single conduct does not allow for an adequate expression of the negative value of the event and risks to prejudice the general-preventive function of the sentence. The message that is transmitted could be misunderstood: it does not matter how many crimes are committed because you will be called to answer only the most serious violation.

The proliferation of the legal qualifications of a fact risks fueling tendencies to a symbolic use of the criminal instrument in order to frame and narrate a traumatic historical event: as is well known, the qualification of a crime as a genocide possesses a much higher evocative force a description of the same fact as a war crime, regardless of the sanctioning treatment that is subsequently inflicted. Even the crime against humanity, if intended as damaging to all humanity as such<sup>329</sup>, contributes to the adjectiveness of international criminal law as a symbolic right with strong ethical connotations<sup>330</sup>. The evident neckline that occurs

---

<sup>326</sup>JENNINGS, M. Article 78-Determination of the sentence, in TRIFFTERER, O. (ed.), **Commentary on the Rome Statute of the International Criminal Court: Observers' notes, article by article**, op. cit.,

<sup>327</sup>ICC, Prosecutor v. Bemba Gombo, Decision on Sentence, op. cit., par. 94-95. ICC, Prosecutor v. Germain Katanga, *Décision relative à la peine*, op. cit., par. 146-147.

<sup>328</sup>ICC, Prosecutor v. Bemba Gombo, Judgment pursuant to Article 74 of the Statute, TC-III, ICC-01/05-01/08, op. cit.

<sup>329</sup>DRUMBL, M.A. **Rule of law amid lawlessness: Counseling the accused in Rwanda's domestic genocide trials**, op. cit., pp. 545s. NEIER, A. **War crimes: Brutality, genocide, terror, and the struggle for justice**, ed. Times Books, New York, 1998, pp. 213ss. MACLEOD, C. **Towards a philosophical account of crimes against humanity**, in *European Journal of International Law*, 21, 2010, pp. 293, 295 and 302. DANNER, A.M. **Constructing a hierarchy of crimes**, op. cit., pp. 477ss. LUBAN, D. **A theory of crimes against humanity**, in *Yale Journal of International Law*, 29, 2004, pp. 86-92.

<sup>330</sup>DRUMBL, M.A. **Atrocity, punishment and international law**, Cambridge University Press, Cambridge,

between qualification and sanction-or, in procedural terms, between the judgment phase and the sentencing phase-does not allow compliance with the requirements of proportionality between liability<sup>331</sup> and punishment<sup>332</sup>. The principle of proportion between illicit fact and criminal consequence is the criminal policy directive. With reference to the competition of norms, first requirements of legality emerge that require to evaluate, with a structural analysis, the elements of this case.

Then there are proportional requirements that require evaluating with tools also of an evaluative nature that the value of the crimes in competition is not disproportionate to that of the concrete fact committed and to the sanctioning. This means that the absorbing effect must already and even earlier occur in the legal qualification process of the fact, if the structural relationships between the offenses can be resolved in favor of the unit of crime. In the opposite case of plurality of crimes, however, multiple legal qualifications should have a role in determining the sentence. The proportionality that is established between the qualification of the fact and the sanctioning treatment guarantees, on the one hand, respect for the functions that the penalty performs in international criminal law, still today identified mainly in remuneration and general prevention<sup>333</sup>. Proportionality ensures compliance with the principle

---

2007, pp. 173ss. SZOKE-BURKE, S. **Avoiding belittlement of human suffering. A retributivist critique of ICTR sentencing practice**, in *Journal of International Criminal Justice*, 10, 2012, pp. 577ss.

<sup>331</sup>The aggregation principle grounds the criminal liability of corporations on the combined acts or omissions of individual agents where each act or omission is in itself insufficient. Mental states and conduct on the part of different individuals are joined together and considered as a whole. The underlying rationale is that a combination of personal transgressions or minor failures might reveal a gross breach of duty on the part of the company, or collective awareness that warrants the entity's responsibility for a criminal consequence. Some jurisdictions have been hesitant to extend the application of aggregation to crimes requiring proof of intent as opposed to only knowledge. Other legal systems have recognized the utility of the principle with regard to situations entailing recklessness and even gross negligence. See for details and analysis: POSNER, E. PORAT, A. **Aggregation and law**, in J.M. Olin Program in Law and Economics Working Paper No. 587, 2012. FINDLAY, M. CHAH HUI YUNG, J. **Principled international criminal justice: Lessons form tort law**, ed. Routledge, London & New York, 2018. FINDLAY, M. HENHAM, R. **Exploring the boundaries of international criminal justice**, ed. Routledge, London & New York, 2016, pp. 83ss.

<sup>332</sup>JØRGENSEN, N.H.B. **State responsibility for aiding or assisting international crimes in the context of the arms trade treaty**, in *The American Journal of International Law*, 108 (4), 2014, pp. 722-749. BRANDTS, C. **Guilty landscapes: Collective guilt and international criminal law. Cosmopolitan justice and its discontents**, ed. Routledge, London, 2010, pp. 53-68.

<sup>333</sup>DRUMBL, M.A. **Collective violence and individual punishment: The criminality of mass atrocity**, in *Northwestern University Law Review*, 99, 2005, pp. 577-595. GOLASH, D. The justification of punishment in the international context, in MAY, L. HOSKINS, Z. (a cura di), **International criminal law and philosophy**, Cambridge University Press, Cambridge, 2010, pp. 201-223. BLEWITT, G.T. The importance of a retributive approach to justice, in BLUMENTHAL, D.A. MCCORMACK, T.L.H. (a cura di), **The legacy of Nuremberg: Civilising influence or institutionalised vengeance?**, Martinus Nijhoff Publishers, The Hague, 2008, pp. 39-46. AMBOS, K. **Castigo sin soberano? La cuestión del ius puniendi en derecho penal internacional. Una**

of equality of treatment, keeping distinct-even on the sanctioning level-the hypotheses of unity of crime from those of plurality. It is not known what sentence would have been imposed on the courts in the event that Bemba Gombo had been found guilty of the only crime of rape. Given that the Statute requires to determine a penalty for each crime committed, it can be assumed that even in the case of units of crime rape would be punished with 18 years imprisonment. The disparity in treatment resulting from the absorption emerges from a comparison with two different scenarios. The first is attributable to the hypothesis of material competition of crimes: the latter should undergo a more severe disciplinary treatment than that provided for in cases of unit of crime (for example: 22 years of imprisonment). The second scenario occurs in cases of formal competition of crimes. It is believed that the plural qualification of the event (crime against humanity and war crime) should be punished more severely than the unitary qualification of the same fact (crime against humanity), but in a way inferior to the cases of material competition of crimes (for example: 20 years of imprisonment)<sup>334</sup>.

In the latter scenario, the proportional requirements that require evaluating, also with evaluative tools, that the value of the crimes in competition are not disproportionate to that of the concrete fact committed, are met by recourse to the proposed solution based on the hierarchy of international crimes. On the one hand, the plural qualification of the fact is avoided under several rules which are distinguished by the contextual element by applying only the most serious case. On the other hand, since the commission of a crime in the presence of several typical contexts increases the value of the conduct, in the process of determining the sentence it is appropriate to resort to aggravating circumstances, which allow to differentiate the hypotheses of unity of crime application of the only crime against humanity because it is the only case imputed by the derivative hypotheses in which unity is the result of a logical process or a *reductio ad unum*-application of the only crime against humanity because considered more serious than the respective crime of war charged

---

**primera contribución para una teoría del derecho penal internacional consistente**, in Revista Persona y Derecho, 68, 2013, pp. 5-38. AMBOS, K. On the rationale of punishment at the domestic and international level, in HENZELIN, M. ROTH, R. (a cura di), **Le droit pénal à l'épreuve de l'internationalisation**, ed. LGDJ, Paris, 2002, pp. 320ss. SUNGA, L.S. **The emerging system of international criminal law**, Martinus Nijhoff Publishers, The Hague, 1997, pp. 324ss.

<sup>334</sup>PUSCHKE, J. Grund und Grenzen des Gefährdungsstrafrechts am beispiel der Vorbereitungsdelikte, in HEFENDEHL, R. **Grenzenlose Vorverlagerung des Strafrechts?**, BWV Berliner Wissenschafts-Verlag, Berlin, 2010, pp. 10ss.

cumulatively. A more careful reflection on the problem of the competition of rules can therefore contribute to a greater systematicity and legitimacy of the ICC subsystem by limiting the objectives pursued by the criminal trial to the sole identification of individual responsibilities<sup>335</sup> and the commissioning of a sentence. The fulfillment of further needs-such as the historical reconstruction of events, the search for truth, the transition to a form of democratic state, the pedagogical function of international intervention-comes into "contrast" and creates "tensions" with the proper aims of a penal system. International criminal law is the *par excellence* instrument of the pay paradigm of international justice, but it is not the only possible response-and sometimes the most effective-to the commission of large-scale crimes. The retributive paradigm is flanked by a reconciliation-restorative one<sup>336</sup>, which can be an alternative to criminal law or a complementary tool<sup>337</sup>. What is the most effective paradigm for dealing with the past can not, for obvious reasons, be the object of these brief reflections, also because the theme does not lend itself to clear, definitive conclusions: the more we go into the problem, the more we reveal the essentially political nature, with the inevitable consequence of the search for acceptable compromises<sup>338</sup>.

However, if the choice is made in favor of an instrument-criminal law-which tends to be inhumane in its need to cause suffering, it must scrupulously respect the substantive and procedural principles that prevent it from becoming a means of revenge or justice of the

<sup>335</sup>See, LIAKOPOULOS, D. **Die Hybridität des Verfahrens der Internationalen ad hoc Strafgerichtshöfe und die Bezugnahme auf innerstaatliches Recht in der Rechtsprechung**, in International and European Union legal Matters, 2012. TURAN, G. **Responsibility to prosecute in an age of global governmentality: The International Criminal Court**, in Cooperation and Conflict, 50, 2015. ODRIOZOLA GURRUTZAGA, M. **Responsabilidad penal por crímenes internacionales y coautoría medita**, in Revista Electrónica de Ciencia Penal y Criminología, 17, 2015, pp. 7ss. JAIN, N. **Perpetrators and accessories in international criminal law. Individual modes of responsibility for collective crimes**, op. cit., GOY, B. **Individual criminal responsibility before the International Criminal Court: A comparison with the ad hoc Tribunals**, op. cit., AZZOLINI BIANCAZ, A. **La construcción de la responsabilidad construcción de la responsabilidad penal individual en el ámbito internacional**, in Alegatos Revista, 20, 2018.

<sup>336</sup>GOLDMAN, A.I. **A theory of human action**, op. cit.

<sup>337</sup>HENDERSON, C. (a cura di), **Commissions of inquiry: Problems and prospects**, Hart Publishing, Oxford, Portland & Oregon, 2017. CLARK, P. **The Gacaca Courts, post-genocide justice and reconciliation in Rwanda. Justice without lawyers**, Cambridge University Press, Cambridge, 2010. MACULAN, E. **La expansión de los juicios por la verdad**, in MACULAN, E. PASTOR, D. (a cura di), **El derecho a la verdad y su ejercicio por medio del proceso penal**, ed. Hammurabi, Buenos Aires, 2013, pp. 247-295. NALEPA, M. KLEPACKA, E. **Institute of National Remembrance-Commission for the prosecution of crimes against the Polish Nation**, in Encyclopedia of Transitional Justice, 3, 2012. BRACHTHÄUSER, F. HAFNER, A. **Transformative reparation: Should reparation change societies?**, in Zeitschrift für ausländisches öffentliches Recht, n. 78 (3), 2018.

<sup>338</sup>AZZOLINI BIANCAZ, A. **La construcción de la responsabilidad construcción de la responsabilidad penal individual en el ámbito internacional**, op. cit.,

winners (or the strongest)<sup>339</sup>. A criminal law found, therefore, also thanks to a rigorous and careful reflection on the institution of the competition of rules, which can put in relation the three pillars on which rests (or should rest) the criminal law, also at international level: "fact illicit, author's personality and criminal consequences (...)"<sup>340</sup>.

### 35 REFERENCES

A.A.V.V., **Commentary on the second Geneva Convention**, Cambridge University Press, Cambridge, 2017.

\_\_\_\_\_. **Jurisdiccion universal. Sobre crímenes internacionales**, ed. Comares, Granada, 2013.

ADAMS, A. **The first rape prosecution before the ICC: Are the elements of crimes based on a source of international law?**, in *International Criminal Law Review*, 15, 2015, pp. 1100ss.

AGIRRE ARANBURU, X.A. **Sexual violence beyond reasonable doubt: Using pattern evidence and analysis for international cases**, in *Leiden Journal of International Law*, 23, 2010, pp. 610ss.

AHLBRECHT, A. BÖHMEER, K.M. **Internationales Strafrecht**, C.F. Müller, 2018.

AINLEY, K. **The International Criminal Court on trial**, in *Cambridge Review of International Affairs*, 24, 2011.

AKANDE, D. Classification of armed conflicts: Relevant legal concept, in WILMSHURTS, E. (a cura di), **International law and the classification of conflicts**, Oxford University Press, Oxford, 2012.

AKHAVAN, P. **Reducing genocide to law. Definition, meaning, and the ultimate crime**, Cambridge University Press, Cambridge, 2012, pp. 58ss.

\_\_\_\_\_. **The crime of genocide in the ICTR jurisprudence**, in *Journal of International Criminal Justice*, 3, 2005, pp. 989ss.

AKSENOVA, M. **Symbolism as a constraint on international criminal law**, in *Leiden Journal of International Law*, 30, 2017, pp. 478ss.

ALFONSO, C. El crimen de reclutamiento y utilización de niños soldados en el primer fallo de la Corte Penal Internacional, in AMBOS, K. MALARINO, E. STEINER, C. (a cura di), **Análisis de la primera sentencia de la Corte Penal Internacional. El Caso Lubanga**, Konrad Adenauer Stiftung, Berlin, 2014, pp. 164ss.

ALIÑÁN, A. OLLÉ SESÉ, M. **Estudios sobre derecho penal internacional**, ed. Marcial Pons, Madrid, 2018.

ALMEVIST, J. ESPOSITO, C. **The role of courts in transitional justice. Voices from Latin America and Spain**, ed. Routledge, London & New York, 2013, pp. 177ss.

ALONSO, H. Current trends on modes of liability for genocide, crimes against humanity and war crimes, in STAHN, C. VAN DEN HERIK, L. (eds.), **Future perspectives on international criminal justice**, T.M.C. Asser Press, The Hague, 2010, pp. 522-524.

<sup>339</sup>MINEAR, R.M. **Victor's justice. Tokyo war crimes trials**, Princeton University Press, Princeton, 2016.

<sup>340</sup>GOLDMAN, A.J. **A theory of human action**, op. cit.,

- AMBOS, K. **Castigo sin soberano? La cuestión del ius puniendi en derecho penal internacional. Una primera contribución para una teoría del derecho penal internacional consistente**, in *Revista Persona y Derecho*, 68, 2013, pp. 5-38.
- \_\_\_\_\_. **Defences in international criminal law**, in BETRAM, S. BROWN, S. **Research handbook on international criminal law**, Edward Elgar Publishers, Cheltenham, 2011.
- \_\_\_\_\_. **Der Allgemeine Teil des Völkerstrafrechts. Ansätze einer Dogmatisierung**, Duncker & Humblot, Berlin, 2002, pp. 774-778.
- \_\_\_\_\_. **Internationales Strafrecht**, C.H. Beck, München, 2014, par. 4.
- \_\_\_\_\_. **La parte general del derecho penal internacional. Bases para una elaboración dogmática**, ed. Duncker & Humblot, Berlin, 2005.
- \_\_\_\_\_. **May a state torture suspects to save the life of innocents?**, in *Journal of International Criminal Justice*, 6, 2008, pp. 265ss.
- \_\_\_\_\_. **On the rationale of punishment at the domestic and international level**, in HENZELIN, M. ROTH, R. (a cura di), **Le droit pénal à l'épreuve de l'internationalisation**, ed. LGDJ, Paris, 2002, pp. 320ss.
- \_\_\_\_\_. **Remarks on the general part of international criminal law**, in *Journal of International Criminal Justice*, 4 (4), 2006, pp. 660-673.
- \_\_\_\_\_. **Sexual offenses in international criminal law, with a special focus on the Rome Statute of the International Criminal Court (July 3, 2012)**, in BERGSMO, M. BUTENSCHØN SKRE, A. WOOD, E.J. (eds.), **Understanding and providing international sex crimes**, Torkel Opsahl Academic Epublisher, Beijing, 2012, pp. 144ss.
- \_\_\_\_\_. **The first judgment of the International Criminal Court (Prosecutor v. Lubanga): A comprehensive analysis of the legal issues**, in *International Criminal Law Review*, 12, 2012, pp. 136ss.
- \_\_\_\_\_. **Treatise on international criminal law. Foundations and general part**, Oxford University Press, Oxford, 2013, pp. 97ss.
- \_\_\_\_\_. **Treatise on international criminal law. Volume II: The crimes and sentencing**, Oxford University Press, Oxford, 2014, pp. 257ss.
- AMBOS, K. WIRTH, S. **The current law of crimes against humanity. An analysis of UNTAET Regulation 15/2000**, in *Criminal Law Forum*, 13, 2002, pp. 18ss.
- APONTE, A. **Persecución penal de los crímenes internacionales**, ed. Ibáñez, Bogotá, 2010, pp. 23ss.
- APTEL, C. **The intent to commit genocide in the case law of the International Criminal Tribunal for Rwanda**, in *Criminal Law Forum*, 13, 2002, pp. 277ss.
- ARSANJANI, M.H. **The Rome statute of the International Criminal Court**, in *American Journal of International Law*, 93, 1999, pp. 22-43.
- ASKIN, K.D. **Sexual violence in decisions and indictments of the Yugoslav and Rwandan Tribunals. Current status**, in *American Journal of International Law*, 93, 1999, pp. 97ss.
- \_\_\_\_\_. **War crimes against women: prosecution in international war crimes Tribunals**, Martinus Nijhoff Publishers, The Hague, 1997, pp. 380-382.
- AUSTIN, J.L. **A plea for excuses**, in CHAPPELL, V.C. (a cura di), **Ordinary language: Essays in philosophical method**, Dover, New York, 1964, pp. 1-30.
- AYAT, M. **Quelques apports des tribunaux pénaux internationaux ad hoc et notamment le TPIR, à la lutte contre les violences sexuelles subies par les femmes durant les génocides et les conflits armés**, in *International Criminal Law Review*, 10, 2010, pp. 789ss.
- AZZOLINI BIANCAZ, A. **La construcción de la responsabilidad construcción de la responsabilidad penal individual en el ámbito internacional**, in *Alegatos Revista*, 20,

2018.

BACHAROVA, T. **The standing of victims in the procedural design of the ICC**, ed. Brill, The Hague, 2017.

BADAR, M.E. **From the Nuremberg Charter to the Rome Statute: Defining the elements of crimes against humanity**, in San Diego International Law Journal, 5, 2004, pp. 128-131.

\_\_\_\_\_. **The concept of mens rea in international criminal law: The case for a unified approach**, Hart Publishing, Oxford & Portland, Oregon, 2013, pp. 126ss.

BADAR, M.E. PORRO, S. Rethinking the mental elements in the jurisprudence of the ICC, in STAHN, C. (a cura di), **The law and practice of the International Criminal Court**, Oxford University Press, Oxford, 2015, pp. 651ss.

BAGARIC, M. MORSS, J. **International sentencing law in search of a justification and coherent framework**, in International Criminal Law Review, 6, 2006, pp. 214-217.

BALCELLS, L. KALYVAS, S.N. **Does warfare matter? Severity, duration, and outcomes of civil wars**, in Journal of Conflict Resolution, 58 (8), 2014, pp. 6ss.

BALIBAR, E. WALLERSTEIN, I. **Race, nation, classe. Les identités ambiguës**, La Découverte, Paris, 2007.

BARBERO, N. **La ¿relativa? aplicación del principio de legalidad en Derecho Penal Internacional**, in Revista Nuevo Foro Penal, 13, 2017, pp. 124ss.

BARCO, G.E. **Rückwirkung und die Entwicklung der internationalen Verbrechen. Elemente einer allgemeinen Konzeption des nullum-crimen-sine lege Prinzips im Völkerstrafrecht**, Duncker & Humblot, Berlin, 2018.

BARZEGARZADEH, A. JALALI KARVEH, M. RAISI, L. **Principle of legality and its relation with customary law in international criminal law**, in Mediterranean Journal of Social Science, 6, 2015, pp. 400ss.

BEHRENS, P. **Genocide and the question of motives**, in Journal of International Criminal Justice, 10, 2012, pp. 501ss.

BEHRENS, R. HENHAM, J. **Elements of genocide**, ed. Routledge, Taylor & Francis, Glass House Book, New York, 2013, pp. 194ss.

BEIGBEDER, Y. **International Criminal Tribunals**, ed. Palgrave Macmillan, London, 2011.

BEKOU, O. **Crimes at crossroads. Incorporating international crimes at the national level**, in Journal of International Criminal Justice, 10, 2012, pp. 677-691.

BELLELO, R. (ed.), **International criminal justice**, Ashgate Publishing, Farnham, 2010, pp. 461ss.

BELTZ, A. **Prosecuting rape in International Criminal Tribunals: The need to balance victim's rights with the due process rights of the accused**, in Journal of Civil Rights and Economic Development, 20, 2012.

BENEDICT, R. **Race and racism**, ed. Routledge, London & New York, 1983.

BENSOUDA, F. Gender and sexual violence under the Rome Statute, in DECAUX, E. DIENG, A. SOW, M. (a cura di), **From human rights to international criminal law. Studies in Honour of an African Jurist, the Late Judge Laïty Kama**, ed. Brill/Martinus Nijhoff Publishers, The Hague, 2007, pp. 401.

BERGSMO, M. **Thematic prosecution of international sex crimes some critical comments from a theoretical and comparative perspectives**, ed. Torkel Opshahl Academic Epubliher, Beijing, Beijing, 2012, pp. 294ss.

BERGSMO, M. WUI LING, C. PING, Y. (a cura di), **Historical origins of international criminal law**. Vol. 1-3, ed. TOAEP, Brussels, 2014.

- BETTWY, D.S. **The genocide Convention and unprotected groups: Is the scope of protection expanding under customary international law?**, in Notre Dame Journal of International and Comparative Law, 1, 2011, pp. 102ss.
- BIANCHI, L. The prosecution of rape and sexual violence: Lessons from prosecutions at the ICTR, in DE BROUWER, A.M. **Sexual violence as an international crime: Interdisciplinary approaches**, ed. Intersentia, Antwerp, Oxford, 2013, pp. 125ss.
- BIKUNDO, E. **International criminal law using or abusing legality?**, ed. Routledge, London & New York, 2014.
- BITTI, G. Article 21 of the statute of the International Criminal Court and the treatment of sources of law in the jurisprudence of the ICC, in STAHN, C. SLUITER, G. (eds.), **The emerging practice of the International Criminal Court**, Martinus Nijhoff Publishers, Leiden, 2009, pp. 285-304.
- BJORGE, E. **The evolutionary interpretation of treaties**, Oxford University Press, Oxford, 2014.
- BLAISE NGAMENI, H. **La diffusion du droit international pénal dans les ordres juridiques africaines**, ed. L'Harmattan, Paris, 2017.
- BLEWITT, G.T. The importance of a retributive approach to justice, in BLUMENTHAL, D.A. MCCORMACK, T.L.H. (a cura di), **The legacy of Nuremberg: Civilising influence or institutionalised vengeance?**, Martinus Nijhoff Publishers, The Hague, 2008, pp. 39-46.
- BOAS, F. **The mind of primitive man**, ed. Praeger, Santa Barbara, 1983.
- BOAS, G. BISCHOFF, J.L. REID, N.L. **Elements of crimes under international law. Volume II**, Cambridge University Press, Cambridge, 2008.
- BOAS, G. CHIFFLET, P. **International criminal justice**, Edward Elgar Publishers, Cheltenham, 2017.
- BOCK, S. **Zurechnung im Völkerechtstrafrecht**, in Zeitschrift für Internationale Strafrechtsdogmatik, 7-8, 2017, pp. 414ss.
- BOED, R. **Individual criminal responsibility for violations of article 3 common to the Geneva Convention of 1949 and of Additional Protocol II thereto in the case law of the International Criminal Tribunal for Rwanda**, in Criminal Law Forum, 13, 2002.
- \_\_\_\_\_. **Judgment of a Trial Chamber in the case of The Prosecutor v. Laurent Semanza**, in International Criminal Law Review, 3, 2003, pp. 406ss.
- BOESTEN, J. WILDING, P. **Transformative gender justice: Setting an agenda**, in Women's Studies International Forum, 49, 2015, pp. 77ss.
- BOGDAN, A. **Cumulative charges, convictions and sentencing at the ad hoc International Tribunals for the Former Yugoslavia and Rwanda**, in Melbourne Journal of International Law, 1, 2002, pp. 3ss.
- BOISTER, N. CURRIE, R.J. **Routledge handbook of transnational criminal law**, ed. Routledge, London & New York, 2015.
- BONACKER, T. SAFFERLING, C. **Victims of international crimes: An interdisciplinary discourse**, T.M.C. Asser Press, The Hague, 2013.
- BOOK, J.P. **Appeal and sentence in international criminal law**, BWV Berliner Wissenschafts Verlag, Berlin, 2011, pp. 124ss.
- BOOTHBY, B. **And for such time as: The time dimension to direct participation in hostilities**, in New York University Journal of International Law and Politics, 42, 2010, pp. 742ss.
- BOOYSEN, H. **Convention on the Crime of Apartheid**, in South African Yearbook of International Law, 2, 1976, pp. 56-96.

- BOSLY, H.D. VANDERMEERSCH, D. **Génocide, crimes contre l'humanité et crimes de guerre face à la justice**, ed. Bruylant, Bruxelles, 2012.
- BOSTER, V. **An introduction to transnational criminal law**, Oxford University Press, Oxford, 2012, pp. 24ss.
- BOTTE-KERRISON, A. **Responsibility for bystanders in mass crimes. Towards a duty to rescue in international criminal justice**, in *International Criminal Law Review*, 17, 2017, pp. 882ss.
- BOWERS, A. **International Criminal Court**, Wolf Legal Publishers, The Netherlands, 2011.
- BRACHTHÄUSER, F. HAFFNER, A. **Transformative reparation: Should reparation change societies?**, in *Zeitschrift für ausländisches öffentliches Recht*, n. 78 (3), 2018.
- BRAMMERTZ, S. MICHELLE, J. **Lessons learned in prosecuting gender crimes under international law: Experiences from the ICTY**, in EBOE BRANDTS, C. **Guilty landscapes: Collective guilt and international criminal law. Cosmopolitan justice and its discontents**, ed. Routledge, London, 2010, pp. 53-68.
- BROWNLIE, I. **Principles of public international law**, Oxford University Press, Oxford, 2012.
- BULTZ, A. **Redefining apartheid in international criminal law**, in *Criminal Law Forum*, 24, 2013, pp. 224-225.
- BURBER, M.D. HÖRNLE, T. **The Oxford handbook of criminal law**, Oxford University Press, 2014.
- BURCHARD, C. **Torture in the jurisprudence of the ad hoc tribunal. A critical assessment**, in *Journal of International Criminal Justice*, 6 (1), 2008, pp. 175ss.
- BURKHARDT, S.U. **Violence à l'Égard des Femmes en Situation de Conflit armé**, in *Finnish Yearbook of International Law. Volume IX*, Brill/Martinus Nijhoff Publishers, The Hague, 1998.
- \_\_\_\_\_. **Vergewaltigung als Verbrechen gegen die Menschlichkeit Sexualisierte Gewalt, Makrokriminalität und Völkerstrafrecht**, LIT Verlag, Berlin, 2005.
- BYRON, C. **War crimes and crimes against humanity in the Rome Statute of the International Criminal Court**, Manchester University Press, Manchester, 2009, pp. 242ss.
- CAGGIOLI, G. **Sexual violence in armed conflicts: A violation of international humanitarian law and human rights law**, in *International Review of the Red Cross*, 96, 2014, pp. 506ss.
- CALVO-GOLLER, K. **La procédure et la jurisprudence de la Cour pénale internationale**, ed. Lextenso, Montchrestien, 2012.
- CAMARGOS, L.A. **A responsabilidade penal internacional dos indivíduos: Estudo do caso Darfur**, in *Revista de Direito Brasileira*, 2013, pp. 199ss.
- CARCANO, A. **Sentencing and the gravity of the offence in international criminal law**, in *International and Comparative Law Quarterly*, 51, 2002, pp. 583-609.
- CARSON, K.E. **Reconsidering the theoretical accuracy and prosecutorial effectiveness of international Tribunals ad hoc approaches to conceptualizing crimes of sexual violence as war crimes, crimes against humanity and acts of genocide**, in *Fordham Urban Law Journal*, 39, 2012, pp. 1250ss.
- CARTER, L. MULGREW, R. ABELS, D. **Research handbook on the international penal system**, Edward Elgar Publishing, Cheltenham, 2016.
- CARTER, L.E. **The future of the International Criminal Court: Complementarity as a strength or a weakness?**, in *Washington University Global Studies Law Review*, 12, 2013, pp. 454ss.

- CASSESE, A. JESSBERGER, F. CRYER, R. DÉ, U. **International criminal law**, ed. Routledge, London & New York, 2016.
- CASSESE, A. GAETA, P. **Cassese's international criminal law**, Oxford University Press, Oxford, 2013, pp. 37ss.
- CASSESE, A. **International criminal law**, Oxford University Press, Oxford, 2003, pp. 81-82.
- \_\_\_\_\_. **International criminal law**, Oxford University Press, Oxford, 2008, pp. 182ss.
- \_\_\_\_\_. **The Geneva Protocols of 1977 on the humanitarian law of armed conflict and customary international law**, in *UCLA Pacific Basin Law Journal*, 3, 1984, pp. 55ss.
- \_\_\_\_\_. **The nexus requirement for war crimes**, in *Journal of International Criminal Justice*, 10, 2012, pp. 1414ss.
- \_\_\_\_\_. **The statute of the International Criminal Court: Some preliminary reflections**, in *European Journal of International Law*, 10, 1999, pp. 152ss.
- CAYLEY, A.T. **Prosecuting mass atrocities at the Extraordinary Chambers in the Courts of Cambodia (ECCC)**, in *Washington University Global Studies Law Review*, 11, 2012, pp. 446ss.
- CCOURTNEY, J. KAOUTZANIS, C. **Proactive gatekeepers: The jurisprudence of the ICC's pre-trial Chambers**, in *Chicago Journal of International Law*, 2015, pp. 525ss.
- CHANEY, K.R. **Pitfalls and imperatives: Applying the lessons of Nuremberg to the Yugoslav war crimes trials**, in *Dickinson Journal of International Law*, 14, 1995, pp. 58ss.
- CHAZAL, N. **Beyond borders? The International Criminal Court and the geopolitics of international criminal justice**, in *Griffiths Law Review*, 22, 2013, pp. 715ss.
- CHERIF BASSIOUNI, M. **The International Criminal Court and global social control: International Criminal Justice in late modernity**, ed. Routledge, London & New York, 2015.
- \_\_\_\_\_. **The sources and content of international criminal law: A theoretical framework**, in CHERIF BASSIOUNI, M. (a cura di), **International criminal law. Volume I, Sources, subjects and contents**, Martinus Nijhoff Publishers, The Hague, 2008, pp. 95-100.
- \_\_\_\_\_. **Crimes against humanity. Historical evolution and contemporary application**, Cambridge University Press, Cambridge, 2011, pp. 400ss.
- \_\_\_\_\_. **International crimes: Jus cogens and obligatio erga omnes**, in *Law and Contemporary Problems*, 59, 1996, pp. 68ss.
- \_\_\_\_\_. **Principles of legality in international and comparative criminal law**, in CHERIF BASSIOUNI, M. (ed.), **International criminal law, vol. I: Sources, subjects and contents**, Martinus Nijhoff Publishers, The Hague, 2008, pp. 73-105.
- \_\_\_\_\_. **The legislative history of the International Criminal Court: Introduction, analysis and integrated text. Volume I**, ed. Brill/Martinus Nijhoff Publishers, New York, 2005, pp. 151ss.
- CHERIF BASSIOUNI, M. MANIKAS, P. **The law of the International Criminal Tribunal for the Former Yugoslavia**, Transnational Publishers 1996, pp. 555ss.
- CHERNOR JALLOH, C. MEISNER, S. **The law reports of the Special Court of Sierra Leone, vol. III**, ed. Brill/Martinus Nijhoff Publishers, The Hague, 2015, pp. 366ss.
- CHERNOR JALLOH, C. MORGAN, A. **International criminal justice processes in Rwanda and Sierra Leone: Lessons for Liberia**, in CHERNOR JALLOH, C. OLUFEMI, E. **Shielding humanity. Essays in international law in honour of judge Abdul G. Koroma**, ed. Brill, The Hague, 2015.

CHERNOR JALLOH, C. **The Sierra Leone Special Court and its legacy: The impact for Africa and international criminal law**, Cambridge University Press, Cambridge, 2013, pp. 234ss.

\_\_\_\_\_. **What makes crimes against humanity crimes against humanity?**, in *American University International Law Review*, 28, 2013, pp. 408ss.

CHESNEY-LIND, M. MERLÓ, A.V. **Global war on girls? Policing girl's sexuality and criminalizing their victimization**, in *Women and Criminal Justice*, 25, 2015.

CHESTERMAN, S. **An altogether different order, defining the elements of crimes against humanity**, in *Duke Journal of Comparative and International Law*, 10, 2002, pp. 332ss.

CHIEDU MOGHALU, K. **International humanitarian law from Nuremberg to Rome: The weighty precedents of the international criminal Tribunal for Rwanda**, in *Pace International Law Review*, 14, 2002, pp. 285ss.

CHIFFLET, P. BOAS, G. **Sentencing coherence in international criminal law: The cases of Biljana Plavšić and Miroslav Bralo**, in *Criminal Law Forum*, 23, 2012, pp. 158.

CLARK, J.N. **The "crime of crimes": genocide, criminal trials and reconciliation**, in *Journal of Genocide Research*, 14, 2012, pp. 55-77.

CLARK, P. **Rape, sexual violence and transitional justice challenges. Lessons from Bosnia Herzegovina**, ed. Routledge, London & New York, 2018.

\_\_\_\_\_. **The Gacaca Courts, post-genocide justice and reconciliation in Rwanda. Justice without lawyers**, Cambridge University Press, Cambridge, 2010.

CLARK, R.S. Crimes against humanity and the Rome Statute of the International Criminal Court, in POLITI, M. NESI, G. (a cura di), **The Rome Statute of the International Criminal Court: A challenge to impunity**, Ashgate Publishing, Aldershot, 2001.

\_\_\_\_\_. **Does the Genocide Convention go far enough? Some thoughts on the nature of criminal genocide in the context of Indonesia's invasion of East Timor**, in *Ohio Northern University Law Review*, 8, 1981, pp. 327ss.

\_\_\_\_\_. The "weapons provisions" and its annex: The belgian proposals, in BELLELLI, R. (a cura di), **International criminal justice. Law and practice from the Rome statute to its review**, Ashgate Publishing, Farnham, 2010, pp. 489-495.

\_\_\_\_\_. **The mental element in international criminal law**, in *Criminal Law Forum*, 12, 2001, pp. 327-329.

CLARKE, K.M. KNOTNERU, A.S. DE VOLDER, E. **Africa and the ICC**, Cambridge University Press, Cambridge, 2016.

CLARKE, K.M. **Refining the perpetrator culpability history and international criminal law's impunity gap**, in *The International Journal of Human Rights*, 19, 2015, pp. 594ss.

COLE, A. International criminal law and sexual violence, in MCGLYNN, C. MUNRO, V. **Rethinking rape law. International and comparative perspectives**, ed. Routledge, London & New York, 2010, pp. 49ss.

COLLARD, M. **Torture as State crime. A criminological analysis of the transnational institutional torturer**, ed. Routledge, London & New York, 2018.

CONWAY, G. **Conflicts of competence norms in EU Law and the legal reasoning of the ECJ**, in *German Law Journal*, 11, 2010, pp. 985ss.

CORN, G.S. et al., **The war on terror and the laws of war. A military perspectives**, Oxford University Press, Oxford, 2015.

CORTEN, O. KLEIN, P. **The Vienna Conventions on the law of treaties. A commentary**, Oxford University Press, Oxford, 2011.

- COSTA, J.P. **La Cour européenne des droits de l'homme. Des juges pour la liberté**, ed. Dalloz, Paris, 2017.
- COTE BARCO, G.E. **Rückwirkung und die Entwicklung der internationalen Verbrechen. Elemente einer allgemeinen Konzeption des nullum-crimen-sine-lege-Prinzips im Völkerstrafrecht**, Duncker & Humblot, Berlin, 2018.
- COTTIER, M. GRIGNON, J. Art. 8(2)(b)(xxvi), in TRIFFTERER, O. AMBOS, K. (a cura di), **The Rome Statute of the International Criminal Court. A Commentary**, C.H.Beck-Hart-Nomos, München, Oxford, Baden-Baden, 2016, pp. 524ss.
- CRAWFORD, J. **Brownlie's principles of public international law**, Oxford University Press, Oxford, 2012.
- CROCO, S.E. **The decider's dilemma: Leader culpability, war outcomes, and domestic punishment**, in American Political Science Review, 105 (3), 2011, pp. 458ss.
- CRONIN-FURMAN, K. **Managing expectations: International criminal trials and the prospects for deterrence of mass atrocity**, in The International Journal of Transitional Justice, 7, 2013, pp. 438ss.
- CROWE, J. WESTON-SCEUBER, K. **Principles of international humanitarian law**, Edward Elgar Publishing, Cheltenham, 2013, pp. 8ss.
- CRYER, R. et al., **An introduction to international criminal law and procedure**, Cambridge University Press, Cambridge, 2014, pp. 310ss.
- CRYER, R. FRIMAN, H. ROBINSON, D. WILMSHURST, E. **An introduction to international criminal law and procedure**, Cambridge University Press, Cambridge, 2014, pp. 231ss.
- CRYER, R. **Prosecuting international crimes. Selectivity and the international criminal law regime**, Cambridge University Press, Cambridge, 2005, pp. 257ss.
- CRYER, R. **The definitions of international crimes in the Al Bashir arrest warrant decision**, in Journal of International Criminal Justice, 7, 2009, pp. 290ss.
- CULLEN, A. **Definition of non-international armed conflict in the Rome Statute of the International Criminal Court: An analysis of the threshold of application contained in Article 8(2)(f)**, in Journal of Conflict and Security Law, 12, 2008.
- CUPIDO, M. **The policy underlying crimes against humanity. Practical reflections on a theoretical debate**, in Criminal Law Forum, 22, 2011, pp. 294ss.
- D'ASCOLI, S. **Sentencing in international criminal law: The UN ad hoc Tribunals and future perspectives for the ICC**, Hart Publishing, Oxford & Portland, Oregon, 2011.
- DAMNJANOVIC, V. **Die Beteiligungensformen im deutschen und serbischen Strafrecht sowie in der ICTY-Rechtsprechung**, BWN Berliner Wissenschafts Verlag, Berlin, 2013, pp. 246ss.
- DANA, S. **The sentencing legacy of the Special Court for Sierra Leone**, in Georgia Journal of International and Comparative Law, 43, 2014, pp. 620ss.
- DANNER, A.M. **Constructing a hierarchy of crimes in international criminal law sentencing**, in Virginia Law Review, 87, 2001, pp. 465ss.
- DARCY, S. Defences to international crimes, in SCHABAS, W.A. BERNAZ, N. **Handbook of international criminal law**, ed. Routledge, London & New York, 2011, pp. 231-245.
- DAVID, E. **Principes de droit des conflits armés**, ed. ULB, Bruxelles, 2002, pp. 109.
- \_\_\_\_\_. **Traité de droit pénal international**, ed. Bruylant, Bruxelles, 1995, pp. 266-268.

DAVIDSON, C. **How to read international criminal law: Strict construction and the Rome Statute of the International Criminal Court**, in *St. John's Law Review*, 91, 2017, pp. 4ss.

DAZA GONZÁLEZ, A. **El principio de complementariedad en el derecho penal internacional**, ed. Universidad Católica de Colombia, Bogotá, D.C, 2015.

DDAMULIRA MYJUZI, J. **Prosecution and punishing torture in South Africa as a discrete crime and as a crime against humanity**, in *African Journal of International and Comparative Law*, 23, 2015, pp. 342ss.

DE BROUWER, A.M. HEIKKILÄ, M. **Victim issues: Participation, protection, reparation and assistance**, in SLUITER, G. FRIMAN, H. LINTON, S.

DE BROUWER, A.M. KU, C. RÖMKENS, R. VAN DEN HERIK, L. **Sexual violence as an international crime: Interdisciplinary approaches**, ed. Intersentia, Antwerp, Oxford, 2013, pp. 123ss.

DE BROUWER, A.M. **The importance of understanding sexual violence in conflict for investigation and prosecution purposes**, in *Cornell International Law Journal*, 48, 2015.

DE CASADEVANTE ROMANI, C.F. **International law of victims**, ed. Springer, Berlin, 2012.

DE HEMPTINNE, J. **Controverses relatives à la définition du crime de persécution**, in *Revue Trimestrielle des Droits de l'Homme*, 53, 2003, pp. 35ss.

\_\_\_\_\_. **La définition de la notion de "population civile" dans le cadre du crime contre l'humanité. Commentaire critique de l'arrêt Martić**, in *Revue Général de Droit International Public*, 114, 2010, pp. 93-104.

DEFALCO, R.C. **Accounting for famine at the Extraordinary Chambers in the Courts of Cambodia. The crimes against humanity of extermination, inhumane acts and persecution**, in *The International Journal of Transitional Justice*, 5, 2011, pp. 148ss.

DEGUZMAN, M. **Article 21-Applicable law**", in TRIFFTERER, O. (ed.), **Commentary on the Rome Statute of the International Criminal Court: Observers' notes, article by article**, C.H. Beck/Hart/Nomos, Oxford & Oregon, Portland, Baden-Baden, München, 2008, pp. 701-712.

\_\_\_\_\_. **The International Criminal Court's gravity jurisprudence at ten**, in *Washington University Global Studies Law Review*, 12, 2013, pp. 476ss.

\_\_\_\_\_. **How serious are international crimes? The gravity problem in international criminal law**, in *Columbia Journal of Transnational law*, 51, 2012, pp. 20ss.

DELMAS-MARTY, M. **Violence and massacres-Towards a criminal law of inhumanity?**, in *Journal of International Criminal Justice*, 7, 2009, pp. 8ss.

DEREYMAEKER, G. MUNTIGH, L. **Sexual violence and torture in international criminal law. Amnesty International. Rape and sexual violence: Human rights law and standards in the International Criminal Court**, in *Journal of Human Rights Practice*, 3, 2011, pp. 48ss.

DEUTCH, S.T. **Putting the spotlight on "the terminator": How the ICC prosecution of Bosco Ntaganda could reduce sexual violence during conflict**, in *William & Mary Journal of Women & Law*, 23, 2016, pp. 656ss.

DINH, N.Q. DAILLIER, P. PELLET, A. **Droit international public**, ed. LGDJ, Paris, 1994, pp. 632ss.

DINSTEIN, Y. **Crimes against humanity**, in MAKARCZYK, J. (a cura di), **Theory of international law at the threshold of the 21st Century. Essays in Honour of Krzysztof Skubiszewski**, ed. Brill/Martinus Nijhoff Publishers, Leiden, 1996, pp. 903ss.

- DIRNSTEIN, Y. **Non-international armed conflicts in international law**, Cambridge University Press, Cambridge, 2014, pp. 186ss.
- DÍAZ SOTO, J.M. **Una aproximación al concepto de crímenes contra la humanidad**, in *Revista Derecho Penal y Criminología*, 95, 2015, pp. 123ss.
- DON TAYLOR III, B. Crimes against humanity in the Former Yugoslavia, in BELLELLI, R. (a cura di), **International criminal justice. Law and practice from the Rome Statute to its review**, ed. Ashgate Publishing, Farnham, 2010, pp. 285-294.
- DÖRMANN, K. LA HAYE, E. VON HEBEL, H. The context of war crimes, in LEE, R.S. (a cura di), **The International Criminal Court. Elements of crimes and rules of procedure and evidence**, Transnational Publishers, New York, 2001, pp. 121ss.
- DÖRMANN, K. **Preparatory Commission for the International Criminal Court: The elements of war crimes**, in *International Review of the Red Cross*, 82, 2000, pp. 780ss.
- DÖRR, O. Article 31. General rule of interpretation, in DÖRR, O. SCHMALENBACH, K. (a cura di), **Vienna Convention on the Law of Treaties. A commentary**, Springer, Heidelberg-New York 2012, pp. 536ss.
- DOSWALD BECK, L. **Human rights in times of conflict and terrorism**, Oxford University Press, Oxford, 2011.
- DROEGE, C. **Get off my cloud: Cyber warfare, international humanitarian law, and the protection of civilians**, in *International Review of the Red Cross*, 92, 2012.
- DROST, P.N. **The crime of State: Penal protection for fundamental freedoms of persons and peoples-Genocide**, ed. Sythoff, Leiden, 1954, pp. 100-102.
- DRUMBL, M.A. **Atrocity, punishment and international law**, Cambridge University Press, Cambridge, 2007, pp. 173ss.
- DRUMBL, M.A. **Collective violence and individual punishment: The criminality of mass atrocity**, in *Northwestern University Law Review*, 99, 2005, pp. 577-595.
- \_\_\_\_\_. **Rule of law amid lawlessness: Counseling the accused in Rwanda's domestic genocide trials**, in *Columbia Human Rights Law Review*, 29, 1998, pp. 545s.
- \_\_\_\_\_. **Unlawful recruitment and use of children: From proscription to prevention: Reimagining child soldiers in international law and policy**, Oxford University Press, Oxford, 2012, pp. 16ss.
- DU PLESSIS, M. **South Africa's implementation of the ICC Statute. An african example**, in *Journal of International Criminal Justice*, 5, 2007, pp. 460-479.
- DUBINSKY, A. **An examination of international sentencing guidelines and a proposal for amendments to the International Criminal Court's sentencing structure**, in *New England Journal on Criminal and Civil Confinement*, 33, 2007, pp. 609-637.
- DUBLER SC, R. KALYK, M. **Crimes against humanity in the 21st century**, ed. Brill, The Hague, 2018.
- DUGARD, J. L'apartheid, in ASCENSIO, H. DECAUX, E. PELLET, A. (a cura di), **Droit international pénal**, ed. Pedone, Paris, 2012, pp. 203ss.
- DURAJ, E. **Protecting children rights under international criminal justice**, in *Academic Journal of Business, Administration, Law and Social Sciences*, 1, 2015, pp. 94ss.
- EBBE, O.N.I. **Comparative justice systems. Policing, judiciary and corrections**, ed. Palgrave, London, 2013.
- EBOE-OSUJI, C. **International law and sexual violence in armed conflicts**, ed. Brill, The Hague, 2012, pp. 146ss.

- EBY, C.P. **Aid "specifically directed" to facilitate war crimes. The ICTY's anomalous actus reus standard for aiding and abetting**, in Chicago Journal of International Law, 115, 2014.
- EDEN, P. **The role of the Rome Statute in the criminalization of apartheid**, in Journal of International Criminal Justice, 12, 2014, pp. 184-185.
- EINARSEN, T. Prosecuting aggression through other universal core crimes at the International Criminal Court, in SADAT, N.L. **Seeking accountability for the unlawful use of force**, Cambridge University Press, Cambridge, 2018.
- ELLIS, M.S. CHERNOR JALLOH, C. **The International Criminal Court in an effective global justice system**, Edward Elgar Publishing, Cheltenham, 2016.
- ERDEI, I. **Cumulative convictions in international criminal law: Reconsideration of a seemingly settled issue**, in Suffolk Transnational Law Review, 34, 2001, pp. 15ss.
- ESER, A. **Comparative criminal law**, ed. Nomos & Hart Publishing, München, 2017.
- \_\_\_\_\_. Mental elements-Mistake of fact and mistake of law, in CASSESE, A. GAETA, P. JONES, J.R.W.D. (a cura di), **The Rome Statute of the International Criminal Court**, Oxford University Press, Oxford, 2001, pp. 907ss.
- \_\_\_\_\_. The need for a general part, in M. CHERIF BASSIOUNI (a cura di), **Commentaries on the International Law Commission's 1991 Draft Code of Crimes Against the Peace and Security of Mankind**, ed. AIDP, Toulouse, 1993, pp. 43-61.
- ESTUPIÑAN SILVA, R. **Principios que rigen la responsabilidad internacional penal por crímenes internacionales**, in Anuario Mexicano de Derecho Internacional, 2012, pp. 136ss.
- FEINBERG, J. Action and responsibility, in BLACK, M. (a cura di), **Philosophy in America**, Cornell University Press, Ithaca, 1965, pp. 134-160.
- \_\_\_\_\_. **Doing and deserving: Essays in the theory of responsibility**, Princeton University Press, Princeton, 1974, pp. 134.
- FENRICK, W.J. **The Crime Against Humanity of Persecution in the Jurisprudence of the ICTY**, in Netherlands Yearbook of International Law, 31, 2001, 89 ss.
- FERNÁNDEZ-PACHECO ESTRADA, C. **The international criminal Court and the Čelebići test: Cumulative convictions based on the same set of fact's from a comparative perspective**, in Journal of International Criminal Justice, 15, 2017, pp. 692ss.
- FINDLAY, M. CHAH HUI YUNG, J. **Principled international criminal justice: Lessons form tort law**, ed. Routledge, London & New York, 2018.
- FINDLAY, M. HENHAM, R. **Exploring the boundaries of international criminal justice**, ed. Routledge, London & New York, 2016, pp. 83ss.
- FINNIN, S. **Mental elements under article 30 of the Rome Statute of the International Criminal Court: A comparative analysis**, in International and Comparative Law Quarterly, 2012, pp. 336ss.
- FITZMAURICE, M. ELIAS, O. MERKOURIS, P. (eds), **Treaty interpretation and the Vienna Convention on the Law of Treaties, 30 years on**, Martinus Nijhoff, The Hague, 2010, pp. 9ss.
- FLECK, D. **The handbook of humanitarian law in armed conflicts**, Oxford University Press, Oxford, 1995, pp. 40ss.
- FLETCHER, G.P., **The stories lectures. Liberals and romantics at war: The problem of collective guilt**, in Yale Law Journal, 111, pp. 2002ss.
- FOUNTAIN CALEB, C.J. **Sexual violence, the ad hoc Tribunals and the International Criminal Court: Reconciling Akayesu and Kunarac**, in ILSA Journal of International & Comparative Law, 20, 2013, pp. 4ss.

- FOURNET, C. PÉGORIER, C. **“Only one step away from genocide”. The crime of persecution in international criminal law**, in *International Criminal Law Review*, 10, 2010, pp. 714ss.
- FOURNET, C. **The crime of destruction and the law of genocide. Their impact on collective memory**, Ashgate Publishing, Hampshire, 2007, pp. 99-108.
- FRANCIONI, F. RONZITTI, N. **War by contract. Human rights, humanitarian law, and private contractors**, Oxford University Press, Oxford, 2011.
- FRANCISCO, M.I.F. **Aspects of implementing the culpability principle both under international and national criminal law**, Wolf Legal Publishers, The Hague, 2008.
- FRY, E. **Legal recharacterisation and the materiality of facts at the International Criminal Court: Which changes are permissible?**, in *Leiden Journal of International Law*, 29, 2016, pp. 577-597.
- FULFORD, A. **The reflections of a trial judge**, in *Criminal Law Forum*, 22, 2011, pp. 216ss.
- GAETA, P. **The defence of superior orders: The Statute of the International Criminal Court versus customary international law**, in *European Journal of International Law*, 10, 1999, pp. 189ss.
- GAETA, P. The history and the evolution of the notion of international crimes, in BELLELLI, R. (a cura di), **International criminal justice. Law and practice from the Rome statute to its review**, Ashgate Publishing, Farnham, 2010, pp. 169-180.
- \_\_\_\_\_. **When is the involvement of State Officials a requirement for the crime of torture**, in *Journal of International Criminal Justice*, 6, 2008, pp. 190ss.
- GALLANT, K.S. **The principle of legality in international and comparative criminal law**, Cambridge University Press, Cambridge, 2009.
- GASSER, H.P. **Acts of terror, “terrorism” and international humanitarian law**, in *International Review of the Red Cross*, 95, 2013.
- \_\_\_\_\_. International humanitarian law: An introduction, in HAUG, H. (a cura di), **Humanity for all. The International Red Cross and red crescent movement**, Paul Haupt, Berne, 1993, pp. 510ss.
- GEERT, J. KNOOPS, J. **Defenses in contemporary international law**, Martinus Nijhoff Publishers, The Hague, 2008, pp. 7ss.
- GEISLER, C. **Zur Vereinbarkeit objektiver Bedingungen der Strafbarkeit mit dem Schuldprinzip: Zugleich ein Beitrag zum Freiheitsbegriff des modernen Schuldstrafrechts**, Duncker & Humblot, Berlin, 1998, pp. 130ss.
- GIORGETTI, C. **The rules, practice and jurisprudence of international Courts and Tribunals**, ed. Brill, The Hague, 2012, pp. 194ss.
- GLESS, S. **Internationales Strafrecht. Grundriss für Studium und Praxis**, Helbing Lichtenhahn, Basel, 2015.
- GLOBKE, C. **Die Auslieferung an den Internationalen Strafgerichtshof**, Mohr Siebeck, Tübingen, 2009.
- GOLASH, D. The justification of punishment in the international context, in MAY, L. HOSKINS, Z. (a cura di), **International criminal law and philosophy**, Cambridge University Press, Cambridge, 2010, pp. 201-223.
- GOLDMAN, A.I. **A theory of human action**, Princeton Legacy Library, Princeton, 2016.
- \_\_\_\_\_. **The individuation of action**, in *Journal of Philosophy*, 68, 1971, pp. 762ss.
- GOODMAN, R. **Human rights treaties, invalid reservations, and State consent**, in *American Journal of International Law*, 96, 2002, pp. 537ss.

- GORDON, G.S. **Hate speech and persecution. A contextual approach**, in *Vanderbilt Journal of Transnational Law*, 46, 2013, pp. 332ss.
- GOSNELL, C. **Damned if you don't liability for omissions in international criminal law**, Ashgate Publishing, Farnham, 2013.
- GOW, J. KERR, R. PAJIC, Z. **Prosecuting war crimes, lessons and legacies of the International Criminal Tribunal for the Former Yugoslavia**, ed. Routledge, Abington & New York, 2014.
- GOY, B. **Individual criminal responsibility before the International Criminal Court: A comparison with the ad hoc Tribunals**, in *International Criminal Law Review*, 12, 2012, pp. 5ss.
- GRABENWARTER, C. **European Convention on human rights: ECHR**, C.H. Beck, München, 2014.
- GRABERT, A. **Dynamic interpretation in international criminal law. Striking a balance between stability and change**, ed. C.H. Beck, München, 2015, pp. 68-73.
- GRAF, R. **The International Criminal Court and child soldiers: An appraisal of the Lubanga judgment**, in *International Criminal Justice*, 10, 2012, pp. 948ss.
- GRÉCIANO, P. **Justice pénale internationale**, ed. Mare & Martin, Paris, 2016.
- GREEN, L.C. **The contemporary law of armed conflict**, Manchester University Press, Manchester, 2000.
- GREENAWALT, A.K.A. **Rethinking genocidal intent: The case for a knowledge-based interpretation**, in *Columbia Law Review*, 99, 1999, pp. 2259ss).
- GREENWOOD, C. Customary law status of the 1997 Additional Protocols, in DELISSEN, A.J.M. TANJA, G.J. (a cura di), **Humanitarian law of armed conflict**, Martinus Nijhoff Publishers, The Hague, 1991, pp. 93ss.
- \_\_\_\_\_. Scope of application of humanitarian law, in FLECK, D. (ed), **The Handbook of international humanitarian law**, Oxford University Press, Oxford, 2008, pp. 45ss.
- GREER, S. **Is the prohibition against torture, cruel, inhuman and degrading treatment really "absolute" in international human rights law?**, in *Human Rights Law Review*, 15, 2015, pp. 5ss.
- GRESCHKOW, A. **Feindbilder der Nachkriegsgeneration in Bosnien und Herzegowina: Bosniens Jugend zwischen Hoftung und den Schatten der Vergangenheit**, Diplomica Verlag GmbH, Hamburg, 2014.
- GREWAL, K. **The protection of sexual autonomy under international criminal law. The International Criminal Court and the challenge of defining rape**, in *Journal of International Criminal Justice*, 10, 2012, pp. 373ss.
- GREY, R. SHEPHERD, L.J. **Stop rape now?: Masculinity, responsibility, and conflict-related sexual violence**, in *Men & Masculinities*, 15, 2012, pp. 117ss.
- GRONO, N. DE COURCY WHEELER, A. The deterrent effect of the ICC on the Commission of International Crimes by government leaders, in STAHN, C. (ed), **The law and practice of the International Criminal Court**, Oxford University Press, Oxford, 2015, pp. 1228ss.
- GROSSI, L.M. GREEN, D. **An international perspective on criminal responsibility and mental illness**, in *Practice Innovations*, 2(1), 2017, pp. 4ss.
- GROVER, L. **Child soldier victims of genocidal forcible transfer. Exonerating child soldiers charged with grave conflict-related international crimes**, ed. Springer, Berlin, 2014.
- GROVER, L. **Interpreting crimes in the Rome statute of the International Criminal**

**Court**, Oxford University Press, Oxford, 2016.

HAFAJEE, R.L. **Prosecuting crimes of rape and sexual violence at the ICTR: The application of joint criminal enterprise theory**, in Harvard Journal of Law and Gender, 29, 2006, pp. 206ss.

HAGAY-FREY, A. **Sex and gender crimes in the new international law: Past, present, future**, Martinus Nijhoff Publishers, The Hague, 2011, pp. 80ss.

HAHD AL-KASASIBAH, F. **Torture as crime under international law and torture victims' rights**, in Journal of Law Policy and Globalization, 42, 2015, pp. 146ss.

HALLEY, J. **Rape in Berlin: Reconsidering the criminalisation of rape in the international law of armed conflict**, in Melbourne Journal of International Law, 12, 2008, pp. 80ss.

HALLING, M. **Push the envelope: Watch it bend: Removing the policy requirement and extending crimes against humanity**, in Leiden Journal of International Law, 23 (4), 2010, pp. 828ss.

HANNA MORAWSKA, E.R. **The complex structure of the absolute prohibition of torture. Comments in the light of the regulation of article 3 of the European Convention on Human Rights**, in Espaço Jurídico Journal of Law, 17, 2016, pp. 769ss.

HANSEN, T.P. **The policy requirement in crimes against humanity: Lessons from and for the Case of Kenya**, in George Washington International Law Review, 43, 2001, pp. 1-42.

HAPPOLD, M. **The protection of children against recruitment and participation in hostilities: International humanitarian law and human rights law as complementary legal frameworks**, in Collegium, 44, 2014, pp. 99, 105ss.

HARRIS, D. O'BOYLE, M. WARBRICK, C. **Law of the European Convention on Human rights**, Oxford University Press, Oxford, 2014, pp. 372ss.

HARRIS, D.J. **Cases and materials on international law**, Sweet & Maxwell, London, 1998.

HAYES, N. **Creating a definition of rape in international law: The contribution of the international criminal Tribunals**, in DARCY, S. POWDERLY, J. **Judicial creativity at the international criminal Tribunals**, Oxford University Press, 2010, pp. 130ss.

HAYS PARKS, W. **Part IX of the ICRC direct participation in hostilities study: No mandate, no expertise, and legally incorrect**, in New York University Journal of International Law and Politics, 42, 2010, pp. 770ss.

HEFENDEHL, R. **Grenzenlose Vorverlagerung des Strafrechts?**, BWV Berliner Wissenschafts Verlag, Berlin, 2010, pp. 24ss.

HEIKILLÄ, M. **Coping with international atrocities through criminal law: A study into the typical features of international criminality and the reflection of these traits in international law**, Åbo Akademis förlag, Åbo Akademi University Press, Finland, 2013.

HEINE, G. VEST, H. **Murder/wilful killing**, in MCDONALD, G.K. SWAAK-GOLDMAN, O. (a cura di), **Substantive and procedural aspects of international criminal law. Volume I: Commentary**, Kluwer law Intrnational, The Hague, 2000, pp. 175ss.

HELLER, K.J. **A sentence-based theory of complementarity**, in Harvard International Law Journal, 53, 2011, pp. 208ss.

\_\_\_\_\_. **The Rome Statute of the International Criminal Court**, in HELLER, K.J. DUBBER, D. (eds.), **The handbook of comparative criminal law**, Stanford Law Books, Stanford, 2011, pp. 597ss.

\_\_\_\_\_. **The Taylor sentencing judgment: A critical analysis**, in Journal of International Criminal Justice, 11, 2013, pp. 838ss.

- \_\_\_\_\_. **What is an international crime?**, in *Harvard International Law Journal*, 49, 2018.
- HENCKAERTS, J.M. **Deportation and transfer of civilians in time of war**, in *Vanderbilt Journal of Transnational Law*, 26, 1993, pp. 472ss.
- HENCKAERTS, J.M. DOSWALD-BECK, L. **Customary international humanitarian law**. Volume I: Rules, Cambridge University Press, Cambridge, 2009.
- HENDERSON, C. (a cura di), **Commissions of inquiry: Problems and prospects**, Hart Publishing, Oxford, Portland & Oregon, 2017.
- HOCHMAYR, G. **Applicable law in practice and theory-Interpreting article 21 of the ICC statute**, in *Journal of International Criminal Justice*, 12, 2014, pp. 655-679.
- HOGANDOGAN, J. **Murder as a crime under international law and the statute of the International Criminal Tribunal for the Former Yugoslavia: Of law, legal language, and a comparative approach to legal meaning**, in *Leiden Journal of International Law*, 11, 1998, pp. 165-181.
- HOLÁ, B. BIJLEVELD, C. SMEULERS, A. **Consistency of international sentencing: ICTY and ICTR case study**, in *European Journal of Criminology*, 9, 2012, pp. 546ss.
- \_\_\_\_\_. **International sentencing facts and figures, sentencing practice at the ICTY and ICTR**, in *Journal of International Criminal Justice*, 9, 2011, pp. 437ss.
- HOLLING, J. **Internationaler Strafgerichtshof und Verbrechens prävention**, LIT Verlag, Münster, 2016, pp. 148ss.
- HUNEEUS, A. **International criminal law by other means: The quasi-criminal jurisdiction of the human rights court**, in *American Journal of International Law*, 107, 2013, pp. 6ss.
- HÜNERBEIN, I. **Straftatkonkurrenzen im Völkerstrafrecht**, Duncker & Humblot, Berlin, 2005, pp. 130ss.
- HWANG, P. **Defining crimes against humanity in the Rome Statute of the International Criminal Court**, in *Fordham International Law Journal*, 22, 1998, pp. 502 ss.
- INNES, B. **History and methods of torture crime and detection**, ed. Mason Crest, Pennsylvania, 2002.
- JACKSON, M. **A conspiracy to commit genocide. Anti-fertility research in apartheid's chemical and biological weapons programme**, in *Journal of International Criminal Justice*, 13 (4), 2015, pp. 933-950.
- \_\_\_\_\_. **Complicity in international law**, Oxford University Press, Oxford, 2015.
- JÄGER, H. **Makrokriminalität. Studien zur Kriminologie kollektiver Gewalt**, ed. Suhrkamp, Berlin, 1989.
- JAIN, N. **Perpetrators and accessories in international criminal law. Individual modes of responsibility for collective crimes**, Hart Publishing, Oxford & Portland, Oregon, 2014.
- JALLOH CHEVROR, C. MARONG A., **Promoting accountability under international law for gross human rights violations in Africa. Essays in honour of prosecutor hasan Bubacar Jallow**, ed. Brill, The Hague, 2015.
- JARVIS, M. **The practice of international criminal law. Some reflections from an ICTY Prosecutor**, in *International Criminal Law Review*, 17, 2017, pp. 400ss.
- JENKS, C. **Law as shield, law as sword: The ICC's Lubanga decision, child soldiers and the perverse mutualism of direct participation in hostilities**, in *University of Miami National Security and Armed Conflict Law Review*, 3, 2013, pp. 106, 122ss.
- JESSBERGER, F. **The definition and the elements of the crime of genocide**, in GAETA, P. (a cura di), **The UN Genocide Convention**, Oxford University Press, Oxford, 2009, pp. 106ss.

- JEUTNER, V. **Irresolvable norm conflicts in International Law. The concept of a legal dilemma**, Oxford University Press, Oxford, 2017, pp. 57ss.
- JIA, B.B. The differing concepts of war crimes and crimes against humanity in international criminal law, in GOODWIN-GILL, G.S. TALMON, S. **The reality of international law. Essays in Honour of Ian Brownlie**, Oxford University Press, Oxford, 2012.
- JOECKS, W. MIEBACH, K. (Hrsg.), **Münchener Kommentar zum Strafgesetzbuch**, C.H. Bech, München, 2017.
- JONES, J.R.W.D. Whose intent is it anyway?-Genocide and the intent to destroy a group, in VOHRAH, L.C. et al. (a cura di), **Man's inhumanity to man**, ed. Brill/Martinus Nijhoff Publishers, The Hague, 2003, pp. 467ss.
- JØRGENSEN, N.H.B. **State responsibility for aiding or assisting international crimes in the context of the arms trade treaty**, in The American Journal of International Law, 108 (4), 2014, pp. 722-749.
- KADISH, S.H. **Fifty years of criminal law: An opinionated review**, in California Law Review, 87, 1999, pp. 954ss.
- KARKERA, T.R. **International Criminal Court's protection of women: The hands of justice at work**, in American University Journal of Gender, Social Policy & the Law, 12, 2004, pp. 202ss.
- KASHKOULIAN, E.M. REZA A., **The principle of legality of crimes of international criminal law perspectives**, in International Journal of Science and Research, 5, 2016, pp. 42ss.
- KEITH. K.M.F., **The mens rea of superior responsibility as developed by ICTY jurisprudence**, in Leiden Journal of International Law, 14 (4), 2001, pp. 618ss.
- KELLER, L.M. **The continuing peace and with justice debate. Recent events in Uganda and the ICC**, in The University of the Pacific Law Review, 48, 2017, pp. 265ss.
- KELLY, M.J. **The debate or genocide in Darfur, Sudan**, in University of California, Davis Journal of International Law & Policy, 19, 2012, pp. 208ss.
- \_\_\_\_\_. The parameters of vicarious corporate criminal liability for genocide under international law, in BYRNES, A. HAYASHI MICHAELSEN, C. **International law in the age of globalization**, ed. Brill, The Hague, 2013.
- KELMAN, H.C. HAMILTON, V.L. **Crimes of obedience: Toward a social psychology of authority and responsibility**, Yale University Press, New Haven-London, 1989, pp. 46.
- KELT, M. VON HEBEL, H. General principles of criminal law and the elements of crimes, in LEE, R.S. (a cura di), **The International Criminal Court. Elements of crimes and rules of procedure and evidence**, Transnational Publishers, New York, 2001, pp. 28ss.
- KEMP, G. **Individual criminal liability for the international crime of aggression**, Cambridge University Press, Cambridge, 2017.
- \_\_\_\_\_. **South Africa's (possible) withdrawal from the ICC and the future of the criminalization and prosecution of crimes against humanity, war crimes and genocide under domestic law: A submission informed by historical, normative and policy considerations**, in Washington University Global Studies Law Review, 14, 2017, pp. 414ss.
- \_\_\_\_\_. The Implementation of the Rome Statute in Africa, in WERLE, G. FERNANDEZ, L. VORMBAUM, M. (a cura di), **Africa and the International Criminal Court**, ed. Springer, The Hague, 2014.
- KHAN, K.A.A. BUISMAN, C. GOSNELL, C. **Principles of evidence in international criminal justice**, Oxford University Press, Oxford, 2010, pp. 138ss.

- KILLEAN, R. **An incomplete narrative: Prosecuting sexual violence crimes at the extraordinary Chambers in the Courts of Cambodia**, in *Journal of International Criminal Justice*, 13 (3), 2015, pp. 335ss.
- KIRAN, G. **The protection of sexual autonomy under international criminal law: The International Criminal Court and the challenge of defining rape**, in *Journal of International Criminal Justice*, 10, 2012, pp. 376ss.
- KIRBY, P. **How is rape a weapon of war? Feminist International Relations, modes of critical explanation and the study of wartime sexual violence**, in *European Journal of International Relations*, 18, 2012, pp. 802ss.
- KIRCHENHAST, T. **Victims and the criminal trial**, ed. Palgrave & Macmillan, London, 2016.
- KIRSCH, S. **Der Begehungszusammenhang der Verbrechen gegen die Menschlichkeit**, Frankfurter kriminalwissenschaftliche Studien, Frankfurt am Main, 2009.
- \_\_\_\_\_. **The two notions of genocide. Distinguishing macro phenomena and individual misconduct**, in *Creighton Law Review*, 42, 2009, pp. 352ss.
- KLABERS, J. **Just revenge? The deterrence argument in international criminal law**, in *Finnish Yearbook of International Law*, 12, 2012, pp. 25ss.
- KNOOPS, G.J.A. **An introduction to the law of international criminal Tribunals: A comparative study**, ed. Brill, The Hague, 2014, pp. 234ss.
- KNOOPS, J. **An introduction to the law of international criminal Tribunals. A comparative study**, ed. Brill. The Hague, 2014.
- KOENIG, K. LINCOLN, A. GROWTH, R. **The jurisprudence of sexual violence-Sexual violence & accountability project, working paper series**, Human Rights Center, University of California, Berkeley, May 2011, pp. 4ss.
- KOHEN, M.G. **La promotion de la justice des droits de l'homme et du règlement des conflits par le droit international. Liber amicorum Lucius Caflisch**, Martinus Nijoff Publishers, The Hague, 2007.
- KOLB, R. HYDE, R. **An introduction to the international law of armed conflicts**, Edward Elgar Publishing, Cheltenham, 2008.
- KOLB, R. SCALIA, D. **Droit international penal**, Précis, Helbing Lichtenhan, Bâle, 2012, pp. 99-105.
- KOLB, R. **The international Court of justice**, Hart Publishing, Oxford & Portland and Oregon, 2013, pp. 1280ss.
- KONATÉ, D. **La Cour Pénale Internationale: Entre nécessité de justice et impératif de pax**, ed. L'Harmattan, Paris, 2018.
- KONLE, K. **Makrokriminalität im Rahmen der jugoslawischen Sezessionskriege**, Herbert Utz Verlag, 2010, pp. 49ss.
- KOVÁCS, P. Racial groups, in SHELTON, D.L. (a cura di), **Encyclopedia of genocide and crimes against humanity**. Volume I (I-S), ed. Thomson Gale, Farmington Hills, 2005, pp. 855-857.
- KRABE, M. **Excusable evil: An analysis of complete defenses in international criminal law**, ed. Intersentia, Antwerp, Oxford, 2014.
- KRESS, C. **Nulla poena nullum crimen sine lege**, in *Max Planck Encyclopedia of Public International Law*, 2010, pp. 4ss.
- \_\_\_\_\_. **On the outer limits of crimes against humanity: The concept of organization within the policy requirement: Some reflections on the March 2010 ICC Kenya decision**, in *Leiden Journal of International Law*, 23, 2010, pp. 863ss.

- \_\_\_\_\_. **Some reflections on the international legal framework governing transnational armed conflict**, in *Journal of Conflict and Security Law*, 15, 2010, pp. 245ss.
- \_\_\_\_\_. **The crime of genocide under international law**, in *Leiden Journal of International Law*, 6, 2006, pp. 461-502.
- \_\_\_\_\_. **The International Court of Justice and the elements of the crime of genocide**, in *European Journal of International Law*, 18, 2007, pp. 619-629.
- \_\_\_\_\_. **Universal jurisdiction over international crimes and the Institut de Droit International**, in *Journal of International Criminal Justice*, 4, 2006, pp. 561-585.
- \_\_\_\_\_. **War crimes committed in non-international armed conflict and the emerging system of international criminal justice**, in *Israel Yearbook on Human Rights*, 30, 2001, pp. 136ss.
- KRETZMER, D. **Rethinking the application of international humanitarian law in non-international armed conflicts**, in *Israel Law Review*, 42, 2009.
- KUCHER, O. PETRENKO, A. **International criminal responsibility after Katanga: Old challenges, new solutions**, in *Russian Law Journal*, 3, 2015, pp. 144ss.
- KUCZYŃSKA, H. **Changing evidentiary rules to the detriment of the accused? The Ruto and Sang decision of the ICC Appeals Chamber**, in *Polish Yearbook of International Law*, n. 37, 2017.
- KURTH, M. **The Lubanga case of the International Criminal Court: A critical analysis of the Trial Chamber's findings on issues of active use, age and gravity**, in *Goettingen Journal of International Law*, 5, 2013, pp. 431-453.
- KURU, H. **Prohibition of use of force and cyber operations as "force"**, in *Journal of Learning and Teaching in Digital Age*, 2, 2017, pp. 48ss.
- KWIECIEŃ, R. **General principles of law: The gentle guardians of systemic integration of international law**, in *Polish Yearbook of International Law*, n. 37, 2017.
- LA HAYE, S. **The elements of war crimes-Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, and sexual violence**, in LEE, R.S. (a cura di), **The International Criminal Court. Elements of crimes and rules of procedure and evidence**, Transnational Publishers, New York, 2001, pp. 184ss.
- LANGER, M. **The diplomacy of universal jurisdiction: The political branches and the transnational prosecution of international crimes**, in *American Journal of International Law*, 105, 2011, pp. 1, 42ss.
- LAVIOLETTE, N. **Commanding rape: Sexual violence, command responsibility and the prosecution of superiors by the international criminal Tribunals for the Former Yugoslavia and Rwanda**, in *The Canadian Yearbook of International Law*, 36, 1998, pp. 94ss.
- LAWRENCE, J.C. HELLER, K.J. **The limits of Article 8(2)(b)(iv) of the Rome Statute, The first ecocentric environmental war crime**, in *Georgetown International Environmental Law Review*, 20, 2007, pp. 73-113.
- LAWSON, R.A. SCHERMERS, H.G. **Leading cases of the European Court of Human Rights**, Ars Aequi Books, Nijmegen, 1997, pp. 615ss.
- LBAN, D.J. **Una teoría de los crímenes contra la humanidad**, Bogotá, Temis, 2011.
- LEATHERMAN, J.L. **Sexual violence and armed conflict**, Polity Press, London, 2011, pp. 10ss.
- LEBLANC, L.J. **The United Nation Genocide Convention and political groups: Should the United States propose an amendment?**, in *Yale Journal of International Law*, 13, 1988, pp. 268ss.

- LETT, A. **The meaningless existence of universal jurisdiction**, in Michigan State International Law Review, 23, 2015, pp. 547ss.
- LEVEAU, F. **Liability of child soldiers under international criminal law**, in Osgoode Hall Review of Law and Policy, 4, 2014, pp. 36-66.
- LIAKOPOULOS, D. **Die Hybridität des Verfahrens der Internationalen ad hoc Strafgerichtshöfe und die Bezugnahme auf innerstaatliches Recht in der Rechtsprechung**, in International and European Union legal Matters, 2012.
- \_\_\_\_\_. **Il crimine dello stupro nel diritto internazionale penale**, in Rivista Strumentario Avvocati. Rivista di Diritto e Procedura Penale, 4, 2009.
- \_\_\_\_\_. **International Criminal Court: Impunity status and the situation in Kenya**, in International and European Union Legal Matters, 2014.
- \_\_\_\_\_. **L'ingerenza umanitaria nel diritto internazionale e comunitario**, ed. Cedam, 2007.
- \_\_\_\_\_. **La sentenza "Pavle Strugar" per i danni alla città di Dubrovnik del Tribunale penale internazionale per la ex Jugoslavia**, in Rivista Gazzetta Ambiente, 3, 2005, pp. 154-167.
- \_\_\_\_\_. **Male rape and sexual crimes in international criminal law jurisprudence: A critical appraisal**, in Revista de Estudios Juridicos, 18, 2018.
- \_\_\_\_\_. **Parità di armi nella giustizia penale internazionale**, vol. 1, ed. Libellula University Press, Puglia, 2018.
- \_\_\_\_\_. **Responsabilità internazionale penale individuale e statale**, in Rivista Strumentario Avvocati. Rivista di Diritto e Procedura Penale, 4(2), 2009.
- \_\_\_\_\_. **The defence of superior order in common law system. Approaches and influences in international criminal law**, in Jindal Global Law Review, 5, 2014.
- LIAKOPOULOS, D. ZAGER, U. **Victim-perpetrator and individual criminal responsibility in international criminal law**, in International and European Union Legal Matters, 2014.
- LIN, H. **Cyber conflict and international humanitarian law**, in International Review of the Red Cross, 92, 2012.
- LINDROOS, A. **Addressing norm conflicts in a fragmented legal system: The doctrine of *lex specialis***, in Nordic Journal of International Law, 74, 2005, pp. 38ss.
- LINGAAS, C. **Imagined identities: Defining the racial group in the crime of genocide**, in Genocide Studies and Prevention: An International Journal, 2016, pp. 80ss.
- \_\_\_\_\_. **The crime against humanity of apartheid in a post apartheid world**, in Oslo Law Review, 2, 2015.
- LIPPMANN, M. **The Convention on the Prevention and Punishment of the Crime of Genocide**, in Arizona Journal of International and Comparative Law, 15, 1998, pp. 456ss.
- LLEDÓ, R. **El principio de legalidad en el derecho penal internacional**, in Eonomia. Revista en Cultura de la Legadidad, 11, 2016, pp. 249ss.
- LÓPEZ, R. **The duty to refrain: A theory of State accomplice liability for grave crimes**, in Nebraska Law Review, 97, 2018, pp. 122ss.
- LOSCHIN, L. **The persistent objector and customary human rights law: A proposed analytical framework**, in University of California Davis Journal of International Law and Policy, 2, 1996, pp. 147ss.
- LUBAN, D. **A theory of crimes against humanity**, in Yale Journal of International Law, 29, 2004, pp. 86-92.

- LUBELL, N. **Extraterritorial use of force against non-State actors**, Oxford University Press, Oxford, 2010.
- MACKINNON, C.A. **Defining rape internationally: A comment on Akayesu**, in *Columbia Journal of International Law*, 45, 2006, pp. 944ss.
- MACLEOD, C. **Towards a philosophical account of crimes against humanity**, in *European Journal of International Law*, 21, 2010, pp. 293, 295 and 302.
- MACULAN, E. La expansión de los juicios por la verdad, in MACULAN, E. PASTOR, D. (a cura di), **El derecho a la verdad y su ejercicio por medio del proceso penal**, ed. Hammurabi, Buenos Aires, 2013, pp. 247-295.
- MACULAN, E. LIÑÁN LAFUENTE, A. Relaciones concursales, *concurso delictorum*, in FISCHER, H. KRESS, C. LÜDER, S.R. (a cura di), **International and national prosecution of crimes under international law. Current developments**, ed. Nomos, Baden-Baden, 2001, pp. 318ss.
- \_\_\_\_\_. Relaciones concursales, in GIL GIL, A. MACULAN, E. (a cura di), **Derecho penal internacional**, ed. Dykinson S.L., Madrid, 2016, pp. 312ss.
- MAIER, N.B. **The crime of rape under the Rome statute of the ICC: With a special emphasis on the jurisprudence of the ad hoc criminal Tribunals**, in *Amsterdam Law Forum*, 11, 2011, pp. 148ss.
- MAISSON, R. **Justice pénale internationale**, ed. PUF, Paris, 2017.
- MANACORDA, S. MELONI, C. **Indirect perpetration versus Joint Criminal Enterprise: Concurring approaches in the practice of international criminal law?**, in *Journal of International Criminal Justice*, 9 (1), 2011, pp. 165ss.
- MANTOVANI, F. **The general principles of international criminal law: The viewpoint of a national criminal lawyer**, in *Journal of International Criminal Justice*, 1 (1), 2003, pp. 26-38.
- MARCHADIER, F. **Convention européenne des droit de l'homme et des libertés fondamentales**, in *Revue Critique de Droit International Privé*, 193 (49), 2014, pp. 679-694.
- MARCHUK, I. **The fundamental concept of crime in international criminal law. A comparative analysis**, ed. Springer, London, 2014, pp. 113ss.
- MARCUS, D. **Famine crimes in international law**, in *American Journal of International Law*, 97, 2003, pp. 271ss.
- MARGETTS, K. KAPPOS, K.I. **Current developments at the ad hoc International Criminal Tribunals**, in *Journal of International Criminal Justice*, 10, 2012, 448ss.
- MARIE-CLAUDE, J.B. **Cracking the toughest nut: Colombia's endeavour with amnesty for political crimes under Additional Protocol II to the Geneva Conventions**, in *Notre Dame Journal of International & Comparative Law*, 17, 2017, pp. 8ss.
- MAROCHKIN, S.Y. NELAEVA, G.A. **Rape and sexual violence as torture and genocide in the decisions of international Tribunals: Trans-judicial networks and the development of international criminal law**, in *Human Rights Review*, 15, 2014, pp. 474ss.
- MARTÍN, M. LIROLA, I. **Sexual crimes in international humanitarian law**, Institut Català Internacional per la Pau, Barcelona, 2013.
- MARTINS AMORIUM DUTRA, B. **Criminal responsibility in the crimes committed by organized structures of power: Jurisprudence analysis in the light of international criminal law**, in *Revista de Faculdade de Direito da UERJ*, 37, 2012, pp. 5ss.
- MARXSEN, C. **What do different theories of customary international law have to say about the individual right to reparation under international humanitarian law?**, in *Zeitschrift für ausländisches öffentliches Recht*, n. 78 (3), 2018.

- MAY, L. **Crimes against humanity. A normative account**, Cambridge University Press, Cambridge, 2005, pp. 80-95.
- MAY, L. HOSKINS, Z. **International criminal law and philosophy**, Cambridge University Press, Cambridge, 2014, pp. 202ss.
- \_\_\_\_\_. **The extraordinary Chambers in the Courts of Cambodia. Assessing their contribution to international criminal law**, ed. Springer, Berlin, 2016.
- MCBRIDE, J. Child soldiers at the International criminal Court, in MCBRIDE, J. **The war crime of child soldier recruitment**, T.M.C. Asser Press, The Hague, 2013.
- MCCAUSLAND, C. **From tolerance to tactic: Understanding rape in armed conflict as genocide**, in Michigan State International Law Review, 26, 2017, pp. 158ss.
- MCHENRY, J.R. **The prosecution of rape under international law: Justice that is long overdue**, in Vanderbilt Journal of Transnational Law, 35, 2002, pp. 1310ss.
- MEERNIK, J. KING, K. **The sentencing determinants of the International Criminal Tribunal for the Former Yugoslavia: An empirical and doctrinal analysis**, in Leiden Journal of International Law, 16, 2003, pp. 740-741.
- MEISENBERG, S. **The extraordinary Chambers in the Courts in Cambodia. Assessing their contribution to international criminal law**, ed. Springer, Berlin, 2016.
- MELLOH, F. **Einheitliche Strafzumessung in den Rechtsquellen des ICC-Statuts**, Duncker & Humblot, Berlin, 2010, pp. 378.
- MELONI, C. State and individual responsibility for targeted killings by drones, in SANTONI DE SIO, F. DI NUCCI, E. (a cura di), **Drones and responsibility: Legal, philosophical and socio-technical perspectives on the use of remotely controlled weapons**, Ashgate Publishing, Farnham, 2016, pp. 47-64.
- MELZER, N. **Keeping the balance between military necessity and humanity: A response to four critiques of the ICRC's interpretive guidance on the notion of direct participation in hostilities**, in New York University Journal of International Law and Politics, 42, 2010, pp. 832ss.
- MERON, T. **International criminalization of internal atrocities**, in American Journal of International Law, 89, 1995, pp. 554-577.
- \_\_\_\_\_. **Revival of customary humanitarian law**, in American Journal of International Law, 99, 2005, pp. 817ss.
- \_\_\_\_\_. **The continuing role of custom in the formation of international humanitarian law**, in American Journal of International Law, 90, 1996, pp. 238.
- \_\_\_\_\_. **The Geneva Conventions as customary law**, in American Journal of International Law, 81, 1987, pp. 348ss.
- MESEKE, S. La contribution de la jurisprudence des tribunaux pénaux internationaux pour l'ex-Yugoslavie et le Rwanda à la concrétisation de l'incrimination du crime contre l'humanité, in CHIAVARIO M. (a cura di), **La justice pénale internationale entre passé et avenir**, ed. Dalloz, Paris, 2003, pp. 173-222.
- METTRAUX, G. **Crimes against humanity in the jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda**, in Harvard International Law Journal, 43, 2002, pp. 237-316.
- \_\_\_\_\_. **International crimes and the ad hoc Tribunals**, Oxford University Press, Oxford, 2005.
- \_\_\_\_\_. Nexus with armed conflict, in CASSESE, A. et al., (a cura di), **Oxford Companion to International Criminal Justice**, Oxford University Press, Oxford, 2009, pp. 435ss.

- \_\_\_\_\_. The definition of crimes against humanity and the question of a “policy” element, in SADAT, N.L. (a cura di), **Forging a Convention for Crimes Against Humanity**, Cambridge University Press, Cambridge, 2011, pp. 142-176.
- MIANO, S.M. **Toward a child-oriented approach to reparations: Reflecting on the rights and needs of child victims of armed conflict**, in *The Fletcher Journal of Human Security*, 28, 2013, pp. 30ss.
- MIBENGE, C.S. **Sex and international Tribunals: The erasure of gender from the war narrative**, University of Pennsylvania Press, 2013.
- MILANOVIĆ, M. **Is the Rome statute binding on individuals? (And why we should care)”,** in *Journal of International Criminal Justice*, 9, 2011, pp. 25-52.
- MILANOVIC, M. The lost origins of *lex specialis*: Rethinking the relationship between human rights and international humanitarian law, in OHLIN, J.D. (a cura di), **Theoretical boundaries of armed conflict and human rights**, Cambridge University Press, Cambridge, 2016, pp. 30ss.
- MINEAR, R.M. **Victor’s justice. Tokyo war crimes trials**, Princeton University Press, Princeton, 2016.
- MOUTHAN, S. **Sexual violence against men and international law criminalising the unmentionable**, in *International Criminal Law Review*, 13 (4), 2013, pp. 667ss.
- \_\_\_\_\_. **The prosecution of gender-based crimes at the ICC. Challenges and opportunities**, in *International Criminal Law Review*, 11, 2011, pp. 775ss.
- MULGREW, R. **Towards the development of the international penal system**, Cambridge University Press, Cambridge, 2013.
- MURMANN, U. **Problems of causation with regard to (potential) actions of multiple protagonist**, in *Journal of International Criminal Justice*, 12 (2), 2014, pp. 284ss.
- NADJ, D. **International criminal law and sexual violence against women: The interpretation of gender in the contemporary international criminal trial**, ed. Routledge, London & New York, 2018.
- NALEPA, M. KLEPACKA, E. **Institute of National Remembrance-Commission for the prosecution of crimes against the Polish Nation**, in *Encyclopedia of Transitional Justice*, 3, 2012.
- NEAL, K.N. **Child protection in times of conflict and children and international criminal justice**, in *Georgia Journal of International and Comparative Law*, 43, 2015, pp. 634ss.
- NEBESAR, D.A. **Gender-based violence as a weapon of war**, in *University of California, Davis Journal of International Law and Policy*, 4, 1998, pp. 148ss.
- NEHA, J. **Judicial lawmaking and general principles of law in international criminal law**, in *Harvard International Law Journal*, 57, 2016, pp. 111, 114ss.
- NEIER, A. **War crimes: Brutality, genocide, terror, and the struggle for justice**, ed. Times Books, New York, 1998, pp. 213ss.
- NEMITZ, J.C. **The law of sentencing in international criminal law: The purpose of sentencing and the applicable method for the determination of the sentence**, in *Yearbook of International Humanitarian Law*, 4, 2001, pp. 113-114.
- NERLICH, V. The status of ICTY and ICTR precedent in proceedings before the ICC, in STAHN, C. SLUITER, G. (eds.), **The emerging practice of the International Criminal Court**, Martinus Nijhoff Publishers, Leiden, 2009, pp. 305-325.
- NERSESSIAN, D.L. **The contours of genocide intent. Troubling jurisprudence from the International Criminal Tribunals**, in *Texas International Law Journal*, 37, 2002, pp. 231.
- NI AOLÁIN, F.D. HAYNES, D.F. CAHN, N. Gender and the forms and experiences of

- conflict, in NI AOLÁIN, F.D. HAYNES, D.F. CAHN, N. **On the frontlines: Gender, war, and the post-conflict process**, Oxford University Press, Oxford, 2011, pp. 42ss.
- NICHOLSON, J. **Strengthening the validity of international criminal Tribunals**, ed. Brill, The Hague, 2018.
- NMEHIELLE, V.O.O. **Africa and the future of international criminal justice**, Eleven International Publishing, The Netherlands, 2012.
- NOLLEZ-GOLDBACH, R. SAADA, J. **La justice pénale internationale face aux crimes de masse**, ed. Pedone, Paris, 2014.
- NOUTE, G. **Treaties and subsequent practice**, Oxford University Press, Oxford, 2013, pp. 224ss.
- NSEREKO, D.N. Commentary on Prosecutor v. Naletilić and Martinović, in KLIP, A. SLUITER, G. (a cura di), **Annotated leading cases of international criminal tribunals. Volume IV: The International Criminal Tribunal for the Former Yugoslavia 1999-2000**, Intersentia, Antwerp-Oxford- New York, 2002, pp. 66ss.
- O'CONNELL, S. **Gender based crimes at the International Court**, in Plymouth Law and Criminal Justice Review, 3, 2010, pp. 72ss.
- O'BYRNE, K. **Beyond consent. Conceptualising sexual assault in international criminal law**, in International Criminal Law Review, 11, 2011, pp. 495ss.
- O'KEEFE, R. **International criminal law**, Oxford University Press, Oxford, 2015, pp. 59ss.
- \_\_\_\_\_. **Universal jurisdiction: Clarifying the basic concept**, in Journal of International Criminal Justice, 2, 2004, pp. 735-760.
- ODRIOZOLA GURRUTZAGA, M. **Responsabilidad penal por crímenes internacionales y coautoría medita**, in Revista Electrónica de Ciencia Penal y Criminología, 17, 2015, pp. 7ss.
- OHLIN, J.D. FINKELSTEIN, C. GOVERN, K. (a cura di), **Cyber war. Law and ethics for virtual conflicts**, Oxford University Press, Oxford, 2015.
- OHLIN, J.D. **Targeting and the concept of intent**, in Cornell Law Faculty Publications, paper 774, 2013, pp. 84ss.
- OLÁSOLO, A.H. **Derecho internacional penal y humanitario**, ed. Tirant Lo Blanch, Valencia, 2016.
- \_\_\_\_\_. **Ensayos de derecho penal y procesal internacional**, ed. Diké, Bogotá. 2011.
- \_\_\_\_\_. **International criminal law, transnational criminal organizations and transitional justice**, ed. Brill/Martinus Nijhoff Publishers, The Hague, 2018.
- OLUSANYA, O. **Do crimes against humanity deserve a higher sentence than war crimes?**, in International Criminal Law Review, 4, 2004, pp. 431-473.
- OLUSANYA, O. **Double jeopardy without parameters. Re-characterisation in international criminal law**, ed. Intersentia, Antwerp-Oxford, 2004, pp. 190ss.
- \_\_\_\_\_. **Sentencing war crimes and crimes against humanity under the International Criminal Tribunal for the Former Yugoslavia**, ed. Europa Law, Groningen, 2005.
- OOSTERVELD, V. **Gender-sensitive justice and the International Criminal Tribunal for Rwanda**, in New England Journal of International and Comparative Law, 12, 2005, pp. 119, 128ss.
- ORENTLICHER, D.F. **Some kind of justice, the ICTY's impact in Bosnia and Serbia**, Oxford University Press, Oxford, 2018.
- OSTOJIC, M. **Between justice and stability: The politics of war crimes prosecutions**, Ashgate Publishing, Farnham, 2014.

- OSUJI, C. **Protecting humanity: Essays in international law and policy in honour of Navanethem Pillay**, Martinus Nijhoff Publishers, The Hague, 2010, pp. 97ss.
- PALMER, E. WILLIAMS, S.J. A “shift in attitude”? **Institutional change and sexual and gender-based crimes at the Extraordinary Chambers in the Courts of Cambodia**, in *International Feminist Journal of Politics*, 20, 2017.
- PAULUS, A. VASHAKMADZE, M. **Asymmetrical war and the notion of armed conflict. A tentative conceptualization**, in *International Review of the Red Cross*, 91, 2009, pp. 110ss.
- PAUST, J.J. **Nullum crimen and related claims**, in *Denver Journal of International Law and Politics*, 25, 1997, pp. 322ss.
- \_\_\_\_\_. **Congress and genocide: They’re not going to get away with it**, in *Michigan Journal of International Law*, 11, 1989, pp. 92ss.
- PAUWELYN, J. **Conflict of norms in public international law**, Cambridge University Press, Cambridge, 2003, pp. 385ss.
- PEAY, J. **Mental incapacity and criminal liability: redrawing the fault lines?**, in *International Journal of Law and Psychiatry*, 2015, pp. 4ss.
- PÉREZ CABALLERO, K. **El elemento político en los crímenes contra la humanidad. La expansión de la figura al crimen organizado transnacional y el caso de las organizaciones de narcotraficantes mexicanas en el sexenio 2006-2012**, Dykinson S.L., Madrid, 2015, pp. 72ss.
- PICCOLO, I. **The crime of rape in international criminal law**, ed. International Courts Association, 2013.
- PLANZER, A. **Le crime de génocide**, Freiburg, 1956, pp. 97.
- POSNER, E. PORAT, A. **Aggregation and law**, in J.M. Olin Program in Law and Economics Working Paper No. 587, 2012.
- POWELL, C. **You have no God: An analysis of the prosecution of genocidal rape in international criminal law**, in *Richmond Public Interest Law Review*, 20, 2017, pp. 26ss.
- PUSCHKE, J. Grund und Grenzen des Gefährdungsstrafrechts am beispiel der Vorbereitungsdelikte, in HEFENDEHL, R. **Grenzenlose Vorverlagerung des Strafrechts?**, BWV Berliner Wissenschafts-Verlag, Berlin, 2010, pp. 10ss.
- QUICK, N. Forced transfer and customary international law: Bridging the gap between Nuremberg and the ICTY, in MEISENBERG, S.M. STEGMILLER, I. (a cura di), **The Extraordinary Chambers in the Courts of Cambodia. Assessing their contribution to international criminal law**, ed. Springer, The Hague, 2016, pp. 291-319.
- RAINEY, B. WICKS, W. OVEY, C. **Jacos, White and Ovey: The European Convention on Human Rights**, Oxford University Press, Oxford, 2017.
- RAMJI-NOGALES, J. **Questioning hierarchies of harm: Women, forced migration and international criminal law**, in *International Criminal Law Review*, 11, 2011.
- RANDALL, C. **Universal jurisdiction under international law**, in *Texas Law Review*, 66, 1988, pp. 814ss.
- RATNER, S.R. ABRAMS, J.S. **Accountability for human rights atrocities in international law. Beyond the Nuremberg legacy**, Oxford University Press, Oxford, 2001, pp. 46ss.
- REED, A. BOHLANDER, M. (a cura di), **General defences in criminal law. Domestic and comparative perspectives**, Ashgate Publishing, Farnham, 2014.
- REID, K. **A practitioner's guide to the European Convention on Human Rights**, ed. Sweet Maxwell, London, 2011.

- RENZO, M. **Crimes against humanity and the limits of international criminal law**, in *Law and Philosophy*, 31, 2012, pp. 444ss.
- REVERTE, R.S. **Referencia al crimen de genocidio aproximación genocide crime**, in *Revista de Estudios Jurídicos*, 16, 2016.
- RIKHOF, J. **Crimes against humanity, customary international law and the International Tribunals for Bosnia and Rwanda**, in *National Journal of Constitutional Law*, 6, 1996, pp. 231ss.
- ROBERTS, C. **On the definition of crimes against humanity and other widespread or systematic human rights violations**, in *University of Pennsylvania Journal of law & Social Change*, 20, 2017, pp. 4ss.
- ROBERTS, K. **Striving for Definition. The Law of Persecution from its Origins to the ICTY**, in ABTAHI, H. BOAS, G. (a cura di), **The dynamics of international criminal justice. Essays in Honour of Sir Richard May**, Martinus Nijhoff Publishers, The Hague, 2006, pp. 257ss.
- ROBERTS, K. **The contribution of the ICTY to the grave breaches regime**, in *Journal of International Criminal Justice*, 7, 2009, pp. 750ss.
- \_\_\_\_\_. **The law of persecution before the International Criminal Tribunal for the Former Yugoslavia**, in *Leiden Journal of International Law*, 15, 2002, pp. 636ss.
- ROBINSON, D. **Defining “crimes against humanity” at the Rome Conference**, in *American Journal of International Law*, 93, 1999, pp. 55ss.
- \_\_\_\_\_. **The mysterious mysteriousness of complementarity**, in *Criminal Law Forum*, 21, 2010, pp. 6ss.
- \_\_\_\_\_. **Three theories of complementarity: Charge, sentence or process?**, in *Harvard International Law Journal*, 53, 2012, pp. 87ss.
- ROBINSON, D. WILMSHURST, E. **An introduction to international criminal law and procedure**, Cambridge University Press, Cambridge, 2010, pp. 184ss.
- ROBINSON, N. **The Genocide Convention. A commentary**, Institute of Jewish Affairs, New York, 1960, pp. 82-85.
- RODMAN, K.A. **Justice is interventionist: The political sources of the judicial reach of the Special Court for Sierra Leone**, in *International Criminal Law Review*, 13, 2013, pp. 65ss.
- RODRÍGUEZ-VILLASANTE Y PRIETO, J.L. **La protección del niño los conflictos armados por el derecho internacional humanitario los niños soldados**, in *AFDUAM: Anuario de la Facultad de Derecho de la Universidad Autónoma de Madrid*, 15, 2011, pp. 220ss.
- ROHAN, C. ZYBERI, Z. **Defense perspective on international criminal justice**, Cambridge University Press, Cambridge, 2017.
- ROSCINI, M. TRUST, L. **Cyber operations and contemporary international law**, Oxford University Press, Oxford, 2014.
- ROSE, S.J. **Prosecutor v. Taylor: The implications for Bashar Al-Assad**, in *Boston College International & Comparative Law Review*, 37, 2014, pp. 12ss.
- ROSSKOPF, U. **Die innere Tatseite des Völkerrechtsverbrechen. Ein Beitrag zur Auslegung des Art. 30 IStGH Statut**, BWV Berliner Wissenschafts, Berlin, 2007, pp. 90ss.
- ROTHER, R. MEEMIK, J. INGADÖTTIR, T. **The realities of international criminal justice**, ed. Brill, The Hague, 2013.
- ROZAKIS, C.L. **The concept of “jus cogens” in the law of treaties**, ed. North-Holland, New York, 1976, pp. 22ss.

- RUSSELL-BROWN, S.L. **Rape as an act of genocide**, in *Berkeley Journal of International Law*, 21, 2003, pp. 362ss.
- RYER, R. The Tokyo IMTR and crimes against peace (aggression) is there anything to learn?, in SADAT, N.L. **Seeking accountability for the unlawful use of force**, Cambridge University Press, Cambridge, 2018.
- SÁCOUTO, S. **Victim participation at the international Criminal Court and the Extraordinary Chambers in the Courts of Cambodia: A feminist project**, in *Michigan Journal of Gender & Law*, 19, 2012, pp. 298ss.
- SADAT, N.L. **Crimes against humanity in the modern age**, in *American Journal of International Law*, 107, 2013, pp. 376ss.
- SAFFERLING, C. **International criminal procedure**, Oxford University Press, Oxford, 2012, pp. 97ss.
- SAFFERLING, C.J.M. The special intent requirement in the crime of genocide, in SAFFERLING, C.J.M. CONZE, E. (a cura di), **The Genocide Convention sixty year after its adoption**, ed. Springer, The Hague, 2010, pp. 172ss.
- SAINZ-PARD, P.V. **Is child recruitment as a war crime part of customary international law?**, in *The International Journal of Human Rights*, 12, 2008, pp. 594ss.
- SAMSO, M. **High hopes, scant resources: A word of scepticism about the anti-fragmentation function of article 31(3)(c) of the Vienna Convention on the Law of Treaties**, in *Leiden Journal of International Law*, 24, 2011, pp. 5ss.
- SÁNCHEZ REVERTE, R.S. **Referencia al crimen de genocidio aproximación genocide crime**, in *Revista de Estudios Jurídicos (Segunda Época)*, 16, 2016.
- SANTALLA VARGAS, E. **An overview of the crime of genocide in Latin American jurisdiction**, in *International Criminal Review*, 10, 2010, pp. 441ss.
- SASCHA, D. BACHMANN, D. EDA NWIBO, L. **Pull and push- Implementing the complementarity principle of the Rome Statute of the ICC within the AU: Opportunities and challenges**, in *Brooklyn Journal of International Law*, 43, 2018, pp. 464ss.
- SATZGER, H. SCHLUCKEBIER, W. WIDMAIER, G. **Strafprozessordnung (StPO)**, Carl Heymanns Verlag, Köln, 2017.
- SCHABAS, W.A. **Problems of international codification-Were the atrocities in Cambodia and Kosovo genocide?**, in *New England Law Review*, 35, 2001, pp. 287ss.
- \_\_\_\_\_. **Darfur and the "odious scourge": The Commission of Inquiry's findings on genocide**, in *Leiden Journal of International Law*, 18, 2005, pp. 877ss.
- \_\_\_\_\_. **International criminal law**, Edward Elgar Publishing, Cheltenham, 2012.
- \_\_\_\_\_. **State policy as an element of international crimes**, in *Journal of Criminal Law and Criminology*, 98, 2008, pp. 953-982.
- \_\_\_\_\_. **The European Convention on Human Rights: A commentary**, Oxford University Press, Oxford, 2015.
- SCHINDLER, D. **The different types of armed conflicts according to the Geneva Conventions and Protocols**, in *Recueil des Cours de l'Académie de Droit International*, 163, 1979, pp. 131ss.
- SCHLÜTTER, B. **Developments in customary international law: Theory and the practice of the International Court of Justice and the International Ad Hoc Criminal Tribunals for Rwanda and Yugoslavia**, Martinus Nijhoff Publishers, Leiden, 2010.
- SCHMITT, M.N. **Deconstructing direct participation in hostilities: The constitutive elements**, in *New York University Journal of International Law and Politics*, 42, 2010, pp. 698ss.

- \_\_\_\_\_. The use of cyber force and international law, in WELLER, M. (a cura di), **The Oxford Handbook of the use of force in international law**, Oxford University Press, Oxford, 2015, pp. 1110ss.
- SCHOMBURG, W. PETERSON, I. **Genuine consent to sexual violence under international criminal Law**, in American Journal of International Law, 101, 2007, pp. 121ss.
- SCHRAMM, E. **Internationales Strafrecht**, C.H. Beck, München, 2018.
- SCHUETZE-REYMANN, J. **International criminal justice on trial. The ICTY and ICTR case referral practice to national Courts and its possible relevance for the ICC**, ed. Duncker & Humblot, Berlin, 2016.
- SCHÜNEMANN, R. **Strafverfahrensrecht**, ed. C.H. Beck, München, 2012, pp. 439ss.
- SCHUON, C. **International criminal procedure: A clash of legal cultures**, T.M.C. Asser Press, The Hague, 2010.
- SCULLY, S. **Judging the successes and failures of the Extraordinary Chambers of the Courts of Cambodia**, in Asian Pacific Law & Policy Journal, 13, 2011, pp. 14ss.
- SEIBERT-FOHR, A. VILLIGER, M.E. **Judgments of the European Convention of Human Rights. Effects and implementation**, ed. Nomos, Baden-Baden, 2017.
- SELLERS, P.V. **Sexual violence and peremptory norms: The legal value of rape**, in Case Western Reserve Journal of International Law, 34, 2002, pp. 290ss.
- \_\_\_\_\_. **Wartime female slavery: enslavement?**, in Cornell International Law Journal, 44, 2011, pp. 116ss.
- SERNÍN RODRÍGUEZ, C.A. **La evolución del crimen de lesa humanidad en el derecho penal internacional**, in Boletín Mexicano de Derecho Comparado, 47, 2017, pp. 210ss.
- SFEKAS, S.J. **A court pure and unsullied: Justice in the justice trial at Nuremberg**, in University of Baltimore Law Review, 46, 2017, pp. 462ss.
- SHAHABUDDEEN, M. **Does the principle of legality stand in the way of progressive development of law?**, in Journal of International Criminal Justice, 2, 2004, pp. 1007ss.
- SHAHABUDDIN, M. **International criminal justice at the Yugoslav Tribunal-A judge's recollections**, Oxford University Press, Oxford, 2012.
- SHANY, Y. **Assessing the effectiveness of international Courts: A goal-based approach**, in American Journal of International Law, 106, 2012, pp. 225ss.
- \_\_\_\_\_. **How can international criminal Courts have a greater impact upon national criminal proceedings? Lessons from the first two decades of international criminal justice in operation**, in Israel Law Review, 46, 2013, pp. 4ss.
- SHELTON, D.L. **Human rights and the hierarchy of international law sources and norms**, in Saskatchewan Law Review, 65, 2002, pp. 299-335.
- SIKKINK, K. **The justice cascade: How human rights prosecutions are changing world politics**, ed. W.W. Norton, New York, 2011.
- SIMON, T.W. **Genocide, torture and terrorism: Ranking international crimes and justifying humanitarian intervention**, ed. Palgrave Macmillan, London, 2016.
- SIVAKUMARAN, S. Identifying an armed conflict not of an international character, in STAHN, C. SLUITER, G. (a cura di), **The emerging practice of the International Criminal Court**, Martinus Nijhoff Publishers, Leiden-Boston, 2009, 363-380.
- \_\_\_\_\_. **Re-envisaging the international law of internal armed conflict**, in European Journal of International Law, 22, 2011, pp. 240, 240-242.
- \_\_\_\_\_. **The law of non-International armed conflict**, Oxford University Press, Oxford, 2012.

SLOANE, R.D. **Sentencing for the "crime of crimes". The evolving "common law" of sentencing of the International Criminal Tribunal for Rwanda**, in *Journal of International Criminal Justice*, 5, 2007, pp. 729ss.

SLUITER, G. "Chapeau elements" of crimes against humanity in the jurisprudence of the UN ad hoc Tribunals, in SADAT, N.L. (a cura di), **Forging a Convention for Crimes Against Humanity**, Cambridge University Press, Cambridge, 2011, pp. 102-141.

\_\_\_\_\_. **The emerging practice of the International Criminal Court**, Martinus Nijhoff Publishers, Leiden-Boston, 2009, pp. 381-400.

SLUITER, G. FRIMAN, H. LINTON, S. VASILIEV, S. ZAPPALÁ, S. **International criminal procedure. Rules and principles**, Oxford University Press, Oxford, 2013, pp. 1576ss.

SMET, S. The "absolute" prohibition of torture and inhuman or degrading treatment in article 3 ECHR: Truly a question of scope only?, in BREMS, E. GRARADS, J. (eds), **Shaping rights in the ECHR: The role of the European Court of Human Rights in determining the scope of human rights**, Cambridge University Press, Cambridge, 2013.

SMEULERS, A. HOLA, B. ICTY and the culpability of different types of perpetrators of international crimes, in SMEULERS, A. (ed.) **Collective violence and international criminal justice**, ed. Intersentia, Antwerp, Oxford, pp. 175-206.

SMITH, A. **Child recruitment and the Special Court of Sierra Leone**, in *Journal of International Criminal Justice*, 2, 2004, pp. 1141ss.

SOREL, J.M. BORÉ EVENO, B. 1969 Vienna Convention: Article 31-Interpretation of treaties, in CORTEN, O. KLEIN, P. (eds), **The Vienna Conventions on the law of treaties: A commentary**, Oxford University Press, Oxford, 2011, pp. 804, 817ss.

SQUATRITO, T. YOUNG, O.R. FOLLESDAL, A. ULSTEIN, G. **The performance of international Courts and Tribunals**, Cambridge University Press, Cambridge, 2018.

STAHN, C. **One step forward, two steps back? Second thoughts on a "sentence-based" theory of complementarity**, in *Harvard International Law Journal*, 53, 2012, pp. 183-196.

STEINL, L. **Child soldiers as agents of war and peace: A restorative transitional justice approach to accountability for crimes under international law**, ed. Springer & T.M.C. Asser Press, Berlin, 2017, pp. 124ss.

STEPAKOFF, S. **When we wanted to talk about rape: Silencing sexual violence at the Special Court for Sierra Leone**, in *International Journal of Transitional Justice*, 1, 2007.

STEPHENS, P.J. **Collective criminality and individual responsibility: The constraints of interpretation**, in *Fordham International Law Journal*, 2014, pp. 508ss.

STEWART, G.P. The International Criminal Court, in MAIER, C.N.B. **The crime of rape under the Rome statute of the ICC: with a special emphasis on the jurisprudence of the ad hoc criminal Tribunals**, in *Amsterdam Law Forum*, 11, 2011.

STOLK, S. **Imaging scenes of mass atrocity from afar: Maps and landscapes at the International Criminal Court**, in *London Review of International Law*, 6, 2018.

STUCKENBERG, C.F. **A cure for concursus delictorum in international criminal law?**, in *Criminal Law Forum*, 16, 2005, pp. 371ss.

\_\_\_\_\_. Cumulative charges and cumulative convictions, in STAHN, C. (a cura di), **The law and practice of the International Criminal Court**, Oxford University Press, Oxford, 2015, pp. 843ss.

\_\_\_\_\_. Multiplicity of offences, concursus delictorum, in FISCHER, H. KRESS, C. LÜDER, S.R. (a cura di), **International and national prosecution of crimes under international law. Current developments**, ed. Nomos, Baden-Baden, 2001, pp. 588ss.

- \_\_\_\_\_. **Vorstudien zu Vorsatz und Irrtum im Völkerstrafrecht: Versuch einer Elementarstrafrecht für eine übernationale Vorsatzdogmatik**, ed. De Gruyter Recht, Berlin, 2011, pp. 6ss.
- SULLO, P. **Beyond genocide: Transitional justice and Gacaca Courts in Rwanda**, ed. Springer, Berlin, 2018.
- SUNGA, L.S. **The emerging system of international criminal law**, Martinus Nijhoff Publishers, The Hague, 1997, pp. 324ss.
- SVÁČEK, O. **Brothers and sisters in arms as victims of war crimes. Ntagada case before the ICC**, in Czech Yearbook of Public & Private International Law, 9, 2018.
- SWAAK-GOLDMAN, O. **The crime of persecution in international criminal law**, in Leiden Journal of International Law, 11, 1998, pp. 145-154.
- SWART, B. ZAHAR, A. **The legacy of the international criminal Tribunal for the Former Yugoslavia**, Oxford University Press, Oxford, 2011, pp. 298ss.
- SZOKE-BURKE, S. **Avoiding belittlement of human suffering. A retribuvist critique of ICTR sentencing practice**, in Journal of International Criminal Justice, 10, 2012, pp. 577ss.
- SZPAK, A. **National, ethnic, racial and religious groups protected against genocide in the jurisprudence of the ad hoc International Criminal Tribunals**, in European Journal of International Law, 23, 2012, pp. 155-173.
- T.L.H. MCCORMACK, Crimes against humanity, in D. MCGOLDRICK, P. ROWE, E. DONNELLY (a cura di), **The Permanent International Criminal Court. Legal and policy issues**, Hart Publishing, Oxford & Portland, Oregon, 2004, pp. 192ss.
- TAGUIEFF, P.A. **La force du préjugé. Essai sur le racisme et ses doubles**, ed. La Découverte, Paris, 1988.
- TEITGEN, C. **La Convention européenne des droits de l'homme: 60 ans et après?**, ed. LGDJ, Paris, 2013.
- TIEMESSEN, A. **The International Criminal Court and the politics of prosecutions**, in The International Journal of Human Rights, 22, 2014.
- TIMMERMANS, T. **Fundamental rights protection in Europe before and after accession of the European Union to the European Convention on Human Rights**, in Liber amicorum Pieter Van Dijk, M. Van Roosmalen and others (eds.), Intersentia, Antwerp, Oxford, 2013, pp. 225ss.
- TOFAN, C. **Torture in international criminal law**, Wolf Legal Publishers, The Netherlands, 2011.
- TOMUSCHAT, C. **Universal criminal jurisdiction. Jurisdiction with respect to the crime of genocide, crimes against humanity and war crimes**, in Yearbook of the Institute of International Law, 71, 2005, pp. 246ss.
- TRAHAN, J. **Is complementarity the right approach for the International Criminal Court's crime of aggression-Considering the problem of overzealous National Court prosecutions**, in Cornell International Law Journal, 45, 2012, pp. 576ss.
- TRIFFTERER, O. AMBOS, K. (a cura di), **The Rome Statute of the International Criminal Court. A Commentary**, C.H.Beck-Hart-Nomos, München, Oxford, Baden-Baden, 2016.
- TRIFFTERER, O. BOCK, S. Article 33, in TRIFFTERER, O. AMBOS K. (a cura di), **The Rome Statute of the International Criminal Court**, C.H.Beck-Hart-Nomos, München, Oxford, Baden-Baden, 2016, 1195ss.
- TRIFFTERER, O. Can the "elements of crimes" narrow or broaden responsibility for criminal behaviour defined in the Rome statute?, in STAHN, C.

- \_\_\_\_\_. **Genocide, its particular intent to destroy in whole or in part the group as such**, in *Leiden Journal of International Law*, 14, 2001, pp. 399ss.
- TROUILLE, H. **How far has the international criminal Tribunal for Rwanda really core since Akayesu in the prosecution and investigation of sexual offenses committed against women? An analysis of Ndindilyimana et al**, in *International Criminal Law Review*, 13, 2013, pp. 750ss.
- TUNKIN, G. **Is general international law customary law only?**, in *European Journal of International Law*, 4, 1993, pp. 534-542.
- TURAN, G. **Responsibility to prosecute in an age of global governmentality: The International Criminal Court**, in *Cooperation and Conflict*, 50, 2015.
- VALIANI, S. **Genocide left unchecked: Assessing the ICC's difficulties detaining Omar al-Bashir**, in *Berkeley Journal of International Law*, 35, 2017, pp. 152ss.
- VAN DEN HERIK, L.J. **The contribution of the Rwanda Tribunal to the development of international law**, Martinus Nijhoff Publishers, Leiden-Boston, 2005, pp. 199ss.
- VAN DER HAVE, N. **The prevention of gross human rights violations under international human rights law**, ed. Springer, Berlin, 2018.
- VAN DER WILT, H. NOLLKAEMPER, A. (a cura di), **System criminality in international law**, Cambridge University Press, Cambridge, 2009.
- VAN DER WILT, H. PAULUSSEN, C. **Legal responses to transnational and international crimes**, Edward Elgar Publishers, Cheltenham, 2017.
- VAN DER WILT, H. **War crimes and the requirement of a nexus with an armed conflict**, in *Journal of International Criminal Justice*, 10, 2012, pp. 1116ss.
- VAN DER WOLF, W.J. DE RUITER, D. (a cura di), **Crimes against humanity and international criminal law**, Wolf Publishers, The Netherlands, 2011, pp. 96 ss. and 246ss.
- VAN ROOSMALE, M. et al., (eds), **Fundamental rights and principles, Liber amicorum Pieter van Dijk**, ed. Intersentia, Antwerp, Oxford, 2013, pp. 49-71.
- VAN SCHAAK, B. **The definition of crimes against humanity: Resolving the incoherence**, in *Columbia Journal of Transnational Law*, 37, 1999, pp. 789ss.
- \_\_\_\_\_. **The principle of legality in international criminal law**, in *Santa Clara Law Review*, 51, 2011, pp. 104ss.
- \_\_\_\_\_. **The crime of political genocide. Repairing the Genocide Convention's blind spot**, in *Yale Law Journal*, 106, 1997, pp. 2259 ss.
- VAN SLIEDREGT, E. **Individual criminal responsibility in international law**, Oxford University Press, Oxford, 2012, pp. 20ss.
- VAN SLIEDREGT, E. VASILIEV, S. **Pluralism in international criminal law**, Oxford University Press, Oxford, 2014, pp. 285ss.
- VASILIEV, S. ZAPPALÁ, S. (eds.), **International criminal procedure: Principles and rules**, Oxford University Press, Oxford, 2013, pp. 1299-1374.
- VENTURA, M.J. GILLET, M. **The fog of war: Prosecuting illegal uses of force as crimes against humanity**, in *Washington University of Global Studies Law Review*, 12, 2013, pp. 526ss.
- VENTURA, M.J. **The duty to investigate Zimbabwe crimes against humanity (torture) allegations: The Constitutional Court of South Africa speaks on universal jurisdiction and the ICC act**, in *Journal of International Criminal Justice*, 13, 2015, pp. 861-889.
- \_\_\_\_\_. **The illegal use of armed force (other inhuman act) as a crime against humanity an assessment of the case for a new crime at the International Criminal Court**, in *SADAT*,

- N.L. **Seeking accountability for the unlawful use of force**, Cambridge University Press, Cambridge, 2018.
- VERDIRAME, G. **The genocide definition in the jurisprudence of the ad hoc Tribunals**, in *International and Comparative Law Quarterly*, 49, 2000, pp. 588ss.
- VIJ, V. **Individual criminal responsibility under aiding and abetting after the specific direction requirement in the Taylor and Perišć cases**, in *Die Friedens-Warte*, 2013, pp. 160ss.
- VOGT, S.M. **As a matter of fact, No: Appellate jurisdiction to review denials of deferral of removal under the Convention against torture**, in *American University Journal of Gender, Social Policy & The Law*, 25, 2017, pp. 92ss.
- VOJDIK, V.K. **Sexual violence against men and women in war: A masculinities approach**, in *Nevada Law Journal*, 15, 2014-2015, pp. 925ss.
- VON AHLBRECHT, H. **Geschichte der völkerrechtlichen Strafgerichtsbarkeit im 20. Jahrhundert**, ed. Nomos, Baden-Baden, 1999, pp. 312ss.
- VON HEBEL, H. ROBINSON, D. **Crimes within the jurisdiction of the court**, in LEE, R.S. (a cura di), **The International Criminal Court. Elements of crimes. The making of the Rome statute. Issues, negotiations, results**, Kluwer Law International, The Hague, 1999, pp. 118ss.
- VON HEBEL, H. **The decision to include elements of crimes in the Rome statute**, in LEE, R.S. et al. (eds.) **The International Criminal Court: Elements of crimes and rules of procedure and evidence**, Transnational Publishers, Ardsley, NY, 2001, pp. 4-8.
- VON LISZT, F. **The rationale for the nullum crimen principle**, in *Journal of International Criminal Justice*, 5, 2007, pp. 1005-1008.
- WAGNER, N. **A critical assessment of using children to participate actively in hostilities in Lubanga: Child soldiers and direct participation**, in *Criminal Law Forum*, 24, 2013, pp. 182ss.
- WAKE, M.N. SMITH, E. (eds.), **General defences in criminal law. Domestic and comparative perspectives**, ed. Routledge, London & New York, 2016, pp. 255-272.
- WASCHENFORT, G. **International law and child soldiers**, Hart Publishing, Oxford & Portland, Oregon, 2015, pp. 5ss.
- WATERROW, J. SCHUMACHER, J. **War crimes trials and investigation. A multi-disciplinary introduction**, Oxford University Press, Oxford, 2018.
- WAUGH, C. **Charles Taylor and Liberia: Ambition and atrocity in Africa's lone star State**, ed. Zed Books, New York, 2011.
- WAUTERS, J.M. **Torture and related crimes-A discussion of the crimes before the International Criminal Tribunal for the Former Yugoslavia**, in *Leiden Journal of International Law*, 11, 1998, pp. 155-164.
- WEINER, P. **The evolving jurisprudence of the crime of rape in international criminal law**, in *Boston College Law Review*, 54, 2013, pp. 1210ss.
- WEISSBRODT, D. HANSEN, J. NESBITT, N. **The role of the Committee on the Rights of the Child in interpreting and developing international humanitarian law**, in *Harvard Human Rights Journal*, 24, 2011, pp. 116ss.
- WEISSBRODT, D. HEILMAN, C. **Defining torture and cruel inhuman and degrading treatment**, in *Law & Inequality: A Journal of Theory and Practice*, 35, 2017.
- WEITZ, Y. **Rwandan genocide: Taking notes from the holocaust reparations movement**, in *Cardozo Journal of Law & Gender*, 17, 2009, pp. 370ss.

- WERLE, G. BURGHARDT, B. **Do crimes against humanity require the participation of a State or a "State-like" Organization?**, in *Journal of International Criminal Justice*, 10, 2012, pp. 1151-1170.
- WERLE, G. JESSBERGER, F. **International criminal justice is coming home: The new German Code of crimes against international Law**, in *Criminal Law Forum*, 13, 2002, pp. 202ss.
- \_\_\_\_\_. **Principles of international criminal law**, Oxford University Press, Oxford, 2014, pp. 35ss.
- WERLE, G. **Völkerstrafrecht**, ed. Mohr Siebeck, Tübingen, 2003, pp. 300-301.
- WHARTON, S. **The evolution of international criminal law: prosecuting "new" crimes before the Special Court for Sierra Leone**, in *International Criminal Law Review*, 11, 2011, pp. 218ss.
- WIENER, N. **Excuses, justifications and duress at the international criminal tribunals**, in *Pace International Law Review*, 26, 2014, pp. 92ss.
- WIESSNER, S. **Ethnic groups**, in SHELTON, D.L. (a cura di), **Encyclopedia of genocide and crimes against humanity**. Volume I, Thomson Gale, Farmington Hills, 2005, pp. 304ss.
- WILLIAMS, J. **The international campaign to prohibit child soldiers: A critical evaluation**, in *The International Journal of Human Rights*, 15, 2011, pp. 1072, 1075-1077.
- WILLIAMS, S. PALMER, E. **The extraordinary Chambers in the Courts of Cambodia: Developing the law on sexual violence?**, in *International Criminal Law Review*, 15, 2015, pp. 454ss.
- WILLIAMSON, J.A. **Some consideration on command responsibility and criminal liability**, in *International Review of the Red Cross*, 90, 2008, pp. 306ss.
- WOLTAG, J.C. **Cyber warfare: Military cross-border computer network operations under international law**, Cambridge University Press, Cambridge, 2014.
- WOUTERS, J. VERHOEVEN, S. **The prohibition of genocide as a norm of ius cogens and its implications for the enforcement of the law of genocide**, in *International Criminal Law Review*, 5, 2005, pp. 401ss.
- XAVIER, I. **The incongruity of the Rome statute insanity defence and international crime**, in *Journal of International Criminal Justice*, 14 (4), 2016, pp. 795ss.
- YEE, S. **The Erdemović sentencing judgment: A questionable milestone for the International Criminal Tribunal for the Former Yugoslavia**, in *Georgia Journal of International and Comparative Law*, 26, 1997, pp. 272ss.
- YOGENDRAN, S. **Did the International Criminal Court fail child victims in the Lubanga reparations order?**, in *Amsterdam Law Forum*, 9, 2017, pp. 68ss.
- YUVARAJ, Y. **When does a child "participate actively in hostilities" under the Rome statute? Protecting children from use in hostilities after Lubanga**, in *Utrecht Journal of International and European Law*, 32, 2011, pp. 84ss.
- ZAHAR, A. SLUITER, G. **International criminal law-A critical introduction**, Oxford University Press, Oxford, 2008.
- ZAKERHOSSEIN, M.H. **Situation selection regime at the International Criminal Court**, ed. Intersentia, Antwerp, Oxford, 2018.
- ZAKERIAN, A. ALIKHANI, M. **International Criminal Tribunal for the former Yugoslavia, activities and achievements**, in *Quarterly of Foreign Policy*, 2013, pp. 7ss.
- ZAWATI, M.H. **The International Criminal Court and complementarity**, in *Journal of International Law and International Relations*, 12, 2016, pp. 208-228.

ZEEGERS, K. OVERY, A. **International Criminal Tribunals and human rights law. Adherence and contextualization**, T.M.C. Asser Press, The Hague, 2016, pp. 18ss.