

## **ON HUMAN RIGHTS – PARTICULARLY CRIMES AGAINST HUMANITY**

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### **Abstract**

In today's world of devastation, largely due to armed conflicts and humanitarian tragedies, as well as to the phenomenon of terrorism - which has plagued societies from the East to the West - the role of states in fulfilling their obligations towards respecting, protecting and ensuring the realization of human rights figures prominently. As far as terrorist acts are concerned, there is no consensus on their possible inclusion in the very concept of "crimes against humanity", although some authors express their agreement of its inclusion. In view of the non-existence of a Convention on Crimes against Humanity, such international crimes - which have *jus cogens* status - create obligations for States, such as the obligation to investigate, punish and extradite. In this context, the Responsibility to Protect (or R2P) is also highlighted, as the state has the prime responsibility to protect the populations from crimes against humanity.

### **Keywords**

Crimes against Humanity, Human Rights, Terrorist Acts, International Human Rights Law, International Criminal Law

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## ON HUMAN RIGHTS – PARTICULARLY CRIMES AGAINST HUMANITY<sup>1</sup>

Daniela Martins

### I. Introduction

The definition of crimes against humanity<sup>2</sup>, not without controversy, has been a source of uncertainty and fluctuation<sup>3</sup>, since there is (as yet) no Convention on crimes against humanity. The United Nations International Law Commission has taken over the draft for a Convention on Crimes against Humanity to address the gap that appears to exist in the international legal order. "The most frequently-mentioned candidate for rewriting is the 'policy element', which is seen by many scholars and jurists as an unnecessary impediment to prosecution"<sup>4</sup>. Indeed, the current multiplication of terrorist acts has motivated the discussion of the statute of such acts. Terrorism is not included in art. 7 of the Rome Statute of the ICC<sup>5</sup>. The recent decisions of the International Criminal Tribunal for the former Yugoslavia (ICTY) and Rwanda (ICTR) have reaffirmed that crimes against humanity can be disconnected from armed conflict and that the requirement for state connection is not absolute, provided that an organizational policy can be established.

Acts prohibited under the Rome Statute of the International Criminal Court concern violations of fundamental human rights<sup>6</sup>, such as the right to life and the right not to be

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<sup>2</sup> The word *war crimes* "was selected by U.S. Supreme Court Justice Robert Jackson, the chief U.S. prosecutor at Nuremberg and the head of the American delegation to the London Conference that framed the Charter. Jackson consulted with the great international law scholar Hersch Lauterpacht, but they decided to leave their deliberations unrecorded, apparently to avoid courting controversy. In 1915, the French, British, and Russian governments had denounced Turkey's Armenian genocide as "crimes against civilization and humanity," and the same phrase appeared in a 1919 proposal to conduct trials of the Turkish perpetrators", David Luban; "A Theory of Crimes Against Humanity", *The Yale Journal of International Law*, Vol. 29, 2004, p. 86.

<sup>3</sup> For example, see the concept of "systematic attack" for which there is no convergence, since international instruments have deferred the following terms: the ICTY statute, adopted in 1993, requires the existence of armed conflict; the ICTR statute, adopted one year later, waived the requirement of armed conflict but required a discriminatory motive. The ICC Statute, adopted in 1998, only requires a state or political organization.

<sup>4</sup> Darryl Robinson; "The draft Convention on Crimes against Humanity: what to do with the Definition", 2014, p.3. Available at: <http://regnet.anu.edu.au/sites/default/files/uploads/2015-08/CAH%20What%20to%20Do%20with%20the%20definition%20Robinson%202014%2011%20later%20revs.pdf>.

<sup>5</sup> See UN Doc. A/CONF.183/C.1/L.27, available at: [http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings\\_v1\\_e.pdf](http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v1_e.pdf).

<sup>6</sup> Human rights are presented as a legal category. Each human right constitutes a certain type of normative standard and implies a relationship of public law between human beings and normative authorities with a view to pursuing the fundamental values and protecting the needs against the interference of the public authorities (vertical dimension). The typical structure of a Human Right contains a subject, an object and a content. For further information see Ana Maria Guerra Martins, *Direito Internacional dos Direitos Humanos - relatório*, Almedina, 2016, p 83 and following.



tortured (the latter has as a consequence the prohibition of torture as a guarantee) - which have the nature of peremptory norms of International Law - as well as other particular offenses concerning specific human rights (e.g. prohibition of racial discrimination). As Hans-Peter Kaul<sup>7</sup> claims, crimes against humanity directly violate fundamental rights and can indirectly affect the enjoyment of almost all human rights and freedoms. These crimes are so serious that "a moral and arguably legal duty arises to end the criminal conduct"<sup>8</sup>: the states thus have obligations in relation to human rights and freedoms, such as respect for them and abstention from violating acts, as well as to protect them<sup>9</sup>.

## II. Crimes against Humanity as a violation of Human Rights

*"Crimes against humanity that are so heinous-so horrible-that are viewed as an attack on the very quality of being human"<sup>10</sup>*

The term *crimes against humanity* gained momentum after World War II<sup>11</sup>- in line with the actual international protection of human rights, which only occurred after that period "as a reaction to the atrocities and human rights violations committed, in particular, by the Hitler regime"<sup>12</sup>. David Luban<sup>13</sup> points out that the sentence "crimes against humanity", a concept that we propose to address, suggests that offenses are committed not only against people and their communities, but against all humanity (regardless of community). "Humanity means both the quality of being human-humanness-and the

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On the difference between human rights and fundamental rights, see Robert ALEXY; "Constitutional Rights and Constitutional Review"; *Lecture given at the Faculty of Law of the University of Coimbra* (30 October 2012). Available at: [http://www.fd.unl.pt/docentes\\_docs/ma/jsb\\_ma\\_16920.docx](http://www.fd.unl.pt/docentes_docs/ma/jsb_ma_16920.docx). The author explains that "[t]he importance of constitutional rights stems from the fact that constitutional rights are rights that have been recorded in a constitution with the – subjective or objective – intention of transforming human rights into positive law, in other words, the intention of positivizing human rights *qua* moral rights."

<sup>7</sup> See Hans-Peter Kaul, Judge and Second Vice-President of the International Criminal Court, at the international conference "The protection of Human Rights through the International Criminal Court as a Contribution to Constitutionalisation and Nation – Building", 2011. Available at: [https://www.icc-cpi.int/NR/rdonlyres/2C496E38-8E14-4ECD-9CC9-5E0D2A0B3FA2/282947/FINAL\\_Speech\\_Panel1\\_HumanRightsandtheInternational.pdf](https://www.icc-cpi.int/NR/rdonlyres/2C496E38-8E14-4ECD-9CC9-5E0D2A0B3FA2/282947/FINAL_Speech_Panel1_HumanRightsandtheInternational.pdf).

<sup>8</sup> See, on behalf of all, David Scheffer; "Crimes Against Humanity and the Responsibility to Protect" in Leila NADYA SADAT (ed.); *Forging a Convention for Crimes Against Humanity*, Cambridge, 2011, p. 305.

<sup>9</sup> As Maria Luísa Piqué points out, in the field of human rights there is a negative obligation that forces states to respect rights or to refrain from repressing them (obligation to achieve results), while there is another positive obligation with regard to the states' action "to ensure rights, or to take measures in order to secure human rights" (obligation of conduct); "Beyond Territory, Jurisdiction, and Control: Towards a Comprehensive Obligation to Prevent Crimes Against Humanity" in Morten Bergsmo and Song Tianying (eds.); *On The Proposed Crimes Against Humanity Convention*, Torkel Opsahl Academic EPublisher, Brussels, 2014, p. 143.

<sup>10</sup> See Sean D. Murphy, "New Mechanisms for Punishing Atrocities Committed in Non-International Armed Conflicts", *Melbourne Journal of International Law*, Vol. 298, 2015, p. 299.

<sup>11</sup> The protection of human beings under international law took place even before World War II. This protection includes humanitarian intervention, the inclusion of provisions relating to the protection of certain rights in certain states, and particular regimes of conventional protection for victims of armed conflict, among other things. However, the international protection of human rights only came to full fruition after World War II, when human rights were recognized as global and universal rights – also, the modern notion of human rights and the development of international justice arose from the barbarism perpetrated by Nazi Germany.

<sup>12</sup> Ana Maria Guerra Martins; *Direito Internacional dos Direitos Humanos - relatório*, Almedina, 2016, p. 100. See also Hannah Arendt, who describes the Holocaust as a new crime, a crime against humanity, in the sense of a crime against the status of being human, against his own nature; *Eichmann in Jerusalem: A report on the banality of evil*, 1965, p. 268.

<sup>13</sup> See David Luban; *A Theory of Crimes... op. cit.* p. 86.



aggregation of all human beings-humankind<sup>14</sup>, therefore, crimes against humanity are an attack on the quality of being a person, a quality that requires from rule of law and the international community respect, protection and the promotion of an inalienable set of human or fundamental rights necessarily associated with this existence<sup>15</sup>.

The reason for the formulation of this particular offense, for the first time included in clause c) of art. 6 of the Charter of the Nuremberg Court in 1945<sup>16</sup>, arises from the absence in international law of a rule covering crimes against the population itself<sup>17</sup>. As opposed to the normative consecration of the crime of genocide, which was developed through a treaty, until the adoption of the Statute of the International Criminal Court<sup>18</sup> crimes against humanity were largely the product of customary international law. In this regard, the establishment of the ICC (universal level) was a key milestone in the protection of human rights<sup>19</sup>.

It should be noted that at regional level it is worth noting the adoption on 27 June 2014, under the aegis of the African Union, of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights<sup>20</sup> - whose entry into force

<sup>14</sup> See David Luban; *A Theory of Crimes... op. cit.* pp. 86-87.

<sup>15</sup> The thesis according to which the foundation of human rights is based on the idea of the dignity of the human person is based on this. Dignity is the quality that defines the essence of the human person, or it is the value that confers humanity to the subject. The idea of dignity must, therefore, guarantee the freedom and autonomy of the subject. According to the first paragraph of the Preamble to the UN Universal Declaration of Human Rights (1948), dignity is understood as being inherent and universal to all members of the human community. Both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) state in their second preambular paragraphs that dignity is the foundation of human rights. The Charter of Fundamental Rights of the European Union also contains the inviolability of the dignity of the human being as a gateway to the system of fundamental rights of the European Union, in accordance with its art. 1, in which all other rights, such as the right to life or the prohibition of torture, are anchored. The first historical moment in which the dignity of the human person was accepted as a constitutional principle was in the Constitutional Charter of the German Republic of 1949 - from that historical milestone, the constitutionalisation of the dignity of the human person is present in several contemporary constitutions.

<sup>16</sup> According to Antonio Cassese, this article aimed at the prosecution and punishment of the most repugnant atrocities, that is, those acts that could subvert the sense of the principle of the dignity of the human person; «Genocide». In Antonio Cassese, P. Gaeta e J. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I, Oxford University Press, 2002, p. 335 and following. The requirement in that article that it had to be an act committed before or during the war served to limit the scope of the precept (and thus the jurisdiction of the Court).

<sup>17</sup> As a result of this absence, the atrocities committed during World War II by the Nazis against Jews and other civilians could only be prosecuted as individual or collective offenses under German Criminal Law. According to Ilias Bantekas e Lutz Oette, "[t]his outcome, however, would have been absurd given that the Holocaust was much more than simply the accumulation of multiple offences and could not in any way be left to the devices of ordinary criminal law"; *International Human Rights – Law and Practice*, Cambridge University press, 2013, p. 709.

<sup>18</sup> It should be noted that the ICCI has a limited and secondary nature in its intervention because there is no international jurisdiction reserve for certain crimes (Principle of complementarity and subsidiarity) - the Court intervenes in a subsidiary capacity when national jurisdiction does not ensure appropriate investigation and trial.

<sup>19</sup> See Paula Escarameia; "Prelúdios de uma Nova Ordem Mundial: O Tribunal Penal Internacional, Revista Nação e Defesa", *Instituto da Defesa Nacional*, no.104-2<sup>nd</sup> series, 2003, p.25.

See Leila Nadya Sadat, who wrote: "[g]iven the centrality of charges of crimes against humanity to the successful prosecution of atrocity crimes, the ICC's treatment of crimes against humanity will therefore be critically important. Moreover, because the ICC is a permanent court with the capacity to intervene in ongoing situations (even prior to the outbreak of conflict in some cases), the Court's prosecutions of crimes against humanity may assume a preventive role at the ICC that similar prosecutions could never have assumed at the ad hoc tribunals".<sup>19</sup> See Leila Nadya Sadat; "Crimes Against humanity in the modern age"; *The American Journal of International Law*, Vol. 107, 2013, p. 334.

<sup>20</sup> Available at: [http://au.int/sites/default/files/treaties/7804-treaty-0045\\_-\\_protocol\\_on\\_amendments\\_to\\_the\\_protocol\\_on\\_the\\_statute\\_of\\_the\\_african\\_court\\_of\\_justice\\_and\\_human\\_rights\\_p.pdf](http://au.int/sites/default/files/treaties/7804-treaty-0045_-_protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_p.pdf).

See also Patrícia Galvão Teles e Daniela Martins; "Tribunal Penal Internacional – Desafios Atuais", *Relações Internacionais*, Instituto Português de Relações Internacionais, Vol. 54, June 2017, p. 28 and following.



is pending. The purpose of this Protocol is to provide that Court with a section on international criminal law with jurisdiction to prosecute, in particular, crimes against humanity.

The constraints imposed by the Rome Statute (such as the failure to include the principle of universality)<sup>21</sup> make the ICC's task intrinsically difficult. However, the inclusion of the principle of universality in the new Convention on Crimes against Humanity can constitute a major step forward in inter-state cooperation in punishing such serious violations of international law by establishing more effective jurisdiction of the ICC. Indeed, "until the ICC becomes a truly universal tribunal (if it will ever become one), its 'partial' or 'incomplete' jurisdiction will remain a challenge"<sup>22</sup>.

Crimes against Humanity are defined in art. 7 of the Rome Statute of the ICC. According to paragraph 1 of the precept, "crime against humanity" means any of the following acts, when committed in the context of a generalized or systematic attack against any civilian population, with knowledge of this attack: a) Homicide<sup>23</sup>; b) Extermination; c) Slavery; d) Deportation or forced transfer of a population; (e) Imprisonment or other serious deprivation of physical liberty, in violation of fundamental rules of international law; (f) Torture<sup>24</sup>; g) Rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilization or any other form of sexual violence of comparable gravity; (h) Persecution of a group or community for political, racial, national, ethnical, cultural, religious or sexually identifiable reasons as defined in paragraph 3, or other criteria universally recognized as being unacceptable in international law relating to any act referred to in this paragraph or to any crime within the jurisdiction of the Court; i) Forced disappearance of persons; j) Crime of apartheid; (k)<sup>25</sup> Other inhuman acts of a similar character which intentionally cause great suffering, serious injury or affect mental or physical health." Unhappy with this definition, Charles Chernor Jalloh suggests reformulating it by an amendment to the Rome Statute<sup>26</sup>.

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<sup>21</sup> The competence is not universal since it is restricted, in principle, to the states that have ratified the Rome Statute. The ICC does not prosecute all perpetrators of crimes against humanity: The Treaty of Rome provides that the jurisdiction of the ICC is limited to crimes committed in the territory of the State Party or by its nationals. However, in the draft articles that may be part of a future Convention on Crimes against Humanity, it is proposed that the states exercise jurisdiction not only in relation to crimes committed in their territories or by their nationals, but also by non-nationals abroad who are within the territory of the said State Party. This is a major step forward in the process of protecting human rights. DIRE TLADI stresses "[p]erhaps the central element of the ILC project will be the obligation to prosecute or extradite, a legal principle known as *aut dedere aut judicare*. The *aut dedere aut judicare* obligation, broadly stated, obliges a state to prosecute offenders *present in its territory or, if it is unable or unwilling to do so, to extradite the offender to a state that is willing to do so*"; *Complementary and cooperation in international criminal justice, Assessing initiatives to fill the impunity gap*: paper 227, Institute For Security Studies, 2014. Available at: <https://issafrica.s3.amazonaws.com/site/uploads/Paper277.pdf>.

<sup>22</sup> See Patrícia Galvão Teles; "O Tribunal Penal Internacional e a evolução da ideia do combate à impunidade: uma avaliação 15 anos após a Conferência de Roma", *Janus.net*, Universidade Autónoma de Lisboa, Vol. 5, no.2, November 2014-April 2015, p. 4.

<sup>23</sup> "Events like the 11th September attacks could be prosecuted under this heading. The acts were multiple and coordinated, causing the death of thousands of people, in furtherance of Al Qaeda's terrorist policy against the United States. Thus, they were 'systematic'", Roberta Arnold; *The prosecution of Terrorism as a Crime... op. cit.* p. 994

<sup>24</sup> Terrorism can also be covered in this paragraph, since such a provision omits the requirement of connection "to a public official". *Idem*.

<sup>25</sup> See Draft Code of Crimes Against the Peace and Security of Mankind, International Law Commission Report, 1996, p. 47 Available at: [http://legal.un.org/docs/?path=../ilc/documentation/english/a\\_cn4\\_I532.pdf&lang=EF](http://legal.un.org/docs/?path=../ilc/documentation/english/a_cn4_I532.pdf&lang=EF): inhuman acts should be those "which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm."

<sup>26</sup> See. Charles Chernor Jalloh; "What Makes a Crime Against Humanity a Crime Against Humanity", *American University International Law Review*, Vol. 28 No. 2, 2013, p. 435.



Paragraph 2 of this article presents a set of definitions that have as main purpose the delimitation of the conducts typified in number 1. Andrew Clapham poses the question "if such acts are already violations of human rights law, what is the added value of criminalising them at international level?"<sup>27</sup> International criminalization makes it possible for the individual to be tried before an International Court<sup>28</sup>. But what will justify, *ab initio*, the criminalization of such acts? Bassiouni<sup>29</sup> was one of the first authors to advance a doctrinal basis for international criminalization. Such offenses, according to the author, affect internationally significant interests, posing a threat to world peace and security, with transnational implications. That is why there is universal interest in repressing these crimes, which results, in principle, in universal jurisdiction.

*Crimes against humanity* are, therefore, defined as a "generalized or systematic attack against any civilian population, with knowledge of this attack" (article 7 (1) of the Rome Statute of the ICC). The concept of "attack" presupposes, in terms of clauses (a), (b), (c), (d) and (e), that these offenses taken together (that is, cumulative) give form and existence to a government policy against a target civilian group.

The **objective elements** of crimes against humanity are defined in clauses. (a) to (k) of paragraph 1. The offenses are required to be systematic in nature and must be endorsed by the state, government or entity in charge. At this point, there is controversy<sup>30</sup> in the nature of terrorist acts<sup>31</sup> committed by non-state actors - will they be considered agents of crimes against humanity? There are two ways in which such offense (terrorism) can be taken into account as Crime against Humanity: as one of the subcategories of crimes against humanity or as an "inhuman act" (k). This is the view of Roberta Arnold<sup>32</sup>, for whom the advantage of including terrorism in one of the subcategories is that they can be committed by all, including non-state actors and "[s]econdly, a wide range of victims is covered, including every person who is not performing *de facto* combating functions, independently from his or her nationality." Michael A. Newton and Michael P. Scharf believe that "[e]xpanding the corpus of crimes against humanity [to terrorism] could provide a harmonized legal framework applicable in both times of armed conflict or peace"<sup>33</sup>. According to Kai Ambos, "[t]he intentional killing of more than 100 people constitutes the required single act of murder. As a

<sup>27</sup> See. Andrew Clapham; "Human Rights and International Criminal Law" in William SCHABAS, *The Cambridge Companion to International Criminal Law*, Cambridge University Press, p. 6.

<sup>28</sup> See Andrew Clapham; *Human Rights and International...op. cit.* p. 7.

<sup>29</sup> See Cherif Bassiouni; "The Penal characteristics of conventional international criminal law", *Case Western Reserve Journal of International Law*, Vol. 15, No. 1, 1983, p. 30 and following.

<sup>30</sup> See, on this matter, Michael P. Scharf e Michael A. Newton: "Assuming that non-state actors are in fact legally capable of committing crimes against humanity, the acts of any large-scale group such as the Mafia, organized drug trafficking or terrorist organization, or even a gang capable of committing 'widespread or systematic crimes' would be sufficiently covered by the specifically listed categories of crimes against humanity. In such a case, there is no need to list terrorism as a separate crime against humanity; rather, the specific act is already covered in the crimes against humanity of murder, persecution, or other identifiable crime."; *Terrorism and Crimes Against Humanity... op. cit.* p. 275.

<sup>31</sup> "[T]errorist attacks have usually been defined as serious offences, to be punished under national legislation by national courts. The numerous international treaties on the matter oblige the contracting states to engage in judicial cooperation for the repression of these offences. In my opinion, it may be safely contended that, in addition, at least trans-national, state-sponsored or state-condoned terrorism amounts to and international crime and is already contemplated and prohibited by international customary law as distinct category of such crimes.", Antonio Cassese; "Terrorism is Also Disrupting Some Crucial Legal Categories of International Law"; *European Journal of International Law*, 2001, p. 994.

<sup>32</sup> Roberta Arnold; "The prosecution of terrorism as a crime against Humanity", *ZaoRV*, Vol. 64, 2004, pp. 994 and 999.

<sup>33</sup> See Michael A. Newton and Michael P. Scharf; "Terrorism and Crimes Against Humanity" in Leila Nadya Sadat (ed.); *Forging a Convention for Crimes Against Humanity*, Cambridge University Press, 2011, p. 272.



consequence, the ICC has jurisdiction *ratione materiae*, without being controversial"<sup>34</sup>. In fact, the author points to two bases for the ICC's jurisdiction over such acts: (1) the active personality principle (it exists for some ISIS members who are nationals of ICC States Parties, as per clause b) of paragraph 2 of art. 12); 2) the principle of territoriality (clause a) of paragraph 2 of art. 12) - a certain territorial connection is required from the state where the offense was committed, it being understood that such a connection exists when the perpetrator is resident in the same state (part of the ICC Statute). But in the case of ISIS, the actors have no fixed territory or have a connection to third countries (such as Iraq, Libya, and Turkey). The author suggests, however, that the requirement of a sufficient territorial link to a Member State is necessary - as when the act (or its effects) is produced in a Member State. There are those who argue<sup>35</sup> that subsuming terrorism to the category of crimes against humanity would lead to the dilution of *lex specialis* into *lex generalis*, so it would be preferable to establish terrorism as a separate category of transnational crime. For Bassiouni, the only entities liable to commit acts that gain the status of crimes against humanity - other than the government - are those that hold elements of state sovereignty - Gestapo, KGB<sup>36</sup>. It is thus a narrow view of the term "political organization" as including only the government, excluding non-state actors<sup>37</sup>. Conversely, an expansion of the scope of universal jurisdiction to such non-state actors is applauded by some authors, including James Fry<sup>38</sup>.

In view of the lack of consensus regarding the inclusion of the crime of terrorism into the catalogue of crimes against humanity, it should be noted that "[the] fight [against] terrorism raises two complex problems with regard to human rights: on the one hand, the right of the civilian population to have its own security strengthened, on the other hand, the right to the protection of fundamental human rights, which must be ensured even for the alleged terrorists.

A balance must be struck between the human rights of victims and of terror suspects and the rights of citizens in general, who can see their fundamental freedoms affected and restricted by measures taken in the name of the fight against terrorism"<sup>39</sup>, according to Patrícia Galvão Teles.

Regarding the **subjective elements**, it should be noted that according to the general principles of international law, the subjective element of crimes against humanity can be divided into two distinct moments: knowledge/awareness of the wider context in which crime is committed, that is, that these offenses are part of a systematic, widespread and large-scale policy of abuse; and the need to verify intention with respect to the practice of the underlying offense. Thus, individual responsibility for crimes against humanity is not limited to the fact that a person commits crimes of widespread or systematic scope.

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<sup>34</sup> On the ICC's jurisdiction over terrorist acts, see Kai Ambos; "The new enemy of mankind: The jurisdiction of the ICC over members of 'Islamic State'"; *Blog of the European Journal of International Law*, 2016, paragraphs. 2 and 3. Available at: <https://www.ejiltalk.org/the-new-enemy-of-mankind-the-jurisdiction-of-the-icc-over-members-of-islamic-state/>.

<sup>35</sup> See Ben SAUL; "Reasons for defining and criminalizing 'terrorism' in international law", The University of Sydney, Legal Studies Research Paper No. 08/121, 2008, p. 248.

<sup>36</sup> See also William A. Schabas; "State Policy As An Element of International Crimes", *Journal of Criminal Law and Criminology*, Vol. 98, No. 3, 2008, pp. 953, 973.

<sup>37</sup> The Jurisprudence of the International Criminal Tribunal for the former Yugoslavia has accepted the possibility of non-state actors being tried for crimes against humanity - see, for example, the International Criminal Tribunal for the Former Yugoslavia, *Tadić*, 1997, para. 654.

<sup>38</sup> See James Fry; "Terrorism as a Crime Against Humanity and Genocide: The backdoor to universal jurisdiction", *UCLA Journal of International Law & Foreign Affairs*, Vol. 7, 2002, p. 197 and following.

<sup>39</sup> See, for example, Patrícia GALVÃO TELES, "Terrorismo e Direitos Humanos", *Janus.Net*, 2003 § 1.



It is required that the perpetrator be *aware* of the general context in which the crime was committed, a knowledge that must be combined with *malice*. As far as crimes against humanity are concerned, there is no requirement for intent in the volitional element, admitting any form of malice (also both the necessary and the possible).

These are international crimes committed directly against the civilian population which acquire a certain proportion/scale that goes beyond the so-called crime with a purely private intent and can be committed in the territory of a single state or at the borders. Finally, the crime concerns the most hateful acts of violence and persecution known to mankind.

***In accordance with the above, the requirements for a crime to be considered as a crime against humanity are:***

- i) *Acts committed in a generalized or systematic way*<sup>40</sup>- These are alternative requirements. The notion of attack has been studied in jurisprudence. Examples include the *Nahimara et al.* case<sup>41</sup>, in which the International Criminal Tribunal for Rwanda cited the *Kunerac et al.* case in order to concretize the notion that it considers to be substantiated in the conducts involving committing acts of violence. The Court concluded that an attack on the civilian population means a violent action against the civilian population, or some kind of treatment referred to in sub-paragraphs a) to i) of art. 7.

It is necessary that the attack be generalized to the extent that it interferes with a large number of people (multiplicity of victims, which excludes isolated acts of violence). The attack must be systematic, which means that it must be committed according to a pre-conceived plan whose implementation or policy should result in the repeated and ongoing commission of inhuman acts.

- ii) *Acts committed against any civilian population* – In fact, the “civilian population” requirement has been the subject of debate, largely because of the difficulties in transposing the notions of International Humanitarian Law<sup>42</sup>. If one agrees to a human rights approach, this will ensure a range of positive rights for all individuals regardless of their underlying status. It is particularly debated whether that term should be interpreted broadly or narrowly - since the Rome Statute is silent on that point. Leila Nadya Sadat<sup>43</sup> suggests that the term “civilian population” should have an autonomous meaning, rather than merely a demarcation of the meaning of international humanitarian law, since any person is protected against attacks on his life by the protection afforded to him by the right to life. According to the author, the

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<sup>40</sup> It is understood that the requirements are disjunctive. The practice of the ICCI has reaffirmed this- See *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, Pre-Trial Chamber, ICC-01/09, Mar. 31, 2010, para. 94.

<sup>41</sup> International Criminal Tribunal for Rwanda, *Nahimara et al.* (Case No. ICTR-99-52-A), Judgement, 28- Nov. 2007, para. 916. Available at: <http://cld.unmict.org/assets/filings/90-ICTR-99-52-2079-4-MEDIA-Nahimara-et-al-appeals-judgement.pdf>.

<sup>42</sup> One can read, for example in the *Bemba* case (*The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC- 01/05-01/08) that the civilian population includes all persons who are civilians in opposition to members of the armed forces and other legitimate combatants.

<sup>43</sup> See Leila Nadya Sadat; “Putting Peacetime First: Crimes against Humanity and the Civilian population requirement”, *Emory International Law Review*, Vol. 31, 2017, p. 206.



Court should not only analyse the formal status of a victim (as a civilian) within the meaning of international humanitarian law, but take into account the actual situation of the individual or the population being abused - a position that I endorse and which, according to Leila Nadya Sadat, ensures the tendential abolition of the artificial division between protected persons and unprotected people during War and Peace<sup>44</sup>.

The notion of "civilian population" must then be interpreted broadly - - "[a]n attack can be committed against any civilian population, regardless of nationality, ethnicity or any other distinguishing feature, and can be committed against either national or foreign populations."<sup>45</sup> The notion of civilian population "is much broader than the four groups enumerated in the Genocide Convention"<sup>46,47</sup>. Steven Ratner, Jason Abrams and James Bischoff believe that such a requirement suggests that even the most atrocious acts, such as some terrorist attacks, are not crimes against humanity, even when they are isolated<sup>48</sup>, which is criticized by the authors as it confines the scope of crimes against humanity.

- iii) *Acts deriving from the instigation or direction of the government or of any other political organization (policy element)*<sup>49</sup> - The International Law Commission decided to include such a requirement in order to include inhuman acts committed by private persons without state involvement.<sup>50</sup> Clause a) of paragraph 2 of art. 7 of the ICC's Rome Statute expresses this view. Such a provision expressly contemplates the commission of crimes against humanity by non-state perpetrators. The jurisprudence of the ICC suggests that the term "political organization" includes "any organization or group with the capacity and resources to plan and carry out a widespread or systematic attack."<sup>51 52</sup>

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<sup>44</sup> *Idem*, p. 207.

<sup>45</sup> *First Report of the Special Rapporteur on Crimes Against Humanity*, Sean MURPHY, para. 135.

<sup>46</sup> See Ilias Bantekas and Lutz Oette; *International Human Rights... op. cit.* p. 710.

<sup>47</sup> In the *Kunarac* case, the Tribunal said that: "the use of the word 'population' does not mean that the entire population of the geographical entity in which the attack is taking place must have been subjected to that attack. It is sufficient to show that enough individuals were targeted in the course of the attack, or that they were targeted in such a way as to satisfy the Chamber that the attack was in fact directed against a civilian 'population', rather than against a limited and randomly number of individuals."; *ICTY Prosecutor v. Kunarac and Others*, 2002, para. 63.

<sup>48</sup> Steven R. Ratner, Jason S. Abrams and James L. Bischoff; *Accountability for human rights atrocities in international law – Beyond the Nuremberg Legacy*, 3d Edition, Oxford University Press, 2009, p. 79.

<sup>49</sup> In 1995, the International Law Commission discussed the debate on whether acts by non-state actors could be included as crimes against humanity, which, according to some members, would not be possible. However, the jurisprudence of the International Criminal Tribunal for the former Yugoslavia has accepted the possibility of non-state actors being tried for crimes against humanity. - See the *Tadić* case, 1997 "the law in relation to crimes against humanity has developed to take into account forces which, although not those of the legitimate government, have *de facto* control over, or are able to move freely within, a defined territory", para. 654. Darryl ROBINSON identified four theories regarding this requirement. See «Essence of Crimes Against Humanity Raised at ICC», *Blog of The European Journal of International Law*, 2011. Available at: <http://www.ejiltalk.org/essenceof-crimes-against-humanity-raised-by-challenges-at-icc>.

<sup>50</sup> Primarily, the International Law Commission defined crimes against humanity as "Inhuman acts such as murder, extermination, enslavement, deportation or persecutions, committed against any civilian population on social, political, racial or cultural grounds *by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities*"; Report of the International Law Commission on the work of its sixth session, *Yearbook of the International Law Commission, 1954*, vol. II, p. 150. Later, it defined it as "any of the following acts, when committed in a systematic manner or on a large scale and *instigated or directed by a Government or by an organization or group*", ILC Report, 1996, p. 47.

<sup>51</sup> See *First report on crimes against humanity*, Sean Murphy, para. 147.

<sup>52</sup> "Such a policy may be made either by groups of persons who govern a specific territory or by any organization with the capability to commit a widespread or systematic attack against a civilian population."



iv) *Knowledge of the attack* - the author of the act must commit it with knowledge of doing it.

Criminalizing this type of behaviour presupposes the states' obligations to prevent<sup>53</sup> them (as well as the obligation to punish them). The State<sup>54</sup> is obliged to **protect**<sup>55</sup> all fundamental rights, since, by assuming a monopoly on the use of lawful coercive force, it is obliged to protect the life, safety, well-being, freedom, and the property of private individuals. In fact, "the threshold between human rights violations and crimes against humanity takes on a particular significance in the context of [...] the 'Responsibility to Protect'".<sup>56</sup> The "R2P" concept came from the International Commission on Intervention and State Sovereignty (ICISS).<sup>57</sup> The State's duty to protect the dignity and basic human rights of its own population<sup>58</sup> is essentially achieved through positive normative or factual actions aimed at the effective protection of fundamental rights. This duty is essentially carried out through positive actions but also includes duties of abstention, of no negative affection, which from the perspective of individuals, translate into both positive and negative rights. Violation of such an obligation implies the State's responsibility<sup>59</sup>. Regarding the new Convention on Crimes against Humanity - a project initiated by the International Law

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International Criminal Court, *Katanga Case* (ICC-01/04-01/07) between the Prosecutor v. Germain Katanga, 2008, para. 396. Available at: <https://www.icc-cpi.int/drc/katanga>.

<sup>53</sup> States have a duty to respect, protect and fulfil fundamental rights. The fundamental rights legally guarantee individual access to goods which, due to their importance for the dignity of the human person, personality development, autonomy, freedom, and well-being of the people, the Portuguese Constitution (CRP) and the other international instruments understood deserving maximum protection. The constitutional consecration of fundamental rights has a very precise legal meaning: it always imposes upon the State, and upon each of its constituted powers, duties of subordination and legal binding, which, in general, result in corresponding claims and rights of realization for the individuals, whose awareness can be translated into the ownership of public subjective rights, i. e., rights to be legally claimed in their own interests to ensure the fulfilment of the respective state's duties.

<sup>54</sup> The International Community also has a responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VII of the Charter of the United Nations, to protect populations from crimes against humanity.

<sup>55</sup> For further information, see Jorge Reis Novais; *Direitos Sociais: Teoria jurídica dos direitos sociais enquanto direitos fundamentais*, Coimbra Editora, 2010, p. 256 and following.

Following the widespread and systematic attack against the civilian population by the Libyan regime, the UN Security Council adopted Resolution 1970 on 26 February 2011 (available at: [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/1970](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1970) (2011)), making explicit the reference to the responsibility to protect. The Security Council has called for an end to violence, "recalling the Libyan authorities' responsibility to protect its population", imposing international sanctions. In Resolution 1973 (available at: [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/1970](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1970) (2011)), adopted on 17 March 2011, one reads that attacks on the civilian community constitute crimes against humanity. In the UN Secretary-General Ban Ki-Moon's report on Implementing the Responsibility to Protect (A/63/677, 2009), three pillars of this obligation are identified. They are: 1) The State has the primary responsibility to protect the populations from genocide, war crimes, crimes against humanity and ethical cleansing, as well as their incitement; (2) The International Community has the responsibility to encourage and assist states in fulfilling such responsibility; (3) The International Community has the responsibility to use appropriate diplomatic, humanitarian and other means to protect against such crimes. If a state is manifestly lacking in its obligation to protect, the international community must prepare to take collective action to protect the population, in accordance with the Charter of the United Nations. (Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N09/206/10/PDF/N0920610.pdf?OpenElement>).

<sup>56</sup> Andrew Clapham; *Human Rights and International...op. cit.* p. 7.

<sup>57</sup> Such a Commission was called upon to reach an international consensus on humanitarian intervention following the experience of the 1990s (experiences such as Somalia, Rwanda, Bosnia and Kosovo). It was, therefore, the responsibility - in the first instance, of the state concerned - to protect its own population. The concept of responsibility to protect was adopted by the Member States of the United Nations at the World Summit in 2005.

<sup>58</sup> See ICISS; *The Responsibility to Protect*, Report of the International Commission on Intervention and State Sovereignty, 2001, p. 8. Available at: <http://responsibilitytoprotect.org/ICISS%20Report.pdf>

<sup>59</sup> See articles adopted by the International Law Commission in 2001: *Responsibility of States for internationally wrongful acts*, Available at: [http://legal.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_6\\_2001.pdf](http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf).



Commission in 2014 - Rita Maxwell<sup>60</sup> believes that it represents an important opportunity to give a greater meaning to the responsibility to protect insofar as it consolidates the relationship between this responsibility and the states' obligation to prosecute crimes against humanity. In that regard, David Scheffer suggests that an explicit provision should be incorporated in the alleged Convention as to the responsibility to protect requiring effective action by states<sup>61</sup>.

### III. Crimes Against Humanity - an integral part of Jus Cogens

*"[A]t the individual level, that is, that of criminal liability, it would seem that one of the consequences of the jus cogens character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction [...] This legal basis for States' universal jurisdiction over torture bears out and strengthens the legal foundation for such jurisdiction found by other courts in the inherently universal character of the crime. It has been held that international crimes being universally condemned wherever they occur, every State has the right to prosecute and punish the authors of such crime"<sup>62</sup>.*

The definitions given by the Statutes of the International Tribunals for the former Yugoslavia and for Rwanda - art. 5 and art. 3 of the Statutes, respectively - made a decisive contribution to the consolidation of crimes against humanity as *jus cogens* rules. Thus, the international community is obliged to ensure universal respect for consecrated *jus cogens* norms. Currently, *jus cogens* is a recognized element of international law. Part of the doctrine characterizes *jus cogens* norms as the product of natural law, that is, *jus cogens* as emanation "which grew out of the naturalist school, from those who were uncomfortable with the positivists' elevation of the state as the sole source of international law."<sup>63</sup> International practice has identified crimes against humanity as *jus cogens*. An example of this is the case opposing Germany to Italy (Jurisdictional Immunities of the State Case) where the Court suggested that the prohibition of crimes against humanity constitutes a *jus cogens* rule<sup>64</sup>. "The prohibition of genocide [...], crimes against humanity cannot be only internal affairs of a certain state since they reflect the

<sup>60</sup> See Rita Maxwell; "The Responsibility to Protect and to Prosecute: Reflections on the Canadian Experience and Recommendation for the Proposed Crimes Against Humanity Convention" in Morten Bergsmo e Song Tianying (eds.); *On the Proposed Crimes Against Humanity Convention*, Torkel Opsahl Academic EPublisher, Brussels, 2014, p. 277.

<sup>61</sup> David Scheffer; "Crimes Against Humanity and the Responsibility to Protect" in Leila Nadya Sadat (ed.); *Forging a Convention for Crimes Against Humanity*, Cambridge, 2011, p. 306.

<sup>62</sup> International Criminal Tribunal for the Former Yugoslavia (ICTY) – Trial Chamber II, Case Number IT-95-17/1-T: *Prosecutor v. Anto Furundzija*; 10 December 1998, para. 156.

<sup>63</sup> See Mark W. Janis; "The Nature of Jus Cogens", *Connecticut Journal of International Law*, Vol.3, 1988, pp. 359, 362. Another part considers the wording of art. 53rd CVDT, focusing on consent as a vital element. There are also authors who have viewed *jus cogens* with scepticism and stressed the difficulties of its definition and concretization, as Jorge Miranda; *Direito Internacional Público*, Vol. I, Lisbon, 1995, p. 146.

<sup>64</sup> See *Concerning Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening)*, ICJ Reports 2012, 99, at 141 (para 95).



core values of international society”<sup>65</sup>, so, “certain human rights do represent *jus cogens*, since it brings *legal duties* of the state to the community as a whole and gives legitimacy for the *legal interest* of the community, which was elaborated above in the notion of *erga omnes*.”<sup>66</sup>

In 2001, the International Law Commission indicated that the prohibition of crimes against humanity was a peremptory norm of international law accepted and recognized<sup>67</sup>. Later, in the *Belgium v. Senegal* case<sup>68</sup>, the ICJ recognized that some acts, such as the prohibition of torture, had a *jus cogens* nature, which made it implicitly recognized that the prohibition of such a systematic act would also have a *jus cogens* character. “Among the principles of general or common international law, there are those that the doctrine has called *jus cogens* principles [...] which are principles that do not depend on the willingness or agreement of wills of subjects of international law; which play an eminent role in confronting all other principles and precepts; and which have their own legal force, with inherent effects in the subsistence of norm and contrary acts [...] *jus cogens* is evolving and susceptible to transformation and enrichment by the addition of new rules”<sup>69</sup>. As to the nature of the *jus cogens* norms, Mark W. Janis writes that *jus cogens* is not a form of customary law, but a form of constitutional law, which forms the basis of the legal system of the International Community<sup>70</sup>. The peremptory norms<sup>71</sup> oblige states to prevent their violation<sup>72</sup>. *Jus cogens* norms override any other rules, including constitutional rules - *jus cogens* should be seen as a material limit of constitutional revision.<sup>73</sup>

As Cherif Bassiouni points out, “certain crimes affect the interests of the world community as a whole because they threaten the peace and security of humankind and because they shock the conscience of humanity. If both elements are present in a given crime, it can be concluded that it is part of *jus cogens*”<sup>74</sup>.

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<sup>65</sup> Predrag Zenovic, “Human Rights Enforcement Via Peremptory Norms – A Challenge to State Sovereignty”, *RGSL Research Papers*, No. 6, Riga Graduate School of Law, 2012, p. 26.

<sup>66</sup> *Idem*.

<sup>67</sup> See *Draft Articles on State Responsibility, Commentary on Article 26*, in *Official Records of the General Assembly, Fifty-sixth Session*, and U.N. Doc. A/56/10, 2001, p. 283: “peremptory norms that are clearly accepted and recognized include the prohibition of [...] crimes against humanity”.

See also the *Report of the International Law Commission Sixty-Sixth Session*, 2014 (5 May – 6 June and 7 July – 8 August). Available at: <http://legal.un.org/ilc/reports/2014/english/annex.pdf>.

<sup>68</sup> *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, I.C.J. Reports 2012, p. 422, at para. 99; also *Prosecutor v. Furundžija*, Trial Chamber, Judgment, ICTY Case No. IT-95-17/1, para. 153 (1998); and also *Al-Adsani v. United Kingdom*, E.Ct.H.R., Judgment, App. No. 35763/97, para. 61 (2001).

<sup>69</sup> See Jorge Miranda. *Direito Internacional Público – I*, Lisbon, 1995, pp. 143-150.

<sup>70</sup> Mark W. Janis; “The nature of Jus Cogens”, *Connecticut Journal of International Law*, Vol. 2, 1988, p. 362.

<sup>71</sup> Article 71 of the Vienna Convention on the Law of Treaties deals with the consequences of the invalidity of the treaty which conflicts with a peremptory norm of general international law (under the terms of articles 53 and 64 of the Convention).

<sup>72</sup> Lauri Hannikainen; *Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status*, Helsinki: Finnish Lawyers’ Pub. Co., 1988, p. 722.

<sup>73</sup> Ana Maria Guerra Martins; *Direito Internacional dos Direitos Humanos...op. cit.* pág. 117.

See also Ana Maria Guerra Martins and Miguel Prata Roque; “A Tutela Multinível dos Direitos Fundamentais – a posição do Tribunal Constitucional português”; *Conferência Trilateral dos Tribunais Constitucionais Espanhol, Italiano e Português*, 2014. Available at: <https://www.tribunalconstitucional.es/ActividadesDocumentos/2014-10-16-00-00/2014-PonenciaPortugal.pdf>.

<sup>74</sup> See Cherif Bassiouni; “International crimes: *Jus Cogens* and *Obligatio Erga Omnes*”, *Law and Contemporary problems*, Vol. 59, 1998, p. 69.



As for the concept of *jus cogens*, the international law doctrine is not unanimous. Whereas for Eduardo Correia Baptista<sup>75</sup> *jus cogens* norms are all norms of customary law that impose *erga omnes* obligations, unless there is a customary practice that expressly removes this "statute", Ana Maria Guerra Martins<sup>76</sup> believes that not all international human rights standards are *jus cogens*; the International Human Rights Law is one of the fields of privileged application of this type of norms. All intangible rights are *jus cogens* (which have been extended by the Human Rights Committee<sup>77</sup>) – they are related to the physical and moral integrity of the human person and to freedom. They are inalienable attributes of the human person and are based on values that express the value of respect for the inherent dignity of the person.

A *jus cogens* crime is characterized by state conduct regardless of whether it manifests itself in an action or an omission. It should be borne in mind that an international crime that has such status must itself meet the following conditions: existence of legal instruments that show the prohibition of its practice, the (high) number of states that have incorporated such a prohibition in their legislations and also the number of national and/or international legal proceedings related to the same crime. Evidence of general principles of international law and the role of the doctrine are also pointed out as evidence of such *jus cogens*. Some doctrine defends that crimes against humanity have acquired the status of *jus cogens* crimes for manifesting the ability of a specific conduct to shock the conscience of humanity<sup>78</sup>. Thus, the values and principles protected through the promotion of peace, security and dignity of mankind are shared by all states and are universally accepted<sup>79</sup>.

International crimes that acquire *jus cogens* status constitute *erga omnes*<sup>80</sup> obligations that are non-derogable. The origin of the problem of *erga omnes* obligations with regard to *jus cogens* crimes comes from the ICJ's advisory opinion on Reservations to the Convention on the Prevention and Punishment of Genocide<sup>81</sup>. It is, however, difficult to verify the legal obligations arising from the *jus cogens* nature of international crimes, Oliver Dorr and Kirsten Schmalenbach are presented as examples: "the duty to prosecute

<sup>75</sup> See Eduardo Correia Baptista; *Direito Internacional Público*, Lisboa, Vol. I, 1995, p. 432 and following.

<sup>76</sup> Ana Maria Guerra Martins; *Direito Internacional dos Direitos Humanos – relatório...op. cit.* p. 92 and following.

<sup>77</sup> Starting to include the right of all persons deprived of their liberty to be treated with humanity and respect, the prohibition of hostage-taking, the prohibition of deportation or forced transfer of persons, the prohibition of incitement to racial, religious or national hatred.

<sup>78</sup> See Faustin Z. Ntoubandi, *Amnesty for Crimes Against Humanity Under International Law*, Martinus Nijhoff Publishers, Leiden, Boston, 2007, p. 218.

<sup>79</sup> Markus Petsche begins by defining values as constituting "the underlying foundation of the normative system of any given society or community [...] and are, therefore, more 'fundamental' than norms.", «Jus Cogens as a Vision of the International Legal Order». *Penn State International Law Review*, Vol. 29, No.2, 2010, p. 258. Such fundamental values can be created either through state practice or by acquiring "fundamental" status by inherence, irrespective of the acceptance and/or recognition of the International Community. For Cancado Trindade, such fundamental values "do not emanate from the inscrutable 'will' of the states, but rather [...] from human conscience"; «Jus Cogens: The determination and the Gradual expansion of its material contents in contemporary international case-law», *Course 3*, 2008, p. 6.

<sup>80</sup> *Erga omnes* obligations are international obligations that bind through the same rule one state in relation to all other states, which in turn are in the same legal situation. The *jus cogens* norms have a close connection with *erga omnes* obligations. All the *jus cogens* rules impose obligations of this kind, since they protect common interests. In the *Barcelona Traction* case (ICJ, 1970), the distinction between *erga omnes* effects (obligations of states *vis-à-vis* the international community as a whole) and *vis-à-vis* obligations (those arising with respect to another state) the ICJ's definition of *erga omnes* refers to an obligation assumed before all.

<sup>81</sup> *Reservations to the Convention on the Prevention and Punishment of the crime of genocide, Advisory opinion of 28 May 1951.* Available at: <http://www.icj-cij.org/docket/index.php?sum=276&p1=3&p2=4&case=12&p3=5>.



or extradite, the non-applicability of domestic laws limiting the criminal responsibility or prosecution for such crimes (amnesty) and the universality of (mandatory) jurisdiction [...] The *jus cogens* nature of international core crimes is believed to generate all legal obligations necessary to bring to justice persons who are guilty of these crimes.”<sup>82</sup>

#### IV. Final considerations

*“There is no doubt that the recent development of international criminal law corresponds to the development of international human rights.”<sup>83</sup>*

International law crimes (core crimes) were significantly codified when the Rome Statute of the International Criminal Court was adopted. “[P]arts of international criminal law have developed [...] to respond to egregious violations of human rights in the absence of effective alternative mechanisms for enforcing the most basic of humanitarian standards.”<sup>84</sup> The prohibition of crimes against humanity ascended to the status of *jus cogens* norm. The perpetration of such acts constitutes an attack on the quality of being a person, a quality that requires respect, protection and promotion of an inalienable set of human rights from the rule of law and from the international community. The criminalization of this type of serious offenses under international law was accompanied by “timidity and ambiguity in the face of political constraints.”<sup>85</sup>

Fundamental rights<sup>86</sup> imply, by nature, limits to public authorities and, in turn, to so-called state sovereignty (the concept of sovereignty itself is in crisis, in its classic aspect) - human rights treaties arise precisely to obviate situations in states that cannot guarantee people's rights.

The Convention on Crimes against Humanity, still missing, appears to be an important piece in the field of International Human Rights Law, since “[e]nding impunity for mass crimes is a common responsibility of humanity as a whole and

justice for victims of such serious crimes should never be sacrificed at the altar of political expediency”<sup>87</sup>.

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<sup>82</sup> See Oliver Dorr and Kirsten Schmalenbach; *Vienna Convention on the Law of Treaties: A commentary*, Springer, 2012, p. 933.

<sup>83</sup> Predrag Zenovic, “Human Rights Enforcement Via Peremptory Norms – A Challenge To State Sovereignty”, *RGSL Research Papers*, No. 6, Riga Graduate School of Law, 2012, p. 40.

<sup>84</sup> Robert Cryer, Hákan Friman, Darryl Robindson, and Elizabeth; Wilmshurst; *An introduction to international criminal law and procedure* – 2nd ed., Cambridge University Press, New York, 2010, p. 13.

<sup>85</sup> Jorge Miranda; *Direito Internacional Público... op. cit.* p. 310.

<sup>86</sup> It should, however, be clarified that “human rights” (international plan) and “fundamental rights” (internal constitutional plan) differ in the legal sphere because they are different realities. Regarding the distinction, see on behalf of all Alexandre Melo Alexandrino; “Hermenêutica dos Direitos Humanos”, Conference given at the “Protection of Human and Fundamental Rights” course organized by the University of Lisbon Law Faculty under the Framework Agreement for cooperation with the University Centre of Euripedes (UNIVEM) and University of Northern Paraná (UENP), between January 11 and 13, 2011. Available at: <http://www.fd.ulisboa.pt/wp-content/uploads/2014/12/Alexandrino-Jose-de-Melo-Hermeneutica-dos-Direitos-Humanos.pdf>.

<sup>87</sup> President Song, Prosecutor Bensouda and ASP-President Intelmann: “Humanity is bound together in a common quest to end impunity”, ICC-CPI-20140910-PR1038, *Press Release*: 10/09/2014. Available at: <https://www.icc-cpi.int/legalAidConsultations?name=pr1038>



It is important to clarify the notion of "crimes against humanity", especially as regards the interpretation of the concept of "civil population". In addition, expanding the range of agents of crimes against humanity could have the advantage of "opening a door" to non-state actors - an increasingly assertive presence in the globalised world - by adopting a broad vision of the term "political organization" in clause a) of paragraph 2 of art. 7 of the Rome Statute. Regarding the agents of this type of criminal offense, the inclusion of the crime of terrorism in the catalogue of crimes against humanity seems an important point to consider in this legal debate.

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