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International Politics of Justice
The Political Underpinnings of the Emergence of an International Regime*

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If a change of political regime often entails a reevaluation of the recent historical past of a nation, there are cases in which this re-evaluation is brought about from outside. Thus, transitional justice gains an international dimension. This dimension can occur either if the crimes perpetrated by a political regime affect nationals of other States, or if the successor regime lacks the will or capacity to bring such cases before justice, because "ideally, all crimes would be prosecuted by domestic courts"[1]. At a retrospective look, the Nuremberg trials are the first instances of this sort (although they might also be interpreted as "justice of the victors"[2]). The political stakes surrounding the Cold War have prevented the development of international criminal justice until the fall of the USSR, but during the 1990s, it gained a new impetus that led to the creation of the International Criminal Court in 1999.

However, talking about "international criminal justice" compels us to take a number of precautions concerning the terminology itself, as well as its content. We would like, from the beginning, to point to the awkward sonority of the word "international" in this context, since the word as such generally refers to relations between the governments of States. Our subject, international criminal justice, transcends this level, as, on the one hand, we should talk about perpetrators – that is, individuals, and, on the other hand, we should talk of a jurisdiction which is established in the name of a universal competence – and not a inter-governmental one. Although the International Criminal Court, the court that exercises this jurisdiction, is established by a Treaty signed by States[3], the body of law which it applies is not international law, but human rights and criminal law; it also acts in the name of a "universal" jurisdiction. Thus, the inter-national, the universal/transnational and the domestic dimensions are intertwined in this relatively new and hybrid form of international jurisdiction. However, bringing a body of domestic law (in this case,

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[1] Judge Phillip KIRSCH, President of the International Criminal Court, "Applying the Principles of Nuremberg in the ICC", Keynote Address at the Conference "Judgment at Nuremberg", Washington University, 30 September 2006.

[2] This issue has been extensively presented as one of the main problems of the Nuremberg trials; e.g. Hannah ARENDT, *Eichmann la Ierusalim. Raport asupra banalității răului*, transl. by Mariana Neț, All, București, 1997, esp. pp. 276-304.

[3] Rome Statute of the International Criminal Court, 2001, http://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf (accessed on January 15, 2012)

criminal law) onto the international level constitutes an awkward evolution, which deserves further examination[1].

In this article, I will raise some questions about the international political issues involved by the extraordinary development of human rights regimes over the past two decades, that have also led to the emergence of an international criminal justice. These issues concern, first, the problem of the articulation between the fundamental norm of the international system – that is, sovereignty – and the fundamental norm of human rights – that is, the right to life. More generally speaking, this is a problem of linkage, or hierarchy, between two bodies of law: international law and human rights. Second, I will get to a more practical layer of the discussion and tackle the issue of the state strategies in the emergence of an international human rights regime. Since international law remains politically negotiable, we will try to look into the political context that allowed for the developments that led, at the end of the 90s, to the creation of the ICC, as well as to the transformation of the meaning of "sovereignty" in order to include the responsibility to protect populations against ethnic cleansing, genocide, war crimes, and crimes against humanity.

All the questions treated in this article can be approached on two different layers, which in fact lead us to very different understandings of the issues involved. A legal perspective is very different from a political one, and the explanations offered by each perspective are different. We will try to illustrate this point throughout the text, by highlighting the points in which the two disciplines diverge. However, the subject of international criminal justice cannot be tackled univocally, since it constitutes a body of law *in statu nascendi*, being at the same time a highly politicized domain, touching national interests, issues of sovereignty, the problem of dealing with the past and so on. This is why we need both perspectives in order to grasp the complexity of issues linked to the emergence of this legal body.

The two layers of the discussion – the legal and the political one – will be doubled by a twofold perspective on the issues involved. Two types of questions will preoccupy us: first, how is it possible to link, in the legal doctrine but also from a philosophical point of view, international law and human rights in the same body of law?; second, and more pragmatically, what is the meaning of this evolution? Whom does it serve, how did it take place and with what consequences on the evolution of the international environment? From all these, we hope to be able to draw a conclusion about the transforming nature of the meaning of "sovereignty", as well as on the deep, structural transformation of what we still call today the "inter-national".

Therefore, the remaining of this article will be structured as follows. We will begin by a clarification of the meaning of the term "sovereignty", then of "human rights", from a legal, a political and a philosophical perspective, in order to be able to respond to the question of the logical articulation and relation between the two bodies of law which concurred to the emergence of international criminal justice – international law and human rights. A subsequent part will be dedicated to an account of the apparition of the ICC, as well as to an analysis of individual States strategies in this process of regime-making. The consequences of this evolution will be also assessed.

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[1] This evolution might also be interpreted as a hypostasis of the process of "constitutionalization of international law", process which has been documented, among others, by Erika De WET, "The International Constitutional Order", *International and Comparative Law Quarterly*, vol. 55, no. 1, 2006, pp. 51-76; Jeffrey L. DUNOFF, Joel P. TRACHTMAN (eds.), *Ruling the World? Constitutionalism, International Law, and Global Governance*, Cambridge University Press, Cambridge, 2009. We will come back on this idea in a subsequent part of this article.

Sovereignty and its Limits

It would appear that, from the point of view of international law, sovereignty is quite a simple concept. As we will show in what follows, the approach of international law on sovereignty does not raise important dilemmas. This is probably due to the long years of practice during which international lawyers have taken this concept for granted. As soon as we begin to question the origins and the implications of the concept in international politics, the issues surrounding it become more and more difficult to grasp and put together, especially in the context of the latest developments in international practice (such as, precisely, international criminal justice, or the concept of responsibility to protect). This is why understanding the historical evolution of the concept of sovereignty is paramount for seizing the transformations incurred by the nowadays international system of States, including that of international law.

According to a renowned international law scholar and practitioner, Ian Brownlie:

> "The competence of states in respect of their territory is usually described in terms of sovereignty and jurisdiction […] The normal complement of state rights, the typical case of legal competence, is described commonly as 'sovereignty'; particular rights, or accumulations of rights quantitatively less than the norm are referred to as 'jurisdiction'. In brief, 'sovereignty' is the legal shorthand for legal personality of a certain kind, that of statehood (!!!)"

and he goes on by saying that "the analogy between sovereignty and ownership is evident"[1]. The contractualist philosophers of the Enlightenment would be outraged by this interpretation of sovereignty as ownership, after all their efforts dedicated to explaining the link between the power of the sovereign and the consent of the governed[2]. Brownlie also draws attention on the inconsistent use of the term by lawyers and policy-makers:

> "...a terminology which is not employed very consistently in legal sources such as works of authority or the opinions of law officers, or by statesmen, who naturally place political meanings in the foreground. The terminology as used by lawyers is also unsatisfactory in that the complexity and diversity of the rights, duties, powers, liberties, and immunities of states are *obscured by the liberal use of omnibus terms like 'sovereignty' and 'jurisdiction'*..."[3] (emphasis added).

Thus, the word seems not to have a very substantive meaning from the point of view of legal studies. However, sovereignty *is* "the basic constitutional doctrine of the law of nations", along with the equality of states[4]. Its corollaries are the exclusive

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[1] Ian BROWNLIE, *Principles of Public International Law*, 5th edition, Oxford University Press, Oxford and New York, 1998, p. 106. Ian Brownlie is Professor of International Law at Oxford University and a member of the International Law Commission.

[2] For example, John LOCKE, *Two Treatises of Government* (1689), Cambridge University Press, Cambridge, 1988, *Second Treatise,* Chapter 8, section 95; Jean-Jacques ROUSSEAU, *Du contrat social ou principes de droit politique* (1762), Paris, Union Générale d'Editions, 1963; Etienne La BOETIE, *Discours de la servitude volontaire* (1549), J. Vrin, Paris, 2002.

[3] Ian BROWNLIE, *Principles*…cit, p. 106.

[4] *Ibidem*, p. 289.

jurisdiction over a given territory and the population living there; "a duty of non-intervention in the area of exclusive jurisdiction of other states", as well as the obligation to respect customary and conventional international law[1]. We should note – as this will be useful for our further demonstration – that nothing is mentioned about any obligation, or responsibility, of the state towards its own citizens; only the obligations towards the other subjects of international law, are emphasized, as well as the interdiction to intervene.

We think that the simple analogy between sovereignty and legal personality or ownership of a certain territory cannot account for the nature of the state as an actor of the international system. Of course, territorialization is an important feature of the modern states-system, but this is put under question by the advent of globalization – the porousness of borders, the emergence of virtual communities etc. This is why, in order to understand sovereignty and its relation with international criminal justice, we have to further investigate the concept.

Sovereignty is the basic norm of the international system ever since the Treaty of Westphalia in 1648, which poses the two basic principles underlying the modern system of States: "Whose realm, his religion" and "The King is Emperor in his kingdom". What do these principles mean, and how can they be still relevant nowadays?

The Thirty Years War (1618-1648) had shown that social unrest is very likely in territories where individuals have different opinions about religion. This is why the Treaty of Westphalia enhances a principle first sketched at the Peace of Augsburg, in 1555: *cujus regio, ejus religio*[2]. In fact, the provisions of the Peace of Augsburg, although not yet as explicit as those of Westphalia, are very relevant for the transformation of the nature of political power at the crossroads between the Middle Ages and the modern times. The concept of sovereignty was different in the medieval political thinking, when the ultimate foundation of power rested on God, while on earth there was a very precise hierarchy of vassalage between different rulers. But the Reformation ideas shook the bases of legitimacy of the divine law and broke the unity of the christian political body. This problem of fragmentation was highly politicized, as it entailed communal struggles between the supporters of the two religions, be they peasants or princes. The peace of Augsburg allowed every prince the liberty of choosing among Catholicism and Protestantism[3], forbidding external constraint (art. 3). Intervention on the territory of other princes in order to protect their coreligionists was also forbidden (art. 10)[4]. The formula used in the text was the following:

> "Every prince has the right and the power to protect and support the ancient religion on their lands, in their cities and communes: *ubi unus dominus, ibi una sit religio*"[5].

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[1] *Ibidem*.

[2] The formula as such does not appear in the Peace of Augsburg, although it is associated with its provisions. It seems that the first occurrence can be found in the work of a Lutheran canonical priest, Joachim Stephani, in 1599. Cf. Joseph LECLER, *Histoire de la tolérance au siècle de la Réforme*, Albin Michel, Paris, 1994, p. 257.

[3] More precisely, Lutheranism, as the other Protestant variants, such as Calvinism, Zwinglianism or, worse, Anabaptism were not recognized. Cf. *ibidem*.

[4] The German version of the text can be found at http://www.lwl.org/westfaelische-geschichte/portal/Internet/finde/langDatensatz.php?urlID=739&url_tabelle=tab_quelle (accessed on March 13, 2011)

[5] Quoted in Joseph LECLER, *Histoire de la tolérance*…cit., p. 256.

These are the precise origins of the principle of non-intervention, more explicitly stated at Westphalia. It is also the beginning of a movement through which the religious realm more and more passes under the temporal authority of the kings, rendering their power unlimited in the form of the absolutist monarchies. If during the Middle Ages, the King was first of all God's subject (and, very often, also the Pope's subject and the vassal of the Emperor), the Reformation brings about the era in which sovereignty is all-encompassing, as there is nothing above the authority of the prince. The Latin formula also emphasizes the territorial nature of the sovereignty (*cujus regio*). In a broader sense, this principle allows monarchs an absolute right to decide over their subjects – exclusivity of jurisdiction on a territory. This is the internal dimension of sovereignty.

The second principle to be found in the Treaty of Westphalia has, in its turn, a history of several centuries. Quentin Skinner asserts that something very similar to the modern idea of sovereignty existed in the attitude of the Italian cities that refused to subject themselves to the Holy Roman Emperor as early as the 12th to 14th centuries[1]. But it is not "sovereignty" in a legal sense, but rather the idea of liberty, understood as independence towards the Emperor and the possibility of freely choosing their form of government[2]. But these claims don't have any legal basis, since the legal practice of the epoch was based on Roman law, more precisely on the Justinian Code, according to which the Emperor was "*dominus mundi*"[3]. In this context, at the beginning of the 14th century, a man appears who will give a totally different interpretation to the Roman law: Bartolus of Sassoferrato (1314-1357), of whom Skinner says he is "the most original law scholar of the Middle Ages"[4]. He defends the idea that, where the Roman law and the reality don't correspond to each other any more, it is the law which should be adapted, and not the reality[5] – a very revolutionary idea for the Middle Ages law school. As this was the case for the Italian cities, which refused to obey the Emperor, Bartolus argued that they had the right to exercise judicial powers, since they were doing it already[6]. Thus takes shape an important principle that would be developed by lawyers in the centuries to come and will be enshrined in the Treaty of Westphalia: that every king, on his territory, is equivalent in authority to the Emperor: *rex imperator in regno suo*. This notion also emphasizes the territorial nature of sovereignty; we've insisted on this aspect all through the discussion in order to make a point, later, on the link between territoriality and the transformations of sovereignty in our times. But, according to Skinner, Sassoferrato also talks about "this key of sovereignty which is the right to delegate a competence to inferior instances of jurisdiction"[7]. Unfortunately, Skinner himself does not use the term "sovereignty" in a very consistent manner. He often equates it with *Imperium* – or, there is a fundamental distinction that we wish to make here between the medieval idea of *Imperium* and

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[1] Quentin SKINNER, *Les fondements de la pensée politique moderne*, transl. by Jerome Grossman and Jean-Yves Pouilloux, Albin Michel, Paris, 2001, pp. 31 and following.

[2] *Ibidem*, p. 32.

[3] *Ibidem,* p. 33.

[4] *Ibidem*, p. 34.

[5] Bartolus of SASSOFERRATO, *In I Partem Codicis Commentaria*, printed in 1588, Basel, quoted by Quentin SKINNER, *Les fondements de la pensée politique*…cit., pp. 34-37.

[6] IDEM, *In I Partem Digesti Novi Commentaria,* printed in 1588, Basel, quoted by Quentin SKINNER, *Les fondements de la pensée politique*…cit., pp. 35-36.

[7] Quentin SKINNER, *Les fondements de la pensée politique*…cit., p. 38.

the modern idea of sovereignty stated at Westphalia, which marks a fundamental fragmentation of the former christian unity of Europe – plurality of political entities, as well as the beginning of the legal equality of states.

In political philosophy, the first explicit theory of modern sovereignty is to be found in Jean Bodin's *Six livres de la République* (1576). Drawing on the theories of the Italian jurists on the 14th century which discussed the link between the authority of the Pope and that of the Emperor, and writing in the context of the emergence of the absolutist monarchy in France, Bodin begins by arguing that nothing can be above the authority of the sovereign[1], to later on admit that the sovereign himself is bound by the laws of nature and the laws of God[2].

Thus, in the Treaty of Westphalia, sovereignty has three main characteristics that governed the organization of the states system until nowadays:

- first, the right of States to political self-determination;
- second, the principle of equality between States;
- and third, the principle of non-intervention in another State's internal affairs.

Consequently, the sovereign has the right of life and death over his subjects without the possibility for any entity external to the State to intervene. The norm of sovereignty, with its corollary of the legal equality among States, has allowed for the functioning of an anarchical international system – that is, a system where there is no authority superior to the sovereign States. This system was well off until the end of the 19th century; but the 20th century has brought about phenomena in the light of which the concept of sovereignty had to be re-evaluated, such as totalitarianisms, the Holocaust, the Yugoslavian massacres or the Rwandan genocide.

The spatial organization of the world was significantly affected by the shift of the nature of political power brought about by the Treaty of Westphalia:

> "As a consequence of sovereignty, political lines upon maps assumed great importance. The concept of the powerful city-state, radiating and concentrating power, and of overlapping circles of influence, was replaced with the idea of homogeneity within linear territorial borders"[3].

However, a new shift is taking place beginning with the end of the Cold War, in which space is once more reevaluated in the light of instant communication and permeability of borders.

The philosophical tradition which develops apart from IR theory or legal studies has a different perspective on sovereignty. According to Carl Schmitt, for example, "sovereign is he who decides on the exception"[4], that is, the sovereign is above the legal order because he has the power to suspend it. More recently, Giorgio Agamben has built, upon this definition, the idea that in our times, the state of exception is too often invoked by a political power which is on a "threshold of indeterminacy between

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[1] Jean BODIN, *Les Six Livres de la République,* Book I, Chapter 8, "De la souveraineté" (1593), Fayard, Paris, 1986.

[2] *Ibidem*, Book III, chapter 6.

[3] Martin GRIFFITH, Therry O'CALLAGHAN, *International Relations: The Key Concepts*, Routledge, London, 2002, p. 297.

[4] Carl SCHMITT, *Political Theology* (1922), transl. from German by George Schwab, The MIT Press, Cambridge and London, 1985, p. 5.

democracy and absolutism"[1]. In fact, this discussion is very relevant for the subject of international criminal justice, since the latter is called upon in order to punish these excesses of sovereignty. Recent writings of IR scholars have argued that the exercise of sovereignty is intimately linked to violence; the latter is constitutive to the State, since it is the instrument though which the domestic political space is distinguished from the foreign one[2]. The sovereign state of the 20th century is constituted through violence, boundaries and identity[3]. The perpetuation of the norm of sovereignty as the prevailing mode of subjectivity in international politics is also made possible through the condemnation of all "deviant" cases:

> "'Quasi-states' or 'failed states' represent empirical cases of states which deviate from the model by failing to display the recognizable signs of sovereign statehood. In this failure they help to reinforce the hegemonic mode of subjectivity as the norm"[4].

In this perspective, the International Criminal Court can be viewed as another instrument through which the norm (also in the sense of "normality") of sovereignty is reinforced, through contrast: there are States incapable of judging their own criminals, and States who are. Consequently, there are more sovereign States and less sovereign States – an idea that is never explicit, but which is subtly present in the hegemonic political discourse about humanitarian intervention, international criminal justice or the responsibility to protect.

Natural Rights: A Counterweight to Sovereignty?

On the other hand, starting with the 17th century, some authors, such as Hugo Grotius, John Locke or Immanuel Kant, begin to claim that men have certain rights by virtue of the very fact that they are humans: the doctrine of *natural rights* finds its most advanced theoretical expression in the Western Enlightenment, but in spite of being the product of a particular epoch and a particular area, it manages to promote a claim to universality. While Hugo Grotius was the first to write that we can identify certain universal rules that can be considered valid even in the hypothesis of the absence of God[5], later during the 17th century, John Locke argues that the main duty of the government is to protect the natural rights of its subjects[6]. Natural rights limit the authority of the government, in such a way that a government that is not protecting the rights of its citizens can be legitimately overthrown. This is an idea which can also be identified, in a more undeveloped form, in the writings of the protestant

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[1] Giorgio AGAMBEN, *The State of Exception*, University of Chicago Press, Chicago, 2005, p. 3.

[2] Richard DEVETAK, "Postmodernism", in Scott BURCHILL *et al.*, *Theories of International Relations*, Palgrave, London, 2001, pp. 181-208/p. 191.

[3] The writings of the postmodern IR scholars converge to this argument. Cf. *Ibidem*, p. 196.

[4] *Ibidem*.

[5] Hugo GROTIUS, *De jure belli ac pacis* (1625)/*Le droit de la guerre et de la paix*, Presses Universitaires de France, Paris, 2005.

[6] John LOCKE, *Two Treatises*…cit.

theologists who tried to justify the right to resist to an oppressive sovereign[1]. Actually, their arguments have been borrowed and adapted in order to support the English revolutions in 1640 and 1688, and reformulated by John Locke in a manner that posed clear limits to the authority of the government. The discussion on natural rights during the Enlightenment, as well as the political evolutions later led to several Declarations of human rights: the American Declaration of Independence (1776), the French Declaration of Rights of men and citizens (1789); more recently, the Universal Declaration of Human Rights (1948)[2].

Normally, the task – and the right – to overthrow a sovereign that does not fulfill its basic function pertains to the oppressed people. None of the writings of the Enlightenment philosophers does justify foreign intervention, or some kind of a universal authority that might act if the people is unwilling or unable to assert its natural rights. The argument of John Locke on the legitimacy of overthrowing a government that does not protect the rights of its citizens establishes the limits of internal sovereignty: these are the respect of the natural rights: life, liberty, and property (according to Locke). However, his theory does not raise the question of the legitimacy of foreign intervention, thereby not affecting external sovereignty and the principle of non-intervention, which remain untouched. This poses a philosophical problem for the supporters of the universal jurisdiction of the ICC: if we accept the existence of natural rights, and that men are endowed with an inborn capacity to distinguish between good and bad, why aren't those who are guilty of the acts incriminated through the ICC Statute punished by their own peoples? Why is it necessary to have a jurisdiction superior to the national ones? But, as we will try to prove, although the existence of 'universal human rights' is one of the fundamental pillars on which rests the discourse about international criminal justice, its justification does not unfold in this logic. The problem is not one of juridical or philosophical argumentation; we think that the creation of the ICC is not justified by concerns of justice and not even politics, but rather by technical concerns of managing a set of phenomena that threaten to destabilize the international space (such as acts of genocide, crimes against humanity etc.: see the sad record of the last 20 years). We are witnessing, in international politics, a shift from a political paradigm towards a paradigm of governmentality[3].

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[1] Those who support the idea of overthrowing an tyrannic sovereign are known as "monarchomacs" (the Scottish John Knox, the French Théodore de Bèze and Philippe de Mornay). For Knox's arguments, see his work *On Rebellion* (1558, Cambridge, Cambridge University Press, 1994. For a wider discussion on the subject, see Quentin SKINNER, *Les fondements de la pensée politique*…cit., pp. 615-661.

[2] We are of course aware of the numerous criticisms that have been raised to the natural law doctrine (starting with Jeremy BENTHAM's "Critique of the Doctrine of Inalienable, Natural Rights", in *Book of Fallacies*, 1824; but also George Edward MOORE, *Principia Ethica*, Cambridge University Press, Cambridge, 1903; for a discussion on cultural relativism, see Alison RENTELN, "Relativism and the Search for Human Rights", *American Anthropologist*, vol. 90, no. 1, 1988, pp. 56-72). However, an assessment of the righteousness of each position does not make the object of our inquiry. Our purpose was to expose the historical development that led to the idea that there should be an international or universal jurisdiction dealing with the protection of human rights.

[3] As we will argue further in this article, we use the word in the sense it was used by Michel FOUCAULT, *Securitate, teritoriu, populație*, transl. from French by Nicolae Ionel, Idea Design and Print, Cluj-Napoca, 2009.

I will not discuss here the delicate question of whether or not human rights are truly universal or whether they are a mere particular product exported by the Western culture to the other parts of the globe. What is important from the point of view of our demonstration, is that the overwhelming majority of States have willingly accepted to be bound by these rights, by signing international declarations, treaties and conventions[1]. Moreover, the final declaration of the Wold Summit of 2005 states that "The universal nature of human rights and freedoms is beyond question"[2]. In consequence, they behave internationally *as if* human rights *were* universal.

Now, which is the relation between human rights and international law? That is, if we accept, following Kelsen[3], that any legal system has a hierarchy of norms, what hierarchical relation can be established between these two bodies of law?

Traditionally, international law – *jus gentium* – is a body of law whose subjects are the States. States sign treaties, conventions and agree to be bound by norms in a society which is structurally anarchical, with no authority capable of enhancing the law. Individuals are not – or were not, until recently, considered subjects of international law. But the Nuremberg trials have introduced a breach in this logic, by allowing individuals to be tried by a jurisdiction other than the national one. A blank period followed during the Cold War, when the bipolar structure of the system did not allow for the emergence of a consensus over the issue of an international human rights jurisdiction. But the establishment, in 1993, of the International Criminal Tribunal for Yugoslavia, and then, in 1994, of the International Criminal Tribunal for Rwanda opened the way for a development that culminated, in 1998, with the signing of the Rome statutes.

The theoretical justification of the possibility of existence of an international human rights jurisdiction is not yet very clear – although it is quite widely accepted nowadays. It nevertheless raises several questions – to which we don't pretend to have an answer, but which are important to be aware of. *First*, the relation between the body of international law and that of human rights remains blurred. A hierarchy between these two bodies of law cannot be convincingly argued, since they differ in nature, scope, and form. From this point of view, an international human rights jurisdiction cannot be quite *inter-national*, because its subjects are not States, but individuals. (A more accurate word would probably be *universal* criminal justice,

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[1] Such as the Universal Declaration of Human Rights (1948), which however is technically non-binding and has not been signed as such by all the UN member States; The Convention for the prevention and repression of the crime of genocide, Res. 260 A (III) of the UN General Assembly, 9 December 1948; The International Covenant of civil and political rights, adopted at 16 December 1966 through Res. 2200 A (XXI) of the UN General Assembly; The Convention against torture and other cruel, inhuman or degrading treatment or punishment, Res. 39/46 of the UN General Assembly, 10 December 1984.

[2] Resolution adopted by the General Assembly "2005 Wold Summit Outcome", A/RES/60/1, par. 120.

[3] Hans KELSEN, *Pure Theory of Law*, University of California Press, Berkeley, 1967. International lawyers might argue that one cannot invoke Kelsen on this matter because his theory of the hierarchy of norms is valid only in *constitutional* legal orders. To this objection, we can respond that, in fact, putting together human rights and international law (through the creation of the ICC, for example) is precisely a hypostasis of what has been called *constitutionnalization of international law* (see, for ex., Erika DE WET, "The International Constitutional Order", cit.; Antonio SEGURA SERRANO, "The Transformation of International Law", *Jean Monnet Working Paper* 12/09, 2009).

but the claim to universality is, itself, contestable). Thus, *second*, another issue to be clarified is the statute of the individual as subject of international justice – and hence of international law. The implications of this evolution are quite troubling for the future of world politics. The erosion of the State as an international actor has already been emphasized by research in international political economy (as linked to the incapacity to control markets)[1] or migration and borders (as linked to the porousness of borders)[2], but the penetration of the individual into the international might be a sign of the constitutionalization of international law, in legal terms, and of the world becoming a single polity, in political terms. The state level is more and more affected and is becoming less and less relevant. *Third*, and directly related to our previous comment, we should raise the question of the transformation of the meaning of *sovereignty*. Recent theoretical developments have linked the sovereignty of the state to the idea of responsibility towards its own citizens – *responsibility to protect*. A state that cannot protect its citizens against ethnic cleansing, genocide, crimes against humanity and war crimes cannot claim sovereign rights[3]. But the question still remains over the authority entitled to decide whether a State has failed to its responsibility to protect, and over whose responsibility is engaged in cases where the State fails. *And what, finally, remains of sovereignty under these circumstances?*

International Criminal Justice: World Biopower?

The issue of the individual becoming a subject of international law has numerous implications. It is linked, for example, to the declining role of the State as an international actor in the globalizing world. As frontiers become more and more permeable, and thus more and more irrelevant, the founding distinction laying at the bases of the identity of the State – the distinction inside/outside – becomes blurred[4]. This allows for the diffusion of power – initially residing *inside* the State – towards the outside – but the problem is that, outside, there is no single entity capable of assuming the functions of the State. International criminal justice takes over an object – populations, that have to be protected – and a subject, the perpetrator, by precisely leaving aside the State, and by performing a particular technique of power. What has been, until now, "international politics" is becoming, in the words of G. Agamben, "politics contaminated with law"[5].

How can we explain that the international criminal jurisdiction only covers one of the natural rights presented in this doctrine throughout the centuries? Why is the right to life considered superior to all others, and why is life more universal than

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[1] Susan STRANGE, *The Retreat of the State. The Diffusion of Power in the World Economy*, Cambridge University Press, Cambridge, 1996.

[2] John RUGGIE, "Territoriality and Beyond: Problematizing Modernity in International Relations", *International Organization*, vol. 47, no. 1, 1993, pp. 139-174.

[3] A lengthier discussion on the subject in André CABANIS, Jean-Marie CROUZATIER, Ruxandra IVAN, Ciprian MIHALI, Ernest-Marie MBONDA, *La responsabilité de protéger: une perspective francophone*, Idea Design and Print, Cluj-Napoca, 2010.

[4] R.B.J. WALKER, *Inside/Outside: International Relations as Political Theory*, Cambridge University Press, Cambridge, 1993.

[5] Giorgio AGAMBEN, *Homo sacer. Puterea suverană și viața nudă (I)*, transl. from Italian by Alexandru Cistelecan, Idea Design and Print, Cluj-Napoca, 2006.

liberty? We think that one possible answer to this question is biopolitics. In the light of this hypothesis, we might further push Agamben's expression and say that the developing regime of international criminal justice can be considered *law contaminated with bare life*. Because all other attributes, except the fact of being alive, have been taken away from the victims of the crimes punished by international criminal justice. The victim is not perceived as an individual or citizen endowed with rights – be they natural or positive: the only feature that seems to characterize these "populations", as they are most frequently called, is their bare life. Actually, it is biological life that is protected by international criminal justice, and not necessarily human rights – which include quite more than the right to life. Or, this preoccupation for biological life might not be anything more than a technical requirement of governance intended to produce a stable environment.

Thus, in legal terms, the result of the articulation between international law and human rights is precisely what we call international criminal law. But, on the other hand, in political – or, should we say bio-political terms, the result of this articulation is a transfer of the paradigm of governmentality from the national, State-level, to the international – or is it universal? – level.

Michel Foucault has made an argument about the way in which, historically, the State has begun, since the end of the 17th century, to treat its subjects – the citizens – in terms of "populations" while the power is more and more exercised as a power over the bare life. Series, statistics and probabilities are some of the means by which the State *manages* the population, with the purpose of ensuring its security. Thus the space where the State exercises its power becomes a space populated by masses, and not by individuals. The *political* concept of "citizens" is replaced by the statistical idea of "population". The new technology of power – bio-power – is taking in charge the population, as a whole, as a totality. Biopolitics is, thus, politics that is ordered, structured, organized by the principle of security – not security of individuals, but of *populations*[1].

Or, the cases taken into account by international criminal justice – genocide, ethnic cleansing, crimes against humanity – are precisely the types of offense that are threatening the security of *populations* in their biological dimension. We are thus witnessing a process of shifting of the bio-power paradigm from the national to the international – or should we say, universal? – level. Gradually, the international politics is no longer politics among states (or, as Morgenthau put it, among nations[2]), but politics of managing populations. The State is once more left aside, overlooked, excluded from this paradigm of exercising power.

But, while in the domestic realm, the mechanisms of the bio-power lay within the State, for the international level it is not at all clear which is the instance that exercises this bio-power. When a State fails to protect its subjects, or to do justice to the populations affected by mass murders, and cannot claim sovereignty anymore, it is a fictitious "international community" who should take over the moral duty, the responsibility to protect.

But is this a moral duty, or is it merely a technical requirement of disciplining the international political space? The international repercussions of genocide-type events are sometimes very important – waves of refugees, regional instability, economic problems. The Rwandan genocide, for example, spilled over the entire region. The

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[1] Michel FOUCAULT, *Securitate, teritoriu*…cit., *passim*.

[2] Hans MORGENTHAU, *Politics Among Nations*, Alfred A. Knopf, New York, 1948.

interest of the so-called "international community" is, first and foremost, maintaining stability and order.

The International Criminal Court

The International Criminal Court was established through the Rome Statute, signed in 1998 and entered into force in July 2002. But the process had started at least a decade earlier, in 1989, when the General Assembly of the UN requested to the International Law Commission to investigate the possibility of the creation of such an instance[1]. The Commission wrote a draft statute by 1994, and several rounds of negotiations on the treaty text took place between 1994 and 1998, when a proposal was presented at the Rome Conference. The Rome Statute has been amended once, through the UN Security Council Resolution 6/11 June 2010 – an amendment that is very significant and which will be discussed later in this article. In June 2011, that is, at the time of the writing of this article, there were 116 States Parties to the Rome Statute, out of the 193 UN member States. But several important "pillars" of the international system are missing from this list, such as the USA, the Russian Federation, or China – all of them permanent members of the UN Security Council and thus having a veto right.

Rationae materiae, the Court can judge four types of crimes: genocide, crimes against humanity, war crimes and the crime of aggression (Rome Statute, art. 5). The crime of aggression did not originally figure among the competencies of the Court, as this was a very delicate negotiation subject; it was added through the amendment made by the UNSC Resolution 6/11 June 2010. The Statute further details the definition of these types of crimes in articles 6-8 *bis,* although some of them have been already defined in other UN sponsored Conventions, such as the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. The crimes against humanity and the crimes of war have been prosecuted by the Nuremberg trials as well (the crimes against humanity being defined for the first time in the Nuremberg Charter), while genocide has only been legally defined in 1948. The crime of aggression seems to be replacing the "crimes against peace" from the Nuremberg trials; the UN Charter condemns aggression committed by States, but the UN SC Res. 6/11 June 2010 is preoccupied by individuals who are at the origin of the decisions to commit aggressions.

Rationae temporis, the Court has competence to judge only crimes that have been committed after the entry into force of the Treaty (art. 11). This provision enhances the inter-national character of the institution, which is the result of a compromise among States; a truly universal institution would have been invested with the power to judge even prior crimes, because at least three of the four types of crimes in the Rome Statute were penalized before the creation of the Court (and thus the principle *nullum crimen sine lege* would have been respected).

Finally, *rationae personae*, the Statute of the Court is more ambiguous. Article 12 explicitly states that two cases can be taken into account: the Court can judge either nationals of the Sates Parties, or nationals of third States who committed crimes in the territory of States Parties. Let's take the following fictive example: if a Chinese citizen commits crimes against humanity on the Cambodian territory (which is Party to the ICC), it can be deferred to the Court. Moreover, the third paragraph of article 12

[1] UN General Assembly Resolution 44/39, 1989.

indefinitely extends the area of jurisdiction of the Court, by allowing a State which is not a Party to the Statute to accept the jurisdiction of the Court for a particular case. For example, if an American citizen commits one of the four incriminated acts on the territory of Russia, the latter can accept the jurisdiction of the Court for the case in point. This virtually makes possible even for the countries that have not accepted the jurisdiction of the Court to be, to some extent, subject of the Rome Treaty. The State as such is not concerned, as subject of international law; but the situation described above implies that virtually all non-signatory States lose exclusive jurisdiction over their nationals, without having accepted this[1]. This is why the USA has been signing, beginning with 2002, bilateral treaties with as many countries as possible in order to make sure that its nationals would not be deferred to the Court in any case[2]. This seems the only legal possibility for a State to exempt its citizens from ICC jurisdiction.

A situation can be referred to the Court by a State Party (art. 14), by the Security Council acting under Chapter VII of the Charter (art. 13b), or by the initiative of the Prosecutor of the Court (art. 15). The latter case significantly extends the area of competence of the Court, since bringing a criminal before justice does not depend anymore on the authority of any State, or group of States. The Court thus gains an important autonomy with respect to those who created it – the States – and escapes their control. This is one of the evolutions against which some of the States who took part in the negotiations of the Rome Statute drew the attention of the international community. But others considered it to be desirable from the point of view of the independence of the Court.

The Rome Statute is the result of hard negotiations between the signatory States. Even non-signatories, such as the USA, have participated in negotiations (and have only decided later that they would not sign). This is why sometimes the terms of the Treaty are softer than one would have been expected from a universal jurisdiction. But nevertheless, the Treaty creates limits for State sovereignty, both for States Parties and non-Parties, in several ways. For the States parties, the Treaty creates an area in which they loose jurisdiction over their nationals (while exclusive jurisdiction is one of the main features of sovereignty). Thus, in a way, the individual becomes directly linked to the international level, trespassing the national one.

The situation is even worse for States which are not parties to the Treaty, as they may loose jurisdiction over their nationals without having accepted it. In the words of David Scheffer:

> "Article 12 of the ICC treaty reduces the need for ratification of the treaty by national governments by providing the Court with a jurisdiction over the nationals of a non-party State. Under article 12, the ICC may exercise such jurisdiction over anyone anywhere in the world, even in the absence of referral by the Security Council..."[3].

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[1] The 1969 Vienna Convention on the Law of Treaties, art. 34-38, poses the principle that only States that are parties to a Treaty should be bound by its terms. This is one of the main principles of international law.

[2] A list of the States that signed such a Treaty can be found at http://www.amicc.org/usinfo/administration_policy_BIAs.html#countries (accessed on 22 April 2007): there are 95 States that signed bilateral agreements with the USA which are into force, out of which 49 are State Parties to the Rome Statute. The complete texts of the agreements are also available at the same URL.

[3] David T. SCHEFFER, "The US and the International Criminal Court", *The American Journal of International Law*, vol. 93, no. 1, January 1999, pp. 12-22/p. 18.

States Interests and the ICC

We thus arrive at a more practical layer of our argument, which concerns individual states strategies in this process of international legalization of human rights.

Why is anarchy, according to Waltz, the best and most natural type of international structure/system? Supposing the creation of a hierarchic order (e.g., governed by the principles of human rights, which would be above international law): "In hierarchic orders, the means of control become an object of struggle. Substantive issues become entwined with efforts to influence or control the controllers"[1]. The criterion for establishing a strong international organization (such as the ICC, for example) is, firstly, to have a strong core, supported and sponsored by the most powerful states in the system. This would lead, according to K. Waltz, to a permanent struggle between States to control the core of the organization. The ICC has not even arrived at this point yet, as some of the most powerful actors in the system have found ways to bypass it. China, the Russian Federation and the USA are not part of the ICC; moreover, the latter has been signing, since 2002, bilateral treaties for excepting its citizens from deferral to the ICC[2]. But even though it would, at some point, arrive to include the major powers in the system, the theory of Waltz says that these powers would be tempted to control the core and to impose their political strategies over the organization.

On the other hand, if we look at the states that most strongly supported the legalization of international criminal justice, we will notice that these are, in general, the same states that are the most active in peace-keeping (Canada, the Northern States). Or, there are authors who argued that this type of participation in international organizations is a strategy of the so-called middle powers aimed at enhancing their international leverage[3]. Some other accounts of the emergence of the first international criminal courts emphasize the fact that these were created as the less/least costly solution, in political terms for the governments: in the cases of Bosnia and Rwanda, pressures from the public opinion to take action were very high, while governments hesitated to prompt military intervention for fear of casualties[4]. Thus, the solution of international criminal justice would have been a surrogate for more decisive action from the international community.

But even though this was a process initiated by the States – whether willingly or by "muddling through"[5], it has now escaped their control and cannot be stopped anymore. Together with other evolutions of the international political space that we mentioned above, it will eventually lead to a complete transformation of the notion of "sovereignty".

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[1] Kenneth WALTZ, *Theory of International Politics*, McGraw Hill, New York, 1979, p. 111.

[2] As a peculiarity of the ICC terminology, the list of State parties to the Rome Statute is presented on the following categories: African States, Asian States, Latin American and Caribbean States, Eastern European States, and "Western European an other States".

[3] Laura NEACK, "UN Peacekeeping: in the Interest of Community or Self?", *Journal of Peace Research*, vol. 32, no. 2, May 1995, pp. 181-196.

[4] Christopher RUDOLF, "Constructing an Atrocities Regime: The Politics of War Crimes Tribunals", *International Organization*, vol. 55, 2001, p. 662.

[5] Charles LINDBLOM, "The Science of Muddling Through", *Public Administration Review*, vol. 19, no. 2, 1959, pp. 79-88.