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MODULE V

UNIT 14

Multilateral instruments in the context of the United Nations. Universal jurisdiction

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LEVEL I: TOPIC

SUMMARY

1. INTRODUCTION

In the second half of the last century the most serious forms of crime (terrorism, drug-trafficking, trafficking in human beings and organised crime in general) arrived on the international scene with a bang. In order to combat this new criminal phenomenon, cooperation between states is necessary. As described in Unit 1, the concept of criminal law based on classical sovereignty theory goes into crisis –due to its ineffectiveness-, and alliances begin to be formed; first, between states and subsequently in regional environments, leading to a supranational response to a problem that crosses the borders between states.

International cooperation for the suppression of transnational crime has evolved significantly. Compared with classical sovereignty theory, based on the principle of territoriality and non-intervention, which favoured the impunity of said crime, international cooperation based on principles that objectively restricted the sovereignty of each state emerged strongly. And in this regard, the contribution of international organisations both on a universal (United Nations) and regional (Organisation of American States, African Union, Council of Europe[1] and the European Union, among others) level has been decisive and inestimable in the fight against this criminal phenomenon.

The United Nations Organisation (the UN)[2] is an international organisation "with a universal vocation"[3], established in the UN Charter[4] in general terms, in which those regarding international peace and security predominate, and it is for this reason that the policies on international judicial cooperation in criminal matters are intimately linked to its activity[5].

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[1] Although strictly speaking the conventions of the Council of Europe are not universal conventions as they are only open to the Member States of said organisation, third states – even non-European ones- can be a party to them when invited by the Committee of Ministers. Thus, for example, the USA and Canada are parties to the Convention on the Transfer of Sentenced Persons of 1983. See Unit 4 for more information.

[2] Website of the United Nations: http://www.un.org/

[3] As all states are invited to participate; it comes close to universality as it currently has 192 Member States, virtually all of the internationally recognised countries.

[4] Signed in San Francisco on 26 June 1945**.**

[5] As pointed out in Unit 1, the first definition contained in a treaty of what can be understood as "judicial assistance" is in the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988. Indeed, Article 7 of the same contains a thorough definition of the types of cooperation, apart from extradition, which is contained in Article 6. This definition has served as inspiration for the multiple bilateral and regional conventions on mutual assistance in criminal matters that saw the light of day in subsequent years.

The UN has approved a significant number of regulatory acts, mainly multilateral conventions, although there are also declarations, resolutions and recommendations, the aim of which is to combat the most serious manifestations of organised crime (terrorism, drug trafficking and organised crime in general) as well as the internationalisation of criminal activities in general. To that end, the UN has promoted the development of cooperation policies in each of its conventions[6].

Meanwhile, it is necessary to highlight that one of the primary concerns of the UN throughout these years has been the prosecution and punishment of those responsible for serious and large-scale violations of fundamental human rights and the basic principles of international humanitarian law. Different routes have been followed in this regard:

- On the one hand, the broadening of the scope of the criminal jurisdiction of states regarding crimes against the international community and the rights of man, expanding the cases in which the criterion of the universality of the criminal jurisdiction of states is recognised, whose internal criminal justice systems progressively recognise the obligation for states to prosecute or extradite those accused of said crimes.
- On the other, and at the same time, the creation of International Criminal Courts, the route chosen by the Security Council to create *ad hoc* bodies (in 1993, with the International Criminal Court for the former Yugoslavia, and in 1994, with the International Criminal Court for Rwanda), and later on, on a permanent and universal basis, with the approval of the Rome Statute creating the International Criminal Court in 1998.
- Finally, the search for new jurisdictional formulas for addressing the suppression of crimes committed, with the appearance of internationalised courts of a hybrid nature (both as far as their composition and applicable law are concerned). Thus, the courts established in Sierra Leone, Cambodia, East Timor, Kosovo, Bosnia-Herzegovina, Iraq and Lebanon.

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[6] In this regard, on 14 December 1990, the General Assembly, in plenary session, approved a series of recommendations on international cooperation for crime prevention and criminal justice in the context of development. As well as urging the Member States to intensify the fight against international crime, respecting and promoting the rule of law and legality in international relations, which means they must complete and continue developing international criminal justice, comply in full with the obligations derived from the international treaties and instruments in this field and examine their national legislation in order to verify that it responds to the needs of international criminal justice, it provides an incentive for international cooperation in crime prevention by adopting effective instruments in the fight against international crime (for example, developing more effective international rules for preventing money laundering and investments related to criminal activities such as terrorism and the illicit traffic of narcotics).

This process of internationalisation of criminal justice is related to the important development undergone by international criminal law in the nineties (for example, the 1996 Draft Code of Crimes against the Peace and Security of Mankind). Crimes under international law (aggression, genocide, crimes against humanity) belong to types of crimes that can be considered consolidated at present. Moreover, new and diverse procedural systems have been set up to protect the interests of the international community, highlighting the novel position that the individual (whether the accused or the victim) has in the international legal system.

We will set out the topic by first analysing the conventions, resolutions and other UN instruments before going on to study, in the second section and as part of the international criminal jurisdiction, the plurality of models of international criminal courts as well as the universal nature of the criminal jurisdiction of states, and we will conclude with a reference to what is known as transitional justice, a concept that covers a group of proceedings of a judicial or other nature that take place in societies undergoing a transition to democracy in order to reconcile people and ensure justice is done in relation to human rights violations committed under the previous regime, thus facilitating a stable and lasting peace.

2. CONVENTIONS, RESOLUTIONS AND OTHER UNITED NATIONS INSTRUMENTS

With a view to offering a panoramic – although not exhaustive – view of the scope of the activity performed by the UN in its more than fifty years of existence and in the different spheres related to criminal cooperation, we will seek to systematically list some of the most relevant instruments (multilateral treaties[7], resolutions, declarations, recommendations, etc.) by subject matter. In this unit and the ones that follow it in this Module, we will study the most important instruments.

[7] http://treaties.un.org

Charter of the United Nations and Statute of the International Court of Justice

1. Charter of the United Nations, San Francisco, 26 June 1945.
2. Declarations of acceptance of the obligations contained in the Charter of the United Nations.
3. Statute of the International Court of Justice.
4. Declarations recognising as compulsory the jurisdiction of the International Court of Justice under Article 36, paragraph 2, of the Statute of the Court.

Pacific Settlement of International Disputes

1. Revised General Act for the Pacific Settlement of International Disputes. New York, 28 April 1949.

Human Rights

1. Convention on the Prevention and Punishment of the Crime of Genocide. New York, 9 December 1948.
2. International Covenant on Economic, Social and Cultural Rights. New York, 16 December 1966.
3. International Covenant on Civil and Political Rights. New York, 16 December 1966.
4. Optional Protocol to the International Covenant on Civil and Political Rights. New York, 16 December 1966.
5. Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity. New York, 26 November 1968.
6. International Convention on the Suppression and Punishment of the Crime of Apartheid. New York, 30 November 1973.
7. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. New York, 10 December 1984.
8. International Convention against Apartheid in Sports. New York, 10 December 1985.
9. International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. New York, 18 December 1990.
10. a) Amendments to articles 17 (7) and 18 (5) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. New York, 8 September 1992.

11. b) Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. New York, 18 December 2002.
12. Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty. New York, 15 December 1989.
13. Convention on the Rights of Persons with Disabilities. New York, 13 December 2006.
14. Optional Protocol to the Convention on the Rights of Persons with Disabilities. New York, 13 December 2006.
15. International Convention for the Protection of All Persons from Enforced Disappearance. New York, 20 December 2006.

Minors

1. Convention on the Rights of the Child. New York, 20 November 1989.
2. Declaration of the Rights of the Child adopted by UN General Assembly Resolution 1386 (XIV) of 10 December 1959.
3. Optional protocols to the Convention on the Rights of the Child on the involvement of children in armed conflict. Nueva York, 25 May 2000. UN General Assembly Resolution A/RES/54/263 of 25 May 2000.
4. Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. New York, 25 May 2000.

Discrimination

1. International Convention on the Elimination of All Forms of Racial Discrimination. New York, 7 March 1966.
2. Convention on the Elimination of All Forms of Discrimination against Women. New York, 18 December 1979.

Bioethics

1. Universal Declaration on the Human Genome and Human Rights, 11 November 1997.

Refugees and stateless persons

1. Convention relating to the Status of Refugees. Geneva, 28 July 1951.
2. Convention relating to the status of Stateless Persons. New York, 28 September 1954.
3. Convention on the Reduction of Statelessness. New York, 30 August 1961.
4. Protocol relating to the Status of Refugees. New York, 31 January 1967.

Narcotic Drugs and Psychotropic Substances

1. United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. Vienna, 20 December 1988.
2. Single Convention on Narcotic Drugs, 1961. New York, 30 March 1961.
3. Convention on psychotropic substances. Vienna, 21 February 1971.

Trafficking in persons

1. International Convention for the Suppression of the Traffic in Women and Children, concluded at Geneva on 30 September 1921, as amended by the Protocol signed at Lake Success, New York, on 12 November 1947.
2. International Convention for the Suppression of the White Slave Traffic, signed at Paris on 4 May 1910, amended by the Protocol signed at Lake Success, New York, 4 May 1949.
3. a) Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others. Lake Success, New York, 21 March 1950.
4. b) Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others. Lake Success, New York, 21 March 1950.

Diverse criminal matters

1. Protocol amending the Slavery Convention signed at Geneva on 25 September 1926. New York, 7 December 1953.

2. International Convention Against the Taking of Hostages. New York, 17 December 1979.
3. International Convention Against the Recruitment, Use, Financing and Training of Mercenaries. New York, 4 December 1989.
4. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents. New York, 14 December 1973.
5. Convention on the Safety of United Nations and Associated Personnel. New York, 9 December 1994.
6. International Convention Against the Taking of Hostages. New York, 17 December 1979.

Corruption and organised crime

1. United Nations Convention against Corruption. New York, 31 October 2003.
2. United Nations Convention against Transnational Organised Crime. New York, 15 November 2000, signed in Palermo on 13 December 2000.
3. a) Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime. New York, 15 November 2000.
4. b) Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organised Crime. New York, 15 November 2000.
5. c) Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organised Crime. New York, 31 May 2001.
6. United Nations International Code of Conduct for Public Officials of 28 January 1997.
7. United Nations Declaration against Corruption and Bribery in International Commercial Transactions of 21 February 1997.
8. United Nations Measures against Corruption and Bribery in International Commercial Transactions of 25 January 1999.

Terrorism

1. International Convention for the Suppression of Terrorist Bombings. New York, 15 December 1997.

2. International Convention for the Suppression of the Financing of Terrorism. New York, 9 December 1999.
3. International Convention for the Suppression of Acts of Nuclear Terrorism. New York, 13 April 2005.
4. Convention on the Physical Protection of Nuclear Material, on the illicit appropriation and use of nuclear materials of 1980.
5. 2005 Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation.
6. Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, regarding terrorist activities against fixed offshore platforms of 1988.
7. Convention on the Marking of Plastic Explosives for the Purpose of Identification of 1991.
8. International Convention for the Suppression of Acts of Nuclear Terrorism of 2005.

Criminal justice

1. United Nations Standard Minimum Rules for the Treatment of Prisoners of 31 July 1957.

Air and maritime safety

1. Convention on Offences and Certain Other Acts Committed on Board Aircraft ("Tokyo Convention") of 1963.
2. Convention for the Suppression of Unlawful Seizure of Aircraft ("Hague Convention") of 1970.
3. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation ("Montreal Convention"), regarding acts of aircraft sabotage, such as bombings on board aircrafts in flight of 1971.
4. Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation of 24 February 1988.

5. Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, regarding terrorist activities on board ships of 1988.

International Criminal Courts

1. Rome Statute of the International Criminal Court. Rome, 17 July 1998.
2. Agreement on the Privileges and Immunities of the International Criminal Court. New York, 9 September 2002.
3. International Criminal Court for Rwanda, established by UN Security Council Resolution 995 (1994) of 8 November 1994 by virtue of Chapter VII of the Charter of the United Nations.
4. International Criminal Court for the former Yugoslavia, established by UN Security Council Resolution 827 (1993) of 25 May 1993 by virtue of Chapter VII of the Charter of the United Nations.

3. INTERNATIONAL CRIMINAL JURISDICTION

3.1. *AD HOC* INTERNATIONAL CRIMINAL COURTS

3.1.1. BACKGROUND: THE NÜRNBERG AND TOKYO TRIBUNALS

After the experience of the *Treaty of Versailles of 28 June 1919*, which included the right of the victorious powers of the First World War to judge those persons accused of having committed acts which were contrary to the law of war and the obligation for Germany to arrest the criminals[8], at the end of the Second World War the International

[8] ANDRÉS DOMÍNGUEZ, A. C. (2006): *Derecho Penal Internacional*. Valencia. Tirant lo Blanch, citing the unpublished work of Professor Francisco Javier Alvarez García on the International Criminal Courts, page 57. This author highlights, however, that "the aim of trying the military personnel accused of war crimes was flawed due to the decision on the part of the victorious powers – after the German refusal to extradite war criminals – to subject the task of judging its own soldiers to German justice – and applying its own laws. This mission was entrusted to the Leipzig Supreme Court and resulted in the imposition of minimum sentences, which were not even enforced according to the terms of the judgments, handed out to lower ranking personnel".

Military Tribunals of Nürnberg and for the Far East (Tokyo) were set up in 1945[9] and 1946[10] respectively, in order to try the main German and Japanese persons accused of having committed "crimes against peace, war crimes and crimes against humanity".

In both cases, the tribunals were created on an *ad hoc* and *unilateral* basis, i.e., by virtue of a political decision adopted by the victors. As for the law to be applied, according to the provisions of the statutes, the criminal justice system applied to the persons responsible was to be dual: international law and the internal rules of each state (material and procedural). In addition, we have the blatant violation of the elemental principles of material and procedural criminal law, essentially, the principle of legality of crimes and sentences (*Nullum crimen, nulla poena sine praevia lege*) and the non-retroactivity of criminal rules, which occurred as the acts in question predate the statutes, as well as the impartiality of the judges (nationals of the victorious powers) and that the investigation and trial were performed by the same judicial body[11].

Even so, the tribunals established hugely significant precedents, without which the most recent achievements in international criminal law would not have been possible[12]. Thus, in 1948 the UN General Assembly adopted the Convention for the Prevention and Punishment of the Crime of Genocide[13], one day before the proclamation of the *Universal Declaration of Human Rights* and it set up in 1950 a special committee to prepare the statute of a permanent International Criminal Court. Subsequently, various UN resolutions declared that crimes against humanity would be prosecuted and could not be left unpunished[14].

After the end of the Cold War, the General Assembly picked up where it had left off,

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[9] The four-party commission of the victorious powers (USA, Great Britain, France and the USSR) in London on 8 August 1945 announced the Agreement and Statute that would govern the creation and operation of the international military tribunal charged with judging the criminal liability of the major war criminals.

[10] On 19 January 1946 the Charter for the creation of the International Military Tribunal for the Far East was executed.

[11] Together with these legal arguments, there are also the criticisms of those who described it "as "justice of the victors" against the defeated, in a war in which both sides had committed unheard-of barbarities, bombings of entire cities, of monuments, of civil installations, with the result of thousands of victims among a population that was not participating in the conflict", MUÑOZ CONDE, F. y MUÑOZ AUNIÓN, M. (2003), *¿Vencedores o vencidos?*, Valencia. Cine-Derecho, Tirant lo Blanc, page 18.

[12] PELÁEZ MARÓN, J. M., *El desarrollo del Derecho Internacional Penal en el siglo XX*, page 109, in V.A. (2000): *La criminalización de la barbarie: la Corte Penal Internacional*, Madrid. Consejo General del Poder Judicial. And as we will see in Section 6, they are considered the origin of the current concept of transitional justice.

[13] Resolution 280 A, III. UN Treaty Series, vol 78, page 277.

[14] The last, Security Council Resolution (1674) of 28 April 2006.

asking the International Law Commission in 1989 to prepare drafts of the *Statute of the International Criminal Court* and a *Code of Crimes against the Peace and Security of Humanity*. These drafts were presented by said Commission in 1994 and 1996[15] respectively, and once redrafted, extended and completed by a Committee comprised of governmental representatives, they constituted the basis for the work of the Rome Diplomatic Conference which gave rise to the International Criminal Court.

3.1.2. THE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA

In parallel to this process, initiatives of a more limited scope have arisen in the final decade of the last century, but which are nevertheless of great importance as forerunners of the International Criminal Court, such as the International Criminal Tribunal created by UN Security Council Resolution 827 (1993) of 25 May 1993 by virtue of chapter VII of the Charter of the United Nations for prosecuting persons responsible for genocide and other serious violations of international humanitarian law and the laws or customs of war committed in the territory of the former Yugoslavia[16] (ICTY) between 1 January 1991 and a date to be determined by the Security Council once peace has been restored[17], thus approving the Statute of the Tribunal (Statute of the ICTY) which establishes the following crimes as liable for punishment and subject to its jurisdiction: genocide, crimes against humanity, violations of the international laws or customs of war and serious violations of the Geneva Convention of 1949[18].

In the preamble to its Resolution, the Security Council expressed is grave alarm at the

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[15] Report of the International Law Commission, 48th meeting, UN Doc. A/CN.4/L. 522, 31 May 1996.

[16] The official website is in English, *International Criminal Tribunal for the former Yugoslavia* (ICTY): http://www.icty.org/

[17] Despite the fact that the Tribunal is currently operating at maximum capacity, its approach is focused on the imminent end of its mandate. From this point of view, the Court is trying those who were in command and refers a significant number of the accused with intermediate or subordinate ranks to national courts within the former Yugoslavia (Source: official website of the ICTY: http://www.icty.org/sections/AbouttheICTY).

[18] The Geneva Conventions of 1949 and the Additional Protocols thereof are international treaties that contain the main rules aimed at limiting the barbarity of war. They protect those who do not participate in the hostilities (civilians, medical personnel, members of humanitarian organisations) and those who can no longer participate in the conflict (wounded, sick, shipwrecked, prisoners of war). The Geneva Conventions only apply to international armed conflicts, with the exception of Article 3, which is common to the 4 Conventions and covers civil wars within a country. On the occasion of its 60th anniversary, the need to update these texts has been raised in view of new scenarios that have arisen in armed conflicts in the 21st century. See the following link to the website of the International Committee of the Red Cross (ICRC): http://www.icrc.org/web/eng/siteeng0.nsf/iwpList2/About_the_ICRC?OpenDocument

continuing reports of widespread and flagrant violations of international humanitarian law occurring within the territory of the former Yugoslavia, especially in the Republic of Bosnia-Herzegovina, including reports of mass killings, massive, organised and systematic detention and rape of women, and of the practice of ethnic cleansing[19].

In line with the stated purpose of the Security Council Resolution, the objective of the ICTY was fourfold:

- prosecute persons accused of serious violations of international humanitarian law;
- ensure justice is done in relation to the victims of such violations;
- avoid future crimes;
- contribute to restoring the peace by promoting reconciliation in the former Yugoslavia[20].

The ICTY, based in The Hague (Netherlands), consist of two Trial Chambers and an Appeals Chamber, a Prosecutor and a Registry serving both the Chambers and the Prosecutor. It has 16 permanent judges and a maximum of nine *ad litem* judges per Chamber. The judges are chosen by the General Assembly and the permanent ones are appointed for a period of four years and may be re-elected.

As we indicated earlier, the jurisdiction of the ICTY is limited to genocide, crimes against humanity and war crimes committed since 1991 in the territory of the former Socialist Federal Republic of Yugoslavia. Moreover, its jurisdiction only applies to physical persons and not to organisations, political parties, administrative entities or other legal entities.

Since its creation, the Tribunal has publicly prosecuted, amongst other individuals, the deceased former president of Yugoslavia, Slobodan Milosevic, and is currently trying the former president of the Republic of Srpska, Radovan Karadzic, and the military leader of the Serb Republic, Ratko Mladic.

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[19] After the death of Marshal Josip Broz "Tito" in 1980, in the midst of an economic crisis and great tension between the different republics, the former Socialist Federal Republic of Yugoslavia began to break up, leading to a bloody conflict in 1991.

[20] The Resolution states that "in the particular circumstances of the former Yugoslavia, the establishment as an *ad hoc* measure by the Council of an international tribunal and the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the restoration and maintenance of peace".

Likewise, and using the Tribunal for the former Yugoslavia as a model, Security Council Resolution 995 (1994) of 8 November 1994, by virtue of Chapter VII of the Charter of the United Nations, established an international tribunal for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda[21] (ICTR), as well as those responsible for genocide and other such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994 Its constitution, composition and operation are regulated in the Statute annexed to this Resolution (Statute of the ICTR)[22].

The ICTR, based in Arusha (Tanzania), consists of three Trial Chambers and an Appeals Chamber, a Prosecutor and a Registry. The Trial Chambers have 3 judges each. The judges in the Appeals Chambers are the same ones as in the Appeals Chamber of the ICTY.

The ICTR is authorised to prosecute persons responsible for genocide and crimes against humanity as well as those persons who committed or ordered the commission of serious infringements of Article 3 common to the Geneva Conventions of 12 August 1949 regarding the protection of victims of armed conflicts[23] and Additional Protocol II of said Conventions of 8 June 1977, committed between 1 January and 31 December 1994 by Rwandans in the territory of Rwanda and neighbouring states, as well as crimes committed by non-Rwandans in Rwanda.

It is worth highlighting that, as with the ICTY, its jurisdiction only applies to physical persons. The fact that the accused person may have been following orders from a superior does not release him/her from criminal responsibility, but the ICTR may consider it a mitigating factor in the interests of fairness.

The general regime of jurisdiction immunity for criminal matters acknowledged to senior representatives of states (heads of state or government) is not applicable, as set out in

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[21] The official website is in English, French and Kinyarwanda, *International Criminal Tribunal for Rwanda* (ICTR): http://www.ictr.org/

[22] The government of Rwanda became incapable of controlling bloody tribal conflicts between the Tutsi minority and the Hutu majority. President Habyalimana was assassinated in April 1994. The rebel forces of the Rwandan Patriotic Front, dominated by Tutsis, clash with the government. A cruel civil and ethnic war ensues. Thousands are killed and there are tens of thousands of refugees.

[23] As mentioned in note 9, said Article 3 also covers civil wars within a country, unlike the Geneva Conventions, which only apply to international armed conflicts.

the rules that establish these tribunals (Article 7.2 of the Statute of the ICTY and Article 6.2 of the Statute of the ICTR)[24] and which the International Court of Justice has recognised as exceptions to the immunity rule[25].

In both cases, and "unlike the Nürnberg and Tokyo Tribunals, the ICTY and the ICTR are *truly international*. It has rightly been stated that the Nürnberg and Tokyo Tribunals were "multinational tribunals, but not international tribunals in the strict sense", in that they represented only one segment of the world community: the victors"[26].

Article 29 of the Statute of the ICTY and Article 28 del Statute of the ICTR establish the obligation for the states to cooperate with the investigation and prosecution of persons accused of having committed serious violations of international humanitarian law.

In implementing these provisions, the states have adopted rules on a national level regarding how to perform said obligation[27], with the most important consequence being the preferential jurisdiction of the ICTY and the ICTR over national courts in the event that both have concurrent jurisdiction over serious violations of international humanitarian law committed in the former Yugoslavia or in Rwanda, respectively (Article 9 of the Statute of the ICTY and Article 8 of the Statute of the ICTR).

Moreover, the national judicial bodies may be officially charged with performing specific tasks at the request of the *ad hoc* Tribunals such as: identification and location of persons, taking statements, presenting evidence, arresting persons, or even surrendering or transferring an accused person in order to place him/her at the disposal of the *ad hoc* Tribunals. The collaboration of INTERPOL has proved to be particularly important in carrying out these operational actions (via its system of international

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[24] It is sufficient to recall that the prosecution of Slobodan Milosevic by the ICTY in May 1999 took place when he was still President of the Federal Republic of Yugoslavia.

[25] In Democratic Republic of the Congo vs. Belgium (Decision of 14 February 2002, ICJ, 2002, paragraph 61, page 25), which we will refer to later.

[26] First report of the ICTY (A/49/342.S/1994/1007, paragraph 10). http://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual_report_1994_en.pdf

[27] Thus, in Spain, the laws on cooperation with the *ad hoc* Tribunals are: Organic Law 15/1994, of 1 June, on Cooperation with the International Tribunal for prosecuting the persons responsible for serious violations of international human rights committed in the territory of the former Yugoslavia and Organic Law 4/1998, of 1 July, on Cooperation with the International Tribunal for Rwanda.

notices).

As for the serving of sentences, according to Article 27 of the Statute of the ICTY and Article 26 of the Statute of the ICTR, they will be carried out in a state designated by the Tribunal from among those that have previously agreed to perform said task.

3.2. THE INTERNATIONAL CRIMINAL COURT

3.2.1. ORIGINS AND CHARACTERISTICS

After long and intense negotiations, on 17 June 1998 the Conference of Plenipotentiaries approved the Rome Statute of the International Criminal Court (ICC), at a conference held by the UN, by 120 votes in favour, including all the European Union (EU) countries[28]. Nevertheless, the ICC had to wait until 1 July 2002 to enter into force, once its Statute had been approved by 139 countries and ratified by 76 of them. At present, 107 countries are party to the Statute[29].

The objective of the Rome Statute is the creation of the ICC, as an *independent* judicial body, albeit linked to the UN, of a *permanent* nature and with a potentially *universal* scope, with jurisdiction to prosecute the most important crimes for the international community as a whole.

Since the international criminal courts created to date have been for specific situations and of a temporary nature, the constitution of an international criminal jurisdiction with a

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[28] Seven countries voted against (USA, Russia, China, India, Cuba, Iraq and Israel) and 21 abstained. The belligerent position of the USA against the ICC is worth highlighting. In the words of Senator Jesse Helms, in his intervention before the US Senate on 31 July 1998 a few days prior to the creation of the ICC: "Rejecting the Rome treaty is not enough. The US must fight the treaty (…) The ICC is indeed a monster - and it is our responsibility to slay it before it grows to devour us" (http://www.derechos.org/nizkor/impu/tpi/helms.html). President Bill Clinton initially refused to sign the Rome Statute, but shortly before leaving the White House he decided to sign. Subsequently, President George W. Bush announced that the USA was officially withdrawing from the ICC. In August 2001 he took a step backwards and sent the American Service Members Protection Act to Congress, which strictly prohibited any US authority from cooperating with the ICC. Finally, with a view to achieving full immunity of its personnel abroad, the USA has signed Bilateral Immunity Agreements with dozens of States parties of the ICC, in which they undertake (in exchange for preferential treatment in certain fields) not to bring complaints before the ICC regarding US nationals in their respective territories even if they are responsible for crimes over which the ICC has jurisdiction on the basis of Article 98 of the Rome Statute (they are hence also known as Article 98 agreements).

[29] Spain authorised the ratification of the Statute of the ICC though Organic Law 6/2000 of 4 October (http://boe.es/g/es/boe/dias/2000/10/05/seccion1.php#00000).

general and permanent vocation represents a decisive step in the development of an international order. As MÁRQUEZ CARRASCO[30] points out, "the Treaty of Rome thus gives birth to the final international institution of the 20th century and the first (…) of the 21st century"; "it is, therefore, something quite magical that for the 21st century the international community can have a permanent ICC which aims to bring an end to impunity".

Overcoming the difficulty that the diversity of political and legal systems of the states participating in the Rome Conference causes, the resulting Rome Statute is a complete text that regulates all the necessary aspects for the establishment and effective operation of the ICC: its establishment (based in The Hague), composition and organisation; the applicable law and the general principles of criminal law on the basis of which it is to act; the delimitation of its jurisdiction, from both a material, spatial and temporal point of view; the classification of crimes and the punishments to be imposed, as well as the rules for enforcing them; the rules of procedure and of operation of the judicial bodies, and the mechanisms of collaboration with the states and other international bodies in order to best attain the objectives to which it aspires.

Moreover, the Rome Statute envisages that the rules it contains will subsequently be developed by means of several regulatory instruments, which include the Elements of Crimes, the Rules of Procedure and Evidence, the Regulations of the Court, the Regulations of the Office of the Prosecutor, the Regulations of the Registry, the Code of Judicial Ethics, the Staff rules of the ICC, Staff Regulations, the Agreement with the UN, the Agreement on Privileges and Immunities[31], Financial Regulations and Rules governing Financial Management.

Formally, the Rome Statute consists of a preamble and 128 articles, systematically grouped into thirteen sections. Of this broad content, we will now look at some of the most significant aspects.

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[30] MÁRQUEZ CARRASCO, M.C., "Alcance de la Jurisdicción de la Corte Penal Internacional: Jurisdicción universal o nexos jurisdiccionales aplicables", in V.A. (2000), *"La criminalización de la barbarie: la Corte Penal Internacional"*, Madrid, Consejo General del Poder Judicial, pages 359 and 360.

[31] Agreement on privileges and immunities of the International Criminal Court, New York 9 September 2002.

3.2.2. RULES ON JURISDICTION AND PROCEDURE

The ICC is a judicial institution with the power to investigate and prosecute persons accused of committing the most serious crimes: genocide, crimes against humanity and war crimes. The ICC can only exercise its authority when the accused person is a national of a state that is party to the Rome Statute or when the crime has been committed in the territory of a state that is party to the statute. These conditions are not necessary when the situations have been referred to the office of the Prosecutor of the ICC by the UN Security Council or when a state accepts the jurisdiction of the ICC without having been a party to the Rome Statute.

It is important to highlight that the ICC does not have authority to prosecute states, only physical persons, or to prosecute isolated events, but serious violations of international humanitarian law committed in an extensive or continued manner in a given situation.

As we already indicated in relation to the ICTY and the ICTR, the immunities of serving foreign agents cannot be invoked vis-à-vis international courts (Article 27 of the Rome Statute), as the principle of *par in parem iurisdictionem* which justifies the immunities before judges of another state does not apply to them.

As for the material jurisdiction of the ICC, Article 5 of the Rome Statute limits it to "the most serious crimes of concern to the international community as a whole", referring to genocide, crimes against humanity, war crimes and aggression. The first three categories of crimes are classified in the Rome Statute (Articles 6 to 8) pursuant to the most modern trends of international criminal law. The instrument "Elements of the Crimes" specifies these categories of offences in order to help the ICC interpret and apply these rules. As for the crime of aggression, the Review Conference of the Rome Statute (held in Kampala, Uganda, between the 31st of May and the 11th of June, 2010) defined this crime and regulated the manner in which ICC competencies are to be exercised with regards to the same[32].

The jurisdiction of the ICC will be obligatory for the states parties, which will automatically accept its jurisdiction by the mere fact of ratifying or joining the Rome

[32] The conditions agreed upon for entry into force in the aforementioned conference stipulated that the ICC cannot exercise its jurisdiction over the crime until the 1st of January 2017, when the States have made the decision to activate this jurisdiction.

Statute. Moreover, the jurisdiction of the Court may be extended to other non-states parties when they have accepted the jurisdiction of the Court because the crime in question was committed on their territory or by their nationals, or when the Security Council so determines by virtue of its powers, pursuant to Chapter VII of the Charter of the United Nations[33] (Articles 12 and 13 of the Rome Statute).

As for the temporal scope of its jurisdiction, Article 11 of the Rome Statute expressly states that it will not have retroactive effect. Therefore, the ICC only has jurisdiction over crimes committed after 1 July 2002, the date the Rome Statute entered into force. When a state formalises its entry as a party to the Statute, the jurisdiction of the ICC commences sixty days later, unless it has made a declaration granting jurisdiction to the Court prior to that date.

A fundamental characteristic of the jurisdiction of the ICC is its complementary nature vis-à-vis national jurisdictions. The principle of complementarity, contained both in the Preamble ("the ICC established under this Statute shall be complementary to national criminal jurisdictions") and in Article 1 of the Rome Statute, takes the form of a procedural requirement for the processability or admissibility of the action in Article 17 of the Rome Statute, by virtue of which the jurisdiction of the ICC will only be exercised on a subsidiary level, when the competent state waives the obligation to investigate, prosecute and punish certain acts because it has no wish to do so or because it cannot do so effectively.

Therefore, and contrary to the provisions of the *ad hoc* Courts in the above sections (where the principle of the primacy of their jurisdiction over that of the states applies in the event they coincide), the obligation for the states parties to cooperate with the ICC is based on the principle of complementarity. This means that the national jurisdictional bodies responsible for prosecuting the crimes envisaged in the Rome Statute are not obliged to waive their jurisdiction in favour of the ICC; to put it another way, the ICC does not have primacy vis-à-vis the national jurisdictions. Instead it acts in a complementary manner to them, in the event that the state in question cannot prosecute or does wish to do so (Articles 17 and 18 of the Rome Statute[34]).

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[33] This was the case of the actions of the ICC in Darfur (Sudan), as a result of which in July 2008 the first arrest warrant for a serving Head of State was issued by the Prosecutor of the ICC, regarding the Sudanese President Omar Hassan Ahmad Al Bashir, for genocide, crimes against humanity and war crimes committed against thousands of people belonging to the Fur, Masalit and Zaghawa ethnic groups.

[34] In implementing these provisions of the Rome Statute, the Spanish law on Cooperation with

This principle of complementarity seeks to guarantee the sovereignty of the states in legal matters and strengthen the national justice systems. Nevertheless, the ICC can act when there have been unjustified delays in national judicial proceedings or when decisions are adopted with a view to protecting a person and preventing him/her from being held criminally responsible.

The power of the ICC to investigate, judge and punish all crimes under its jurisdiction is limited. Consequently, certain situations will necessarily be the responsibility of the states concerned.

Article 25 of the Rome Statute deals with criminal liability which is limited to physical persons who will be individually responsible for the crimes envisaged in the Statute. The criminal liability of legal persons is not established. The ICC will investigate, prosecute and punish those persons over 18 years of age whose responsibility for the crimes over which the ICC has jurisdiction has been proven. Moreover, it should be highlighted that the crimes for which the ICC has jurisdiction are not time-barred.

In relation to the investigation and prosecution of cases, the Prosecutor's Office may begin investigations when the states parties to the Rome Statute or the UN Security Council refer situations to it. Moreover, the Prosecutor can decide, on the basis of information received from reliable sources, whether to start an investigation after receiving approval from the Pre-Trial Chamber. This Chamber is comprised of three ICC judges who act independently of the decisions of the Prosecutor's Office. Nevertheless, and in order to guarantee the prevalence of the national jurisdiction of the states parties over the events, the latter have wide-ranging powers to call for the Prosecutor to withdraw and to challenge the jurisdiction of the ICC or the admissibility of the case, with the sole exception of cases which have been sent to the ICC by the Security Council. In such cases, the interest of the international community, on whose behalf the Council is acting in seeing justice done as a means of restoring international peace and security in a certain situation, prevails. For the same reason, the Security

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the ICC, Organic Law 18/2003 of 10 December, states in Article 10 that the Spanish justice system will withdraw in favour of the ICC; although Article 8 of the same law envisages the possibility of asking the ICC prosecutor to withdraw in those cases in which the information supplied by the Spanish Public Prosecutor's Office would seem to indicate that jurisdiction has been or is being exercised in Spain or, as a result of the notification received, the Spanish authorities have begun investigations.

Council has the extraordinary power to call for the suspension of the actions of the ICC in relation to a given situation, if it considers it necessary in the interests of international peace and security (Articles 13 to 17 of the Rome Statute).

In addition to the rules on jurisdiction and procedure, the Rome Statute contains a series of general principles of criminal law aimed at guiding the actions of the ICC: "*nullum crimen sine lege*", "*nulla poena sine lege*", *"ratione personae"* non-retroactivity, individual criminal responsibility, rejection of any distinction based on official capacity, responsibility of leaders and other superiors, the fact that crimes cannot be time-barred, the element of intent, circumstances releasing one from criminal responsibility, *de facto* and *de jure* errors, and the performance of orders from superiors and legal provisions.

As for the structure and development of the proceedings, a combination of English and continental law features is used, also taking advantage of the experiences of the *ad hoc* International Criminal Tribunals. The Rome Statute establishes a double instance system, once the investigation stage has concluded.

For the first time in the history of international criminal law, the victims of crimes over which the ICC has jurisdiction are entitled to participate in the trials taking place before the Court, with legal representation, and can request reparation. The Registry of the ICC will assist the victims and witnesses during the proceedings.

The protection of the rights of the accused person is indispensable for guaranteeing a fair trial. In this regard, the Registry has a list of defence counsel who have proven themselves to be highly competent and undertake to comply with the Code of Professional Conduct before the ICC. The defence teams of the accused persons will also receive logistical support from the ICC and, if necessary, financial aid.

As for the sentences (Part VII of the Rome Statute), it is established that the ICC may sentence persons found guilty to imprisonment for a specific number of years not exceeding thirty or, in exceptional cases, to life imprisonment, when justified by the extreme seriousness of the crime committed and the personal circumstances of the sentenced person. Moreover, the ICC may impose fines and confiscations of the proceeds of crime and assets resulting from it, notwithstanding the rights of third parties acting in good faith.

Terms of imprisonment will be served in a state designated by the ICC in each case, on the basis of a list of states that have stated their willingness to receive sentenced persons in their penitentiary establishments, although this willingness may be subject to certain conditions[35].

3.2.3. STRUCTURE AND OPERATION

As for the structure of the ICC[36] -to which the Rome Statute devotes Part IV- it is comprised of four bodies: the Presidency, the Chambers, the Prosecutor's Office and the Registry.

The Presidency is comprised of the President and the two Vice-presidents chosen by the 18 ICC judges. The Presidency is responsible for the correct administration of the ICC.

The Chambers of the ICC comprise the 18 judges, chosen by the states parties to the Rome Statute. The Chambers are as follows: Appeals, First Instance and Pre-Trial.

Known for their high moral character and integrity, the judges are chosen from among candidates all over the world. They are responsible for ensuring that trials are fair and that justice is duly done.

The Prosecutor's Office is responsible for investigating the crimes under the jurisdiction of the ICC and accusing the suspected perpetrators of said crimes.

The Registry is responsible for the non-judicial aspects of the administration of the ICC. Its specific tasks include assisting witnesses before the ICC and aiding the victims to ensure their rights are safeguarded. The Registry is also responsible for safeguarding the rights of the accused person to a fair trial and due process according to the Rome Statute.

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[35] Organic Law 6/2000, dated 4 October, which authorises Spain's ratification of the Statute of the ICC, includes a declaration stating that Spain is prepared to receive persons sentenced by the ICC in its penitentiary establishments, provided the term of the prison sentence imposed does not exceed the maximum envisaged in Spanish legislation; this declaration is expressly permitted under Article 103 of the Statute, and is also necessary due to the provisions of Article 25.2 of the Constitution, which states that terms of imprisonment and security measures must be aimed at the re-education and social rehabilitation of the sentenced person.

[36] The official languages of the ICC are the same ones as for the United Nations: Arabic, Chinese, Spanish, French, English and Russian.

The independence of the judges, the Prosecutor's Office and the personnel of the ICC is formally guaranteed by the Rome Statute and the ICC documents approved by the states. A series of safeguards prevents the ICC from acting for political motives.

3.2.4. THE OBLIGATION TO COOPERATE WITH THE ICC

There is a general obligation for the states parties to cooperate fully in the investigation and prosecution of crimes over which the ICC has jurisdiction. Conscious of the fact that this obligation to cooperate is the cornerstone of the entire structure of the ICC, the Statute dedicates Part IX: *International Cooperation and Judicial Assistance* (Articles 86 to 102, Rome Statute) to it in its entirety, contemplating three main forms of cooperation: the surrender of persons to the Court; international judicial assistance for the provision of documents, evidence, etc., and the enforcement of diverse aspects of the Court's judgments. In the event of a failure on the part of states parties to cooperate, the ICC may raise the matter before the Assembly of states parties or before the Security Council, if it was the latter that referred the matter.

In fulfilment of this obligation of collaboration[37], the States parties adopted laws on cooperation with the ICC. By way of example, the corresponding Spanish text in this regard is Organic Law 18/2003 of 10 December on Cooperation with the ICC, Articles 2 and 3 of which regulate active and passive cooperation, respectively.

3.2.5. IBER-RED – ICC RELATIONS

Title IV of the Iber-RED Regulation, which deals with relations with other networks and bodies with jurisdiction in the field of international judicial assistance establishes, as a general principle, that in order to fulfil its objectives, Iber-RED "aspires to maintain contact and exchange experiences with other judicial cooperation networks and international bodies that promote international legal cooperation" (Provision 13, section 1), before going on to expressly mention cooperation with the International Criminal

[37] Article 88 of the Rome Statute reads as follows: "*States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part*."

Court and Eurojust.

Indeed, Section 1 of Provision 14 states that “Iber-RED, in relation to the internal law of the countries belonging to the Iberian-American Community of Nations, may provide assistance by duly fulfilling requests for cooperation sent by the International Criminal Court”.

The necessary contacts have been established between the Secretary General of Iber-RED and the ICC so that these provisions can be fulfilled with the necessary fluidity.

It is also worth highlighting that representatives of the ICC have participated in the annual meetings of the Iber-RED Contact Points.

3.2.6. EUROPEAN NETWORK OF CONTACT POINTS IN RELATION TO PERSONS RESPONSIBLE FOR GENOCIDE, CRIMES AGAINST HUMANITY AND WAR CRIMES

Created by Council Decision 2002/494/JHA of 13 June 2002[38], with a view to enhancing cooperation with the ICC (and the International Criminal Tribunals for the former Yugoslavia and Rwanda, as the case may be) and combating impunity in relation to the most serious crimes, each Member State designated a contact point for the exchange of information on the investigation of cases of genocide, crimes against humanity and war crimes (such as those referred to in Articles 6, 7 and 8 of the Rome Statute).

Based, like other networks, on the principle of direct communication between contact points, their function is, upon receipt of a request and in accordance with the corresponding arrangements between Member States and the national legislation in force, to provide all information in their possession that may be relevant for investigations of cases of genocide, crimes against humanity and war crimes, and to cooperate with the competent national authorities.

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[38] Motivated by cases of persons involved in such crimes who seek refuge within the frontiers of the European Union, as set out in the Preamble.

The contact points meet once a year at the offices of Eurojust, which means that they are also close to the seat of the ICC (both are in The Hague).

3.3. INTERNATIONALISED COURTS

The evolution of the fight against impunity has led to a search for new jurisdictional formulas for tackling the suppression of the crimes committed. In this way, together with the *ad hoc* international criminal tribunals (the International Criminal Tribunals for the former Yugoslavia and Rwanda), whose activities are drawing to a close, and the International Criminal Court, the most recent development has been the appearance of internationalised courts of a hybrid nature[39].

Indeed, after the experiences of the ICTY and the ICTR, the subsequent evolution has led to the development of individual criminal responsibility for genocide, crimes against humanity and war crimes via new channels, entailing a definite changing of the guard as regards the legal-international formulas used, affecting both form and content –the applicable law- and this is in clear contrast to the developments in the immediately preceding period.

This multiplication of judicial and quasi-judicial international bodies, despite –as we have said- the creation of the ICC, is the result of political demands or the individual circumstances of some states. However, it should be highlighted that in general terms they are better accepted that *ad hoc* special courts because the latter are seen as a last resort, a unilateral imposition, while with the former there is local, active participation which is balanced out and coordinated with the international element[40]. In this regard it is sufficient to compare the successive jurisdictional bodies established for mass crimes (Sierra Leone, Cambodia, East Timor, Iraq, Kosovo and Bosnia-Herzegovina) or for specific crimes (Lebanon), to see the profound transformation in the way the question is dealt with.

These new jurisdictional models present different degrees of internationalisation, and

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[39] And there is good reason to believe that the internationalised criminal justice systems will continue to proliferate. Just such a possibility was discussed in Burundi and Sudan. In the end, the UN Security Council referred the matter of Darfur to the ICC.

[40] OLLÉ SESÉ, M. Justicia universal para crímenes internacionales, La Ley, Madrid, 2008, p 50.

while some are hybrid courts, formed of national and international judges and are characterised by being an alternative to *ad hoc* international courts, they are not integrated into the internal legal systems and act with independent international status (the Special Tribunals created for Sierra Leone and the Lebanon), others, the internationalised national criminal courts, form part of a national criminal justice system, lack international independence and only have some features of an international nature: their jurisdiction covers certain categories of crimes and the law applied by these Courts – comprising national and international judges and prosecutors - is both internal and international (the Extraordinary Chambers of Cambodia or the Special Panels for Serious Crimes of East Timor or the war crimes Court of Bosnia-Herzegovina[41])[42]. Finally, the internationally assisted local Courts receive international support (Special Court for Iraq). Kosovo[43] meanwhile, does not have a special court or chamber, but incorporates international judges into its judicial system.

Some of these judicial bodies have earned severe criticism due to their lack of legitimacy, partiality and lack of procedural guarantees. Some of them have even applied the death penalty.

3.4. OTHER INTERNATIONAL COURTS

In this section we will deal with a collection of judicial bodies, with different names (tribunals or courts) and geographical scopes (universal or regional), whose missions (for example, in the protection of human rights) only affect international criminal law on a secondary or incidental level. In some cases, and despite the fact that they belong to regional integration organisations, they currently lack jurisdiction over said subject

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[41] In the case of Bosnia and Herzegovina we are dealing with a national court comprised of international judges and prosecutors which includes a Division for War Crimes. Established by an Act of the Parliament of Bosnia and Herzegovina dated 3 July 2002, and approved by the High Representative on 12 November 2002, based in Sarajevo, its mandate is not limited in time (unlike the case of the *ad hoc* international criminal tribunals). Within its criminal jurisdiction, the court hears the war crimes cases sent to it both by the International Criminal Court for the former Yugoslavia and the State Investigation and Protection Body, belonging to the Security Ministry.

[42], Nevertheless, in these cases, regardless of the relevance of the internationalisation of criminal justice, they are still formulas for cooperation with states or entities that lack an effective judicial system capable of punishing certain crimes, or situated in territories under the administration of the United Nations; RODRÍGUEZ BARRIGÓN, J.M., *Op. cit.*, page 335.

[43] The UN Security Council adopted Resolution 1244, of 10 June 1991, after confirmation that the security forces of the Federal Republic of Yugoslavia had withdrawn from Kosovo and the NATO air operations had been suspended. This Resolution called on the Secretary General to establish the UN Interim Administration Mission in Kosovo (UNMIK). Under its mandate Regulations 1999/24 and 2001/9 were issued, establishing the judicial model in Kosovo and providing for the participation of international judges.

matter, although that is not to say they will not acquire it in the future.

Thus, the International Court of Justice falls within the universal sphere. In the European regional sphere we have the European Court of Human Rights and the Court of Justice of the European Union, and in the Americas the Inter-American Court of Human Rights, the Central American Court of Justice and the Court of Justice of the Andean Community.

3.5. THE UNIVERSAL CRIMINAL JURISDICTION OF STATES

3.5.1. SCOPE AND LIMITS OF THE CRIMINAL JURISDICTION OF STATES

As we pointed out in the introduction to the unit, one of the avenues chosen to prosecute and punish those responsible for serious human rights violations, together with the international and internationalised criminal courts, is the expansion of the scope of the criminal jurisdiction of states. That is, domestic judges participate in the suppression of crimes against the international community and the rights of man (principle of universal jurisdiction).

However, and as we will see, the extent of said jurisdiction when the offences were carried out abroad and the persons involved, actively or passively, have no connection with the forum, will depend on each state, its foreign policy objectives and its diplomatic relations, as well as the relevance it grants to the protection of human rights beyond its borders.

There is no doubt that the judges in the state where the crime was committed have jurisdiction (principle of territoriality). The *forum locus commissi delicti* is the most natural connection between criminal jurisdiction and the expression of sovereignty of the state.

However, as the Permanent Court of International Justice (PCIJ) observed in the "Lotus" case (France *vs.* Turkey) in 1927[44]: "Though it is true that in all systems of law

[44] PCIJ Series A, No. 10 (1927), "S.S. Lotus (France *vs*. Turkey)", Judgment of 7 September

the principle of the territorial character of criminal law is fundamental, it is equally true that all or nearly all these systems of law extend their action to offences committed outside the territory of the State which adopts them, and they do so in ways which vary from State to State. The territoriality of criminal law, therefore, is not an absolute principle of international law and by no means coincides with territorial sovereignty".

Thus, said principle is completed by another series of principles that, acting as a link, extend the jurisdiction of the state to offences committed outside its territory and seek to prevent certain crimes going unpunished.

Thus, this real or protective principle allows a state to punish offences committed outside its territory, regardless of the nationality of the perpetrator, provided that they harm its interests or affect its security or the exercise of the prerogatives of public authority (for example, in crimes against peace or the independence of the state, against the head of state, against its authorities or officials).

It is based on the need to grant jurisdiction to one state in the event that its fundamental interests are threatened and the state where the offences were committed fails to adopt the appropriate measures.

Meanwhile, the principle of active personality grants jurisdiction to the judge of the state of which the suspected perpetrator is a national or where he/she resides, and the principle of passive personality attributes jurisdiction to the judge of the state of which the victim is a national or where he/she resides (regardless of the place where the offences were committed and the nationality of the perpetrator).

While the application of the principles of territoriality and active personality can lead to conflicts, their coexistence is based on the aim of avoiding the impunity of persons who, after committing a crime abroad, attempt to escape the place where the crime was committed and take refuge in the state of which they are a national under the principle of non-surrender of nationals, thus avoiding extradition.

As we said earlier, the Rome Statute is based on the complementary relationship of the ICC with the national judges, and international cooperation in that area has aimed at

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1927.

obliging states to affirm and exercise their jurisdiction when a territorial or personal link with the crime has been established (see, for example, Article 5.1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984).

Indeed, some international treaties impose the jurisdiction on the judge of the place where the suspected perpetrator of the crime was arrested (*iudex aprehensionis*) in the event that, for one reason or another, the extradition requested by one of the countries whose jurisdiction is considered obligatory is rejected (*aut dedere aut iudicare*)[45]. This is the case of Article 5.2 of the Convention against Torture.

In order to avoid impunity in these cases, a series of transfers has been prepared in the event the states parties undertake to prosecute persons claimed by another state but whose extradition, for one reason or another, is not granted (principle of substitution). The priority here is to guarantee the universality of suppression within the context of non-universal jurisdiction because otherwise if there is no request for extradition (or if it is denied to an applicant whose jurisdiction is not obligatory according to the same treaty), there is no obligation to prosecute.

3.5.2. THE CONFIGURATION OF THE PRINCIPLE OF UNIVERSAL JUSTICE

In a the above cases there is a link to the state, be it the *territory* (where the crime was committed or where the suspected perpetrator was arrested), the *interest* of the state or the *nationality* or *residence* of either the perpetrator or the victim.

A very different matter is the principle of universal justice, based on the decentralised defence of interests and values of the International Community as a whole and not on purely state or individual ones. This principle represents a further step in relation to mere cooperation between states for combating crime[46].

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[45] The premise underlying the *aut dedere aut iudicare* principle is the interest of a state connected with the crime, either because it was committed on its territory or due to the nationality or residence of the persons involved or due to a specific interest of protection or defence, in prosecuting individuals that it locates in the territory of another state and whose extradition it requests.

[46] Indeed, Mercedes GARCÍA ARÁN points out that the instruments of cooperation by means of which the states provide mutual assistance for combating crime already represent a degree of recognition of supranational interest in the suppression of crime and essentially take the form of agreements on

As for its scope, universal justice complements, as well as excepting, the principle of territoriality, declaring the competence of the criminal jurisdiction of a state for prosecuting crimes committed outside its territory, regardless of the nationality or residence of the perpetrator, the victim and the state in which the crime was committed[47].

Obviously, the judge at the place where the events occurred, particularly if they are connected with the nationality or usual residence of the suspect, is the natural judge of these crimes and he/she should be given priority and a certain amount of time before conclusions are reached on his/her intentions, capacity and independence (principle of subsidiarity).

The main problem arises when, by virtue of the principle of universal justice, suspected criminals are prosecuted in states with no territorial or personal connection with the offences and the suspects are not physically at the disposal of the judge of the state in question[48].

In reality, the presence of the accused before the judge that intends to prosecute him/her is not essential –although it is always convenient- for bringing proceedings. According to the Spanish Constitutional Court, "it is an essential requirement for trial and sentencing"[49]. There is no reason, on the other hand, to block the option of extradition that would make such presence possible[50].

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extradition, procedural or police cooperation or the recognition of foreign judgments, etc., designed to offset the limits of territorial action of states, although their raison d'être is not necessarily the recognition of legal interests assumed by the international community as its own. GARCÍA ARÁN, M. "El principio de Justicia Universal en la Ley Orgánica del Poder Judicial español", in Various Authors (2000), "Crimen internacional y jurisdicción universal", Valencia, Tirant lo Blanch, page 64.

47 In the same way, the Preamble of Organic Law 13/2007, of 19 November, which introduced illegal trafficking of persons or illegal immigration to the catalogue of Article 23.4, by stating that by virtue of the principle of universal jurisdiction, any state may exercise jurisdiction in relation to serious offences against the interests of the international community regardless of the place the crime was committed and the nationality of the author or victim

48 On this point, the case law of the German Supreme Court on the "legitimate link" for the jurisdiction of Germany in cases of genocide outside its territorial limits is interesting.

49 Judgment 237/2005, of 26 September, of the Spanish Constitutional Court, seventh point of law.

50 In this regard, the Princeton Principles on Universal Jurisdiction (A/56/677, 4 December 2001), which are the result of the examination of the legislation by a group of academics and experts, distributed as a document of the UN General Assembly (2001) at the request of Canada and the Netherlands , maintain that the presence of the accused person is a condition for the exercise of universal jurisdiction, but it declares at the same time that the extradition of a suspect can be requested on the grounds of this jurisdiction (Principles 1.2 and 1.3).

In its origins, the exercise of this jurisdiction was legitimated in consensual rules of public international law that made it possible to persecute acts of piracy committed on the high seas, i.e., in areas outside the sovereignty of the states[51].

In more recent times, specifically in 1962, the Supreme Court of Israel[52] declared that the Israeli state had authority on the basis of universal jurisdiction to try the Nazi war criminal Adolf Eichmann. And the French Court of Cassation[53], in 1998, accepted the jurisdiction of French courts to prosecute acts of genocide in Rwanda in 1994 by Rwandans against Rwandans.

Nevertheless, it is worth remembering that to date there is no rule in the international legal system that obliges, or indeed prohibits, the incorporation of the principle of the universal jurisdiction of states for crimes under international law into the internal law of states.

It is therefore an option open to the states, which can undertake to exercise it by means of international treaties. This is the case of war crimes, as the Geneva Conventions of 1949 (Articles 50, 51, 130 and 1479) and the Protocols of 1977 (Article 85) imply the obligation of the states parties to try the suspected criminals arrested on their territory under their jurisdiction, regardless of the place where the acts were committed, the personal circumstances of the persons involved and the existence or otherwise of an extradition request.

In compared law, we find different countries that have assimilated the principle of universal prosecution, to a greater or lesser degree. The case of Belgium is the most paradigmatic because it went from having one of the broadest legislations on universal justice to having one of the strictest laws in the space of just five years. [54] Indeed, with the Act of 10 February 1999, ("*La Loi relative à la répression des violations graves de droit international humanitaire*"), Belgium equipped itself with of the most advanced laws in the world in the fight against the impunity of international crimes. It attributed

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[51] Thus, in the Lotus case, the PCIJ stated that "and as the scene of the pirate's operations is the high seas, which it is not the right or duty of any nation to police, he is denied the protection of the flag which he may carry, and is treated as an outlaw, as the enemy of all mankind – *hostis humani generis* - whom any nation may, in the interest of all, capture and punish", PCIJ (1927), *op. cit.*, 70.

[52] "Attorney General of Israel *vs.* Eichmann".

[53] "Dupaquier, Kalinda et autres *vs.* Wenceslas Munyeshyaka".

[54] On this point, see "Juridictions nationales et crimes internationaux", CASSES, A. and DELMAS-MARTY, M. Press Universitaire de France. Paris, 2002, pages 69 et seq.

jurisdiction to Belgian judges to prosecute genocide, crimes against humanity and war crimes regardless of where they were committed and the nationality of the perpetrator, even *in absentia,* and rejecting any kind of immunity on the basis of posts held.

Four years later, strong political pressure on the one hand and practical difficulties on the other, led to two successive reforms. One, the act dated 23 April 2003, did extend the material scope of the law by adapting the criminal classification to that of the Rome Statute and to those envisaged in other treaties to which Belgium was party, although it redirected the scope of the immunities within the limits of international law (in relation to which the ICJ had made a declaration in its judgment of 14 February 2002[55])[56] and, above all, restricted and conditioned the application of the principle of universal prosecution by establishing a general filter–the initiative of the Federal Attorney (Public Prosecutor, in other countries) - in the cases in which the jurisdiction was based on the principle of universal prosecution *in absentia*[57]. The second reform, the *Loi relative aux violations graves du droit International humanitaire* of 5 August 2003, restricts the principle of universal justice to such a degree that it even removes any express reference to it, effectively replacing it with other principles connected to the forum: active (that the suspect be a Belgian national or long-term resident) and passive (that the victim be a Belgian national or long-term resident) personality.

In Germany, on the other hand, there was an extension of universal jurisdiction as far as principles were concerned, although with important provisos regarding the procedure by demanding national points of connection when there is not a certain expectation that the proceedings will be concluded[58].

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[55] In the Democratic Republic of the Congo vs. Belgium (Decision of 14 February 2002, TIJ, 2002, paragraph 61, page 25.

[56] The immunities of serving foreign agents, as we pointed out earlier, does not apply vis-à-vis international tribunals –vis-à-vis the OCTY (Article 7.2 of its Statute), the ICTR (Article 6.2 of its Statute) and the ICC (Article 27 of the Rome Statute).

[57] This decisive intervention by the prosecutor is not unheard-of and is also envisaged in other countries. In Canada, for example, whose justice system rejected a procedure based on the principle of universal prosecution -as did those of other members of the Commonwealth-, that is, the prosecution of criminals who took refuge there after the Second World War –conditioned in any event upon the presence of the suspect in Canada, it requires the written consent of the *Attorney General* or *Deputy Attorney General* (*Crimes against Humanity and War Crimes Act 2000*, Article 8, b).

[58] Thus, its International Criminal Code establishes said principle in Article 1 for the prosecution of crimes of genocide, crimes against humanity and war crimes regardless of where they were

The legislation of the United States, despite not recognising universal jurisdiction in criminal matters, does envisage it in civil matters (*Alien Tort Claims Act*, 1980), making it possible (for foreign citizens too) to file indemnificatory complaints for damages caused by foreigners abroad when "committed in violation of the law of nations or a treaty of the United States" [59], considering the perpetrator (the torturer – the pirate or slave trader in times past-) "*hostis humani generis* "enemies of the human species" (Filartiga vs. Peña-Irala, 2nd Circuit, 1980)[60]. The *Torture Victim Protection Act*, 1991, enhanced this possibility. Unfortunately, these complaints are not possible when the tortures or criminal actions are attributed to the United States and its agents (Sánchez Espinosa vs. Reagan, 1985).

In Spain, the principle of universal justice is contained in Organic Law 6/1985, dated 1 July, of the Judiciary (LOPJ)[61], in Article 23.4, according to the wording approved by Organic Law 1/2009, of 3 November, which extends the jurisdiction of Spanish courts to offences committed by Spaniards or foreigners outside of the national territory which can be classed, according to Spanish criminal law, under the following criminal categories:

a Genocide and crimes against humanity.
b Terrorism.
c Piracy and the hijacking of aircraft.
d Crimes related to prostitution and the corruption of minors or the disabled.
e Illegal trafficking in psychotropic, toxic and narcotic drugs.
f Illegal trafficking of persons or clandestine immigration, workers or otherwise.
g Those related to genital mutilation of women, provided the persons responsible are in Spain.

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committed (in Germany or abroad), against the criterion held at that time by the case law of the German Supreme Court on the need for a point of connection with Germany.

However, the breadth of the principle of universal justice should be specified with reforms on a procedural level, with the incorporation of the principle of opportunity (Article 153 of the German Procedural Code) which –in order to prevent an overload of the justice system- establishes a ranking of the jurisdictions responsible for prosecuting international crimes, with the State Attorney being able to refrain from prosecuting any of the crimes if none of the suspects is German or if the act is prosecuted by an international criminal tribunal or another state which has jurisdiction by virtue of the principle of territoriality or active or passive personality.

[59] Thus, complaints have been filed against multinational companies which are domiciled or have operations in the USA such as Chevron or Shell.

[60] In these Civil Proceedings, the claimant, Dolly Filartiga, in 1979, alleged before the Courts of justice of the USA – taking advantage of the fact that Américo Norberto Peña-Irala was resident in that country at the time – that her son of 17 years of age, of Paraguayan nationality, was tortured to death by the defendant, in his capacity as inspector general of the Paraguayan police.

[61] The full text can be read at: www.poderjudicial.es

h Any other that, according to international treaties or conventions, in particular the Conventions on humanitarian international law and the protection of human rights, should be prosecuted in Spain.

Notwithstanding what the international treaties and conventions signed by Spain may state, in order for Spanish courts to be able to hear the above crimes, it must be proven that the persons presumed to have committed them are in Spain or that there are victims of Spanish nationality, or that there is another relevant link to Spain and, in any event, that proceedings representing an effective investigation and prosecution of said offences have not commenced in another competent country or in an international Court.

The criminal proceedings brought before the Spanish courts will be provisionally stayed if it is discovered that another trial is examining the events reported in the country or by the Courts referred to in the foregoing paragraph[62].

Finally, Article 23.5 states that if criminal proceedings are brought in Spain in the scenarios envisaged in sections 3 and 4 above, it will also be necessary for the criminal not to have been acquitted, pardoned or sentenced abroad or, in the latter case, he/she must not have served the sentence. If the sentence has only been served in part, it will be taken into account in order to apply a proportionate reduction of the corresponding sentence.

This precept, in its original form, assumed the principle of universal prosecution in very broad terms. Despite successive legislative amendments, designed to include new forms of crime in the catalogue in Article 23.4, the important limitation imposed by the principle of complementarity with the International Criminal Court[63] and some attempts by the judicial body responsible for applying it, the National Criminal Court (*Audiencia Nacional*), as well as by the Supreme Court, to "reinterpret" said principle, the *coup de grâce* came in the 2009 reform.

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[62] However, Organic Law 18/2003, of 10 December, on cooperation with the ICC (Article 7) ruled out the possibility of the Spanish courts and the Public Prosecutor's Office acting *ex officio* in relation to events occurring in other states where the presumed perpetrators are not Spanish and that the ICC has jurisdiction to try, and it establishes that if a claim or complaint is brought before the Spanish courts, they will simply inform the claimant of the possibility of going directly to the ICC Prosecutor. Only in the event the latter decides not to investigate the matter or if the ICC considers the case cannot be given leave to proceed, can the jurisdiction of the Spanish judges be affirmed in the terms envisaged in Article 23.4 of the Organic Law of the Judiciary.

[63] See Article 7 of Organic Law 18/2003, of 10 December, on Cooperation with the International Criminal Court referred to in the previous footnote.

In view of previous decisions from the National Criminal Court (Rulings of 4 and 5 November 1998, the Scilingo and Pinochet cases), which had emphatically affirmed the principle of universality to back its jurisdiction over crimes allegedly committed by the Chilean and Argentinean military *juntas* in the seventies and eighties of the last century, the Court itself, in a Ruling of 13 December 2000, in relation to crimes that occurred in Guatemala, while maintaining the principle, rejected investigation by means of an exceedingly strict interpretation of subsidiarity (the burden of proof of the jurisdictional inactivity in the country in which the crime was committed).

Subsequently, the Supreme Court, in deciding on the appeal filed by the plaintiffs, in its controversial judgment 327/2003, dated 25 February, corrected the National Criminal Court and adopted a position that was the exact opposite, drastically limiting the principle of universal prosecution by establishing points of connection as criteria that correct the application of Article 23.4 LOPJ: the requirement of the presence of the accused person in Spanish territory and the connection with the national interest, specifically via the existence of Spanish victims.

Finally, following an appeal of the Supreme Court judgment, the Constitutional Court, in judgment 237/2005, dated 26 September, stated that Spanish law establishes a principle of *absolute*, concurrent universal jurisdiction, not subordinate to any other jurisdiction, in a manner that conforms to international rules. The Constitutional Court considered the theory of points of connection established by the Supreme Court to be contrary to the right to effective judicial protection and which were nevertheless included by the legislator in the 2009 reform. “The opinion of the Supreme Court on universal jurisdiction (...) is based on purposes that do not sit easily with the foundations of the institution itself, which (...) gives rise to a practical *de facto* abrogation of Article 23.4 LOPJ”[64]. These arguments were reiterated in Constitutional Court Judgment 227/2007, dated 22 October (“Falum Gong” case).

The consequences of this judgment were felt immediately. The Plenary Session of the Criminal Division of the National Criminal Court not only adopted a resolution for the unification of criteria on the application of universal jurisdiction, revising its earlier *doctrine* (3 November 2005), it also immediately gave leave to proceed to complaints regarding genocide, terrorism and torture committed in Guatemala between 1978 and 1986 (Ruling of 21 February 2006) as well as (Ruling of 10 January 2006) the

[64] Fourth Point of Law of the above-mentioned Constitutional Court judgment.

complaints against the former president of the Peoples' Republic of China, Jiang Zemin, the former prime minister, Li Peng, and other Chinese leaders for alleged crimes of genocide in Tibet, revoking the earlier decision of the first instance criminal court not to accept them (Ruling of 5 September 2005)[65].

3.5.3. THE OUTLOOK IN EUROPE

Faced with the restrictive trend affecting the principle of universal jurisdiction in the internal sphere of states in the fight against international crime –which for some leaves said principle severely weakened, virtually agonising[66]-, we have to highlight a trend running in the opposite direction in the European sphere. Council Decision 2003/335/JHA of 8 May 2003 on the investigation and prosecution of genocide, crimes against humanity and war crimes, considers that cases often arise in Member States of persons who have been involved in such crimes and who seek to enter and remain in the European Union. The Council declares that these crimes should not be left unpunished and, to that end, it is necessary to adopt measures nationally and step up cooperation with the International Criminal Court (and with the *ad hoc* International Criminal Courts, as the case may be) in order to ensure that justice is actually done in this regard. Previously, Council Decision 2002/494/JHA of 13 June 2002 created the European Network of National Contact Points for the exchange of information on the investigation of these international crimes.

Moreover, once the temporary mandate of the International Criminal Court for the former Yugoslavia concludes, the possibility exists for officers of intermediate rank and subordinates to be tried for the serious crimes of which they are accused via the principle of universal jurisdiction.

3.6. TRANSITIONAL JUSTICE

3.6.1. CONCEPT AND PURPOSES

The term 'transitional justice' is used to cover a group of processes of a judicial or other nature that are carried out in countries undergoing a

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[65] Ruling of 5 September 2005

[66] CASSESE, A.: "Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction", Journal of International Criminal Justice, vol. 1 (2003), p. 589.

transition to democracy **in order to reconcile and do justice vis-à-vis human rights violations that occurred under the previous regime, thus facilitating a stable and lasting peace[67].**

Transitional justice is a response to systematic or generalised human rights violations[68]. Its objective is the recognition of victims and the promotion of the possibilities of peace, reconciliation and democracy. Transitional justice is not a special form of justice, but justice adapted to countries that are transforming themselves after a period in which there was a generalised violation of human rights[69].

The Nürnberg and Tokyo trials at the end of the second world war are usually cited as the origin of the current concept of transitional justice. This new approach of transitional justice emerged in the late eighties and early nineties of the last century, mainly in response to political changes in Latin America and Eastern Europe and the need for justice in these regions. At that time, people wanted to deal with the systematic abuses of the former regimes, but without jeopardising the political transformations underway. As these changes were popularly known as "transitions to democracy"; people began to refer to this multi-disciplinary field as "transitional justice".

Together with the legal aspect, the concept of transitional justice has been a key element in the democratisation processes, with instruments such as the Commissions for Truth and Reconciliation (in Argentina, Chile, South Africa, Sierra Leone and East Timor, among others). Moreover, the wars in the Balkans and Rwanda, together with the creation of international tribunals to deal with massive human rights violations, have represented the

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[67] AVELLO, M. (2007): *La justicia transicional vista desde Europa*. Fundación para las Relaciones Internacionales y el Diálogo Exterior (FRIDE). Madrid. www.fride.org

[68] The legal basis for transitional justice can be found in the Judgment of 29 July 1989 from the Inter-American Court of Human Rights in Velásquez Rodríguez *vs.* Honduras, in which the Court determined that all states have four fundamental obligations in the context of human rights. They are: *a)* take reasonable steps to prevent human rights violations; *b)* carry out a serious investigation of violations committed within its jurisdiction; *c)* impose the appropriate punishment on those responsible, and *d)* ensure the victim adequate compensation.

These principles have been explicitly affirmed by subsequent Court judgments and backed by decisions of the UN Human Rights Committee and the European Court of Human Rights. The creation of the International Criminal Court in 1998 was also significant, as its Statute enshrines state obligations which are of vital importance for fighting impunity and ensuring the respect of victims' rights.

[69] *Enciclopedia del Genocidio y de los Crímenes contra la Humanidad*, Vol. 3, Macmillan Reference, USA, 2004, pp. 1045-1047.

incorporation of international law to the field of transitional justice. Finally, transitional justice is an important element for the construction and maintenance of peace in the different peace processes underway since the mid-nineties.

A report from the UN Secretary General presented to the Security Council in 2004 on "The rule of law and transitional justice in conflict and post-conflict societies"[70] recommends that the international community embrace integrated and complementary approaches to transitional justice. Contemplating measures of a judicial nature alone in a post-conflict situation can have the opposite effect to the one sought, preventing the achievement of the objectives of peace and stability for the territory.

3.6.2. TYPES OF MEASURES

The different strategies to be followed can be grouped into categories, depending on the objectives: justice, truth, rehabilitation of victims, institutional reform, forgetting or remembering. The main measures that are usually adopted under the concept of transitional justice are the following:

- **J*udicial proceedings*, either in national or international courts, using special tribunals (with national and international legal experts), as well as the transnational justice mechanisms –civil and criminal proceedings in foreign courts.**
- ***Truth commissions*, the main instruments for investigating and unearthing information on key abuses of periods of the recent past. It is often the official bodies of the state that make recommendations to remedy abuses and prevent their reoccurrence.**
- ***Vetting*[71].**

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[70] http://www.un.org/es/comun/docs/index.asp?symbol=S/2004/616&referer=/spanish/&Lang=E

[71] **ONU, *Rule of Law Tools for post-conflict states*. *Vetting: an operational framework,* New York and Geneva, 2006. *Vetting* is defined as the process for assessing the integrity of civil servants in order to determine whether they fulfil the conditions necessary to form part of the state institutions. Integrity is taken to mean the adherence by the civil servant to the international human rights principles, as well as his/her professional conduct.**

- ***Reparation programmes*** **are initiatives sponsored by the state that help ensure material and moral reparation for damages caused by past abuses. In general, they distribute a combination of material and symbolic benefits to the victims, which may include financial compensation and official apologies.**
- ***Amnesty*****.**
- ***Commemoration of efforts*****. This can include museums and public monuments that preserve the memory of the victims and increase the moral awareness of past abuses, in order to build a barrier to prevent a repetition.**
- ***Reform of the security system*****. These efforts seek to transform the armed forces, the police, the judiciary and those related to the state instruments of repression and corruption into instruments of public service and integrity.**
- ***Demobilisation, disarmament and reintegration*****.**

As can be seen, the spectrum of possible actions is broad and non-exclusive, as each society is free to choose how best to deal with its past. The most recent cases show that it is often necessary to use a combination of actions.

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Madrid, 3 December 2012

LEVEL II: TO LEARN MORE

INTERNATIONALISED COURTS

1.1. THE SPECIAL COURT FOR SIERRA LEONE

UN Security Council Resolution 1315 (2000) of 14 August 2000 called on the Secretary General to negotiate an agreement with the Government of Sierra Leone to create an independent special court[72] responsible for prosecuting the main persons responsible for the atrocities committed in the territory of said country, ravaged by several years of civil war in which 200,000 people died[73]. The agreement was formalised on 16 January 2002[74].

The Special Court for Sierra Leone (SCSL) represents a new kind of judicial body. Established jointly by the UN and the Government of Sierra Leone, it is an *international and national court*, with international and Sierra Leonean judges, is based in the country where the crimes were committed (in Freetown, capital of Sierra Leone) and applies national and international legislation.

The SCSL has jurisdiction to judge crimes against humanity, in particular “war crimes and the remaining serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996”.

As Amnesty International pointed out[75]: "This is an occasion to reaffirm aspirations that the Special Court will succeed in bringing justice to some of the thousands of victims of

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[72] See the official website, *The Special Court for Sierra Leone*: http://www.sc-sl.org/

[73] The atrocities committed led, following the Lomé Peace Accords in 1999, to the creation of a “Commission for Truth and Reconciliation” the purpose of which was to create an impartial record of all the cases of human rights violations and send recommendations to the government with a view to preventing future conflicts. The concern regarding the situation of impunity in relation to the serious crimes committed in this state, against its population and against UN personnel, led the Security Council to call on the Secretary General to negotiate the Agreement; RODRÍGUEZ BARRIGÓN, JM, Op. cit., page 338.

[74] The Agreement between the UN and the Government of Sierra Leone on the establishment of a Special Court for Sierra Leone is included in an Annex to the Report from the UN Secretary General of 4 October 2000.

[75] In its document on Sierra Leone: *Statement at the official opening of the court-house of the Special Court for Sierra Leone* (IA Index: AFR 51/004/2004), published by Amnesty International on 9 March 2004. http://www.amnesty.org/es/

the horrific crimes committed, which included murder, mutilation, rape, sexual slavery and recruitment of children."

This Special Court represents a new type of judicial body. It was established jointly by the UN and the Government of Sierra Leone and is an *international and national court*, with international and Sierra Leonean judges, with its seat in the country where the crimes were committed (Freetown, capital of Sierra Leone), applying both national and international legislation. The statute of this court was inspired by the statutes of the ICC and the *ad hoc* tribunals for the former Yugoslavia and Rwanda.

Since its work began, the SCSL has encountered serious obstacles due to the lack of cooperation and support from both individual states and the international community in general. It has been conditioned by the refusal of some states to fulfil the commitments they gave by virtue of international law[76] and has also had to deal with a serious financing deficit. Nevertheless, to date the SCSL has rendered six sentences.

1.2. THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

In the case of the Extraordinary Chambers in the Courts of Cambodia (ECCC)[77], the watering-down of its legal-international traits is even more evident. While there is an Agreement from May 2003[78] between the UN and the Royal Government of Cambodia on prosecution under Cambodian Law of the crimes committed in said country during the period of Democratic Kampuchea (between 17 April 1975 and 6 January 1979), it does not actually create the courts that the Cambodian state was to establish in the Act on the establishment of *Extraordinary Chambers in the Courts of Cambodia for the prosecution of crimes committed during the period of Democratic Kampuchea*, and

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[76] "In particular, international pressure must be exerted on the Government of Nigeria which, in flagrant violation of its obligations under international law, is openly harbouring Charles Taylor with guarantees that he will be neither surrendered to the Special Court nor brought before Nigerian courts", Amnesty International explains.

[77] The official website is available in English, French and Khmer: http://www.eccc.gov.kh/

[78] Its object was to regulate cooperation between the UN and the Government of Cambodia in order to prosecute the senior leaders of Democratic Kampuchea and those who held greatest responsibility for the crimes and serious transgressions of Cambodian criminal law, international humanitarian law and common law in the area, as well as the international instruments to which Cambodia is a party. The full text can be found on the following website: http://www.hrcr.org/hottopics/UNKhmer.html

whose composition is dominated by Cambodian judges (Articles 10 and 11), with the applicable law being Cambodian law enhanced with some international law developments (Articles 3 and 8).

The court, based in Phnom Penh (Cambodia), has jurisdiction to prosecute crimes committed in the territory of Cambodia by senior leaders and main persons responsible during the period of Democratic Kampuchea[79].

In July 2010, the first Judgment regarding comrade Duch, in charge of Tuol Seng –a notorious torture centre in Phnom Penh- was handed down, he was sentenced to 35 years for murder and crimes against humanity.

Meanwhile, the intervention of the international community in the process of the establishment of these judicial bodies was limited to the approval of the agreement of the UN General Assembly by virtue of Resolution 57/228 B of 22 May 2003. Moreover, despite the fact that it was an international agreement that gave birth to this judicial body, the Cambodian state was granted wide-ranging freedom in relation to the exercise of these jurisdictional functions as the agreement envisages the possible suppression of these judicial forums should the state so decide.

1.3. THE IRAQI SPECIAL TRIBUNAL

The Iraqi Special Tribunal (IST) was established after the Second Gulf War, by Statute no. (1), dated 10 December 2003[80], approved by the Iraqi Governing Council[81]; its seat is in Baghdad.

The Tribunal has jurisdiction over genocide, crimes against humanity, war crimes and violations of Iraqi law, such as prevarication and the use of a position to follow a policy "that may lead to war or the use of the Iraqi Army against another Arab nation".

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[79] That is, the surviving leaders of the Khmer Rouge regime that governed the country between 17 April 1975 and 7 January 1979 to whom the disappearance of at least one and a half million people is attributed.

[80] The English version is available at: http://www.ictj.org/static/MENA/Iraq/iraq.statute.engtrans.pdf

[81] Said Tribunal was charged with prosecuting former president Sadam Hussein.

It has jurisdiction to prosecute the crimes committed by Iraqis or persons resident in Iraq between 17 July 1968 (the date of the Ba'athist coup) and 11 May 2003 in Iraq or in "other places", including crimes committed in the war against Iran (1980-88) and the invasion of Kuwait (1990-91).

It comprises, at least, a trial chamber with five permanent judges appointed for a term of five years, an appeals chamber with nine judges and 20 examining magistrates appointed for a three-year term.

The Iraqi Government has the possibility of appointing foreign judges and the president of the IST may choose non-Iraqi judges "specialised in war crimes" as advisors.

1.4. THE SPECIAL PANELS FOR SERIOUS CRIMES OF EAST TIMOR

An international commission of investigation on East Timor established by the UN Secretary General at the request of the Commission on Human Rights recommended that an international tribunal be set up to prosecute the persons responsible for human rights violations. Moreover, it indicated that the UN should participate throughout the investigation process in order to determine responsibility and punish the perpetrators of the abuses committed, and that it was important to effectively tackle these questions in order to ensure that future decisions of the Security Council were respected.

Instead of establishing an international tribunal, the UN accepted Indonesia's assurance that it would start investigations and prosecutions in its own courts. Meanwhile, the UN Security Council passed Resolution 1272 (1999), dated 25 October 1999, establishing the United Nations Transitional Administration in East Timor (UNTAET)[82], whose general responsibility was to run the country, being empowered to "exercise all legislative and executive authority, including the administration of justice" (Point 1), with authorisation to take all necessary measures to fulfil its mandate (Point 4), and with the requirement that those responsible for acts of violence be brought to justice (Point 16).

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[82] The official website: http://www.un.org/peace/etimor/etimor.htm

The Special Panels of the Dili District Court (SPDDC), with the presence of international judges, have jurisdiction over the following serious crimes: genocide, war crimes, crimes against humanity, murder, sexual offences and torture, committed between 1 January and 25 October 1999 in the territory of East Timor by nationals, whether they actually committed them or ordered, solicited or induced others to commit them; whether they facilitated, aided or otherwise abetted the commission of crimes; who will be held individually responsible, regardless of any official capacity they may hold or of whether the crime was committed following an order from a commander or other superior[83].

Moreover, in relation to personal and territorial jurisdiction, these Special Chambers have “universal jurisdiction", which means that they are competent if the serious crime in question was committed within the territory of East Timor, by a citizen of East Timor; or if the victim of the serious crime was a citizen of East Timor[84].

Finally, the applicable law was both international humanitarian law and the laws of East Timor[85].

1.5. THE SPECIAL TRIBUNAL FOR LEBANON

On 13 December 2005, the Government of the Lebanese Republic asked the UN to establish an international tribunal to prosecute those responsible for the bombing that took place on 14 February 2005 in the city of Beirut which killed former Lebanese primer minister Rafiq Hariri and another 22 people. This action led to an immediate response from the Security Council highlighting the negative effect that this attack had had on the unstable geopolitical balance in the Lebanon[86].

Pursuant to UN Security Council Resolution 1664 (2006), the UN and the Lebanese Republic negotiated an agreement on the establishment of a Special Tribunal for the

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[83] See UNTAET Regulations 2000/11 and 2000/15.

[84] Sections 2.1 and 2.2 of UNTAET Regulation 2000/15.

[85] For example, sexual offences were to be governed by the Criminal Code of East Timor (Sections 8 and 9 of UNTAET Regulation 2000/15).

[86] The classification of this act as terrorism gave rise to the creation of an International Independent Investigation Commission, which was given the mission of cooperating with the Lebanese authorities in investigating the same; RODRÍGUEZ BARRIGÓN, JM, *Op. cit.*, page 339.

Lebanon (STL). When the UN Security Council passed Resolution 1757 (2007), dated 30 May 2007, the provisions of the annexed document, including the Statute of the STL in the form of an appendix, entered into force on 10 June 2007.

The seat of the STL was to be outside of the Lebanese state in order to guarantee the performance of its functions in an independent and impartial manner[87].

The composition of the Tribunal is mixed, comprising national and foreign judges, with the latter forming a majority.

The mandate of the STL[88] is to prosecute persons responsible for the attack of 14 February 2005 resulting in the death of former Prime Minister Rafiq Hariri and in the death or injury of other persons. This UN decision to create a new *ad hoc* tribunal to investigate and prosecute specific crimes is difficult to explain if we take into account that the ICC, a body with similar jurisdiction, already existed[89].

The jurisdiction of the STL may be extended beyond the 14 February 2005 bombing if the Tribunal finds that other attacks that occurred in Lebanon between 1 October 2004 and 12 December 2005 are connected, in accordance with the principles of criminal justice, and are of a nature and gravity similar to the attack of 14 February 2005. This connection includes but is not limited to a combination of the following elements: criminal intent (motive), the purpose behind the attacks, the nature of the victims targeted, the pattern of the attacks (modus operandi), and the perpetrators. Crimes that occurred after 12 December 2005 can be eligible to be included in the Tribunal's jurisdiction under the same criteria if it is so decided by the Government of the Lebanese Republic and the United Nations with the consent of the Security Council.

As for the applicable law, according to Article 2 of its Statute, Lebanese criminal law will apply to the prosecution and punishment of the offences in question. We are thus dealing with the first tribunal "of an international nature" whose exclusive mission is the prosecution of crimes defined and configured in a national legal system[90].

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[87] The UN and the Netherlands signed a Headquarters Agreement on 21 December 2007.

[88] The official website is in English, French and Arabic: http://www.stl-tsl.org/

[89] RODRÍGUEZ BARRIGÓN, JM, *Op. cit.*, page 340.

[90] RODRÍGUEZ BARRIGÓN, JM, *Op. cit.*, page 343.

OTHER INTERNATIONAL COURTS

1.1. OF A UNIVERSAL SCOPE: THE INTERNATIONAL COURT OF JUSTICE

The International Court of Justice (ICJ), based in The Hague (Netherlands), is the main judicial body of the UN[91]. It was established by the Charter of the United Nations, signed on 26 June 1945 in San Francisco, and aims to attain one of its main objectives: "to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace". This is in contrast to the international criminal courts we have seen whose ultimate purpose is to contribute to restoring peace. To put it another way, the function of this court is preventive, while that of the others is suppressive.

The ICJ functions according to a Statute[92] which forms part of the Charter, as well as in accordance with its own Regulations. Its work began in 1946, when it replaced the Permanent Court of International Justice (PCIJ), established in 1920 under the auspices of the League of Nations.

The ICJ has 15 judges chosen by the General Assembly and the Security Council in independent votes. They are chosen on merit and not on the basis of nationality although an effort is made to ensure that the main legal systems existing in the world are represented on the ICJ. There cannot be two judges from the same state. The term of the mandate of the judges is nine years and they may be re-elected.

The function of the ICJ is twofold: to resolve, pursuant to international law, the legal disputes that states present and to issue advisory opinions on legal matters when requested by the specialised bodies and organs of the United Nations duly authorised to do so[93]. Individuals cannot take recourse to the ICJ.

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[91] The official website is in English, *International Court of Justice* (ICJ), and French, Cour Internationale de Justice (CIJ), and there is a link to documents in Spanish: http://www.icj-cij.org/

[92] http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0

[93] Both the General Assembly and the Security Council may request an advisory opinion of the ICJ on any legal question. Other UN organs and specialised bodies may request advisory opinions on legal questions that correspond to their sphere of activity with the authorisation of the General Assembly.

The jurisdiction of the ICJ covers all the disputes that the states submit to it and all matters envisaged in the Charter of the United Nations or in the treaties and conventions in force (for example, the resolution of disputes between two or more states parties related to the interpretation or application of UN Conventions against Translational Organised Crime and against Corruption, among others)[94].

The states may undertake in advance to accept the jurisdiction of the ICJ in special cases, either by signing a treaty or convention that stipulates that the case will be submitted to the Court or by means of a special declaration to that end. These declarations of obligatory acceptance of the jurisdiction of the ICJ can exclude certain types of cases.

Pursuant to Article 38 of its Statute, in resolving the disputes submitted to it, the ICJ applies:

- international conventions, whether general or particular, establishing rules expressly recognised by the states parties to the dispute;
- international custom, as evidence of a general practice accepted as law, and;
- judgments as well as the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

If the parties so agree, the ICJ may also decide a case *ex aequo et bono*.

1.2. THE EUROPEAN REGIONAL SPHERE

1.2.1. THE EUROPEAN COURT OF HUMAN RIGHTS

Within the European system for the protection of human rights we have the European Court of Human Rights (ECHR)[95], linked to the Council of Europe (CE), a regional

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[94] For example, the resolution of disputes between two or more states parties related to the interpretation or application of an international treaty or convention that cannot be resolved by means of negotiation within a reasonable term will, at the request of one of the states parties, be submitted to arbitration. In the absence of agreement on the organisation of the arbitration, either of the states parties may refer the matter to the ICJ by means of a request pursuant to its Statute. See Article 35 of the UN Convention on Transnational Organised Crime, Article 66 of the UN Convention against Corruption, or even, in the context of the Council of Europe, Article 42 of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime.

[95] The official website is in English, *European Court of Human Rights*, and French, Cour européenne des

cooperation organisation. The ECHR was created in 1959 and has its seat in Strasbourg (France).

It is a body with international jurisdiction, with the power to deal with requests from individuals or contracting states alleging violations of the civil and political rights declared in the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950.

1.2.2. THE COURT OF JUSTICE OF THE EUROPEAN UNION

Since its creation in 1952, the Court of Justice of the European Union (CJEU)[96] linked to the European Union (EU), a regional integration organisation, is based in Luxembourg and its mission is to ensure that "the law is observed in the interpretation and application" of the Treaties.

As part of that mission, the Court of Justice:

- reviews the legality of the acts of the institutions of the European Union;
- ensures that the Member States comply with their obligations under Community law;
- interprets Community law at the request of the national courts and tribunals.

It is the judicial authority of the EU and, in collaboration with the courts of the Member States, it ensures the uniform application and interpretation of Community law.

The Court of Justice of the European Communities, based in Luxembourg, consists of three jurisdictional bodies (Article 19 of the Treaty on European Union):

- the Court of Justice (comprised of one judge from each Member State assisted by advocates general);
- the General Court (with at least one judge per Member State);
- the specialised courts.

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droits de l'homme, with a link to documents in Spanish: http://www.echr.coe.int/echr/

[96] The official website is available in all the EU languages (22 in total): http://curia.europa.eu/jcms/jcms/Jo1_6308/

The Court of Justice of the EU is called upon to hear appeals lodged by a Member State, by an institution or by national or legal persons and also regarding preliminary questions referred to it on the interpretation of EU law (Article 19.3 TEU). Moreover, the Treaty on the functioning of the EU recognises its competence for legislative initiative (Articles 289.4 and 294.15).

It also envisages the creation of a **European Prosecutor's Office** based on Eurojust, unanimously approved by the Council, following consent from the European Parliament, in order to combat offences that harm the EU's financial interests (Article 86.1 TFEU), and in order to do so it will be responsible for discovering the perpetrators of the offences, bringing criminal proceedings and requesting that they be tried, in the context of a criminal prosecution.

1.3. THE AMERICAN REGIONAL SCOPE:

1.3.1. THE INTER-AMERICAN COURT OF HUMAN RIGHTS

Within the American system for the protection of human rights and with similar functions to the ECHR, we have the Inter-American Court for Human Rights (ICHR)[97], based in San José de Costa Rica, an autonomous judicial institution of the Organisation of American States (OAS) whose objective is the application and interpretation of the American Convention on Human Rights and other treaties concerning the same matters. It was established in 1979.

It is formed by jurists of the highest moral standing and widely recognised competence in the area of human rights, who are elected in an individual capacity.

1.3.2. THE CENTRAL AMERICAN COURT OF JUSTICE

La Central American Court of Justice (CCJ), based in Managua, forms part of the Central American Integration System (SICA) aimed at guaranteeing "respect for the law in the interpretation and execution of the present Protocol and its supplementary instruments or acts pursuant to it".

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[97] Its website is in English and Spanish: http://www.corteidh.or.cr

The CCJ guarantees “respect for the law in the interpretation and execution of the Protocol of Tegucigalpa with amendments to the Charter of the Organisation of Central American States (ODECA) and its supplementary instruments or acts pursuant to it"[98]. We should not forget that the protection, respect and promotion of human rights constitutes the fundamental base of the SICA. In this regard it is solemnly proclaimed that the CCJ represents the national conscience of Central America and, moreover, is considered the depository and custodian of the values that constitute the Central American Nationality.

The CCJ will have jurisdiction to hear any grievance submitted to it *ex parte* and rule with *res judicata* authority, and its doctrine will be binding for all states, bodies and organisations that form part of or participate in the SICA, and for all legal persons.

The procedures envisaged in this Statute and those established in the regulations and laws are aimed at safeguarding the purposes and principles of the SICA, the objectivity of rights, the equality of the parties and the guarantee of due process of law.

It is worth highlighting that by virtue of a mandate of the Heads of State and Government of the SICA, on 2 December 2005 a Central American Treaty on Arrest Warrants and Simplified Extradition was adopted. This means that taking into account the functions of the CCJ in the protection of human rights, the court could deal with issues of a criminal law nature.

1.3.3. THE COURT OF JUSTICE OF THE ANDEAN COMMUNITY

The Court of Justice of the Andean Community (CJAC), based on the city of Quito, is the supranational court of the Andean Community of Nations (CAN), of a permanent nature, created to establish the law of sub-regional integration and ensure uniform interpretation and application of the same.

In the Preamble to the Treaty creating the CJAC, the Governments of the Member States declare that "... the stability of the Cartagena Agreement and of the rights and obligations arising from it must be safeguarded by a high-ranking judicial authority independent of the Governments of Member Countries and of the other bodies of the

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[98] **Tegucigalpa Protocol to the Charter of the Organization of Central American States (ODECA)**

Cartagena Agreement, capable of ruling on community law, settling disputes arising from it and consistently interpreting it".

It exercises its jurisdiction in the territory of the four Member States and is competent to act as the final interpreter of the legal system of the Community (preliminary interpretation question), as well as ensuring that the Member States observe it (action due to breach) and of the organs and institutions of the Andean Integration System (nullity action, appeals on the grounds of omission or inactivity, legality questions). It is also responsible for labour matters and has an arbitral function.

The Andean Community, despite being a regional integration organisation, has not yet formalised specific agreements on international legal cooperation.

Madrid, 3 December 2012

LEVEL III: REFERENCE DOCUMENTATION

WEBSITES

United Nations: http://www.un.org/

UN Treaties: http://untreaty.un.org

Ad hoc International Criminal Tribunals

- International Criminal Tribunal for the former Yugoslavia, created by UN Security Council Resolution 827 (1993) of 25 May 1993 by virtue of Chapter VII of the UN Charter (http://www.icty.org/)
- International Criminal Tribunal for Rwanda, created by UN Security Council Resolution 995 (1994) of 8 November 1994 by virtue of Chapter VII of the UN Charter (http://69.94.11.53/)

International Criminal Court

- Rome Statute of the International Criminal Court. Rome, 17 July 1998 (http://www.un.org/law/icc/index.html)
- The Elements of Crimes, the Rules of Procedure and Evidence, the Regulations of the Court, the Regulations of the Office of the Prosecutor, the Regulations of the Registry, the Code of Judicial Ethics, the Staff rules of the ICC, Staff Regulations, the Agreement with the UN, the Agreement on Privileges and Immunities, Financial Regulations and Rules governing Financial Management. (https://www.icc-cpi.int/fr%20meus/icc/legal%20texts%20and%20tools/Pages/legal%20tools.aspx)

Internationalised courts

- Special Court for Sierra Leone (http://www.sc-sl.org/)
- Special Chambers of the Courts of Cambodia (http://www.eccc.gov.kh/)

- Iraqi Special Court (http://www.iraq-ist.org/en/home.htm)
- Special Panels for Serious Crimes in East Timor (http://www.un.org/peace/etimor/etimor.htm)
- Special Tribunal for Lebanon (http://www.stl-tsl.org/)

Other International Courts

- International Court of Justice (http://www.icj-cij.org/)
- Inter-American Court of Human Rights (http://www.corteidh.or.cr)
- Central American Court of Justice
- Court of Justice of the Andean Community
- European Court of Human Rights (http://www.echr.coe.int/echr/)
- Court of Justice of the European Union (http://curia.europa.eu)

Transitional Justice

- International Centre for Transitional Justice (http://www.ictj.org/en/)

Madrid, 3 December 2012