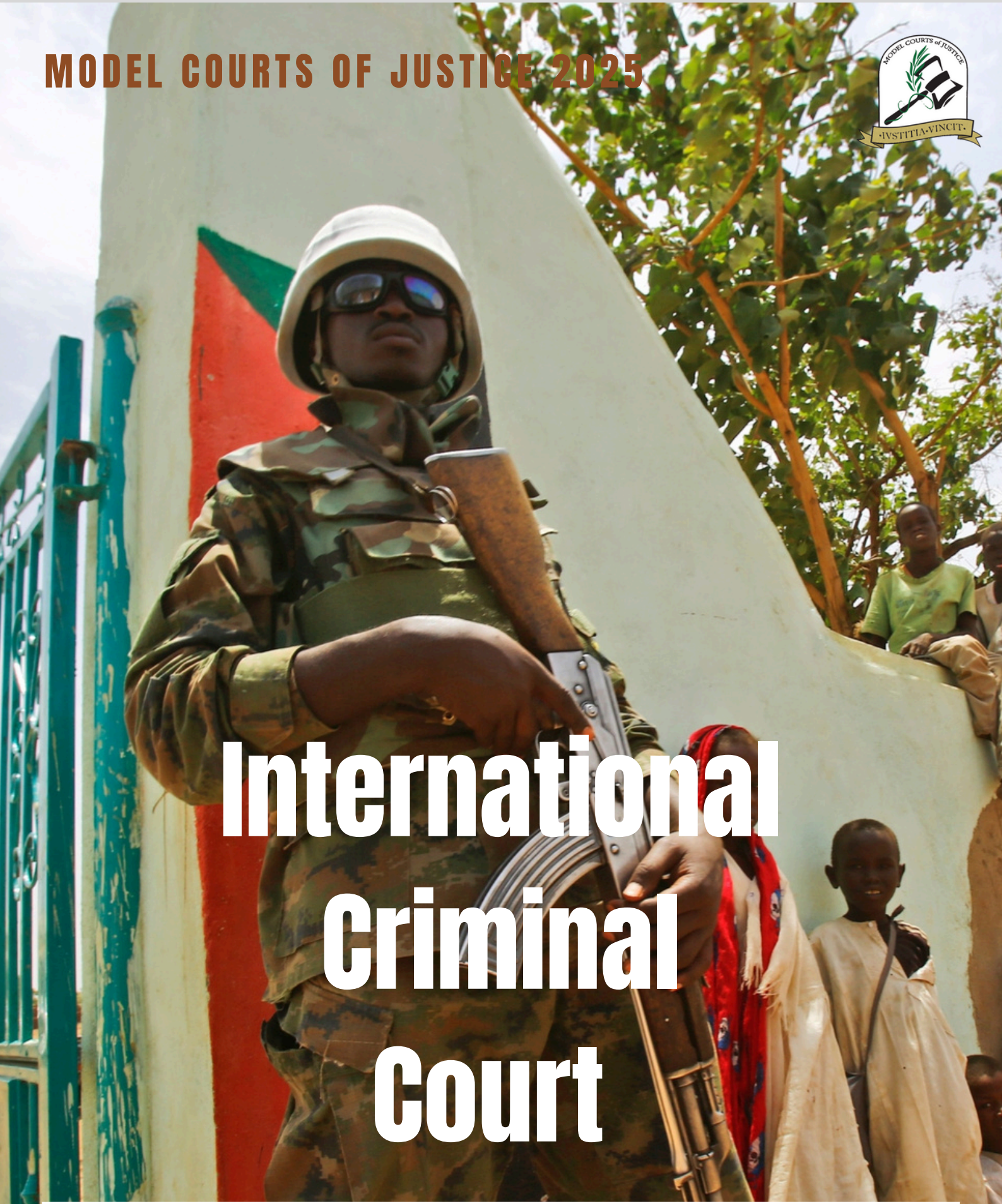
MODEL COURTS OF JUSTICE 2025



International Criminal Court

Written by Rana Elif Taze
Supervised by Aydan Seyidaliyeva

16 PEACE, JUSTICE AND STRONG INSTITUTIONS

LETTER FROM THE SECRETARY-GENERAL

Highly Esteemed Participants,

It is my pleasure to welcome you all to the 13th Edition of the Model Courts of Justice as the Secretary-General. My name is Aydan Seyidaliyeva and I am a junior law student at Ankara University, currently on her Exchange Program at Utrecht University Law School.

The participants of the Model Courts of Justice 2025 will be focusing on the fields of international humanitarian law, international criminal law and most importantly the customary law in terms of immunity from the jurisdiction of the International Criminal Court. The case that will be simulated this year is *'The Prosecutor v. Omar Hassan Ahmad Al-Bashir'*. In this regard, the participants, will have the opportunity to practice their subjects and improve their written and oral skills with regards to criminal proceedings.

I would first like to express my gratitude to Miss Rana Elif Taze for excelling in the writing of the entire academic material for this court and always being more than enough despite many difficulties she has encountered. Second, I appreciate the trainee of the International Criminal Court Mr Ali Seyidaliyev for his significant progress and dedication for the Academic Team of the Model Courts of Justice 2025. Last, I would like to thank the Director-General of the Model Courts of Justice 2025 and the most valuable source of our motivation throughout the entire preparation process, Miss Elfin Selen Ermiş for enduring organizational excellence and professionalism with her wonderful organization team despite uncountable obstacles and the given conditions.

Before attending the sessions, I highly recommend that all the participants read the Study Guide and Rules of Procedure and prepare the printed versions of these documents with them to refer to during the Conference.

If you have any questions or hesitations about the Conference, please do not hesitate to contact me at secretarygeneral@modelcj.org

Sincerely,

Aydan Seyidaliyeva

Secretary-General of the Model Courts of Justice 2025

LETTER FROM THE UNDER-SECRETARY-GENERAL

Esteemed Participants,

I am Rana Elif Taze, and I am a junior law student at Ankara University. It is my honour to welcome you all to the thirteenth edition of Model Courts of Justice the distinguished international law conference of Ankara University.

This edition of the Model Courts of Justice, the International Criminal Court, will simulate the case of The Prosecutor v. Omar Hassan Ahmhocal-Bashir. This case has significance in matters related to the jurisdiction of the ICC in general and the immunity of the heads of state before the ICC. In this case, it will be considered the elements of crimes against humanity, war crimes, and genocide and discussed whether Omar Hassan al-Bashir has immunity against the alleged crimes.

While I conclude my words here, I would like to state that this Study Guide has been written and completed diligently and with devotion from all around Europe: Zagreb, Budapest, Istanbul, Odense, Paris, Rome, Vienna, Munich, and Frankfurt. To be a USG as an Erasmus Student at the same time was not easy. Still, thanks to the greatest efforts and support of the Secretary-General, Ms. Aydan Seyidaliyeva, I could serve for this year's edition. Additionally, this conference would never be possible without the utmost devotion of our Director General, Ms. Elfin Selen Ermiş. They achieved the impossible despite the all challenges and are now presenting this conference proudly. Finally, I would like to thank both the members of the Academic team and the Organisational team for their distinguished contributions.

Kindest regards,

Rana Elif Taze

Under-Secretary-General for the International Criminal Court

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I. INTRODUCTION TO INTERNATIONAL CRIMINAL LAW

1. The Notion of the International Criminal Law

International criminal law (ICL) is one of the newest branches of law. It is designed to prohibit certain categories of serious atrocities, to make perpetrators criminally accountable for their acts, and it principally deals with genocide, war crimes, crimes against humanity (CAH) and crimes of aggression.[1] ICL offences grew out of Public International Law (PIL), International Humanitarian Law (IHL), International Human Rights Law (IHRL), and as well as Criminal Law[2]. However, there are no certain boundaries of ICL. Even today, there are still disagreements between academics and practitioners about the framework of international criminal law.[3]

The roots of international criminal law date back to the end of the 18th century and 19th century. In the later 18th century, there were some protections for individuals provided by international law through the laws of war. Initially, only war crimes were mentioned during the whole millennia. The concept of war crimes evolved as customary law.[4] When it comes to the later 19th century several European states attempted to codify these norms with, as it is explained below, "The Law of Hague" and "The Law of Geneva."[5] Thus, the history of modern ICL mostly starts with the post-World War II era. By that time some tribunals had been held, for instance, the International Military Tribunal (Nuremberg Trials) and the International Military Tribunal for the Far East (Tokyo Tribunals). It was the time that two furtherly-mentioned bodies of law had been converged: international public law and criminal law.

The above-mentioned convergence is not limited to given trials. International Criminal law governs and concerns inter-state relations, responsibilities, and rights of the states. On the other hand, criminal law makes prohibitions on individuals and brings penal sanctions on individuals

[1] Michelle Burgis-Kasthala 'Holding Individuals to Account Beyond the State? Rights, Regulation and the Resort to International Criminal Responsibility' [2017] Regulatory Theory 429-444.

[2] *Ibid.*

[3] Ronald C.Syle, Beth Van Schaack *International Criminal Law: Essentials* (Aspen Publishers 2009) 1-47.

[4] Customary law is a set of laws based on the traditions, customs, or norms of a local community

[5] 'Developments in the Law - International Criminal Law' (2001) 114 Harv L Rev 1943.

which have been imposed by a nation state[6]. When it comes to International Criminal law, it takes its source from international law but brings penal sanctions on individuals.

In sum, it is possible to say that the main idea behind International Criminal Law is to hold accountable the individuals who have perpetrated atrocity crimes in the name of international society and enlighten of sources of international law and customs.

2. The History of International Criminal Law

a. Early Developments of International Criminal Law

As mentioned earlier, it is possible to date international criminal law back to the 18th century. Even though there was no certain vision, within the meaning of today, of ICL, traces of it could be found. Significant steps regarding ICL were taken by the abolition of piracy and slavery later in the 1800's. Up until these developments, ICL primarily focused on acts committed by a state against the nationals of another state. In short, only war crimes were considered until that time. With the recognition of piracy and slavery, private actors of such offences also are considered by the field of International Criminal Law. [7]

Piracy was widespread in the 18th and 19th centuries, and there was no international tribunal to sentence these actions since these offences were committed on the high seas. The prohibition of piracy opened the way for the notion of universal jurisdiction, and thus to notion of ICL. On the other hand, the abolition of slavery and the slave trade was another important step for the story of ICL and international human rights. In the 1815 Vienna Congress, slavery was mentioned as "repugnant to the principles of humanity and universal morality." Following that, the 1890 Convention Relative to the Slave Trade and Importation into Africa of Firearms, Ammunition, and Spiritous Liquors (the Brussels Act) called all signatories to criminalize slave

[6]Mihaela Aghenitei & Ion Flaminzeanu, 'International Criminal Law' (2015) JL & Admin Sci 345.

[7] Ronald C.Syle, Beth Van Schaack *International Criminal Law: Essentials* (Aspen Publishers 2009) 1-47.

trade and prosecute offenders. It would not be wrong to say that this was another early-example of universal jurisdiction. [8]

Another vital source of International Criminal Law is International Humanitarian Law. IHL defines rules regarding in terms of armed conflicts. The first multilateral IHL treaty in History is the 1856 Paris Declaration Respecting Maritime Law. This declaration addressed the privateering and neutrality of commercial ships in times of war. It was followed by the First Geneva Convention of 1864. From the IHL perspective, The Geneva Conventions and The Hague Conventions were the most significant developments. The Hague Conventions are 14 and each of them is focused on different issues. The First Hague Conventions (1899) titled Pacific Settlements of International Disputes was signed but never ratified.[9] The other Hague Conventions can be listed as follows: the Laws and Customs of War on Land (Hague II), Maritime Warfare (Hague III), the Launching of Projectiles and Explosives from Balloons (Hague IV, 1), Asphyxiating Gases (Hague IV, 2), and Expanding Bullets (Hague IV, 3), the Rights and Duties of Neutral Powers and Persons in Case of War on Land (Hague V), the Status of Enemy Merchant Ships at the Outbreak of Hostilities (Hague VI), the Laying of Submarine Automatic Contact Mines (Hague VIII), Bombardment by Naval Forces in Time of War (Hague IX), Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention (of 6 July 1906) (Hague X), Convention relative to Certain Restrictions with regard to the Exercise of the Right of Capture in Naval War (Hague XI), Convention relative to the Establishment of an International Prize Court (Hague XII), Convention concerning the Rights and Duties of Neutral Powers in Naval War (Hague XIII), and the Discharge of Projectiles and Explosives from Balloons (Hague XIV). As can be seen in the previous sentence, the Hague Conventions (“The Hague Law”), defined the means and methods of warfare, limited the tactics of war, and prohibited the usage of certain weapons. The Hague Conventions also introduced the Martens Clause, which will be explained further in the following parts.[10]

[8] *Ibid.*

[9] *Ibid.*

[10] *Ibid.*

The International Committee of the Red Cross (ICRC), which will also be explained later, was established by the First Geneva Convention in 1864. After that, the 1949 Geneva Conventions and the following protocols were sponsored by the ICRC. Geneva Conventions ("The Geneva Law"), provided protection for individuals impacted by war, especially those who do not or no longer participate directly in hostilities, such as the shipwrecked, prisoners of war (POW), and the civilian and non-combatants (*hors de* combat*).* Four classes of individuals are specifically protected: the wounded and the sick in the field of combat, wounded and sick at sea, prisoners of war, other civilians, and non-combatants. [11]

The aftermath of World War I was the first genuine global effort to address international crimes through the exercise of international and domestic criminal jurisdiction. After the War, the Central Powers[12] were accused by Allied Forces[13] of several offences. Germany was accused of atrocities, including unrestricted submarine warfare, brutal occupations, the targeting of civilians and undefended towns, breaches of neutrality, and the initiation of the war in the first place. On the other hand, the Ottoman Empire was accused of perpetrating genocide against the Christian Armenian Population, which is located in south-eastern Anatolia. It was one of the first genocide accusations in modern history. Thus, with these accusations, there were also some contrasting arguments regarding that trials would exacerbate instability in the fledgling Weimar Republic and in Turkey, where new governments were struggling to consolidate their authority in the wake of the war. Also, it was possible that the trials could create a new dangerous conflict atmosphere for the Allied Forces again. In the end, only a handful of individuals were tried, and those who were prosecuted were essentially exonerated. This failed history was ever present since a mere two decades later as a world war once again ravaged the globe.[14] The attempts after World War I failed mostly because of fragile unity and resolving among the Allies in the immediate post-war period.

[11] *Ibid.*

[12] Central Powers included: The Ottoman Empire, Austria-Hungarian Empire, German Empire and Bulgaria.

[13] Allied Forces included: The United Kingdom, Frances, Russia, The United States, Italy.

[14] *Ibid.*

b. International Criminal Tribunals

The roots of international criminal law might be regarded as attempts in the 19th century. However, the actual developments in the field are mostly dates to the post-World War II era. After World War II, the Allied Powers as the victorious party of the War, established two International Military Tribunals: The International Military Tribunal ("Nuremberg Tribunals") in Germany and the International Military Tribunal for the Far East ("Tokyo Tribunals") in Japan. These tribunals were established to prosecute high-level German and Japanese military and civilian authorities. According to the Allies, the offences conducted by the perpetrators "*had no particular geographic localisation*."[15]

The Nuremberg Tribunal was established by the London Agreement of August 8, 1945, among France, The United Kingdom, The Soviet Union, and the United States. However, the Tokyo Tribunal was established by U.S. General Douglas MacArthur, who was the Supreme Allied Commander of the Far East. Following this, other Allied forces approved this. As a consequence of these developments, the codification of ICL also began with the promulgation of treaties addressing genocide, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and addressing war crimes with the 1949 Genova Conventions.

Nuremberg Tribunals convened from 20 November 1945 to 1 October 1946. The twenty-four Nazi leaders were tried by the International Military Tribunal, which consisted of judges from four Allies. In the aftermath of the trials, three Nazi leaders were acquitted, seven of them were sentenced to ten years of imprisonment and the other eleven were sentenced to death. The other remaining 3, either was very ill to try or suicided before trials.

Tokyo Tribunals were held between 3 May 1946 to 12 November 1948. Right before these trials, the Japanese Cabinet launched war crimes trials of Japanese defendants to prevent subsequent trials by the Allies. 8 people were tried. However, it did not work, and all were subsequently retried by Tokyo Tribunals. In total, 28 people who had various high-governmental roles have been tried. Seven defendants were sentenced to death by hanging, sixteen defendants to life imprisonment, one to 20 years of imprisonment, and one to 7 years

[15] Ronald C.Syle, Beth Van Schaack *International Criminal Law: Essentials* (Aspen Publishers 2009) 1-47.

of imprisonment. Interestingly, by the 1950s, most of the Tokyo defendants who were sentenced to imprisonment had been paroled. Furthermore, two of the defendants returned to their high government positions in Japan.

The trials did not end there. In addition to the Nuremberg and Tokyo trials, more than five thousand trials other trials were held. The United States itself hosted 12 key trials. Each of them has a theme and an appropriate name. For instance, The Hostages Trial, The Einsatzgruppen Trial, The Doctors Trial, The Ministers Trial, The High Command Trial, and so on. In total, as stated, 5,000 trials were held of German and Japanese POWs accused of committing war crimes and CAH.

Following these, there were also domestic activities related to ICL. The most argued and well-known one was the trial of Adolf Eichmann. Eichmann worked for Nazis for years in the department of mass deportations from Eastern Europe to ghettos and extermination camps. After the surrender of Germany, U.S. troops detained him in internment camps. However, he escaped by traveling to Argentina with a fake passport and lived there until 1960. In 1960, Israeli Mossad agents abducted him. This caused a diplomatic crisis between Argentina and Israel. The crisis went before the UN Security Council. The council condemned Israel because of the kidnapping and ordered Israel to make "appropriate restitution".[16] Israel Eichmann was charged with crimes against humanity, war crimes, and "crimes against Jewish people" under the Israeli 1950 Nazi and Nazi Collaborators Punishment Law. In his defence, Eichmann argued that Israeli Courts could not prosecute him under *ex post facto*[17] legislation for acts that he *allegedly* committed before Israel existed. He also added that he was following the orders. Notwithstanding, he was convicted and sentenced to death by hanging in 1962.

Another similar domestic activity was the Klaus Barbie Case in 1987. Klaus Barbie was the head of the Gestapo in Lyon, and he was also called the "Butcher of Lyon". He was prosecuted for crimes against humanity in connection with his involvement in the deportation of French

[16] United Nations Security Council (UNSC) Res 138 S/4349 (Signed on 23 June 1960).

[17] Retrospectively

Jews and partisans during World War 2. He has already been prosecuted for these offences but these verdicts had lapsed while he was in exile in Bolivia.

Barbie, sentenced to life imprisonment, however, died after four years of serving the sentence.

As time passes, with the help of these above-mentioned developments, the international society has started to build a regime of international human rights.[18] The Universal Declaration of Human Rights was released in 1948. In addition to that declaration two Covenants, which are twins, followed in 1966. These Covenants were regarding to protection of civil and political rights of the civilians[19] and economic, social, and cultural rights[20]. Over time, states increasingly consented to more enforcement mechanisms by human rights institutions such as expert committees, human rights reports, monitoring human rights practices, accepting individual complaints and petitions, and so on. These institutions sometimes were domestic, regional or international. All these treaties and institutions created new norms regarding the common law of international human rights law and ICL.

c. Rome Statute and Establishment of International Criminal Court

In the late 1980's and early 90's, genocide has shown itself within Europe in different forms. For instance, deportation, concentration camps, "ethnic cleansing," and mass killings, especially against the Bosnian Muslims in former Yugoslavia[21]. There were conflicts in the former Yugoslavian territory, around Bosnia, in 1992-1995. The UN Security Council ("UNSC") addressed the conflict in several resolutions. Resolution 780, adopted on 6 October 1992, The Security Council directed Boutros Boutros-Ghali to establish a Commission of Experts to document violations of international law. As these investigations were ongoing, governments and intra-governmental and non-governmental organizations called for the

[18] Ronald C.Syle, Beth Van Schaack *International Criminal Law: Essentials* (Aspen Publishers 2009) 1-47.

[19] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

[20] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 2200A (XXI).

[21] Ronald C.Syle, Beth Van Schaack *International Criminal Law: Essentials* (Aspen Publishers 2009) 1-47

creation of an *ad hoc*[22] international tribunal for the documented abuses. With Resolution No 808, on 22 February 1993, the Security Council unanimously decided that "*an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991*".[23] After that, Boutros-Ghali prepared a specific proposal for such a tribunal. In his subsequent report, he presented a tribunal scheme and appended a draft statute setting forth existing international humanitarian and criminal law. By its power in Chapter VII in the United Nations Charter, the Security Council unanimously adopted a draft statute in Resolution No 827 on 25 May 1993. With this, the International Criminal Tribunal for Yugoslavia ("ICTY") was established. The next year, another massive genocide situation occurred in Rwanda. Upward 800,000 Tutsi and Hutu individuals perished within four months, a rate of killing that exceeds further than Nazi Holocaust. The Security Council did not remain unresponsive against almost a million dead in Rwanda and established the International Criminal Tribunal for Rwanda ("ICTR") with Resolution No 955. Also, with this resolution, the UNSC stated that widespread violations of international law, largely within the borders of a single state, constituted a threat to international peace and security within the meaning of Chapter VII of the UN Charter.

In addition to the ad hoc tribunals in Yugoslavia and Rwanda some other ad hoc tribunals have been established from outside the Security Council to respond to massive crimes committed in Sierra Leone, Cambodia, and East Timor.

The relative success of ICTY and ICTR served as further inspiration for the idea of establishing an international criminal court. After holding six separate sessions, the Preparatory Committee prepared a consolidated draft Statute that served as the basis for comprehensive negotiations at a Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court held in Rome, Italy, from 15 June 1998 to 17 June 1998.[24] The final statute is called the Rome Statute of the International Criminal Court (also called "ICC Statute" or "Rome Treaty").

[22] Created or done for a particular purpose when it is necessary.
[23] United Nations Security Council (UNSC) Res 808 S/RES/808 (Signed on 22 February 1993).
[24] *Ibid.*

The Statute was completed and adopted at the Diplomatic Conference. Delegations of 120 states, multiple observers, intergovernmental organisations, and hundreds of non-governmental organisations attended the Conference. Only seven states voted against the Statute: The United States, Yemen, Iraq, China, Israel, Qatar, and Libya. Consequently, the International Criminal Court entered into force in 2002 with the deposit of the 60th instrument of ratification. International Criminal Court has jurisdiction over war crimes, CAH, genocide, and crimes of aggression. However, in the first edition of the Statute, the crimes of aggression (or with its former description, "crimes against peace") did not take place because there was no definition agreed upon. The definition of this offence argued for years. Finally, between 2009 and 2010 a Review Conference was held by the International Criminal Court to consider adopting aa definition of aggression. The ICC started its first hearings in 2006 pursuant to the multilateral Rome Statute to investigate, prosecute, and try individuals accused of genocide, war crimes, and crimes against humanity and to sentence with imprisonment the individuals who are found guilty. Today, it is headquartered in the Netherlands at the Hague.

3. Sources of International Criminal Law

As stated previously, international criminal law mostly has common sources as public international law. ICL mainly has five sources; three of them are primary, and the other two are subsidiary, which means they are not directly binding. The sources of international law are defined in Article 38 of the International Court of Justice statute. These five sources are as follows:

1) International conventions
2) Customary international law
3) General principles of international law
4) Judicial decision (subsidiary source)
5) Scientific opinions, writings of scholars (subsidiary source)

The order of searching for a rule is the same as the list above. The one who is looking for a norm should first look at the rules of international conventions. For the ICL, these conventions may be the ICC Statute and the Vienna Convention. If there is a lack or gap, then customary international law rules should be applied. Even if these rules are not sufficient and not

responding the need, then general principles of international law may be used. These principles may be related to human rights law and international humanitarian law due to the close links between international criminal law and these fields. If there is still a gap or some parts are missing, then subsidiary sources might be used. Firstly, previous judgments of international courts and maybe even national courts could be checked. As a last resort, it is possible to use the doctrine and writings of scholars. It is important to bear in mind that since it is also stated in its name, the last two are subsidiary and can only be used when the primary sources are not responding to the problems or needs.[25]

In section 3 of the Vienna Convention on the Law of Treaties, the implementations of the treaties, entry into force, provisional application, observance, application, and interpretation of treaty matters are regulated. Especially the articles between 31-33 are important regarding the interpretation of treaty issues. On the other hand, there are also regulations that are made by the ICC. Article 21 of the Rome Statute carries the *Applicable Law* heading and regulates directly the sources of ICL for the ICC. In addition to that, the part 3 of the Rome Statute "General Principles of Law" is also important.

4. Principles of International Criminal Law

As with the other fields of law, it is also important for international criminal law to define some principles and be bound by them. There are four principles of ICL in general. These principles are defined within the historical process of ICL. These three principles as follows:

a) *nullum crimen, nulla poena sine lege* (The principle of legality)

b) *lex prospicit non respicit* (The principle of non-retroactivity)

c) *nulla poena sine culpa* (The principle of individual guilt)

d) *ne bis in idem* (The principle of prohibition of double-jeopardy)

[25] Antonio Cassese *Cassese's International Criminal Law* (3rd ed. Oxford University 2013).

a) *nullum crimen, nulla poena sine lege* (The Principle of Legality)

The principle of legality is the most important and the most non-arguable principle of ICL. The source of this principle is actually criminal law, and it is developed in the times of customary law. *Nullum crimen sine lege* is the Latin expression for "there is no crime without law". This principle of ICL is granted by Article 22(2) of the ICC Statute. Following this, *nulla poena sine lege* is the expression for "there is no punishment without law". Which is also regulated in Article 23 of the ICC Statute. The principle of legality consists of these two milestones. In the statute, it is basically said that "*the definition of a crime shall be strictly construed and shall not be extended by analogy"*[26], and a person may only be punished of a crime that in accordance with the Statute. It is important to understand what is construing strictly and extending with analogy. To construct a crime strictly means holding an individual only with the first meaning of a definition of an offence. This brings us to "not extending by analogy." This means not extending the meaning of a law and only interpreting in the scope of that specific sentence that was provided by the exact article. However, it should be considered that the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted. This is also one of the concepts of criminal law. In this regard, we can see again the link between the ICL and criminal law itself.

***b) lex prospicit non respicit* (The Principle of Non-retroactivity)**

This principle is granted in the Article 24 of the ICC Statute. The principle of non-retroactivity is the term for application ICL in terms of time. By this principle it is granted that, a person may not be punished with an activity that is not a crime by the time that activity committed. It would not be wrong to say that it provides security to individuals on their actions. Otherwise, it would be possible to hold liable each person because of their activity. And this is also important for the predictability of the law. In the sub-clause 2 of the Article 24, it also granted that if a change in law occurs, then the person, who is investigated, prosecuted or sentenced may profit by the *law more favourable*. This linked with the interpreting law in favour of an individual.[27]

[26] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNITS 3 (Rome Statute) art.22(2).

[27] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNITS 3 (Rome Statute) art.24.

c) *nulla poena sine culpa* (The Principle of Individual Guilt)

The principle of individual guilt is regulated in Article 25 of the ICC Statute. This principle is also one of the concepts that is taken from criminal law. *Nulla poena sine culpa* refers to that there is no punishment for a person who did not commit a crime. With this principle, it also granted that it is impossible to hold a person accountable because of an offence that is not perpetrated by that person. In the statute the principle of individual guilt is explained as: "*A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute*."[28]

d) *ne bis in idem* (The Principle of Prohibition of Double-Jeopardy)

This expression mean "not doing the same thing twice" in Latin. And for modern criminal law, therefore ICL it means there is no punsihment twice for the same offence. This principle is regulated in Article 20 of the ICC statute. According to that article, no person shall be tried because of a crime that they are already convicted or acquitted, by ICC or another court[29]. This is also important for, again, the predictiabilty of the law.

II. INTRODUCTION TO THE INTERNATIONAL HUMANITARIAN LAW

1. History of International Humanitarian Law

The term International Humanitarian Law mostly refers to developments and regulations in modern times. However, the field is way older not as a term but as a concept. According to the definition made by ICRC, IHL is a set of rules seeking to limit the effects of armed conflict, for humanitarian reasons.[30] In other words, International Humanitarian Law is an international set of rules governing armed conflicts and this concept is not new. Since ancient times, societies

[28] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNITS 3 (Rome Statute) art.25(2).

[29] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNITS 3 (Rome Statute) art.20.

[30] International Commission of the Red Cross Advisory Service on International Humanitarian Law 'What is International Humanitarian Law?' (July 2004)

have always manifested efforts to diminish the effects of war. For instance, in ancient Israeli, Greek, and Roman cultures, civilians and combatants were always distinguished from each other. Similarly, in African and Islamic traditions, it is dictated that captured combatants and civilians should be treated humanely. Additionally, there are also some efforts to regulate the rules during the war in medieval times. As an example, in 1139 various rules were set by the Second Lateran Council regarding forbidding some weapons and tactics during the war.[31]

As the previous paragraph explained, IHL is one of the most codified bodies of ICL with its rich customs. Of course, these customs are followed by new rules and developments. As time passed and conflicts get harsher, new requirements have occurred, both for civilians and combatants. Modern society has responded to these requirements by holding several conferences and conventions.

a) 1864 First Geneva Convention

When it comes to modern times, it is possible to start the development of International Humanitarian Law with the 1856 Paris Declaration Respecting Maritime Law. It was not a comprehensive movement but a step. It aimed to abolish piracy in armed conflicts. Nearly all imperial states signed this convention. However, as stated above, the convention was not comprehensive, and a new attempt has been made to regulate piracy further. However, this attempt remained insufficient.

The 1863 Lieber Code, which is also known as General Order No.100, was another remarkable step. It was made during the American Civil War[32] and remarkable step because, after the Lieber Code, IHL rules increasingly applied to non-international armed conflicts as well. With this Code, issues such as martial law, military jurisdiction, and the treatment of Confederate irregular fighters, such as spies, prisoners of war, and hostages have been

[31] *Ibid.*

[32] *Ibid.*

regulated.[33] Lieber Code also was the first codification for customary international law and law of war for Europe and it became the basis of the 1907 Geneva Convention later.[34]

Following these developments, the International Committee of the Red Cross was established in 1863 and shortly after it, in 1864, the first Geneva Convention was signed by the efforts of Henry Dunant. After he witnessed the wounded and lying soldiers in Solferino during the conflict between Austria and the Kingdom of Sardinia. He wrote and published the book called "*A Memory of Solferino*." This book was about what he saw on Solferino and came up with the idea of a neutral organisation that helped wounded soldiers during the war.[35] The book was published in 1859 and caused a great shock in international society. In 1863, Dunant's book was discussed at a meeting of the Geneva Public Welfare Society. In that meeting, a committee of five was appointed to prepare a paper on the subject. The president of the committee was General Guillaume-Henri Dufour. With further developments, the name of the committee became "International Committee for Relief for Wounded Soldiers"; and then ultimately, at its meeting on 20 December 1875, it was to adopt its present name "International Committee of the Red Cross."[36] After the establishment of the Committee, on 22 August 1864 a meeting of the representatives of 12 European states had been summoned. This meeting was at the initiative of the Geneva group and met under the presidency of Dufour. The deliberations took two weeks and concluded by signing the *Convention for the Amelioration of the Condition of the Wounded in Armies in the Field.* Article 1 of this *Geneva Convention,* albeit with certain inevitable qualifications, accepted Dunant's emphasis on neutrality and with Article 7 the Red Cross symbol was recognised by states and could take the form not just of an armlet, but also of a flag to be adopted for hospitals, ambulances, and evacuation parties.[37]

In sum, this Convention established rules to govern the duty to provide relief to the wounded regardless of nationality. Additionally, it designated the Red Cross symbol as a protected ensign.

[33] Instructions for the government of armies of the United States, in the field.

[34] The Berlin and Hague Conferences.

[35] *Ibid.*

[36] Adam Roberts, 'Foundational Myths in the Laws of War: The 1863 Lieber Code, and the 1864 Geneva Convention' (2019) 20 Melb J Int'l L 158.

[37] *Ibid.*

b) 1899 and 1907 Hague Conventions

The First Hague Conference was held on the proposal of the Russian Tsar Nicholas II and his foreign minister. The proposal was made on 24 August 1898, and the Conference was held on 18 May 1899. The conference was finalised on 29 July 1899 by signing of the treaties, declarations, and final act of the Cnference. They entered into force on 4 September 1900. The 1899 Hague Conference contained three treaties and three additional declarations as follows:[38]

i. Convention for the Pacific Settlement of International Disputes
ii. Convention with respect to the Laws and Customs of War on Land
iii. Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 22 August 1864
iv. Declaration Concerning the Prohibition of the Discharge of Projectiles and Explosives from Balloons or by Other New Analogous Methods
v. Declaration concerning the Prohibition of the Use of Projectiles with the Sole Object to Spread Asphyxiating Poisonous Gases
vi. Declaration Concerning the Prohibition of the Use of Bullets which can Easily Expand or Change Their Form Inside the Human Body Such as Bullets with a Hard Covering which does not Completely Cover the Core, or Containing Indentations

A few years after the first conference, regarding the increasing agitation across the world, Tsar Nicholas II invited the nations again. The proposal belonged to the President of the USA, Theodore Roosevelt. Following this summon, the Second Hague Conference was held on 15 June 1907. During the Conference, three main issues were tried to be regulated: measures for the prevention of war, measures for the regulation of war, and measures relating to neutrality.[39] In total, the conference lasted four months and concluded with two resolutions, a recommendation, thirteen conventions, and a declaration. These conventions are as follows: the Laws and Customs of War on Land (Hague II), Maritime Warfare (Hague III), the Launching of Projectiles and Explosives from Balloons (Hague IV, 1), Asphyxiating Gases (Hague IV, 2), and Expanding Bullets (Hague IV, 3), the Rights and Duties of Neutral Powers and Persons in Case of War on Land (Hague V), the Status of Enemy Merchant Ships at the

[38] Carnegie Endowment for International Peace: Organization and Work.

[39] James L. Tryon, 'Hague Conferences' (1910-1911) 20 Yale LJ 470.

Outbreak of Hostilities (Hague VI), the Laying of Submarine Automatic Contact Mines (Hague VIII), Bombardment by Naval Forces in Time of War (Hague IX), Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention (of 6 July 1906) (Hague X), Convention relative to Certain Restrictions with regard to the Exercise of the Right of Capture in Naval War (Hague XI), Convention relative to the Establishment of an International Prize Court (Hague XII), Convention concerning the Rights and Duties of Neutral Powers in Naval War (Hague XIII), and the Discharge of Projectiles and Explosives from Balloons (Hague XIV).

The most important convention may be considered as the fourth convention regarding, Respecting the laws and Customs of War on Land. Additionally, the fundamental principle of *jus in bello*[40] could be found in Article 22 of this convention. Other regulations made by the conventions aimed to forbid to use of poisoned weapons, to kill or wound the belligerents who are *hors de combat*[41], calculated to cause unnecessary suffering, the destruction or seizure of enemy property unless imperatively demanded by the necessities of war, and to attack the undefended towns, villages, dwellings, or buildings. The Hague Conventions also introduced the Martens Clause which is explained below.[42]

c) 1949 Geneva Conventions

Although the Fourth Hague Convention retains the modern reality of conflicts, the IHL rules of today actually take the Geneva Conventions of 1949 and additional Protocols of 1977 as ground.[43]

After World War II, it was clear that there was a need for new regulations. The1949 Geneva Diplomatic Conference was held between 21 April and 12 August 1949 in Geneva. Fifty-nine states sent delegations and four other states were represented by observers. The purpose of the Conference was the revision of the Convention of 1929 for the Amelioration of the Condition of Wounded and Sick of Armies in the Field and of the Convention of 1929 relative to the

[40] Rules that are validated in terms of war.

[41] Those soldiers who have laid down their weapons and no longer present a threat.

[42] *Ibid.*

[43] *Ibid.*

Treatment of Prisoners of War; the revision of the Tenth Hague Convention of 1907 for the adaptation to Maritime Warfare of the principles of the 'Geneva' Convention of 1906; and the preparation of a new Convention for the Protection of Civilian Persons in Time of War. On 12 August 1949, the Final Act of the Conference was signed, and the four new Conventions that were attached to it were opened for signature for six months.[44] The Geneva Conventions of 1949 were mainly focused on four issues and provided specific protections to four classes of individuals not actively involved in combat: the wounded and the sick in the field (Geneva Convention I), wounded and sick at sea (Geneva Convention II) prisoners of war (Geneva Convention III), and civilians and other non-combatants (Geneva Convention IV).[45] Also, The 1949 conventions have been modified with three additional protocols: 1977 Protocol I relating to the Protection of Victims of International Armed Conflicts, 1977 Protocol II relating to the Protection of Victims of Non-International Armed Conflicts, and 2005 Protocol III relating to the Adoption of an Additional Distinctive Emblem.

Geneva Convention regarding the protection of the wounded and the sick in the field (Geneva Convention I), is directly descended from the first Geneva Convention which was signed on 22 August 1864, for the Amelioration of the Condition of Soldiers Wounded in Armies in the Field. This Convention was revised twice before the Geneva Convention of 1949 was signed. Geneva Convention II, regarding the protection of the wounded and sick at sea, was a descend of several conventions. In 1899, following an earlier unsuccessful effort in 1868, the guidelines of the Geneva Convention of 1864 were modified for use in maritime conflicts during a Convention organized by the first Hague Conference, which was signed by all the participating states. In 1907, the Hague Convention of 1899 was updated to align with the modifications made to the Geneva Convention in 1906 and was subsequently referred to as the Tenth Hague Convention. Consequently, the Geneva Convention II of 1949 was a descend of these attempts and finalised conventions. Followingly Geneva Convention III, regarding prisoners of war, is subsequently took the place of the Prisoners of War Convention of 1929. Prisoners of War Convention was complementary to the Hague Conventions concerning the Laws and Customs of War on Land of 29 July 1899 and 18 October 1907. Lastly, Geneva Convention IV regarding

[44] Joyce A. C. Gutteridge, 'The Geneva Conventions of 1949' (1949) 26 Brit YB Int'l L 294.

[45] *Ibid.*

the of civilians and non-combatants are supplementary to Sections II and III of the Regulations annexed to the Hague Conventions of 1899 and 1907. [46]

The entirely new concept that was introduced with the Geneva Conventions of 1949 was that the parties to each convention undertake certain obligations in respect, *not of an international war, but of 'a conflict not of an international character occurring in the territory of one of the High Contracting Parties.'*[47] This basically means that from the Geneva Conventions of 1949 on, all of the IHL rules are not only valid for international conflicts but also domestic conflicts, in other words, civil wars. However, when this Article was drafted, it caused several difficult discussions. Because the outcome of this article was limiting the territorial sovereignty of states. But, in fact, this Article granted such obligations only to ensure the observance of certain fundamental human rights in case of both domestic and international conflicts. The article was stipulating that persons who take no active part in hostilities shall be treated with humanity. In addition to that, particularly, the violence of life and person, the taking of hostages, outraging upon personal dignity, passing of sentences, and carrying out executions without the judgment of a regularly established court is prohibited.

Another important concept introduced by the 1949 Geneva Conventions was "grave breaches" as the legal definition of war crimes. This definition covered by the following acts committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property that is not justified by military necessity and carried out unlawfully and wantonly.[48] These breaches could be found in Convention III. In addition to these offences, some other actions are considered grave breaches by the Convention: taking of hostages, unlawful deportation, transfer, or confinement.[49] These offences can be found in Convention IV.

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[46] *Ibid.*

[47] Convention (III) Relative to the Treatment of Prisoners of War (signed on 12 August 1949) 6 U.S.T. 3316; 75 U.N.T.S. 135 art 3.

[48] International Committee of the Red Cross 'The Geneva Convention of 12 August 1949' https://www.icrc.org/sites/default/files/external/doc/en/assets/files/publications/icrc-002-0173.pdf.

[49] *Ibid.*

Of the ones mentioned so far, the most important for modern laws of today are these conventions. Because, of course, although the previously mentioned conventions have prepared the ground for IHL, the most recent and comprehensive ones are the 1949 Geneva Convention. *The Geneva Conventions and their Additional Protocols are international conventions containing the most important rules limiting the barbarity of war.*[50] They are fundamental to international humanitarian law, which governs armed conflict and seeks to reduce its effects both on civilians and belligerents.

2. Fundamental Principles of International Humanitarian Law

International humanitarian law is the branch of public international law that seeks to force limits on the destruction and suffering caused by armed conflict. It is established by Article 22 of the Hague Conventions by saying that it is not unlimited that the aims of the belligerents to injure the enemy[51]. To achieve these limitations and implement the conventions properly, international humanitarian law needs several principles. These principles are as follows:

i. The principle of humanity
ii. The principle of distinction between civilians and combatants
iii. The principle of proportionality
iv. The principle of military necessity

All of these principles accomplish part of each other therefore they are related to each other and every principle of IHL is irreplaceable.

a. The Principle of Humanity

The Principle of Humanity is the first principle of International Humanitarian Law that is defined by customary international law and the Geneva Conventions of 12 August 1949. This principle imposes certain limits on the means and methods of war and requires humanly treating to captured enemies. It is aim is to limit suffering, injury, and destruction during armed conflict; in that way, it seeks to protect life and health to ensure the respect to human-being. [52]

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[50] International Committee of the Red Cross 'Geneva Conventions and their Commentaries' https://www.icrc.org/en/law-and-policy/geneva-conventions-and-their-commentaries.

[51] *Ibid.*

[52] International Committee of the Red Cross ' The Principles of Humanity and Necessity https://www.icrc.org/sites/default/files/wysiwyg/war-and-law/02_humanity_and_necessity-0.pdf .

With this principle it also precludes the assumption that anything that is not obviously prohibited is permitted. Another important step regarding the principle of humanity is *Martens Clause*, which is explained below. Basic considerations of the principle of humanity are reflected and expressed in the Martens Clause. In short, this clause grants the power to look past treaty regulations and customary laws to take into account humanitarian principles and the demands of public morality.[53]

b. The Principle of Distinction Between Civilians and Combatants

The principle of distinction between civilians and combatants is one of the most important principles of IHL because of its function to reduce the effects of war on civilians. When it comes to the question of what distinction is, it is a very complicated issue. During the process of IHL many definitions of distinction has been made in several conventions and laws. But today, if we want to see most current and basic definition, it is the definition made by ICRC. According to ICRC, the distinction between civilians and combatants and between civilian objects and military objects.[54] As it can be seen here, with the principle of distinction not only the civilians but also their properties and living quarters are protected. When it is considered as an ordinary soldier base, a soldier must distinguish between combatants and civilians, between who is protecting during conflicts and subjects to deliberate attacks (other combatants).[55] However nowadays, exercising this principle is getting progressively difficult. Because conflicts are not occurring in the battlefields far from the consternation of civilians anymore or even combatants do not have easily recognisable uniforms all the time[56] Since issues like these exist, it is vital to make definitions of "civilian" and "combatant".

When it comes to the definition of a civilian, in most general words, they are the population of a nation who is party to a conflict. With that being said, civilian term covers all individuals who are not actively taking part in a conflict and intend to reduce sufferings that are caused by war. Although this discrimination has a vital importance there is no certain definition of the

[53] Rupert Ticehurst 'The Martens Clause and the Laws of Armed Conflict' https://www.onlinelibrary.iihl.org/wp-content/uploads/2021/07/Martens-Clause-LOAC.pdf.
[54] International Committee of the Red Cross 'Distinction' https://casebook.icrc.org/a_to_z/glossary/distinction .
[55] Geoffrey S. Corn *The Law of Armed Conflict: An Operational Approach* (Aspen Publishers 2nd Edition) 2012.
[56] *Ibid.*

term civilian in Geneva Conventions of 1949[57] and there were several options on the definition of civilian in doctrine. In addition to these doctrinal studies, it is also considered by ICRC in the commentaries of the Geneva Convention of 12 August 1949 and Additional Protocol I of 1977. In these commentaries ICRC underlined that it is *essential*[58] to have an exact definition of each category: civilians, combatants, civilian objects, and military objects. Despite emphasis no other definition has been made further. On the other hand, with the Additional Protocol I of 1977, the extent of the POW definition was tried to be expanded. The Protocol considered the POW as individuals who did not comply with the generally accepted definition, including anyone not defined to be a combatant by the traditional standards of combatants and would place civilians at risk.[59] Accordingly, a civilian is anyone who does not qualify for POW status if captured, so it is one of the most reasonable methods of defining civilians as anyone who is not authorised to participate in hostilities. Additionally, several types of persons are subjects for new discussions because of the complexity of their status. For instance there may be some spies or mercenaries who could qualify for combatant status, but many of them would not and instead they would be considered civilians. It is also important to note that most of these attempts of definition are mostly for international conflicts and when it comes to non-international, or domestic, conflicts the situation is more difficult and still needs to be clarified.

About the definition of combatants, combatants are the persons who have immunity for prosecution in terms of lawful attacks.[60] Geneva Convention IV sets out a definition of belligerents that included armies, comprehending, militia and volunteer corps, that met the following conditions:

i. to be commanded by a person responsible for their subordinates
ii. to have fixed distinctive emblem recognisable at a distance
iii. to carry arms openly
iv. to conduct their operations in accordance with the laws and customs of war.[61]

[57] *Ibid.*
[58] Geoffrey S. Corn *The Law of Armed Conflict: An Operational Approach* (Aspen Publishers 2nd Edition) 2012.
[59] Geoffrey S. Corn *The Law of Armed Conflict: An Operational Approach* (Aspen Publishers 2nd Edition) 2012.
[60] *Ibid.*
[61] Geoffrey S. Corn *The Law of Armed Conflict: An Operational Approach* (Aspen Publishers 2nd Edition) 2012.

Even though this definition was made in Geneva Convention IV, they were not mentioned as "combatant". Until Additional Protocol I of 1977, just like civilians, it was not that treaty law defined this term. Combining the Geneva Convention IV and Additional Protocol I, combatants include the following categories of individuals: members of the armed forces of a party to the conflict; members of militias and organised resistance movements belonging to a party to the conflict; members of regular armed forces belonging to governments not recognised by the Detaining Power; and inhabitants of a non-occupied territory who spontaneously take up arms to resist invading forces[62].[63]

c. The Principle of Proportionality

Proportionality is the word used describe to keeping a balance between things and not exaggerating. In terms of war, the usage of it is similar. It is usually asked, "Is it possible to protect the law in terms of war?" and "How is it possible to protect the law in war?" The answer to the first question is yes, and it is provided by the regulations of international humanitarian law. To answer the second question and accomplish international humanitarian law, we need the principle of proportionality. This principle seeks to limit the damages caused by military operations by stipulating that the consequences of the warfare methods and strategies employed in conflict should not be excessive in relation to the military benefits pursued.[64] In other words, the principle of proportionality prohibits military objectives that are "*expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."*[65]

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[62] *levée en masse* : A policy of mass national conscription, often in the face of invasion. See also: https://www.britannica.com/topic/levee-en-masse .

[63] Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War IV (Signed on 12 August 1949) 6 U.S.T. 3516; 75 U.N.T.S. 287 Art 4.

[64] International Committee of the Red Cross 'Proportionality' https://casebook.icrc.org/a_to_z/glossary/proportionality#:~:text=The%20principle%20of%20proportionality%20prohibits,and%20direct%20military%20advantage%20anticipated%E2%80%9D.

[65] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (Signed on 8 June 1977) 1125 U.N.T.S. 3. Art 51(5)(b).

In sum, the principle of proportionality aims to prevent wars from exceeding and crossing the aim. It also aims to protect individuals and objects that are not direct actors and subjects of war.

d. The Principle of Military Necessity

The principle of military necessity is closely related to the third principle, the principle of proportionality. The function of these principles is to permit measures that are actually necessary to succeed in a legitimate military purpose and which are not prohibited and violating the requirements of international humanitarian law.[66] With basic expressions, this principle requires that to achieve a legitimate military measurement, this measurement should be necessary and irreplicable with another action. Military necessity principles prevent arbitrary attacks and other measures of the military. In terms of a conflict, the only legitimate purpose is to weaken the opposite military groups. Other purposes excluding this, which contradicts humanitarian demands. Consequently, humanitarian law steps in and seeks to provide a balance of military necessity and humanitarian demands, and that is why the proportionality and military necessity principles are closely related to each other. [67]

e. Martens Clause

Martens Clause is not a principle by itself and also it is not an official principle provided by ICRC. However, it is generally mentioned with the principle of humanity and considered the ground of that principle. This clause was introduced by Russian Diplomat Fyodor Fyodorovich Martens for the first time in the preamble of the 1899 Hague Conventions and named after his surname. As stated above this clause, this clause grants the power to look past treaty regulations and customary laws to take into account humanitarian principles and the demands of public morality.[68] The form of this clause in the 1899 Hague Convention was as follows: "*Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity*

[66] *Ibid.*
[67] *Ibid.*
[68] Rupert Ticehurst 'The Martens Clause and the Laws of Armed Conflict' https://www.onlinelibrary.iihl.org/wp-content/uploads/2021/07/Martens-Clause-LOAC.pdf.

and the requirements of the public conscience."[69] Martens aimed to provide humane treatment to POWs and civilians even in terms of situations that were not clearly regulated by international treaties or IHL. It also requires that applications during wartime be limited not only to military purposes but also to humanitarian purposes. It draws an ethical line to parties of war. Another significant point of this clause is to include POWs as a protected group category.

Today, even though humanity has passed through world wars and made plenty of regulations towards war, this clause still preserves its importance. For the society of today, this clause became an inspiration and ground for the establishment of the court, ICC, relating to human rights violations and war crimes and adaptation of international treaties regarding international humanitarian law.

III. INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT

1. History

The International Criminal Court is the one and only permanent court with jurisdiction to prosecute and try individuals for the crimes of genocide, war crimes, crimes against humanity and crimes of aggression. The Court is seated in Hague, Netherlands. It was established in 2002 by an international treaty: the Rome Statute. However, the whole concept of the international criminal court and its history can be connected to approximately 60 years before its establishment.

As stated above several times, there have been some attempts to regulate war crimes in history. After the Second World War, these attempts gained new aspects and fastened. The first prominent steps were taken by the establishment of international criminal tribunals regarding war crimes and crimes against humanity were perpetrated during the Second World War. The first criminal tribunals were the International Military Tribunal (Nuremberg Trials) and the International Military Tribunals for the Far East (Tokyo Trials). These trials were established

[69] Jean-Marie Henckaerts and Louise Doswald-Beck *Customary International Humanitarian Law Volume I: Rules* (Cambridge University Press, ICRC 2009).

by their charters regarding the rules of procedure and definition of the offences that would be considered.

In the meantime, also the Geneva Conventions of 1949 have been signed by 43 countries and ratified by 196 today.[70] These Conventions mostly focused on protecting civilians and non-combatants and prohibiting some actions during war and conflicts. It may be said that these limitations were solid grounds for further regulations regarding international criminal law. In addition to the Geneva Conventions of 1949, three additional protocols were made in 1977 and 2005.

Following these developments, two *ad hoc* tribunals established in the 1990s: the International Criminal Tribunal for the former Yugoslavia (1993) in response to violations of the laws and customs of war, genocide, and crimes against humanity and ethnic cleansing allegedly perpetrated in the former Yugoslavia[71] and the International Criminal Tribunal for Rwanda (1994) in response to civil war and genocide[72]occurred and violation of Article 3 of the Second Additional Protocol of the Geneva Conventions[73] in Rwanda. These two tribunals were established by their own statutes, similar with the Nuremberg and Tokyo Trials and they created by the resolutions by the United Nations Security Council.[74]

After the relative success of these two *ad hoc* tribunals, the idea of an international criminal court has occurred. Upon this idea, the Perpetratory Committee was created by the United Nations General Assembly in 1996 in order to establish the International Criminal Court. This Committee submitted a Draft Statute at the Diplomatic Conference in Rome. This Draft Statute contained 116 articles.[75] At the end of the Diplomatic Conference, the Draft was completed and adopted, in this way the International Criminal Court was officially established. The Statute

[70] Convention on the Prevention and Punishment of the Crime of Genocide (Signed on 9 December 1948) United Nations, Treaty Series, vol.78, p. 277.

[71] *Ibid.*

[72] 'Developments in the Law: International Criminal Law' (2001) Harward Law Review p 1984.

[73] *Ibid.*

[74] United Nations Security Council (UNSC) Res 827 and 955, 25 May 1993 and 8 November 1994 S/RES/827 (1993) and S/RES/955 (1994).

[75] *Ibid.*

entered into force after the deposit of the 60th instrument of ratification.[76] The ICC, started with its first hearings in 2006 with the case of *The Prosecutor v Thomas Lubanga Dyilo.*[77] Today, the Court has jurisdiction over crimes that is perpetrated after 1 July 2002.[78]

2. Structure

The International Criminal Court consists of eighteen judges that are from all around the world and elected only for nine years by the Assembly of States Parties in accordance with the Rome Statute.[79] The structure of the Court consists of four primary organs, and these are the Presidency, the Judicial Divisions, the Office of the Prosecutor, and the Registry. In addition to that, there are two bodies independent from the court, although they are a part of the ICC organisation. These two organs are the Assembly of the Party States and the Trust Fund for the Victims.

The Presidency is the administrative organ of the International Court, and it is responsible for overall issues of the Court. Nevertheless, the Office of the Prosecutor is an exception, and the responsibility of the Presidency does not include this organ. Additionally, the Presidency has some other specific functions that are assigned by the ICC Statute, for instance, judicial/legal functions and external relations. The judicial function of the Presidency is two faceted. First, the Presidency provides support to enable the Chambers to conduct fair, effective and expeditious public proceedings such as establishing and appointing the Chambers to the situations. Second, it has specific legal and judicial functions, including judicial review of decisions of the Registrar and concluding court-wide cooperation agreements. In the scope of its external function, it concludes cooperation agreements with states, maintains relations with states and other entities, promotes public awareness of the Court through these external relations. Also, it coordinates and seeks consensus with the Prosecutor on all matters of mutual concern.[80] With all of its functions, the Presidency has also supervisory duties such as ensuring

[76] *Ibid.*

[77] The Prosecutor v. Thomas Lubanga Dyilo (Pre-Trial Chamber Decision) ICC-01/04-01/06 (7 February 2007).

[78] International Criminal Court 'How the Court Works' https://www.icc-cpi.int/about/how-the-court-works .

[79] International Criminal Court 'The Judges of the Court' https://www.icc-cpi.int/sites/default/files/Publications/JudgesENG.pdf .

[80] International Criminal Court 'Presidency and Chambers' https://www.icc-cpi.int/sites/default/files/iccdocs/PIDS/publications/PresidencyandChambersEng.pdf .

proper administration of the court, except the Office of the Prosecutor, and overseeing the work of the Registry. The President and First and Second Vice Presidents are elected for three renewable years by an absolute majority of the Judges of the Court.[81]

The Office of the Prosecutor (OTP) has duties for conducting effective and efficient preliminary examinations and investigations, prosecutions of perpetrators of genocide, CAH, war crimes, and crimes of aggression. The Office performs all these processes independently, impartially, and objectively consistent with its statutory duties and core values. The prosecutor starts an investigation upon referral of a situation by a state party or act of the UNSC addressing a threat to international peace and security. Moreover, it is also possible for the Prosecutor to start an investigation under its power *proprio motu*[82], on the territory or against nationals of a state party under the confirmation by a Pre-Trial Chamber of the Court. By performing these processes, the Office of the Prosecutor always follows the policy that is focused on who carries the greatest criminal responsibility for crimes committed in a situation. The Office is headed by the Prosecutor who was elected by the Assembly of the State Parties for nine non-renewable years. The Prosecutor has full authority to manage and administer the Office, including its staff, facilities, and other resources. The OTP also includes two Deputy Prosecutors who are also elected by the Assembly of the State Parties for nine non-renewable years as well as the Prosecutor. The Office is divided into two prosecution pillars and an integrated services division. These prosecution pillars are managed by the Deputy Prosecutors. These Deputies manage the time of prosecution pillars, which govern the equal division of situations and cases based on a unified team concept. Additionally, they oversee preliminary examinations and investigations, prosecutions, and, in terms of where it is applicable, appeals proceedings provide strategic advice and guidance to the prosecutor. Lastly, the Integrated Service Division centralises the support functions that provide cross-cutting support to the OTP.[83]

The Registry is the neutral organ of the ICC that provides services to all other bodies. It has three main categories of duties: judicial support, external affairs and management. Judicial support includes general court records, translation and interpretation, counsel support, the detention centre, legal aid, library services; supports victims to participate the prosecutions and

[81] International Criminal Court Project (The International Criminal Court) 'Structre of the ICC' https://www.aba-icc.org/about-the-icc/structure-of-the-icc/.

[82] With their own initiative.

[83] International Criminal Court 'Office of the Prosecutor.' https://www.icc-cpi.int/sites/default/files/2022-12/factsheet-otp-web-v.3-eng.pdf .

apply for reparations, for witnesses to receive support and prosecution. External affairs include external relations, public information and outreach, fielding office support and victims and witnesses' support. Lastly, the management function includes security, budget, finance, human resources, and general services.

The Chambers are organised into Divisions in accordance with the Article 39(1) of the Rome Statute. These organs carry out the judicial function of the ICC. Chambers consists of eighteen judges and three sub-divisions in total. These sub-divisions are the Pre-Trial Division, Trial Division, and the Appeals Division. The Pre-Trial and Trial Divisions consist of three judges. Assignment of Judges to the divisions based on functions that will be performed, qualifications, and experiences of the judge. This is done in a manner that ensures making an appropriate combination of expertise in criminal law and procedure and international criminal law that benefit of each division. The President of each division shall be elected for a year period among members of that division to oversee the administration of that Division. Also, when it is required, the Presidency may constitute more than one Pre-Trial Chamber or the Presidency may decide to attach a judge of the Trial Division to the Pre-Trial Division and *vice versa.* However, it may appoint a judge both for Pre-Trial and Trial phases of that certain case.[84]

a. Pre-Trial Chamber

The Pre-Trial Chamber consists of three judges who are experienced primarily in criminal trials. They are elected from their respective Division for three years. Nevertheless, it is also possible to carry out the processes by a Single Judge. The President Judge of the Chamber may be elected among the members of that Division.

The Chamber grants or denies an investigation that is initiated by the Office of the Prosecutor and makes a preliminary determination on whether the case is in the jurisdiction of the Court or not without prejudice and subsequent determination in respect of jurisdiction and admissibility of the Court. In accordance with the Rome Statute, The Pre-Trial Chamber may review the decision of the OTP regarding not to initiate an investigation or not to prosecute a certain case. In addition to all these functions, the Chamber issues warrants of arrest, summons appears before the court upon the request of the prosecutor and guarantees the rights of persons during the investigating phase. Additionaly provides prosecution and privacy of victims and

[84] *Ibid.*

witnesses, preserves evidence, safeguards information affecting national security, protects persons who have been accused or who have been appeared for summons if necessary .After the surrender of a suspect, the Pre-Trial Chamber holds a hearing in presence of the Prosecutor and their counsel to determine whether the charges can be confirmed or not.[85]

b. Trial Chamber

The Trial Chamber is composed of three judges who are elected by that Division for a three-year period however if there is an ongoing trial that a judge participates in, then they shall move on with that specific case even if the time exceeds more than three years. President of the Chamber shall be elected among the members of the Chamber.

After the Confirmation of a charge by the Pre-Trial Chamber, the Presidency Constitutes a Trial Chamber for trial. The primary function of that chamber is to ensure a fair and expeditious trial. To fulfil this function trials must be held in the presence of the accused person and public, except in special circumstances that are required for closed sessions. In any case, the sentences are pronounced in public. The Chamber determines whether an accused is innocent or guilty and if so, it imposes a sentence that does not exceed thirty years or for extreme gravities life imprisonment. Also, financial penalties may be imposed.[86]

c. Appeals Chamber

Unlike the pre-trial and trial chambers, the appeal chamber consists of five judges instead of three. The Division addresses appeals that are submitted by or on behalf of convicted individuals, the Prosecutor, legal representative of victims, or *bona fide* owners of property adversely impacted by a decision of the Court. The convicted person may appeal against the conviction and sentence. The Prosecutor may appeal against the acquittal or conviction of an accused, or the sentence. Appeals may be made on procedural errors, errors of fact or law, and any other grounds affecting the fairness or reliability of the proceedings or decisions. In those situations, Appeals Chamber may reverse or amend the conviction or sentence and may order a new trial that would be held before the Trials Chamber. It is also possible that the Chamber may revise the final judgment of conviction or the sentence. Another function of the Appeals

[85] *Ibid.*
[86] *Ibid.*

Chamber is to review the sentence. The Chamber may reduce the sentence or reviews at least every three years. Alongside its appealing and reviewal function, the Appeals Chamber may also be responsible for deciding the questions regarding the disqualification of the Prosecutor or a Deputy Prosecutor. Decisions made by the Pre-Trial Chamber during the course proceedings may also be appealed including decisions regarding jurisdiction and admissibility.[87]

d. Jurisdiction

The jurisdiction of the Court is regulated under Part 2 and Articles 5, 11, 12, and 13 of the ICC Statute. The offences that are under the jurisdiction of the Court are regulated under Article 5 of the Statute, and these are genocide, crimes against humanity, war crimes, and crimes of aggression. According to the Statute, the Court has jurisdiction over the above-mentioned offences committed after the entry into force of the Statute. The jurisdiction may only be exercised over State parties however, in some cases it is also possible for the Court to use its jurisdiction on *state non-parties*. It may occur by the will of that State or a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations. The other situations in which one or more of such crimes appear to have been committed is referred to the Prosecutor by a State Party in accordance with Article 14 or an investigation that is initiated by the Prosecutor in respect of such a crime in accordance with the Article 15 of the Statute.[88] The Court has jurisdiction in situations where one or more States are part of the Statute and could exercise its powers on the territory of the State in which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft; or on the State of the person that is accused of the crime is a national.[89]

[87] *Ibid.*

[88] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNITS 3 (Rome Statute) Article 13.

[89] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNITS 3 (Rome Statute) Article 12.

e. General Principles of the ICC

General principles of the ICl, therefore the general principle of the ICC, are regulated and defined under the Rome Statute. These general principles are, as explained above, *nullum crimen, nulla poena sine lege, nulla poena sine culpa, lex prospicit non respicit*, and *ne bis in idem* principles.A s an addition to these principles of ICL, the International Criminal Court also uses looks for *mens rea*[90] and *actus reus*[91] elements to define individual criminal responsibility.[92] These two elements are taken from general principles of domestic criminal law instead of international criminal law. On the other hand, with these principles and elements, the ICC also considers responsibility of commanders and other superiors while examining a case regarding high governmental officials or commanders of armies.[93]

f. Applicable Sources of Law

The applicable sources of law are generally in accordance with the applicable law for international law and international criminal law. The applicable sources of law for the International Criminal Court are defined by the Rome Statute Article 21. According to the Article, in the first place, the Court applies the Rome Statute and the elements of crimes, rules of procedure, and evidence that are regulated in the Statute. Secondly, where appropriate, international treaties and general principles of international law including principles of international armed conflicts may be applied. It is also possible to apply the general principles of law that are derived by the national courts and legal systems of the world as well as it is not inconsistent with the Statute and international law and norms. Alongside these sources, the Court may also apply principles and rules that are interpreted in its previous decisions. However, these interpretations may not be inconsistent with international human rights and may not discriminate against persons founded on the grounds such as defined in Article 7, Paragraph 3 of the Statute, and other reasons such as but not limited to age, race, colour,

[90] The intention or knowledge of wrongdoing that constitutes part of a crime, as opposed to the action or conduct of the accused.

[91] Action or conduct which is a constituent element of a crime, as opposed to the mental state of the accused.

[92] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNITS 3 (Rome Statute) Article 25.

[93] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNITS 3 (Rome Statute) Article 28.

language, religion or belief, political or other opinions, national, ethnic or social origin, wealth, birth or other status.[94]

IV. KEY CONCEPTS

1. Genocide

Genocide is one of the massive offences that are under the jurisdiction of the International Criminal Court. It is defined in Article 6 of the Rome Statute. As explained in the previous paragraphs, it is not a new concept, examples of it might be seen during history. However, as a term, it is merely new. Even during the Nuremberg Tribunals, there was no such term called "genocide." Genocide, as a term, was first defined under the Convention on the Prevention and Punishment of the Crime of Genocide of 1948. Finally, as a result of this convention, in 1998 it was regulated as an offence under the Rome Statute.

As it is described under the Rome Statute, genocide comprises the following acts that intend to destroy, a national, ethnical, racial, or religious group in whole or in part by conducting:

(a) Killing members of the group,
(b) Causing serious bodily or mental harm to members of the group,
(c) Deliberately inflicting on the group conditions of life to bring physical destruction in whole or in part,
(d) Imposing measurements to prevent births,
(e) Forcibly transferring children of the group to another group.[95]

With an overview of these above-mentioned acts, it is possible to say that genocide might occur in very broad sense with various different shapes. It is not easy to recognise the genocidal acts in first. To distinguish the genocide from the offences such as crimes against humanity, these elements are required: genocidal intent must be existed, genocidal acts must be occurred that is described under the ICC Statute, and finally these acts must be committed against the groups

[94] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNITS 3 (Rome Statute) Article 21.

[95] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNITS 3 (Rome Statute).

that the Statute protects. Since the "intent" is an intangible term, it shall be defined by the Court on each case basis.[96]

2. Crimes Against Humanity

Crimes against humanity describes under the article 7 of the Rome Statute. It might be considered as similar with the genocide, because there are several genocidal acts and acts within the scope of CAH that is close to each other. However, crimes against humanity are more extensive than the genocide. First of all, unlikely with genocide, it is not required to committing specific acts against "protected groups." Secondly, there are far more acts in the scope of crimes against humanity. The offenses in the extent of CAH, also defined under the same Article and as follows:

(a) Murder,
(b) Extermination,
(c) Enslavement,
(d) Deportation or forcible transfers,
(e) Imprisonment or other severe violations of physical liberty by violation of fundamental rules of international law,
(f) Torture,
(g) Rape, sexual slavery, enforced prostitution or forced pregnancy, enforced sterilisation, or any other types of sexual violence,
(h) Persecution of any identifiable group based on political, racial, national, ethnic, cultural, religious, or other grounds deemed impermissible under international law, related to any acts or crimes within the jurisdiction of the Court.
(i) Enforced disappearance of persons,
(j) The crime of apartheid,
(k) Other inhumane acts of a comparable nature deliberately inflicting significant pain or causing severe harm to physical or mental health.[97]

As it is clear, CAH contains a number of inhumane acts. While perpetrating these acts, there is no need to have a specific intent to destroy a certain group; it is enough to harm any civilian

[96] *Ibid.*
[97] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNITS 3 (Rome Statute)Article 7.

person and other persons who are not belligerent, as was explained previously. In sum, there are two common elements for these offences to consider as CAH: there must be a widespread or systematic attack directed against civilians, and the perpetrator knew, should have known, or intended to attack civilians of these such crimes. Perpetrators might be soldiers and commanders, also they might be high level government officials, such as prime ministers or presidents.

Although the extent of crimes against humanity is very broad, the most common ones are as follows with regards with our certain case: Murder, extermination, forcible transfer, torture, and rape.

a. Murder

Murder is defined under Article 7(1)(a) of the Rome Statute. The elements of this crime are, first the perpetrator(s) must kill one or more persons. The other elements are the two essential elements, that is given above. Which are the widespread or systematic attack must be conducted and the perpetrator knew, should have known, or intended to kill those civilians.[98]

b. Extermination

Extermination is defined under Article 7(1)(b) of the Rome Statute. There are four elements for this crime. The first one is that the perpetrator(s) must kill one or more persons by inflicting conditions of life calculated to bring about the destruction of a part of a population. Inflicting conditions of life include the deprivation of access to food and medicine.[99] The second element is that the conduct must be constituted or took place as a part of the mass killing of members of a civilian population.[100] The other two elements are the essential two elements that are explained before.

[98] International Criminal Court 'Elements of Crimes' https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf .
[99] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNITS 3 (Rome Statute) Article 7(2)(b).
[100] International Criminal Court 'Elements of Crimes' https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf .

c. Forcible Transfer

Forcible Transfer takes place in Article 7(1)(d) of the Rome Statute. As an addition to two essential elements there three more elements for this crime. The first one is the perpetrator(s) must deport or forcibly transferred one or more persons to another State or location without grounds permitted under the international law. “Forcibly” does not only mean the physical force, it contains threat of force or correction, that caused by fear of violence, duress, detention, psychological oppression or abuse of power against civilians.[101] “deport” or “forcibly transfer” might interpreted as any kind of displacement. The deported civilians must lawfully present the area that they were deported from. Regarding this element, the other condition is that the perpetrator must be aware of the facts that these civilians were lawfully presenting.[102]

d. Torture

This offence is defined under Article 7 (1)(f) of the Rome Statute. According to the definition made by the ICC, in addition to two essential elements, a torture offence is the severe physical or mental pain or suffering upon one or more persons by the perpetrator(s). These such persons must be under the custody or the control of the perpetrator(s). This pain or suffering should have not arisen from and was not inherent in or incidental to, lawful sanctions.[103]

e. Rape

Rape is described under Article 7(1)(g) with the other sexual offences. To consider that this offence has been perpetrated, the perpetrator(s) must invade the body of a person by conduct resulting in penetration of any part of the body of the victim or the with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body. This invasion must be committed by force or threat of force, such as that caused by the fear of violence, duress, detention, psychological abuse, or abuse of power against a person by taking advantage of a coercive environment or the victim must be unable to give genuine consent.[104]

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[101] International Criminal Court ‘Elements of Crimes’ https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf Footnote 12.
[102] International Criminal Court ‘Elements of Crimes’ https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf .

[103] *Ibid.*
[104] *Ibid.*

The "invasion" consent must be interpreted gender-neutral and broad enough.[105] Incapable persons of giving consent are the persons who are under-age, or affected by natural or induced conditions.[106]

3. War Crimes

War crimes are one of the oldest offences that are under the jurisdiction of the International Criminal Court. From ancient times to today, war crimes has been named and described variously. Even though the name and extent vary, the first aim of this description was always to reduce the suffering and causalities of conflicts. Today, war crimes defined under Article 8 of the Rome Statute. The definition within the Statute, extents the offences that is counted under the relevant Geneva Conventions, serious violations of the international laws and customs applicable in international armed conflict, and serious violations of the laws and customs applicable in armed conflicts *not of an international character*.[107]

Under this Article, there are more than fifty offences counted for the different characteristics of the armed conflicts. For this certain case, the conflicts do have *not of an international character*, and two war crimes specifically mentioned by the Court: *intentionally directing against the civilians* and *pillaging.*

a. Intentionally Directing Against Civilians

This offence is described under the Article 8(2)(e)(i) of the Statute. According to the definition, there are five elements. First, the perpetrator(s) must direct an attack on civilians. This attack must object to the civilian population, or individual civilians, that were not taking part in hostilities directly. The perpetrator(s) must intend the civilian population or individual civilians as the object of that certain attack. The conduct must take place in the context of an armed

[105] International Criminal Court 'Elements of Crimes' https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf Footnote 15.
[106] International Criminal Court 'Elements of Crimes' https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf Footnote 16.
[107] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNITS 3 (Rome Statute)Article 8.

conflict that is non-international character. Finally, the perpetrator must be aware of the factual circumstances of an armed conflict.[108]

b.Pillaging

Pillaging is defined under Article 8(2)(e)(v) of the Statute. This offence consists of five elements. For the occurrence of this crime firstly, the perpetrator(s) must appropriate certain property and intend to deprive the owner(s) of the property and to utilise it for individual or personal purposes. Individual or personal purposes should be interpreted as except the military necessities.[109] This appropriation must be out the consent of the owner(s). Lastly, just like the previous offence explained above, this conduct must take place during the circumstances of an armed conflicts that has a non-international character and the perpetrator(s) must be aware of this factual circumstances.

4. Crimes of Aggression

Crimes of aggression are the most recent offences that were included under the Rome Statute and the jurisdiction of the Court. Since this concept, crimes of aggression generally, was quite controversial from the Second World War to the present. It could not be included in the first version of the Rome Statute. Although it was included in the draft text of the Statute, no definition could be reached on which the signatory states agreed during the Conference. It was added to the Statute after a conclusion was finally reached in 2010 and is currently regulated under Article 8 *bis* of the Statute. In the definition under this article, crimes of aggression means the Planning, preparing, initiating, or executing an act of aggression by someone with significant control over political or military actions of a State constitutes a clear violation of the United Nations Charter due to its nature, severity, and scale.[110]

[108] International Criminal Court 'Elements of Crimes' https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf
[109] International Criminal Court 'Elements of Crimes' https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf Footnote 62.
[110] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNITS 3 (Rome Statute)Article 8 *bis.*

V. CASE BEFORE THE COURT: THE PROSECUTOR V. OMAR HASSAN AHMAD AL-BASHIR

1. Overview

a. Sudan

Sudan is located in the north-eastern part of Africa as a very cosmopolit country with many different ethnicities. The country surrounded by Chad surrounds in the west, Ethiopia and Eritrea in the east, Libya, and Egypt in the north, and South Sudan in the south. The population of the country is divided into different ethnic groups, such as but not limited to; Arabs, Bejas, Nubas, Furs, Mashalits, Zaghwas, and Egyptians. Due to the diversity of ethnic groups in Sudan, some conflicts between them have occurred since 2003.[111]

b. Omar Hassan Ahmad Al-Bashir

Omar Hassan Ahmad Al-Bashir is the former head of state of the Republic of Sudan who was in charge between 1989 and 2019. Bashir was born on 1 January 1944, in Hosh Bannaga village near to Khartoum as an ethnic Arab. In following years, he joined the Sudanese Army when he was 16. After that, he went to Kairo, Egypt for his military education, and graduated from the Sudanese Military Academy in 1966. Omar Al-Bashir fought for Egypt during the Yom Kippur (Arab-Israel) War in 1973. In 1975 Al-Bashir was sent to the United Arab Emirates as a military attaché. After he went back to Sudan, he became the garrison commander. Following these he became the commander of the armored parachute brigade. After coming into power as brigadier general, he led a military coup against the democratically elected leader of Sudan, Sadiq al-Mahdi on 30 July 1989. Al-Bashir replaced Al-Mahdi with the new head of state Ahmad Al-Mirghani. Also a dominant political party, National Congress Party, was founded by him in 1992. After this foundation, he was elected three times as president of Sudan until 2019. In 2019, Al-Bashir was overthrown by a military *coup d'état* after months of civil protests and uprisings. After the military coup, he was arrested for corruption allegations.[112]

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[111] *see also*:'Explore All the Countries- Sudan' (CIA 2024) https://www.cia.gov/the-world-factbook/countries/sudan/ accessed 9 October 2024.

[112] *see also:* 'Omar Al-Bashir on Trial: Will Justice Be Delivered?' (Aljazeera 24 August 2024) https://www.aljazeera.com/news/2019/8/24/omar-al-bashir-on-trial-will-justice-be-delivered Accessed 9 October 2024

While he was on the rule for nearly 30 years, a civil war, several uprisings, and some other disturbances took place. The main reason behind these incidents was apartheid allegations against the Government of Omar Al-Bashir. As stated above, Sudan has different ethnical groups, and the majority of the population consists of Sudanese Arabs. According to allegations, the rule of Al-Bashir has applied discriminative, and beyond that racist, policies to non-Arab groups such as Furs, Massalists, and Zaghwas. These three groups belong to the native African population instead of Sudanese Arabs. However, since the majority of the country and also the government consist mostly of Arab population the above-mentioned groups were in a minority situation at a particular point. The main location of these conflicts was the Darfur region in the southern Sudan. Major conflicts started with the attack on Al-Fasher Airport, near to Darfur, in March 2003. Government opposition groups namely the Sudanese Liberation Movement/Army (SLMA) and Justice and Equality Movement (JEM), mostly consisting of Fur, Zaghawa, and Masalits, have taken responsibility of [113] offensive actions. After the airport attack, government of Sudan issued a general call for mobilisation of Janjaweed Militia as a response to activities of opposition groups. Janjeweed Militia was a militant group consisting of Arabs. While the tension arose in the region with this attack, several conflicts occurred. The parties of these conflicts were; Sudanese Government, Sudanese Army, and Janjaweed Militia at on side, and SLMA and JEM, which are the government opposition groups,on the other side. During the conflicts, the Government and, indirectly, President Omar Al-Bashir was accused with perpetrating genocide, crimes against humanity, and war crimes. Conflicts lasted until 14 July 2008. On that day Chief Prosecutor of International Criminal Court ("ICC") Moreno-Ocambo considered the situation in Darfur and directed some allegations against Al-Bashir. Following that ICC issued a warrant of arrest on 4 March 2009.[114]

c. Issues Regarding Immunity of Al-Bashir as the Head of State

From the first Warrant of Arrest to today, the immunity of Al-Bashir was one of the contentious matters on the case. Since Sudan is not a state party to the ICC and the Rome Statute, it is

[113] *see also*: Harriet Barber 'Men with No Mercy: The Vicious History of Sudan's Rapid Support Forces' (The Telegraph 2023) https://www.telegraph.co.uk/global-health/terror-and-security/sudan-unrest-militia-rapid-support-forces-janjaweed/ Accessed 9 October 2024

[114] Prosecutor v. Al Bashir,(First Warrant of Arrest), Case No. ICC-02/05-01/09, (4 March 2009)

alleged that the Court has no jurisdiction on the situation of Darfur therefore Bashir could not be arrested and surrendered by benefiting from his immunity as the head of Sudan.

Immunity is one of *jus cogens* norms of international law. As an extent, immunity implicates exemption from interference of any foreign authority by taking irrespective measures on another sovereign State or representatives of states.[115] It is mostly accepted that this term derives from equality, independence, and dignity of states by being sovereign and *suprema potestas*[116] subjects of international community.[117] The immunity gains importance exactly when it comes to the criminal matter. It functions as a shield from the jurisdiction of other foreign authorities on a state, head of state or other state officials in some cases. In this case, foreign authorities shall not sit in judgement on acts performed by another state unless there is the consent of the subjected state.[118] By saying foreign authorities both the foreign national courts and international criminal courts or tribunals are meant.

When it comes to the "heads of state," this expression generally indicates the highest power or authority of states which also represents on behalf of that state in international relations. The term shall be defined under the domestic law of each state, mostly by constitution. It might be the democratically elected president or a monarch. The person, who enjoys the immunity, might be head of more-than one states simultaneously, like the Commenwealth States, as well as that they might be head of a one state.

Regarding this case, there are several contrary opinions on the possibility to arrest and surrender of Al-Bashir by Sudan or other required states for the ICC. On one hand, it alleged that in three situations the immunity of heads of state derogies by Article 27 of the Rome Statute, these conditions bind (i) state parties, (ii) States that accepted *ad hoc* the Court's jurisdiction; and (iii) non-party States referred by the UN Security Council. It is averred that, In accordance with the chapeau of article 13 of the Statute, when the UN Security Council refers situations to the Court, the Court exercises its jurisdiction under the Statute similarly to

[115] Ramona Pedretti *Immunity of Heads of State and State Officials for International Crimes* (Martinus Nijhoff Publishers) 8 January 2015.

[116] Highest Authority.

[117] Ramona Pedretti *Immunity of Heads of State and State Officials for International Crimes* (Martinus Nijhoff Publishers) 8 January 2015.

[118] *Ibid.*

cases referred by States Parties or initiated on *proprio motu* the Prosecutor.[119] In addition to that it also evaulated by the some scholars that by the Resolution 1593 that required the cooperation of Sudan, the State became a subject of the jurisdcition of the ICC and might be counted as a *quasi*[120] state party.[121]

On the other hand, it is alleged, by the African Union and member states of the African Union including Sudan, that according to international law, Heads of State are granted immunity, and there are no exceptions to this fundamental principle, even concerning crimes that fall under the jurisdiction of the Court or crimes of jus cogens. Therefore, Mr. Al-Bashir, in his capacity as the Head of State of Sudan, a nation that is not a party to the Statute, holds immunity from both arrest and surrender. About the UNSC Resolution 1593, some scholars alleged that a treaty creates neither rights nor obligations in respect of a State not party to it without that State's consent, as a cardinal tenet of customary international law therefore this Resolution does not provide ICC jurisdiction over Sudan or made the State as a state party, if so, it would constitute a violation of *pacta tertiis* [122] rule in treaties.[123]

2. Facts of the Case

1. In April 2003 El-Fasher Airport, near Darfur, was attacked, and the Government of Sudan (hereinafter GoS) issued a general call for the mobilisation of the Janjaweed Militia as a response to activities of Sudan Liberation Movement/Army Justice and Equality Movement and other armed opposition groups in Darfur. Thereafter, GoS forces, including the Sudanese Armed Forces and their allies Janjaweed Militia, the Sudanese Police Force, the National Intelligence and Security Service and the Humanitarian Aid Commission, conducted a counter-insurgency campaign against opposition groups in the Darfur region. Thereupon with attempts of the President of

[119] Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, (Judgment in the Jordan Referral Al-Bashir Appeal) para 88.
[120] Partially.
[121] Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, (Judgment in the Jordan Referral Al-Bashir Appeal) para 86.
[122] A treaty binds the parties and only the parties; it does not create obligations for a third state. See also: https://www.oxfordreference.com/display/10.1093/oi/authority.20110803100300498#:~:text=%5BLatin%3A%20a%20treaty%20binds%20the,A%20Dictionary%20of%20Law%20Enforcement%20%C2%BB .
[123] Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, (Judgment in the Jordan Referral Al-Bashir Appeal) para 85

Chad, Humanitarian Ceasefire Agreement was signed on 8 April 2004 between GoS, SLM and JEM in order to mediate the conflict. Despite the agreement armed conflicts continued.[124]

2. Janjaweed and GoS carried out calculated attacks on civilians, however, these attacks were beyond a counter-insurgency campaign and partake of crimes against humanity and genocide.[125] According to accusations, under the direction of Al-Bashir, Janjaweed militia bombed, pillaged, and destroyed the villages of Fur, Masalit, and Zaghawa tribes due to their alleged regard to SLM/A and JEM groups. Janjaweed also committed mass rape and other sexual abuses against the women of these tribes. As a result, millions of Darfuris, people who could survive, have been displaced to camps or neighboring countries. Omar Al-Bashir was held responsible for supervising and encouraging these human rights violations and propagating the non-existent differences between historically homogenous ethnic groups in order to control those who opposed the Sudanese government.[126]

3. On 18 September 2004, the United Nations Security Council (UNSC) released a resolution (Resolution No 1564)[127] and created the International Commission of Inquiry on Darfur (ICID) to investigate the human rights abuses in Sudan. Through extensive investigations, the Commission determined that the Janjaweed militia violated international humanitarian law during internal armed conflicts using widespread and systematic attacks. Also, ICID evaluated the jurisdictional requirements of the International Criminal Court (ICC), and they stated that under Article 17 of the Rome Statute[128], the Court has jurisdiction since the GoS had no measures in place for conflicts. Following these evaluations on 31 March 2005, UNSC adopted a resolution

[124] Saher Valiani, 'Genocide Left Unchecked: Assessing the ICC's Difficulties Detaining Omar al-Bashir' (2017) 35 Berkeley J Int'l L 150

[125] There were some disagreements about genocide accusations in first warrant of arrest however it is accepted in second warrant of arrest that there was genocide crime.

[126] Prosecutor v. Al Bashir,(First Warrant of Arrest), Case No. ICC-02/05-01/09, (4 March 2009)

[127] United Nations Security Council, 'Resolution 1564' (18 September 2004), UN Doc S/RES/1564.

[128] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNITS 3 (Rome Statute)

(Resolution 1593) [129]and referred the situation in the Darfur region to the ICC prosecutor.

4. On 21 July 2008, the African Union (AU) Peace and Security Council requested to defer the prosecution against Al-Bashir for twelve months according to Article 16 of the Rome Statute. However, The UNSC did not respond to this request, and Moreno-Ocampo proceeded with prosecution.

5. Prosecutor Moreno-Ocampo considered the situation and found *reasonable grounds* to allege Bashir was responsible for the stated crimes:
    i. For genocide under Article 6 of Rome Statue (a) killing members of the Fur, Masalit, and Zaghawa ethnic groups, (b) causing serious mental harm, and (c) deliberately inflicting conditions of life calculated to bring about their physical destruction in part;
    ii. For crimes against humanity, including acts of (a) murder, (b) extermination, (d) forcible transfer of the population, (f) torture, and (g) rapes; and
    iii. For war crimes for intentionally directing attacks against the civilian population and pillaging.[130]

6. Pre-Trial Chamber I, acceded with Moreno-Ocampo and issued a warrant of arrest on 4 March 2009 however they stated that there was no *reasonable ground* to accept genocide allegations.

7. Following these, The AU was concerned over the lack of actions and issued a decision and stated in the name of all member states of the AU that they would not cooperate with the arrest and surrender of President Al-Bashir pursuant to Article 98 of the Rome Statute.

8. After this statement of the African Union, on 12 July 2010, a second warrant of arrest was issued, and the second one also included the accusations of genocide.

[129] United Nations Security Council, 'Resolution 1593'(31 March 2005), UN Doc S/RES/1593.

[130] *ibid*

9. On July 21, 2010, ICC issued additional requests to Sudan and to members of ICC to arrest and surrender President Al-Bashir. It was directly before the visit of President Al-Bashir to Chad. Contrary to the request of ICC, Chad did not rescind its invitation to Omar Al-Bashir and refused to arrest him.

10. On 28 August 2010, Al-Bashir visited Kenya. However, Kenya refused to arrest Al-Bashir as well. According to Kenya that would have been detrimental to peace process of Kenya and also since Kenya is a member state of African Union, they stated that they had obligations to obey they duties regarding the African Union.

11. In 2011, Al-Bashir visited two ICC member states: Djibouti and Chad on 8 May 2011 and 7 August 2011. The ICC issued a Decision to the UN Security Council and the Assembly of States Parties to the Rome Statute regarding President Al-Bashir's presence in Djibouti and advised them to take measurements that they deem appropriate.[131] However, these requests were not responded to by the concerned states.

12. On 29 March 2017, he visited the Hashemite Kingdom of Jordan, but Jordan did not arrest and surrender Al-Bashir.

13. As a response to the failure of Jordan to arrest and surrender Al-Bashir, on 11 December 2017, Pre-Trial Chamber II (the Pre-Trial Chamber) issued a "Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender of Omar Al-Bashir."[132]

14. On 18 December 2017, Jordan requested to appeal this decision on several issues. On 21 February 2018 Pre-Trial Chamber granted this request.

[131] Prosecutor v. Al Bashir (Decision Informing the United Nations Security Council and the Assembly of States Parties to the Rome Statute about Omar Al-Bashir's recent visit to Djibouti) Case No. ICC-02/05-01/09, (12 May 2011)

[132] Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, (Judgment in the Jordan Referral Al-Bashir Appeal).

15. On 11 April 2019 Omar Hassan Al-Bashir was overthrown by a military coup and arrested on the allegations of corruption after the military coup the new government of Sudan promised for cooperation with the International Court on the surrender of Al-Bashir, however, further steps would never be taken.

16. Finally, on 6 May 2019, The Appeals Chamber made a Judgment on the previous request of Jordan to appeal the decision of the Pre-Trial Chamber II.

3. Claims of Parties

a. The Claims of the Prosecution:

(1) There are reasonable ground to believe a core component of GoS counter-insurgency campaign was unlawful attack on the civilians, mostly consisting of Fur, Masalit, and Zaghawa groups of Darfur region because GoS accused to these groups by having regard with SLM and JEM and other opposing groups. Additionaly, as a part of core component of the counter-insurgency campaign, GoS forces systematically committed acts of pillaging after the seizure of the towns and villages that were subject to their attacks,

(2) There are also reasonable grounds to believe that war crimes were perpetrated within the meaning of Article 8(2)(e)(i) and 8(2)(e)(v) soon after the attack to the Al-Fasher Airport in 2003 until 14 July 2008 by GoS forces including Sudanese Army and their allied forces Janjaweed Militia.

(3) It is also clear that unlawful attacks on the above-mentioned groups in Darfur region were widespread and have affected at least hundreds of thousands of civilians, and they were conducted systematically because the acts of violence involved followed to a considerable extent a similar pattern. Additionally, the GoS forces subjected throughout the Darfur region,

(i) Hundreds of thousands of civilians belonging mostly Fur, Masalit, and Zaghawa groups to acts of forcible transfer,

(ii) Thousands of civilian women, belonging primarily to mentioned groups, to acts of rape and,

(iii) Civilians, belonging primarily to mentioned groups, to acts of torture.

(4) It is obvious that as part of the unlawful attacks of the GoS, their forces subjected to acts of murder and extermination against the furtherly mentioned ethnic groups in the Darfur region.

(5) Similar to unlawful activities of GoS in the region, the Sudanese Police Force, National Intelligence and Security Service, and the Humanitarian Aid Commission committed crimes against humanity as well, consisting of murder, extermination, forcible transfer, torture, and rape within the scope of Article 7(1)(a),(b),(d),(f),(g) of the Rome Statute in Darfur region.

(6) Furthermore, there are reasonable grounds to believe that Omar Hassan Ahmad Al-Bashir has played an essential role in coordinating, with other high-ranking Sudanese political and military leaders, the design and implementation of the furtherly mentioned GoS counter-insurgency campaign as being *de facto* and *de jure* President of the State of Sudan and Commander in Chief of the Sudanese Armed Forces from March 2003 to 14 July 2008. Also in that alternative, it is claimed that,

(i) The role of Bashir was beyond coordinating the design and implementation of the common plan,

(ii) He was in full control of all branches of organs of the State of Sudan including Sudanese Armed Forces, Janjaweed Militia, National Intelligence and Security Service, and the Humanitarian Aid Commission,

(iii) He used such control to secure the implementation of the common plan.

(7) There are also reasonable grounds to believe that genocide has been conducted by GoS forces within the orders of Al-Bashir. Under Article 6 of the Statute genocide defined as (a) killing members of Fur, Masalit, and Zaghawa ethnic groups, (b) causing serious mental and bodily harm, (c) deliberately inflicting conditions of life calculated to bring about their physical destruction, (d) imposing measures intended to prevent births in the group, and (e) forcibly transferring children to another group.

(8) For all of the reasons mentioned above there are reasonable ground to believe that Omar Al-Bashir is criminally responsible as an indirect perpetrator or as an indirect

co-perpetrator[133] for Article 7(1)(a), 7(1)(b), 7(1)(d), 7(1)(f), 7(1)(g), 8(2)(e)(i), 8(2)(e)(v).

(9) Under the Article 58(1) of the Rome Statute, it is necessary to arrest Omar Hassan Ahmad Al-Bashir to ensure that,

(i) He will appear before the Court,

(ii) He will not obstruct or endanger the ongoing investigation of the crimes for which he is allegedly responsible under Statute,

(iii) That he will not continue with the commission of the above-mentioned crimes.

b. The Claims of Omar Hassan Ahmad al-Bashir:

I. On behalf of Omar Hassan Ahmad Al-Bashir, all of the accusations brought by the prosecution are rejected.

II. In accordance with the Rome Statute, especially Articles 86, 87 and 89 only **party** states are obliged to cooperate with the International Criminal Court about arrest and surrender matters. However, even though Article 87(5) of the Statute states, " *The Court may invite any State not party to this Statute to provide assistance under this Part on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis*."[134] as mentioned before it is not binding for any state that is **not** party. Consequently, since Sudan is a *state non-party*, Mr. Al-Bashir may not be a subject for arrest and surrender that was required by the International Criminal Court.

III. In addition to the above-mentioned matters, article 98 of the Statute grants that the Court may not proceed with a request for surrender or assistance that requires the

[133] Indirect perpetrator: The individual who directs, requests, or encourages the perpetration of a crime, which ultimately takes place or is attempted. *See also* Rome Statute Article 25(3)(b)
Direct perpetrator: The person who commits such a crime, whether as an individual, jointly with another, or through another person, regardless of whether that other person is criminally responsible. *See also:* Rome Statute Article 25(3)(a).

[134] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNITS 3 (Rome Statute) art.87

requested state to act inconsistently with the obligations granted by international law about State or diplomatic immunity of a person or property of a "third-state." It is clear that by saying "third-state" it is referring to *state non-parties*. Again, under this Article it is also granted that the Court cannot proceed with the request of arrest and surrender of a person without the consent of the requested State.

IV. President Al-Bashir enjoys personal immunity from foreign criminal jurisdiction under customary international law and *jus cogens*[135] as a president of a sovereign state.

4. Established Agenda of the Court

The Court shall decide:

1. May the counter-insurgency campaign by the Government of Sudan and Janjawed Militia considered as genocide under Article 6 of the Rome Statute? If so, on what ground could it be counted?
2. May the counter-insurgency campaign by the Government of Sudan and Janjawed Militia counted as crimes against humanity under Article 7 of the Rome Statute? If so, on what ground could it be counted?
3. May the counter-insurgency campaign by the Government of Sudan and Janjawed Militia counted as war crimes under Article 8 of the Rome Statute? If so, on what ground could it be counted?
4. May Omar Hassan Ahmad Al-Bashir be held liable about the above-mentioned offences? If so, shall he be liable as direct perpetrator or indirect perpetrator?
5. On the basis of the claims of Al-Bashir and other African States, could Al-Bashir benefit from the immunity of heads of states?

[135] *Jus Cogens:* Peremptory norms of general international law. *See also:* United Nations Report of the International Law Commission Seventy-first session (29 April–7 June and 8 July–9 August 2019), Chapter V

V. Applicable Law

a. Rome Statue

Article 6

For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.

Article 7

1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(a) Murder;

(b) Extermination;

(c) Enslavement;

(d) Deportation or forcible transfer of population;

(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

(f) Torture;

(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

(i) Enforced disappearance of persons;

(j) The crime of apartheid;

(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

(a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

(b) "Extermination" includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

(c) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

(d) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

(e) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture

shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

(f) "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

(g) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

(h) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

(i) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.

Article 13:

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

(a) *A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;*

(b) *A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or*

(c) *The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.*

Article 19:

1. *The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17.*

2. *Challenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by:*

(a) An accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58;

(b) A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted; or

(c) A State from which acceptance of jurisdiction is required under article 12.

3. *The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility. In proceedings with respect to jurisdiction or admissibility, those who have referred the situation under article 13, as well as victims, may also submit observations to the Court.*

4. *The admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State referred to in paragraph 2. The challenge shall take place prior to or at the commencement of the trial. In exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial. Challenges to the admissibility of a case, at the*

commencement of a trial, or subsequently with the leave of the Court, may be based only on article 17, paragraph 1 (c).

5. *A State referred to in paragraph 2 (b) and (c) shall make a challenge at the earliest opportunity.*

6. *Prior to the confirmation of the charges, challenges to the admissibility of a case or challenges to the jurisdiction of the Court shall be referred to the Pre-Trial Chamber. After confirmation of the charges, they shall be referred to the Trial Chamber. Decisions with respect to jurisdiction or admissibility may be appealed to the Appeals Chamber in accordance with article 82.*

7. *If a challenge is made by a State referred to in paragraph 2 (b) or (c), the Prosecutor shall suspend the investigation until such time as the Court makes a determination in accordance with article 17.*

8. *Pending a ruling by the Court, the Prosecutor may seek authority from the Court:*

(a) *To pursue necessary investigative steps of the kind referred to in article 18, paragraph 6;*

(b) *To take a statement or testimony from a witness or complete the collection and examination of evidence which had begun prior to the making of the challenge; and*

(c) *In cooperation with the relevant States, to prevent the absconding of persons in respect of whom the Prosecutor has already requested a warrant of arrest under article 58.*

9. *The making of a challenge shall not affect the validity of any act performed by the Prosecutor or any order or warrant issued by the Court prior to the making of the challenge.*

10. *If the Court has decided that a case is inadmissible under article 17, the Prosecutor may submit a request for a review of the decision when he or she is fully satisfied that*

new facts have arisen which negate the basis on which the case had previously been found inadmissible under article 17.

11. *If the Prosecutor, having regard to the matters referred to in article 17, defers an investigation, the Prosecutor may request that the relevant State make available to the Prosecutor information on the proceedings. That information shall, at the request of the State concerned, be confidential. If the Prosecutor thereafter decides to proceed with an investigation, he or she shall notify the State to which deferral of the proceedings has taken place.*

Article 27:

1. *This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.*
2. *Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.*

Article 58:

1. *At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that:*

(a) *There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and*

(b) *The arrest of the person appears necessary:*

- *(i) To ensure the person's appearance at trial;*
- *(ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings; or*
- *(iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.*

2. The application of the Prosecutor shall contain:

(a) The name of the person and any other relevant identifying information;

(b) A specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed;

(c) A concise statement of the facts which are alleged to constitute those crimes;

(d) A summary of the evidence and any other information which establish reasonable grounds to believe that the person committed those crimes; and

(e) The reason why the Prosecutor believes that the arrest of the person is necessary.

3. The warrant of arrest shall contain:

(a) The name of the person and any other relevant identifying information;

(b) A specific reference to the crimes within the jurisdiction of the Court for which the person's arrest is sought; and

(c) A concise statement of the facts which are alleged to constitute those crimes.

4. The warrant of arrest shall remain in effect until otherwise ordered by the Court.

5. On the basis of the warrant of arrest, the Court may request the provisional arrest or the arrest and surrender of the person under Part 9.

6. The Prosecutor may request the Pre-Trial Chamber to amend the warrant of arrest by modifying or adding to the crimes specified therein. The Pre-Trial Chamber shall so amend the warrant if it is satisfied that there are reasonable grounds to believe that the person committed the modified or additional crimes.

7. As an alternative to seeking a warrant of arrest, the Prosecutor may submit an application requesting that the Pre-Trial Chamber issue a summons for the person to appear. If the Pre-Trial Chamber is satisfied that there are reasonable grounds to believe that the person committed the crime alleged and that a summons is sufficient to ensure the person's appearance, it shall issue the summons, with or without conditions restricting liberty (other than detention) if provided for by national law, for the person to appear. The summons shall contain:

(a) The name of the person and any other relevant identifying information;

(b) The specified date on which the person is to appear;

(c) A specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed; and

(d) A concise statement of the facts which are alleged to constitute the crime. The summons shall be served on the person.

Article 87:

1. *(a) The Court shall have the authority to make requests to States Parties for cooperation. The requests shall be transmitted through the diplomatic channel or any other appropriate channel as may be designated by each State Party upon ratification, acceptance, approval or accession.*

   Subsequent changes to the designation shall be made by each State Party inaccordance with the Rules of Procedure and Evidence.

   (b) When appropriate, without prejudice to the provisions of subparagraph (a) requests may also be transmitted through the International Criminal Police Organisation or any appropirate regional organisation.

2. *The requested State shall keep confidential a request for cooperation and any documents supporting the request, except to the extent that the disclosure is necessary for execution of the request.*

3. *In relation to any request for assistance presented under this Part, the Court may take such measures, including measures related to the protection of information, as may be necessary to ensure the safety or physical or psychological well-being of any victims, potential witnesses and their families.*

4. *The Court may request that any information that is made available under this Part shall be provided and handled in a manner that protects the safety and physical or psychological well being of any victims, potential witnesses and their families.*

5. *The Court may invite any State not party to this Statute to provide assistance under this Part on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis.*

6. *Where a State not party to this Statute, which has entered into an ad hoc arrangement or an agreement with the Court, fails to cooperate with requests pursuant to any such arrangement or agreement, the Court may so inform the Assembly of States Parties or, where the Security Council referred the matter to the Court, the Security Council*

7. *Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.*

Article 97

Where a State Party receives a request under this Part in relation to which it identifies problems which may impede or prevent the execution of the request, that State shall consult with the Court without delay in order to resolve the matter. Such problems may include, inter alia:

(a) *Insufficient information to execute the request;*
(b) *In the case of a request for surrender, the fact that despite best efforts, the person sought cannot be located or that the investigation conducted has determined that the person in the requested State is clearly not the person named in the warrant; or*
(c) *The fact that execution of the request in its current form would require the requested State to breach a pre-existing treaty obligation undertaken with respect to another State.*

Article 98:

1. *The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under*

international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

2. *The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.*

b. *Charter of the United Nations*

Article 25:

The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

Article 103:

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

c. United Nations Security Council Resolution No 1593

The Security Council,

Taking note of the report of the International Commission of Inquiry on violations of international humanitarian law and human rights law in Darfur (S/2005/60),

Recalling article 16 of the Rome Statute under which no investigation or prosecution may be commenced or proceeded with by the International Criminal Court for a period of 12 months after a Security Council request to that effect,

Also recalling articles 75 and 79 of the Rome Statute and encouraging States to contribute to the ICC Trust Fund for Victims,

Taking note of the existence of agreements referred to in Article 98-2 of the Rome Statute,

Determining that the situation in Sudan continues to constitute a threat to international peace and security,

Acting under Chapter VII of the Charter of the United Nations,

1. Decides to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court;

2. Decides that the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully;

3. Invites the Court and the African Union to discuss practical arrangements that will facilitate the work of the Prosecutor and of the Court, including the possibility of conducting proceedings in the region, which would contribute to regional efforts in the fight against impunity;

4. Also encourages the Court, as appropriate and in accordance with the Rome Statute, to support international cooperation with domestic efforts to promote the rule of law, protect human rights and combat impunity in Darfur;

5. Also emphasizes the need to promote healing and reconciliation and encourages in this respect the creation of institutions, involving all sectors of Sudanese society, such as truth and/or reconciliation commissions, in order to complement judicial processes and thereby reinforce the efforts to restore long lasting peace, with African Union and international support as necessary;

6. Decides that nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or

omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State;

7. Recognizes that none of the expenses incurred in connection with the referral including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily;

8. Invites the Prosecutor to address the Council within three months of the date of adoption of this resolution and every six months thereafter on actions taken pursuant to this resolution;

9. Decides to remain seized of the matter.

VI. CONCLUSION

The element that makes this case a landmark is the contrary aspects about the jurisdiction of the ICC upon the immunity of the presidents of the *state non-parties*. Although the serious human rights violations and the law of war violated in the Darfur region it must be determined whether the ICC could try President Omar Hassan Ahmad Al-Bashir regarding the alleged crimes despite his immunity as a president of a sovereign state. This case creates an atmosphere to consider several significant matters including the sovereignty of states against the jurisdiction of the ICC immunity of the presidents, and serious breaches of customary law and *jus cogens* of war on the matters concerning civilians.

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