

# INDIVIDUAL CRIMINAL RESPONSIBILITY UNDER INTERNATIONAL CRIMINAL LAW

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## **Abstract:**

Individual criminal responsibility has been a great conquest of international law for half a century. Today, what is obvious is that the individual really becomes accountable for his acts and acts before an international criminal court, as a defendant.

To engage the responsibility of the individual, it requires the presence of several conditions. Moreover, for the international criminal responsibility of the individual to be effective, it is necessary to determine the wrongful individual acts considered as offenses as well as the persons who are criminally responsible. However, this responsibility remains limited in the face of several difficulties

**Keywords:** International law ; Individual ; Criminal responsibility

## Introduction

Internationally, an individual can be held criminally responsible for various forms of participation in crime.<sup>1</sup> In 1945, for the first time in the international legal order, it was no longer the State which was at the heart of international law: "It is men and not abstract entities who commit crimes whose repression is essential, as a sanction of international law".<sup>2</sup> Recognition of the individual to access international jurisdictions explains the right of our subject on « **the Individual criminal responsibility under International Criminal Law** ».

International criminal responsibility means that any perpetrator of an act which constitutes an international offense is responsible for this act and liable to a penalty which is pronounced, as the case may be, by an international criminal jurisdiction.<sup>3</sup>

With regard to the individual, according to the Robert dictionary, it designates "the human being as a particular being different from all the others". According to Jean Salmon, the individual is a "human being, private person, human person, individual. These different terms are synonymous."<sup>4</sup>

Historically, only states are covered by international law. Therefore, international responsibility was considered to constitute exclusively an inter-State relationship.<sup>5</sup> Individuals were naturally excluded from this classic structure and if an individual is the victim of treatment contrary to international law on the part of a foreign State, it is his State which "takes up the cause of its national".<sup>6</sup>

At the beginning of the 20th century, a growing interest by the international community in the respect of humanist values and the first attempts to allow the individual to seize international

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<sup>1</sup> AM La Rosa, " DICTIONNAIRE DE LAW INTERNATIONAL PENAL ", openedition books, 1998, p.94

<sup>2</sup> A famous passage from the judgment of the International Military Tribunal at Nuremberg remains this topical regard. See: *Jug. Nuremberg*, p. 235. See: Anne-Laure Chaumette. « Les personnes pénalement responsables », Ascensio, Hervé and Decaux, Emmanuel and Pellet, Alain. *Droit international pénal*, Pedone, HAL, 2018, p.477, <https://hal.parisnanterre.fr/hal-01661071>

<sup>3</sup> AM La Rosa, op.cit. p.93

<sup>4</sup> Dictionary of public international law, LGDJ, Bruylant, Brussels, 2001, p. 573.

<sup>5</sup> A. DECENCIERE-FERRANDIERE, op.cit., pp.34-36; D. ANZILOTTI, « La responsabilité internationale des états à raison des dommages soufferts par des étrangers », RGDIP, 1906, pp. 5-6.

<sup>6</sup> He thus becomes the subject of international responsibility through diplomatic protection. The injured individual does not have his own right on the international level, he is excluded before the international jurisdictional authorities. See: Judgment No. 10 Lotus Case (France v. Turkey) of September 7, 1927, in the case of the Permanent Court of International Justice declared that international law governs relations between independent States. Series A, No. 10, p.18.

jurisdictions began to be recorded. In this regard, we can cite the XII Hague Convention of October 18, 1907 establishing the International Prize Court, in which individuals may apply to the Court (Articles 4 and 5 of the Convention) . But, for lack of ratification by Great Britain, it did not enter into force.<sup>1</sup>

In 1928, the Permanent Court of International Justice admitted in an advisory opinion that nothing prevented the individual from becoming a subject of international law. According to the Court, "it cannot be disputed that the very object of an international agreement, according to the intention of the contracting parties, may be the adoption by the parties of certain precise rules creating individual and applicable rights and obligations by national courts."<sup>2</sup>

On the other hand, it was only at the end of the Second World War that the individual was criminally responsible before an ad hoc international criminal court for war crimes and crimes against humanity. These are the Nuremberg International Military Tribunal<sup>3</sup> and the Tokyo Tribunal<sup>4</sup>. With the creation of these two tribunals, the individual began to be directly confronted with the rules of international law to which, until now, only the State was subject.<sup>5</sup>

Thus, following the events in the former Yugoslavia and in Rwanda, the United Nations Security Council decided to create two ad hoc criminal jurisdictions. These are the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda.<sup>6</sup>

The subsequent adoption of the ICC Statute on July 17, 1998, can be seen as an effective evolution of the status of the individual under international law. In Article 1, it enshrined the jurisdiction of the Court to try individuals who have committed serious violations of international humanitarian law.

Theoretically, the consideration of the individual as a subject of international law has always been questioned by doctrine. Hence there are those who consider that only the State is subject to international law and they therefore deny the individual any existence in international law.<sup>7</sup>

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<sup>1</sup>See: N. Toumi , « L'individu devant les juridictions pénales internationales », FDSPT, Tunis, 2009, p.4

<sup>2</sup>Advisory Opinion on the Jurisdiction of the Courts of Danzig, PCIJ, Advisory Opinion, March 3, 1928, Series B, No. 15.

<sup>3</sup> The tribunal was created by the Treaty of London of August 8, 1945 to try the major criminals of the Axis (November 1945/1946). For more, see: " Trial of Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946", chrome-extension://efaidnbmnnnibpcajpcgclefindmkaj/https://www.legal-tools.org/doc/512713/pdf/

<sup>4</sup>The tribunal was established on January 19, 1946 to try Japanese civilian and military officials. For more, see: Bernard Lambert, " Entre déni et oubli : le procès de Tokyo (1946-1948) ", Le Monde Juif, 1996, P.17 to 31

<sup>5</sup>N. Toumi , op.cit. p.6

<sup>6</sup>Resolution 955 of November 7, 1994.

<sup>7</sup>J. SPIROPOLUS, « L'individu et le droit international », RCADI, 1929-V, p. 200.

Others like DUGUIT, who considers that the individual is the sole subject of international law and that the State is only a technical process for managing collective interests.<sup>1</sup>

Individual criminal responsibility has been a great conquest of international law for half a century, and has undergone a spectacular revival in the last two decades thanks to the considerable investment made in the creation of institutions of international criminal justice. Today, not only is the existence in positive law of such a principle no longer in doubt, but individual responsibility is the subject of all solicitations from the general public.<sup>2</sup>

### **So, how can we qualify the commitment of the Individual criminal responsibility under International Criminal Law?**

To concretize the commitment of the Individual criminal responsibility. Emphasis must be placed on the effective engagement of the Individual criminal responsibility under International Criminal Law ( I ) and then on the limits of this engagement ( II ).

#### **I- An effective engagement of the Individual criminal responsibility under International Criminal Law**

Individual criminal responsibility is a fundamental principle of international criminal law. It holds individuals accountable for their actions when they commit serious crimes that violate international law. Thus, as a first step, it is important to determine the constituent elements of individual criminal responsibility (A) and its implementation (B).

##### **A- The constituent elements of the Individual criminal responsibility**

To engage the responsibility of the individual, it requires the presence of an offense. Breach means breach of an international obligation. This violation may consist of an action or an omission. The word infraction is synonymous in international criminal law with the word crime”. Moreover, that it is imputable to him.

Individual criminal responsibility cannot be engaged by the mere fact of the violation of a norm of international law. The latter must be essential and, for that, must affect the interests of the international community as a whole. The doctrine qualifies this essential norm as a “crime”.

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<sup>1</sup>L. DUGUIT, *Treaty of Constitutional Law*, 1921. See also: J. DUMAS, « Sauvegarde internationale des droits de l'Homme », RCADI, 1937-1, p. 9.

<sup>2</sup>F. Mégret, "Les angles morts de la responsabilité pénale individuelle en droit international", *Interdisciplinary Review of Legal Studies*, Volume 71, 2013, p.84

## **Individual criminal responsibility under International Criminal Law**

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An international crime is a violation of the rules of customary or conventional law. It “relates to rules intended to protect values considered fundamental by the international community as a whole, therefore there is a universal interest in the repression of such crimes.”<sup>1</sup>

These are the crime against humanity (1), crime of genocide (2), war crime (3) and crime of aggression (4)

### **1- The Crimes against humanity**

Crimes against humanity" means the criminalization of certain inhumane acts of a heinous character committed within the territory of a State against its own citizens was a revolutionary contribution to international law.<sup>2</sup>

The Nuremberg Tribunal statute defined crimes against humanity as "murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population before or during war, or persecutions on political, racial or religious grounds, when these acts or persecutions, whether or not they constituted a violation of the domestic law of the country where they were perpetrated, were committed as a result of any crime falling within the jurisdiction of the Court or in connection with this crime".<sup>3</sup>

The ICTY statute provides in its article 5 for murder, extermination, enslavement, expulsion, imprisonment, torture, rape, other inhumane acts, as well as persecutions on the other hand.<sup>4</sup>

### **2- The crime of genocide**

According to Article II of the United Nations Convention on the Prevention and Punishment of the Crime of Genocide, genocide is "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) serious bodily or mental harm to members of the group; (c) intentionally inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) measures aimed at preventing births within the group; e) forced transfer of children from one group to another group. »

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<sup>1</sup>PAZARTZIS (PH.), "la répression pénale des crimes internationaux" Paris, Pedone , 2007, p.25.

<sup>2</sup>N. Toumi , op. Quote . p.17

<sup>3</sup>See Article 6(c) of the Nuremberg Tribunal Statute.

<sup>4</sup>See: STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, 1993, chrome-extension://efaidnbmnnnbpcajpgclefindmkaj/https://www.icty.org/x/file/Legal%20Library/Statute/statute\_sept09\_en.pdf

This definition has been reproduced in the statutes of the ICTY (art.4), the TPLR (art.2) and the ICC (art.6). This definition has become consolidated as part of customary international law.

### 3- The War Crimes

War crimes traditionally relate to violations of the customary or conventional law of armed conflict. This notion has evolved with the codification and progressive development of the law of armed conflict or humanitarian law, and the jurisprudential contribution of international criminal tribunals.<sup>1</sup>

Article 6 of the statute of the Nuremberg tribunal contained an initial definition of war crimes in the form of a non-exhaustive list of "violations of the laws and customs of war" War crimes were included in the jurisdiction of the 60 ad hoc international criminal tribunals. Articles 2 and 3 of the ICTY Statute empower the tribunal to prosecute alleged perpetrators of "grave breaches of the 1949 Geneva Conventions" and "violations of the laws and customs of war".<sup>2</sup>

### 4- The crime of aggression

The crime of aggression echoes the “crimes against peace” defined in Article 6 of the Statute of the Nuremberg Tribunal and Article 5 of the Statute of the Tokyo Tribunal.

Thus, the General Assembly adopted a definition of aggression in its resolution 3314 of December 14, 1974. According to Article 1<sup>of</sup> this Resolution, "aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any way inconsistent with the Charter of the United Nations, as provided in this definition. »

Moreover, for the international criminal responsibility of the individual to be effective, international law must not determine only the wrongful individual acts considered as offences. But, it must also determine the people who are criminally responsible.

According to Article 7:1 of the ICTY Statute, "Anyone who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime...shall be individually responsible for that crime".<sup>3</sup>

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<sup>1</sup>C. RENAULT, “La place des crimes de guerre dans la jurisprudence des Tribunaux pénaux internationaux”, Brussels, Bruylant, 2004.

<sup>2</sup>These violations include, but are not limited to, "murder, ill-treatment and deportation for hard labor or any other purpose of populations in occupied territories, murder or ill-treatment of prisoners of war or persons at sea, the execution of hostages, the plunder of public or private property, the wanton destruction of towns and villages, devastation not justified by military necessity".

<sup>3</sup>See also: Articles 6:1 of the Statute of the ICTR and Art. 25 of the CPI Statute

This means that the individual incurs liability when acting exclusively as a private person, or those who commit crimes on their own, or as a public official of the State. That is to say those who commit crimes within the framework of the exercise of the prerogatives of public power.

### **B- The implementation of the Individual criminal responsibility**

When the international criminal responsibility of the individual is engaged by the international criminal jurisdictions, these judicial authorities will condemn the perpetrators of serious violations undermining international humanitarian law, by applying sanctions or penalties corresponding to these crimes.

The role of the judge in the determination of his sentences is essential. It uses subjective and objective criteria to apply it to responsible persons. With regard to the subjective criteria, the international judge must take into consideration a set of data, of circumstances, which relate to the person of the condemned. He must preserve the dignity of the condemned. He must also take into consideration the state of health and the mental state of the accused individual, based on expert reports. Generally speaking, the judge must decide on a case-by-case basis, taking into account the personal situation of the accused individual.

With regard to the objective criteria, recidivism and premeditation constitute aggravating circumstances of the sentence that the judge must take into consideration. He must also determine the applicable penalty at his discretion. To the penalty of imprisonment, he may add a fine or the confiscation of material goods. On the other hand, it can decide in certain cases to reduce the sentence, for example if it finds that the defendant has shown a willingness to cooperate with the court in the investigations and prosecutions.

The implementation of the international criminal responsibility of the individual does not exclude the engagement of the responsibility of the State in the name of which the individual acted. This is concurrent liability.<sup>1</sup>

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<sup>1</sup>International law always seeks to engage the responsibility of the State, alongside the responsibility of the individual because the responsibility of the State could turn out to be important in addition to its highly symbolic character, the condemnation of a State would greatly facilitate compensation, since often the damage caused by individuals, due to their importance and extent, greatly exceeds the means at their disposal to deal with their reparation, most often the victims come up against the insolvency of individuals to provide victims with reparation for the damage they have suffered Example, In the Bosnian case, Bosnia and Herzegovina wanted to challenge Serbia's responsibility to obtain damages, since reparation for the damage caused exceeds the means at its disposal the perpetrators of the crimes perpetrated in Srebrenica. See : N. Toumi . Op.cit. p.69

The international criminal responsibility of individuals and the responsibility of States have common characteristics, particularly with regard to the violation of "jus cogens" <sup>1</sup>of the fundamental principles of international humanitarian law.

## **II- A limited engagement of the Individual criminal responsibility under International Criminal Law**

International law recognizes the individual as responsible for serious violations of international humanitarian law capable of presenting himself and appearing before an international criminal jurisdiction. It is this right which determines the limits of the competence of the individual and, consequently, the limits of the engagement of individual international criminal responsibility.

On the other hand, one finds on the one hand, various forms of exemptions from the international penal responsibility of the individual (II), and on the other hand, of the difficulties which make obstacle with the engagement of the individual penal responsibility ( II)

### **A- An exemption from individual international criminal responsibility**

Individual can exonerate himself from his responsibility if he proves that he is entitled to benefit from one of the cases of exoneration from responsibility or even more, by arguing his immunity from jurisdiction linked to his official capacity. To escape international criminal responsibility, the individual must provide proof of his irresponsibility.

In this sense, the individual plays a cardinal role in order to convince the judge that he has not committed the crime which is imputed to him, or that even if he has really committed it, he benefits from a motive exemption from criminal responsibility as provided for in the statutes of international criminal jurisdictions.

On the other hand, the accused individual cannot in any case argue his official capacity or the fact of applying orders to escape responsibility. This means that the official status of the accused does not exempt him from his criminal responsibility and does not constitute a reason for reducing the sentence. On the other hand, he may benefit from one of the reasons for exoneration from liability. These reasons are not systematically applied by the international

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<sup>1</sup>Article 53 of the Vienna Convention on the Law of Treaties of 1969 provides, in fact, that a norm has the force of jus cogens when "the international community of States as a whole" recognizes it as a rule "from which no derogation is permitted and can only be modified by a subsequent norm of general international law having the same character". The fundamental feature of the concept of jus cogens is, therefore, the principle of the recognition of the validity of a rule that is to say of a right which imposes a certain behavior, as unavailable, by the whole of the international community. The principle is of a strictly formal type and requires, for the existence of a norm of jus cogens.



judge but it is case by case. Therefore, the judge can refuse or accept a means of proof brought by the individual.

First, the constraint distinguished either physical or moral. Physical restraint is that exerted on the body of the accused individual. Whereas, moral constraint is exerted on the individual will.<sup>1</sup> It deprives him of his freedom of decision. Here, coercion can be a reason for exoneration since it eliminates an essential element of criminal liability, which is freedom of decision.

The second reason for exemption is self-defence. In order for self-defence to be accepted as a reason for exonerating liability, two conditions must be met:

First, the defense must be proportionate to the magnitude of the danger involved, that is, it must not exceed the appropriate means and intensity to prevent its consequences. Second, the attack must be current and immediate."<sup>2</sup>

Third reason for exemption is the state of intoxication. This ground was only provided for by the Statute of the ICC in its article 31:1 :b . To constitute a ground for exoneration from criminal responsibility, the intoxication must be involuntary.<sup>3</sup>

### **B- The difficulties of incurring individual criminal responsibility**

The issue of individual criminal responsibility is a recent issue, and traditionally jurisdictional immunity is an obstacle to the criminal prosecution of State bodies such as the Head of State or ministers, in application of international law designed on the inter-State model and anxious to respect the sovereign equality of States.

Thus, the States are always reticent with regard to international criminal jurisdictions, and do not agree to cooperate easily with these international bodies, and especially in terms of the arrest and extradition of the presumed culprits, which is a prerequisite for any appearance of the individual before an international criminal court.<sup>4</sup>

However, the procedure of trial in absentia does not exist before international criminal courts, therefore judges must rely on the cooperation of States to arrest and transfer suspects. State

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<sup>1</sup> Articles 7 of the Statute of the Nuremberg Tribunal. 6 of the Tokyo Tribunal statute, 7/2 of the ICTY statute, 6/2 of the ICTR statute and 27/2 of the ICC statute 170. GLASER (S.): “L'élément moral de l'infraction internationale”, RGDI, 1955, p. 537. 171 Prosecutor/Drazen ERDEMOVIC Case IT-96-22 of December 29, 1996-March 5, 1998.

<sup>2</sup> GIRAUD (E.), “La théorie de la légitime défense”, RCADL, 1994 - III, p. 692.

<sup>3</sup> See Article 31 of the ICC Statute "Grounds for excluding criminal responsibility"

<sup>4</sup> RUCZ (C.), « O.N.U. et le respect des droits de l'Homme », Juris -classeur de droit international, issue 124, 2000, p. 38.

cooperation is therefore the basic principle enabling international criminal tribunals to accomplish the mission assigned to them by the international community. So there is an obligation incumbent on the States of the State may refuse to cooperate with a jurisdiction by its partial or total rejection of a request for assistance if this request is for the reproduction of documents, the disclosure of evidence that affects its national security and defence.

Further, the State may deny the Prosecutor access to its territory to investigate human rights violations.

The non-cooperation of the States constitutes in fact an obstacle which prevents the normal development of the procedure, the regular functioning of the criminal justice, adding to these difficulties, the aptitude of certain States with regard to the international criminal jurisdictions, and especially the hostility shown by the United States of America towards the ICC, this hostility can be placed in the context of the ambiguous relationship that the superpower maintains with international law and more specifically with international criminal justice .<sup>1</sup>

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<sup>1</sup>CONDORELLI (L.), " La Cour pénale internationale: un pas de géant (pourvu qu'i soit accompli...) ", RGDIP, 1999, pp. 7-21.

### **Conclusion**

International law recognizes the individual as responsible for his acts committed. These acts must constitute a serious violation of international law

The Individual criminal responsibility can engage a second responsibility, that of the State. Two distinct but complementary responsibilities may result

Only, although individual responsibility has its advantages, it also has the same disadvantages as those of criminal justice in general.

Hence, there are many individuals who have committed or who continue to commit serious violations of international humanitarian law but who still go unpunished. The very effectiveness of individual criminal responsibility has come into question.

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