The International Criminal Court in the light of American and French positions

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Wars and the suffering they bring on have for a long time – and sometimes still are - been considered as social inevitability altogether eluding individual responsibility. Since two centuries, the Nation State had imposed this resignation by covering rulers and soldiers by its sacred legitimacy. That era of progress had constructed an international law knowing only states and prohibiting the implication of persons. As such, in the event of a penal offence in the laws for armed conflict, the State alone had the authority to hunt down and punish the guilty. The International Criminal Court constituted a decisive turning point that led law away from this disastrous path. Wars and their suffering were from this point on recognized as the consequence of individual misdeeds, liable to be prosecuted directly by the international community.

We will examine first of all how this movement of attributing responsibility both to individuals as soldiers as well as politics was born and developed in reaction to the rise of the Nation State[1], and then describe rapidly the judicial mechanisms to which it gave rise through the Treaty of Rome. We will then compare the American and French positions in this regard, attempting to show that they express less a contrast between the contempt of the Laws of Armed conflicts by the one and its respect by the other, than divergent conceptions of the role of the State, as much with regard to other peoples as with regard to its own citizens.

History of the International Criminal Court

Since the 1st July 2002, date of its coming into force, the Treaty of Rome thus made the threat of appearing before a criminal court weigh personally on those responsible for genocides, crimes against humanity or war crimes[2]. In fact, many roads led to Rome.

After 1872, Gustave Moynier[3] had proposed a permanent court in reaction to the Franco-Prussian War[4]. In 1919 the victors of Versailles had envisaged in their turn an international court aimed at enemy criminals of war[5]. But it was only in the wake of the Second World War that the vanquished would be subjected to a Law of the Victorious laden with judicial forms, at Nuremberg[6], as in Tokyo[7].

In 1948, the United Nations General Assembly (UNGA) adopted a Convention on the Prevention and the Repression of the crime of Genocide[8] and envisaged international courts of justice to punish them, inviting the Commission of International law to study the feasibility of an international judicial system. In 1989 the UNGA requested the Commission to resume the work held up by the Cold War. In 1993, then in 1994, the UN Security Council would establish two *ad hoc* courts to curb crimes against humanity, war crimes and genocides for the conflicts in ex-Yugoslavia and in Rwanda.

In 1994, the Commission of International Law presented a project for the statutes of the International Criminal Court and advised the General Assembly to call for a conference in order to negotiate a treaty for setting up this court. From 1995 to 1998, a preparatory commission instituted by the General assembly held six sessions at the seat of the UN in New York, sessions to which the non-governmental organizations (NGOs) contributed considerably. Basing themselves on the draft text of the preparatory commission, the UNGA in its 52nd session called for a diplomatic conference in order to finalize and adopt the treaty.

This "Rome Conference" brought together from June 15th to July 17th 1998, 160 countries, framed by 17 inter-governmental organizations, 14 United Nations agencies and 124 NGOs. After five weeks of impassioned negotiations, 120 countries voted for the "Statutes of Rome," setting up the International Criminal Court, 7 countries voting against (amongst whom the United States, Israel and China), 21 others abstaining. France made up an element that both motored and moderated the conference, the United States, on the other hand demonstrating a determined but creative opposition to both the objectives and the status of the court.
The Preparatory Committee will then resume its work of finalizing the elements necessary for the creation and for the smooth functioning of the court, notably the Rules of Procedure of Proof and the definition of crimes. France will ratify the treaty on June 9th, 2000 [11], two years before its coming into force on July 1st, 2OO2. On September 1st, 2006, 102 countries had ratified the Statutes.

Today, the International Criminal Court has been referred to by the United States on presumed crimes in Uganda, the Democratic Republic of Congo, and the Central African Republic, as well as by the UN Security council on presumed crimes in Sudan. The Prosecutor has decided to inquire into the cases of Uganda, Congo and Darfour.

The International Criminal Court

As opposed to the *ad hoc* tribunals of the Hague for Yugoslavia and of Arusha for Rwanda, set up within the framework of the United Nations, the International Criminal Court is set up, at the Hague, as an autonomous international organization. The history of the discreet negotiations conducted in Rome by the most important States of the planet to give birth to this organization, particularly, those of the last hours, while the specter of the failure of the conference was hovering, remains to be written. They led to compromises, which mark the most important articles of the Statutes, betraying the complexity and the fierceness of the negotiations.

Put down by **Article 7,** the definition of crime against humanity offers several traces of these dealings. It provides, for example[12], that the context of the crime must be a generalized or systematic attack launched against a civil population. This *alternative* formulation was extracted by Canada, while the United States, France and Great Britain wanted a *cumulative* formulation, limiting the field of the article. Conversely, the United States obtained, still with the objective of mastery of this field, a precise definition[13] of offenses cited by the article[14], which they will reinforce once again, in opposition to France's opinion, by constitutive elements of crimes meant to constrain judges in their interpretation of the preceding articles. The statutes of the ICC thus set down in a number of cases, a more restrictive definition of crimes[15] than that adopted by preceding international texts and conventions.

So also for article 8, the one on war crimes, the most worrying article for American, British and French forces constantly engaged in external conflicts: it prohibits neither nuclear, biological or chemical arms nor anti-personnel mines. It will remain, on the other hand, very strict vis-à-vis the responsibility of executants and chiefs with relation to collateral damage to civilian populations, and this alone will justify Pentagon's aversion for the Statutes.

Article 12,concerning the competence of the court, sets down measures that were much criticized by the organizations defending human rights, for they limit this competence which they would have wished to be universal. At the close of the difficult negotiations, the Court is competent only if it is referred to by a State or by the prosecutor on the condition that one of the following states had ratified the Statutes: either the one on whose territory the crime has been committed, or the one of which the person committing the crime is a national. The Court is, on the other hand, competent in all cases that are submitted to it by the Security Council[15]. The United

States could consider itself protected from this by their right of veto in the Council. We will see how the future will relativize this protection (see note 29).

Article 17 was without doubt the key to the adoption of the Statutes by the largest number by the acceptance, contrary to the *ad hoc* international tribunals, of the complementarity of the Competence of the Court in relation to national jurisdictions: it is only in the event of their failure to institute credible proceedings that the Court can justify its submission to it. The fact that this arrangement did not succeed in disarming American opposition leaves room for the suspicion that the United States feared that their military justice prove itself to be insufficiently strict (see note 25) and thus open the field to the complementary competence of the ICC.

Finally, ***articles 27, 28 and 29***, dealing with the responsibility of political, civil and military chiefs caused concern to France but above all, made the United States indignant, as they saw in it an interference incompatible with their constitution. As for the military chief, the Statute provides for his responsibility if he knew or should have known that his forces were committing or going to commit crimes and if he had not taken reasonable steps for preventing the execution of these crimes or if he had not submitted them to the competent authorities for the purposes of enquiry and proceedings. Finally, arrangement alien to French juridical culture, Article 29 stipulates that "crimes that were a matter for the ICC could not lapse".

France and the International Criminal Courts

France has always been an active promoter of international criminal justice. From the early 90's the Ministry of Justice keenly joined forces for the resumption of the United Nations' work on the subject. Yet, from 1995 onwards, the tensions between the prosecutor of the International Criminal Tribunal for Yugoslavia and Ministry of Defense will temper this enthusiasm: marked by Common Law, the procedure of this tribunal will shock the French militia called upon as witnesses in Bosnian affairs.

In July 1998, Marc de Brichambaut[17] will then have to keep within the Delegation that he leads in Rome, a delicate balance between the representatives of a fervent Ministry of Justice and those of a cautious Ministry of Defense, which moreover had support from the Presidency of the Republic. This creative tension allowed France to contribute considerably to the introduction, in the Statutes of the

ICC of the lessons of the International Criminal tribunals. Under the influence of the Ministry of Defense, it will distinguish itself, besides, by its fight for what will become Article 124 of the Statute: the possibility for a signatory to exclude its nationals from the authority of the Court in relation to war crimes. It will obtain, on the subject, *in extremis,* a temporary success, which exonerates its army from the jurisdiction of the Court until 2009[18].

Before the Houses (see note 11) authorized the French executive to ratify the treaty creating the International Criminal Court, it was necessary to reconcile the provisions of article 27 of the statute concerning the responsibility of leaders with Article 678 of the Constitution of 1958 concerning that of the Head of State. The Congress, which met on June 29th 1999, adopted to that effect a revision of a very general nature[19]. To attempt to limit the vulnerability of the Head of state thus opened in its handling of dissuasion, France's ratification will be accompanied by an interpretive declaration, stipulating that the "dispositions of Article 8 of the Statute [...] concern exclusively conventional weapons and would have no way of regulating nor prohibiting the eventual use of nuclear weapons, nor to do a disservice to other rules of international law applicable to other weapons, necessary for the exercise by France of its natural right to legitimate defense".

The ratification of the Statute was however not enough in itself for its implementation: for one, on account of the fact of the absence in French law of certain crimes targeted by the Court risked preventing French courts from prosecuting them before the ICC in the name of the complementarity of its competence, seized them, for the other, because of the absence of juridical tools allowing for technical cooperation with the Court. The very technical question of cooperation was for the most part settled by the Law of February 26th 2002 [20]. On the other hand, the introduction of the crimes in French Law has still not taken effect, which reveals a certain offhandedness on the part of France with regard to its commitments.

French law certainly already permitted the prosecution of genocide and a part of the crimes against humanity, but not war crimes[21]. A draft law was then presented to the Council of Ministers of July 26th 2006, which would complete the legislation concerning crimes against humanity and incorporate article 8 of the Rome Statutes[22] on war crimes. At the moment when these lines are written, the state of the Draft Law is not very true to the Rome Statutes and disappoints the more militant NG0s by the

absence of affirmation of the universal competence of French courts on these crimes[23].

The United States and the International Criminal Court

The Unites States were the principal instigators of the Nuremberg and Tokyo tribunals, from the comfortable position of victors. They also supported the creation of the ICT for Yugoslavia (see note 9) and for Arusha (see note 10) but their militia very quickly set up as reticent a relationship as the French did, if more discreetly.

At the time of the Rome negotiations in June and July 1998, determined not to vote for the Statute, they nevertheless envisaged success for the conference and carried out pragmatic guerrilla warfare to reduce its effects, in particular the competence of the future tribunal as the freedom of appreciation of its judges, forcing themselves to handle carefully the gaps permitting their nationals to get away from its jurisdiction on any occasion. Once the Statute was adopted, they continued to push in this direction with the tiniest details of the follow-up work of the Preparatory Commission.

On December 31st 2000, the last day of the deadline provided by the Statute, President Clinton will sign the treaty, all the while advising his successor not to ratify it. On May 6th 2002, President Bush will make known to the United Nations his country's relinquishing signing[24], after a large-scale campaign against the Court[25].

This campaign had in fact begun under the Clinton presidency, when, led by the comical hyper-nationalist Senator, Jessie Helms, Conservative Congressmen had initiated what would become, under the Bush presidency the "American Service Members' Protection Act" or the ASPA. Among other arrangements, it prohibited any cooperation with the ICC, both on the part of the executive as well as American courts; it forbade military assistance to countries having ratified the Rome Statutes, apart from essential allies; it imposed conditions on American participation in UN peace-keeping operations that kept engaged soldiers outside the reach of the ICC: it authorized the President to utilize "all the necessary and appropriate means to liberate an American citizen held by the International Criminal Court" provisions that were scoffed at world-wide under the nickname of the *Hague Invasion Act* . While France delayed integrating the Rome Statute in its internal Law, the United States thus wrote an anti-ICC doctrine into their own.

On July 12th 2002, the United States succeeded in imposing at the Security Council, with the derisive collusion of China and Russia, of Resolution 1422. By this Resolution, the Council, turning Article 16 of the Statute away from its aim[26], ordering the ICC to abstain from prosecuting any participant in a peacekeeping operation who was a national of a country that was not a party to the Treaty of Rome. This resolution will be renewed in 2003 but the United States, their credit undermined by the Iraq War, will fail to impose it in 2004 and seem to have given up since.

Simultaneously, handling without discretion promises and the economic as well as political intimidations, Washington will force itself to extract from a maximum of countries bilateral accords aimed at an international obligation of non-extradition of American nationals to the ICC, inviting these countries to rely on article 98 of the Rome Statute[27]. To this day, about a hundred countries have signed such agreements[28].

But the world was simpler that Jessie Helms' vision of it. In September 2004, the United States needed to substantiate genocide in Darfour. They preached, for a start, the setting up of an *ad hoc* African tribunal. Failing to make this opinion prevail, they agreed, on March 31st 2005, to abstain from resolution 1593 of the Security Council allowing the Prosecutor to seize these crimes. The American repugnance for the ICC had to cede in the face of even stronger aversions.

The comparison between the attitude of the United States and that of France vis-à-vis the International Criminal Court allows us to understand better the fundamental stakes of the ICC, thanks to the light thrown by the two intersecting philosophies with regard as much to international politics as to the role of the State vis-à-vis its citizens. This brief work has not permitted us to develop the American argument against the court, but it would be an error to see in this refusal a contempt for the Law of Armed Conflict, of which the United States have on the contrary always been supporters - and occasionally promoters – even if its practice was able (as in Vietnam) and can still (as in Iraq) deny the verb.

As long as the law of armed conflicts claimed only to regulate relations between States, the Americans tolerated a hierarchy of norms that placed this international law above their national law without interference. But when a non-American court could bypass their Constitution to directly reach an American citizen, whose protection is the foundation of the founding texts, this was unacceptable for

them. One could, of course discern behind this refusal a doubled feeling of superiority from the persecution complex of the First world power, and one should ponder about the weight of the military institution in the functioning of the American democracy. However, profoundly, it is their loyalty to a more than two hundred year old Constitution – to which they attribute an international authority – which is involved and which will be difficult to bypass.

On the contrary, France, who agreed to bend its own fundamental law to the exigencies of the Rome texts does not give to its own inconstant institutions any extra-national legitimacy. This ancient nation has many a time experienced its incapability to punish the individual crimes of its own agents from the moment they were covered by the reasons of State. It acknowledges as progress the vigilance of an external magistrate who constrains it from now on to judge them with neither delay nor weakness, as demonstrated by the briskness of its reaction to the Mahé affair in the Ivory Coast.

Feebleness of a declining country, - yet prompt to fight against supranational nature – faced with the vigour of a nation with the strength of age? On the contrary, wisdom of an experienced State that measures the limits of the lucidity of the nation-State opposed to an adolescent people, unconscious of the threats that its asocial conduct carries for peace and for the weak? Each one will appreciate, but it remains that the international Criminal Court has started a movement that one hopes is irreversible: wars and their suffering are no longer regarded and treated as social inevitabilities, but as the consequence of personal misdeeds that it is necessary to prosecute and to punish, and that the State can no longer legitimize. Those democratic countries that are delaying admitting it would nevertheless be the first beneficiaries. The attitude, on this point, of the democratic majority from the 2006 mid-term elections at the American Congress shall be followed with attention.

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1. About one of Napoleon's sentences " by the deputies of all the sovereigns of Europe", Joseph de Maistre wrote to the Count de Front in 1815 : "It would be the grandest and the most important sentence that one has ever seen in the world ; one could develop the finest principles of Law of the people and, whichever way it turned, it would be a grand monument in history."
2. These misdeeds emerge in *jus au bellum* as opposed to the crime of aggression, a part of *jus ad bellum* of which the Rome Conference had to also organize the personal suppression, but that could not define. This definition could be attempted once again at the revision of the Statute envisaged in 2009.
3. Swiss jurist born in 1826 and deceased in 1910, Louis Gabriel Gustave Moynier was one of the founders of the International Committee of the Red Cros of which he was president during forty-six years. See on this subject André Durand, "Gustave Moynier and the Peace Societies", International Review of the Red Cross, 314/1996. ICRC, S 532-550, ISSN 1560-7755.
4. Gustave Moynier 'Note sur la creation d'une institution judiciaire internationale propre à prévénir et à réprimer les infractions à la Convention de Génève", *Bulletin international des sociétés de secours aux militaries blesses*, No. 11, April 1872, p.122-131.
5. Article 227 of the Treaty provided a translation of Guillaume II before an international court composed of judges from the United States, Great Britain, France Italy and Japan. The Commission of responsibilities of originators of war and sanctions concluded with the establishment of an international court, which could however only act following a lack of cooperation of the countries where the accused had taken refuge.
6. On August 8th 1945, the London Agreement created the military court of Nuremberg. Its charter authorized it to judge crimes against peace, war crimes and crimes against humanity. Twenty-four Nazis would be prosecuted.
7. Created on January 19th 1946 by proclamation of General Douglas MacArthur's, acting supreme Commander of the Allied Powers in the Far-East. Twenty-eight Japanese would be prosecuted.
8. Approved and submitted for the support of the Assembly General in its Resolution 260 A (III) of December 9th, 1948. Came into force on January 12th, 1951. Cf.< http://www.unhcr.ch/french/html/menu3/b/p_genoci_fr.htm>.

9. the Hague International Criminal Court for ex-Yugoslavia, created by Resolution 808 of February 22nd 1993.
10. The Arusha International Criminal Court for Rwanda, created by Resolution 955 of November 8th, 1994.
11. Depositing of instruments of ratification authorized by the Law no. 2000-282 of March 30th 2000 (J.O. of March 2000).
12. Article 7, § 1.
13. Article 7,§ 2.
14. Article 7 § 1 : attack launched against a civil population; extermination, reduction to slavery, deportation of forced transfer of the population, torture, forced pregnancies; persecution; apartheid; forced disappearances".
15. Article 9.
16. Article 13 b.
17. State Counselor, today General Secretary of OSCE
18. Only France and Columbia claimed the benefit of this article.
19. Article 53-2: *The Republic may recognize the jurisdiction of the International Criminal Courts under the conditions provided in the Treaty signed on July 18th, 1998.*
20. Law no. 2002-268
21. France ratified several international treaties that related to war crimes, such as the Geneva Conventions of 1949 and their additional protocols, but has still not brought them into effect in its internal laws.
22. It does not take up in particular sexual slavery, nor the term *apartheid,* which is replaced by the crime of *segregation.* It retains, in conformity with French jurisprudence, the exigency of a prior existence of a concerted plan as a constitutive element of the crime. As opposed to the Statutes of the court, it does not generalize besides in French law, imprescriptibility for all the crimes that it cracks down on.
23. Despite article 689 of the Code of Criminal procedures: "The authors or accomplices of offences committed outside the territory of the Republic can be prosecuted and tried by French jurisprudence […] when an international agreement gives competence to French courts of law to take cognizance of the offences."

24. Signature that bound the United States to not fighting the ICC. It would entrust to John Bolton, then Under-Secretary of State for the control of armaments and later, to its representative to the United Nations, the task of signing a renunciation whose juridical scope was uncertain.
25. The Pentagon's role in this campaign will be essential, as witnessed by, amongst other examples, the attention that President Bush paid to it before the 10th Mountain Division returning from operations on 19th July 2002, at Fort Drum, NY: "Every person who serves under the American flag will answer to his or her own superiors and to military law, not to the rulings of an unaccountable international criminal court." One will contemplate the argument according to which the fact of being 'unaccountable' would be a flaw for a court of law.
26. In the spirit of the Statutes, article 16 aimed principally at permitting the Security Council to suspend the courts' action when the prosecution of a war criminal could upset negotiations for peace.
27. In the spirit of the Statutes, article 98 aimed at permitting a State to treat the case of a contradiction between its obligations on account of the ICC and other international obligations, like , for example the diplomatic immunity of the prosecuted person.
28. Or approximately as many as the number of states that are party to the Rome Statutes. Let us recall that the UN has 192 members. Those of the States party to the Statutes of Rome, who signed these agreements said to be "of article 98" got themselves into a real contradiction with the general obligation of cooperation with the Court stipulated by Article 86 of the Statute.
29. Taken in application of article 13 of the Statute, this resolution recognizes the universal legitimacy of the ICC, since it authorizes for the first time its prosecutor to prosecute crimes in a country which is not party to the Rome Statute, committed by nationals of a country that is not party to it, (including, eventually, Americans). That it was taken with the consent of the United States gives matter for reflection on the durability of the American opposition to the court.

Revue des revues, sélection de décembre 2007

Philippe Ferlet et Patrice Sartre : « La Cour pénale internationale à la lumière des positions américaine et française »
article publié initialement dans *Études*, février 2007.

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