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THE INTERNATIONAL CRIMINAL COURT

(presented by Dr. Sergio González Gálvez)

OPENING REMARKS

The approval of the International Criminal Court Statute on July 17, 1998 in Rome, Italy, has been assessed by Bruce Broomhall,[1] a founding member of the International Criminal Court Society, under the following wording:

> The achievements of the Statute of Rome, which was conceived by the States as a system to coordinate an efficient answer for the most serious crimes, are quite diversified. Above all, the Court [*sic*] will encourage the States to investigate and prosecute genocide, war crimes and other crimes of lesa humanity and, under the appropriate circumstances, to carry out the corresponding inquiries and hearing. This will promote its main objective of dissuading abuse commissions and reducing the crimes that have so cruelly stained with blood the twentieth century. By diminishing crime levels, the Court will lessen the strain and tensions that threaten the peace and security of all nations. Furthermore, it will also significantly reduce the costs incurred by the States and the international community when the armed conflicts end, to repair their consequences.
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> Furthermore, the Court will also offer a neutral space for the trials, in order to reduce the discord that may arise from any doubt regarding the extradition of an individual to a specific State, the jurisdictional capacity between the States to the right to file procedures against a given suspect or the legal recourse available to the States to take an aggressive and unilateral executory action. The Court will help the victims to draw a line regarding the past through the reparations they can obtain, and the implicit recognition of their suffering during the trial. It will thus help the States to achieve a national (or international) reconciliation and sustainable peace. According to the statement made during the Conference of Rome by Lamberto Dini, Minister of Foreign Affairs of Italy, if co-existence between the people becomes less insecure, the Court "will make a big leap forwards in society, not only in the political but also in the moral sense. As mentioned by Professor Cherif Bassiouni, President of the Drafting Committee of the Diplomatic Conference, this would entail the culmination of a history that began at the end of the First World War.

Notwithstanding the above, it is our opinion that this important and legitimate effort was left unfinished. Thus, in order to achieve such a worthy objective, a series of actions should be undertaken which we will try to explain. The Inter-American Juridical Committee should assess the reasons why the Statute, only two years after its adoption, has not entered into force and, in this case, to propose actions that the OAS Member States could consider in order to support this international instrument.

1. Main objective of the Statute

An assessment of the situation during the post-war period until our times is given in an interesting article published in January 1997, by the international secretary of Amnesty International;[2] however, although some of its conclusions are debatable, due to its importance to position the problem it has been reproduced below:

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[1] BROOMHALl, Bruce. *La Corte Penal Internacional: visión general, y la cooperación con los Estados*. Italia: Instituto Legal Internacional de Derechos Humanos, Instituto internacional para Altos Estudios en Ciencias Penales. 1998. p. 46-47.

[2] Amnistía Internacional. *Corte Penal Internacional: la elección de las opciones correctas-parte I*. Spain, Idex: AI:10R 40/01/975, January 1997. p. 11.

Several States started investigating or filing legal procedures since the Second World War, covering actions committed on their territory or in others. These actions were based on the universal jurisdiction applicable to facts that constitute severe violations of humanitarian rights or systematic or generalized abuse that could be considered crimes committed against humanity. Only a small number of States have carried out these investigations or indictments against the Government authorities that ruled at that time, among which are Bosnia and Herzegovina, Croatia, the United States and the Federative Republic of Yugoslavia. However, most of the investigations and trials did not entail a direct threat to these Governments. For example, in 1994, a private citizen was declared guilty of genocide in Brazil for acts committed in 1963.

Just a few States have exercised universal jurisdiction on people suspected of having committed crimes in other States to judge them in their own courts, some of them are: Austria, Belgium, Denmark, Spain, Italy and the Netherlands, or to transfer them to an international tribunal, such as: Germany, Belgium, Bosnia and Herzegovina, Cameroon, France, Kenya, the Netherlands, Switzerland and Zambia. The majority of the States did not start their investigations or procedures until a new government came into power, among them: Germany, Argentina, Bolivia, Cambodia, Cuba, Ethiopia, Equatorial Guinea, Greece, Honduras, Latvia, the Central African Republic, the Republic of Korea, Rwanda and South Africa, or after their victory in a small war, such as Bangladesh, India and Kuwait. Nevertheless, in the majority of these States only a small percentage of the total number of potential suspects has been investigated or prosecuted.

Additionally, amnesty laws and peace agreements have hindered or interrupted investigations or trials in many States, such as Argentina, Bangladesh, Brazil, Chile, Croatia, El Salvador, Haiti, Honduras, India, Liberia, Nicaragua, Peru, South Africa, Suriname and Uruguay. Furthermore, many of the procedures have not adjusted to the international norms or have even resulted in fraudulent trials.

2. Problems arising from the Statute of Rome regarding the constitution of an International Penal Court

a) Complexity of the negotiation

First of all, it must be highlighted that we are referring to a Statute text that was imposed at the last minute, with no previous consultation, despite the fact that a consensus text had been negotiated throughout a day, in good faith, with the President of the Plenary Committee, that had reached quite an advanced phase. The final text presented was only discussed at the final stage, with a very small group of countries, thus restricting the possibility of further discussing the negotiation already started.

It was informally suggested that, under this scenario, the negotiations should stop for a few days or weeks in order to continue at a later date, in order to reach a consensus text, which was heading the right way. The host country was against this motion, seconded by the group known as the *like-minded* countries, in other words, the main promoters supporting the constitution of this Court. Unfortunately, the text finally presented granting us less than 24 hours to consult our authorities, incorporated many of the proposals that had been expressly rejected during the negotiations, among others, those mentioned in the sections listed below:

b) Nexus between the International Criminal Court and the United Nations Security Council

Under the framework of the Statute negotiations, no attempt was made to solve old discrepancies related to the interpretation of some Clauses of the UN Charter, and even less to ignore the main responsibility –but not the only one– of the Security Council as regard safekeeping peace, in accordance with Chapter VII of this international instrument; additionally, neither could it be accepted that the instrument under negotiation consecrated theses that implied, in any way whatsoever, a policy of subordination of the International Criminal Court with regard to Security Council.

During the negotiations, and in step with this line of action, some countries managed to eliminate from

the Statute text the reference made to the Security Council as the only body that represented a nexus with the Court, in two instances: first, in the text that states that when a country does not comply with the Statute, the Assembly of the States Parties must notify this fact to the Security Council in order to enable it to "take the measures it deems appropriate"; and the second, when due to the pressure exercised by the Arab countries and other African and Latin American countries "aggression" was incorporated in Article 5th —which defines the scope of the Statute —as a crime that falls under the jurisdiction of the Court. Subject to an adequate definition of its constitutive elements, it was possible to avoid the reference made to the Security Council, and to substitute the term *aggression* whenever it was mentioned by the concept that the way in which "aggression" is typified must be compatible with the "pertinent provisions contained in the UN Charter". Nevertheless, despite the success of these efforts, the Statute contains the following references to the Security Council, which are difficult to accept:

i) The power granted to the Security Council to request the Court to postpone the investigation or prosecution trial of a crime already underway, without setting any maximum timeframe (the terms established are renewable). This provision, in addition to the fact that it excludes the UN General Assembly, unduly canceling the empowerment granted to this body as per Chapter VII of the Charter, may even come to paralyze the Court from performing its tasks, through the action of the Council.

ii) The erroneous interpretation of Chapter VII of the Charter - accepting that only the Security Council can refer a situation to the Court to initiate the proceedings whenever it deems that a situation has arisen wherein it appears that one or several crimes that fall under the jurisdiction of the Court have been committed, unduly excluding the General Assembly --also empowered in accordance with the above-mentioned Chapter of the Charter-- is an error in accordance with the law, that may have consequences in the Court's future.

The opposition to these references is based on the following juridical sources:

1) To accept, as per Chapter VII, that the action of the Court should remain subject to the action of the Security Council, many of whose decisions are restricted by the right to veto, rightfully used but also abused by the five Permanent Members of the body under reference is --in our personal opinion-- a serious political error for countries that have been struggling since San Francisco to foster the democratization of the UN Organization.

2) We share the point of view expressed on this subject by the American Association of Jurists, that states that a Treaty whose objective is to constitute an International Court, includes clauses that subordinate the jurisdictional activity of the Court – in any way whatsoever--, to the decisions of another international body or organization, either to be its driving force, suspend the action, and delay or paralyze it, may be null by law, in accordance with Article 53 of the Vienna Convention on the Law of Treaties that stipulated this sanction for any Convention that goes against an imperative rules of the general International Law *(jus cogens)*.

As it has been duly ascertained by the above-mentioned American Association of Jurists, the clauses that consecrate this subordination to the Security Council go against the principle of independence of the judicature and the right every person has to appeal to an independent court to solve a pertinent matter that constitutes an imperative and duly consecrated rule in Articles 10 of the Universal Declaration of Human Rights, 14 of the International Pact of Civil and Political Rights, and 1st and 2nd of the Basic Principles Related to the Independence of the Judicature, duly approved by the UN General Assembly in Resolutions 40/32 and 40/46, issued in 1985.

3) Thus - why should we insist in not recognizing the Security Council as the only body of the UN Organization empowered according to Chapter VII of the Charter?

This is done on the basis of an important precedent established by a Resolution that deals with the Unity of Action in Favor of Peace, approved by the UN General Assembly in 1950 which was the basis of a new rule, as it is has been correctly defined by the Mexican jurist Jorge Castañeda in one of his papers referring to the

juridical value of the resolutions issued by the United Nations, based on the criteria that if the Security Council, due to the lack of an unanimous agreement among its Permanent Members, does not comply with its main responsibility of safekeeping international peace and security in a case in which a threat to peace is strongly perceived, or violation of peace or any act of aggression, the General Assembly must examine the issue and adopt the pertinent recommendations applicable to the case.

4) Article 24 of the United Nations Charter empowers the Security Council with the *main* responsibility of safekeeping international peace and security, which logically and legally implies that the Charter takes into account a *subsidiary* responsibility that may only correspond to the General Assembly.

5) The attribution of this main responsibility on a non-exclusive status to the Council, lies on the hypothesis that, in fact, this body could act efficiently in safekeeping or restoring peace. Nevertheless, when a situation actually arises that paralyzes the Council (mainly due to the veto) in the fulfillment of the actions for which it is institutionally responsible, the General Assembly must necessarily undertake a *subsidiary* responsibility in matters related to international peace and security.

Notwithstanding the above, it should be clearly explained that, as it is only logical to suppose, the Charter does not refer to the punishment of those guilty of international crimes among the powers granted to its main bodies. However, it is a commonly accepted practice to suppose that if we examine a threat to peace or an act of aggression, this must also include the possibility that the Security Council and the General Assembly should be able to request the International Criminal Court to investigate the facts already analyzed, and if applicable, to punish the individuals responsible.

The theory of recognizing in the Statutes the subsidiary jurisdictional capacity of the UN General Assembly, in compliance with the proposal forwarded during the Conference of Rome, was rejected by the Security Council Permanent Members --except China-- and by their military allies at the Conference of Rome and was supported by a group of nations --among which the Arab Group-- faced by the indifference of the greater majority of the members of the African Group as well as the majority of the Latin American countries which, perhaps due to their lack of understanding the full implications this issue could represent, preferred to abstain instead of clashing with the Security Council Permanent Members in this forum.

c) The need to prepare a typification of weapons for mass destruction as war crimes

Another aspect that raised concern was the rejection to include on the list weapons whose use was typified as war crimes, in other words, a weapon for mass destruction --chemical, bacteriological and nuclear--, thus, when the Statute enters into force we will be facing the absurd situation of recognizing as a typical war crime the use of poison or poisoned weapons and not the use of weapons intended for mass destruction.

The non-inclusion of weapons for mass destruction as war crimes is incompatible with the traditional thesis supported by the vast majority of the United Nations member States, that sustains that not only a general and total disarmament should be reached as soon as possible, starting with nuclear disarmament, but that a rule of International Law already exists which has been confirmed by custom and recognized in Resolution 1653 issued in 1961 by the UN General Assembly. This Resolution expressly declares these weapons illegal, and was duly supported by the International Court of Justice in its historic Consultative Opinion dated July 8, 1996, which in its core text points out that "in general, the threat represented by the use of nuclear weapons is contrary to the international law rules applicable in cases of armed conflicts and, in particular, goes against the principles and rules of humanitarian rights".

Regarding the juridical effect mentioned in Resolution 1653 issued by the UN General Assembly, we are already aware of the doubts raised by the fact that a resolution issued by an international body of this nature could create a right. Nevertheless, at least the contrary theory or, in other words, the probable recognition of the legality of the weapons is placed in serious doubt, in view of the fact that the outstanding majority of the UN Member countries voted the above-mentioned Resolution issued by the most representative body of the international community interests, wherein this illegality is expressly stated.

Despite the fact that in paragraph 2, item b) number XX of Article 8th on war crimes of the approved Statute, a mention is made regarding the possibility of adding other weapons such as missiles, war materials and methods "which by their own nature cause superfluous damage and unnecessary suffering or result in indiscriminate effects that violate the international humanitarian law applicable to armed conflicts" to the list of prohibited weapons, the inclusion of a padlock --by the mere statement that other weapons may be considered *war crimes* "subject to the fact that these weapons are covered by a total prohibition and are included in an Annex of the current Statute, due to an amendment approved in compliance with the provisions contained in Articles 121 and 123 on this matter"-- which makes it extremely difficult to add, on a short time basis, other weapons on the list included in the Statute.

Furthermore, the previous wording implies that not even chemical or bacteriological weapons --that are already banned according to a Treaty-- may be considered as *war crimes* until they are included in an Annex of the Court Statute. Also implying that nuclear weapons, due to the position of the nuclear powers in general – with the probable exception of China – that refuse to allow multi-lateral negotiations to advance towards a nuclear disarmament through a treaty, will remain in limbo for many years to come.

Undoubtedly, just as in the case of the nexus that exists between the Security Council and the Court, the negotiation of the Statute to create the Tribunal is not the proper channel to decide such a complex matter as the inclusion of weapons for mass destruction as typical war crimes. This is the reason why we looked for other formulas that could protect the different positions, which were emphatically rejected. On the other hand, neither can we accept precepts that were interpreted against the positions we have traditionally sustained in all fora on this subject, and which directly contradict the aforementioned Consultative Opinion handed down by the International Court of Justice.

With regard to the threat posed by nuclear weapons, it must be stressed that in 1987 in the United States the Pentagon lifted the ban against consulting some of their documents that show that there have been real instances when other cities have been threatened with the use of nuclear weapons. In other words, to talk about the threat of using nuclear weapons is not a mere theoretical hypothesis, all to the contrary, there are some actual instances of this nature; for example:

1) On May 20, 1953, President Eisenhower and the United States military High Command approved the use of nuclear weapons against China, in the case that the war with Korea tended to worsen.

2) In April 1954, President Eisenhower offered two atomic bombs to the French to break the communist siege in Dien Bien Phu, Vietnam, although it was already too late.

3) On November 1, 1969, President Nixon approved the plans presented to use nuclear weapons in the war against Vietnam.

4) In 1970, in the middle of a civil war in Jordania, Kissinger threatened the Soviet Union that the United States would use tactical nuclear weapons in the Middle East if King Hussein was not deposed.

Moreover, in the document entitled *The threats of use of nuclear weapons*, by David R. Morgan,[3] we find the following critical situations mentioned, among several others:

> 1946.- 10 months after the Second World War ended, the Soviet Union demanded oil concessions similar to those the British held in Iran. To reinforce their claim, Soviet troops remained posted in the North of Iran and deployed their tanks alongside the border. Despite the fact that the withdrawal of the troops and tanks from Iran was agreed during the Conference of Ministers of Foreign Affairs held in London on March 2, 1946, when the deadline set in the agreement arrived the Soviet Union had still not withdrawn its troops. In view of the above, President Truman convened Soviet Ambassador Gromyko, and through him granted a 48 hours peremptory term to his country to withdraw all their armed forces from Iran or they would drop an atomic bomb on Soviet territory. The troops were withdrawn in 24 hours.

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[3] Cfr. Morgan, David R., *Summaries of the threats of use of nuclear weapons during the sixteen known nuclear crisis of the cold war 1946-1985. Veterans against nuclear arms*, Vancouver, 22 Octubre 1995.

1948-1949.- Right in the middle of the tense relationship that existed between the Western power and the Soviet Union and its satellite countries at the beginning of the Cold War, on June 24, 1949 the Russians cut-off all access to Berlin by land, giving rise to the beginning of the blockade. The United States Navy Secretary as well as the State Department Secretary and the Commander-in-Chief, Forrestal, George Marshall and Omar Bradley, met to decide if, in reply to the Soviet blockade of Berlin, they were going to execute the *Broiler Plan.* This plan of attack entailed the destruction of 24 Soviet cities by launching 34 atomic bombs. On September 30, 1949, the access to Berlin was opened and the blockade ended.

1956.- During the crisis at the Suez Canal, Premier Krushev threatened to use nuclear bombs against London and Paris, to which the United States government replied that if such an attack occurred, it would automatically trigger a nuclear reply from their side.

1962. - Crisis due to the Soviet missiles placed in Cuba. After the failure of the Bay of Pigs invasion that had the support of the United States, the Soviet Union offered Cuba to secretly install some nuclear missile heads for their defense, but these facilities were discovered by U-2 planes through some photographs while overlying the region. After a few extremely stressful days had elapsed, both governments mutually threatened each other with nuclear attacks. When both Krushev and Kennedy almost lost control of the military forces, the Soviet leader offered to withdraw the missiles from Cuba but before doing so, he was able to obtain guarantees that this Caribbean country would not be invaded by the United States.

d) Expansion of the jurisdictional capacity of the International Criminal Court to cover other international crimes (Final Minutes of the Conference of Rome, Resolution E)

The greater majority believes that the International Criminal Court Statute should restrict itself to those crimes on which a consensus is reached, which in summary are: genocide, war crimes and lesa humanity crimes --strongly supporting the addition of aggression-- which at the last minute was extended to include *illegal drug traffic and terrorism.*

It is quite probable that this extension does not justify a formal objection to the Statute, but it is nevertheless a new element that must be assessed by the authorities of each country in the light of the situation related to the first of these crimes throughout the continent.

e) Restrictions to the scope of the chapter related to "war crimes" (Article 8th)

A general restriction was included in the opening text of the Chapter related to "war crimes", by pointing out that the International Criminal Court will be empowered to rule on these crimes "especially when they are committed as part of a plan or policy, or as part of the commissioning of said crimes on a large scale". All of this was expressed despite the fact that the list on these crimes only includes the most aberrant acts that may be committed during an armed conflict.

Although this issue must also not be considered as a serious impediment to endorse the Statute, its incorporation in the text must be taken into account to show the influence exercised by the countries with bellicose traditions and policies throughout the negotiations, that sought a way to ensure that the actions performed by the armed forces would not be subject to a trial by the International Criminal Court, based on the premise that, due to their experience in warlike activities, their legislations were sufficient to judge all war criminals of their nationality. Notwithstanding the above, there are some commentators that pointed out that the use of the term *in particular* contained in this Article, recognizes that typical cases of war crimes do not necessarily have to be part of a plan or policy to fall under the jurisdiction of the International Criminal Court.

f)Another problem related to the application of the Chapter on "war crimes" (Article 124)

In order to offer the total scope of the extra safeguards favorable to the countries that are military powers and have or may have troops beyond their borders, a provision was incorporated in the Statute which had not been previously negotiated with the countries participating in the Conference. When applied to the issues covered by this Convention, it points out that any State Party may declare that over a period of 7 years, as of the date in which the Statute enters into force in that State, the latter is empowered to declare that

it will not accept the jurisdictional capacity of the International Criminal Court on matters related to *war crimes,* whenever these crimes are committed by one of its nationals or on its territory.

This is another advantage for the military powers that has no justification, and if it was decided to keep it in the text without consulting *all* the other participating countries, it should have been extended to other crimes that fall under the jurisdiction of the International Criminal Court or, otherwise, eliminated.

g) Definition of a non-international armed conflict (Article 8th, paragraph f)

A number of doubts arise regarding the definition of a *non-international armed conflict* incorporated in the Statute which, as it is explained further on,[4] was taken from a sentence handed down by the Tribunal created by the Security Council for former Yugoslavia.

h) Provisions that may be considered incompatible with the majority of the legislations in force in the OAS member States

a. Article 20. *Res Judicata* or *non bis in ídem*

In its paragraph 3, this Article stipulates several exceptions to the principle of *res judicata*when it is pointed out that the International Criminal Court will not prosecute anyone that has already been judged by another tribunal for the crimes incorporated in the Statute, *unless* the other tribunal, *in the opinion of said International Tribunal,* believe that the decision:

a) complied with the purpose of removing from the accused the penal responsibility for crimes that fall under the jurisdiction of the International Criminal Court, or

b) it had not been informed in an independent and unbiased manner, in accordance with the procedural guarantees duly recognized by International Law, or if this had been done in such a manner that, under those circumstances, it was incompatible with the intent of submitting the individual to legal proceedings.

It is considered that with its present wording, this precept could affect the principle of *res judicata* contained in Article 20, as it offers a possibility to the International Criminal Court to reopen trials on which a sentence has already been handed down, in order to grant extradition and to judge once again the individual of that nation that is presumed responsible for an international crime.

b. Article 27. Illegality of the official post

This Article establishes that "the official post held by a person, either as a Chief of State or Government, member of a government or parliament, duly elected representative or working as a civil servant, may under no circumstances whatsoever be exempted from any penal responsibility, nor will this constitute *per se* a reason to reduce the sentence"; further on it adds that: "the immunities and special rules and procedures that are applicable to the official position held by a person, as an arrangement of a national law or international law, will not impede the International Criminal Court from exercising its legal jurisdiction over this individual".

This provision could be inconsistent with the criteria adopted by the majority of our legislations on this subject matter.

c. Article 29. Imprescriptibility of crimes

This precept establishes in a clear and express manner, that "the crimes that fall under the jurisdictional capacity of the International Criminal Court will not prescribe". Although the imprescribility is not contemplated in many of our legislations as this could be interpreted as a violation of the individual guarantees of the defendant. The opinion is that this clause should not become a real impediment to subscribe to this convention, taking into account above all else the seriousness and importance of the international crimes incorporated in the Statute.

d. Article 54. Functions and attributions of the prosecutor regarding the investigations

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[4] See number 5, item 5), of this paper.

Defining the powers granted to the prosecutor, this precept gave rise to some doubts as it established that the International Criminal Court prosecutor could carry out investigations in the territory of a State; further on, in Article 57 bis, it is made clear that said international official will only be able to carry out this investigation if a cooperation agreement is obtained from the State in question; or when it is expressly stated that same lacks the necessary conditions to carry out this cooperation request; or, *de facto,* there is no authority or competent body belonging to its juridical system to fulfill the cooperation request.

It should be noted, that the exercise of this power by the prosecutor is subject to the authorization of the Court of Preliminary Issues of the International Criminal Court, that is a certain type of control and supervision mechanism to avoid the possibility of any interference situations arising in the reserved domain of a State. There is no doubt, however, that the precept is highly controversial.

e. Article 72. Protection of information that affects national security

This Article is applicable to all cases wherein the dissemination of information or documents of a State Party, in the latter's opinion, could affect national security. Regarding the above, paragraph 5 of this precept defines the measures that an acting State may take jointly with the prosecutor, defense attorney, and the Court of Preliminary Issues of the International Criminal Court, in order to satisfy its concern regarding the dissemination of information that affects its security interests; subsection c) is included among these measures, as its text mentions that among other restrictions the *doors closed* or *ex parte* limitations can be used, which could be incompatible with the Mexican legislation in force as regard the minimum guarantees of the accused.

Furthermore, no agreement was ever reached through any type of negotiations regarding this Article; it was simply included as part of a package that the President of the Preparatory Committee imposed on the last day, without previously consulting all the delegations. Its main problem lies in the fact that sub-section d) of paragraph 5 allows the presentation of *ex parte* information, that only the judges would know about, which is contrary to the scope that the Mexican courts have granted to the constitutional guarantees contained in Articles 14 and 20.

f. Article 77, paragraph 1, item b. Applicable penalties, life imprisonment.

This Article establishes the penalties applicable by the International Criminal Court, among which is included "life imprisonment, when justified by the extreme seriousness of the crime committed and the personal circumstances of the accused".

Although life imprisonment is not accepted in many of our legislations, its application is clearly found in the marginal annotations contained in Article 110, paragraph 3, of the International Criminal Court Statute, that stipulates the possibility of reviewing the sentence after 25 years of it have elapsed. Perhaps this marginal annotation could make it more feasible.

3. <u>The International Criminal Court: a proposal that could ensure its feasibility</u>

It should be clearly understood that, in our opinion, no State should renounce its participation in the International Criminal Court. However, their incorporation to it demands, in our opinion, that some action should be taken, although other options may exist to achieve the objective of ensuring the feasibility of such a Court. We have expressed below some explanations covering the ideas we wish to propose:

1) Nexus between the Court and the United Nations Security Council

Recommendation

We must ensure that the UN General Assembly issues a resolution that clearly explains the matter related to the responsibilities of the General Assembly and the Security Council, in accordance with Chapter VII of the Charter of this world organization. If this is not feasible from a parliamentary point of view, to find a way for the General Assembly to request a consultative opinion from the International Court of Justice on this issue, in order to hand down an opinion on this specific problem as well as the restrictions regarding the nexus that may be acceptable between an international body of a political nature and a world court, always bearing in mind the need to preserve the independence of the latter.

2) The need to prepare a typification of weapons of mass destruction as "war crimes"

Recommendation

Taking into account the fact the Preparatory Committee of the Court will meet in order to approve other elements of the crimes that fall under the jurisdictional capacity of the Court, we must explore the possibility of presenting and approving an Interpretative Statement that bridges the existing gap between the prohibitions related to weapons for mass destruction.

This will be a very difficult parliamentary battle that we must take to other United Nations fora once the Preparatory Committee has finished its task. Notwithstanding the above, we consider it necessary due to the political importance entailed in maintaining our positions in issues related to disarmament.

3) Expansion of the jurisdictional capacity of the International Criminal Court to cover other international crimes

Recommendation

We believe that the inclusion of other crimes under the jurisdiction of the International Criminal Court, such as drug traffic and terrorism, must not represent an insurmountable impediment to subscribe the Statute, always subject to the fact that the elements that characterize the existence of these crimes must be compatible with the major problem issues that exist in our continent.

Restrictions to the scope of the chapter related to "war crimes"

Recommendation

Although it is true that none of the elements referred to in this item must be considered as a serious impediment to subscribe the Statute, its incorporation in the text must be taken into account to show the influence exercised by the countries with bellicose traditions and policies throughout the negotiations, that sought a way to ensure that the actions performed by their armed forces would not be subject to a trial by the International Criminal Court, which is the reason of their concern regarding the institutional nexus recognized between that Court and the Security Council. This is why a statement should be made pointing out that each act typified as a crime in accordance with the Statute must be assessed, regardless from the fact that it may be part of a State policy. As a matter of fact, this position is duly guaranteed by the International Committee of the Red Cross.

5) Difficulties encountered to define non-international armed conflicts incorporated in the Statute

Another problem we face is that the definition of non-international armed conflicts incorporated in the Statute, was not even taken from the one adopted by the Additional Protocol II of the 1949 Geneva Agreement on non-international armed conflicts, approved by a considerable number of States, but was instead taken from a decision of the Court of Appeals of the International Penal Tribunal for former Yugoslavia, in the TADIC case, with the following wording: "It applies to armed conflicts that take place in the territory of a State, when there is a long-standing armed conflict between the government authorities and organized armed groups or between said groups".

By rejecting the definition given to a non-international armed conflict included in the Statute, we do not try to avoid any type of commitment regarding this type of conflict, as the contractual obligations applicable to non-international conflicts are already included in Article 3rd, which is related to the 1949 Geneva Agreements, which we recognize with no reservation whatsoever. Notwithstanding the above, neither could we accept a definition of non-international armed conflicts that was vague in nature and, due to being vague, dangerous.

The only breakeven point of the definition that was finally included can be found in the paragraph added at the end of the above-mentioned Article 8th, that indicates that "nothing of what has been set forth in paragraphs 2 c) and e) [in other words, the definition of a non-international conflict] will affect the responsibility that concerns all Governments, which entails safekeeping and restoring public order in the State and to defend the territorial unity and integrity of the State by any legitimate means", despite the fact that by incorporating a rather dubious definition taken from the Tribunal created by the UN Security Council, it does not consider the issue of compensations strongly enough, which is what robs it of its full juridical validity.

It is undoubtedly true, that this is one of the points that should be reopened for discussion once the Statute enters into force and amendments may be presented for the terms already fixed. This would require an arrangement of positions between the countries that have already accepted this international instrument and others, that prefer to wait until this issue is solved before taking any part in it.

6) National Legislations and the International Criminal Court

The situation of the provisions of the Statute that may be incompatible with national legislations and that, at least in some cases, could have been salvaged with their respective reservations. Nevertheless, it was complicated even further when at the last minute and without holding any wide-ranging prior consultations, the clause that *allowed reservations* was eliminated from the agreement, without taking into account that in order for these reservations to be accepted, the requirement is that they do not affect the spirit and letter of the instrument in the understanding of the other States Party, while granting the necessary flexibility to the States to define the scope of the commitments they will have to undertake.

In addition to the strategy presented herein, there are also other actions that each State must take individually, for example, to trigger an internal effort to assess how the military and penal jurisdictions can be improved, by preparing a typification of the crimes that have an international scope but have not been included in our legislations. For this purpose, the sources used --among others-- could be the definition of crimes incorporated in the International Criminal Court Statute and the military legislation of friendly countries, regardless from the fact that if this international instrument is accepted which, when it happens, would certain constitute a very important step forwards to grant validity to the principle of *supplementarity*.

Proposal for the Inter-American Juridical Committee

Taking into account that:

The existence of an International Criminal Court completely independent from any other political body, would be an extremely important contribution in the fight against impunity at the international level.

Bearing in mind that the Statute of Rome is not an agreement to protect human rights, but an Agreement that develops International Humanitarian Law, whose original purpose is to rule the activity of armed conflicts and, thus, is more directly related to the countries that participate in peace operations or which, for any reason whatsoever, have their troops outside of their borders or which make use of armed force with greater frequency. Although the typification of many of these crimes has been included in the Statute, they may also occur in time of peace.

Highlighting that it is essential that the countries that voted against this international instrument or abstained, and that represent more than half of the world population and are vital to ensure the strategic balance of the world, must reconsider their position if we manage to take actions such as those described in this document, to solve our legitimate concerns.

An important contribution in this search for a solution to the problems expressed above, could be that the Inter-American Juridical Committee issues a well-founded opinion on the feasibility of this Court, taking into account all the issues described in this paper.

Resolves:

1. To include and issue on the Agenda of the Committee entitled "Possibilities and Problems of the International Criminal Court Statute".

2. Appointing as rapporteur of this topic ..... …….

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