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INTERNATIONAL CRIMINAL COURTS

(presented by Dr. Jorge Palacios Treviño)

When on July 17, 1998 the Rome Diplomatic Conference adopted the treaty containing the Statute whereby the International Criminal Court was created, the old aspiration came true of establishing a permanent international criminal court aimed preventing impunity for crimes of which millions have been victims and which due to their seriousness are considered as a "threat to peace, security and well-being of the world", as stated in the Preamble of the Rome Statute. In a certain way, the International Criminal Court constitutes the realization of the so-called universal jurisdiction; that is, the duty of the States to punish or extradite, in accordance with the provisions contained in international conventions. The background of the establishment of the Court dates back to the end of World War I, since the Peace Treaty of Versailles already contemplated the establishment of *ad hoc* courts –although none was established- "to prosecute those accused of committing unlawful acts and customs of war". Article 227 of this treaty even ordered the arraignment of Kaiser William II for a "supreme offense against international morality"; in other words, for considering that he was the main responsible for the war. However, the government of Holland, which had given him asylum, refused to extradite him. For this reason, only a few criminals were prosecuted in Germany, and were qualified as symbolic.

Since that time, the opinion became widespread that International Law could directly impose obligations upon individuals and, consequently, liability for committing these crimes of war and crimes against humanity and, for this reason, they were qualified as international crimes. This opinion was included in the London Agreement of August 8, 1945, which created the Nuremberg International Tribunal for the purpose of judging war criminals of the Axis powers On this agreement, which was challenged on the grounds of violating the principle of non-retroactivity, Alfred Verdross states "it exceeds the limits of common International Law, since it not only encompasses war crimes and crimes against humanity, which were already punishable in accordance with the laws of all States, but also crimes against peace which are defined as the "planning, preparation, initiation and waging of wars of aggression" and were only contemplated as crimes committed by States and not by individuals.

In any case, the jurisprudence of the Nuremberg International Military Tribunal consolidated the opinion that physical persons should be liable and, therefore, punished for such crimes in spite that the judgments issued by the referred court were even qualified as illegal and it was said that the punishment of the guilty authorities was only based on *lege ferenda*.

The Nuremberg Tribunal justified its actions as follows:

> That international law imposes duties and liabilities upon individuals as well as upon States has long been recognized … Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.....The principle of international law, which under certain circumstances protects the representative of a state, cannot be

applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings.

On the other hand, resolutions unanimously adopted by the United Nations General Assembly in 1946 recognized the juridical value of the principles contained in the 1945 London Agreement and in the judgments of the Nuremberg Tribunal, and entrusted the International Law Commission to formulate them:

These principles are the following:

I. Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.

II. The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.

III. The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.

IV. The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law provided a moral choice was in fact possible to him.

V. Any person charged with a crime under international law has the right to a fair trial on the facts and law.

VI. The crimes hereinafter set out are punishable as crimes under international law:

Crimes against peace:

a) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances; b) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under a).

War crimes:

Violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation to slave-labor or for any other purpose of civilian population of or in occupied territory; murder or ill-treatment of prisoners of war, of persons on the Seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity. Crimes against humanity: Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.

VII. Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law.

It is now indisputable that since long ago International Law contains rules that apply directly to individuals.

Once the legitimacy of the jurisprudence of the Nuremberg and Tokyo trials was established – the latter set up to prosecute Japanese World War II criminals – they served as important precedent for the establishment of the International Criminal Court in Rome.

Nguyen Quoc Dinh, Patrick Dailler and Alain Pellet, in their "Droit International Public", Paris, 1980, consider that even though there is still no doubt that individuals are subject to international community law, their participation as such is limited to two cases: when the international community "assigns duties and fully punishes them if they violate them and when it protects and confers rights upon them". Examples of these hypotheses could be the following: with regard to the former, the punishment of crimes that fall under the jurisdiction of the International Criminal Court - which will be discussed below- and, with regard to the second one, human rights.

In order for the international community to be able to discharge the duty of punishing, International Law establishes the universal jurisdiction to punish these acts; in other words, as the above-quoted authors state, "the ubiquity of punishment is the main principal of international criminal law".

Until now, the duty of punishing these crimes is the jurisdiction of the States although limited to specific cases established in common International Law or specific treaties; however, in order to be able to punish them, the States must enact the corresponding criminal rules; in other words, International Law imposes upon the State the obligation of punishing a given crime, but it can only be punished by virtue of internal law. Although the foregoing is true, it should be recalled that there are two exceptions since in 1933 the United Nations Security Council established an *ad hoc* international criminal court to prosecute those responsible for violating Humanitarian International Law and laws and customs of war during the conflict of former Yugoslavia, and in 1994 it established another similar tribunal in connection with the Civil War in Rwanda. It should be pointed out, however, that the establishment of these *ad hoc* tribunals was challenged by several countries, among them Mexico, since they considered that the Security Council lacks authority to create these tribunals.

Although for some internationalists there are no rules of International Law that regulate, in general, the international liability of individuals, just only in specific cases such as genocide, piracy, slavery and apartheid; for others, the majority, crimes of war, crimes against peace and crimes against humanity are crimes in respect of which it is accepted, by virtue of common International Law, that not only the responsibility of the individual but also the universal jurisdiction to punish them is included in general international law; that is, *jus cogens.* It is even considered that statutory limitations do not apply to these crimes according to common International Law and the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity adopted under the auspices of the United Nations in 1968.

Many countries support universal jurisdiction, and accordingly, some European countries have adopted legislation that allows them to prosecute in their courts nationals and foreigners charged with crimes against humanity committed abroad; for example a Belgian court condemned 4 Hutus from Rwanda for genocide; Prosecutors from that country investigated Prime Minister of Israel Ariel Sharon, and French judges stated their intention of summoning Henry Kissinger for interrogation on the crimes committed during the coup d´état that ousted Allende. On the other hand, Israel used the above principle to prosecute and obtain the death penalty for war criminal Rudolf

Eichmann, after he was abducted by a commando in Argentina, and a Nuremberg tribunal requested the extradition of Carlos Guillermo Gutiérrez Manso, a former Argentinian general, for the disappearance and murder of German student in Argentina in 1977. An Argentine judge ordered the preventive imprisonment of this person for the purpose of extraditing him and an Italian Court also sentenced him in absence for the disappearance of 8 Italians during the Videla administration.

In the United States, the courts have also resorted to the principle of universal jurisdiction for violation of human rights occurring outside this country.

It was also on the basis of this principle of universal jurisdiction that the Spanish Judge Garzon requested the British authorities to arrest and hand over Augusto Pinochet. Chile, on its part, claimed the principle of territoriality and diplomatic immunity.

Some treaties that serve as examples of the generalization of the principle of universal jurisdiction are the following:

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted in New York on December 10, 1984. According to the provisions contained in the Convention, torture is a crime that the States Parties are obliged to punish or to extradite the indicted person, as provided in Article 6, which reads as follows: …

> Any State Party in whose territory a person alleged to have committed any offence referred to in article 4 is present shall take him into custody or take other legal measures to ensure his presence. The custody and other legal measures shall be as provided in the law of that State but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted.

The Inter-American Convention on the Forced Disappearance of Persons, adopted in Belém, Brazil, on June 9, 1994. This Convention establishes that the forced disappearance of persons is a crime considered as continuous or permanent, and that the systematic practice thereof is considered a crime against humanity; it further provides that it is not a political crime for extradition purposes and that statutory limitations are not applicable to either the criminal actions or the punishment except in those countries where a fundamental rule prevents it, and, in this case, the statute of limitations must be equal to that applicable to the most serious offense of the internal legislation of the country in question.

Convention on the Prevention and Punishment of the Crime of Genocide (which is a crime against humanity), dated December 9, 1948. The Convention provides that genocide is a crime under international law which the States Parties undertake to prevent and punish and that persons committing genocide will be punished, whether they are rulers, officials or private individuals. Article 5 of the Convention is worth quoting because it provides that the crime of genocide must be prosecuted by the State where it was committed or by the relevant criminal court, since it is considered that with this provision a State Party to the Convention and to the Statute that created the International Criminal Court would be obliged to hand over to the Court a person who may be found in its jurisdiction and required by such Court, even if the possibility of the existence of such Court had not been taken into account since it was established exactly 50 years after the Convention in question was adopted.

Statute of the International Criminal Court. It is essentially a list of serious and important crimes for the international community which the States Parties undertake to punish or in the event they do not wish to or are unable to do it, the Court will do it on a supplementary basis. Consequently, the system established by the Statute does not prevent national courts from continuing to operate normally and continue having the primary responsibility of preventing and punishing all crimes over which they have jurisdiction including those which, on a supplementary basis, fall under the jurisdiction of the Court. In other words, it does not replace the criminal judicial systems of the States Parties but supplements them. For the time being, the Court will only have jurisdiction over serious crimes and if the national courts punish them properly it will never intervene; for this reason, it is said that the governments that protect corrupt or inefficient judicial systems are those that object to the establishment of the Court.

The crimes over which the Court will initially have jurisdiction are: genocide, crimes against humanity, and crimes of war. With regard to the latter, it should be clarified that the Court will have jurisdiction over those crimes committed both in an international armed conflict and those committed in a conflict that, without being international, takes place in the territory of a State but is a prolonged armed conflict between the government authorities and organized armed groups or among such groups.

Unfortunately, the Court will not have jurisdiction, at least until now, over the most atrocious crime – aggression – notwithstanding most countries wish it had, since the Statute provides that the Court may only exercise this jurisdiction 7 years after the treaty goes into effect and provided an agreement is reached on the determination of the crime and on the conditions on which the Court will have jurisdiction over it.

The current lack of jurisdiction of the Court over the crime of aggression is a result of the influence the large powers have in international forums, and also the authority to interfere that was granted to the Security Council which may order the Court to stop an action or suit brought notwithstanding the fact that it is an eminently political body and the Court is a jurisdictional body; however, it is considered that this is the price paid for having the Court in the same way the Security Council is the price paid for having the United Nations. Another example that illustrates what has just been stated about the influence of the large powers is the failure to include in the treaty as a crime of war the use of mass destruction weapons (chemical, biological and nuclear).

Now then, in order for the Court to be able to comply with its role of supplementing national courts, it must have sufficient decision-making authority to intervene and judge the author of a crime that falls under its jurisdiction if the State that has original jurisdiction does not prosecute him or prosecutes him inadequately.

With regard to this authority of the Court it has been said that it would violate the principle that nobody can be prosecuted twice for the same crime; however, it has been considered that in the cases contemplated in the Statute there been no trial or, if there has been one, it has been a sham and therefore the Court would not be prosecuting the criminal for a second time.

This authority of the Court is also criticized because it is considered that it is equivalent to having a supranational revision court. This is true; however, it should be taken into account that this the only way to prevent a crime from remaining unpunished besides the fact that this authority stems from the power the international community of

States has, as a whole, to create imperative rules of international law, as provided in Article 53 of the 1969 Vienna Convention on the Law of Treaties, 1969.

No statutory limitation applies to crimes that fall under the jurisdiction of the International Criminal Court but the Court will only have jurisdiction in respect of crimes committed after the Statute went into effect; notwithstanding, it should also be considered whether the Court will be able to prosecute the so-called permanent crimes, such as, abduction or the forced disappearance of persons.

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