INTERNATIONAL CRIMINAL COURT AND THE ROME STATUTE SOME NOTES ON THE PRINCIPLE OF COMPLEMENTARITY: A READING OF THE BRAZILIAN LAW

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Abstract

The Second World War, despite of the atrocities committed, is a mark in the history of human rights achievements. The Charter of Human Rights and the establishment of the United Nations recognized the international community as one of the most important allies of the effectiveness of human rights. The response of international community to all violations of human rights could be seen in the establishment of international criminal courts. Despite of all efforts to create a permanent international criminal jurisdiction after Nuremberg, only in the 1990`s, after the cold war, the world could see a real mobilization to accomplish the aim of establishing such jurisdiction. The Rome Statute, which created the permanent international criminal court and its rules and proceedings, has had a tremendous support from the international community, and also from Brazil. But, despite of the advance that the Rome Statute represents, there is a long way to be followed, especially because all states that make part of the treaty must understand that the ICC has its basis on the complementary principle, and it is not a violation of sovereignty, but a tool to strengthen national sovereignty. This is the issue that will be examined on this article.

Keywords: *international criminal court, The Rome Statute, the principle of complementarity, the Brazilian criminal law*

Introduction

The presidential decree no. 4.388 of September 25, 2002, promulgated the Rome Statue of the International Criminal Court[1]. The statute had been previously ratified by the National Congress through the legislative decree no.112 of June 6, 2002. Later, the constitutional amendment no.45 recognized the legitimacy of the International Criminal Court in the fifth article of the National Constitution. The court would then prosecute crimes defined by the Rome Statute.

The international norm effective in the internal level, established the jurisdictional competence of the International Criminal Court for the prosecution of crimes such as genocide, crimes against humanity, crimes of war and of aggression , established the penalties and defined the procedures to be observed, from the investigation to the execution of those accused of such crimes.

It would be, however, relevant to know under what conditions or assumptions the International Criminal Court would act in case there is a conflict or concourse with the Brazilian jurisdiction. It is, therefore, possible to ask: if a Brazilian citizen commits one of the crimes

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[1] It is possible to question the legal nature of the Rome Statute as an international treaty for the defense of human rights .The nature of the statute could be characterized by its function in the protection of human rights. On the other hand, this same function could also be questioned under the argument that the statute is not a declaration of human rights but that it is simply a punitive judicial order in the international context.

mentioned or if such crime is committed in Brazilian territory which organ would have the competence to act? What would be the penal law applicable to the case?

How to establish the cooperation between Brazil and the International Criminal Court?

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Problem description

Those questions take from the principle of complementarity[2] the fundamentals to the answer, since such principle is the basis of the International Criminal Court action and of the application of the dispositions of the Rome Statue. To answer such questions, however, one must examine some previous concepts.

Antecedents

The International Criminal Court is an instance created neither to regulate the internal reality of the States nor to override the capacity of these States to deal with local problems. The International Criminal Court is rather one more tool for humanitarian protection derived from the recognition of the universal[3] character of human rights to reinforce the process of accountability for international crimes at a national level. The court is one more judicial instrument to strengthen national justice systems by incorporating specific international standards.

The movement towards an international penal jurisdiction in terms of human rights is associated with the omission or incapacity of national jurisdictions to deal with severe violations which breed a feeling of collective indignation in the international community and create the need for power to handle such issues. The International Criminal Court is , therefore, the most adequate instrument to assert human rights. Moreover, the insufficiency of economic sanctions, the rights of the victims, and the importance of not forgetting the atrocities committed enhance the desire of establishing a permanent International Criminal Court.

The resort to Penal Law by the international community to condemn as crimes attempts to transgress universal human rights and to punish atrocities according to international standards leads to the need of expanding the power to effectively protect human rights.

While it is possible to establish two instances of responsibility for international crimes national and international- it is also necessary to find if there any areas in which the two instances clash. Whereas national jurisdictions in the prosecution of international crimes are guided by the principle of universality -universal or cosmopolitan justice- it is perfectly possible for two or more States to demand the right to prosecute criminals.

When the case, however, is referred to the international judicial order, whose action Becomes necessary because of the incapacity or impossibility to punish at a national level, the action of the International Criminal Court is applicable and non- conflicting.

In such case the International Criminal Court has the monopoly of International Penal Law as an instance of guarantee or ‘ultima ratio ‘. The legitimacy of international Criminal courts derives from their capacity of assuring that human rights are protected according to Norberto Bobbio[4].

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[2] The idea of complementarity has the sense of subsidiarity.

[3] The universal character of human rights derives from identifying common standards and not from unifying values , in order to respect social , cultural, and political diversity, which characterizes different societies. In terms of human rights, the multicultural aspect of global society answers the need to reach harmony rather then to unify.Moreover , the concepts of universal and multicultural values are compatible and complementary in the sense that one ends where the other begins.

[4] A Era dos Direitos, Editora Campos, 2004.

The solution to the apparent conflict lies on two principles: the primacy of international jurisdiction and its complementary character. While the primacy is based on the idea that international jurisdiction should prevail over national jurisdiction, the principle of complementarity assumes a local incapacity or connivance to supply an answer to a given situation.

The Nuremberg, Tokyo, Rwanda and the former Yugoslavia Tribunals were guided by the principle of primacy of international jurisdiction while the idea of a permanent International Criminal Court is guided by its complementarity principle. The adoption of the complementarity principle in a permanent Criminal Court uses the double function of the principle to guarantee that atrocities do not remain unpunished and that national justice systems become stronger through the recognition of universal values.

Answers to the questions

First question

The answer should be developed based on the 1st and 17th articles of the Rome Statute. The 1st article writes that the International Criminal Court serves as a complement to national penal jurisdictions. On a first reading, one can see that the International Criminal Court's action does not eliminate the competence of the internal jurisdiction but rather assumes the non incidence of such jurisdiction. Article 17, I , and its lines "a", "b", "c", and "d", state in which situations the competence of the International Criminal Court is admissible, adding that a specific case will not be admitted if a) such case is object of inquiry and criminal procedures under the State's jurisdiction; b) if the case has been object of inquiry and criminal procedure by the State and the State has decided not to deal with such case; c) if the defendant has been definitely tried ; d) and if the case is not severe enough to justify the intervention of the International Criminal Court.

Lines "a" and " b" refer to the lack of will or incapacity of the State to carry out the investigation or the criminal procedure as a condition for the intervention of the International Criminal Court. Line "c" is based on denial - the *ne bis in idem-,* the measure used to prevent the double prosecution of the same case. Finally, in line "d", when the case is regarded as not severe the intervention of the International Penal Court is not justified.

Thus follows the first interpretation of the principle of complementarity, which considers the action of the International Criminal Court as secondary to the national jurisdiction, whose delimitating criteria are the existence or not of : a) the case to be prosecuted ; b) the will and disposition of punishing on the part of the State under consideration; and the severeness of the violation .In this line there is a recognition that the jurisdiction of the International Criminal Court neither precedes nor overrides the national jurisdiction but simply works as a complement under the assumption that those accountable for the behavior described in the 5th article of the Rome Statute should not remain unjustifiably unpunished. Whether the deliberate intention of the State, under whose jurisdiction the case would be prosecuted, is not to punish or whether there is lack of will or incapacity or even lack of structure to prosecute, in all cases, the crimes described in the 5th article and the following articles of the Rome Statute, justify the action of the International Criminal Court.

Once the conditions above have been fulfilled the International Criminal Court will be enabled to exert its jurisdiction if a) there is an accusation from the State to prosecute b) if there is an accusation from the United Nations Security Council to prosecute c) if the prosecutor is entitled to act without provocation. (13th article).

Therefore, in answer to the first question, one notices that the prevailing and original compentences to prosecute the Brazilian who commits the crime of genocide are subject to the

Brazilian justice. The Brazilian citizen will only be prosecuted by the International Criminal Court in case the Brazilian justice does not demonstrate the necessary disposition to punish him[5]. The case considered internal does not represent an obstacle for the International Criminal Court to act, once the decision whose effects have become final relates to a situation of impunity.

Second question

The answer is based on the innovations introduced by the international norm of criminalization of certain behaviors, which are numbered and described in the 5th article and the following articles of the Rome Statue. These are crimes of genocide, of war, of aggression and against humanity. With the exception of aggression, all the other crimes were defined in detail.

In Brazil the crime of genocide is provided for and defined in the Federal Law. n.2.889/56. In case a Brazilian citizen commits genocide, considering the character and primacy of national jurisdiction, the Brazilian penal law will be applied. Likewise, if the action of the International Criminal Court is admitted according to the requirements described in the 17th article of the Rome Statute, the law to be applied will be the international law. In this case both the application of the Brazilian penal law and the competence of national justice will be guided by the 7th. o, I , "d" article of the penal code, whose basic principle is that of universal justice with the assumption of international commitment on the part of the Brazilian state to punish the violation.

The action of the Brazilian Justice in this case is not submitted to any condition, not even the entrance of the accused in national territory so that he can be prosecuted[6].

The same solution applies to crimes of war and crimes against humanity. Although these crimes do not have a correlated denomination, some of the behavior which defines such crimes corresponds to the normative provisions of the Brazilian Law. Whenever there is a relationship of symmetry with the internal legislative order, there are no reasons to be concerned. In cases in which there is no such symmetry a question arises: Could the Brazilian Justice apply the international penal norm as a source of integration[7]? Here is an extremely difficult question with two possible solutions. The first solution is to accept that the Brazilian Justice System cannot apply the international norm under the argument that the constitutional legislative procedure required to consider certain behaviors as crimes to be punished was not observed. The result is a nationalistic view based on the respect to national sovereignty by preserving its constitutional competence.

A second solution derives from the premise that the National Constitution in its beginning and in the 4th article recognizes in the international order a complement to the national order. The same disposition recognizes that Brazil in its international relations will be guided by the prevailance of human rights. The 5th article recognizes international treaties that focus on human rights as a source of national law and accept as legitimate the International Criminal Court. The

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[5] The lack of disposition may be characterized by the existence or non- existence of some investigation procedure, legal procedure of acknowledgement or even execution. It is important to emphasize that once the action of the International Criminal Court is recognized as legitimate based on the requirements, procedures, and provisions of the Rome Statute, there will be no possibility of appeal to the National Justice against the course taken.

[6] Although the Penal Code establishes the action of the Brazilian Justice and consequently the application of the Brazilian Law without the existence of any condition such as the criminal's entrance in Brazilian territory, one should not forget that the right to information in the national penal process has a status of constitutional guarantee. Besides, the right to information is equally recognized in the'" Pacto de São José da Costa Rica", ratified by Brazil. In other words, although the penal action is approved by a judge, it will not follow its natural course in case the defendant is neither personally cited , nor does he appear in court to be questioned and nor does he nominate a defense attorney according to the terms of the 366th article of the Penal Code.

[7] It is important to notice that when analyzing the international norm as a complement to the national law, the idea of complementing changes its function as the national justice applies the international norm.

National Constitution further defines the procedures of incorporation of international treaties. Finally, the Act of Transitory Constitutional Dispositions indicates an effort of the country to contribute to the creation of an International Human Rights Court.

To sum up, one cannot deny that the human rights are an ideological option of the Brazilian State and consequently in its most variable sources, also including international customs. The recognition of international treaties as a source of internal law and the legislative process of incorporation, as far as international human rights treaties are concerned, derive from the same constitutional power which provided for the other formal sources and their respective legislative procedures. Thus, one is led to the conclusion that international treaties, mainly those of human rights, are as legitimate as the legislative procedure required for the approval of the law in a formal sense, which considers certain behaviors as crime and applies punishment as provided for in the 5th article, XXXIX of the National Constitution[8]. According to these arguments the Brazilian Justice System could apply the international material law in case there is an absence of provision in the internal legislation for crimes of war and against humanity.

Unlike the crime of genocide, these two other types of crime in the Brazilian penal law and in the enforcement of National Justice are provided for in the 7th ,II,"a" article ,of the Penal Code, which equally follows the principle of universal justice. In this case, however, specific conditions must be attended to so that the Brazilian Justice can act, such as in the already mentioned entrance of the criminal in national territory.

Such understanding proves to be reasonable and coherent in that it preserves the information values in the internal level , allowing the incidence of the international norm only in case there is absence of will on the part of the Brazilian State to punish the individual responsible for one of the violations described in the 5th article of the Rome Statute.

Admitting the subsidiary enforcement of the international law which defines crimes and prescribes penalties means respecting the prudence, the caution and the coherence necessary to defend the National Law, preserving the objectives proposed by the Rome Statute. It should be noticed that the Rome Statute has intended neither to exclude the competence of the national jurisdiction nor to override the internal legal order. The objective of the statute has been to qualify a permanent mechanism of protection of human rights in case there is lack of interest or incapacity of national states to investigate and punish crimes that violate human rights.

Therefore, with the exception of crimes of war and against humanity the penal law to be applied in case a Brazilian commits the crime of genocide will be the Brazilian law, which will prevail over the international material norm, according to the principle of complementarity, whose incidence is guided by the same criteria which authorize the action of the International Criminal Court.

Third question

Regarding the cooperation which must be established between Brazil and the International Criminal Court , one must consider that the decisions of this court are directly executed internally without any need to control acceptance. Such conclusion derives not only from the acceptance of the Rome Statute, which forbids any reservations in relationship to the effectiveness of its dispositions but also from the Brazilian Constitution. The introductions of the 1st, 3rd , and 4th articles of the National Constitution express the option for human rights in all possible levels both internal and international.

[8] The solution is supported by the 5th article of the Penal Code, which prescribes the enforcement of the Brazilian law on crimes committed in national territory with the exception of situations dealt with in international treaties. With the exception of crimes committed in national territory the international law will be applied.

The International Criminal Court expresses more than one level of concern about human rights, which are the foundation of the court's legitimacy .The international penal responsibility for international crimes does not clash with the national jurisdiction. Rather, the responsibility assumes the non- interference of the national jurisdiction according to a process model deemed as fair. The moment the International Criminal Court acts, one assumes that the attempts to penalize at national level have been exhausted.

The recognition of the legitimacy of the International Criminal Court by the Brazilian Constitution from an ideological point of view, implied the acceptance not only of the court's jurisdiction but also of all its decisions. The creation of the International Criminal Court was not meant to pre-empt the sovereignty of States; the main objective was to strengthen the integration the States in the international justice order.

Therefore, all the decisions of the International Penal Court can be executed in Brazil, according to a model of compulsory cooperation, which excludes the demand for legal control. In case there is no cooperation on the part of the State, the United Nations Security Council becomes the legitimate organ to impose sanctions.

Conclusions

The Rome Statute stands out as a great achievement when compared to other international criminal courts created by resolutions of the United Nations Security Council. These courts are guided by the principle of primacy of international jurisdiction, leading to two types of questioning: a) regarding national sovereignty, b) the rationality which must guide the action of these courts, restricted to the prosecution of crimes severe enough to justify their intervention.

The founding principle of complementarity qualifies the International Criminal Court for its capacity to solve the apparent conflict between the national and international jurisdictions and between the national and international penal law. The International Criminal Court qualifies as an instrument to protect and assert human rights, which are fundamental to the action of the principle of complementarity and basic to the mechanism that safeguards the primacy of national sovereignty and the strength of internal jurisdiction.