THE INTERNATIONAL CRIMINAL RESPONSIBILITY OF THE INDIVIDUAL AND ENFORCEMENT MECHANISMS

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1. INTRODUCTION (I)

Under international criminal law (ICL), mechanisms are established to ensure compliance with its norms and the personal responsibility of those who commit or order violations of ICL and requires that those responsible for serious violations be prosecuted and punished as criminals.

1. MODES OF REPRESSION (II)

The activity of prosecuting and convicting (punishing) international crimes constitutes the repressive character of international criminal law/international criminal law.

What are the mechanisms developed by the DPI to deal with these crimes and what are the consequences that derive from their commission (sanction or penalty)?

1. MODES OF REPRESSION (III)

The principles of repression for DPI are embodied in various bodies of law, from the 1945 Nuremberg Statute of the International Military Tribunal to the 1998 Rome Statute.

The so-called Nuremberg and Tokyo Trials left an important legacy in establishing basic rules for the prosecution of war criminals and the determination of such crimes.

1. MODES OF REPRESSION (IV)

In the document ‘Principles of International Law Recognised in the Charter of the Nuremberg Trials and in the Judgements of the Tribunal’, the United Nations set out the legal principles that were to apply to war crimes, crimes against humanity, and crimes against peace.

They are confirmed by General Assembly Resolution 95 of 1946.

2. INDIVIDUAL CRIMINAL LIABILITY

The principles (mechanisms) of repression, contained in the Statute of the International Criminal Court (hereinafter ICC), the so-called Rome Statute (1998), in its Part III, in the Statute of the International Military Tribunal at Nuremberg (1945) and in other norms:

- **International criminal responsibility of the individual (Art. 25.2 ECPI)**

The commission of one of these crimes, whether as a perpetrator or according to any other forms of participation - accomplice, instigator, instigator, co-operator or accessory after the fact - incurs criminal liability.

2. THE INTERNATIONAL CRIMINAL RESPONSIBILITY OF THE INDIVIDUAL

- **International criminal responsibility of the individual (Art. 25.2 ECPI).**

In accordance with this statute, the Court shall have jurisdiction in respect of individuals.

- 25.2 Whoever commits a crime within the jurisdiction of the Court shall be individually responsible and liable to punishment in accordance with this statute.

2. THE IRRELEVANCE OF OFFICIAL POSITION

- **Irrelevance of official position (Art. 27 ECPI)**

Inappropriateness of international or internal immunities and privileges associated with certain positions (international or internal representation).

Examples: J. Kambanda (former prime minister of Rwanda), S. Milosevic (president of the former Yugoslavia).

2. IRRELEVANCE OF OFFICIAL POSITION

Statute of the International Military Tribunal (Nuremberg)

'The official position of the accused, whether they are Heads of State or officials in charge of Government Departments, shall not exonerate them from responsibility or serve to mitigate the penalty'.

2. IRRELEVANCE OF THE OFFICIAL POSITION

- **Responsibility of managers and other superiors (Art. 28 ECPI)**

Responsibility for the acts of subordinates under their effective control when:

- they knew or should have known.

- failure to take reasonable and necessary measures to prevent or suppress.

2.EXCLUSION OF DEFENCE OF DUE OBEDIENCE

- **Exclusion as a defence of due obedience (Art. 33 ECPI).**

It is not a defence unless it is a duty of obedience established by law, ignorance of the unlawful nature of the order, and an order that is not manifestly unlawful, which by definition is an order to commit genocide or crimes against humanity.

2.EXCLUSION OF THE DEFENCE OF DUE OBEDIENCE

At the International Military Tribunal Nuremberg:

'The fact that the accused acted in obedience to orders from his government or a superior shall not relieve him of responsibility but may be considered as a mitigating factor in determining sentence if the Court considers that justice so requires'.

3. PRINCIPLES OF INTERNATIONAL CRIMINAL LAW ENFORCEMENT

- **Imprescriptibility**

Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity of 1968.

It enshrines the imprescriptibility of war crimes and crimes against humanity, obliging states to adopt the necessary domestic measures to ensure that the statute of limitations does not apply to the crimes covered by the convention.

3. PRINCIPLES OF INTERNATIONAL CRIMINAL LAW ENFORCEMENT

It is enshrined in Article 29 of the Rome Statute.

"Crimes within the jurisdiction of the Court shall not be subject to any statute of limitations".

3. PRINCIPLES OF INTERNATIONAL CRIMINAL LAW ENFORCEMENT

- **Prohibition on granting asylum or refuge**

Resolution AG 3074 (1973).

Article 7: *In accordance with Article 1 of the Declaration on Territorial Asylum of 14 December 1967, states shall not grant asylum to any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime or a crime against humanity.*

4.MODES OF REPRESSION: international tribunals

COURTS RESPONSIBLE FOR PROSECUTION OF INTERNATIONAL CRIMES

- National courts or tribunals in application of one of the titles of jurisdiction admitted in international law.
- Military criminal tribunals (Nuremberg, Tokyo).
- International tribunals, permanent and ad hoc (International Criminal Court, International Criminal Tribunal for the former Yugoslavia or ICTY and ICTR)
- Mixed or internationalised tribunals (Cambodia Genocide Court, Sierra Leone Tribunal).

4. ENFORCEMENT BY NATIONAL JURISDICTIONS

The work of international justice must be carried out by states themselves, through their domestic jurisdictions.

As reaffirmed in the preamble of the ICC Statute, it is the duty of states to submit to their criminal jurisdiction those responsible for international crimes, including war crimes. States should therefore establish effective criminal legislation and promote mutual legal assistance between states.

4. ENFORCEMENT BY NATIONAL JURISDICTIONS

- Full Stop Law examples.
- Argentina. Law 22.924, the National Pacification Law, promulgated on 22 September 1983, became known as the **Self-Amnesty Law** because through it, the leaders of the military dictatorship, faced with the possibility of being prosecuted by the government that would result from lifting the political ban and calling elections, issued an amnesty for themselves. The amnesty established the expiry of the statute of limitations against those accused as criminally responsible for having committed crimes of forced disappearance of persons (illegal detentions, torture, and aggravated homicides).

4. ENFORCEMENT BY NATIONAL JURISDICTIONS

- Spain's 1977 Amnesty Act: its aim was reconciliation between the two sides in the Spanish Civil War, as well as forgiveness for serious crimes against humanity committed during and after the conflict. The amnesty represented the state's renunciation of the *ius puniendi* or the exercise of criminal coercion over those who violated basic legal rights. Political prisoners and ETA prisoners were also released. The justification was that through this process Spain would be able to ratify a new constitution to overcome the confrontation.

4. ENFORCEMENT BY NATIONAL JURISDICTIONS

These jurisdictions have a leading role in the repression of IPR, as the ICC is designed to complement the work of domestic jurisdictions.

This follows from Article 1 of the ICC Statute, which provides for a jurisdiction that is complementary to the criminal justice system of states.

Article 1. of the Rome Statute: *'The Court shall be a permanent institution...it shall be complementary to national criminal jurisdictions'.*

4. ENFORCEMENT BY NATIONAL JURISDICTIONS

In the case of Spain, the LOPJ (6/1985), as amended by Act 1/2014, contains elements of international justice and determines the scope of Spanish jurisdiction in this criminal area.

We must consider several principles:

a. territoriality.
b. extraterritoriality.
c. protection or real principle.
d. universal justice.

4. ENFORCEMENT BY NATIONAL JURISDICTIONS

a) Principle of territoriality.

Article 23 1. "*In criminal matters, Spanish jurisdiction shall be exercised in cases involving crimes and offences committed in Spanish territory or committed on board Spanish ships or aircraft, without prejudice to the provisions of international treaties to which Spain is a party".*

The territory of the state is made up of space: land, sea (territorial sea), and air. It also includes Spanish ships and aircraft, regardless of where they are located, thus giving an international character to a crime committed, for example, on a Spanish ship.

4. ENFORCEMENT BY NATIONAL JURISDICTIONS

b) Principle of extraterritoriality.

It extends jurisdiction beyond its own territory.

Art. 23.2 opens the extraterritorial route: *'2. Spanish jurisdiction will also hear crimes that have been committed outside the national territory, if those criminally responsible are Spanish nationals or foreigners who have acquired Spanish nationality after the commission of the act'.*

4. ENFORCEMENT BY NATIONAL JURISDICTIONS

c) Principle of protection or real principle.

Article 23.3 presents a list of crimes that affect the sovereignty of the state itself, and therefore the state considers itself competent to hear them if committed by Spaniards or foreigners outside the national territory.

Examples: treason and against the peace or independence of the state; forgery of the royal signature or stamp, of the State seal, of the signatures of ministers and of public or official seals; attempts against Spanish authorities or public officials.

4. ENFORCEMENT BY NATIONAL JURISDICTIONS

According to Article 23.4, Spanish jurisdiction will have jurisdiction over acts committed by Spaniards or foreigners outside the national territory that could be classified, according to Spanish law, as any of the following offences:

- Genocide and lèse humanité.
- Enforced disappearance.
- Torture.
- Terrorism.
- Offences relating to prostitution and corruption of minors.

4. ENFORCEMENT BY NATIONAL JURISDICTIONS

- Illegal trafficking of psychotropic, toxic, and narcotic drugs.
- Trafficking in human beings.
- Piracy and unlawful seizure of aircraft.
- Those regulated in the European Convention on preventing and combating violence against women and domestic violence.
- Corruption between private individuals or in international economic transactions.

4. ENFORCEMENT BY NATIONAL JURISDICTIONS

- On counterfeit medical products and offences threatening public health.
- Any other whose prosecution is made compulsory by a treaty in force for Spain or by other regulatory acts of an international organisation of which Spain is a member, in the cases and under the conditions determined therein.

THE PRINCIPLE OF UNIVERSAL JUSTICE

In Article 23.4, we find a series of international crimes that can be heard by Spain and that the principle of extraterritoriality and the principle of universal justice can be applied, by virtue of which the jurisdiction of a state can hear certain crimes regardless of where and by whom they have been committed.

Universal justice: principle by virtue of which it was possible for the Spanish justice system to prosecute certain serious crimes (including serious human rights violations, such as genocide) committed abroad.