"The Scope and Meaning of the International Criminal Court"

Maria Leonor Machado Esteves de Campos e Assunção
Member of the Portuguese Delegation to the Rome Diplomatic Conference

The 1st July 2002 marked the coming into force of the Convention approving the Statute of the International Criminal Court.

Despite controversy regarding its conformity to the Portuguese Constitution eventually leading to an extraordinary amendment, Portugal ratified the Convention. Therefore Portugal will be represented at the first Assembly of State Parties, to be convened in order to elect many of the Court's organs.

I do believe that the ICC will preserve in Humanity's feeble memory:

the image of the Armenian extermination by the Turks;

the absolute denial of Human dignity represented by the Nazi Concentration Camps;

the starving men, women and children in Stalin's Ukraine;

the victims of the My Lai Massacre;

and every single Human being subject to ethnic, religious or ideological persecution.

The history and meaning of the ICC are profoundly set within the history of the XX century. However, its destiny is one and the same with the Millennium transition.

I am convinced that the establishment of the ICC reflects two fundamental ideas.

On the one hand, the set of requirements imposed on Criminal Law, both on the national and international level: the protection of the most important social values. The values that are considered fundamental to the integrity and development of Humankind.

On the other hand, it is an attempt to give birth, or rebirth, to the sense of what it means to be a Human Being. That sense, emerging from the Statute of the ICC, particularly in crimes against the definition of Humanity, is essentially ethic for it defines the limit to every *de facto* or *de iure* Power.

The ICC celebrates a strong effort to create a space and time of consensus in the Community of Men around a "core set of values", indispensable to every responsible Citizen – State relationship. Those values may be described as part of what Hans Küng refers to as a "planetary ethics"[1].

The protection of these values is the cornerstone of the Court's foundation, whose Statute was approved at Rome on July 1998.

Such approval was absolutely extraordinary. From 1955, with Heinrich Jesheck's dismissal of its mere possibility[2] to 1992, the obstacles that lay in its way (both before and after the adoption of the U.N. Charter) were considered insurmountable.

One of the most formidable obstacles is the "never ending question" of the definition of the crime of aggression.

[1] "Declaration vers une éthique planétaire", in Parlement des Religions du Monde, Chicago, 1993.
[2] "Crimes du droit des Gens", in Revue International de Droit Pénal, 1955, p. 552.
[3] "Crimes du droit des Gens", in Revue International de Droit Pénal, 1955, p. 552.

Brief History of the ICC

Allow me, briefly I promise, to note the Historic background of the establishment of an International Criminal Jurisdiction.

At the end of the Great War, over 40 years after the attempts by the Peace Society in 1872 and Spanish Senator Arturo de Marcoartu in 1875to make an International Penal Code, the Treaty of Versailles was signed on 28 June 1919. . A specific reference to a special Court to judge and punish those accused of acts against the customs and laws of war was inserted, although it was never set in practise.

True to its Statute, the Association Internationale de Droit Pénal adopted, at its first Congress in Brussels in 1926, made a resolution calling for the creation of an International Criminal Court. A Draft Statute of an International Criminal Tribunal was approved in 1928, and later, in 1935, a Draft Code of International Criminal Law was published. Among those in charge of both these accomplishments the names of Vespasian Pella and Donnedieu de Vabres stand out[4]. None of these Drafts was ever discussed at the Societé des Nations.

At that time, the current context in Europe was not favourable for such an initiative. The Briand-Kellog Pact was signed, internal corrosion of the Weimar Republic was evident and Adolf Hitler exhorted the German people at the Berlin Hall of Sports, to fulfil a sacred mission designed by the "Creator of the Universe": a war without truce, aiming at the domination of the Whole Earth by the Arian Race, where ideas such as universalism, humanism and internationalism were hollow demonstrations

[4] See, "Les Projets das Nations Unies pour l Institution d une justice pénale internationale", Revue Internationale de Droit Pénal, Recueil d Avis, 1964.

of cowardice and unacceptable despise for the power of origin and blood ties. That in the same year Pella declared the establishment of an International Criminal Code prosecuting Universal Criminal Law, far from a utopia, was a powerful accomplishment of contemporary jurist's consciousness.

The Convention on Terrorism adopted at Geneva in 1937, calling for the establishment of an ICC, would never come into force.

During the 1950's the Genocide Convention and the 1954 Draft Code of Crimes against Peace and Security of Mankind stressed the need for an international criminal jurisdiction[5]. However the World, particularly Europe, its wounds just beginning to scar, was still sweeping up the debris and trying to forget.

Trying to forget the Tokyo trials, that reminded us of the mass murder of Chinese population, the biological experiments in Manchuria and the victims of Hiroshima and Nagasaki.

Trying to forget the Nuremberg trials that reminded us of the gas chambers, the summary executions by the *Einsatzgruppen* and *SonderKommandos.*

The International Community felt that the condemnations and executions that took place were not a tribute paid by the vanquished, but rather the inverted image of its own acquittal.

The ICC was viewed, in the coming decades, as a madman's vision in the Cold War myriad of utopian dreams.

In 1980 the Draft Code of International Criminal Law Cherif Bassiouni presented at the U.N. in the Final Report on the Execution of the

[5] See "International Instruments Specifically Related to the Question of the Code of Offences Against the Peace and Security of Mankind or to the Specific Offences", in Yearbook of the International Law Commission, 1983, Vol.II, Part One.

Apartheid Convention[6], was never discussed. A similar Draft by the U.N.'s International Law Commission, reviewed in 1984/85, met with the same fate.

Nevertheless, numerous armed conflicts featuring the systematic and blatant violation of international norms present in such instruments as the Geneva Conventions, the Genocide Convention, and the Torture Convention, led to the adoption by the General Assembly of a resolution commending the U.N.'s ILC the elaboration of a Draft Statute of the ICC[7]. At roughly the same time, in 1993[8] and 1994[9] the Security Council urgently decided to create the ICTY and the ICTR.

The ever increasing flow of information did nothing to stop the Tutsi extermination, or the ethnic cleansing, the rape, the civil slaughter and the massive destruction of property.

However, the process of creating these Ad-hoc Tribunals, whose jurisdiction is limited in space, and in the case of Rwanda, time; their submission to the Security Council; the lack of precision in the definition of crimes, and serious gaps in the procedural rules, requiring fulfilment by jurisprudential labour, again brought into the spotlight the need for the ICC.

Therefore in 1995, the General Assembly declared the establishment of a Preparatory Committee that led to the adoption of the Draft Statute of the ICC presented to the Rome Diplomatic Conference.

The ICC

It is my intention to elucidate, roughly, a few of the issues which, I believe, may constitute essential elements for our reflection on the Criminal

[6] In Hofstra Law Review, 9, n.1-2, 1980/1, p. 523-592.
[7] Res. 47/33, UN Doc. A/47/584.
[8] S/Res/827.
[9] S/Res/955.

Law System enshrined within the ICC statute, while recognising some of its weaknesses.

On the one hand, the source of this specific criminal law is neither an act of affirmation of State sovereignty, nor even specifically the monopoly right of the State to punish, the standard of legitimacy for domestic criminal law; but rather it is an act of the will of the international community.

On the other hand, it must be acknowledged that in practical terms, the applicability of this law, or in other words, the efficiency of the power of international jurisdiction which it regulates from the moment of its existence, renders absolutely necessary the constant preservation of that will. This means that the States must comply, recurrently, with the obligations deriving from the suitable ratification of this law[10].

Therefore, I will begin my analysis with the issue of the scope of validity of international criminal law. Simply put, who is submitted to the ICC jurisdiction and can thus be judged by the Court.

It must be mentioned that crimes against the action of justice, such as corruption or false testimony, are taken into consideration, but they are of secondary importance – as shown by their inclusion among the Procedural Rule of Judgment[11] in Chapter 6.

---

[10] On the necessary link between the application of international criminal law and international judicial cooperation, see M. Cherif Bassiouni "Characteristics of International Criminal Law Conventions", in, "International Criminal Law, Vol. 1, M. Cherif Bassiouni ed. Transnational Publishers, New York, 1986 and "Projet de Code Penal International, in Revue Internationale de Droit Pénal, 1er et 2e trimestres 1981, 72, and "The Sources and Content of International Criminal Law: A Theoretical Framework", in International Criminal Law, Vol. 1, M. Cherif Bassiouni ed., 2d ed. forthcoming in 1998, and "Negociating the Treaty of Rome on the Establishment of an International Criminal Court, in Cornell International Law Journal, vol. 32, Number 3, 465. See also M. Cherif Bassiouni/Daniel Derby, "Final Report on the Establishment of an International Criminal Court for the Implementation of the Apartheid Convention and Other Relevant International Instruments, in Hofstra Law Review, 9, 19801, 527, and C. Bassiouni/C. Blakesley, "The need for an International Criminal Court in the New International World Order, in Vanderbilt Journal of Transnational Law, Vol. 5, 1992, 160, as well as H. Jesheck, "Development and Future Prospects", in International Criminal Law, Vol. 1, ed. M. Cherif Bassiouni, cited supra, 97, and Jeffrey L. Bleich, "Cooperation with National Systems", in Nouvelles Études Pénales, Association Internationale de Droit Pénal, 1997, 245-267.

[11] Article 70 of the Statute of the I.C.C.

Diversely, the core crimes, the Tribunal determines to judge are the crimes of genocide, crimes against humanity, war crimes and the crime of aggression. However, regarding war crimes, Article 124 allows that any State party to the Statute is not obliged to accept the jurisdiction of the Court for a period of seven years. In addition the essential elements constituting the crime of aggression are as yet undefined. Under the light of the principle of legality, enshrined in Article 22, this implies that this crime is not yet punishable.

The norms which define crimes under the jurisdiction of the Court, as to their content and scope, stayed behind the most ambitious proposals, which aimed to widen the scope of its competence, *e.g.* the crimes of drug trafficking[13], terrorism, and the classification of the use of nuclear weapons as war crimes. Taking this into consideration, it should be stressed that the Statute explicitly refers to acts committed in situations of domestic armed conflict as within the scope of war crimes and considers as crimes the recruitment or enlistment in the army of individuals under the age of 15, as well as the act of using them for active participation in hostilities[14].

The intervention of the Court is limited to situations where conducts arise which may be subsumed to the types of crimes under the Statute. Furthermore, the crime must have occurred on the territory of a Party State, a State in which the jurisdiction of the Court has been accepted, on board a vessel or aircraft registered in any of these States, or been committed by a national of any of these States[15]. The crimes must not be those for which

---

12 Article 70 of the Statute of the I.C.C.

13 On international crimes, see M. Cherif Bassiouni "Characteristics of International Criminal Law Conventions", cited supra note 9.

14 Article 8 (2) -c), d) and e).

15 Article 12.

the State has jurisdiction under domestic criminal law [16], unless the State decides not to carry out the investigation or prosecution, or is obviously unwilling or genuinely unable to do it[17]- "due to a total or substantial collapse or unavailability of its national judicial system".

As an example we can examine Portuguese law, taking into consideration the Portuguese Declaration. Although I personally believe there is the need for an amendment in Portuguese Criminal Law, aiming to encompass all conducts described in the ICC's Statute,the ICC will only have jurisdictionon the crimes of genocide, war, or against humanity that have occurred in Portugal, or by Portuguese or foreigners found in Portugal, and only if Portugal is unwilling or genuinely unable to carry out the investigation or the prosecution.

These limits, or preconditions, to the jurisdiction of the ICC express the so called *principle of complementarity* between the jurisdiction of the Court and that of individual nations. Something I have personally stressed is the idea of *Subsidiary Intervention,* which constitutes the cornerstone of International Criminal Law[18]. *Subsidiary Intervention* is not the only possible solution regarding state sovereignty, but may be the only feasible choice in light of the very nature of this system of Law:

A two-fold subsidiarity.

---

[16] Articles 1, 17, 18 and 19.

[17] Article 17.

[18] See Maria Leonor Assunção, "O Tribunal Internacional e o Mito de Sísifo", in Revista Portuguesa de Ciência Criminal, 8, 1998, p.31, and " De como o Estatuto do Tribunal Internacional Penal certifica um Novo Modelo de Direito Penal", in Revista Espanola de Derecho Militar, Separata a la Revista núm: 75, 2000.

On the one side it means that International Criminal Law is not meant to protect the whole of the international community, but only those most important social values internationally considered as inviolable[19].

On the other side, it expresses the supremacy of national jurisdictions (particularly national criminal jurisdictions). Hence, wisely, the basic idea and aim of criminal law is accomplished: the protection of social values offended by a particular crime, by means of punishment imposed upon the criminal wrongdoer. This punishment enables the necessary and desirable social catharsis for the reestablishment of social peace, and renews the strength of community expectations towards their system of Justice.

Moreover it enables the people's right to reconcile with their own History.

In this way, the non-inclusion of the principle of the universality as a jurisdiction criterion is understood.

The coherence of this system of International Criminal Law is stated with the acceptance of two basic principles.

The first is the principle *ne bis in idem*[20], meaning that the ICC shall not judge when the agents of the crime were tried by another court or when criminal proceedings are still pending. Exceptions to this rule are:

1. situations of *mala fides* (where the proceedings are made for the purpose of shielding the person concerned from being brought to international justice or there is an obvious inconsistency with the purpose of holding that person responsible) and
2. situations in which the guarantees recognized under international law have not been respected.

[19] Ibid.
[20] Article 20.

The second principle referred to is the jurisdiction *ratione temporis*, a generally recognized principle of modern criminal law, the principle of non-retroactivity: the ICC will have no jurisdiction over crimes committed prior to its coming into force.

It must be emphasised that, as far as the jurisdiction *ratione personae* of these rules is concerned, they are applicable to all persons[21] over the age of eighteen[22]. It is also to be noted that immunities, or special procedure rules which may attach to the official capacity of certain individuals, shall not bar the Court from exercising its jurisdiction and therefore do not constitute obstacles to international responsibility[23]. In any case, Article 98(1) must be interpreted in such a way that it is compatible with the limits to State cooperation for purposes of surrender, as opposed to the opinion of the United States Delegation.

There is a special concern regarding the holding of military commanders, and persons acting in effect as military commanders and superiors, accountable[24] by omission (*commission by omission*). In these two categories of people, responsibility may result from gross negligence (and not a requirement of recklessness), which is an exception to the general rule of Article 30, which determines that a person shall be criminally responsible if acting with intent and knowledge.

Regarding the crime of genocide and the crime against humanity, it is laudable that defence of property[25] and obedience to superior orders[26] have been ruled out as grounds for excluding criminal responsibility.

---

21 Article 25.

22 Article 26.

23 Article 27.

24 Article 28.

25 Article 31(1)-c).

26 Article 33.

It must also be mentioned that no statutes of limitation have been established that could eliminate criminal accountability or the applicability of a criminal penalty after any elapsed period of time[27].

In addition, I wish to mention that, as far as the applicable penalties system is concerned, it possesses the following characteristics:

1: submission to a principle of strict legality[28], *i.e.*, the court can only impose the penalties in accordance with the Statute;

2: death penalty is not accepted as a punishment;

3: life imprisonment is restricted to situations justified by the extreme gravity of the crime, taking into consideration a high degree of guilt of the convicted person. Any life imprisonment penalty includes a compulsory review of sentence after 25 years have been served[29].

In accordance with the Statute, the Court must take into consideration all circumstances relating to the conduct or to the agent, *i.e.*, to the unlawfulness of the conduct and to the guilt, as well as decisions in favour of a joint penalty in cases involving a concourse of offences[30].

The procedural system, which is to be derived from the procedural criminal norms of the Statute, basically corresponds to the model of a fair trial, as reflected in international documents such as the International Covenant on Civil and Political Rights and the European Convention on Human Rights.

This was also reaffirmed in the Conclusions of the 15th Congress of the International Association of Criminal Law, held in Rio de Janeiro in 1995, in which the Toledo Recommendations were approved.

---

27 Article 29.

28 Article 23.

29 Article 77-b) in conjunction with Article 110(3).

30 Article 78.

In conformity, there is a clear separation between the entities of judgement and of investigation. In addition, the procedural parties, the Prosecutor and the suspect or the accused person, are entitled to participate effectively in the judgement of the case[31].

In fact, the Prosecutor is an independent and autonomous entity, not bound to any orders. He or she is competent to exercise criminal action powers, to investigate alleged criminal facts, to determine the existence of grounds to initiate investigation proceedings and to accuse within a framework of strict legality and objectiveness, allowing, however, for a degree of opportunity[32].

The Prosecutor's actions are liable to a rigid system of inspection. First, his crime investigation is dependent upon a referral by a legitimate entity, either a State Party[33], or the Security Council[34]. Second, any investigation requires authorization by the Pre-Trial Chamber.

Whenever an investigation is initiated *motu proprio* by the Prosecutor, on the basis of information sought through a variety of sources, (*i.e.* intergovernmental or non-governmental organizations, organs of the

---

31 On the generally accusatory procedural structure, *maxime* its articulation with the participation of the procedural parties in the proceedings, see FIGUEIREDO DIAS. Direito Processual Penal. (Lições coligidas por Maria João Antunes) Secção de Textos, Faculdade de Direito da Universidade de Coimbra, 1988/9; *A Reforma do Processo Penal na Europa: o exemplo português*, a paper presented to the legal and criminal section of the Comparative Law Society, 1992; and *Sobre os Sujeitos Processuais no novo Código de Processo Penal. in* O novo Código de Processo Penal. Coimbra, Almedina, 1997, pp. 3 and ff.

32 Effectively, even where there are sufficient elements to prove that the crime has been committed, the Prosecutor may decide that there are no reasonable grounds for criminal proceedings. Indeed, he may decide, taking into account all the circumstances of the crime, including its gravity, the interests of victims and the age or infirmity of the alleged perpetrator, that *there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice*. See Article 53(1)-c) and (2)-c). Such a decision is subject to review either by the State Party which puts forward a complaint or by the Security Council where the situation is referred to the Court by this entity under Chapter VII of the Charter of the United Nations, or by the Pre-Trial Chamber, the entity which is competent to review such a decision *motu proprio*. See Article 53(3).

33 Articles 13-a) and 14.

34 Article 13-b).

United Nations or others - including victims and witnesses)[35], the investigation depends on authorisation by the Pre-Trial Chamber[36].

The Pre-Trial Chamber is the competent entity to review the decision of the Prosecutor not to proceed with the investigation and may, under certain circumstances, request the Prosecutor to reconsider such a decision[37], as well as review the charges at the end of the investigation, on the basis of a preliminary hearing upon which it presides. It must be mentioned that, as in continental-based procedural systems such as that of the Portuguese, the Prosecutor does not necessarily pursue an interest opposed to that of the accused[38].

To prove it is the duty to investigate *à charge et à décharge*;

the duty to inform promptly the accused of evidence which may show his innocence, affect the credibility of the prosecution evidence or be relevant to mitigate the guilt of the accused;

and the possibility of an appeal on behalf and in favour of the accused[39].

The Trial Chamber is competent to judge and its functions are established in accordance with a principle identifiable with the continental law principle of investigation[40]. It has wide powers of control during the trial, *e.g.*, to ensure that it is conducted with full respect for the defence

---

35 Article 15.

36 Chambre Préliminaire in the French version and Sala de Questiones Preliminares in the Spanish version.

37 Article 53.

38 On the relationship between the Prosecution and the convicted person in criminal procedure see CUNHA RODRIGUES. *Sobre o princípio de igualdade de armas.* Revista Portuguesa de Ciência Criminal. 1(1991), pp. 77 and ff; and FIGUEIREDO DIAS. Direito Processual Penal I. 1974, pp. 254, 249 and 471.

39 Articles 54(1)-a), 67(2) and 81(1)-b), (2)-a).

40 On the connection between the so called "principle of investigation" and a predominantly accusatory procedural structure, see FIGUEIREDO DIAS. *op.cit.* footnote 26.

rights and guarantees of the accused or to rule on the relevance or admissibility of any evidence. The judges of the Trial Chamber have powers of investigation of the facts subject to judgement, within the limits established in the accusation, which defines the object of the proceedings, irrespective of the contributions of the Prosecutor or the accused and his representative[41].

I would like to emphasize that it was advantageous that the system of plea-bargaining has been rejected[42].

It must be stressed that the procedural position of the Prosecutor and of the judges of the various Chambers is subjected to a system of excusing and disqualification, to be regulated in the Rules of Procedure and Evidence[43]. This means that it must be understood in the light of their statute and in accordance with a system of incompatibilities and immunities and a definition of the circumstances for removal from office[44]. In my view, such a statute guarantees that these functions will be exercised with impartiality.

Furthermore, one must stress that the Prosecutor and the deputy prosecutors, as well as the Judges, are designated through an election by the Assembly of State Parties, and are only bound to criteria of independence and competence. This is especially true as neither the Prosecutor, nor the Judges are subjected to any order from any State (even their own), or from the U.N.'s Security Council, General Assembly or Secretary-General. The ICC is not an organ of the United Nations.

---

41 Articles 64 and 69.

42 Article 65(5).

43 Articles 41 and 42.

44 Article 46.

I would like to make a small comment regarding the position of the accused.

The accused, unlike the victim, is a real procedural party or subject[45]. Indeed, the victim intervenes basically in residual terms, *e.g.*, by informing the Prosecutor that the crime has been committed and by presenting views on the necessary protection measures or for reparation purposes[46]. The victim's role was broadened in the Rules of Procedure and Evidence.

The accused is, in fact, a procedural subject insofar as he intervenes with the support of a system of rights and guarantees that derive their existence from the principle of the respect for his dignity as a human being.

It is from such a principle that certain principles are to be extracted, such as:

the principle of the presumption of innocence[47] and its corollaries[48];

the principle *in dubio pro reo* and that of non-reversal of the burden of proof[49], as well as the prohibition of the use of duress through illegal means in violation of the Statute and in non-compliance with internationally recognized human rights[50];

---

45 On the concept of procedural subject, see FIGUEIREDO DIAS. *Sobre os sujeitos processuais…* *op. cit.* Footnote 26.

46 Articles 15, 68(3) and 75(3).

47 On this principle and its scope, see FIGUEIREDO DIAS. *La protection des Droits de l'Homme dans la Procédure Pénale. Rapport du Groupe National Portugais de l'I.D.P.* Revue Internationale de Droit Pénal. 1978, n. 3, pp. 267 and ff.

48 See ASSUNÇÃO, Maria Leonor. *Criminal Procedure in Macau: Structure and fundamental Principles. in* The Right to Fair Trial in International and Comparative Perspective. The University of Hong Kong, Centre for Comparative and Public Law, 1997, pp. 72 and 73.

49 Articles 66 and 67(1)-i).

50 Such a prohibition is not, however, adopted to a full extent by the Statute, insofar as, under Article 69(7), evidence obtained by illegal means is admissible if it is not antithetical to or does not seriously damage the integrity of the proceedings, or if it does not cast substantial doubt on the reliability of the evidence. In my view, this is an unreasonable deviation from such a principle, which is not understandable.

and the principle of respect for the will of the accused.

The principle of the prohibition of the use of illegal means in obtaining evidence implies, firstly, that an admission of guilt may only be considered where the accused voluntarily makes it and fully understands its the consequences[51]. It means, furthermore, that the accused has the right to remain silent, *i.e.*, in practical terms, the right to refuse testifying on facts of which he is accused.

This silence cannot be considered an unfavourable consideration in the determination of either the applicability of a procedural measure of detention or the degree of penalty[52].

The nucleus of rights and guarantees of the accused encompasses, moreover:

the right to representation through legal assistance of his or her choice[53];

the right to be informed of the content of the charge in a language that the accused fully understands;

the right to rebut;

and the right to appeal against unfavourable sentences[54].

Conclusion

---

51 Article 65.

52 Articles 55 and 67.

53 See, however, the admissibility to refuse any legal assistance and the non-obligatory character of legal assistance. It is up to the Court to decide on the need to have legal assistance assigned in any case where the interests of justice so require. Article 67(1)-d)

54 Articles 67 and 81.

Finally, I would like to take the liberty to refrain, for the time being, from drawing any conclusion as to the future efficiency of these rules of criminal law, that is, of the ways in which they will be made applicable to concrete situations by the competent entities. It will depend naturally on timely State compliance of the principles, which confer a meaning and consistency onto the norms on judicial cooperation, and enforcement of sentences[55]. (I would like to seize the opportunity to reject, strongly, the recent position of the United States towards the ICC, adopted on 13 May 2002, where not only will the Statute not be ratified but also there is a claim for an "unsigning" mechanism, a concept heretofore unknown to international law.)

I wish to reaffirm how important it is to reflect on the function and the grounds of these rules of criminal law.

This law is aimed at protecting a minimum standard set of values by repressing all conducts which may represent very serious offences to such values. The Preamble of the Statute of the Court refers to such conducts by describing them as 'unimaginable atrocities' of which 'children, women and men have been victims' during this century and which 'deeply shock the conscience of mankind'. They not only deserve, but impose upon the international community the duty to repudiate them vehemently.

The belief that neither the aims of the State nor national security, military needs, ideology or religious beliefs may justify practicing conducts which act, irremediably, against human dignity and, therefore, affect the integrity of values which are part of the world heritage that has been enshrined, is, in an impressive form, in the norms of the Statute of the International Criminal Court.

---

[55] Parts 9 and 10 of the Statute of the I.C.C.

Through the approval by 121 States, the signatories by 139 States, and the ratification by 78 States, thus far, this document certifies a minimum basis of consensus that legitimises the normative meaning that inhabits it and established its validity. Such a consensus has been rendered possible around what Umberto Eco has designated as "the new intolerability threshold"[56].

Every act of genocide, every act of murder, torture or rape, when committed as part of a widespread or systematic attack directed against any civilian population and, during an armed conflict, every offence to life, to physical integrity or to liberty, *rectius* sexual liberty, directed against any individual civilian, or *hors-de-combat*, is in itself a proclamation of the intolerable[57] insofar as it shatters the idea of Man and, in the impressive words of Voltaire, 'dishonours the human nature'[58].

Due to the means of information which provide the citizens of the World with the images of the full horror of such acts, the eyes of Voltaire's Candide, who observed the atrocities practiced in the huge battlefield of Europe, have become today the eyes of each one of us[59].

This dimension of the intolerable, which is shared in this way, makes it impossible to avoid or forget and imposes on us a part of co-responsibility as a form of fighting against the negation of human existence, which is symbolized in such conducts.

Such notion of co-responsibility ultimately lends its strength to international criminal law, to the extent that it symbolizes the core of the concept of alterity, *i.e.*, as Emmanuel Lévinas has taught, the respect of the rights of corporality of the Other, based on a profound belief that 'whoever

---

[56] In "Migrações, tolerância e intolerável. Cinco escritos morais", Difel, 1998, p. 121.

[57] *ibid.*

[58] *apud* André GLUKSMANN, "E Voltaire inventou a a Televisão. O bem e o mal. Cartas imorais de Alemanha e da França", Ed. Inquérito, 1998, p.238.

[59] see André GLUKSMANN. *op. cit.*

feels his right to exist constantly threatened during the daily hour when the other one suffers and dies'[60].

[60] Catherine CHALIER. Lévinas – a utopia do humano. Instituto Piaget, p. 128.