

INTERNATIONAL CRIMINAL COURT

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Abstract

This paper contains the effort of the world civilization and needs of formation of permanent International criminal court. The paper describes establishing of the Rome Statute of the International Criminal Court and its ratification. Further in the paper, the structure of the Rome Statute is described. The author of the paper gives a summary about formation of the International criminal court, about the Rome Statute, its applying and certain obstructions that occurred in operation. Further, the organization and jurisdiction of the International criminal law is shown. In that direction, court composition and also the jurisdiction of the court are described. Within the jurisdiction of the court specifically are described the four hardest international crimes: genocide, crimes against humanity, war crimes, aggression and crime. Than the obligatory jurisdiction, complementary jurisdiction and the general principals of the international criminal law are described. Within the general principals of the international criminal law there are given the main principles: The principle of legality, Non bis in idem, Nullum crimen sine lege, Nulla poena sine lege, Non-Permissibility of retroactive act, The principle of personal criminal responsibility, Exclusion of jurisdiction against persons which are below the age of eighteen, Responsibility of commanders and other chiefs and other general principles. At the end of the paper, the penalties prescribed in the Rome Statute are given.

Keywords: International criminal Court, Rome Statute, Summary, Organization, Jurisdiction, Genocide, Crimes against humanity, War crimes, Aggression

1. Establishment of the International Criminal Court

The history of mankind continually emphasizes the idea of universal peace and the paradigm of progressive forces for the development of world civilization and harmonization of life in the planetary community. That paradigm leads to the process of globalization, ranging from local to regional to global level. The energy is guided towards creating a global community

with respect to the intertwined individual and collective rights as irreversible processes. Reduced on a level of international criminal law and they represent a reaction to the atrocities committed in history, especially after the Second World War. The concept of international criminal laws in the application of its supranational norms in terms of the norms of national legislation despite occasional obstructions associated with the dogma of absolute sovereignty of states in order to particularize with extreme tendencies for situating the still present nationalism and fundamentalism. Although with occasional obstructions the international criminal law is increasingly being pushed by the force of its arguments by creating a closed system of norms binding on national legislation.

Serious violations of human rights body especially with the most brutal methods of war, with an explicit violation of international war and humanitarian law, as well as the responsibility of the perpetrators were declaratively established by the international organizations, a subject to judicial persecution in national penal systems and the international ad hoc courts, but they didn't fully achieved their goal especially because of the numerous objections to restricted Justice. Experience has shown that traditional penal legislations were not effective enough. The reason was the lack of international penal law as a complete system. Also present were the reasons of a political nature as ad hoc tribunals were established by the states with the strongest influence on them accordingly. Finally there are also reasons of a financial nature related to high costs in the operation of the court. It imposes the need for the international community finally to confront the internationalized measures and instruments, which also imposed the need to establish a system of international instruments based on the principle of consensus of states consistent with the postulates of legal order and international criminal law. The international community manages that by the international institutions statutes and by an ultimate creation of a permanent International Criminal Court. It will provide continuity in efforts on codification of international criminal law and building an international supranational penal system that will contain the rules for criminal responsibility and instruments for their application.

In world history and especially in International criminal law it will be remembered that after 400 years after Hugo Grocius wrote "The Law of War and Peace," a century of the first Hague Peace Conference, which in a way established the rules of war and after a few ad hoc tribunals, mankind finally had the first International Criminal Court.

The foundation of the global system of international legal protection of the corpus of human rights and freedoms is the UN Charter of 1945. The United Nations continued its efforts towards the codification of human rights and freedoms as a part of international law and of international criminal law,

finally systematized in the Treaty of Rome as the founding act of the International Criminal Court.

It must be noted that due to procedural differences in their founding and the permanent International Criminal Court, which was established with the International Criminal Court, which was established by international agreement, courts and ad hoc resolutions, they are called tribunals. (*Zaneta Kose, Criminal Court in July, p.2*).

Besides that the establishment of the International Criminal Court with a resolution of the Security Council would mean a lack of independent status of the court and its dependence of the permanent members of the Security Council. With the establishment of the court by an international agreement at the Diplomatic Conference of the United Nations in Rome, that dilemma is finally resolved and soon it will give its implications to the U.S. position.

1. Rome Statute of the International Criminal Court

Even in 1948 the General Assembly of the United Nations from the International Law Commission asked to investigate the possibility of establishing a permanent International Criminal Court. On that occasion first drafts were made and submitted in 1951 and 1953, but because of the block division and the Cold War this initiative was never materialized. Its recovery came in 1990 and 1992 and in 1993 the Commission of the General Assembly submitted a new draft of the statute, which was revised in 1994. After that the General Assembly of the United Nations established an ad hoc committee that in 1995 brought a conclusion to continue the work of the statute and make preparations for the holding of a diplomatic conference for the adoption of the final version of the statute. (*Z. Stojanovic., International criminal law, Belgrade 6th plenipotentiary, ISBN 86-86223-03-6*).

Finally the plenipotentiary diplomatic conference of the United Nations held in Rome on 17 July 1998 adopted the Rome Statute of the International Criminal Court, which actually established the International Criminal Court as a permanent international judicial institution responsible for the prosecution and punishment of the toughest offenses: genocide, crimes against humanity, war crimes and aggression, but only after the definition of aggression will be adopted and further added to the Statute, according to the statement of the court, so it is stressed out that the Municipality of member states of the International Criminal Court should adopt that definition in the first revision conference scheduled for 2009, an event that never happened.

In addition to the Statute of the Court, a Final Act of the Rome Conferences adopted, and the resolution for establishing the International Criminal Court, which founded a Preparatory committee to prepare proposals

on several acts necessary to start the work of the Court, including the Rules procedure for proving relationships and agreements between the Court and the United Nations, the Court and the host country and the privileges and immunities of the Court. (*United Nations Diplomatic Conference on Plenipotentiaries off the Establishment Off An International Criminal Court, Rome, Italy June 15 - 17 July 1998: Draft statue for the International Criminal Court, A/CONF.183/C.I/L.76, 16 July 1998*).

The Statute is governing the jurisdiction of the court stipulated that it comes into force 60 days after the ratification by 60 countries. Signing began on July 17 1998, and the Statute entered into force on July 1, 2002 after the sixties instrument of ratification was submitted to the Secretary General of the United Nations on April 11, 2002.

For the adoption of the Statute voted 120 votes, 7 against and 21 votes abstained. After the adoption of the Statute, 139 countries, signed the Agreement on the set deadline on 31 December 2000.

According the Statute every perpetrator of an offense under the authority of this Court is liable to criminal prosecution by the court after July 1 2002, so after this date the jurisdiction of the court is not territorially and time limited.

China, Israel, Iraq, Libya, Qatar, Yemen and the United States voted against the Statute. U.S., Israel and Yemen signed the Statute at the end of 2000, though the U.S. administration then notify the United Nations that the United States will not be considered a member of the court and consider that they haven't got legal obligations for their Statute's signature, which practically means withdrawal of signature by the U.S. although they haven't explicitly stated that. The reason for such a move of the United States consists in fear of politicized actions that could display the responsibility of U.S. troops. But despite this move of the U.S., the United Nations didn't remove the U.S. from the list of signatories, which means that de jure U.S. remain signatory to the Rome Statute. (*See from Wikipedia, p.2*).

2.2. Structure of the Statute of the International Criminal Court

Considering that the international criminal law is still not sufficiently built, it still hasn't got a penal code so that in a way now the Statute of the International Criminal Court fills that gap in international criminal law. Similarly the provisions contained in the Statute can be divided into two parts: the general norms as part of the statute and regulations as part of a special statute.

Although it is not clearly and legally technically divided, that division would not cause any artificial creation nor a result of a scientific and theoretical creation, but analogous to any Modern Criminal Code, which is divided into general and special provisions of the statutes governing the

matter they can be divide into provisions of general and special part. Later, when the development of international criminal law will enter into its more developed stages and when it comes to establishing an International Criminal Code, these and other provisions will be laid down, and will create the structure of the general and special part of international criminal law. Then the science division on international criminal law in general and special part will be imposed as a necessity conditioned by the nature and structure of international criminal law.

The provisions of the Statute which are by nature from the general part and provisions of the Statute which are by nature from the separate one, although legally and technically not separated, still clearly indicate the nature of the matter they regulate. This division is a logical and necessary considering the very nature of the issues they regulate. However it would be quite wrong when the provisions of the statute would be treated as two completely separate entities because it would not suit the nature of the provisions of the Statute as the only tool in the fight against the toughest kind of international crime.

The provisions of the Statute which by nature belong to a special section presuppose an existence of provisions of the general part of the Statute because the general provisions set forth the general principles of criminal policy of the international community and its tasks, the purpose of punishment, the principles on which the criminal responsibility of how to protect legal goods and values are based, as well as which guarantees are provided to citizens to be taken to criminal liability only under certain conditions and on the basis of criminal liability. The provisions of the special section contain the offenses, the penalties for offenders as well as their execution.

However, those provisions must always have in mind the basic principles contained in the provisions of the statute which by nature are general provisions of the Statute.

The relationship between general and specific categories and institutes governed by the provisions of the statute represent a ratio of the settling of general and special, basic and primary in the concrete and in particular. Institutes that are a subject to special provisions may be reflected and especially interpreted only brought about in corresponding General Institutes of which they are extracted. If special provisions would be interpreted in accordance with and under the appropriate provisions of the general part, it would be an exclusively mechanical interpretation.

Historically seen first the special penal laws appeared which today would suit better in the specific sections of the Penal Laws, while the general part appeared much later by the method of abstraction and generalization of

certain provisions of incrimination of special penal laws.(*Vlado Kambovski, Criminal Law - separate section, Skopje, 2003, p.5-6*).

The reason for this phenomenon is from practical needs of the individual stages of social development. Put in another way first it was necessary to declare which parts will be considered an offense and which penalties could be imposed to perpetrators of such crimes.General criminal law as an expression of a higher degree in the development of criminal law, as synthetic and generic rules on the conditions and grounds of criminal responsibility, assume a certain level of development of the science of criminal law, and general development of the cultural and political conditions in the development of certain societies. Here it becomes evident that the specific criminal laws are older than the general criminal laws. (*Janko Tahovic, Criminal law, Special section, Belgrade 1953, p.2-3*).

However, the general and special part of criminal law is unique, indivisible matter as an integral system of criminal law (*Vlado Kambovski, Criminal Law - Special Section, Skopje, 2003, p. 9*), and the provisions of general and special character contained in the Statute are complementary and necessary accessory that add to complement, including the provisions of process nature.

The Rome Statute of the International Criminal Court from 1998 at the beginning contains a preamble which contains the reasons for adopting it.

Articles 1-4 of the Statute provide the regulation of the court and its headquarters. Articles 5 to 21 prescribe jurisdiction, admissibility and Applicable Law. General principles of criminal law are laid down in Articles 22-33. The composition and administration of the court are prescribed in Articles 34-52. With Articles 53-61 are prescribed rights that govern the investigation and indictment. Proceedings before the Court are prescribed in Articles 62-76. Articles 77-80 prescribe penalties that may be imposed by the International Criminal Court. With articles 81-85 the appeal procedure and its repetition is prescribed. The court's international cooperation and legal assistance follows which are governed by Articles 86-103. The execution of penalties and transfer of sentenced persons are prescribed under Articles 103-111. Then the Statute with Article 112 prescribes the authority and work of the Assembly of States Parties which decide on crucial issues related to the court. The Assembly of States Parties of the International Criminal Court includes those countries that actually accepted the Statute where each country has one representative in the Assembly, which means a voice in decision-making.Parliament has more important responsibilities, of which the most important is the power to amend the Statute of the International Criminal Court, a role similar to the one which the legal bodies have in the national legal systems. The Parliament has a Bureau which is consisted of President, Vice President and 18 members. Assembly meets at least once a

year. Articles 113-118 regulate the financing of the court. The financing of the Court is made from a special fund in which aliment countries that have ratified the statute and under the same rules that apply to the financing of the United Nations or under national wealth of countries by voluntary contributions of states, from other agencies and organizations and funds of the United Nations for approval brought by the General Assembly. The Statute concludes with its final provisions in Articles 119-128.

The Statute of the Court contains provisions on the status of staff, removal from office, provisions for disciplinary action and removal from office, privileges and immunities and working languages.

According Article 52, an integral part of the statute should represent the procedural rules and proof, which adopts the Assembly of States Parties with a two-thirds majority.

The provisions of the Statute regulate the procedure for making amendments to the Statute revision and signature and ratification of the Statute. State Party may denounce the Statute of the Court with a written notification addressed to the Secretary General of the United Nations, and the withdrawal is affected after the expiry of one year from the acceptance of the notification, if it doesn't have its own longer dead line.

2.3. Summary

The adoption of the Rome Statute for the International Criminal Court is a historic step in creating a humane society consistently respecting human rights and freedoms as a civilization value. It is completely understandable that progressive humanity expects the court to commit the repression of the long centuries of dominance of politics over the law and breaking it with a practice of termination unequal yards and approaches to politics of impunity of crimes with the toughest importance to the international community as a whole. This is especially due to the fact that the choice of the Court is based on the very high legal standards and because it is complementary to national criminal jurisdictions and responsibilities. (*Sreto Nogo, Cooperation with International Criminal Courts, Belgrade, 2006, p. 6*).

In this direction the idea of the conference in Rome, with the adoption of the Statute of the Court, was that each country adopt laws on which it would be possible to judge how the politicians and the senior staff officers execute a crime provided for in the Statute of Court or to be transferred to the international Criminal Court if it is not possible to be judged in the state. However at the start of implementation of the Rome Statute and the start of the International Criminal Court certain obstructions occurred in operation in the spirit of the provisions of the Statute because the

world's great powers, China, India, Russia and the United States refused to accept the Rome Statute.

U.S. President George Bush even withdraws the signature of the former President Bill Clinton, which represents a unique event in the history of the judiciary. Bush explained that by emphasizing the fact that “Until the U.S. seek to ensure peace in the world our diplomats and soldiers could be brought before this Court. That worries me a lot. We will try to find a solution to in the United Nations. But we won’t ratify the Statute of the International Criminal Court.” “Meanwhile quickly the disputes between Washington and its conspirators in Europe occurred. (*Klaus Daman, Naga predecessors – the Rome statute celebrates its 10th birthday, 2008., P. 2-3*).

The Statute makes a difference between official and working languages of the Court. The official languages are Arabic, French, Chinese, Russian and Spanish, the languages on which the judgments of the Court are published as well as other irrelevant decisions made by the Court. Working languages are English and French, with the exception, at the request of the parties in a procedure and with the approval of the Court, the parties may use another language. The headquarters of the International Criminal Court is in the Netherlands, in Hague, if needed the court may have a seat elsewhere. According to the Statute, the International Criminal Court exercised constructive cooperation with the Security Council of the United Nations, which guarantees the necessary assistance and supporting its independence and objectivity.

3. Organization And Jurisdiction Of The International Criminal Court

3.1. Court composition

As an international legal institution, the composition of the court provides legal capacity necessary to fully carry out its regular function. The Court is composed of Presidency, Chambers, Office of the plaintiff and Registry.

With the work of the International Criminal Court manages a Presidency consisted of a president and two vice presidents, who are elected from among the judges for a period of three years with the possibility of their re-election. Besides the presidency, the International Criminal Court has three counsels. One counsel is pre-trial and his competence is in relation to the investigation and prosecution phase. The other is the Judicial Council, which takes evidentiary hearing, trial and decisions on penalties. These two councils are composed of at least six judges. The third is the Appeals Court or Council consisting of a president and four judges, it decides on appeals, and may lift the verdict and order another trial before another Trial Chamber to confirm the decision or to reverse the decision on punishment.

The International Criminal Court has a Registry that performs the functions of court administration and its composition includes the support staff of the court. The court has 18 judges for a term of 9 years without the possibility of their re-election. The judges are independent; they can not practice any other profession or business and have similar immunity and privileges of heads of diplomatic missions based on applicable international agreements. The prosecutor acts as an independent and autonomous body within the court. The prosecutor's office is managed by the prosecutor and in his operations he's assisted by one or more deputies who are elected by the Assembly of States Parties to the term of 9 years. The judges, the Prosecutor and his deputies are elected by the Assembly of States Parties and the Secretariat of the Court judges elected by secret ballot.

Within the above stated other provisions from the Statute should be stressed according which the Assembly of States Parties shall constitute one delegates from all member states. Parliament adopts the recommendations of the Preparatory Committee; the budget of the Court shall be elected by judges and prosecutors, and others. Assembly Bureau has constituted a President, Vice Presidents and eighteen members. Assembly meets at least once a year.

The financing of the Court is made from a special fund whose assets are alimeted by contributions from the states, beyond the means of the United Nations approved by the General Assembly, as well as voluntary contributions of states, organizations and individuals.

The court decides regarding conflicts concerning the interpretation or application of the statute, so that conflicts between two or more states are solved by the Assembly. The Statute is regulating the procedure for the adoption of amendments to revise the Statute, its signature and its ratification. According to the final provisions of the Statute, the provisions set out in Articles 119-128 of the Statute enters into force on the first day of the month following the expiration of sixty days from the date of deposit of the sixtieth instrument of ratification or acceptance to the Secretary General of the United Nations. It is prescribed that the state can waive the statute by written notification to the Secretary General of the United Nations, which withdrawal is affected after the expiry of one year from receipt of the notification, if there isn't any set longer dead line.

3.2. Jurisdiction of the Court

The jurisdiction of the International Criminal Court is provided in the second chapter of the Statute of the Court. Thus, under Article 5 of the Statute, the Court is competent to stand trial for the four hardest international crimes: genocide, crimes against humanity, war crimes, aggression and crime. Regarding the offense aggression under Article 121 and 123 of the

Statute, the Court its jurisdiction will establish when this act will be defined by a provision complied with the Charter of the United Nations and when and other conditions for performing the court's jurisdiction regarding this work will be specified.

3.2.1 Genocide

Genocide, according to the Resolution of the General Assembly of the United Nations adopted on the first meeting on 12.11.1946, is defined as cutting the right of existence of entire human groups. The Statute, based on the United Nations Convention on the Prevention and Punishment of the crime of Genocide of 1948, in Article 6 defines genocide as any of the following acts, committed with the intention of totally or partially destroying a national, ethnic, racial or religious group killing members of the group, causing heavy bodily or mental harms to members of the group; intentional placing the group on conditions of life, in order for its full or partial physical destruction, introduction of measures aimed at preventing births within the group and forcibly transferring of children from one group to another.

Following the development of generally accepted legal standards the Statute in Article 33 paragraph 2 expressly states that an order to commit genocide or crimes against humanity is illegal, which means that no order for execution of these works can redeem the perpetrator of these acts. This means that criminal responsibility for genocide includes not only individual perpetrators and accomplices, but also the ones giving orders and the ones encouraging them. The intention that characterizes genocide presumes that the perpetrators of this crime primarily choose their victims based on their association with a group that wants to destroy it, meaning that decisive criterion in determining the genocide's victims is the belonging to a particular group. Primary target is the group as such, and not members of that group, although individuals who make up the target group are always victims of crime. This means that the decisive criterion in determining the genocide is a direct victims belonging to a particular group.

Although the two parts are strongly expressed certain common elements of discrimination, said the immediate victims belonging to a particular group is the criterion that distinguishes genocide from crimes against humanity, for which the belonging to the group is not a qualifying element as in genocide because this crime is directed against individuals based on political, racial or religious grounds. (*Ranko Marijan, War crimes and international legal standards – Civilization need, Zagreb 2008, p.28*).

3.2.2 Crimes against Humanity

Crimes against humanity are defined in Article 7 and any of the following actions , which are executed as part of a broad and systematic

attack against the civilian population through: murder , physical destruction , enslavement , deportation or forcible displacement of the population , imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law , torture , rape , sexual slavery , forced prostitution, forced pregnancy , enforced sterilization and other forms of severe sexual violence respectively; persecution of a certain group or collectivity on political, racial, national ethnic, cultural, religious affiliation or gender appropriate in line with the prescribed in paragraph 3 or other grounds that are prohibited by international law in connection with any action , indicated in that line , or any offense under the authority of the court , forced disappearance of people ; crime of apartheid and other inhumane acts of a similar nature that are intentional causing severe suffering or serious injury on the body or the mental or physical health .

Systematic performance of acts or the specific intent to discriminate or destroy certain political, national, and ethnic or other group is a criterion for distinguishing these incriminations with broad international base from many to them identical acts. Unlike genocide, these works are not only directed at national, ethnical, racial or religious group, but to any group identified as such based on some political, racial, national, etc... base, or against individuals on the basis of political, racial, national or other specified grounds. (*See International Commission of jurists, Definition of Crimes, ICJ Brief to the UN Diplomatic Conference, Rome, 1998, p. 12*).

According to already existing international legal standards, with the application for the existence of an armed collision it is necessary to have an attack, the perpetrator works to be a part of that attack, the attack to be directed against civilians, the attack to be widespread, the perpetrator must know the wider context carried out in his work and to know that his works are part of the attack. In context of the crimes against humanity under attack we do not mean only the use of armed force but also any abuse of the civilian population. The action of the offender and the consequences thereof must be a part of the attack. The expression directed against a civilian population means that in the context of crimes against humanity the civilian population is the primary object of the attack. As a civilian it can be considered the population in which there are people who are not civilians if it is predominantly civilian in a way to keep its primary civilian character. (*Ranko Marijan, War crimes and International legal standards – Civilization need, Zagreb 2008, p.29-30*).

3.2.3 War crimes

War crimes are defined in Article 8 on a complex way and in two parts. The first part includes severe injuries to the Geneva Conventions of 1949, or any action towards persons or property protected under the

provisions of the relevant Geneva Convention, such as premeditated murder, torture or inhuman treatment, including biological experiments, causing great suffering or Severe injury to body or health, appropriation or destruction of property illegally, arbitrarily and in large volume which is not justified by military needs etc.

According to the Additional Protocols 1 and 2 of the Geneva Conventions of 1977, the definition of war crimes has been extended to the military conflicts that have an international character, in terms of violent acts, murder, torture, hostage taking and other acts against persons which take no active participation into hostilities, or members of the armed forces or surrendered persons that remained out of the conflict because of illness, wounding, imprisonment, or for other reasons. The notion of armed conflict that hasn't got an international character does not include internal unrest as riots, isolated and sporadic acts of violence or other similar acts, which does not limit the responsibility of the government to preserve or establish legal order and order in the State or protective completeness and territorial integrity of the state using all legitimate means. (*Kambovski, International Criminal Law, p. 400*).

The second part of the definition of war crimes includes serious violations of the laws and customs applicable in international armed conflicts such as deliberate attacks on civilians, civilian objects, on humanitarian or peacekeeping missions, attacks or bombardment of towns, villages or facilities which are not defended and are not military targets, unlawful killing or wounding the enemy, use of prohibited weapons etc. Besides the atrocities committed during international armed conflict, the definition encompasses hard violations of laws and customs applicable in non-international and armed conflict such as intentional attacks against the civilian population or against citizens who are not involved in hostilities, attacks on facilities, materials, medical units or means of transport and staff carrying trademarks provided in the Geneva conventions, recruiting children under fifteen years of age for participation in hostilities etc.

In this case as well, the notion of non-international armed conflict is not applied to unstable conditions and internal tensions or other similar acts. However it covers armed conflicts on the territory of the state between state authorities and organized armed groups, as well as among groups. (*Kambovski, International Criminal Law, p. 400-401*).

3.3 . Obligatory jurisdiction

The obligatory jurisdiction of the Court is based on the provisions of Article 12 of the Statute. The state that is a party to the Statute accepts the jurisdiction of the Court regarding offenses referred to in Article 5 of the Statute , being the ' automatic ' jurisdiction , which derives from the general

agreement on the nature of the offenses set out in Article 5 of the Statute , which can not be audited , additional interpretations or different views of jurisprudence in order to provide immunity to individuals responsible for these acts , motivated by political reasons and specific constellations of political and other relations and the willingness of a country . Regarding the state, that is not a party to the Statute the court has jurisdiction if the same state with special declaration accept the jurisdiction of the Court. This means that the court has jurisdiction towards: state Party or a state that accepts its authorization by the criterion of territoriality, the state on which territory the act is conducted or the state of registration of the ship or aircraft if the work is performed there and by the criterion of citizenship, the state whose citizen is accused.

According to Article 13 of the Statute, the Court may carry out its jurisdiction regarding acts of Article 5 of the Statute, if according to Article 14 paragraph 1 of the Statute the State party informed the prosecutor that one or more act of the jurisdiction of the Court are executed. That notification should contain all relevant facts and evidences and be submitted to the secretariat with the necessary documentation available

Also, based on the above statutory provisions, the Court may carry out its jurisdiction even when according chapter V of the Constitution of the United Nations and chapter VII of the UN Charter, the Security Council informs the prosecutor that there were executed one or more such acts, as well as when the prosecutor will initiate an investigation on the basis of its powers under Article 15, on official duty (*proprio motu*), based on information received by a state, by government and non-governmental organizations, United Nations bodies and by written or oral testimony at the head office of the court.

Then the prosecutor seriously studying the information may request additional information from applicants. In those cases, if the prosecutor finds that the requirements for initiating the investigation are established, it will seek approval of pre-trial counsel enclosing all the materials collected as a support of the application, and the victims of the crimes can be heard. If after meeting the request and materials the Pre-court counsel assesses the merits of the application, it will allow an investigation, and if it refuses the request it does not preclude the prosecutor to submit a new application based on new facts and evidence. If from the previous examination the prosecutor determines that there are no grounds to seek approval to conduct an investigation, it will notify the submitter of information but that is not an obstacle to collect additional information on the same case with new facts and evidence.

Although the Court, and therefore the Statute have conventional basis, still the actual basis of obligatory jurisdiction of the Court derives

from the universal principle as accepted solution from most punitive legislations and following underneath on international crimes, their spatial validity and universal jurisdiction of states regarding the prosecution of such crimes, and logic stems from the fact that if states could prosecute perpetrators of this crime, that can be done by the Court to which that states had transferred such authority by the acceptance of its Statute.

3.4 . Complementary jurisdiction

The complementary competence as a principle or the subsidiary jurisdiction of the Court regarding national jurisdictions arises from the provisions of Article 1 of the Statute, in which among other things, it is stated that the Court with its jurisdiction complements national criminal right giving authorities. In Article 17 of the Statute more negative assumptions for performing the function of the Court are stated and the start proceedings in the present case: if an investigation is undertaken or a prosecution in the state which has jurisdiction to adjudicate unless she doesn't wants or can't conduct an effective investigation or charge , if for the case an investigation was conducted upon which the state decided not to press charges, unless when such decision arises from the reluctance or inability of the state to institute effective charge; if the person has already been convicted for the offense in question , according to the principle non bis in idem prescribed in Article 20 of the Statute if the offense is not severe enough to justify further action by the Court . It is obvious that the basis of complementary jurisdiction or subsidiary jurisdiction of the Court is based on the "dislike" and "failure " of the state to act in a particular case in a particular subject , which the court determines on the basis of a realistic assessment within the recognized principles of fairness accepted in international law .

The existence of assumptions of unwillingness and inability of the state to act in a particular case is determined in prior proceedings, according provisions of Article 18 of the Statute and the prosecutor informs the States Parties to the Statute as well as the state under which jurisdiction is the specific case that a proceeding is initiated before the Court; one month after the stated notice the state can inform the Court that for the same act has started the proceedings to seek to deviate investigation and the prosecutor, deviating the investigation, within six months after giving up or at any time may reconsider its decision if it determines that the state does not want to or can not currently lead the investigation; if the matter is referred to the state, with a special approval of pre-trial counsel, the prosecutor may himself obtain evidence, if there are special circumstances, or in a case of delay risk.

In Article 18 of the Statute are foreseen the objections regarding jurisdiction and overtaking items. Complaints can put the defendant, State Party having jurisdiction and on that basis started proceedings and the state

from which it is required to accept the jurisdiction in the concrete case; the prosecutor may ask the Court to decide in respect of jurisdiction or taking the subject. Also prescribed are the terms and procedure for complaints that are resolved by pre-trial counsel before the final charge, the trial court upon the validity of the indictment and the Appeals Council decides upon appeals, if it decides that there was no jurisdiction, the prosecutor may file a new application if new facts occur.

Complementary, subsidiary jurisdiction of the International Criminal Court also leaves open the question of jurisdiction between the Court and the jurisdiction of the national courts of party States. In this context the question arises whether it is a competitive jurisdiction between the Court and national courts with its supremacy in terms of the latter, the transfer of criminal proceedings before the Court, or a matter of exclusive competence of the Court in respect of certain offenses. Under the Statute, state jurisdictions have primary meaning over the jurisdiction of the International Criminal Court.

The Court does not replace national legal systems nor any state duty to investigate and to prosecute the perpetrators of international crimes. Court is complementary to national jurisdictions. Thus, the Court will only intervene if the state has no desire or ability to investigate leads up to accuse and condemn the offender who allegedly committed the crime specified in the statute. The state lacks the will if, for example, a state decision is brought in order to protect the defendant on the basis of criminal liability for crimes foreseen within the Statute. Or, the state wouldn't have an opportunity to judge if, for example, it won't be able to implement process because the national criminal law does not predict crimes listed in the statute. Therefore, national law must be aligned so that the state can provide investigation, to accuse and condemn the perpetrator. (*Dragan Simeunovic, Releasing rights from politics - in attachment to Universal Justice, Belgrade, p. 2*).

The effecting of the complementary, subsidiary jurisdiction of the International Criminal Court is effected under the assumption of the existence of the unwillingness or inability of the state or its judicial system. But not defining the terms "unwillingness" and "inability" and the lack of criteria for assessment can lead to a serious political assessment of the effectiveness or ineffectiveness of the national system of criminal justice. Therefore the Court through its practice should build precise elements in terms of these criteria, such as the duration of the proceedings before the national courts, the weight of the sentence whether the defendant is released from prison, pardoned or the act is amnestied etc. (*Kambovski, p.404-405*).

Although it must be acknowledged the jurisdiction of national courts for state sovereignty, still with complementary jurisdiction a balance is established between effective combat with international crimes and justified

fear of politicizing the Court as an instrument of persecution for political purposes.

3.5. General principles of international criminal law

The general principles of criminal law in the Statute of the International Criminal Court are set out in the general part of the statute, even though as such it is not detached as the structures of most national criminal rights, and their penal codes. General provisions of the statute include the basic principles of international criminal law as a complementary unit with generally accepted institutes of criminal law in modern criminal-systems. Thus, the statute contains the basic principles of criminal law, punishment and their execution.

The procedure before the Court is conducted respecting the fundamental principles of criminal law, such as: *nulum crimen sine lege*, *nula poena sine lege*, retroactivity prohibition, personal criminal liability, and exclusion of jurisdiction over persons beneath 18 years, irrelevance of immunity of public functions holders, command responsibility, non-aging acts, the subjective side and grounds for excluding criminal responsibility and command.

3.5.1 The principle of legality

The principle of legality is one of the most important principles in criminal law. Therefore we will briefly dwell on the concept and evolution. The principle of legality is first and primary. That principle gets a specified expression into three directions: first, offenses are only those which the law expressly stipulates as criminal, secondly, penalties as a form of state coercion can only be imposed only under the laws listed within and by observing the established rules established for their determination in some cases and third, during conducted offense the exemption from serving the prescribed penalty, as well as exemption from criminal responsibility can take place only in cases expressly mentioned in their established assumptions. (*Nenov, Criminal law- General honor p.15-16. Also see Girginov, Criminal law-General honor, p. 20-25. Also Dolapchiev, Criminal law p.65-66*).

The principle of legality means protecting citizens from the arbitrariness of the judicial authorities and the arbitrariness of the state and full respect of the law by citizens, as a way of ensuring the interests of society as well as protecting the corpus of human rights. This means that in the essence of the principle of legality are the reasons for public and private interest. (*Marjanovikj, str.39-41*). Therefore, 'it should be said: right is everything of use to the people, but the opposite: only what's right is of use to the people' (*Radbruh, Philosophy of Right, p. 266*).

The principle of legality has its own historical and evolutionary development. As much as in theory there are different opinions, still it can freely be said that England is considered its homeland with the Great Charter of Freedoms (Magna Charta Libertatum) of King John Without a Country (John Lackland) of 1215, by which, sanctions against a free man are permitted only with a lawful judgment from equal people to him or by the law of the land.

It is a legal guarantee of material- legal character which guarantees civil rights and the rule of law. It would have a big impact and on the most precise way it would be proclaimed in the Declaration of the Rights of Man and Citizen of the French bourgeois revolution which states that "You can not stop what is prohibited by law and no one can be forced on what he has not commanded, "and that" the law can establish only penalties that are strictly and obviously necessary. Nobody can be punished except by virtue of law, adopted and proclaimed before the offense and legally applied. "Accepting the idea of the French Revolution, at the time this principle will adopt all EU legislations, most precisely expressed by the famous Latin maxim 'nullum crimen, nulla poena sine lege'"a maxim that owes the criminal law to Anselm von Feuerbach as the founder of the modern German criminal legal science and redactor of Bavarian penal Code of 1813. (*Marjanovikj, p. 38-39. Also Dolapchiev, p. 65*).

This fundamental principle in the criminal law is accepted by all modern criminal-law systems, and also in international criminal law. Thus the Universal Declaration of Human Rights of 1948 in Article 11, paragraph 2 states that: "No one shall be held guilty of a crime based on any kind of action or omission which did not constitute a criminal offense in terms of national or international law at the time when they were committed." Almost the same wording is contained in Article 7 paragraph 1 of the European Convention on Human rights and Article 15 of the International Covenant on Civil and political Rights of 1966.

This and other principles of the criminal law are fully contained in the provisions of the Statute of the International Criminal Court. From the acceptance of the principle of legality legal consequences are arising, this principle can serve as a guarantor of rights and freedoms of citizens, on the one hand, and as a guarantee for the implementation of criminal policy embedded in the national penal laws and the provisions of the Statute of the International Criminal Court. In the provisions of the Statute, the principle of legality of the offense and the punishment, and the prohibition of retroactive effect of the statute is based on general principles of law derived from the national legislation of modern legal systems defined in a way that is generally accepted in modern criminal law. (*Kambovski, p. 406*).

3.5.2 Non bis in idem

Non bis in idem is a principle prescribed in Article 20 of the Statute. According this principle, with the exception of the cases provided within the statute, no person can be judged by the court for an action which is an offense for which the person is convicted for or acquitted by the court. Also no person may be tried by another court for an offense provided in Article 5 of the Statute, which has already been convicted or acquitted by the Court. Article 5, paragraph 3 of the Statute stipulates that no person who is tried by another court for an action forbidden by article 6, 7 or 8, can not be judged by the court for the same offense unless the proceedings in another court was conducted in order that person to be (free) from criminal liability for offences from the competence of the court or it was not conducted independently and impartially according to the norms of regular procedure, recognized by international law, and is conducted in a way that the specific persistences are not appropriate to the intentions of the person to be taken to court.

3.5.3 Nullum crimen sine lege

Nullum crimen sine lege as a principle as laid down in Article 22 of the Statute. According to this principle no person bears criminal responsibility unless his executive action doesn't represent an offense punishable under the authority of the Court. When defining an offense it can not be interpreted by analogy and in the case of ambiguity in its definition, it is interpreted in the interest of the defendant upon the principle 'in Dubio pro libertate. "This principle does not preclude the qualification of certain behavior as criminal offenses under international criminal law regardless of the Statute.

3.5.4 Nulla poena sine lege

Nulla poena sine lege principle is prescribed in Article 23 of the Statute. According that principle, a person convicted by the Court may be punished only under the provisions of the statute. This principle is defined in the statute so it is generally accepted in modern criminal law and as such does not leave any doubt regarding its interpretation.

3.5.5 Non-permissibility of retroactive act

Non-permissibility of the retroactive act provided for in Article 24 of the Statute provides that no person may incur criminal responsibility for an act executed before the entry into force of the statute. If the law regarding the offense is changed before the final judgment the law that is more lenient to the perpetrator will be applied. As already stated the principle nulla poena

sine lege, a principle that has been accepted in the statute as well as in modern penal legislations without any doubt.

3.5.6 The principle of personal criminal responsibility

According to the principle of individual criminal responsibility , prescribed in Article 25 of the Statute , the Court has jurisdiction against individuals who bear personal responsibility and are subject to personal punishment under the provisions of the statute unless they commit an offense which is under the jurisdiction of the Court if the person : commits the offense on his own, accessory with someone else, regardless whether that other person is a criminally liable , seeks orders or encourages the commission of such offense , that is really committed or attempted ; helping another or otherwise complicit in execution or effort , including through the means of execution , otherwise contributes to the execution or attempted execution of the offense by a group of persons acting with general purpose; regarding offense of genocide , directly and publicly arouses others to commit genocide and if attempted such an offense , when it joins the action and begin its execution by taking an important step but the offense is not executed because of circumstances independent of the person's intention . If the person waives execution or otherwise prevents the execution does not bear criminal responsibility and is not a subject to penalty for attempt, if fully and voluntarily waives form the primary goal.

These regulations prescribe the complicity through forms of execution, encouraging and helping, the executor is also a person who contributes to the execution of the work within the group, accepted a bid as a form of execution and its impunity in the case of voluntary withdrawal.

In paragraph 4 of this Article the responsibility is excluded from the states in international law, which they now remain outside the circle of subjects of criminal responsibility, although the adoption of the Statute had such ideas.

3.5.7 Exclusion of jurisdiction against persons, which are below the age of eighteen

According the principle of exclusion of jurisdiction against persons, which are below the age of eighteen, prescribed in Article 26 of the Statute, the Court has no jurisdiction according to people who have not yet turned 18 years of age at the time of execution of the offense.

Irrelevance of immunity of public officials, irrelevance of duty of public officials is contained in the provisions for criminal liability prescribed in Article 27 of the Statute. These provisions apply equally to all persons regardless of their official position. Thus the position of Head of State or Government, a member of the government or parliament member elected

representative or a government official, does not exempt the person from criminal responsibility under this Statute, nor represents a basis for mitigation of sentence. The Immunities or special procedural rules which may have been related to the official position of a person in national or international law are not an obstacle to implement Court jurisdiction against that person.

3.5.8 Responsibility of commanders and other chiefs

Responsibility of commanders and other chiefs, as a principle is laid down in Article 28 of the statute provided that in addition to other grounds of criminal responsibility by statute offences of the competence of the Court are: military chief or person effectively acting as military chief, bears criminal responsibility for offences of the competence of the Court committed by the army, which are under its effective command and control, depending on the case, the result of failure on its part of responsible control over those forces when the military chief or person knew or could under the circumstances know that the armed forces had committed or would commit such offences and the military chief or person has undertaken the necessary and sufficient measures in its power to deter or too shorten performance of offences or surrendered to the authorities for investigation or prosecution. In the relationship between chief and subordinate which is not provided as above, the Chief brings responsibility for the offences under the competence of the Court committed by the subordinates, which are under his effective authority and control, following the missing control of that subordinates by his side, as when the chief new but didn't pay any attention to the information which clearly shows that his subordinates committed or would commit such offense, the corresponding offences are affecting the activity which represents an effective responsibility and control of the chief when chief did not undertake all necessary measures in his competence, to prevent or too shorten the execution of offences or to report to competent authorities for investigation and prosecution. These special rules of command responsibility are arising from "Nurnberg principles "and they have practically suffered verification in the functioning of the criminal justice system through the decisions in Hague.

3.5.9 Other general principles

According to the already accepted solutions of the International criminal law, offences under the jurisdiction of the Court lapse, as prescribed in Article 29 of the Statute.

The subjective side, laid down in Article 31 of the Statute, is consisted in intentionally and the real misconception excludes criminal responsibility. The direct intent (*dolus direktum*) refers to a specified action

when a person wants to commit the same and in respect of the consequences when a person wants those consequences and when they will perform in the normal development of the events (*dolus eventualis*).

Article 31 of the Statute prescribes the grounds for excluding criminal responsibility such as: cases of mental incompetence unless *actio libera in causa*, as well as institutes of necessary defense, except for cases of defensive military operation, last resort and other bases in law which are applied by the International criminal court as the factual or jurisdictional error, prescribed in Article 32 of the statute, which includes that the actual error is the basis for excluding criminal liability only if the subjective side is eliminated while the jurisdictional error can be a base for the exclusion of criminal if the needed subjective side for that offence is eliminated or if the person had jurisdictional duty to submit to the commands of the respective chief, or if the person did not know that the order is illegal, and it was not obvious, as is the case with the commandment to commit genocide against humanity which are obviously illegal, as stipulated in Article 33 of the statute.

3.6. Penalties

The statute has developed its own independent system of fines and penalties as prescribed by Article 77: imprisonment, fines and confiscation of property.

Imprisonment is consisted of deprivation of liberty for a number of years, which can not surpass maximum period of 30 years or life imprisonment, when it is justified because of the exceptional weight of the offense and during special personal circumstances of the executor.

The fine is prescribed as a minor penalty besides the imprisonment sentence and imposed by the Rules of Procedure and proof adopted by the Court.

Confiscation of property is also envisaged as a minor penalty and it applies to cases of crime and the benefits gained by the offence and does not regards the rights of third persons who acted "*bona fide*".

The system of penalties does not prescribe the death penalty even though the draft statute regarding death penalty two options were offered: it can be prescribed for pronouncing in a case of difficult circumstances, if the court finds that it is necessary because of the seriousness of the offense, the number of victims and the size of damage, as well as variant whereby Statute should not contain a provision for the death penalty. Thus Statute accepts the abolish direction regarding the death penalty, which corresponds to the decisions of the majority of modern civilized criminal-legal systems in Europe and worldwide.

The rules for determining penalties prescribed in Article 78 of the Statute, according which the determination of punishment the Court in accordance with the Rules of procedure and evidence evaluates all the circumstances related to the severity of the offense and the offender's personality. In the event of concurrent offences the only sentence imprisonment can not be shorter than the heaviest sentence provided individually or exceed the maximum of thirty years after the principle of aspiration, or may be imposed, if conditions are fulfilled, sentence of life imprisonment upon the principle of absorption.

According Article 79 of the Statute, the fine as well as confiscated objects or property use go to the fund established by the Assembly of States – statute sides, designed to help victims and their families.

Regarding the execution of the sentence imprisonment the Court decides the sentence to be carried out in one of the listed countries which have expressed their consent to receive convicts, and the Court takes into consideration the circumstances relating to the execution system sentence of imprisonment in the State, the application of international standards for the rights of inmates, the opinion of the convict and his nationality and other relevant circumstances.

Unless some other country is not determined, the punishment is carried out in Dutch prisons. The control of sentence execution and the transfer of the convict are decided by the court. After serving the sentence the person is transferred in the state which is obliged to receive the person or country that wants to receive the person. The fine and confiscation of property are executed in the state determined by the decision of the Court to whom the state has transferred funds to the execution of the judgment. To reduce the sentence detention solely the court decides that the sentence can be reduced if the defendant served two-thirds of the sentence or twenty-five years when sentenced to life imprisonment. If the convict escapes from prison, state administering the punishment through mutual aid will require its return from the state to which he escaper, or to will initiate such a request to be brought by the Court.

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