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THE PREMISE OF THE ESTABLISHMENT OF THE INTERNATIONAL CRIMINAL COURT

Dumitrița FLOREA[1], Narcisa GALEŞ[2], Loredana TEREC-VLAD[3]

Abstract

The International Criminal Court is an embryo of international criminal jurisdiction for certain serious facts and under certain conditions. The court is in a continuous process of improvement. It is a relatively new institution in international law, differentiated from those of the same type created ad-hoc for certain countries and deeds committed during a designated period. Therefore, the study of all the problems that this institution raises in the context of contemporary international law and in the relationship with the criminal law of the states represents a challenge for any researcher. The court was created as a result of spectacular developments in terms of realities and criminal law. In terms of realities, mankind was confronted with serious crimes targeting entire human groups, on ethnic grounds, with horrors that have not been known since World War II in the last decade of the 20th century. In the field of international criminal law, the establishment of ad hoc International Courts for the trial of crimes committed in the former Yugoslavia and Rwanda and the efforts to establish courts in Cambodia and Sierra Leone, led to the conception of the need to create a permanent and universal body to ensure the prosecution and punishment of acts of this nature, without forgetting its preventive role through its very existence.

Keywords:

Statute; crime; court; trial; procedure.

JEL classification: K33.

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I. Introduction

This new institution was created and must find its place within a well-structured law entity both internationally and internally. *Internationally*, we are facing the sovereignty of the states, in which the criminal territorial jurisdiction occupies a central place. In the *internal plan*, each state has developed rules of criminal law and of criminal procedure, as well as a whole judicial system - of prosecution, investigation, jurisdiction, execution of punishments - which are often different and without its cooperation no international criminal jurisdiction can succeed. Therefore, the approach of some authors of asking questions, of seeking answers in the Statute of the Court, as well as in its relation with the environment in which they must act, is justified.

International law has, since the nineteenth century, included *norms agreed by two or more states*, by which it was agreed *to pursue and punish certain acts considered by them to be crimes committed in their territories or in areas outside the jurisdiction* of any state (the Free Sea), for example, *acts of piracy, the transport of slaves, trafficking of women and children, drugs traffic and others alike*. In the twentieth century, such norms expanded, including *acts of genocide, acts of terrorism against civil aviation, maritime navigation, against persons protected internationally*. It is what has been called *international criminal law*; we are not in the presence of an international jurisdiction, but of norms by which the states agree to consider certain offenses and punish them within their internal jurisdiction.

II. The historical-legal reasons regarding the establishment of the International Criminal Court

"Humanity can no longer accept the paradox that the criminal responsibility is weaker as the perpetrator is stronger, and his crimes are worse," said Robert Jackson, Nuremberg Court Prosecutor.

Analysing the premises of the establishment of the ICC we must highlight the historical approach, starting from the evolution of ideas and conceptions, especially after the Treaty of Versailles, of the influences of the great partisans of international jurisdictions such as: Vespasian Felia, Dounedieu de Vabres, Stefan Glaser and others, culminating with the courts for the trial of the great German and Japanese war criminals.

Regarding the nearer periods we must consider not only the presentation of the projects and the attempts after the Second World War, but also the analysis of some processes that took place at the national level, in which the accusation referred to crimes under international criminal law.

One of the great paradoxes of the twentieth century is that, although the most prolific in terms of the elaboration of international treaties by which war crimes, crimes against humanity and genocide are codified and defined, the past century, but also the present, has also experienced manifestations of a brutality unheard of in the history of the world. Obviously, the legal instruments represented the expression of the efforts to diminish the cruelties and the destructive effects caused by the civil, regional and world wars. However, the acts of extreme violence and contempt for the human being had such a magnitude during the wars of the twentieth century, that they frequently shocked world public opinion.

One of the responses to such cruel acts was the establishment of an *international justice system*, in the form of ad-hoc courts and in the form of an International Criminal Court with a *permanent character* and with *a vocation of universality*.

This micro-research objectively captures the long and difficult path, on which the idea of international criminal justice has been recognized, as numerous obstacles have arisen towards the establishment of ad-hoc courts and, especially, the establishment of an international criminal court. Expected by the experts, the idea of an international criminal court as a permanent institution with general competence, although it as on the on the UN agenda from 1953, it could find its realization only after 45 years, due to obstacles that were more related to the political will rather than challenging the idea of an international criminal justice.

In order to better understand the mechanism of the Court, we highlight „the norms underlying its establishment and the position of Romania at the Rome Diplomatic Conference. The experience of the ad hoc criminal courts, the conclusions that were drawn as a result of their activity, the positive but also the negative aspects reported in the specialized legal literature, were the grounds and premises for the creation of a permanent international criminal court. We note the establishment and functioning methods, the jurisdiction of the Court, its cooperation with the States Parties and the relations with the United Nations.

The ad hoc international criminal tribunals have been ex post jurisdiction bodies. We must mention that their existence had no implications in the field of international security. The ICC is the first international ex ante criminal organization that can intervene in a military conflict and under these conditions its decisions could influence both political and military decisions, such as limiting certain options or changing the course of certain decisions"[1: 289].

„*The Statute of the International Criminal Court adopted in Rome in 1998"* is analysed taking into account the initial draft elaborated by the *Commission of*

International Law and *the Draft Code of Crimes against Peace and Security of Humanity*, which contain edifying elements regarding the evolution of conceptions and concerns in the field. As the *Statute of the Court* is placed at the confluence between public international law, the rules of international criminal law and those of the criminal law of the different states, the analysis must take into account correctly issues such as: the prevalence of the common-law elements in the first adopted variants of the *Statute and the Rules of Procedure*, the presentation of evidence and the new active role granted to the judge in the preparatory phase of the *pre-trial stage* of the process and in the *trial stage* itself, the procedure of the *Tribunal for the Former Yugoslavia*, but also the conclusions regarding the preliminary observations regarding the influence of the two great procedural systems [2].

Starting from the legal status of the *International Criminal Court*, we further highlight the aspects regarding the relationship between the *International Criminal Court* and the United Nations. Of course, the subject is a wide range of arguments that allow the analysis and interpretation of the specific laws in detail, but this will materialize in a subsequent micro-research.

III. Establishment of the International Criminal Court

At the beginning of the 20s, a series of theses on this topic were developed, among the promoters of the idea of establishing an International Criminal Court being the Romanian jurist Vespasian Pella, along with Baron Descamps, Hugh H.L. Bellot and Henri Dounedieu de Vabres. V.V. Peila has recommended since 1919 the possibility of creating an *International Criminal Court* in the jurisdiction of which, at the same time, the responsibility of the natural persons and of the states enters. Accepted and promoted by the *Inter-Parliamentary Union*, *International Law Association*, *International Congress of Penal Law*, these theses were rejected by the *League of Nations* which considered them at that time as premature.

However, in 1934, „the *Assembly of the League of Nations* adopted the *Convention on the creation of an International Criminal Court* competent to decide on the *liability of persons* who would have been guilty of committing acts that would have come under the *Convention for the Suppression and Punishment of Terrorism*; both conventions were opened for signature in Geneva in 1937 under the empire of increasing attacks on heads of state and other dignitaries (eg the assassination of Chancellor Dolffus of Austria - 1934 and King Alexander the IIIrd of Yugoslavia in Marseille in the same year together with the Foreign Minister of France Barthou, etc.)"[3: 341].

After the Second World War, the idea of creating an *international Criminal Court*, with the exception of special experiences through the creation

of ad hoc Courts (Nuremberg and Tokyo) at that time, never went beyond the project stage.

In 1948, the *Convention on the Prevention and Suppression of the Genocide Crime* provided for the perpetrators of this serious crime to be sent to an *international criminal court* which must be created. In the same year, the *UN General Assembly* asked the *International Law Commission* to examine the possibility and opportunity of setting up such institutions.

In 1954, the *General Assembly* decided to postpone the analysis of this problem, which was related to the development of a *draft Code of crimes against international peace and security* (codification of the principles used by the Nuremberg Court), as well as the definition of the act of aggression.

In 1973, the UN Convention on Apartheid provided for the possibility of referral to an international criminal court of persons accused of committing this crime.

In 1974, the *General Assembly*, by Resolution 3314 (XXIX), adopted by agreement a definition of aggression, which allowed the relaunching of the activity of the *International Law Commission* on *the criminalization of crimes against international peace and security* and the creation of an *International Criminal Court*, but all these efforts did not materialize in success.

In 1989, following the initiative of the State of Trinidad and Tobago, concerned about its situation on the issue of drug trafficking, the *UN General Assembly* asked the *International Law Commission* to review the issue of creating a Court within *the code of crimes against peace and security* and to approve the *competences of the court for persons guilty of drug trafficking.*

In 1992, in the context of the armed conflict in the former Yugoslavia, the *UN General Assembly* (pi. Resolution A / 4733) asked the *International Law Commission* to give priority consideration to a *Statute for the International Criminal Court*, to be finalized in 1994.

In 1993, the *United Nations Security Council*, by Resolution 808, pronounces, starting from the foundation of the VII chapter of the *United Nations Charter*, for the creation of an ad hoc *Tribunal for the former Yugoslavia* whose status was adopted in unanimity of the Council. A quasi-similar ad hoc Tribunal was also created for *Rwanda.*

In 1994, the *General Assembly*, on the basis of its Resolution 49/53, created an ad-hoc Committee to examine the issues related to the creation of an *International Criminal Court* (ICC).

This group met in two sessions during 1995.

The following year, 1996, the ad-hoc committee was transformed into the Preparatory Committee for the establishment of an International Criminal Court (also called Prep.Com), by Resolution 50/46 of the *General Assembly*, whose work was based on the draft Statute prepared by the

International Law Commission. The works Prep.Com. began with the examination of the jurisdiction of the Court, the definition of offenses falling within its scope, the application of the principle of complementarity, the general rules of criminal law and the cooperation between the Court and national criminal jurisdictions [4: 69].

Between March 1996 and April 1998, the United Nations organized 6 meetings of the Preparatory Committee. Delegations met at the UN headquarters in New York to discuss the draft Statute. At the works of Prep. Com. non-governmental organizations (NGOs) and experts in international law also participated, presenting their views on the legal and political aspects related to the establishment of the Court. In addition, throughout this period, both governments around the world and the UN have organized specialized meetings to discuss issues related to the establishment and functioning of the ICC.

IV. UN diplomatic conference of plenipotentiaries for the establishment of an International Criminal Court

The *conference* was held at the *FAO Center in Rome, between June 15 and 18.07.1998*.

At the Conference, the delegations of the UN member states were mandated, by the United Nations, "to concern for the finalization and adoption of the *Convention for the establishment of an International Criminal Court* in accordance with the resolutions of the UN General Assembly 51/207 of December 17, 1996 and 52/160 from December 15, 1997 ".[4]

The negotiations aimed at creating a balanced and modern status text, harmonizing the legal requirements of the different systems of law existing worldwide, and creating an international criminal court that, by exercising jurisdiction over the guilty parties for committing particularly serious crimes, to complement the system of UN instruments for maintaining world peace and security.

The negotiations focused mainly on aspects of the draft Statute that did not meet the agreement of most UN member states: the extent of the Court's powers, the conditions for exercising jurisdiction, the role of the *Security Council*, the prosecutor, the consent of the states, the composition of the Court, issues related to the financing of the Court.

The special political stake of the Conference, the marked differences of opinions and interests between states or at the level of groups of states,

[4] Romania signed the Convention on July 7, 1999 (New York)

made it necessary to submit the draft Statute to the vote. Amendments proposed by India (introduction of nuclear weapons and the role of the Security Council) and the USA (the jurisdiction of the Court) was rejected in the *Plenary Committee*, and following the request of the American delegation to submit to the non-nominal vote, in the Plenary, the text of the Statute, was adopted with 120 votes "for", 7 votes "against" and 21 "Abstentions"[4: 132].

Main provisions:

- According to „the majority point of view of the delegations participating in the Conference, the *International Criminal Court* (ICC) is designed as a permanent legal institution with global jurisdiction in punishing individuals guilty of serious violations of international humanitarian law. The ICC has the capacity to put under accusation and prosecute individuals (as opposed to the International *Court of Justice in The Hague*, whose jurisdiction is limited to states only), its jurisdiction not being limited by chronological or geographical criteria (as in the case of the ad-hoc *International Courts for Rwanda and Yugoslavia*),
- Thus, the *International Criminal Court* was thus established by convention, and its relations with the UN are to be negotiated subsequently in a separate agreement concluded by the two parties [5: 46].

Starting with July 17, 1998, the *Statute of the Court* was open for signature, for all states, until October 16, 1998 at the Italian MFA headquarters and, after that date, until 2000 at the United Nations headquarters in New York. Its entry into force was conditional on the deposit of 60 instruments of ratification.

Romania's position at the Diplomatic Conference from Rome

Romania participated actively in the process of negotiations on the Statute of the Court, both as a member of the Bureau of the *Plenary Committee*, where it held a position of vice-president, and as a member of the group of states of the same orientation (the "like-minded countries" group) which has gathered 64 states: member countries of the European Union (except France), all associated states in the EU, states in Latin America, Asia and Africa.

During the discussions, Romania spoke for:

1. „establishing the jurisdiction of the Court, based on the principle of universal jurisdiction, on crimes considered inherent, the so-called "core crimes" (genocide, war crimes, crimes against humanity and

aggression); regarding other categories of crime (terrorism, crimes arising from illicit drug trafficking, crimes against UN personnel), according to the position adopted by like-minded states, the Romanian delegation argued that they could be subject to further negotiations, within the Preparatory Commission for the establishment of the Court;

2. elaboration and inclusion in the Statute of a generally accepted definition for the crime of aggression;
3. the subsequent definition of the elements of the crimes, necessary for the exercise of the jurisdiction of the Court;
4. the automatic jurisdiction of the Court in the case of the offenses included in the hard core, by this aiming to create a unitary legal regime for the most serious offenses;
5. the application of the principle of complementarity in the relations between the Court and the national courts;
6. granting the UN Security Council the right to present to the Court certain situations that affect international peace and security for investigation (without prejudice to its prerogatives, according to chapter VII of the UN Charter and the right to request the suspension research or trial for a limited period of time (12 months) with the possibility of renewing the request;
7. granting the prosecutor the right to carry out investigations on his own initiative ("proprio moto"), subject to the monitoring of his activity by the Preliminary Chamber of the Court (Pre-Trial Chamber);
8. inclusion of internal armed conflicts in the statute;
9. the inclusion in the Statute of the text variant regarding the list of weapons whose use is considered a war crime, which contained an implicit reference to nuclear weapons (variant agreed by most states, including permanent members of the Security Council);
10. the compromise formula on the financing of the Court, based on contributions from the States Parties (established according to criteria applicable in the UN system, funds from the United Nations (subject to the approval of the UN General Assembly) and voluntary contributions (from governments), international organizations, individuals, corporations and other entities) accepted according to certain criteria established by the Assembly of States Parties.

Romania voted, at the last Plenary Committee meeting, for *'non motion action'* (for rejecting discussions on India's motions - on nuclear weapons and the role of the Security Council - and the USA - on the jurisdiction of the Court, which were intended to prevent adoption of the

text) and in the Plenary, "for" the Statute and signed the Final Act of the Conference with 127 UN member states, including the USA" [4:344].

V. Conclusions

The *Statute of the International Criminal Court* adopted in Rome represents a major change in the way the international community sees peace, transition and the application of international norms. The jurisprudence of the International Criminal Court - and that of the National Courts, which investigates and judges those crimes under the jurisdiction of the Court or which cooperates with it - have brought international criminal law, in a short time, to a level of development as important as it is. On a practical level, the Court fills many of the gaps that seem to characterize the current national judicial systems and encourages the development of national norms.

First of all and the most important argument - the participation at the adoption of the Rome Statute symbolizes a State party's commitment to end impunity and to guarantee fundamental views. In this regard, the position of the French delegate Hubert Vedrine is significant, who stated, at the time of the adoption of the Statute: "*at the turn of the century, marked by horrors that defy human conscience, the fight against impunity achieves a real victory*." to promote the well-being of their citizens by contributing to a legal system that will support the norms of international law and this is possible by stimulating the States involved to investigate and prosecute genocide crimes, crimes against humanity and war crimes within the National Courts, in an independent, impartial and effective way. *Secondly*, the International Criminal Court gives the States an impartial forum, where persons accused of certain offenses may be handed over in cases where they are refusing to hand over them to a particular state. Thirdly, the Court also can, by offering a possible consensus forum, to help resolve the positive conflicts of competence regarding certain causes. It is also possible, perhaps last but not least, for the institution of the Court to reduce the temptation of States Parties to engage in unilateral aggressive acts of justice. Through each of these positive effects on international relations, the State Party that surrenders an accused can avoid harsh political decisions and international pressures, while at the same time providing justice to the victims and ensuring the accused a fair trial, in accordance with the highest standards of international law.

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