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ПРЕТХОДНО САОПШТЕЊЕ

THE SYSTEM OF SANCTIONS FOR INTERNATIONAL CRIMINAL OFFENSES

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Abstract: International criminal law as a supranational, universal set of legal regulations determines the concept and elements of international criminal offenses that violate and infringe international law, thereby violating or jeopardizing universal values, goods and interests protected by international law, and criminal sanctions as measures of social reaction against perpetrators of these offenses. For the application of criminal sanctions against the perpetrators of international criminal offenses, the competent judicial authorities (at the level of the international community) determine the basis of their criminal responsibility in the procedure they conduct. In the system of sanctions, which should fulfill both preventive and repressive role, there are penalties whose application is linked to prescribed requirements. These international sanctions have primacy in relation to criminal sanctions prescribed for similar/identical international criminal offenses by individual national criminal legislations, including the legislation of Bosnia and Herzegovina. The paper discusses the concept, elements, content, purpose, characteristics and types of criminal sanctions for international criminal offenses.

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1. INTRODUCTION

The history of development of human society is a silent companion of numerous wars and armed conflicts between tribes, peoples and, finally, between states. That is why it may rightly be said that the history of human society is, in fact, the history of warfare. Individual states were created in wars, and *vice versa* the States also disappeared from the face of the Earth in wars[3]. From the beginning, ideas about the need to introduce rules for the conduct of war, i.e. all or at least certain armed actions, appeared in parallel with war operations, that is, with the beginning or end of wars.

It was only at the end of the 19th Century that the international community became aware of the need to introduce the rules of war, that is, the „laws and customs" of warfare. It is a set of rules on starting, conducting and ending war, armed conflicts, or occupation[4]. At the base of all these efforts was the idea of „humanizing the war"[5].

The set of numerous Hague conventions[6], agreements and declarations is today called "the Hague law". It is based on common law – "laws and customs of warfare". This law stipulates a set of rules on the rights and obligations of warring parties in the conduct of war actions, in order to limit the choice of ways and means of harming the enemy in an international armed conflict[7].

This is the basis of the international humanitarian law which, decades ago, was called the international law of war or the international law of armed conflicts.[8] Within this branch of law, there are numerous Geneva Conventions aiming to ensure effective protection of victims (civilian population, prisoners of war, wounded persons, sick persons, shipwrecked, medical or religious personnel) from unnecessary destruction.

[3] Juraj Andrassy, *Međunarodno pravo* (Zagreb: Školska knjiga, 1990), 67-81.
[4] Nedeljko Stanković, *Međunarodno krivično pravo* (Tuzla: Evropski univerzitet Brčko distrikta BiH, 2018), 65-68.
[5] Donald, A. Wells, *An Enciklopedia of Wars and Ethics* (Washington: Greenwood, 2005), 299-314.
[6] Bogdan Zlatarić, „Haška konvencija iz 1907. godine i individualna krivična odgovornost za ratne zločine", *Jugoslovenska revija za međunarodno pravo*, 2 (1958): 296-301.
[7] Christine Wyngaert, *International Criminal Law* (Hague-London-Boston: Brill, 1996), 113-127.
[8] Miodrag Simović, Milan Blagojević i Vladimir Simović, *Međunarodno krivično pravo* (Istočno Sarajevo: Pravni fakultet, 2013), 197-237.

2. THE SYSTEM OF INTERNATIONAL CRIMINAL OFFENSES

The Charter of the International Military Tribunal[9], which is an integral part of the London Agreement concluded on 8 August 1945 between the Allied Powers, provides for three types of crimes (international crimes). These are, pursuant to Article 6 of the Charter[10]: a) crimes against peace, b) war crimes, and c) crimes against humanity (genocide).

The UN Security Council Resolution no. 827 of 25 May 1993 adopted the Statute of the International Tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the SFRY since 1991. This Statute provides for four types of crimes (international crimes in Articles 2-5 of the Statute). These are the following crimes: a) grave breaches of Geneva Conventions of 1949, b) violations of the laws or customs of war, c) genocide, and d) crimes against humanity.

The International Criminal Tribunal, formed at the Diplomatic Conference in Rome in July 1998, whose Statute entered into force in mid-July 2002, conducts proceedings and imposes criminal sanctions on criminally responsible perpetrator of certain international crimes as a supranational, universal, permanent judicial body[11]. This Statute foresees the following international criminal offenses (Articles 5-8): a) the crime of genocide, b) crimes against humanity, c) war crimes, with the fact that Article 9 of the Statute defines the elements of these crimes, and d) the crime of aggression[12].

Regardless of which international document is in question, different types of punishments (or other criminal sanctions) are stipulated for these international crimes.

[9] Peter Calvocaressi, *Nuremberg: the Facts and the Consequences* (London: NY Macmillan, 1948), 78-96.
[10] Gustave Mark Gilbert, *Nuremberg Diary* (London: Mass Market Paperback, 1947), 67-101.
[11] Eric Suy, Karel Wellens, *International Law: Theory and Practice* (Hague: Martinus Nijhoff Publishers, 1998), 119-132.
[12] Dragan Jovašević, Ljubinko Mitrović i Veljko Ikanović, *Krivično pravo Republike Srpske, opšti deo* (Banja Luka: Fakultet pravnih nauka, 2017), 254–266.

3. THE PRINCIPLES OF APPLICATION OF CRIMINAL SANCTIONS IN INTERNATIONAL CRIMINAL LAW

The principles represent the basic, guiding principles on which the application of criminal sanctions for international criminal offenses is based[13]. They consider the following as general legal principles of international criminal law[14], which are recognized by the civilized part of mankind:

1) the principle of legality[15] – *nullum crimen, nulla poena sine lege* – an international criminal offense and the punishment for its perpetrator must be prescribed before the offense is committed, which prohibits retroactive application of international criminal law[16] (Articles 22 and 23 of the Rome Statute). Descriptions of the nature of certain international criminal offenses are clearly constructed and cannot be expanded by applying analogy (interpretation by similarity). In an effort to ensure strict compliance with this basic principle of criminal law in general, in paragraph 2 of Article 22 of the Rome Statute stipulates the obligation of the court to interpret the nature of a crime restrictively, i.e. to decide following the model of Article 111-4 of the new Criminal Code of France of 1992 - the principle of *poenalia sunt restrigenda* (expr. lat., "*legile penale trebuie interpretate restrictiv*"). In case of ambiguity, according to the solution from the Rome Statute, the court shall interpret the relevant provision "in favor of the perpetrator of the criminal offense" (i.e. *in dubio pro reo*),
2) presumption of innocence of the defendant (Article 66 of the Rome Statute), according to which everyone shall be presumed innocent until found (proved) guilty before the Court in accordance with the applicable law, whereby the onus is on the Prosecutor to prove the guilt of the accused, so the court must be convinced of the guilt of the accused "beyond reasonable doubt",
3) *lex mitius* (application of a milder law) - Article 24 of the Rome Statute,
4) the principle of guilt - according to which everyone is responsible for his/her own actions (but not for the behavior of other persons) which he/she could not have influenced. This indicates that criminal responsibility in international criminal law is individual (personal)[17],

[13] Borislav Petrović, Dragan Jovašević i Amila Ferhatović, *Krivično pravo 2* (Sarajevo: Pravni fakultet, 2016), 175-179.
[14] Dragan Jovašević, „Pojam, principi i izvori međunarodnog krivičnog prava", *Zbornik Pravnog fakulteta u Nišu*, 53 (2009):71-89.
[15] Vladimir Đuro Degan, *Sources of International Law* (Hague: Martinus Nijhoff Publishers, 1997), 67-112.
[16] Zlatarić, „Haška konvencija iz 1907. godine i individualna krivična odgovornost za ratne zločine", 296.
[17] *Ibid*.

5) the principle of a fair and speedy trial, which is reflected in three ways as: a) the right to an independent and impartial court, b) the right to resolve the criminal matter in a correct manner, publicly and within a reasonable time, and c) the right to exercise procedural rights by the accused, especially the right to be informed about the charges and its grounds, and the right to defense, the right to equality of arms, etc.,
6) *ne bis in idem* - according to which the same person cannot be prosecuted twice for the same criminal matter. In the case law of the Hague Tribunal, no person could be tried before a national criminal court for an offense that represents serious violations of international humanitarian law - if he/she has already been tried before this tribunal, since it has precedence over national courts,
7) the right to appeal in criminal cases,
8) the right to compensation for damages due to illegal deprivation of liberty or wrongful criminal conviction (the Statute of The Hague Tribunal and the Statute of the Rwanda Tribunal do not recognize this right of the defendant) stipulated under Article 85 of the Rome Statute,
9) non-application of statute of limitation of the most serious international crimes (these are offenses in the narrower sense) which is stipulated by Article 29 of the Rome Statute,
10) identity of double criminality as a condition for providing international criminal legal assistance (primarily, extradition of the accused persons),
11) *aut dedere aut judicare* - the principle according to which the state in whose territory a person who is suspected (accused, or convicted) of committing an international criminal crime is located - has two options: a) to extradite such a person to an international criminal court (i.e. to another state - to the requesting state), and b) to try such a person before its own national criminal court[18],
12) the irrelevance of public functions means that the position of the perpetrator of the criminal offense as head of state or government, member of the government or parliament, elected representative or government official does not exempt him from criminal responsibility for committed international criminal offense, nor it is a basis for a milder punishment,
13) the order of a superior does not exempt the perpetrator of international criminal offense provided for by the Statute from accountability, except in cases[19]: a) when the person is under a legal obligation to obey the order of the government or superior, and b) when the person did not know

[18] Hervé Ascensio, Emmanuel Decaux and Alain Pellet (sous la dir. de), "Droit International Pénal", *Revue Internationale de Droit Comparé,* 53, 2 (2001): 513-514.
[19] Helmut Satzger, *International and European Criminal Law* (München: Beck/Hart, 2018), 198-212.

that the order was illegal or when the order was not obviously lawful. Otherwise, Article 28 of the Statute specifically stipulates that the commanders and other superior persons (a military commander or a person acting in the capacity of a military commander) shall be criminally responsible for crimes committed by forces under his or her effective command and control, as a result of his or her failure to exercise control properly over such forces.

The Statute excludes juveniles, who were under the age of 18 at the time of commission of international crime, from liability and punishment for committing criminal offenses of this type. This means that nonage of the perpetrator at the time of committing an international criminal offense constitutes a special basis for excluding the existence of such a criminal offense (even the incrimination of its perpetrator).

4. CONCEPT AND ELEMENTS OF CRIMINAL SANCTIONS FOR INTERNATIONAL CRIMES

In international criminal law, criminal sanctions[20] represent coercive measures for the protection of humanity and international law against socially dangerous and illegal behaviors imposed by the competent judicial authorities in a prescribed procedure, which consist in deprivation or limitation of freedoms and rights of criminally responsible perpetrator. These are measures of social response that apply on the perpetrator of an international criminal offense after its commission and in connection with it. In legal theory, the following are listed as elements of criminal sanctions in international criminal law:

a) these are coercive measures by which the perpetrator of an international criminal offense is deprived of certain rights or freedoms. They are pronounced against the will of the perpetrator of the criminal offense, and even without his consent,
b) criminal sanctions must be prescribed in international legal acts, as well as the requirements for their imposition. This is the principle of determination of sanction in the regulations,
c) among criminal sanctions for international criminal offenses, only fines prevail[21]. At the same time, the existing system of international criminal law accepted the system of indeterminate punishments[22],

[20] Dragan Jovašević, *Krivično pravo, opšti deo* (Beograd: Dosije studio, 2018), 194-203.
[21] Ljubiša Lazarević, „Sistem krivičnih sankcija“, *Jugoslovenska revija za kriminologiju i krivično pravo*, 2 (1987): 28-45.
[22] Milan Vujin, „Međunarodni tribunal za prethodnu Jugoslaviju – odnos prava i neprava“, *Jugoslovenska revija za kriminologiju i krivično pravo*, 3 (1998): 94-97.

d) the prerequisite for the imposition of these sanctions is not only the committed criminal offense, but also the established criminal responsibility of its perpetrator, at the time of undertaking the action of execution,
e) sanctions are imposed by a competent international judicial body (military court, *ad hoc* tribunal, internationalized court or criminal court) and
f) sanctions should achieve a specific purpose[23] - the protection of values guaranteed by international (humanitarian) law and prevention of the perpetrator from committing the same (or similar) crime again, as well as refraining citizens from committing such crimes.

5. TYPES OF CRIMINAL SANCTIONS FOR INTERNATIONAL CRIMINAL OFFENSES

Numerous international documents prescribe the system of international criminal offenses, the basis of criminal responsibility of their perpetrators, as well as criminal sanctions imposed by competent international courts.

Article 27 of the Statute of the International Military Tribunal of 1946 stipulates only one type of criminal sanction for perpetrators of international crimes. Those are penalties. This provision prescribes two types of main punishments that the judicial body imposes "when it finds it is fair". These are[24]: a) death penalty, and b) other penalty (imprisonment which can be for life, i.e. permanent, and limited in time).

The Nuremberg and Tokyo judgments imposed all kinds of sentences on the accused. Article 28 of the Statute also stipulates that, in addition to the main punishments, the judicial authority can impose a secondary punishment on the convicted person. It consists in the confiscation of all stolen property. It is the confiscation of criminally acquired property, which is handed over to the Control Council of Germany.

Law No. 10 of the Control Council for the punishment of persons responsible for war crimes, crimes against peace and crimes against humanity for Germany from 1945, also recognizes several types of punishments. Article 2 paragraph 3 stipulates that any person found guilty of any international criminal offense may be punished by „the tribunal to be just".

Article 24 of the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the SFRY since 1991 (Statute of the Hague Tri-

[23] Ljubo Bavcon, „Družbena funkcija kazenskih sankcij", *Pravnik*, 9 (1961): 253-262.
[24] Dragan Jovašević, „Uloga krivičnih sankcija u uspostavljanju i zaštiti vladavine prava i pravne države", *Teme*, 3 (2009): 761-782.

bunal) determines the types of penalties that may be imposed on perpetrators of international crimes before this body. This Statute prescribes only one type of criminal sanction, imprisonment (deprivation of freedom of movement for a certain period). When determining this penalty, the court leans on the general practice of the courts in Yugoslavia, whereby all the circumstances of the crime are taken into account when determining the penalty, especially the gravity of the crime and the personal characteristics of its perpetrator. In addition to sentence of imprisonment, the Hague Tribunal may impose secondary punishment on the perpetrator of an international criminal offense from the jurisdiction of the Tribunal: a) return of property to their rightful owners (restitution), and b) confiscation of profits obtained through criminal activity, including insidious or violent behavior.

The provisions of Articles 27 and 28 of the Statute of the Tribunal are also important for the application of punishment. Namely, Article 27 of the Statute stipulates that the imposed imprisonment shall be served in a State designated by the Tribunal from a list of States which have indicated to the OUN Security Council their willingness to accept convicted persons. In that case, the sentence of imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the Tribunal. In Article 28 of the Statute of the Hague Tribunal, it is prescribed that the State in which the convicted person is imprisoned, when he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the Tribunal accordingly. The President of the Tribunal, in consultation with the judges, shall decide the matter on the basis of „interest of justice and general principles of law“ [25]. Provisions of identical content are also provided for by the Statute of the Tribunal for Rwanda (Articles 23, 26 and 27).

Finally, the Rome Statute of the International Criminal Tribunal, in part seven, devotes special attention to the penalties that this court may impose on the perpetrators of international crimes under its jurisdiction. The Statute distinguishes two types of penalties. These are: a) main and b) minor penalties.

6. GROUNDS FOR EXCLUSION OF THE APPLICATION OF CRIMINAL SANCTIONS FOR INTERNATIONAL CRIMINAL OFFENSES

It is a general principle of contemporary criminal law in general, and thus also of international criminal law, that every criminal offense and every pronounced criminal sanction is subject to statute of limitation after certain, ex-

[25] Dirk van Zyl Smit, „Odmjeravanje kazne u međunarodnom kaznenom pravosuđu“, *Hrvatski ljetopis za kazneno pravo i praksu*, 2 (2004): 1003-1024.

plicitly prescribed time[26]. This is the basis for terminating the state's right to apply criminal sanctions. There is an exception to this general rule provided by the Convention on the Non-Application of the Statute of Limitations for War Crimes and Crimes against Humanity of 26 November 1968. Namely, this Convention excludes the possibility of criminal prosecution and punishment due to statute of limitation for crimes of genocide and war crimes, as well as for other criminal offenses stipulated under international treaties[27].

By signing and ratifying this Convention, all national criminal legislations, including the legislation in Bosnia and Herzegovina (Article 19 of the Criminal Code of Bosnia and Herzegovina[28]), explicitly exclude the occurrence of the statute of limitations for criminal prosecutions and the statute of limitations for the execution of the pronounced sentence for the following criminal offenses[29]: a) genocide, b) crimes against humanity, c) war crimes against the civilian population, d) war crimes against the wounded and sick, e) war crimes against prisoners of war, f) organizing and inciting the commission of genocide and war crimes, and g) for crimes for which the statute of limitations cannot apply according to ratified international treaties. In the same way, Article 29 of the Rome Statute of the International Criminal Tribunal explicitly excludes any legal limitation regarding criminal prosecution and punishment of perpetrators of crimes within the jurisdiction of this Court[30].

In the national (internal) criminal legislation, in addition to the statute of limitation, amnesty (greek *amnestia* – forgetting, consigning to oblivion) also appears as a basis for shutting down the state for punishment (*ius puniendi*). As a result of the given amnesty, criminal prosecution cannot be initiated or continued against the perpetrator of the criminal offense, nor can criminal proceedings be conducted against him or the sentence imposed be executed. Amnesty is considered a general basis for the termination of any criminal sanction, which can be applied to any perpetrator and for any committed criminal offense. It is given through a law, which is *lex specialis*, which derogates the provisions of the substantive or procedural criminal law. The given amnesty cannot be revoked and it refers to an individually unspecified number of persons[31].

[26] Bogdan Zlatarić, „Problem zastare međunarodnih zločina u usporednom i međunarodnom krivičnom pravu", *Zbornik Pravnog fakulteta u Zagrebu*, 1 (1966): 21-33.

[27] Vladan Vasilijević, „Kažnjavanje za ratne zločine i problem zastarevanja krivičnog gonjenja u međunarodnom krivičnom pravu", *Jugoslovenska revija za kriminologiju i krivično pravo*, 1 (1965): 44-49.

[28] *Službeni glasnik Bosne i Hercegovine*, br. 3/2003, 32/2003, 37/2003, 54/2004, 61/2004, 30/2005, 53/2006, 55/2006, 8/2010, 47/2014, 22/2015, 40/2015, 35/2018 i 46/2021.

[29] B. Vrček, „Nezastarevanje ratnih zločina i zločina protiv čovječnosti, te načelo zabrane retroaktivnosti", *Pravnik*, 2 (1996): 46-49.

[30] Zlatarić, „Problem zastare međunarodnih zločina u uporednom i međunarodnom pravu", 25-28.

[31] Dragan Jovašević, Zoran Stevanović, *Primena amnestije i pomilovanja u krivičnom pravu* (Beograd: Institut za kriminološka i sociološka istraživanja, 2008), 18-26.

7. CONCLUSION

For numerous international crimes that were inaugurated in the last decades of the 20th Century, distinguished in international documents for their significance as follows: a) genocide, b) crime against humanity, c) crime against peace (aggression), and d) war crimes, a system of punishments is prescribed, but also other criminal sanctions. The basis of responsibility is the conscious and voluntary actions of an adult natural person.

As in national criminal law of individual states, and also in the law of Bosnia and Herzegovina, in addition to the system of criminal sanctions and the rules for their imposition, international documents that represent the source of international criminal law - know the rules on the limitation/exclusion of the application of criminal sanctions. These are the grounds that terminate the State's right to apply criminal sanctions prescribed by the law.

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СИСТЕМ САНКЦИЈА ЗА МЕЂУНАРОДНА КРИВИЧНА ДЈЕЛА

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Апстракт: Међународно кривично право као наднационалан, универзалан скуп правних прописа одређује појам и елементе међународних кривичних дјела којима се крши и нарушава међународно право чиме се повређују или угрожавају универзалне, међународним правом, заштићене вриједности, добра и интереси, те кривичне санкције као мјере друштвене реакције према учиоцима ових дјела. За примјену кривичних санкција према учиниоцима међународних кривичних дјела надлежни судски органи (на нивоу међународне заједнице) у спроведеном поступку утврђују основ њихове кривичне одговорности. У систему санкција које треба да остваре, како превентивну, тако и репресивну улогу, издвајају се казне чија је примјена везана за прописане услове. Ове међународне санкције имају примат у односе на кривичне санкције које за слична/истовјетна међународна кривична дјела прописују поједина национална кривична законодавства, па тако и законодавство Босне и Херцеговине. У раду се говори о појму, елементима, садржини, сврси, карактеристикама и врстама кривичних санкција за међународна кривична дјела.

Кључне ријечи: међународно кривично дјело, учинилац, одговорност, суд, кривична санкција.

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