# The Applicable Law by the International Penal Court

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***Abstract:*** The absence of an international criminal jurisdiction at the end of the second milenium, taking into consideration that the criminal acts with worldwide fame had grown, forced the international community to create a common court that would have the power of a punishing instrument for the illicite *erga omnes*. Through the specific role of this Court, which is - to be an international Court and due to the lack of an international code of criminal law and procedure, the problem of the applicable law was elegantly solved by the Court Status. Practically, the definition of „ applicable law" is equivalent answering to the question: „*What normative rule can be applied from the procedural point of view*?" and also to the questions: „ Where are the definitions of the crimes for wich the Court is competent to judge of or for which any person could be judged for by this Court?"

***Keywords:*** International Criminal Court, applicable law, international jurisdiction, Status, principles.

## 1. Introduction

The lack of an international penal jurisdiction at the end of the second millennium taking into consideration that the international known crimes had increased[1], forced the international community to create a common court that would have the value of a punishing instrument for the illicit *erga omnes*[2].

The steps taken to initiate an international penal court were older, starting with the period between the two world wars even though there were voices that had been heard before.

In 1872, Gustav Moynier shaped maybe for the first time the idea of a penal international jurisdiction court that would have the competence to judge the crimes commited against the rights of gints. Presented in Geneve and Cambridge, the idea was rejected by the specific perspective of that time.

After the world war and the treaty of Versailles, a special court was created. It was made of five judges chosen by the victorious states to judge Wilhelm Second of Hohenzolern for his 'prejudices against the international moral values 'and 'to the holy strength of treaties'. He was never judged because he got refugee in Holland and Holland refused his release.

[1] according to art 5. from the Court Status, it judges the following types of crimes : genocide, crimes against humanity, war crimes and aggression crimes .
[2] Mona Maria Pivniceru' Penal Punishment in the International Law' Polirom Publishing House, Iasi, 1999, page 153

Between the two world wars the **United Nations** was the one who promoted the idea of an international penal law court making even a project for the International Court of Justice.

Between1920-1936 the same idea was promoted by the International Association for Penal Law whose great leader was Vespasian Pella[3]. His activity for creating the international penal court and an international penal code led to the creation of the latter and the creation of a status project.

In November 16th 1937, the general assembly of the Nation's Leagues decided to adopt the Convention regarding the creation of the International Penal Court, able to judge people possible to be guilty of some accusations found in the Convention for repressing and punishing terrorism. Both conventions were open to be signed in Geneve, the same year. A strong impulse had been given by the fact that there was a great number of attempts to assassinate people in high positions, chiefs of states or ministers, like Alexander the second of Yugoslavia in Marseille or the Austrian chancellor killed in 1934[4]. Even though the convention was signed by 24 states, it could not be applied because of the beginning of the world war two.

The next step was made only after the end of the world war when, based on the resolution no 260/ 1948 of the general assembly of the U.N.O. the International Law Committee reexamined the problem of founding an international penal court agreeing to do so and even elaborating a project for it. The efforts were joined with the elaboration and the offer for signing of the Convention on the preventing and repressing the genocide in the same year (1948)[5]

Another resolution of the general assembly of the UNO with the no.1187(XII) from 1957 will postpone the problem of creating an international court in the penal law that would have the role to define the crimes of aggression and elaborate the project of a a code of crimes against peace and security of mankind.

The next step was made only after the end of the world war when, based on the resolution no 260/ 1948 of the general assembly of the U.N.O. the International Law Committee reexamined the problem of founding an international penal court agreeing to do so and even elaborating a project for it.

The latter efforts were joined to create a convention that would define certain crimes that should be judged due to their gravity by an international penal court. In this frame is set the UNO convention in 1973 on apartheid which stipulated the judging of such a crime by an international penal court of law. Another step forward for the restart of the International Law Committee activity concerning judging the crimes against humanity and international security was given by defining in 1974 the notion of 'aggressive". This definition was given by the Resolution no. 3314(XXIX) of the general assembly of the UNO. Another problem that speeded the creation of the court was raised by the state of Trinidad Tobago who concerned about the traffic with drugs asked the general assembly of the UNO who at his turn asked the International Law Committee concerning the judge of crimes against peace and international security and creating an international penal court in order to include it in the International Code of Crimes the one about the traffic of drugs too[6].

After about 30 years, the general assembly of the UNO through the resolution no. 45/42/1990 took into consideration the appearance of the International Penal Court, the debates being reinitiated in 1991, 1992, and 1994, times when also was studied a project with 60 articles of a possible international criminal code.

[3] Taken from the forward presentation of Victor Duculescu of ' International Penal Court, History and Reality ' by Dumitru Diaconu, All Beck Publishing House, Bucharest, 1999, where it is said: An exceptional role in this domain was held by the Romanian law specialist Vespasian V. Pella, who, in 1934 suggested the appearance of an international penal law court and in april 1943 he even conceived the first text considering its constitution.

[4] Professor doctor ambassador Aurel Preda-Matasaru, op, cit, page 341

[5] Professor doctor ambassador Aurel Preda-Matasaru, op, cit, page 341

[6] Idem, p. 342

Finally, in the 17th of July 1998 in Rome, the Gathering of the Plenipotentials of the United Nations decided to create the International Criminal Court[7] replacing the actual jurisdictions created to solve the immediate problems[8] and so questionable for the states' sovereignity principles – thing that stopped for a long time the chance to give an international court the jurisdictional power with the fundamental imperative of the international society that is to impose a rule of international permanent responsibility based on the principles and rules of international juridical evolution (crime, punishment, jurisdiction)[9]. Becoming a real work instrument was possible after 60 days since the deposit of the 60 the ratification instrument, thing that happened at July 1st 2002.

From Romania's point of view , our country signed the Convention in July 7th 1999 in New York and ratified it through the Law no 11from 28th of March 2002 and had a favorable position since the beginning following the traditional line of the " between wars" period of the Romanian lawyers that supported this project (like Vespasian V. Pella).

## 2. The Applicable Law

Through the specific of this Court, which is to be an international court, and due to the existence of another international penal code and penal procedure, the problem of the applicable law, was elegantly solved by the Court Status. In fact, the notion of 'applicable law' is equivalent to the answer to the question: *What normative act can be applied from the procedural point of view?* Ant to the question: *Where are the definitions of the crimes that the court is competent to judge and for which a person for by it?*

This way, clarifying the notion, the dispositions of the Court's Status[10] have answered these questions showing that in its activity, the court fundaments the decision and instruments the case taking into considerations the dispositions of the Status and rules of procedure and trial and also , the applicable treaties, the principles and the rules of the international law and the principles established by the international law regarding the armed conflicts. Due to the lack of some regulations either in the Status or in the regulation or to the lack of some guiding principles in the International Law applicable to the specific situation, the Court will judge having in mind the national law of the different juridical worlds systems and if it's necessary, the national law of the country in which the crime was to be judged and if those principles are not the same with the ones in the Status , with the International Law Status, and all the known international rules and regulations.

As can be seen, the Status establishes a priority order, showing that if a situation hasn't got the legal back up of the Court Status or the Regulations of procedure and trial , in order to have a juridical support, because the principle of legality is the basis of the activity of this court, it has shaped which are the dispositions for which it will be applied.

As it could be seen in the case of other international courts (The U.E Court of Justice), the creative interpretation of the law rules, interpretation that can create itself new principles or rules and can be a resource for the Status for further representations.

The most important established rule was the one regarding the fact that any situation that the court would use or interpret based on the applicable laws, should be according to the international human rights and should make no discrimination regarding sex, age, nationality, colour, language, religion or convictions ,

[7] The Court – also known as the International Court
[8] as there were special courts in Nurenberg, Tokio for judging the war crimes accusations, the court of the ex-Yugoslavia , the court for Rwanda,etc
[9] Mona Maria Pivniceru op.cit. page 153
[10] according to art 21 from the Court Status.

political opinions and any other kind, social or background, possessions, birth or any kind of discrimination.

The most important normative resource remains the Court Status. Talking about the ratification of the Status, there are some juridical problems that were mentioned[11]. On one hand there was the problem of the immunity of the parliament members and the chief of state (president or king) because according to article 27 align. 1 from the Court Status, the law is applicable to those people too, and the immunity attached to those functions can not stop the appliance of the Status. The solution to this problem is: the immunity we spoke about, concerns the activity of the prior mentioned people during their function and not to them physically, and the crimes that are under the Court's jurisdiction are not apart of their function. On the other hand, another problem was the delimitation between the words: 'rendering' and 'extradition'. So according to align 1 and 1 and ½ from art 19 from the revised Romanian Constitution[12] the own citizens can not be extradited, except for the situations in which the international conventions apply and there is also reciprocity. On the other side, the Court uses the word 'Extradition "of the own citizens provided that they committed crimes that are of its competence. It is stipulated starting from the definitions of the two terms that we are practically facing two different juridical institutions. The extradition, being realized between two states and being objected to the agreements and reciprocity between them, and the rendering is realized between the member state and the Court.

Romania's contribution to the Court Status regards the suggestions made by the representatives of our country during the former discussion regarding[13]:

- establishing Court's competence based on the universal jurisdiction on inherent crimes like : genocide, war crimes, agresivity and crimes against mankind
- defining the crime of aggression in the Status
- applying the complementary principle in the correlations between the Court and the national Courts
- according the district attorney the right to investigate from his own initiative under the supervision of the preliminary chamber of the Court.
- Including the status' text the list of weapons considered weapons of war when used

The acceptance of the Court's Status was difficult because after the conference in Rome, a number of states, including USA, Israel, China and Libia voted against the status such a situation has it's reasons because the Court is independent and no longer depends on the Security council where states like those have the right to vote[14]

In the foreword of the International Criminal Court status you can see that one of the functions of the Court is to punish the international crimes against the fundamental values of the international society regarded as a whole (life in all her aspects) and also to complementary function as a justice maker for the national jurisdiction against the international crimes and guarantee the respect and the appliance of the justice.

The Court was born with international juridical power so it could be able to fulfill its jobs[15].

The place of the Court is in Hague but the functions and the competences can be fulfilled anywhere in a member state and though a special understanding, in any other state[16]. Also, according to art.2 paragraph 3

[11] Professor doctor ambassador Aurel Preda-Matasaru, op cit page 347-348
[12] the no of the article is from the Constitution before being revised
[13] Professor doctor ambassador, Aurel Preda-matasaru, op. cit. page344-345
[14] Gavril Iosif Chiuzbaian,op.cit.page 314
[15] according to art 4 from the Court's Status
[16] according to art 2 paragraph 1 from the Court Status

from the Court's Status, its meetings can be held elsewhere than its headquarters giving it a greater mobility and accomplishing faster and more efficient its competences.

From the status' dispositions we learn that this court has the following features: it is an *international institution, independent*, (it has according to art. 4 from the Status an international juridical power distinctive from the states and the UNO.) has a *permanent character,* ( it is the main feature that makes it different from the momentary meetings appeared for judging separate cases). Regarding the features of this new international court, is also the fact that according to the Status" dispositions, the Court is not created by another institution but by the states through a direct agreement, it is not a supernational institution because, unlike the former court for the ex Yugoslavia and Rwanda, its jurisdiction is complementary to the national one as we can see from the foreword of the Status and has competences only in the founding or member states, the other states don't have to take into consideration its rules[17]. Speaking of the independent character of the Court, it is not dependent on the U.N.O. like the International Court of Justice, there is a strong bond between the two organizations, even before the Court appeared. The general assembly of the UNO asked for the Conference in Rome in 1998 at it is very well known that this organization asked the International Law Committee to restart the study for creating an international penal court. According to art 128 from the Status, the depositary of it is the General Secretary of UNO. Also, between the UNO and the Court through its president, there is an agreement of collaboration that will begin with the signing of the states and that regards some of the aspects of the collaboration on an administrative line, the presence of the Court at the UNO sessions and the General Secretary at the public Court sessions, the collaboration with its judges and district attorneys.

What is "upsetting" in the regulations and functioning of the Court are the dispositions of the 16th article from the Status according to which: 'no investigation or pursue can be initiated according to this status on a period of 12 months after the Security Council in a resolution adopted according to chapter Vii from the UNO Carta has solicited the court to do so. The request can be renewed by the Council under the same circumstances."

It surprises the possibility given to a political organization to interfere with the activity of a justice court, which, from our point of view questions its independence[18]

In the same area, the ' collaboration ' between the Security Council and the Court there are also the art 13 lett.b0 from the Status which give U.N.O. the possibility to seize the Court about the crimes that are in its competence. This way it's important to say that although according to the art 2. of the UNO Carta, all the member states are equal, the most important competences are held by the 15 members of the Security Council , five of them having permanent membership and the right to vote: USA, China, Russia, France, Great Britain. Reading carefully about the states will reveal that three of them have voted against the Court Status: China, Russia and USA which raises the question on such competences of the Security Council[19]

Another debated aspect is related to the dispositions of the 16th article are the dispositions of the 98th article who give the states the possibility to close bilateral agreements so their own citizens should not be placed under the jurisdiction of the Court[20] these types of agreement, closed until now only by the USA, are in some opinions a hide out of the Status, documents that at the right time could be declared without

[17] Professor doctor Ion M Anghel and university lector lawyer Viorel I. Anghel, " Rules of Law in Wars- the law of the armed conflicts and humanitary international law" Lumina Lex Publishing House , Bucharest, 2003, page 178

[18] see from the opposite point of view the arguments of professor doctor Ion M. Anghel and university lector and lawyer Viorel I. Anghel in the previously mentioned work, page 180

[19] opinion expressed by the professor doctor Nicolas Garcia Rivas in the communication having the theme: 'globalization and universal justice: a parallelism ' presented during the conference "Les chemins de l'harmonisation" (Caile armonizarii) held in Toledo, Spain in 31 March- 2nd April 2005

[20] it's the situation of the USA who have closed over 80 agreements of this kind including with Romania. Gavril Iosif Chiuzbaian, op.cit. page 319

having any value *ab initio*[21] Regarding Romania's position, after signing and ratifying in march 2002 the Court Status, there was a step back by signing in the same year at 1st August of the bilateral agreement with the USA. The agreement states that the Romanian part has the obligation of not giving, transferring or rendering American citizens to a third country to be sent to the Court without the American government' s agreement. The agreement refers both to civilians and military people. Also, this agreement doesn't have a 'both ways' character so the USA can give, transfer or render Romanian citizens to the Court without the Romanian government's permission.

### 3. The general principles of penal law applicable in the procedure taking place in front of the Court.

Judging these causes by the Court takes place based on the juridical norms of the applicable law and also on the basis of other penal juridical ideas. These ideas guide the entire activity that fights against crimes, of the highest antisocial acts, form general principles that the Court takes into account when giving its decision. The role of these principles is that the entire regulations, norms and institutions ruled by the Court Status and the rule of procedure and trial are subordinated and meaningful due to them. They have the role of showing the way and the limits under which the fight against crime should take place.

These general principles have an absolute character and cover all the penal and juridical norms and also over all the institutions stated by the Court Status and the Rules of Procedure and Trial.

In this international procedure, when judging its causes, the Court should take into consideration the following principles known worldwide and defined in this international jurisdictional Status.

1. 'Non Bis In Idem'[22] or the principle according to which no person can be judged twice for the same fact. For this international procedure it is meant to say that no one can be judged for the second time for an action for which it had been previously convicted by the Court. In its extended use, it says that no one can be judged in another jurisdiction for a crime for which the Court accused or him for one of the crimes stipulated in art 5 and the accused can not take his case to be judged in another jurisdiction for another analysis[23]. In the same time, the same principle states also the opposite: if the accused had been judged for one of the crimes stipulated in the articles 6, 7 or 8 of the Status[24] by another jurisdiction,(without mentioning of what kind we can only deduce that it can be national or international), he can no longer be judged by the Court except for the case in which that jurisdiction had the purpose of making the accused disobey the penal regulations of the Court or if the trial did not take place under equitable circumstances or independently and impartially.

The latter efforts were joined to create a convention that would define certain crimes that should be judged due to their gravity by an international penal court. In this frame is set the UNO convention in 1973 on apartheid which stipulated the judging of such a crime by an giving, transferring or rendering more favorable criminal alleged ed by the International and European Penal Law Institute. The law appears rather as a defense that can be raised above the form of incidental exception authority of a judged thing

2. "Nullum crimen sine lege"[25] The principle appears to be a part of the legality principle and is defined as establishing the responsibility of those individuals whose behavior is, at the time the crime itself a crime. Together with the principle "nulla poena sine lege" (no penalty may be applied if it is not stipulated by law), complete the legality principle. It is the oldest of the penal law principles finding its own rulling in 1789 by its enrolling in the Declaration of human rights and citizenship, and in the Universal Declaration of Human Rights adopted by United Nations General Assembly on 10th of December 1948, and in the

[21] see the professor doctor ambassador Aurel Preda Matasaru , op. cit. page 369
[22] according to the art 20 from the Court Status
[23] Article no 5 presents the crimes that are under the competence of the Court to be judged: genocide, the aggression crimes,the war crimes and the crimes against mankind.
[24] the mentioned articles define the crimes of genocide, the crimes against the mankind the the war crimes
[25] stipulated by the dispositions of the 22 art from the Court Status

International Covention on Civil and Political Rights, adopted by the international body on 16th December 1966[26]. The principle of legality is regulated by both criminal law and the Romanian Constitution[27].

3. The no retroactivity principle. It has in this international court a special meaning referring to the person and not the law. Thus, according to it, nobody can be held responsible and shall not be judged by the Court for an earlier behavior to the appearance of the Status[28].

4. The application of a more favorable criminal law, is defined: if the law changes towards the end of a person's trial that person will suffer the more favorable law application.

5. The principle of personal criminal liability, which refers to facts or deeds for which only the person who did them will be held responsible. According to the Statute, to the Court are only responsible individuals who have committed criminal or illegal deeds and no juridical people or various types of organizations. Criminal liability established by the Court and the Court under judge is only individual and not collective. Not every person will respond to the Court, but only those that were over 18 when the alleged crime was committed[29] But the quality of a person to be head of state, government, member of the government or parliament, elected representative of the status does not exempt from liability, nor the circumstances in favor, for the benefit of a reduced sentence. Also, any immunity from that person, based on its status, can not be invoked before the Court[30]

A unique situation is the responsibility of heads of military or other superior, and persons who fulfill this role effectively. They are directly responsible for acts committed by troops under their command and under their control when they actually knew or should know the facts committed by troops under their command or control, and when you have not taken all necessary and reasonable that they stayed in power to prevent or suppress the execution of such deeds.

Immediate superior is responsible for acts committed by subordinates under his command and control or when actually knew that his subordinates had committed or will commit a crime or intentionally neglected to take into account the information which clearly indicated in this. Will also be responsible, when the crime was related to activities under the responsibility and control or effective or not you took all necessary and reasonable, which stayed in his power to prevent or suppress the execution of such deeds.

Statute establishes criminal punishment:

- For the person who commits a crime, alone and together with other people, even if this last person is responsible or not (thus, the author of facts);
- - The person who orders, asks or encourages somebody to commit a crime no matter if the deed was an attempt or consumed (acquired as an accessory)
- the one that helps one way or another to commit the crime( being an accomplice)

What is important is that the criminal responsibility of the person will not affect the state responsibility but will still be realized according to the international laws[31]

6. The principle of not prescribing the facts that are under the competence of the Court[32]

Apart from these principles it is worthy to see that the Status shows that no one can be held responsible if he didn't did the deed with guilt(called psychological element) defining the two elements of guilt: the volition factor (called intention) and the intellectual factor(called conscience).

[26] Costica Bulai "Criminal Law Students' book"
[27] according to art 2 and art 11 of criminal law and art 15 align 2 and art 2 align 9 of the Constitution
[28] according to art 24 of the Court Status
[29] according to the art 26 of the Court Status
[30] according to art 27 of the Court Status
[31] according to art 25 of the Court Status
[32] according to art 29 of the Court Status