Incorporation of the Rome statute into national legislation

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In the chapter 35 of the Slovenian Penal Code, titled Criminal Offences against Humanity and International Criminal Law there is a group of criminal offences, which try to follow the definitions of classical war crimes and similar crimes against humanity from different relevant legal instruments of international criminal law. Slovenia has signed the Rome Statute of the International Criminal Court and ratified it. Only after the ratification criminal lawyers in Slovenia started to publish articles on how to incorporate the provisions of the Rome Statute into the Slovenian Penal Code.

Slovene criminal law is not familiar with responsibility of the superior as a self- standing institute of the general part of penal code. According to Slovene criminal law responsibility for negligent participation in crimes committed intentionally, which is provided for by the Rome statute (art. 28), is logically excluded. There are also some problems with the use of the principle of non-retroactivity of criminal law in Slovenia in the light of the Rome Statute.

1. Introduction. According to typical general constitutional principles, especially the rule of law, found in almost every constitutional system of states around the world, empowered state bodies should make effort to concretize the provisions of ratified international treaties to the degree of direct applicability. This is even more significant in the case of substantive criminal law provisions, which are bound to strict criteria of legality principle (*lex certa*) and perhaps most of all with regard to penal sanctions, which are in such treaties mostly defined in a very general manner. It is therefore only natural, somehow in the very nature of law, that states undertake different measures to concretize international treaties and even more natural, that provisions of international law encourage states to do so. It seams, that some states, especially among the so-called new European democracies (like Slovenia) even go a step further in this direction. As a part of their traditional crime policy they strive to have not only all norms of the so-called general part of substantive criminal law, but also all the criminal offences incorporated in the penal code and not to allow having them also in other statutes. They therefore try to incorporate all of the norms of international criminal law in the penal code as steadfastly as possible. As a result, the immediate application of international criminal law in these states is possible only through the use of blank norms. Penal norms in their penal codes are using such characteristics as “in violation of international law” or “unlawfully”. This is the way, how they through the provisions, which concretize the blank norms, use all the norms from international

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criminal law which have been either ratified explicitly or have acquired customary status in international criminal law and in the same way avoid special codes on international criminal law.

In my opinion, it is very informative to analyze some problems, which typically arise in connection with these efforts. Criminal law systems, built around one and only penal code, with no criminal offences outside, can show their inconsistencies and paradoxes more clearly, than other systems, built on bundles of codes and laws with their own incriminations. Inconsistencies between those codes and laws naturally also exist, but are less obvious perhaps only because of the sheer complexity of the relations between the different statutes.

Allow me to focus on some problems, the Slovenian legislator faces when trying to incorporate the Rome Statute on the International Criminal Court into the present Slovenian penal code. The most outstanding in this regard is the question of command responsibility.

As known, Slovenia, after being partly victim of severe disintegrative processes in the former Federal Yugoslavian state (SFRY) and partly playing an important active role in this processes reached in 1991 the international legal status of an independent state. Very soon after the proclamation of independence it was formally recognized by other states under the chosen name *"Republika Slovenija"* ("Republic of Slovenia"), accepted as a full member of the United Nations (UNO) and from the 1st of May 2004 as a full member of the European Union (EU).[2] After the proclamation of the new constitution (on 23d of December 1991[3]) all legal provisions in force at that time stayed in force, except they were in conflict with human rights and fundamental freedoms.[4] In the field of criminal law in Slovenia stayed in force: the old Criminal Code of SFRY and parallel the Criminal Code of Slovenia as a federal part of Yugoslavia with relatively important legislative powers, especially in the filed of the general part (this powers were given to the federal parts of Yugoslavia by the Yugoslav constitution from the seventies of the last century).

The all new Criminal Code of Slovenia as an independent state *("Kazenski zakonik Republike Slovenije"* – CC RS) was adopted in the new Slovenian parliament in September 1994[5] and entered into force according to its own provisions on entry into force on the 1st of January 1995. Since then it was amended already several times. In 1999[6] crucial characteristics of the amendments were the harmonization with requirements of the EU *acquis communautaire* and the raise of the special maximum of sentence of imprisonment from 20 to 30 years,

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[2] In the criminal legal context it is perhaps worth mentioning, that Slovenia is a full member of the NATO (from April 2004), is using the Euro (€) as the national currency (from January 2007) and is formally scheduled to be accepted into the so called Shengen contractual area next year.

[3] *OJ RS 33/91-I.* The Constitution of the Republic of Slovenia was amended several times since *(OJ RS 42/97, 66/00, 24/03).*

[4] Slovenia adopted this provision in Art. 1 of a special constitutional act, called "Constitutional Act for the Implementation of the Constitution of the Republic of Slovenia" *(OJ RS I 33/91).*

[5] *OJ RS 63/94 from 13th of October 1994.*

[6] *OJ RS 23/99 from 8th of April 1999.*

but the changes and amendments in the special part were of a relatively minor and from all viewpoints rather unimportant nature; the latest changes entered into force on the 5th of May 2004.[7] They affected mainly the special part of the CC RS. Several of the changes, especially in the field of so called international crimes and including some important changes of the general part of the CC RS are regarded as a step towards the so called European criminal law area.

As already mentioned, for the reasons of transparency and consistency of criminal legal order, the Slovenian legislator is making efforts to include all criminal offences in the Penal Code. Even in the field of international crimes, there are no extra statutes. In the chapter 35 of the Slovenian Penal Code, titled *Criminal Offences against Humanity and International Criminal Law* there is a group of criminal offences, which try to follow the definitions of classical war crimes and similar crimes against humanity from different relevant legal instruments of international criminal law. The titles of criminal offences are: *Genocide, Crimes Against Civil Population, Crimes Against the Wounded and the Sick, War Crimes Against Prisoners of War, War Crimes of Use of Unlawful Weapons, Recruitment of Persons, Younger than Eighteen Years, Unlawful Slaughtering and Wounding of the Enemy, Unlawful Plundering on the Battlefield, Infringement of Parliamentary Rights, Maltreatment of the Sick and Wounded and the Prisoners of War, Unjustified Postponement of Repatriation of Prisoners of War, Destruction of Cultural and Historical Monuments and Sights, Warmongering, Abuse of International Symbols, Enslavement, International Terrorism, Endangering Persons under International Protection, Taking of Hostages* and *Piracy*.

In this chapter we find some criminal offences which at least partially surpass the current standards of international criminal law, for example *Maltreatment of the Sick and Wounded and the Prisoners of War (art. 382), Destruction of Cultural and Historical Monuments and Sights (art. 384), Warmongering (art. 385).* All provisions from this chapter of the Slovenian Penal Code are considered to be a classical and historically traditional integrating part of Slovenian penal law, though these are not all of the substantive norms concerning humanity and international criminal law, which are according to Slovenian legal order in force. According to the article 8 and 153 of The Constitution of the Republic of Slovenia[8], published treaties ratified by National Assembly shall take immediate effect as a suprastatutory positive law. Laws not conformed to such treaties would be deemed unconstitutional.

Slovenia has signed The Rome Statute of the International Criminal Court on the 7th of October 1998. The Rome Statute was ratified in The National Assembly on the 22nd of November 2001. After the ratification criminal lawyers in Slovenia started to publish articles on how to incorporate the provisions of the Rome Statute into the Slovenian Penal Code. There was no doubt, that the Rome Statute should

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[7] *OJ RS 40/04 from 20th April 2004.*

[8] Adopted on 23 December 1991 (OJ RS 33/91-I), amended by several constitutional acts: in 1997 (OJ RS 42/97), 2000 (OJ RS 66/2000) and 2003 (OJ RS 24/2003).

be incorporated into the Penal Code, no one raised its voice for a special statute on international crime. But almost all publishing lawyers in Slovenia expressed their doubts on every possible way of incorporation of the provisions on command responsibility of the general part of the Rome Statute into the general part of the Slovenian Penal Code. Allow me to explain these doubts in short.

In the Rome Statue, as well known, the responsibility of superiors for the delinquency of their underlings is based on the provision of article 25/III/b, which criminalizes different types of instigation (ordering, soliciting and inducing) in crimes within the jurisdiction of the International Criminal Court. Apart from that, responsibility of superiors is based also on the article 28, which criminalizes different types of participation in omission in such crimes. The latter establishes a responsibility for military commanders (and persons effectively acting as military commanders) and other superiors who do not have military status (i.e. members of government, leaders of enterprises or political parties) who fail to take all necessary and reasonable measures within their power to prevent or repress crimes of their underlings. In the case of the first (military commanders and their equivalents) negligence is sufficient to hold them responsible for the crimes of their subordinates (which is in the Rome Statute stated as "*[...] owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes [...]*"). In the case of the second (civilian superiors) a superiors' inadvertently negligent disregard of information indicating that a crime of their subordinates is impending does not suffice for their responsibility. Therefore, it is their *"conscious disregard"* of such information (recklessness) that the Rome Statute sets as the lower limit of their responsibility. This means that according to the Rome Statute, a superior can be held responsible on the basis of his negligence for an intentional crime or even for a crime which requires coloured intent (*dolus coloratus*, such as in case of genocide from the article 6 of the Rome Statute).

Furthermore, both superiors (military and civilian) can be held responsible as they would have committed the crimes themselves for their failure to punish the criminal acts of their subordinates ("*[...] failed to take all the necessary and reasonable measures within his or her power [...] to submit the matter to the competent authorities for investigation and prosecution*"). This means that it is possible to establish a criminal responsibility even when such superior's omission took place a long time after the crime of the subordinate was completed. That reminds us on the "accessory after the fact" doctrine which is in most contemporary jurisdictions no longer in use.[9]

It seems that the drafters of the Rome Statute in their legitimate efforts to find the doctrinal apparatus which would allow the Court to find the highest military and civilian officials guilty for their blameworthy deeds, even when they are not directly engaged in the atrocities, developed an institute of international

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[9] See Damaška 2000: 469.

criminal law, which is logically inconsistent[10] and which will presumably cause a lot of problems with the implementation in national legal systems.

2. Implementation of article 28 of the Rome Statute into Slovenian penal legislation. Slovenia, like many other states, has developed an instrumentation of criminal responsibility for omissions that is predominantly based on German doctrine. As a rule, all criminal offences of Slovene penal code, which are designed as *delicta comissiva*, could be committed as *delicta comissiva per omissionem*, this is by being passive (so called commission by omission). This solution was never disputed in Slovene contemporary criminal law theory. The most fundamental classical requirements for criminal responsibility for criminal offences of commission committed by omission derive from penal code and are elaborated by Slovene criminal law theorists: a) in a given case the omission has to be of the same meaning for the occurrence of the unlawful result as commission; b) the perpetrator has to be in the position of guarantor (somebody whose duty is to prevent the occurrence of the unlawful result). The position of a guarantor can be derived from a statute, from a published treaty ratified by the National Assembly, from a contract of employment (including contracts of employment from the field of army), as well as from a threatening prior act of a perpetrator (including acts in war and similar circumstances). It is to be stressed that Slovene judiciary interprets these provisions very restrictively. Numerous criminal law theorists criticize, that Slovene criminal justice is not prone to the use of institute of commission by omission.

Slovene criminal law is not familiar with responsibility of the superior as a self- standing institute of the general part of penal code. Such contributions to a criminal offence, if active, would be judged from the viewpoint of instigation (when such superior orders are not criminalized as *delictum sui generis*[11]) and on the other hand, passive contributions to criminal offence would be judged according to general rules concerning commissions by omission.

According to Slovene criminal law responsibility for negligent participation in crimes committed intentionally, which is provided for by the Rome statute (art. 28), is logically excluded. In other words: the rules concerning commissions by omission in Slovene criminal law do not allow the establishment of criminal responsibility for negligent passivity with regard to any of the crimes from the Rome statute, because all of them can be committed only intentionally .

In this sense, Slovene criminal law is definitely not harmonized with the art. 28 of the Rome Statute. After the examination of research which had been done regarding art. 28 of the Rome Statute, it is not possible to imagine the reformulation of the Slovene institute of responsibility for commissions by omission in such way that it would comply with art. 28 of the Rome Statute.

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[10] See for example Damaška 2001, Ambos 1999, Schabas 2001 or Trifterer 1999.

[11] For example Warmongering (article 385 of the Slovenian Penal Code): "Whoever warmongers or incites others to do so shall be sentenced to imprisonment for not less than one and not more than ten years."

Slovene criminal law theory understands the subject matter of this article as a kind of special criminal offence, which was in the Rome Statute given a too general form and a too general title. Because of that, it is not surprising that the efforts of implementation of the art. 28 of the Rome Statute in Slovenia are directed towards a new incrimination of superior's negligent omission, where unlawful conducts of his subordinates would be defined as an "objective prerequisite of punishability" (*objektive Bedingung der Strafbarkeit*). As the famous American expert in criuminal law, *Damaška* stated, the idea underlying such incrimination would be to punish commanders for what they failed to do rather then, for what others have done.[12]

3. Acting on superior's orders according to Art. 33 Par. 2 of the Rome Statute and the provisions of mistake of law in the Slovenian Penal Code. Another interesting problem, identified during the attempts, to incorporate provisions of the Rome Statute into the Slovenian Penal Code, was the responsibility for acting on superior's orders, as regulated in the Rome Statute (Art. 33 Par. 2) in connection with the general possibility of excluded guilt because of the so-called unavoidable mistake of law, as stipulated in Art. 21 of the Slovenian Penal Code. According to the Slovenian penal law, the perpetrator's guilt can be excluded in all cases of crimes, where he did not and could not be aware of the fact, that his acts lead or could lead to a result, forbidden by criminal law or where he did not and could not be aware of the fact, that his acts are forbidden as such under criminal law. There is no doubt, that a cannibal for instance can have his meal without being guilty under Slovenian criminal law because of such a mistake of law. Several lawyers find it inconsistent with this provision, when a soldier, especially in a non-professional army (army, consisted mainly of recruits) in a psychologically and often juristically typically complex war situation acted in wrong belief, that the superior's order to kill civilians in war (war crimes, genocide) was *in concreto* justified. Slovenian lawyers refuse every incorporation of Art. 33 Par. 2 into the general part of the Slovenian Penal code. They claim, that an incorporation of Art. 33 Par. 2 with the automatic exclusion of every possibility of exculpating mistake of law in cases of genocide and war crimes would not be consistent with the concepts of guilt in the present Slovenian penal law. On their opinion this was also the case with the automatic exclusion of guilt in all cases of mistake of law at the side of the subordinate, where the command was not obviously unlawful and there were no crimes of genocide or war crimes ordered, as stipulated in Art. 33 of the Rome Statute. Such a provision is – as they say – inconsistent with the Slovenian concepts of subordination in the armed forces, as recognised by the present Slovenian penal law and its provisions on mistake of law.

4. The Question of Non-Retroactivity of Criminal Law in the Light of the Rome Statute. Rather unexpectedly in the last months in Slovenia the

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[12] See Damaška 2001: 492.

(constitutional) question of retroactivity of (international) criminal law was raised in a criminal case.

According to the Constitution of the Republic of Slovenia all laws have to be in accordance with ratified international conventions. Ratified and publicized conventions are directly applicable. The constitution states further very clearly that in criminal law there can be no retroactivity of incriminations, except a newer law is beneficial for the perpetrator. There are no provisions in the Constitution about the relationship between international law and ratified international conventions on one hand with the constitution on the other hand. This question was raised in Slovenia in a criminal case, the so called *Ribičič* case in 2006.

The Public Prosecutor's Office of Slovenia tried to set up a criminal case against an 87-year old male, Mr. *Ribičič,* for the crime of genocide, allegedly committed by him in the days after the Second World War (May 1945) on the territory of Slovenia. At that time Mr. *Ribičič* was a high officer of the Yugoslav military intelligence service and allegedly picked up persons to be shot without trial as collaborators of the Nazi regime.

The Slovenian legislator introduced political groups as a special protected category into the incrimination of genocide in the Slovenian Criminal Code with the newest amendments of the Criminal Code, only some years ago. At the time of the allegedly committed genocide, as widely known, no criminal provisions, specially committed to genocide existed worldwide and of course no such provisions were in force in Slovenia also. So the Public Prosecutor's Office of Slovenia stated, that the (in Slovenia ratified) European Convention on the Protection of Human Rights and Fundamental Freedoms from 1950 in article 7/II allows an exception of the Non-Retroactivity Rule in criminal law for grave breaches of international law. According to its opinion, this exception is of higher a rank than the Constitution of Slovenia. At the moment this is a highly disputable question in Slovenian theory of international criminal law and some distinguished theoreticians criticize the prosecutor's opinion heavily. The parallels and relevance of this dispute, going on in Slovenia at the moment in the light of norms, forbidding the retroactivity of norms of the Rome Statute (e.g. Art. 11) is obvious.

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