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INTERNATIONAL CRIMINAL LAW AND INTERNATIONAL CRIMINAL JUSTICE OBJECTIVES AND PURPOSE OF PUNISHMENT IN INTERNATIONAL CRIMINAL LAW THEORY AND PRACTICE

Insufficient development of International Criminal Law, as well as its development under the influence of different legal systems, brought forth the lack of clear definitions of certain criminal law concepts and institutes. When considering the goals of International Criminal Law in theory they are often confused with the goals of International Criminal Justice, but also with the purpose of punishment in International Criminal Law. In that sense, the aim of the paper is, first of all, to analyse

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theoretical understandings of the goals of International Criminal Law and Justice, as well as their definition in the acts within the field of International Criminal Law, in order to provide for the possible manner of defining and delimiting these terms. Further, the aim of the paper is to distinguish from these terms the purpose of punishment in International Criminal Law.

Key words: International Criminal Law, International Criminal Justice, the objectives, punishment, the purpose of punishment in International Criminal Law

1. Introduction

International Criminal Law as a branch of law is characterized by its still insufficient development but also by its continuous development under the influence of national criminal laws, Public International Law, and International Human Rights Law.¹ The underdevelopment of International Criminal Law is reflected both in the practice of international criminal courts, where it is not uncommon that different judges councils have different attitudes regarding the conditions or manner of application of some criminal law institutes, and also in the doctrine of International Criminal Law, where different theorists have different attitudes when defining criminal law terms, determining the elements of those terms, or classifying them.

One of the controversial issues in the International Criminal Law theory is the question of what the goals of this branch of law are. International Criminal Law theorists have rarely dealt with this issue, and among those who have tried to define the goals of International Criminal Law, taking different stands for the goal is noticeable, but also frequent permeation, or even mixing, with the goals of International Criminal Justice, or for the purpose of punishment.

It is clear that the permeation and certain coincidence between the goals of International Criminal Law and the goals of International Criminal Justice exist

1 The more intensive development of the International Criminal Law, which began during the trials before the International Military Tribunals in Nurnberg and Tokyo, was practically blocked by the outbreak of the Cold War, for this reason, the International Criminal Law in the 1990s, when trials took place before ad hoc tribunals for the former Yugoslavia and Rwanda, represented an incomplete combination of provisions in the field of International Humanitarian Law and International Human Rights Law (Adams, 2018: 750). At today's level of development, when there is a permanent International Criminal Court, it can be said that the Statute of this Court represents a kind of codification of International Criminal Law.

since the International Criminal Law, as a branch of law, is embodied in its application within International Criminal Justice. The basic goal of International Criminal Law, similarly to national criminal law, is to perform a protective function, that is, to suppress international crimes by providing protection of universally recognized goods and values from behaviour that harms or endangers them. Within the framework of International Criminal Justice, through trials for committed international crimes, the goals of International Criminal Law are realized in practice, but also some other, additional goals are achieved, such as justice, strengthening the rule of law, providing victims with closure and compensation, etc.

When it comes to the purpose of punishment, through its prescribing and realization in practice, the goals of International Criminal Law are also achieved, thus they are related, but that does not mean that the purpose of punishment and the goals of International Criminal Law can be equalled. Namely, the goals of International Criminal Law as a branch of law are set more broadly, while the purpose of punishment is more specifically defined and related to the concept of individual-subjective responsibility and the individual as the perpetrator of an international crime.

Although there is intervening and, to some extent, overlapping between the objectives of the International Criminal Law and International Criminal Justice and the purpose of punishment in International Criminal Law, they cannot be completely identified. For this reason, the aim of this paper is to point out the existing differences between these concepts and offer a clear way to differentiate them. This could be defined as a consideration with predominant theoretical significance contributing to the development of the International Criminal Law doctrine, but its practical significance cannot be disputed, bearing in mind that it must be clear why International Criminal Justice exists, that is, which goals are strived to be achieved through trials for committed international crimes within international justice, as well as what the purpose of punishing perpetrators of international crimes by international criminal courts is.

The paper is divided in two parts, with the first part discussing the understanding of the goals of International Criminal Law and International Criminal Justice along with the purpose of punishment in both the theory and legal acts in the field of International Criminal Law, while the second part discusses these concepts in the context of their definition and understanding in international criminal courts practice.

2. International Criminal Law Objectives, International Criminal Justice Objectives and Purpose of Punishment in International Criminal Law Theory and Legal Acts

2.1. International Criminal Law Objectives

International Criminal Law as arising from the very title of this branch of law, unites the content of International and Criminal Law, therefore having both an international and criminal character. Its international character is mostly reflected in the sources of this branch of law, which are predominantly international (Cryer, et al., 2010: 16), but also in the objects of its protection and objects of its regulation. Its criminal character is reflected in the fact that International Criminal Law is by its nature criminal law, as well as that it is based on the basic concepts, principles, and national criminal law institutes. While the international character implies understanding and interpretation of the sources of international law, the criminal character requires unambiguous and precise International Criminal Law norms (Cryer, et al., 2010: 16), as well as precise basic concepts, principles, and institutes of International Criminal Law, as required by the principle of legality. When defining and prescribing the concepts, principles, and institutes of International Criminal Law, the goal of this branch of law must be kept in mind.

In the theory of national criminal law, as older one and therefore more developed than the International Criminal Law theory, there are considerations on the goals of criminal law. Although the theory of national criminal law has developed attitudes on the objectives of criminal law, they cannot simply be replicated at the level of International Criminal Law, given its international character. Despite the fact that International Criminal Law is by its nature criminal law, requirements for special definition of its goals arise from its international character. In addition to presenting the goals of International Criminal Law, the literature points out the threefold danger of making an analogy with national criminal law. *First*, the purpose of International Criminal Law is to serve numerous and very different communities, as well as the international community as a whole, which is made up of different interests. *Second*, the collective nature of international crimes, in terms of a large number of perpetrators, but also a large number of victims, significantly distinguishes these crimes from national crimes. *Third*, perpetrators of international crimes most often act in a very unstable environment, such as armed conflict, while perpetrators of national crimes most often commit these crimes in peacetime and stable environments (Sloane, 2007: 40-41).

Although, while analysing certain institutes, principles, or concepts of International Criminal Law an analogy with national criminal law cannot be accept-

able (because, among other things, the choice of specific national criminal law with which the analogy would be made, may be questioned taking in consideration numerous differences between different national legal systems), both in theory and in practice, one always starts from the views expressed in the doctrine of national criminal law. Thus, when presenting the goals of International Criminal Law, one should start from the criminal law goals, especially bearing in mind that the goals of International Criminal Law are rarely mentioned in theory, are not sufficiently analysed and explained, and are mostly associated with, or even taken for the aims of International Criminal Justice and the purpose of punishment for committed international crimes.

When considering the question of whether Criminal Law is needed at all, the theory of national criminal law points to the fact that the main reason why Criminal Law supported by criminal sanctions, should exist is deterrent or preventive in nature, because if there is a certain established application of the provisions of the Criminal Law, it has a discouraging effect on the commission of criminal offences, but also strengthens the respect for social norms (Ashworth, 1999: 16).

In the theory of Criminal Law, one can find the view that the goal of Criminal Law is to perform a protective function, that is, to suppress crime by providing protection for the most important goods and values from behaviours that injure or endanger them (Jareborg, 1995: 24-26). The performance of the protective function, as the basic goal of Criminal Law, has gained even greater importance and a more significant role at the level of International Criminal Law, given that this branch of law seeks to provide protection for the basic goods and values of universal importance for all mankind and that the suppression of international crimes is of concern to the entire international community.

The goals of this branch of law are rarely mentioned in the theory of International Criminal Law, but they all come down to the same thing - international crimes suppression. Since the International Criminal Law is by its nature and purpose Criminal Law (Stojanović, 2012: 20), the goal of this branch of law should be associated with the performance of a protective function. In that sense, the goals of International Criminal Law, which are reflected in the prevention and suppression of international crime, should be understood as an extension or expansion of the same goals of national criminal law - prevention and suppression of national crime (Bassiouni, 2014; 1, 15; Bantekas and Nash, 2007: 2). This conclusion actually makes sense because it is the issue of suppression of crimes that crosses state borders or those crimes that violate the basic values of humanity and the international legal order (Degan and Pavišić, 2005: 15), so the protective function of International Criminal Law is particularly stressed given the im-

portance of protected goods. Some authors define the prevention and suppression of international crimes as a task of International Criminal Law, but they believe that the basic task of this branch of law is still to bring justice (Zaibert, 2016: 358).

Confirmation of this understanding of the International Criminal Law goals can also be found in Paragraph 4 of the Preamble to the Statute of the permanent International Criminal Court (hereinafter “ICC”), in which the member states of the Statute confirm that the gravest criminal offences the international community is concerned about must not go unpunished and that effective prosecution of their perpetrators must be ensured by taking appropriate measures at the national level and by strengthening international cooperation. According to the views in the literature, in this way the practical goals of International Criminal Law are confirmed, *and those are the criminal prosecution and punishment of the perpetrators of the most serious crimes for which the international community as a whole is concerned about* (Triffterer, 1999: 11).

Some theorists also advocate two tasks, i.e. the role of International Criminal Law, and these are: *first*, the protection of international relations, international peace and security, that is, the international community from the so-called international crime, which represents its *protective or conservative role*, and *second*, improvement of these relations, i.e. their development in all areas aimed at improving the existing situation, which represents its *dynamic or progressive role* (Čejović, 2006: 25). In addition to performing the protective function, as the basic goal of International Criminal Law, its progressive role thus defined can be understood as an additional goal of International Criminal Law, within which one should realize that the protection of universally recognized goods promotes development and improvement in all areas.

In addition to performing the protective function, the theory of national criminal law also mentions performing the *guarantee function*, which in some way limits the protective function of Criminal Law, in the sense that citizens are also protected from Criminal Law itself, that is, from the arbitrary and unrestricted application of Criminal Law (Allen, 2007: 2; Stojanović, 2013: 24). In the future development of International Criminal Law, greater importance could be given to performing its guarantee function in terms of raising awareness and a sense of security within the international community that no person will be arbitrarily prosecuted, or that someone can be prosecuted only for the crime that, before it was been committed, was prescribed as an international crime with prescribed criminal sanction. In that way, the citizens of the world are guaranteed the realization of their basic rights and freedoms.

The literature also points to the fact that International Criminal Law is generally faced with a lack of clear definitions, which is the case, among other

things, with the goals of this branch of law, for which various English terms are used, such as objectives, aims, goals, and purposes (Heinze, 2018: 938). While the first three terms can be used in the same sense to indicate “the object to which effort or ambition is directed”, the fourth term “purpose” represents the “reason why something is done or created or the reason why something exists” (Heinze, 2018: 941). On the one hand, in that sense, the purpose of International Criminal Law is defined as the protection of basic individual and collective goods and the prevention of their violation, or the determination of the criminal responsibility of individuals for international crimes committed. On the other hand, the basic goals of International Criminal Law are international peace and security re-establishment, strengthening the protection of International Humanitarian Law, changing the culture of impunity, creating a historical record of committed crimes, satisfying the victims of crime, promoting the reconciliation process, as well as punishment of the perpetrators of international crimes (Heinze, 2018: 949). However, traditionally, the goal of Criminal Law, and, consequently, International Criminal Law is to perform its protective function.

2.2. *International Criminal Justice Objectives*

2.2.1. International Criminal Justice Objectives in Acts of International Criminal Law

Much more often than the goals of International Criminal Law, the goals of International Criminal Justice are defined,² which are contained in the preambles of the statutes, resolutions, and other acts establishing international criminal courts and tribunals. Thus, the London Agreement,³ which established the International Military Tribunal in Nuremberg (hereinafter “NMT”), states that it is an agreement between the contracting states to *prosecute and punish the main war criminals of the European axis*, and at the beginning of the Charter⁴ of this Tribunal it is underlined that Tribunal is established for the *fair and timely trial and*

2 International Criminal Justice includes international criminal institutions, like ICC, ad hoc tribunals and mixed courts, international investigation bodies and national criminal justice, that apply International Criminal Law in their joint work (Bassiouni, 2014: 909).

3 The Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics, *London agreement*, August 8th 1945, available at: <http://avalon.law.yale.edu/imt/imtchart.asp>.

4 International Military Tribunal in Nuremberg, *Charter of the International Military Tribunal*, available at: <http://avalon.law.yale.edu/imt/imtconst.asp>.

punishment of the main war criminals of the European Axis. The Charter of the International Military Tribunal for the Far East⁵ also states that the Tribunal is established for the *fair and timely trial and punishment of the main war criminals in the Far East.*

The Resolution of the Security Council No. 827⁶ of 1993, which established the International Criminal Tribunal for the Former Yugoslavia (hereinafter “ICTY”) first indicates that the situation in the former Yugoslavia continues to be a threat to international peace and security and that crimes should be prevented and effective measures taken to bring to justice those responsible for their execution, then the belief is expressed that the establishment of ad hoc tribunals for the prosecution of those responsible for grave violations of International Humanitarian Law will provide for the achievement of this goal and contribute to re-establishing and peacekeeping, as well as contribute to ensuring that such violence is stopped and effectively sanctioned. A further decision is cited of the establishment of an international tribunal with the *sole purpose of prosecuting those responsible for grave violations of International Humanitarian Law* committed in the territory of the former Yugoslavia starting from January 1, 1991. The first ICTY Annual Report⁷ sets out the threefold purpose (objectives) of this Tribunal, arising from the Resolution No. 827: administration of justice, prevention of further crimes, and contribution to the restoration and maintenance of peace.

Member states of the Statute point out in the Preamble to the Statute of the permanent International Criminal Court, that they are aware that millions of children, women, and men have been victims of unimaginable atrocities that deeply shock the consciousness of humanity (Paragraph 2) and that such atrocities jeopardize security and welfare of the world (Paragraph 3), taking the stand that such grave crimes are no longer an internal matter of states, because they endanger the entire international community. In the literature, the third paragraph of the Preamble is presented as the International Criminal Law base, because this emerging

5 International Military Tribunal for the Far East, *Charter of the International Military Tribunal for the Far East*, available at: http://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.3_1946%20Tokyo%20Charter.pdf.

6 United Nations, Security Council, *Resolution no. 827*, from 25 May 1993, available at: http://www.icty.org/x/file/Legal%20Library/Statute/statute_827_1993_en.pdf.

7 International Tribunal for the prosecution of persons responsible for the serious violations of International humanitarian law committed in the territory of the former Yugoslavia since 1991, *Annual Report*, A/49/342 S/1994/1007, p. 11., Paragraph 11., available at: http://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual_report_1994_en.pdf.

branch of law in reality represents the Criminal Law of the community of nations, with the function of protecting the highest legal values of such a community from such grave criminal offences that jeopardize peace, security, and welfare of the world (Triffterer, 1999: 9). Furthermore, the member states of the Statute confirm that the most serious crimes of concern to the international community as a whole must not go unpunished and that effective prosecution of their perpetrators must be ensured by taking appropriate measures at the national level and strengthening international cooperation (Paragraph 4) (More: Simović-Hiber, 2012: 50-51). According to some theorists, this paragraph confirms the practical goals of International Criminal Law, namely the *prosecution and punishment of perpetrators of the most serious crimes of concern to the international community as a whole* (Triffterer, 1999: 11). Then the determination is expressed to change the current practice of impunity for perpetrators of these crimes and thus contribute to their prevention (Paragraph 5). While in previous paragraph emphasis is on criminal repression, in the fifth paragraph, in addition to repression, another goal of International Criminal Law is emphasized - *prevention*. Therefore, punishment for international crimes is in the service of their prevention, in such a way that punishment also affects those who have already committed these crimes (special prevention), but potential perpetrators also become aware that most serious crimes do not go unpunished (general prevention) (Triffterer, 1999: 12). The Member States further recall that the duty of each State is to, in accordance with its material jurisdiction, initiate criminal proceedings against persons who have committed criminal offenses governed by international instruments (Paragraph 6), that reflects the attitude that the support of national criminal legislations is required for the protection of the stated basic values. In order to achieve these goals (perpetrators of international crimes prosecution and punishment, contributing to the prevention of these crimes), the Member States of the Statute express their determination to establish an independent, permanent International Criminal Court with jurisdiction over the most serious crimes, the entire international community is concerned of (Paragraph 9).

2.2.2. International Criminal Justice Objectives in the Theory of International Criminal Law

In addition to the International Criminal Justice objectives contained in acts of International Criminal Law relating to the prosecution and punishment of in-

ternational crimes perpetrators,⁸ the literature lists many other, *special objectives of International Criminal Justice*, which realization and the extent of the realization are questioned. Thus, international criminal tribunals are expected to serve great goals, such as promoting and maintaining peace and security, writing history, maintaining and promoting the rule of law, encouraging or contributing to reconciliation, and giving a voice to victims of mass crimes (Abels, 2015: 250). Some authors go a step further, supplementing and distinguishing these specific goals of International Criminal Justice from the traditional goals of criminal justice in general. On the one hand, the objectives of International Criminal Justice can be considered the *traditional* objectives of criminal justice in general, reflected in the punishment that is in the service of retribution, but also deterring perpetrators from further crime and rehabilitation, as well as deterring potential perpetrators from committing international crimes. On the other hand, there are *special objectives* that are exclusively characteristic of International Criminal Justice and that distinguish it from the national one, and they are: the rejection and stigmatization of the accused by the international community, confirmation that the international legal system is implemented and applied, ensuring satisfaction for the victims of crimes committed by the accused, efforts to end the conflict and prevent its recurrence, ending the culture of impunity, contribute to the restoration and maintenance of international peace and security, re-establishment of the rule of law, providing accurate historical data on events, reconciliation promotion in regions where international crimes have been committed (Swart, 2008: 100).

Emphasizing the fact that these are international criminal courts and tribunals, some theorists point out that they are also required to provide a panoramic picture of the context of committed international crimes, to give victims the opportunity to express their suffering and obtain compensation, to individualize punishment in order to avoid collective responsibility, to contribute to the end of conflict and stabilization, to perform the socio-pedagogical function of promoting human rights and to develop International Criminal Law. There are two problems in connection with the objectives of International Criminal Justice understood in this way, which relate to the capacity of International Criminal Justice to achieve them and the relation between the very objectives. The consequences of this are the risk of inconsistencies of court decisions, as judges may be guided by different objectives from case to case, as well as the inability to assess the performance

8 Some authors find that the interpretation of the International Criminal Law norms and their application to the case in question is the final duty of international criminal courts, based on what they decide if the defendant is guilty of committing an international crime and impose a punishment (Malekian, 2005: 676).

of international criminal courts (Damaška, 2008: 16 and further). Not only a large number of objectives, but also their diversity, lead to a “aspirations and achievements gap, tension between goals and a lack of ranking order” (Heinze, 2018: 931). These problems can be overcome either by giving up some objectives or by paying less attention to some of them. In this regard, the importance of objectives related to the aspiration of judges to shed light on the historical context of international crimes and the ambition of courts to satisfy the interests of victims should be diminished. Finally, the emphasis should be made on positive general prevention in the form of strengthening the socio-pedagogical function of promoting human rights. Therefore, the supreme task of international criminal courts would be to point out inhumane acts in verdicts, their horrors, and stigmatize their perpetrators, while the extent to which humanitarian norms will be respected and strengthened depends on the extent of their success in aforementioned. The precondition for achieving this objective is that international criminal courts represent moral authority in the societies their actions are directed to. This is sometimes very difficult to achieve, bearing in mind that the legitimacy of international criminal courts is least recognized in the environments where international crimes have been committed, and one of the reasons for this situation is the selectivity of prosecution (Damaška, 2008: 16 and further), but also an insufficient and untimely provision of information to the interested local communities by the international criminal courts, as well as an insufficient exchange of information between them. When international criminal courts make decisions, the affinities of the local communities to which those decisions apply must be taken into account, and the establishment of these courts must involve the prior democratic consent of the local community concerned (Glasius, 2012: 45-47).

The primary objectives of International Criminal Justice also stated in the doctrine are general prevention and retribution, the fight against impunity, reconciliation, and peacekeeping. In addition, two specific functions of international trials and International Criminal Justice are pointed out, namely the function of finding truth and acknowledgment, confirmation, and the function of determining responsibility. The court’s ruling, through verdicts, that the crimes were committed and the punishment of the perpetrators that follows, is an official confirmation of the committed crimes and the suffering of the victims, and prevents the falsification of history, while determining individual criminal responsibility is important for both victims and survivors. Thus, the overarching goal of International Criminal Justice is deterring from the commission of international crimes and assistance in restoring international peace and security by punishing those responsible for international crimes (D’Ascoli, 2007).

Some theorists clearly define the objectives of International Criminal Justice as prevention through intimidation; retribution through selective prosecution, which is assumed to have at least some effect of general intimidation; and providing victims with a sense of justice and closure, but consider it almost impossible to achieve these goals. The assumption that international criminal trials are likely to produce an intimidating effect and thus prevent future crimes has not yet been sufficiently investigated and confirmed, but based on the assumption of intimidation that exists in national criminal justice systems. All that remains is the symbolic of selective prosecution and its presumed impact on peace or the return to normal life in war-torn communities. At the same time, the most important objective of International Criminal Justice, which is also neglected, is to provide victims with closure and compensation (Bassiouni, 2010: 294).

Finally, the theory contains a division into three different categories of International Criminal Justice objectives. The *first category* includes those objectives similar to the classic goals of national criminal legislations: bringing perpetrators to justice, deterring them from committing international crimes in the future, and providing compensation to victims. The *second category* includes the objective of creating a historical record, a record of past events, which is very important bearing in mind that International Criminal Justice faces not only mass crimes, but also mass denials. However, the creation of a historical record is more a tool than an objective of International Criminal Justice, it is a tool that helps to understand what really happened and to decide on the criminal responsibility of the perpetrators accordingly. The *third category* includes the objectives of transitional justice, which in fact assumes that a society emerging from conflict or systematic human rights violations is learning to deal with its past and move towards a peaceful future in which human rights will be respected. These goals are, therefore, future-oriented and envisage: promoting national reconciliation, restoring the rule of law, and contributing to the restoration of peace (Galbraith, 2009: 85 and further).

From the analysed theoretical approaches it can be concluded that a division is mainly made between the *basic objectives of International Criminal Justice*, embodied in the international crimes perpetrators prosecution and punishment, and *external objectives of International Criminal Justice*, embodied in the fight against impunity, administration of justice, strengthening the rule of law, endeavouring to end the conflict and prevent its recurrence, establishing the truth for reconciliation, creation of credible historical records, providing the victims with closure and compensation, as well as the contribution to the international peace-keeping and security restoration. The literature rightly points out that such a large number of objectives and their diversity can create problems in practice, because

different judges, due to the inability to achieve all these objectives, can prioritize different objectives that lead to court decision inconsistencies. However, it is important to point out that the external objectives of International Criminal Justice are also legitimate, and that further providing the basic goals are successfully achieved, it will be easier to achieve the stated external objectives.

The legitimacy of all stated International Criminal Justice objectives is also confirmed by practice, while giving different significance to different goals. In fact, within the empirical research conducted through interviews with the staff of this Court on the effectiveness of the ICC, the respondents were supposed to give their opinion on the importance of certain objectives ICC strives to achieve. Respondents, who came from the Chambers, the Prosecutor's Office, and the Defence, were offered five objectives: fight against impunity and the prosecution of those responsible for international crimes; providing justice to victims and giving victims a voice; capacity building and national courts supplementing; conducting fair and impartial trials; contribution to peace and stability. Although most respondents considered the fight against impunity and the prosecution of those responsible for international crimes as the ICC's primary objective, their responses differed depending on whether they came from the Chambers, the Prosecution, or the Defence. Thus, respondents from the Chambers and the Prosecutions considered that the ICC's main objective was to fight against impunity and prosecute those responsible for international crimes, while the Defence respondents saw the ICC's main objectives in providing justice to victims, giving voice to the victims, national courts capacity building and supplementing (Samaria, et al., 2021: 131-132). Explaining his view that ending impunity for international crimes is a key goal of the ICC, one Chambers respondent pointed out that the *ultimate goal* is to encourage national judiciaries to do their job while the ICC should set an example and give the reason how this would be done. In doing so, the ICC in the long run will no longer have to exist (Samaria, et al., 2021: 133). According to those interviewed, differing views on what the ICC's main objective is can lead to conflict situations in the Court's functioning, due to different views on what the Court should prioritize and how it should be reflected in the Court's daily activities (Samaria, et al., 2021: 135). However, it should be borne in mind that despite the different views on the basic objectives of the ICC, that is a logical consequence of the fact that the respondents belong to different bodies within this Court, all of them are participants in the same procedure, and their synergistic action enables a number of different objectives achievement.

After analysing the above provisions of the acts international criminal courts and tribunals are established on and different views expressed in the liter-

ature, we believe that the content of the preambles of the statutes of international criminal courts, resolutions, and other establishing acts of these courts, called the *objective* or *purpose* of their establishment and that is criminal prosecution and punishment of persons responsible for international criminal offenses, we can understand as a *basic task of international criminal courts*, that is, the *task of International Criminal Justice* (Similarly: Samaria, et al., 2021: 127). This approach becomes clearer if paralleled with the task of national criminal justice, which is to prosecute perpetrators of criminal acts (which is within the competence of the public prosecutor) and trial of the perpetrators of criminal acts, i.e. clarification and resolving criminal matters (which is within the competence of the criminal court) (Bejatović, 2014: 128, 157-158).

By performing this task, international criminal courts contribute to the achievement of the *objectives of International Criminal Justice*, which are broadly set and aimed at the international community as a whole, and can be defined as: fighting impunity, administration of justice, strengthening the rule of law, endeavours to conflict ending and preventing its re-occurrence, establishing truth for reconciliation, providing victims with closure and compensation, as well as contributing to the restoration of international security and peacekeeping.

In terms of historical record making (More: Wilson, 2011), which is often cited as the International Criminal Justice objective, the argument is on the part of those authors who believe that it is more a *tool* than an *objective*, because it assists the understanding of what really happened and to decide upon it on criminal liability of perpetrators.

2.3. *Purpose of Punishment in International Criminal Law*

Since the purpose of punishment in theory is often confused with the objectives of International Criminal Law and International Criminal Justice, which is logical since the purpose of punishment does not exist in itself, it is important to determine what is meant by the purpose of punishment in International Criminal Law in order to distinguish these terms because, as mentioned earlier, they cannot be equalled. The difference between the objectives of International Criminal Law and International Criminal Justice, on the one hand, and the purpose of punishment on the other, is already visible at the level of concepts. As pointed out earlier, the term “objective” should indicate “the object to which effort or ambition is directed”, while the term “purpose” represents “the reason why something is done or created or the reason why something exists” (Heinze, 2018: 941). Starting from such notions of objective and purpose it can be concluded that the

objective of the International Criminal Law is directed towards certain objects, that is, goods and values that are protected by International Criminal Law due to their universal significance. The objective of International Criminal Justice is aimed at those entities that have been injured or threatened by international crimes, such as victims (their protection and compensation), peace and security (their re-establishment), rule of law (its strengthening), etc. Finally, the purpose of punishment in International Criminal Law can be determined as the reason why penalties are prescribed and imposed for perpetrators of international crimes.

From this definition of the stated terms, it is clear that, despite certain permeation and coincidence, they cannot be equated. On the one hand, the objectives of International Criminal Law are broadly set, as providing protection to universally recognized goods and values, accordingly the International Criminal Law in itself already acts as a general preventive measure. On the other hand, the purpose of punishment is more specifically defined and is related to the concept of individual-subjective responsibility of individuals as perpetrators of international crimes, whose punishment at the individual level shows that International Criminal Law is applied. In this way, through the application of International Criminal Law by International Criminal Courts, i.e. through criminal prosecution and trial of international crimes perpetrators, all previously mentioned objectives of International Criminal Justice are achieved.

3. Purpose of Punishment in International Criminal Courts Practice

It is interesting to point out that no act within the International Criminal Law determines the purpose of punishment, since the statutes of international criminal courts and tribunals do not contain such provisions, unlike national criminal laws which, as a rule, prescribe the purpose of punishment and determine it as part of certain Criminal Law institutes.⁹ However, although the purpose of punishment is prescribed in national criminal law, it cannot simply be replicated

9 For example, in the Republic of Serbia, the purpose of punishment is prescribed by the provision of Art. 42. Of Criminal Code as: 1. preventing the perpetrator from committing criminal offenses and influencing him/her not to commit criminal offenses in the future; 2. influencing others not to commit crimes; 3. expressing social condemnation for a crime, strengthening morals and strengthening the obligation to respect the law. It is interesting to point that in Art. 24 of the ICTY Statute stipulates that when determining a prison sentence, the trial chamber will have in mind the general practice of imposing prison sentences in the courts of the former Yugoslavia. According to the Criminal Code of Serbia, the basic criteria for sentencing are the prescribed punishment for a certain criminal offense, the purpose of punishment and mitigating and aggravating circumstances (Article 54, Paragraph 1 of the Criminal Code), so the ICTY should take into account the purpose of punishment.

at the level of International Criminal Law, primarily because of the difference in nature and characteristics among ordinary and international crimes. Namely, international crimes are characterized by mass violence, i.e. the existence of a large number of international crimes perpetrators and the existence of a large number of victims of those crimes. In practice, this leads to the selective prosecution of only the most responsible perpetrators of the most serious international crimes, which calls into question the idea of retribution and deterrence, as the basic purposes of punishment in International Criminal Law. The idea of retribution implies that the perpetrators “get what they deserve”, and if the criminal prosecution is selective - this idea has not been consistently implemented. Also, deterrence cannot fulfil its function, if all perpetrators of (international) crimes are not prosecuted and punished (Maculan and Alicia, 2020: 145-146).

As the purpose of punishment is not prescribed in International Criminal Law, it is left to court practice to determine the purpose of punishment in each specific case, and the views of court practice are very different because they range from branding the defendant to rehabilitation as a way of special prevention achieving. It is notable that the case law does not deal with the issues of the International Criminal Law objectives or the International Criminal Justice objectives as theoretical issues, but with the issues of the purpose of punishment, which is logical since the Chambers deal with concrete perpetrators of international crimes that should be punished in accordance with the principle of individual subjective responsibility.

Since the verdicts of the International Military Tribunals in Nuremberg and Tokyo did not contain explanations, the purpose of punishment was not discussed either (Banović and Bejatović, 2011: 211-212). The ICTY and ICTR judgments state different purposes of punishment (Comprehensive: Keller, 2001), but two are highlighted as basic: retribution and deterrence. In the “*Čelebići*” case, the ICTY Appeals Chamber pointed out that the cases dealt with by the ICTY differed significantly from those normally dealt with by national courts, primarily because of the gravity of the crimes being tried, as they constituted grave violations of International Humanitarian Law and the two main purposes of punishment for these crimes are deterrence and retribution.¹⁰ However, in the opinion of the ICTY Appeals Chamber in the *Aleksovski* case, deterrence is an important factor in sentencing international crimes, but should not be given too much importance, given that retribution is an equally important factor and should be understood as a desire to express the international community’s dismay at the crimes committed,

¹⁰ Judgment, “*Čelebići*” (IT-96-21-A), Appeals Chamber, 20 February 2001, § 806; Judgement, *Furundžija* (IT-95-17/1-T), Trial Chamber, 10 December 1998, § 288.

since the ICTY's punishment should make the international community's condemnation of the crimes committed obvious and show that the international community is unwilling to tolerate grave violations of International Humanitarian Law and human rights.¹¹

In addition to retribution and deterrence, as the basic purposes of punishment for committed international crimes, some chambers cited reprimanding and stigmatization of defendants as purposes of punishment. For example, in the *Erdemović* case, the ICTY Trial Chamber took the stand that reprimanding and public stigmatization by the international community, which thus expressed its disgust at the committed crimes and branded their perpetrators, represented the key purpose of imprisonment for crimes against humanity.¹²

Some judgments already made by the Chambers of the permanent International Criminal Court mention retribution, special and general prevention as purposes of punishment. In the *Katanga* case, in the Decision on punishment in accordance with Article 76 of the Statute¹³ and in the first instance Judgment in the *Bemba* case,¹⁴ retribution, and prevention are emphasized as the two main purposes of punishment. Allegedly, according to the views of the trial chambers the role of punishment is twofold: on one hand, it is the expression of social condemnation of the committed crime and the perpetrator, recognizing in this manner injuries and sufferings inflicted on victims, and, on the other hand, deterrence aimed at deterring those who plan to commit a similar crime from that intent. In the first instance Judgment in the *Al Mahdi* case,¹⁵ the Trial Chamber starts from the view that, according to the Preamble to the ICC Statute, retribution and deterrence are two primary purposes of punishment. At the same time, retribution should not be understood as revenge against the accused, but condemnation of the international community for the committed crimes, through which, by imposing a proportional punishment, the injury committed to the victims is also recognized and peace and reconciliation are promoted. With regard to deterrence, the Trial Chamber considers that the sentence should be adequate in the sense that it should discourage the convicted person from re-offending (special prevention) as

11 Judgment, *Aleksovski* (IT-95-14/1-A), Appeals Chamber, 24 March 2000, § 185.

12 Judgment, *Erdemović* (IT-96-22-T), Appeals Chamber, 29 November 1996, § 65.

13 Decision on Sentence pursuant to Article 76 of the Statute, *Katanga* (ICC-01/04-01/07), Trial Chamber II, 23 May 2014, § 38.

14 Decision on Sentence Pursuant to Article 76 of the Statute, *Bemba Gombo* (ICC-01/05-01/08), Trial Chamber III, 21 June 2016, §§ 10-11.

15 Judgment and Sentence, *Al Mahdi* (ICC-01/12-01/15), Trial Chamber VIII, 27 September 2016, §§ 66-67.

well as ensure that those in consideration of committing similar offenses are deterred from doing so (general prevention).

One gets the impression that deterrence and prevention in the mentioned decisions, are sometimes used as synonyms that are also recognized by the doctrine. Neither practitioners nor theorists of International Law often recognize or acknowledge the difference between deterrence and prevention, where deterrence is based on the hedonistic calculation of the individual weighing the potential benefits against costs, while prevention involves governmental and local programs, policies, and initiatives aimed at reducing the risk factors of criminal behaviour and the victimization rate, strengthening the application of law and the administration of justice, and changing the perception that leads to the commission of criminal offenses (Schense, 2017: 25-26). Although the stated ICC judgments use the term deterrence, the term prevention is sometimes also used as a synonym for deterrence, which again indicates the International Criminal Law underdevelopment, as a branch of law.

As *deterrence* has been singled out as one of the most important purposes of punishment for committed international crimes, the question is raised as to what extent it is possible to achieve the effect of deterrence by punishment by international criminal courts and tribunals.

Searching for the answer to the aforementioned question (See more: Rothe and Victoria, 2013), one study came to the conclusion that similar to the case of national courts, it is difficult to “assess” the deterrent effect of international criminal courts and tribunals. On the one hand, in some cases, despite the fact that criminal proceedings have been initiated, or even passing the verdict by these tribunals and courts, conflict and international crimes commission have continued in the countries of origin of the defendants (for example, in case of former Yugoslavia and DR Congo). On the other hand, in the countries where the conflict calmed down, there were some other circumstances that led to the calming of the conflict (for example in Darfur), so it is not possible to determine the correlation with certainty between initiating trial or passing the conviction by international criminal courts and tribunals and conflict calming (See more: Schense and Carter, 2017: 430-434). While it cannot be claimed with certainty that the existence and operation of international criminal tribunals have absolutely no effect on the settlement of conflicts, it would not be right to claim or expect these tribunals to directly and deliberately contribute to international peace and security (Mégret, 2018: 847).

In cases with the young defendants, the Chambers justifiably took into account another purpose of punishment - rehabilitation. In the *Furundžija* case

before the ICTY, the defendant was 24 years old at the time of the critical events and 29 at the time of the first instance verdict, so the Trial Chamber also calls for rehabilitation as a purpose of punishment given the defendant's age - the fact that he is young.¹⁶ In the *Erdemović* case before the ICTY, the defendant was 23 years old at the time of the critical events and 25 at the time of the first instance decision, so the Trial Chamber considered the fact of his young age as a *mitigating circumstance* when sentencing,¹⁷ clarifying that his young age and character indicated the possibility of his change and that he should be given another chance to start his life from the beginning after his release, while he is still young enough to do so.¹⁸ However, due to the specific nature of the crimes within the ICTY's jurisdiction, the Chamber considered that, regardless of the age of the accused, there was no possibility of considering any rehabilitative purpose of punishment, but rehabilitation as a purpose of punishment must give way to stigmatizing the gravest violation of International Humanitarian Law in order to prevent the reoccurrence. This does not mean that prison treatment alone cannot have rehabilitation as a goal.¹⁹ The attitude against rehabilitation as a purpose of punishment is confirmed by Appeals Chamber in the “*Čelebići*” case before the ICTY, which points out that although national legislations and certain international and regional human rights instruments envisage the possibility that courts deciding on the sentence must take into consideration before all the rehabilitation, the rehabilitation itself cannot have the dominant role in the decision-making process of the ICTY Chambers, taking into account the fact that ICTY cases differ from those dealt with by national courts, primarily regarding the seriousness of the crimes being tried.²⁰

Regarding the *purpose of punishment*, the analysis of the decisions of international criminal courts shows that retribution and deterrence stand out as the main purposes of punishment. The greatest importance is attached to retribution, having in mind the gravity of the crimes that are being tried before these courts. Also, the argument is on the side of those authors who believe that the emphasis should be on positive general prevention. Namely, in the international courts judgments, it is important to point out the inhumanity and terrible consequences of committing international crimes, all with the aim of strengthening and

16 Judgment, *Furundžija* (IT-95-17/1-T), Trial Chamber, 10 December 1998, § 291.

17 Judgment, *Erdemović* (IT-96-22-T), Trial Chamber, 29 November 1996, §§ 47-48.

18 Sentencing Judgement, *Erdemović* (IT-96-22-Tbis), Trial Chamber, 5 March 1998, § 16.

19 Judgment, *Erdemović* (IT-96-22-T), Trial Chamber, 29 November 1996, § 66.

20 Judgment, “*Čelebići*” (IT-96-21-A), Trial Chamber, 20 February 2001, § 806.

enhancement of respect for those norms that provide protection to basic goods and values of humanity, since adoption and compliance with such norms before all impact the non-commission of international crimes.

4. Conclusion

The fact is that International Criminal Law is a still developing branch of law, that this development is influenced by main legal systems with all their diversity, but also different requirements within the international community, international relations development, and the practical needs of International Criminal Justice caused that in the theory of International Criminal Law there is often interference, but also different attitudes on the basic objectives of International Criminal Law, the objectives of International Criminal Justice and the purpose of punishment in International Criminal Law.

Although at first glance theoretical topic, defining and delimiting the objectives of International Criminal Law and the objectives of International Criminal Justice is of great practical importance in directing the future development of International Criminal Law as a branch of law, as well as in directing the work of international criminal courts and their impact on national criminal justice.

Understanding the objective in general as “an object towards which effort or ambition is directed to”, it can be concluded that the basic objective of International Criminal Law is to perform a protective function, i.e. providing protection for the most important goods and values, universally accepted by the entire international community from endangering behavior. Thus the defined objective of International Criminal Law should be understood as an extension of the basic objective of national criminal law, emphasizing that protective function performance gains even greater importance at the international level, having in mind the importance and value of protected goods, i.e. their universality. In the future development of International Criminal Law, within the framework of its progressive role, greater importance should be given to the International Criminal Law guarantee function realization, aimed at providing respect for the rights and freedoms of all members of the international community.

The International Criminal Law objectives derive from International Criminal Law acts, especially from the international criminal courts statutes, where international criminal acts are defined as behaviors that violate or endanger universally recognized goods and values. However, these goals would remain a “dead letter” if there were no international criminal courts that apply the rules contained in International Criminal Law acts, allowing these goals to be achieved.

This is made possible by the fact that perpetrators of international crimes are prosecuted by the international criminal courts which is the basic task of these courts. By performing their basic task, international criminal courts not only contribute to the achievement of the basic goals of International Criminal Law, but also to the achievement of the of International Criminal Justice objectives, which are broader and focused on the international community as a whole, exemplified in the fight against impunity, administration of justice, strengthening the rule of law, endeavours to end the conflict and prevent its recurrence, establishing the truth for reconciliation, providing victims with closure and compensations, as well as contributing to the re-establishment and maintenance of international peace and security.

The objectives of International and National Criminal Justice also largely coincide, such as: the administration of justice, strengthening the rule of law, and providing victims with closure and compensation. However, International Criminal Justice, due to its jurisdiction over international crimes, characterized by the fact that they are most often committed during an armed conflict, has its own objectives, namely: the fight against impunity, efforts to end the conflict and prevent its recurrence, establishing the truth for reconciliation, as well as contributing to the restoration and maintenance of international peace and security. Due to such numerous and diverse objectives, there may be inconsistencies in the case law due to different views regarding goals that should be given priority. Nevertheless, the successful realization of the basic task of International Criminal Justice - criminal prosecution and punishment of perpetrators of international crimes, enables the easier realization of all external goals of International Criminal Justice.

While in theory the issues of the goals of International Criminal Law and International Criminal Justice are considered, the case law, logically, deals with the question of the purpose of punishment, considering that it is related to the concept of individual-subjective responsibility of specific perpetrators of international crimes. In order to distinguish the objectives of International Criminal Law and International Criminal Justice from the purpose of punishment in International Criminal Law it is first necessary to point out the difference that already exists at the level of concepts, where the purpose is now understood as “the reason why something was done or created or the reason because something exists.” In that sense, the purpose of punishment in International Criminal Law, embodied primarily in retribution and deterrence, is more specifically set, directly in connection with the concept of individual-subjective responsibility and individuals as perpetrators of international crimes. Punishing perpetrators of international crimes

international community expresses condemnation for committing such serious crimes, which should also influence the deterrence from their further commission, and in this manner, the purpose of punishment is achieved in the International Criminal Law. Its realization practically achieves the objectives of International Criminal Law as well as the objectives of International Criminal Justice, because only in that way - by punishing the perpetrators of international crimes, it is clear that International Criminal Law is applied and that International Criminal Justice really fulfils its mission.

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