



Strasbourg, 29 October 2003

3rd Consult/ICC (2003) 13

**THE IMPLICATIONS FOR COUNCIL OF  
EUROPE MEMBER STATES OF THE  
RATIFICATION OF THE  
ROME STATUTE OF THE  
INTERNATIONAL CRIMINAL COURT**

**LES IMPLICATIONS POUR LES ETATS  
MEMBRES DU CONSEIL DE L'EUROPE  
DE LA RATIFICATION DU STATUT DE  
ROME DE LA COUR PENALE  
INTERNATIONALE**

# **PROGRESS REPORT BY "THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA"**

1. From its independence in 1991, Republic of Macedonia as an independent and sovereign country and a member state of the UN is **undertaking and fulfilling all its international obligations**, especially those determined by international conventions and other documents. Under the Constitutional Act for implementation of the Constitution from 1991 Republic of Macedonia undertook the membership of former SFR Yugoslavia in the international bodies, organizations and communities and the rights and the obligations that had been created during the existence of the SFR Yugoslavia, including the international conventions. In 1993 the Parliament of Republic of Macedonia delivered some very important decisions regarding its international obligations, among which: Decision for acceptance of the international legal documents about the fundamental human rights and freedoms adopted by the UN, relating to the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, Convention for the Prevention and Repression of the Crime of Genocide, Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes and other basic documents, and Decision for acceptance of the Geneva conventions and protocols.

In the field of the criminal legislation, the obligations created under these conventions imposing incrimination of certain serious crimes, such as genocide, war crimes, and crimes against humanity, are fulfilled by undertaking the criminal legislation of former SFR Yugoslavia, in which all these crimes are incriminated, and later by their incorporation in the Criminal Code of the Republic of Macedonia from 1996.

2. Republic of Macedonia strongly **supports the process of the development of the international criminal law as a supranational law** and the establishment and functioning of the system for international criminal justice, instituted after the Second World War with the Nirmberg Tribunal. Such a development expresses the conviction of every individual that the existence of such a system is the most reliable guarantee for the protection of human freedoms and rights and the existence of an efficient system of international criminal justice is the best preventive measure to repress the international crimes. For nothing works more preventively then the knowledge that every perpetrator of such crime will face the justice, if not before national, then before international criminal court.

Besides, Macedonians and the national minorities living in Republic of Macedonia were victims of genocide and mass crimes themselves throughout the 20th century: Macedonian people have undergone the most terrible genocide in Europe in the 20th century, physical as well as national and cultural; and the two world wars, that were fought on its territory, caused great human casualties and destruction.

That was the unfortunate destiny that Republic of Macedonia, without being involved in the war conflicts, had to encounter during the disintegration of former Yugoslavia. Great numbers of its citizens were victims of the crimes committed in Croatia and Bosnia and Herzegovina; its territory became shelter for tens of thousands of refugees from other former Yugoslav republics etc. Macedonia and its economy suffered tremendous losses with the economic embargo imposed on FR Yugoslavia and the blockade of its borders. In the time of the Kosovo crisis in 1999, Republic of Macedonia provided shelter for over three hundred and fifty thousand refugees from Kosovo.

All the consequences of the crimes committed in its neighborhood are insignificant compared to what struck the Republic of Macedonia with the criminal wave of violence spreading from

Kosovo over the Balkans. Republic of Macedonia and its citizens, regardless of national belonging, became victims of terrorist attacks of Albanian para-military formations, who during the several months of attacks committed many international crimes: genocide and forced displacement of non-Albanian population from the areas in north-western Macedonia, criminal acts against humanity, directed toward civilians, war crimes and destruction of valuable cultural and historical monuments.

Those are the reasons for taking serious interest in the development of the system of international criminal justice. Republic of Macedonia supported the work of the Hague Tribunal for prosecuting war crimes committed in former Yugoslavia: in 1999, during the Kosovo crisis, the Office of the Hague Tribunal was established in Skopje and intensive cooperation was developed between the state bodies - the police, the public prosecution and the courts, and the Office of the Tribunal.

Republic of Macedonia supported the idea of establishing a permanent International criminal court ever since its initiating. Its government delegation participated very actively at the Diplomatic conference in Rome in 1998, where the Statute of the International Criminal Court was adopted.

3. After the signing of the Rome Statute there was a very careful **preparation for its ratification**. Under Article 68 of the Constitution, the Parliament of the Republic of Macedonia ratifies the international treaties. The ratification of international treaties is done by means of a law. Under Article 118 of the Constitution, international treaties that are ratified in accordance with the Constitution become part of the national legal order and can not be changed by law. Furthermore, article 51 of the Constitution provides that the laws, including the law on ratification of the international treaties, have to be in compliance with the Constitution. It follows that the ratified international treaty can not be inconsistent with the Constitution.

During the drafting of the Law on ratification of the Rome Statute, precise analysis has been done concerning the provisions of the Statute, as well as the constitutional provisions that could possibly be an obstacle for ratification because of their inconsistency with the provisions of the Statute. That analysis was focused on two issues: whether the Constitution includes provisions that are contrary to the premises of the Rome Statute, and whether there is a need for additional constitutional provisions that would put into effect certain mechanisms or rules contained in the Statute. Also, analysis of the domestic legal order has been conducted, focusing mainly on the material and procedural criminal law, from the aspect of the necessity for its harmonization with the provisions of the Statute.

The analysis of the Constitution and the domestic legislation represented the basis for the following prior conclusions:

**First**, there is no need for changes in the Constitution for the purpose of modifying the provisions that are inconsistent with the Rome Statute or amendments that would ensure its full implementation.

**Second**, there is no need for a prior intervention in the material criminal law for the purpose of approximation with the material provisions of the Statute.

**Third**, certain changes are necessary in the procedural legislation, and they should be focused on the issues concerning the implementation of the decisions of the ICC, legal assistance and other issues relating to the domestic system of criminal justice and the procedure before the International Criminal Court.

Based on the previous conclusions the Government came to a general conclusion that **all the requirements are fulfilled for ratification** of the Rome Statute and the procedure for ratification and adoption of a law in the Parliament of the Republic of Macedonia should start in the shortest possible period. The Law on Ratification of the Rome Statute on the International Criminal Court was adopted by the Assembly of the Republic of Macedonia on January 30<sup>th</sup>, 2002, and was published in "Official Gazette of the Republic of Macedonia" No. 12/ 2002.

4. Among the issues concerning the possible constitutional obstacles special attention was given to the following:

**a) The extradition of Macedonian nationals to the International Criminal Court.**

The provisions of the Statute regarding extradition, or surrender (Article 89 and 102 of the Statute) could be in discrepancy with the constitutional clause about prohibition on extradition of Macedonian nationals (article 4) which provides that a national of the Republic of Macedonia can not be expelled or surrendered to another state. It is known that many states have turned toward amending their constitutions in order to eliminate this traditional barrier for extradition. Other states accepted the distinction made in the Statute itself (article 102) according to which surrender means giving over to the International Criminal Court, while extradition means surrendering to another state, and on the basis of this distinction the constitutional prohibition is interpreted as a prohibition relating only to extradition.

In its report regarding this matter, the Venice Commission suggests that some states, among which is the Republic of Macedonia, have to change this constitutional prohibition. The analysis of the mentioned constitutional provision, however, does not exclude the following interpretation. The Constitution prohibits extradition to other states, defining it as a prohibition for "expulsion or surrendering". But the Constitution does not prohibit surrendering to the International Criminal Court. On that issue, the Constitution implicitly accepts the already established practice in the (previous) trials for international crimes (from the Nirnberg Tribunal to the Hague Tribunal). That interpretation of the constitutional prohibition is in accordance with one firmly established notion in the international criminal law. And the very provision about extradition, or surrender, in the Rome Statute represents confirmation that the, apparently very tough, principle of the classical extradition law is dismissed. The prohibition for extradition of the state's nationals does not provide for protection from criminal prosecution in general, but it does provide for protection from prosecution in other state if the basic guarantees are not ensured and if there are possibilities of numerous violations, which doesn't make sense when it comes to having impartial International Criminal Court. Consequently, considering the interpretation according to which the constitution prohibits surrender to other state, but does not prohibit surrender to International Criminal Court, despite the fact that it is located in other state (and what if it is located or holds sessions in the concerned state?), the expert and the government circles accept the view that there is no need for changing and adapting the quoted constitutional

clause and it does not represent an obstacle for implementation of the provisions of the Statute relating to the surrender of Macedonian nationals to the Court.

**b) Immunity of the chief of the state, Parliament representatives, Prime Minister and members of the government and other elected representatives or government officials.**

Reaffirming one of the basic principles of "the Law of Nurnberg" about disregarding the immunity of the chief of the state and other state officials, the Statute requires (article 27) that its provisions be applied "equally on all persons regardless of their official status". The official status of the person who commits criminal acts that fall under the Court's jurisdiction does not exclude the criminal responsibility and can not be used as a reason for reducing the punishment. The immunity according to the national or the international law is not a barrier for executing the jurisdiction of the Court on the persons who enjoy immunity.

The Constitution of Republic of Macedonia stipulates that the President of the Republic enjoys immunity and the Constitutional Court of Republic of Macedonia decides for deprivation of the immunity (article 83). This provision, however, does not determine the content of immunity and therefore does not exclude the criminal prosecution for international crimes, nor does it prevent from surrendering to the International Criminal Court. This interpretation of the provision for immunity of the President can be also reaffirmed in the perspective that it is adopted in time when the principle for disregarding the immunity of the chief of the state for this kind of crimes is already established in the international criminal law (ever since Nurnberg, and now confirmed in the practice of the Hague Tribunal). The indetermination of the Constitution, or more precisely, the open definition of the provision for immunity, surely absorbs such a perspective, so there is no need at all to change or amend it.

The identical interpretation can be given in respect to other cases regarding immunity. Other persons who enjoy immunity are: Parliament representatives (article 64), prime minister and the ministers in the government (article 83), judges (article 100), members of the State Judicial Council (article 104), public prosecutor (article 107), judges of the Constitutional Court (article 111). All these provisions use identical, undetermined formulation similar to the one concerning the immunity of the President of the state, which allows for identical interpretation according to which the immunity is not an obstacle for prosecution for international crimes and for surrendering to the International Criminal Court.

**c) Constitutional principle "non bis in idem".**

The constitutional article 14 contains the known principle "non bis in idem": no one can be put on trial twice for act for which he has been already judged and for which final court decision has been delivered. According to the Statute, the International Criminal Court has complementary, subsidiary jurisdiction (article 1, article 17), but that jurisdiction does not exclude the possibility for a second trial before this court, after final decision has been delivered by a domestic court. Thus, for instance, if there is a final decision that stops the investigation or rejects the prosecution, it should not be forgotten that the jurisdiction of the Court could be activated. Furthermore, if there is assessment that the procedure before the domestic court is not conducted independently and impartially, another trial is not impossible even if the previous procedure had finished with a final court decision. On the other hand, the Statute holds on to the principle "*non bis in idem*" (article 20): there is no second trial for an act for which the person is sentenced or released by the Court.

Despite the seeming collision of the constitutional norm and the provisions of the Statute, it should be taken into account that this norm resolves the issue of respecting the "*res judicata*" in the national legal system. The quoted constitutional provision should be extended with the exception which, according to the provisions of the Rome Statute, allows for activating the jurisdiction of the International Criminal Court in cases of bias, partiality etc. of the domestic justice. However, such a modification would be *contradictio in adjecto*, because it would express doubts in the domestic judiciary. Therefore, although at the first sight it seems good to have changes in the constitutional provision, it must be admitted that it would be inconsistent with the other constitutional principles (for independent and impartial judiciary) and, accordingly, illogical.

5. The analysis of the **material criminal law** showed that there is no particular need for its coordination with the provisions concerning crimes and punishments as determined in the Rome Statute. All criminal acts under the Court's jurisdiction: genocide, crimes against humanity, war crimes and aggression (article 5 of the Statute), except the last one, were stipulated in the Macedonian Criminal Code, in a special chapter (Crimes against humanity and international law).

The Macedonian Criminal Code incorporated the following criminal acts that correspond with the acts that fall under the jurisdiction of the Court: genocide (article 403); war crime against civil population (article 404); war crime against wounded and sick (article 405); war crime against war captives (406); use of disallowed means of war (article 407); organizing a group and encouraging for committing genocide and war crimes (article 408); the organized committing of criminal acts that fall under the Court's jurisdiction is incriminated as separate criminal act of organizing a group for committing these acts (article 408); the organizer and the members of the group are punished for organizing, or taking part in the group; unlawful killing and wounding the enemy (article 409); unlawful taking away things from the killed and wounded on the battle field (article 410); wounding Parliament representatives (article 411); cruel treatment of wounded, sick and war captives (article 412); unjustified delay of repatriation of war captives (article 413); destruction of cultural and historical monuments (article 414); encouraging aggressive war (article 415); violation of the international signs (article 416); racism and other forms of discrimination (article 417). The legal descriptions of these incriminations concur with descriptions of the criminal acts under the jurisdiction of the Court.

In the meantime, the proposal for amending the Criminal Code, by which a complete revision is expected and which introduces more new incriminations, gave opportunity to extend definitions of crimes against humanity and international law, in order to adjust them with the ones provided in the ICC Statute:

Article 403 - a: A new crime is inserted - Crime against humanity, The description of this crime completely corresponds to the definition in the Statute.

In Article 404 War crime against civil population; Art. 406 - War crime against war captives; and Article 407 - use of disallowed means of war; the legal descriptions of the crimes are extended also to the forms of this crimes which are contained in the articles of the Statute for war crimes.

A new Article 407-a is inserted, which incriminates approval or justification of genocide, crimes against humanity and war crimes. This incrimination is comprised of public denial, brutal minimizing or approval and justification of these crimes through information systems, where more severe form is when minimization or approval is done with intention to encourage hate, discrimination or violence against a person or group of persons because of their national, ethnic, racial origin or religion.

The organization and encouragement to commit these crimes is extended to the crimes against humanity (Article 416-a), and punishment for membership in that group is increased from one to four years.

The crime - violation of the international signs (Article 416) is amended by adding a new form (pg.2) where a punishment is provided if death or serious personal injury occurred as a result of improper use of a flag of truce, or of the military insignia and uniform of the enemy.

In accordance with the provisions of the Statute, two paragraphs are inserted concerning "command responsibility" and responsibility of the subordinate for a crime committed under orders of the commander (Art. 416-b and Art.416-c).

The crime of aggression should be included in the Macedonian Criminal Code after adopting the international definition for that criminal act, so until then it remains only as incrimination for encouraging aggressive war (article 415).

Regarding the statutory limitation the Criminal Code already contains provision about non-applicability of statutory limitation for the crime of genocide and war crimes (article 112).

The prohibition for a second trial ("non bis in idem") is legalized by inserting definition of the term "court decision" that embody the decision of the Court into those provisions of the Criminal Code regarding the meaning of the legal terms.

There is discrepancy in the provisions concerning the punishment. On one hand, the Statute specifies (article 77): sentence of imprisonment for certain number of years, no longer than thirty years, and the sentence of life imprisonment; fine and confiscation of property acquired while committing the criminal act. The Macedonian Criminal Code, on the other hand, contains the same sanctions, but beside the sentence of life imprisonment specifies the sentence of imprisonment for a certain time, limited to maximum fifteen years. The implementation by a domestic court of a sanction prescribed for criminal acts contained in the Statute could result in the request for activating the complementary jurisdiction of the Court, with the explanation that the delivered sentence is not rigid enough, or in another words, it is not equitable. Still, the provision of the Statute about non-discrimination in the national implementation of punishments and the national laws (article 80) leave space for variations in the system of punishments in the national legislation.

6. Regarding the **procedural criminal legislation**, one issue is still under consideration. Namely, it is necessary to introduce legislation about procedure for assistance and cooperation with the International Criminal Court and for implementation of its decisions, which would deal with international cooperation and judicial assistance (article 86-102), having in mind that the assistance and the cooperation with the Court differ from other kinds of mutual criminal-legal assistance that includes: extradition, "small" criminal legal assistance

and transfer of the criminal procedure, which are all contained in the provisions of the Macedonian Law on Criminal Procedure.

It is indisputable that Macedonian legislation needs this amendments, but there is an open issue if the existing Law on Criminal Procedure should be complemented with provisions regulating the cooperation with the Court, in a new chapter dealing with cooperation with the Court and implementation of its decisions, or a new law should be prepared about cooperation with the ICC.

Next, although the Macedonian Law on Criminal Procedure contains special provisions about implementing the criminal sentence delivered by a foreign court (article 505), these provisions can not be applied when implementing the judgments of the Court, so it is necessary to introduce new provisions in the existing Law, or to eventually add it in new Law.