



THE ROME STATUE WITH VIETNAMESE CRIMINAL LAW

1. Some general principles of criminal laws

1.1. *No second judgement principle (Ne bis in idem)*

The nebis in idem has been defined in Article 20 of Rome Statue. The essence of this principle is that no one will be criminalised twice for the same charges. This is such an important principle within criminal laws to protect individuals who have been prosecuted for one or multi-charges against re-prosecution for same committed charges. This principle is also to protect justice and honesty in the execution of justice. The principle has also been recognised by some courts as their guidance.¹

Article 20 of the Rome statue refers to this principle from two aspects:

First, ICC will not prosecute an individual against a charge which has been judged or released by a court.

Second, other courts will not judge an individual for the charges which ICC has given decisions or ordered releases.

According to this principle, in a case where ICC has given decisions to a national for one or multiple charges as defined in the Article 5 of Rome statue, then that national court will not carry a court proceedings against that individual. On the contrary, if that individual has been prosecuted by a national court, ICC will not try that individual for the same behaviours charged by the national court.

There are not yet such provisions for the execution of this principle within the criminal code of Vietnam, but it must be said that this is an “inevitable principle” in the reality of investigation and criminal proceedings. In light of recognition and performance of criminal judgements executed by foreign courts to see if this has been indirectly defined in Vietnam’s criminal law, this is an open, left over area. Normally, for a verdict which was decided by a foreign court, the performance of such verdict in Vietnam shall be undertaken based on a bilateral judicial agreement between Vietnam and that country, or based on a type of reciprocity principle.² However, a verdict given by an international court, there is not yet a single policy defined within this.

¹ Article 10 of Yugoslavia Court law, Article 9 of Rwanda Court law.

² Article 343 of the 2003 Criminal code.



According to international agreements and execution of international agreed principles, “in a case where the national legal procedures and the international law to which Vietnam is a signatory are differently defined on the same issues, the international principle will be referred to”. Therefore in principle, if a protocol of an international court to which Vietnam is a signatory provides for the *Ne bis in ide* principle, the Vietnamese authorities will adhere to this principle. However, there is not yet a case ever recorded to prove such practice in reality.

1.2. Criminal bases (*nullum crimen sine lege*)

Article 22 provides a principle fundamental to any legal system, which is the *nullum crimen sine lege* (no crime without law) principle: no one is considered to be guilty if the law does not define it. This principle stems from the awareness of serious consequences as a result of the judicial process, and the need to protect individual from intervention by a national legal institution.³ This principle has been long recognised by international law is influential to the process leading to the approval of the Rome Statue.⁴

In Rome statue, this principle interprets that all behaviours considered by a court must be defined as criminal charges and can be judged by the court. This principle prevents the prosecution of an individual from charges not stated in the Statue. The concept of crimes here is also listed in Article 5 as genocide, war crimes and even invasion if this is clearly detailed.

As a result, individuals are only prosecuted for the crimes defined clearly in the Statue by the national members. From their part, member countries will have to cooperate with the International court and give the judgement rights to the court in accordance with the principles defined in the Additional protocol. This is not because this principle relates to the cooperation obligation of member countries, but it can only be applied when such crimes under the judiciary of the Court occur.

In Vietnam criminal code, the *nullum crimen sine lege* principle is mentioned in Article 2 on the basis for criminal obligation: “Only those commit the charges defined by the Criminal code shall be responsible for criminal punishment”. According to Rome Statue, a number of charges are defined by the Criminal code, though not in details and fully defined as in the State. They are peace destruction, waging war of invasion; crime against humanity and war crimes.⁵ Vietnamese citizen therefore will not be prosecuted for behaviours not

³ See Ashworth, Principles

⁴ Se Bruce Broomhal, ‘Article 22 Nullum crimen sine lege’ in Otto Triffterer (ed.), *Complementary on the Rome Statute of the International Criminal Court* (Nomos Verlagsgesellschaft Baden-Baden, 1999), p.452.

⁵ Article 341, 342, 343 of 1999 Criminal Code.



defined in the 1999 criminal code of Vietnam (despite that they are defined by the Rome statute).

1.3. Age of criminal charges

The age of criminal charges defined in the Rome statute which provides exemption to those less than 18 years of age. According to Article 26 of the Rome statute, "a court will not have to the judicial rights to an under-18-year-old at the time the crime is committed". This also means the judicial right of the ICC is not valid to under 18-year-old people. But this also not mean that they can all be exempted from charges if they are under 18 years of age on criminal charges defined by international laws. They will therefore have to take responsibility for the criminal charges mentioned in Article 5 before national court according to the universal jurisdiction, if this is also provided by the national law. This principle of Rome statute is to avoid differences of national laws in defining the age of criminal charges.⁶

Criminal age is defined different from country to country. According to experiences in criminal prevention, Article 12 of the 1999 Criminal Code provides that:

1. People from 16 years of age shall have to take criminal responsibility on all committed crimes.
2. People above 14 years of age but below 16 years of age shall have to take responsibility for the serious charges committed intentionally or for especially severe crimes.

Therefore the 1999 Criminal Code has inherently provided for the fact that people of the age of criminal punishment are competent for taking criminal responsibilities. In application, competent authorities shall investigate the age of criminals and shall only check criminal competence when necessary.⁷ According to the Criminal Code, those who commit crimes against peace, waging invasion war, crime against humanity, and war crime shall be punished from the age of 14 years old, much lower than what is defined in the Rome statute.⁸

1.4 Individual criminal responsibilities

⁶ See Roger S. Clark, Otto Triffterer, 'Article 26 Exclusion of jurisdiction over persons under eighteen', in Otto Triffterer (ed.), *Complementary on the Rome Statute of the International Criminal Court* (Nomos Verlagsgesellschaft Baden-Baden, 1999), p.497.

⁷ See Ministry of Justice, *Scientific comments on the Criminal Code of Vietnam 1999*, Volume I General, (National publishing house, 2001), p. 43.

⁸ Such crimes are seriously committed as having to serve highest punishment frames of over 15 year in imprisonment, life sentence or death penalty. See Article 8 Criminal Code of 1999.



Apart from provisions of regular criminal charges,⁹ the Rome statute also provides for individual criminal responsibilities as in the following cases:

- Order, lure or inspire the commitment of crime (Article 25 Clause 3b)
- Assist or provide help in the purpose of committing crimes, including the provision of tools (Article 25 Clause 3c)

In the first case, the order of such crime is seen as perpetrator rather than complice.¹⁰ Luring into the criminal commitment shall mean giving command, encourage, request or provoke the commitment of crimes.¹¹ Provoking in essence means influencing other to commit crimes. Such influence is mainly sentimental but can also be material as in *vis compulsiva*.¹² Unlike 'order', the relation between 'up' and 'below' is not necessary.

In the second case, a help and support include any kind of assistance, though sentimental or material, which can influence the commitment of the crimes. In other words, 'important influence' is a decisive factor. In this case, it is not possible to adopt one formula to assess the extent of influence, but in certain, it has to be based on 'relation' principle. "Other assistance" is seen as lower than support or complicity.

The 1999, Criminal Code also provides for similar cases. Article 20 Clause 2 states: "organisers, executors, inspirers, and supporters are all complice" and 'the supporter is the one who creates material and mental conditions for the committed crimes". Here, providing material support could be giving perpetrators vehicle, weapons and knives.... to perform the crime. Mental support means giving promise to hide or share certain interests such as increasing salaries for the perpetrators. Supporting is often prior to the execution of crime, and in some case, in the course of action.¹³

1.5. Responsibility of the commander

In international law, the theory of commander responsibilities relates to individual criminal obligation and has been developed from customs created after the world war II.¹⁴ Originally, this theory is about military commanders and certain personnel taking responsibilities for the failings by their under commands or for failing the supervise and manage the under-command. Any individuals, including military commanders or higher rank personnel, are

⁹ See Article 25 Clause 1, 2, 3(a) Rome statute.

¹⁰ See Kai Ambos, 'Article 25 Individual Criminal Responsibility' in Otto Triffterer, supra note 4, tr.480.

¹¹ Black's Law Dictionary 1392 (6th ed. 1990)

¹² Unlike *vis absoluta*, *vis compulsiva* allows freedom to influence, take action and decide. See note 24, Kai Ambos, as cited in No10, p. 481

¹³ See Ministry of Justice, as in citation No. 7, p. 76, 77.

¹⁴ See William J. Fenrick, 'Article 28, Responsibility of commander and other superior', as in citation no. 4



responsible for the behaviour they plan, instigate, order, execute or support. To a certain extent, the commander responsibility theory can be applied as a special form of complice charges in military discipline. The commander takes responsibility for the violations committed directly by their under-command.

Article 28 of the Rome statute provides for criminal charges taken by a commander in the following cases:

(a) Military commanders or same rank personnel shall take criminal responsibility for charges under a court's judiciary which have been committed by their soldiers, as a result of failing to make proper supervision to their under command. In this principle, military commanders are normally members of an arm force in conflict, and have the command over a certain unit. This commander has the right to give order to his under-staff. In some countries, head of State or a leading political figure can be head of military forces. For example, the US President is chief of command.¹⁵ The concept of having power as military commander can be understood even in broader sense which includes police officers in armed policy forces, responsible person of para-military forces, and de facto commander of arm forces, police forces and para-military forces.¹⁶

(b) A high-ranking person shall take criminal responsibility for the crimes under the judgement of a court which are committed by their under-staff and for failing to make proper supervision to their under-staff behaviours. The upper-lower relation mentioned here is non-military. The upper can control according to law (de jure) or (de facto) the behaviours of the lower. Such right is normally related to a high-ranking position because only those shall have the right to control the work done by their lower staff and give orders.¹⁷

In practice, most cases relating to commander responsibility after the world war II are on military commanders. However, an upper person who is not military commander can be prosecuted for failing his task. Article 7 Section 3 Regulation of Yugoslavia Court not only provides for responsibilities of military commanders but also upper commander. The recent decision given by the Court of Appeal ICTY in the Celebibi case has shown that the upper personnel are not necessarily military personnel.¹⁸

The existing laws of Vietnam are not providing for any regulations to this issue.

¹⁵ See William J. Fenrick, 'Article 28 Responsibility of commanders and other superiors', footnote no. 4

¹⁶ As in above (William J. Fenrick)

¹⁷ As in above (William J. Fenrick)

¹⁸ Prosecutor v. Delalic, Mucic, Delic and Landzo, paras. 3550363 (Celebibi case)



1.6. Timeframe for criminal charges

Article 29 of the Rome statute declares no timeframe for the crimes under the judgement of the ICC. No international laws, from Nuremberg Charter to ad-hoc court, provide for this issue. This is logical as where there is no timeframe interference; it is not necessary to mention this point.

The legal systems in many countries provide timeframe to many crimes, even the most severe crimes. For example, according to the French law, the timeframe for a murderer prosecution is 10 years.¹⁹ Many laws starting from Napoleon form laws share many similarities.²⁰ At an Israeli court, Eichman defended that the prosecution is ended with the timeframe but he was rejected by the court.²¹ At an international level, such tendency is reflected under the resolutions of the national assembly, and international agreements within the UN agency and the European Council although such international agreements are not widely signed and ratified.²²

The Criminal Code of Vietnam has a general article on timeframe.²³ Nevertheless, it provides that “No timeframe shall be applied to criminal charges defined in Article 23 of this code and for charges under Chapter XI and chapter XXIV of the code”. They are national security violations, peace destruction, war against humanity including genocide and war crime. Therefore, although it is not yet fully reflected, the Vietnam Criminal Code in essence is in line with the Rome statute in adopting no timeframe for serious charges under the ICC jurisdiction.

2. Some specific stipulations

2.1. Jurisdiction

According to Article 12 of the Rome Statute, ICC has the jurisdiction rights to genocide, war against humanity and war crime and invasion war if/or (a) the nation where the crime happens or (b) the nation where the defendants have nationality as belonging to members of the Rome Statute. Therefore, ICC’s jurisdiction is built on two principles: territorial jurisdiction and nationality jurisdiction. As long as one of these conditions is satisfied ICC can execute its jurisdiction right. However, this also means ICC can have jurisdiction towards citizens of non Statute membership. If a citizen of a country commits a crime in

¹⁹ Penal Code (France) Art. 7.

²⁰ See William A. Strabas, ‘Article 29, Non-applicability of statute of limitations’, in Otto Triffterer, footnote No. 4

²¹ A.G. Israel v. Eichman, (1968) 36 I.L.R. 18 (District Court), para. 53.

²² See Convention on non timeframe for the war crime, 754 U.N.T.S. 73 (1970), European convention on non application of timeframe to the war against humanity and war crime on 25 January 1974, E.T.S 82.

²³ Article 23 Vietnam Criminal Code.



the territory of another country in which this second country is member to Rome statue, ICC has the jurisdiction right to prosecute and try the citizen regardless of whether his nationality is a member of ICC or under the jurisdiction of ICC. Apart from these two cases, ICC also has the jurisdiction rights to citizens of nations of non membership if this is accepted by such countries.²⁴

Article 5 and Article 6 of the Vietnam criminal code recognised the application of judiciary according to territory and nationality principle against crime against the humanity, genocide and war crimes, and that the Vietnam criminal code 'is applicable to all behaviours happening in the territory of the socialist republic of Vietnam' and Vietnamese citizens 'committing crime outside Vietnam territory' can be prosecuted for criminal charges in Vietnam according to provisions of the code". In addition, the Criminal Code also provides that the national court may have jurisdiction over foreign citizens having committed crimes in the foreign territory as long as the international agreements to which Vietnam is a signatory have the same provisions. However, the law of Vietnam does not provide for Vietnamese citizens can be prosecuted by a foreign or an international court as well as the transfer of jurisdiction to such court. In case Vietnam is a member of such an international agreement, Vietnam shall be obliged to it as Article 3 of the 2005 law on signing, membering and performing international agreements of Vietnam provides that "the socialist republic of Vietnam adheres to the international laws which Vietnam is a member".

2.2. *Definition of criminal*

The Rome statue has provided relatively sufficient definition of criminals under the jurisdiction of ICC such as genocide, crime against humanity, and war crimes. Most of the definitions were developed based on the Convention on genocide in 1948 and Four Geneva Conventions in 1949. Currently ICC continues to work on the definition of invasion war so that the Court can execute its jurisdiction over committed individuals at the soonest.²⁵

The Vietnam Criminal Code is not yet defining crimes under ICC jurisdiction. In reality the Code reserves one chapter (Chapter XXIV) on crime of peace destruction, crime against humanity and war crime, however they are generalised provisions. Vietnam has joined the 1948 Convention on genocide in 1981 and the four Geneva Conventions of 1949. Nevertheless such provisions under these conventions have not yet been interpreted into the Criminal code of

²⁴ See Article 12 Clause 3 of the Rome status.

²⁵ Preparatory Committee on the definition of the crime of aggression



Vietnam though member countries are supposed to issue implementation guidelines.²⁶

The Criminal code has taken altogether genocide with crime against humanity and integrated into a common article on crimes against humanity. It has been provided that “the behaviour to kill residents and destroy a whole area, living sources, culture and spiritual values of a country, upheaval of a society to destroy that society, as well as other genocide action or destruction of livelihoods and environment”²⁷ in peace or war times. As compared with the Rome statute, this definition only provides a small part of many characteristics of the crime against humanity, and the nature of genocide.

War crimes are also stated in the Criminal code though as vaguely and not detailed as in the Rome statute. The article 343 states that it is a person’s behaviour ‘in a war ordered or directly involved in the killing of civilians, the injured, prisoners, lootings, destruction of residences, use of prohibited weapons or means as well as other behaviours which seriously violate international laws, international conventions to which the socialist republic of Vietnam is signatory or a member”. In addition, the criminal code’s article 340 also provides for crime against prisoners.

In invasion crime alone, Article 341 of the Vietnam criminal code provides for the war crime as “some one who advocates, provoke for invasion war, prepare, wage invasion war against another country’s independence, territorial integrity and sovereignty shall be sentenced from 2 up to 20 years, life imprisonment or death sentence”. This stipulation has collated the peace destruction behaviour and invasion war crime, but provides no details of on certain behaviours.

It can be said that the Criminal code of Vietnam has provided for genocide, crime against humanity, war crime and invasion crime, but in reality, such crimes are just conceptual rather than being clearly defined. Such stipulation is distant from between the definitions provided by related conventions and the Rome Statute.

2.3. *Immunity*

Article 27 of the Rome Statute confirms that there will be no immunity on criminal charges granted to head of nations, governments or cabinet members, national assembly members or government officials... neither the lowering of sentence for them in case they commit one or many crimes under the jurisdiction of the ICC. Immunity or special privileges are attached to title of a person

²⁶ Article 5 of the Convention on Genocide 1948.

²⁷ Article 342, Vietnam criminal code 1999.



according to national law or international law as well as not intervene the Court's jurisdiction. Such principle has already eliminated the immunity of heads of state and government officials, and they are seen as equal to other individuals.

Article 52 of the 1992 Constitution states: "all citizens are equal to laws". In principle, the Vietnamese laws give no immunity to criminal charges to any individual because of their title or position if they violate crimes defined in the criminal code. Either head of state or government, the law of Vietnam provides immunity. However, to member of the national assembly, immunity can be applied but limited to a certain, not permanent period of time.

The law on the organisation of the national assembly states: "Without the National assembly's consensus, and during the national assembly in session, and without the agreement of the NA Standing committee, no member of the NA shall be arrested or prosecuted".²⁸ This does not interpret that members of the NA can be granted total immunity if they commit one or multitude of crimes defined in the criminal code of Vietnam. However, prosecution can only be undertaken at the agreement of the NA standing committee. The laws on the organisation of People's council and people's committee have provided for the immunity of its members during sessions²⁹ and if so must be done with the consent of the session presidium. But such immunity is to limit movement freedom, and not criminal charges. In both cases, when immunised persons have been prosecuted and tried, they also loose such immunities and NA membership rights.

2.4. Punishment

As defined in Article 7 on punishment of the Rome Statue, ICC can apply term imprisonment or life sentence to those charged with violations under the jurisdiction of the Court. The maximum of the term is 30 years. In addition, the court can decide financial fines or confiscation of property rooted directly from the criminal activities.³⁰ Based on the level of severity and condition of the perpetrator, an appropriate decisions can be issued.³¹

What should be noted is that stipulations under the Rome statue do not affect the way countries apply punishment defined by national laws for criminal charges under jurisdiction of the ICC. Article 80 of the Rome Statue confirms that such stipulations do not affect the practice of national laws. This is compromise controversies over the application or abolishment of the death

²⁸ Article 50 of NA organisational law (Law No. 30/2001/QH10 issued on 26 December 2002).

²⁹ Article 40 of the Law on the organisation of People's council and People's Committees on 30 June 1983.

³⁰ Article 77 of the Rome Statue.

³¹ Article 78 of the Rome Statue.



penalty to crimes such as genocides, crimes against humanity and war crimes in the course of elaborating the Rome Statue.³² This suits to the additional protocol stipulations that ICC is only complementary to national judicial system.

According to the Criminal Code of Vietnam, any person who commits the invasion war could face 10 to 20-year imprisonment, life sentence or death penalty.³³ Crimes such as those against humanity and war crime can be punished with the same degree.³⁴ As a result, according to Vietnam prosecution proceedings, punishment on crimes which might be under the jurisdiction of ICC is not limited to life imprisonment as defined in the Rome statue but death penalty applies. Such punishment is not consensually applied by the Rome Statue and National laws. However, as in the Rome Statue, the application of death penalty by national laws on crimes under the jurisdiction of ICC can be accepted. For the same crime, there exist two judiciaries.

³² See Rolf Einar Fife, "Article 80 Non-prejudice to national application of penalties and national laws" in Otto Triffterer, footnote no. 4.

³³ Article 341 BLHS VN.

³⁴ Article 342, 343 BLHS VN.