

Idea of International Criminal Justice in the Function of Prosecution International Crimes

Vanda Božić, Željko Nikač

Abstract—The wars and armed conflicts have often resulted in violations of international humanitarian law, and often commit the most serious international crimes such as war crimes, crimes against humanity, aggression and genocide. However, only in the XX century the rule was articulated idea of establishing a body of international criminal justice in order to prosecute these crimes and their perpetrators. The first steps in this field have been made by establishing the International military tribunals for war crimes at Nuremberg and Tokyo, and the formation of *ad hoc* tribunals for the former Yugoslavia and Rwanda. In the end, The International Criminal Court was established in Rome in 1998 with the aim of justice and in order to give satisfaction the victims of crimes and their families. The aim of the paper was to provide a historical and comparative analysis of the institutions of international criminal justice based on which these institutions *de lege lata* fulfilled the goals of individual criminal responsibility and justice. Furthermore, the authors suggest *de lege ferenda* that the Permanent International Criminal Tribunal, in addition to the prospective case, also takes over the current ICTY and ICTR cases.

Keywords—International crimes, international criminal justice, prosecution of crimes, *Ad Hoc* tribunal, the International Criminal Court.

I. INTRODUCTION

THE history of human civilization is less marked with relations of cooperation, instead confrontation and conflicts are largely present in human relations, in particular armed conflicts that have internal and international dimensions. Wars and armed conflicts were as a rule followed by serious crimes that have caused distress, disgust and condemnation of the progressive world and the international community. This has inevitably led to reflections on the responsibilities of actors and instigators of crimes committed during the armed conflicts and war, especially with respect to civil and other innocent victims.

The peak of war and related crimes in recent history was during the Second World War that took place in the mid of the past century. Until then unprecedented war crimes and other violations of the norms of international humanitarian law (IHL) have re-actualized the issue of criminal responsibility of the perpetrators and those who ordered these crimes. Before that this issue was discussed after the First World War in which there were many cases that pointed to war crimes and other international crimes. Carried out war crimes against civilians, genocide and grave breaches of the norms of

international humanitarian law actualized the idea of an international tribunal to prosecute crimes and their perpetrators. The official policy of Nazi Germany and the Axis powers included ethnic cleansing of entire groups of people, especially Jews (the Holocaust), Slavs and Gypsies who were systematically killed and stripped of their assets. Due to the scale of these crimes, victims and injured by these acts expected legal and other satisfaction. Bringing executioners and principals to justice was the imperative of rendering justice, solidarity and reconciliation between peoples in the post-war international community. Concretization of this idea was followed by the agreement of the winners after World War II for the establishment of an *ad hoc* International Criminal Tribunal for War Crimes in Nuremberg and the same court in Tokyo.

In the period during and after the Cold War there were more internal and regional armed conflicts and wars around the world, some of which had characteristics of war crimes and other violations of IHL norms.

The situation was even more dramatic after the collapse of the Soviet Union and other events that were accompanied by armed conflicts and wars with strong indications of war crimes and other international crimes (former Yugoslavia, Rwanda). Armed conflicts have long been more than just conflicts in the battlefield. They have far greater international connotations and catastrophic consequences. Taking into account the constancy of these conflicts in national and international relations and serious crimes as their consequence, the international community has formed an attitude about the institutionalization of the idea of permanent international criminal justice.

Pressure of the progressive international community has been great with the request to bring crimes, perpetrators and principals to justice and to receive deserved punishment, and victims to receive their satisfaction.

II. INTERNATIONAL CRIMINAL JUSTICE: HISTORICAL REVIEW

In the 20th century, the idea of establishing an International Criminal Court that would be responsible for prosecuting the most serious international crimes and their perpetrators was matured [29, p.79]. The emergence and development of the international criminal justice took place in several stages: Period until the beginning of World War I, the period between the two World Wars and the period after the Second World War [21].

In the first phase during the reign of Charles Anjou in Naples, a death sentence was imposed on Konrad von Hohenstaufen for the crime of unlawful conduct of war and

Dr. Vanda Božić is with the Department of Criminal Law, Faculty of Law, University of Zagreb, Croatia (e-mail: vanda.bozic@pravo.hr).

Prof. Dr. Željko Nikač is with the Academy of Criminalistic and Police Studies, Beograd, Serbia (e-mail: zeljko.nikac@kpa.edu.rs).

war crimes against civilians [10]. The next significant event was the idea of the Holy See to judge the perpetrators and inspirators of the most serious crimes during the Hundred Years' War (1337-1453). After the horrific crimes against civilians committed in the German town of Breisach (1474), the *ad hoc* criminal court was formed which imposed the death penalty to the Duke of Burgundy Peter von Hagenbach, as the person responsible for the "crimes against natural law and trampling of God and human law" [13].

After the end of the Great War, the issue of individual criminal responsibility for war crimes was raised. In accordance with the Art. 227-230 of the Versailles Peace Treaty raised was the question of responsibility of the German Emperor Wilhelm II for "the highest violation of morality and consecrated respect of international treaties" [2]. The Versailles Peace Treaty provided for the establishment of a special *ad hoc* tribunal for the trial of the highest representative of Germany who was charged with violation of the laws and customs of war and violation of the principles of humanity. However, the procedure was not carried out because the German Emperor got political asylum in the Netherlands, which rejected the request for his extradition. The trial against other defendants (45) was held before the Supreme Court in Leipzig in 1920, which convicted a total of 9 people for war crimes [10].

World War II was undoubtedly the most terrible conflict in the history of human civilization, which had resulted in a huge number of casualties, population migration [18] and enormous material damage. After the war, the question arose about the responsibility of individuals, organizations and countries for many international crimes that were committed. The prosecution of war crimes, crimes against the IHL norms and other international crimes took place at several levels: at the international top level (*ad hoc courts*), an international high-level (*military courts of allies*) and at the national level (*courts of the countries where the crimes were committed*) [1].

III. INTERNATIONAL WAR MILITARY TRIBUNALS AFTER WORLD WAR II

At a conference in Moscow (1943) allies have adopted the famous Declaration of War atrocities and brought other conclusions in the function of the future prosecution of war crimes and perpetrators. Then, at a conference in London (1945) concluded was the Agreement on the establishment of the International Military Tribunal (*Nuremberg Tribunal*) and punishment of the war criminals. Then the Agreement on the Prosecution and Punishment of the Major War Criminals of the European axis and the Statute of the Court were adopted. [30] In accordance with Article 6 of the Statute, the *Ad Hoc Tribunal* at Nuremberg was responsible for the following international crimes: crimes against peace, war crimes and crimes against humanity. Prevailing was the extensive approach to the jurisdiction of the Court in Nuremberg, which was responsible for these international crimes regardless of their geographic orientation, the individual charges and membership of an organization or group that carried out the crimes [12].

Established was the unconditional cooperation of states with the Nuremberg Tribunal and priority of the request of the court, particularly with regard to extradition of accused people for international crimes. Personnel composition of the court reflected the position of the winner states who nominated four members and deputies each, while the President of the Court was elected alternately on a rotating basis. Also, each member state appointed one public prosecutor. With regard to the decision-making, it was envisaged that the verdicts should be passed by a majority of votes, and in the case of an equal number of votes, it was decisive to have the voice of the President of the Court. The court procedure and rules of evidence were arranged mainly in the Statute, but the court could determine certain procedural rules during the course of the proceedings.

The process in Nürburgring continued until 1 October 1946 and included a total of 22 accused. 12 were sentenced to death by hanging; 3 to life imprisonment, four received sentences ranging from 10 to 20 years and 3 of the accused were acquitted [10].

Tokyo Military Tribunal was established to prosecute war crimes in the Far East, committed by the highest Japanese military and political leaders. The Court was composed of eleven judges appointed by the Supreme Allied Commander, on the proposal by state governments that have signed the document on the capitulation of Japan. With regard to the personal composition of the court, the signatories have nominated one judge and verdicts have been made by a majority vote. The Chief Prosecutor of the Court was appointed by the US.

Process in Tokyo lasted until 14 November 1948 against 25 accused people. The court sentenced seven people to death sentence, 16 people to life imprisonment and two people to imprisonment from 7 to 20 years [10].

After World War II, on the newly liberated territories, several courts were established that led criminal proceedings and prosecuted war criminals and people accused of collaboration with the occupying forces. These processes are known as *12 small to Nurembergs* and were used to prosecute local quislings in some European countries [21].

To recap, Nuremberg principles and rendered verdicts had a decisive influence on the individualization of criminal responsibility and the further development of international criminal justice.

IV. AD HOC INTERNATIONAL CRIMINAL TRIBUNALS

After World War II, the world has seen many armed conflicts, wars and military interventions in which there were strong indications of executed war crimes, crimes against humanity and other international crimes. However, block division, conflicting interests and antagonisms have made that right, justice and victims are of secondary importance, and therefore politics have once again prevailed over the profession and universal humanistic values. These were the reasons why the crimes and the perpetrators of the recent armed conflicts in the world were not prosecuted, among which the most important were wars in Vietnam, Algeria, Iraq

and Afghanistan.

The first serious result in the institutionalization of idea of international criminal justice has been made on the occasion of the conflict in the former Yugoslavia. There were strong indications that war crimes and other international crimes were carried out in certain operations, and that was the reason for the international response. UN Security Council in its Resolution No. 817/1993 established the International Criminal Tribunal for the former Yugoslavia (ICTY), [28] known as *Hague Tribunal*. The tribunal was constituted as an *ad hoc* tribunal primarily in order to ensure the prosecution of international crimes, their perpetrators and principals, but also with the idea of mutual reconciliation.

ICTY is responsible for the following international crimes: Crimes against humanity, genocide, grave breaches of the Geneva Conventions of 1949 and violations of the laws and customs of war [11]. In the function of establishing individual criminal responsibility for the crimes in question following authorities were formed: Court Chambers (First Instance and Appeals), the Prosecution and the Registry. Court Chambers have a total of 11 independent judges, of whom 3 judges in the First Instance Chamber (not from the same country) and 5 judges in the Appeals Chamber. Prosecutor is appointed by the UN Security Council and is responsible for investigating crimes and prosecuting the accused for the crimes in question, as well as being independent in its work. However, since the formation of the Tribunal professional and general public had serious objections to the act of incorporation, as well as certain provisions of the Statute, the organization and structure, rules of procedure and legal practice of the court [6].

The initial criticism is related to the fact that the tribunal was established by a decision of the UN Security Council for which it was stated that it has no legal capacity as the UN General Assembly, which was disputed by arguments that Security Council is most important organ in the UN system and that it accordingly possess this type of competence [20]. The aforementioned remark is somewhat justified if we take into account the political context of the establishment and operation, but we think that the UN Security Council is indisputably the body of the highest authority in the UN system and that in accordance with Chapter VII of the UN Charter it is its obligation to protect the (World) peace and security. The Court was established as a corrective to the national courts in cases of bias, of circumventing the law, obstruction of justice and abuse of rights. In support of this view we point out that all the signatories of the Dayton-Paris Peace Treaty recognized the jurisdiction of the Tribunal. It is an undeniable obligation of all to co-operate with the Tribunal and meet the obligation under Article 29 of the Statute relating to the extradition of a person, at the request of the court and without limitation with respect to national legislation [8].

The following objection refers to the regulation of legal procedures generally in accordance with common law and rules of procedure. In the common law system, the adversary principle dominates when it comes to the collection of evidence, [25] which in complex cases leads to the excessive length of proceedings, a conflict of principles presumed

innocence and unlimited detention. Particularly noteworthy is the objection related to the different legal positions of different panels of judges of the Tribunal, even when the factual material in individual cases is obviously very related [22]. We think that the legal practice of the court should be uniform and that would undoubtedly contribute to further increase of confidence in the work of this body, as well as its reputation in the world.

The Court has, in relation to many issues, defined itself by taking individual legal attitudes and *authentic interpretation* of the norms. This was argued with the nonexistence of a higher judicial body of the UN, needs and procedures with a view to removing legal dilemmas in certain cases. The Tribunal has taken a number of legal positions on status issues, defense issues, issues of trials in absentia and others. Prevailing is the functional understanding of competencies that make up the *ratione temporis, loci, personae et materia* and "legal power" of the court to make a definitive decision about "what is right" in each case. ICTY operates as an independent legal body in the international legal order and possesses original jurisdiction, acting in accordance with the *rule of law* and provides legal guarantees to the accused [17].

There is no doubt that the Tribunal acted in complex international circumstances and that the period of its work of nearly three decades has largely achieved its role primarily in the prosecution of war crimes and criminals [7]. As regards to the attempts of reconciliation in the former Yugoslavia we are not sure that the court has done just that, which may not depend only on the Court but also on the sincere wishes and the will of all stakeholders. Perhaps the international community was not always the best to understand all the complexities of relationships in the region of Southeast Europe, and therefore it is the task of *pro futuro* forces to implement peace in the region.

The International Criminal Tribunal for Rwanda (ICTR) was formed by the UN Security Council Resolution no. 955/94 of 08/11/1994. Based on the report of the Commission of Experts for examination of cases of human rights violations during the civil war in Rwanda, the Security Council has used the same act to further adopt the Statute of the court and its legal mechanisms [27].

According to the Statute, the Court for Rwanda has jurisdiction to prosecute crimes and accused of following international crimes: the crime of genocide, crimes against humanity and grave breaches of Art. 3 of Geneva Convention for the Protection of War Victims (1949) and Additional Protocol II (1977), for crimes committed in the territory of Rwanda [27].

In a brief review of the Tribunal for Rwanda we point out to a somewhat unusual organization of the body. Tribunal for Rwanda and the ICTY had a joint prosecutor and a common appeals chamber. In the arguments for this solution founders include reasons of uniformity and unification of legal practice, which is in our opinion questionable because these are still two different judicial bodies. It is true that they are considering the related legal matters in the field of international criminal law, but the environment (geographical,

social, legal) and actors are significantly different. On the other hand, the reasons of efficiency, cost effectiveness of procedures, harmonization of court practice and others may be accepted to some extent.

Certainly, the most consistent objection pertains to trial within a reasonable time. An illustrative example is a marathon process of 10 years against ex minister Pauline Nyiramasuhuko and groups accused of the most serious international crimes. We recall to other objections that were heard by the civil and expert public at the expense of the body, such as corruption, nepotism and other anomalies that had resulted in dismissal (resignation) of several judges and serious delay in the work of the Tribunal [21].

V. THE PERMANENT INTERNATIONAL CRIMINAL COURT (ICC)

As the work of international *ad hoc* tribunals has failed to give success in terms of achieving justice and punishing the perpetrators of international crimes, the Statute of the International Criminal Court as a permanent universal international criminal court to determine individual criminal responsibility and punishment the perpetrators of the most serious crimes was adopted in Rome at the Diplomatic Conference in July 1998. [16] The Rome Statute enters into force a few years later, [23] i.e. on 1 July 2002, while the court based in The Hague, began operating a year later. [9]

The ICC is responsible for the actions relating to criminal offenses of genocide, crimes against humanity, war crimes and crimes of aggression [26] if countries in certain cases do not initiate criminal prosecution [26, art.17-19.] as well as in case of delays and unlawful conduct of criminal proceedings. National courts, prosecution and police are obliged to cooperate with the ICC [26, art.86.] and comply with their requirements. Republic of Serbia adopted a Law on cooperation with the International Criminal Court, [15] and the Republic of Croatia adopted the Constitutional Law on Cooperation with the ICTY governing cooperation in serious violations of IHL committed in the former Yugoslavia since 1991 and the execution of the obligations of the Republic of Croatia arising from Security Council resolution no. 827 (1993), the Statute and Rules of Procedure and Evidence of the ICTY. [3] Also, Republic of Croatia adopted a Law on Application of the Statute of the International Criminal Court and Prosecution of Crimes Against International Humanitarian Law. [14]

The Court is comprised of four bodies: 1-Presidency, 2-Appeals Section, and Pre-trial Section and Legal Department, 3-Prosecutor's Office and the 4-Registry.

Assembly of States Parties of the court by majority voted to elect 18 judges from the list of candidates for a period of nine years, [4] at whose place can be selected people who may be called in their national states to the highest-ranking functions. President of the Court and two vice-presidents are elected for three years by judges and as the Presidency of the Tribunal they are responsible for the proper operation of the ICC. The Office of the Prosecutor is an independent body of the Court responsible for receiving applications and evidence on crimes within the jurisdiction of the Court. [24] The provisions of the

ICC Statute are regulated by criminal procedure [21], [26] through investigation, court proceedings, [21], [26], the appeals process and audit [21], [26], and finally, the execution of the judgment [5].

Although the ICC, equally respecting the solutions of the Anglo-Saxon common law and continental civil law, has established the legal basis of international criminal justice, it is necessary in future legal practice for the ICC to give answers to open legal questions and try to build a unique legal practice in the conduct of the Court. We believe that the international community should support the work of the established ICC and thus strengthen the rule of law as universal principles of international law.

VI. CONCLUSION

Wars and armed conflicts often resulted with violations of norms of IHL, and often the most serious international crimes were committed, such as: genocide, crimes against humanity, crimes of aggression and war crimes. These crimes leave severe and lasting consequences for any society and the international community as a whole, especially if the criminals are not prosecuted and did not receive their deserved punishment, and the victims have not received adequate satisfaction.

First steps on the institutionalization of international criminal justice were made after World War II and the establishment of *Ad hoc* tribunals in Nuremberg and Tokyo, for the prosecution of war crimes committed during the war. For the first time before the courts at Nuremberg and Tokyo affirmed were the principles of individual criminal responsibility and in accordance with that imposed were the proportionate sanctions for international criminal acts, and satisfaction of justice and victims. Decisions of the Tribunal in Nuremberg are of particular importance given that the Court has determined the famous "Nuremberg principles", according to which conditions are created for the realization of international justice and further affirmation of the principles of the rule of law.

The next important step was the establishment of the *Ad hoc* tribunals for the former Yugoslavia and Rwanda for the prosecution of international crimes committed during the wars in these areas. In addition to criminal prosecution the idea was to achieve reconciliation between peoples, as well as ethnic and religious communities. This process is not yet completed and in our opinion time is necessary for the interrelationships to relax and mutual trust to be regained, to promote coexistence and other humanistic values.

The international community has gone a step further after the adoption of the Rome Statute and the establishment of the ICC, because it showed a sincere desire to *pro futuro* prosecute all crimes and accused of the most serious international crimes. Due to the short time frame and insufficient practice of the ICC is not possible to give an adequate critical review of the work of this body, but it is realistic to expect the first results in the near future. It is essential that the ICC in due course comes to life and takes over the jurisdiction in the prosecution of international crimes,

but according to us the problem is that the work of the court is limited to potential offenses *pro futuro*. Maybe it was more appropriate to consider that the ICC takes over the competence and full jurisdiction in the case of the current ICTY and the ICTR.

To conclude, we believe that the Member States of the international community should express *anti-crime solidarity* in the fight against crime, especially in the prosecution of the most serious international crimes. In this context, it is very important to have international criminal and police cooperation, [19] which should enable the arm of justice to reaches all criminals, and to be adequately punished for the crimes committed and for the victims receive appropriate redress. This is primarily related to the area of *ex Yugoslavia* because it is the region that was in the past affected by the horrors of war and crimes, which mostly affected the innocent civilians.

REFERENCES

- [1] Albert V, *Problems of International Criminal Justice*, International Policy No.4, Belgrade 1952.
- [2] Avramov S, Kreća M, *International Public Law*, Official Gazette, Belgrade, 1988, p. 261–269.
- [3] Constitutional Law on Cooperation with the ICC governing cooperation in serious violations of international humanitarian law committed in the former Yugoslavia since 1991 and the execution of the obligations of the Republic of Croatia arising from Security Council resolution no. 827 (1993), the Statute and Rules of Procedure and Evidence of the ICC, Official Gazette, RC 32/96.
- [4] De Bertodano, S. *Judicial Independence in the International Criminal Court*, Leiden Journal of International Law, 2002, 15(2), p.409-430.
- [5] Derenčinović D, *Implementation of the substantive provisions of the Statute of the ICC (Rome Statute) in the Croatian criminal legislation*, HLJKPP No 2, Vol.2, Zagreb 2003, p.877-906.
- [6] Dimitrijević V, etc, *The Hague concerns*, Belgrade Center for Human Rights, Belgrade 2010.
- [7] *Guide to the Hague Tribunal*, Mission OESC in Serbia, Belgrade, 2008.
- [8] Josipović I, *War crimes, Manual for monitoring trials*, Center for Peace, Non-Violence and Human Rights – Osijek, 2007.
- [9] Josipović I, Krapac D, Novoselec P, *The Permanent International Criminal Court*, Croatian Law Center, Zagreb, 2001.
- [10] Jovašević D, *International Criminal Justice - Between Law, Justice, Reconciliation and the Rights of Victims*, International problems, Belgrade, 2011, p. 537-539.
- [11] Jovašević D, *International criminal crime – responsibility and culpability*, Niš, 2010.
- [12] Kreća M., *International Public Law*, Faculty of Law, Belgrade, 2014
- [13] Krivokapić B, *A Somewhat Different View of International Criminal Courts*, Hague Tribunal Between Law and Politics, Institute of Comparative Law, Belgrade 2013.
- [14] Law on Application of the Statute of the International Criminal Court and Prosecution of Crimes Against International Humanitarian Law, Official Gazette, RC 175/03, 29/04, 55/11, 125/11.
- [15] Law on Cooperation with the International Criminal Court, Official Gazette, RS 72/09.
- [16] Majić M, *Basic characteristics of the ICC Statute*, Bulletin of the District Court in Belgrade no.54, Beograd 2001, p. 5-13.
- [17] Milinković B, *Previous practice of the Hague Tribunal*, International politics no.1048, Belgrade, 1996, p.12-15.
- [18] Nikač Ž, Božić V, *Combating criminal acts of illegal migration in the area of the region with particular reference to the Republic of Croatia and the Republic of Serbia*, Legal word, Journal for Legal Theory and Practice Banja Luka 2016, p.193-219.
- [19] Nikač Ž, Božić V: *International Cooperation of Southeast Europe in the fight against crime*, Львівський державний університет внутрішніх справ, Ukraina, Lviv, International scientific conference “Theory and Practice of Law Enforcement Activities,” Conference Proceedings, Lviv, 2016, p.431-443.
- [20] Nikač Ž, Simić B, *The International Criminal Tribunal for the former Yugoslavia and the Republic of Serbia - cooperation in criminal prosecution of war crimes*, Archibald Reiss Days, Vol.2. Academy of Criminalistic and Police studies, Belgrade 2015, p.285-294.
- [21] Nikač Ž, *International police cooperation*, KPA, Belgrade, 2015, p.253-255.
- [22] Petronijević G, *Lack of principles in the application of legal standards in the work of the ICTY*, Hague Tribunal between law and politics, Conference Proceedings, Institute of Comparative Law, Belgrade 2013, p.138-150.
- [23] Račić O, *One view of the permanent International Criminal Court*, International Politics, Belgrade, 1072/1998.
- [24] Raičević N, *Subject matter of jurisdiction of the International Criminal Court*, Foreign legal life, Belgrade, no 1–2/2005, p. 317–326.
- [25] Rakić-Vodinić V, *Overview of Rules of Procedure and Evidence of the International Tribunal for the prosecution of persons presumed to have been responsible for serious violations of IHL committed on the territory of ex YU since 1991, ICTY for ex YU: characteristics and procedures*, Proceedings, Belgrade 1996, p. 103–152.
- [26] Rome Statute of the International Criminal Court, Art.5-9. Available at: <https://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE94757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf>, (01/04/2017).
- [27] SC Res 935, UNSCOR, 49th Sess, 3400th mtg 1, UN Doc.S/RES/935(1994); 935 (1994), UNSCOR, UN Doc. S/1994/1125(1994); 935 (1994) and Annex, UNSCOR, UN Doc.S/1994/1405(1994).
- [28] SC Resolution.no.827 (25/05/1993) GA UN.
- [29] Simović M, *International Criminal Justice: origin and historical evolution*, Yearbook of Faculty of Law, Banja Luka 2014.
- [30] Szrentić N, Stajić A, Lazarević Lj, *Criminal Law-General Part*, Modern administration, Belgrade, 1997.