

The trial of International Crimes from the Practice of the Court of Bosnia and Herzegovina

Review

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Emina KARO¹, Ebrar İBRAİMİ²

¹Department of Political Science, Faculty of Law, International Vizyon University, Gostivar, RNM

²Department of Political Science, Faculty of Law, University of Tetova, RNM

**Corresponding Author e-mail: emina.karo@vizyon.edu.mk*

Abstract

During the disintegration of the former Yugoslavia, thousands people died and millions were forced to leave of Bosnia and Herzegovina.

On behalf of the international community, a high representative office was set up to monitor the civil parties of the Convention and the high representative was appointed by the United Nations Security Council. According with this, in Sarajevo established a State Court of Bosnia and Herzegovina for war crimes as a local institution with international components. Prosecution Office was established also. These organs are specialized for trials and judgement for international crimes such as genocide, war crimes, crimes against humanity etc.

This study analysed establishment of State Court of Bosnia and Herzegovina, procedure and judgement of international crimes. Some of the court decisions due to international crimes will be considered.

Keywords: International Criminal Law, International Crimes, Court Decisions, The State Court of Bosnia and Herzegovina

1. Introduction

Throughout history, people have witnessed by a lot of wars and acts of violence, and have lost their lives. Unfortunately, this is not past, still continuous. The painful experience of Bosnia Herzegovina it is useful to consider as a lesson and to evaluate it as an example. Because of that it can be said that Bosnia and Herzegovina has come a long way to prosecute the international crimes as a small and relatively weak country. Currently, the trial of Bosnia and Herzegovina is working simultaneously with the International Criminal Tribunal for the former Yugoslavia. Bosnia and Herzegovina has the experience of filing a lawsuit against Serbia as a state of genocide; In other words, an attempt was made not only to the individuals but also to the states to be held responsible for the crime of genocide. However, this issue has not been successful.

International criminal law is a subset of public international law, and is the main subject of these materials. While international law typically concerns inter-state relations, international criminal law concerns individuals. In particular, international criminal law places responsibility on

individual persons not states or organisations and proscribes and punishes acts that are defined as crimes by international law.¹

International criminal law is a relatively new branch of international law. It is relatively new; because the list of actions considered international offenses has emerged over time and the rules of international criminal procedure are scarce and they belong only to the courts or criminal courts to which they are applied.

Moreover, the international criminal law is not fully developed, so the elements of international crime (material element or actus reus and spiritual element or mens rea) are not very clear and the penalties to be imposed are not clear. International criminal courts return to the general principles of law in order to interpret rules that are not very clear and to fill in legal gaps.

In addition to the responsibility of states in international law, it is one of the main objectives of international criminal law to ensure that individuals can be held criminally liable and punished for international crimes or international courts. However, it can be said that the implementation of the responsibility of individuals in the international arena is quite new.

Regardless of how these courts are evaluated, it is a fact that in terms of international criminal law, these courts have an important place in terms of international crime acceptance and the registration of criminal responsibilities of individuals by an internationally qualified criminal judiciary and establishment of a permanent international criminal court.²

For successful implementation of international criminal law condition is achieving and prosecute offenders with appropriate sanctions for international crimes such as genocide crime, crimes against humanity, war crimes.

In other respect, as in all international crimes, the international community is protected as a whole. Indeed, these crimes endangers the continuation of the existence of human beings as an act based on the destruction of groups of people. Moreover, as it aims to eliminate a particular group, it also destroys the contributions of the mass to humanity, and has lost civilization as a whole. On the other hand, these crimes threatens international peace and security.³

2. The Trial of International Crimes During the History

The International Criminal Courts were established not only for the individual responsivity, but also to judge the crimes of international law, such as racial discrimination, genocide, and ban on slavery, which were detrimental to the peace and trust of the society and which were important for the protection of human existence.⁴

After Second World War establishing of Nürmberg and Tokyo International Military Tribunals is started punishing of international crimes which is most important step of being a real court from a theoretical decision-making.

¹ What is International Criminal Law? *Part of the OSCE-ODIHR/ICTY/UNICRI Project "Supporting the Transfer of Knowledge and Materials of War Crimes Cases from the ICTY to National Jurisdictions"* Developed by International Criminal Law Services

² Yusuf Aksar, *Uluslararası Ceza Mahkemesi ve Uluslararası Ceza Usul Hukuku*, Birinci Baskı, Seçkin Publishing, Ankara 2003, p. 18-19.

³ Tezcan, Erdem, Önok, 5237 Sayılı Türk Ceza Kanuna Göre Teorik ve Pratik Ceza Özel Hukuku, Seçkin Publishing, Ankara, 2006, p. 65-66.

⁴ Cryer, Friman, Robinson, Wilmschurst, *An Introduction to International Criminal Law and Procedure*, Fourth Edition, Cambridge Press 2009. p.353.

International criminal justice is generally perceived as a justice that is distributed by international courts. This widespread opinion has some positive aspects: the activities of international courts - Nürmberg, La Haye, Arusha - have established strong rules on the individual criminal responsibility of international crimes such as genocide, crimes against humanity and war crimes. Moreover, the international tribunal has become a natural area where crimes against the international legal order are threatened by threatening peace, security and welfare of the world.⁵

The fact that international criminal courts are temporary makes them disadvantaged in relation to their legal resources. The problem of the Nürmberg Court is that he / she makes a trial after the incident. The same is true for further courts. Their status is backward and refers to laws that exist under international law, rather than as a law.⁶

Events in the nineties caused that the United Nations in Europe and Africa felt the need to establish international courts. The International Criminal Court for the former Yugoslavia was established in 1993 and the International Criminal Tribunal for Rwanda was established a year later.

The Yugoslavian and Rwandan Courts are actually united in the body, sharing not only fundamentally similar statuses, but also some institutions. The Prosecutor of both courts and the Appeal Chambers were the same.⁷

International criminal courts need to make decisions based on coercive legal arguments. Applying the general principles of law is an effective way to strengthen legal causality.⁸

International Criminal Court established for the former Yugoslavia in the Balkan region, was potential for global trial of international community for decide to establish an International Criminal Court.⁹

The first conviction for genocide by an international court was given on 2 September 1998 by International Criminal Court for Rwanda for the former mayor of Rwanda, Jean Paul Akayesu. On August 2, 2001, a person was first convicted of genocide crime by International Criminal Court for Former Yugoslavia pwas Radislav Krstich in 1995 for genocide in Srebrenica.¹⁰

In recent years, the criminal investigation of serious human rights abuses has taken an international appearance and many states have established courts of hybrid status. By court of hybrid status, we mean the courts, where both domestic and foreign judges and prosecutors are involved, arising from national and international law. As a result of bilateral agreements with states with the UN, protection courts are established by the UN or by occupation law where the UN intervenes.¹¹

Some of these hybrid courts are: The Special Court of Sierra Leone, the Special Court for East Timor, the Special Court of Cambodia, the Court of Bosnia and Herzegovina, the Special Tribunal for Lebanon etc. The international character of these courts is in line with the United Nations and is supported by the election of judges and prosecutors from their legal basis.¹²

⁵ Florian Jessberger, *International v. National Prosecution of International Crimes*, The Oxford Companion to International Criminal Justice, ed. Antonio Cassese, 1.bs., Oxford University Press, 2009, p. 208.

⁶ Alexander Zahar, Göran Sluiter, *International Criminal Law, A Critical Introduction*, Oxford University Press, 2008, p. 80.

⁷ William A. Shabas, *Uluslararası Ceza Mahkemesine Giriş, Çeviren: Gülay Arslan*, Cambridge University Press, 2006, p. 27.

⁸ Fabian O. Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals*, Leiden, Boston, Martinus Nijhoff Publishers, 2008. p. 74.

⁹ M. Cherif Bassiouni, *International Criminal Law, Third Edition, Vol:3*, Martinus Nijhoff Publishers, 2008. p. 101.

¹⁰ Cryer, Friman, Robinson, Wilmshurst, *ibid.* p. 167.

¹¹ Nimet Güller, Hamide Zafer, *Uluslararası Ceza Mahkemesi, El kitabı*, Gustav – Stresemann - Institut, 2006, p. 15.

¹² Florian Jessberger, “*International v. National Prosecution of International Crimes*”, The Oxford Companion to International Criminal Justice, ed. Antonio Cassese, 1.bs., Oxford University Press, 2009, s.210.

It was emphasized that the most severe crimes of the international community should not be impunity and that these crimes should be effectively prosecuted through international cooperation in order to take effective measures in the national sphere. For this purpose in 2002 year The International Criminal Court was established.¹³

3. The Trial of Court of Bosnia and Herzegovina

A historical question we can ask about war crimes in Bosnia and Herzegovina between 1992 and 1995 is whether or not the perpetrators will be tried. Because crimes are committed against both international law and humanitarian law. However, these people must be identified and investigated for the first time. The High Representative was established in 2000 with the support of the international community to carry out investigations.

Bosnia and Herzegovina's own decision and the High Representative Office, Bosnia and Herzegovina Court and Prosecutor's Office was established. Both of these institutions were effective not only in the prosecution of crimes, but also in the development of law in Bosnia and Herzegovina, in the advancement of legal science and in the development of court practices. Both institutions were established as a separate section for war crimes. In these chapters, the proceedings are conducted according to both the Bosnia and Herzegovina Penal Code and the International Conventions - signed and adapted by Bosnia and Herzegovina. The Prosecutor's Office and the Court are charged with the crime of genocide as well as war crimes.

In March 2005, the war crimes tribunal began to implement the same practices as the rulers of Bosnia and Herzegovina adopted similar legal practices.¹⁴

The Court deals with national laws, including the new penal code and legislation set by the Office of the High Representative, and deals with the most serious crimes related to the war in Bosnia. Other offenses are tried in regional or state courts. It defines, inter alia, criminal law, genocide, crimes against humanity and war crimes; It regulates general criminal law principles such as the responsibility of giving orders and provides a wide range of criminal proceedings.¹⁵

Today, the Court of Bosnia and Herzegovina deals with the serious cases such as war crimes, economic crimes, corruption etc.¹⁶

In addition to the successful handling of many cases, prosecutors at the BiH Prosecutor's Office, who had previously applied to the war crimes tribunal, also played an important role in the preliminary assessment of cases to be held in state and regional courts. It is hoped that these new developments will lead to more successful cases and to ensure the prosecution of war crimes, which are crime in both regions under international law.¹⁷

The Criminal Court and the Prosecutor's Office in Bosnia and Herzegovina have a special section on war crimes. In the war crimes section of the Prosecutor's Office in Bosnia and Herzegovina, those charged with war crimes and crimes against international law are being tried under section

¹³ Albin Eser, "Uluslararası Ceza Mahkemesinin Kurulması", Uluslararası Ceza Divanı, ed. Feridun Yenisey, 1.bs. Arıkan Basım, İstanbul 2007, p.3.

¹⁴ "Justice for Atrocity Crimes, Lessons of International Support for Trials before the State Court of Bosnia and Herzegovina", Human Rights Watch, 2012, p.1.

¹⁵ Court of Bosnia and Herzegovina, Online: <http://www.sudbih.gov.ba/?opcija=sadrzaj&kat=7&id=15&jezik=e>, (Erişim Tarihi: 18.11.2018).

¹⁶ Cryer, Friman, Robinson, Wilmshurst, ibid. p.159-160.

¹⁷ "Still Waiting Bringing Justice for War Crimes, Crimes against Humanity, and Genocide in Bosnia and Herzegovina's Cantonal and District Courts", No: 1-56432-341-2, Human Rights Watch, July 2008, p. 2.

17 of the Criminal Code of Bosnia and Herzegovina. The office of the Prosecutor's Office of Bosnia and Herzegovina was authorized to initiate the proceedings in the territory of Bosnia and Herzegovina during the 1992-1995 period.

Bosnia and Herzegovina has perhaps the most layered and mixed regulations for conducting cases against the severe violation of international humanitarian law.¹⁸ Although ICTY has a priority on war crimes, its jurisdiction is not only its own, but simultaneously. This means opening up war crimes cases in Bosnia and Herzegovina both during and after the war. This has brought a number of problems. First, there is insufficient coordination between the domestic courts and the ICTY in the proceedings of the case files filed on war crimes.

Secondly, local cases were perceived to be the lightest expression and the minimum fair trial standards, as the most severe expression of political and ethnic revenge. Both of these factors gave rise to the Rules of the Road and procedure, ie the 1996 Rome Treaty, which created ICTY's mechanism of reassessment of cases undertaken by the authorities in Bosnia and Herzegovina.

According to the Criminal Code of Bosnia and Herzegovina, in assessing the conditions of war crimes, the Bosnia and Herzegovina Court adopted that it was not necessary for the perpetrator to know or intend to violate an international norm. It is sufficient to prove that his / her behavior is objectively violating international law. This is in accordance with the Criminal Code of the Socialist Federal Republic of Yugoslavia: It is not necessary that the offender violates international law. Violation of international law is an objective requirement for punishment as a war crime.

However, when evaluating the processing of certain individual criminal acts, it is necessary to evaluate the perpetrator's particular knowledge of these specific criminal acts and his / her intention towards them. The Court of Bosnia and Herzegovina has always considered Common Article 3 irrespective of the form of armed conflict, as always a part of the customary law which made all parties binding. Moreover, international crimes are regulated in section 17 of the Criminal Code of Bosnia and Herzegovina. This section is called crimes against humanity and crimes committed against internationally protected groups.¹⁹

According with statistic on judgements of the Court of Bosnia and Herzegovina for the period of 2004 – 2017 for Department of International Crimes the first – instance judgements number is 202. Number of final judgements is 180. 205 persons are sentenced by a final judgment with a total of 2609 years of imprisonment. 78 persons are acquitted by a final judgement, 190 second- instance judgements and 10 third instance judgment been finished.²⁰

¹⁸ Delivering Justice in Bosnia and Herzegovina: An Overview of War Crimes Processing from 2005 to 2010", OSCE Mission to Bosnia and Herzegovina, May 2011, p. 11.

¹⁹ Petrovic, Borislav, Jovasevic, Dragan, *Medjunarodno Krivichno Pravo*, Pravni fakultet Univerziteta u Sarajevu, Sarajevo, 2010, p. 226.

²⁰ Statistic on judgements of the Court of Bosnia and Herzegovina for the period of 2004 – 2017, Online <http://www.sudbih.gov.ba/stranica/102/pregled> Date Accessed: 2 December 2018.

4. Conclusion

It's possible to say that the international criminal courts have a very important contribution to the implementation of the international criminal law, because the international penal laws can be applied in practice through these courts. We have tried to give a general idea about these courts with the International Criminal Courts which we have given an example. As can be seen, not only in these courts is the crime of genocide but also all other war crimes that are contrary to humanitarian law as well.

The courts established on the basis of international law have taken a pioneering role in the detection and punishment of the crime of genocide and have initiated the process for the prosecution of those involved in the crime of genocide as discussed in the theory.

However, despite these positive contributions, these courts also appear when some judicial processes in which there are some shortcomings in the trial and punishment that they have some problems. The fact that the penalties were light when compared with the crime, the heavy proceedings of the judicial process and the difficulties of capturing the perpetrators were the most important problem areas in these courts.

The murder is the rejection of the right of individuals to exist as well as the denial of the right of the human groups to exist. The rejection of such a right will blow the conscience of all humanity. The failure to prevent these crimes, which threatens humanity, results in great losses on the basis of cultural and other influences and is contrary to the moral principles, nature and objectives of the United Nations. The prevention and punishment of the international crimes crime must be a principle recognized and respected by all civil states.

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