COMBATING GENOCIDE AT THE LEVEL OF INTERNATIONAL CRIMINAL TRIBUNALS

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Currently, conviction of persons guilty of committing genocide is carried out not only by the courts of the states themselves and the International Court of Justice, but also within the framework of international ad hoc tribunals, as well as in the International Criminal Court. In this regard, it is relevant not only to tighten criminal prosecution for committing genocide within the framework of international procedures, but also to eradicate shortcomings in the activities of international criminal courts in order to ensure the inevitability of criminal punishment for persons who have committed serious international crimes. The article examines in detail the issues of the establishment and activities of special international tribunals, as well as the problems of criminal prosecution in the International Criminal Court - a permanent international criminal court with jurisdiction over the crime of aggression, war crimes, crimes against humanity and genocide. It is especially noted that the International Criminal Court can accept a crime for consideration only if the state on whose territory the crime was committed or of which the criminal is a citizen is unwilling or actually unable to carry out an investigation and bring charges.

Keywords: genocide, court, justice, crime, prosecution, punishment, jurisdiction.

Nowadays, certain shortcomings in the prosecution of genocide in national courts and the International Court of Justice raise the question of the feasibility of utilizing the potential of international criminal tribunals. In this regard, the establishment and operation of ad hoc international tribunals should be examined in detail.

Given the geopolitical interests of major powers, the establishment of ad hoc courts creates additional opportunities for them to exert political pressure on the new authorities of countries where genocide was committed, particularly against the leaders of these states seeking to pursue independent policies. Thus, in May 1993, the UN Security Council established the International Tribunal for the Former Yugoslavia in response to mass atrocities committed in Croatia and Bosnia and Herzegovina. The International Tribunal for the Former Yugoslavia was the first war crimes court established by the UN and the first international war crimes tribunal since the Nuremberg and Tokyo Tribunals.

The primary goal of the International Tribunal for the Former Yugoslavia was to bring to justice those responsible for the grave international crimes enumerated in its Statute. By bringing those responsible to justice, the International Tribunal for the Former Yugoslavia sought to prevent future crimes and bring justice to thousands of victims and their families, thereby contributing to lasting peace in the region.

Located in The Hague, the International Tribunal for the Former Yugoslavia indicted more than 160 individuals. Among the indicted were heads of state, prime ministers, chiefs of staff of the army, ministers of the interior, and many other high- and mid-level political, military, and police leaders from various parties to the Yugoslav conflict. Its indictments covered crimes committed between 1991 and 2001 against members of various ethnic groups in the

territory of the former Yugoslavia. The International Tribunal for the Former Yugoslavia fundamentally changed the architecture of international humanitarian law. Although the Tribunal handled the majority of cases against Serbs and Bosnian Serbs, it also convicted Croats, Bosnian Muslims, and Kosovo Albanians for crimes against Serbs. These decisions demonstrate that all parties to the conflict committed crimes; the Tribunal did not take sides in the conflict or attempt to create a balance between the various groups. The judges sought to ensure fair and open trials, evaluating the evidence to determine the guilt or innocence of the accused.

Since 2003, the Tribunal has worked closely with local judicial authorities in the former Yugoslavia. The Tribunal's work has had a significant impact on the states of the former Yugoslavia, punishing several high-ranking individuals. The Tribunal has made a significant contribution to ending impunity and promoting reconciliation. In total, since the adoption of the 1948 Genocide Convention, three international criminal tribunals with jurisdiction over the crime of genocide have been established: the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and the International Criminal Court.

It is worth considering the international community's practice of establishing hybrid courts to fully characterize the nature of the criminal tribunals listed above. Although hybrid courts, i.e., by their nature, mixed criminal tribunals (e.g., the Special Court for Sierra Leone, the Special Tribunal for Lebanon, etc.), were also established by the UN, they were not granted jurisdiction over the crime of genocide.

When drafting the 1948 Genocide Convention, the authors likely assumed that such a court would be established by treaty. The above reasoning also applies to the International Criminal Tribunal for Rwanda. Since both of these tribunals were appointed by the Security Council, states cannot claim that they do not "recognize" their jurisdiction. Thus, Serbia has "accepted" the jurisdiction of the International Criminal Tribunal for the former Yugoslavia since at least 1995, due to the Dayton Agreement that ended the war.

As for the treaty-based International Criminal Court, its connection to Article VI of the 1948 Genocide Convention is undisputed. Modeled on Articles II and III of the Genocide Convention, the Statute of the International Criminal Tribunal for the former Yugoslavia and the Statute of the International Criminal Tribunal for Rwanda established the jurisdiction of these tribunals over genocide itself, as well as "other acts", i.e., conspiracy, attempt, direct and public incitement, and complicity. The UN Security Council resolution establishing the International Tribunal for Rwanda references genocide several times, and the term itself is incorporated into the institution's official title: "International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law". The International Tribunal for Rwanda was essentially a genocide tribunal, and its proceedings focused almost exclusively on the genocide that occurred from April to July 1994.

The International Criminal Tribunal for the Former Yugoslavia stands in stark contrast to the International Criminal Tribunal for Rwanda, in that it has brought charges of genocide in relatively few cases [2]. There has been only one conviction for genocide, although it was overturned on appeal.

The Security Council resolution makes no mention of the establishment of a tribunal for the former Yugoslavia, or on its behalf, unlike the Rwanda tribunal. However, the Appeals Chamber confirmed that acts of genocide were committed in Srebrenica, Bosnia and Herzegovina, in mid-July 1995 [3].

The senior Bosnian Serb military officer at the time of the Srebrenica massacre, General Radislav Krstić, was found guilty of aiding and abetting genocide but acquitted of committing the crime itself. All other genocide prosecutions also resulted in acquittals.

The prosecutor of the International Criminal Tribunal for the former Yugoslavia's caution regarding genocide charges became clear in the very first case to reach trial. After Duško Tadić was arrested in Germany, national courts began proceedings against him for aiding and abetting genocide, as well as torture, murder, and grievous physical harm [4, p. 97].

Although Tadić was only a minor participant in serious international crimes in Bosnia, the International Tribunal accepted the case,

preempting the German courts. However, the prosecutor later limited his indictment to war crimes and crimes against humanity, dropping the genocide charge due to a lack of concrete evidence.

It should be noted that prosecutors at criminal tribunals also exert significant influence on the final verdict in genocide cases. For example, in the case of a Serbian leader, genocide charges for crimes committed in Bosnia were dropped by the prosecutor's office as part of a plea agreement. In at least one case, the acquittal of a Bosnian Serb for genocide was not appealed, confirming the existence of significant disagreements within the Prosecutor's Office.

Slobodan Milošević himself, who headed the Yugoslav government in Belgrade during the Balkan Wars in the 1990s, was charged with genocide only in connection with the conflict in Bosnia and Herzegovina. The Kosovo indictment filed in early 1999 did not contain charges of genocide, nor did a subsequent indictment filed in October 2001 for acts in Croatia in late 1991. In November 2001, Milosevic was finally charged with genocide in connection with the war in Bosnia and Herzegovina, which he allegedly led as part of a "joint criminal enterprise" with Bosnian Serb military and civilian leaders. The Trial Chamber then refused to dismiss the genocide charge on the grounds that "there existed beyond reasonable doubt a criminal enterprise, which included members of the Bosnian Serb leadership, whose purpose was the destruction of a portion of the Bosnian Muslim population". However, based on the Tribunal's findings in other genocide cases, it seems unlikely that Milosevic could have been convicted of genocide.

Unlike the International Criminal Tribunal for Rwanda, where the prosecution was primarily based on the crime of genocide, the International Criminal Tribunal for the Former Yugoslavia focused primarily on sentencing for other serious international crimes.

Regarding the work of the International Criminal Court, it is the first permanent international criminal court whose mandate is not limited to a specific situation, but has global scope, with jurisdiction over the crime of aggression, war crimes, crimes against humanity, and genocide. Currently, the Rome Statute of the International Criminal Court has been ratified by 124 States Parties and acts as a court of last resort, intervening only when national authorities fail to conduct genuine investigations and, where necessary, prosecutions. The Court enshrines a broader system of justice for serious international crimes, based on the national courts of its member states.

The International Criminal Court may only consider a crime if the State in whose territory the crime was committed, or of which the perpetrator is a national, is unwilling or effectively unable to investigate and bring charges. Following the issuance of the famous "Arrest Warrant of 11 April 2000" (Democratic Republic of the Congo v. Belgium) by the International Court of Justice, which formulated the principled approach that "immunities enjoyed under international law by senior State officials shall not constitute an obstacle to their criminal prosecution", and the initiation of criminal proceedings against Sudanese President Al-Bashir in the International Criminal Court in 2009, the issue of holding heads of state who have not ratified its Statute accountable for serious international crimes has become more realistic. Therefore, in February 2003, fighting broke out in Sudan between Darfur rebel groups and the government, during which the government armed and supported the Janjaweed militia, who committed mass ethnic cleansing against rebel tribes. By November 2004, tens of thousands of people had been killed, approximately 1.65 million people were internally displaced, and another 200,000 people were forced to flee the country. Acting under Chapter VII of the UN Charter, the Security Council adopted Resolution 1593 on 31 March 2005, referring the situation in Darfur to the International Criminal Court, and in paragraph 2 of the Resolution, it stated that the Government of Sudan should "cooperate fully and provide all necessary assistance to the Court and the Prosecutor". This Security Council resolution was hailed at the time as a major achievement for the International Criminal Court, allowing for the investigation and prosecution of crimes committed during a major humanitarian crisis that would otherwise have been beyond the Court's jurisdiction, as Sudan was not a state party to the Rome Statute. During the debate, the United States called

the crimes in Darfur "genocide", but was categorically opposed to the ICC and sought the creation of an ad hoc international or hybrid criminal tribunal to prosecute violations.

This case also demonstrated the lack of willingness on the part of a number of states to actively cooperate with the International Criminal Court - in practice, they showed no intention of implementing the Statute's provisions. Sudanese President Al-Bashir made official visits to several countries, including Kenya (2010), China (2011), Libya, and Egypt (2012). However, these countries took no steps to detain him and bring him to trial, despite being UN members, and Kenya is not even a member of the International Criminal Court.

Despite the ICC's best efforts, Jordan's failure to extradite Al-Bashir prevented the court from completing its investigation of him. In its judgment of May 6, 2019, rendered pursuant to Article 87(7) of the Rome Statute, in the case of Prosecutor v. Omar Hassan Ahmad Al-Bashir, the Appeals Chamber of the International Criminal Court found that the Hashemite Kingdom of Jordan had failed to comply with its obligations under the Statute by failing to comply with the Court's request for the arrest and extradition of Omar Hassan Ahmad Al-Bashir while he was in Jordanian territory. The Appeals Chamber noted that "both Jordan and Sudan are parties to the Genocide Convention, Article I of which provides that contracting parties 'undertake to prevent and punish' the crime of genocide. The Appeals Chamber noted that Al-Bashir is presumptively responsible for the crime of genocide". Thus, Jordan was obligated to cooperate in the arrest and extradition of Al-Bashir at the Court's request not only as a state party to the Rome Statute but also by virtue of its status as a party to the Convention against Genocide [5].

However, even after this decision, Al-Bashir was not extradited to the Court by Jordan.

Thus, the issuance of an arrest warrant for the head of state was made possible by the ICC's officially stated position in the Al-Bashir case that heads of state do not have immunity from prosecution. Thus, the Appeals Chamber determined that Article 27 of the Rome Statute had undergone a "transformation" and no longer functions as a treaty norm, but as a customary norm of international law, and therefore extends to states that are not parties to the Rome Statute [1].

Regarding this approach by the International Criminal Court, a number of international law experts note that, in interstate relations, a head of state enjoys personal immunity, preventing them from being arrested by another state. However, the ICC's stated position is also based on the decisions of other courts, particularly the case of former Liberian President Charles Taylor, who was tried by the Special Court for Sierra Leone. This position is that international courts are not state organs; they act on behalf of the international community, and immunity does not apply.

Opponents of this transformation in the ICC's operations argue that it violates the principle of complementarily established by Article 17 of the Rome Statute, according to which it exercises its jurisdiction in exceptional circumstances, in addition to the activities of national courts.

Finally, another serious basis for criticism of the ICC is the imbalance between the actual results of its activities and its enormous expenditures.

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