

INTERNATIONAL PROSECUTION OF MACRO-CRIMES COMMITTED DURING THE THIRD ARTSAKH WAR*

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This article articulates the possible legal paths open to international criminal law in order to activate the prosecution of macro-crimes committed during the Third Artsakh War. Neither the Republic of Armenia nor Republic of Azerbaijan nor the Republic of Artsakh is not a member of the Rome Statute of the International Criminal Court (ICC). This makes it difficult to initiate the prosecution of war crimes on an international level. The following article highlights the difficulties and alternatives in overcoming the legal obstacles for activating international criminal prosecution, by waging and comparing the possible instruments. The legal comparison and the historical overview allow considering three different levels for the prosecution of international crimes committed during the Third Artsakh War, where national prosecution based on universal jurisdiction seems to be the most efficient tool.

Keywords: *war crimes, International Criminal Court, crimes against humanity, Nuremberg Principles, Artsakh War, forced displacement, torture, mutilation, inhuman treatment, Azerbaijan, Republic of Artsakh, situation in the State of Palestine, Cook Islands, universal jurisdiction.*

Introduction

During the Third Artsakh War in 2020 – or the Forty-Four-Day War as it was also known - numerous atrocities were committed by the members of the armed forces of the Republic of Azerbaijan, including extrajudicial killings, executions, torture, inhuman treatment, the bombing of cities and the forced displacement of the civilian population of the Republic of Artsakh. So far, however, the international community has not responded to the international crimes committed by members of the armed forces of the Republic of Azerbaijan. This article illustrates the legal opportunities of activating international criminal justice. There are, in general, three possible ways of mobilizing international criminal justice.

The first refers to the International Criminal Court (ICC). Neither the Republic of Armenia nor the Republic of Artsakh is a member of the Rome Statute. That hinders the Court from commencing a preliminary examination. However, there is a precedent with regards to Palestine which activated the international criminal justice for the situation there. The second level is the establishment of a hybrid or specialized international institution for the investigation of crimes in the Republic of Artsakh. The practice of having internationalised institutions for the international conflicts is a common international

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heritage, such as the Extraordinary Chambers in the Courts of Cambodia (ECCC), the Special Tribunal for Lebanon (STL), the Special Court for Sierra Leone (SCSL) and the Kosovo Specialist Chambers KSC, etc.

The third level is the use of the instrument of universal jurisdiction. The states that apply universal jurisdiction to international crimes under the Rome Statute are also first obliged to take steps to punish macro-criminals. Since 2014/15 states such as Spain, Germany, the Netherlands, the United Kingdom and Sweden have actively been applying universal jurisdiction to international crimes.

Historical Overview

Since World War I, the international community has sought ways to punish those most responsible for atrocities committed. The trials in Leipzig and Istanbul are considered the first internationalized attempt at criminal justice against war criminals (Akcam and Dadrian, 78). Although Kaiser Wilhelm II managed to avoid criminal prosecution, Article 227 of the Treaty of Versailles explicitly mentioned the requirement of individual criminal prosecution for a supreme offence against international morality and the sanctity of treaties (Schabas, The Trial of the Kaiser 10). After World War II, the international community reaffirmed the need for international prosecution for international crimes, this time successfully. The Nuremberg and Tokyo trials (Crowe 31) raised awareness of the prosecution of war criminals, but later, during the Cold War, the need for a permanent international court was forgotten due to the political atmosphere, and only after the armed conflict in former Yugoslavia and the genocide in Rwanda did the international community begin with the establishment of the International Criminal Court. On 17 July 1998, the Rome Statute of the International Criminal Court was signed and on 1 July 2002 the Court began operating. 123 countries are currently State Parties to the Rome Statute.

However, neither the Republic of Armenia nor the Republic of Artsakh is a State Party to the Rome Statute. The Republic of Armenia has signed the Rome Statute, but the Constitutional Court of the Republic of Armenia ruled in 2004 that the principle of complementarity derived from Article 17 of the Rome Statute and the amnesty provisions under Article 105 of the Rome Statute do not comply with the Constitution of the Republic of Armenia from 1995 (ՍՂՈ-502; Մարզարյան 267). Therefore, for technical reasons, the Republic of Armenia has not ratified the Rome Statute. However, since then the constitution of the Republic of Armenia has been amended twice.

Although the ICC is a permanent institution for the prosecution of international crimes such as genocide, crimes against humanity, war crimes and crimes of aggression, it does not have a universal but a treaty-based jurisdiction. As a result, the international community continues¹ to consider the establishment of internationalized or specialized institutions such as the Extraordinary Chambers in the Courts of Cambodia (ECCC), the Special Tribunal for Lebanon (STL), the Special Court for Sierra Leone (SCSL) and the Kosovo Specialist Chambers KSC). At the same time, the State Parties to the Rome Statute are also obliged, in accordance with the principle of complementarity, to take their own steps to prosecute international crimes at the domestic level.

International Criminal Court and the Republic of Artsakh

The jurisdiction of the ICC is based upon the four core offenses of genocide, crimes against humanity, war crimes and, since 2018, the crime of aggression. In order to initiate proceedings before the ICC, the prerequisites of jurisdiction pursuant to Art. 5

¹ Bearing in mind the experience with the International Criminal Tribunal for the former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR).

(material jurisdiction), Art. 11 (temporal jurisdiction) and Art. 12 (territorial jurisdiction) of the Rome Statute, the trigger mechanisms within the meaning of Art. 13 of the Rome Statute and the admissibility in accordance with Art. 17 of the Rome Statute, must be met. The State Parties agreed in Rome that international criminal proceedings at the ICC should only be initiated in three cases (Պետրոսյան 232): by the Member States, by the UN Security Council, by transferring a situation to the ICC for investigation (de Wet 35) and the prosecutor can initiate an investigation on their own initiative if the prerequisites are met. For this, the bases of Art. 15 of the Rome Statute must be met (Olasolo 124).

As the Republic of Artsakh is not a State Party to the Rome Statute, the Court lacks the requisite jurisdiction to initiate proceedings. One possibility of activating the ICC in the case of Artsakh would be a referral by the UN Security Council, similarly to what was done in the Libya (S/RES/1970) and Sudan (S/RES/1593) situations. This path is not foreseeable in the near future, given Russia's active presence and the OSCE Minsk Group's mandate in the region.

The second legal path is a self-referral by the Republic of Artsakh in accordance with Art. 12(3) of the Rome Statute.

“If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.”

The ICC already has a practice of self-referrals from non-member States, such as Ukraine, Côte D'Ivoire and Palestine. The core issue here is the problem over the non-recognised status of the Republic of Artsakh. It is a fact that the elements of statehood, also known as the Jelinek elements, (Jelinek 381) such as territory (*Staatsgebiet*), people (*Staatsvolk*) and state power (*Staatsgewalt*) are met in case of Republic of Artsakh. It is doubtful, however, whether the recognition from the other states is required for it to be classified as a “state” within Article 12(3) of the Rome Statute. The Cook Islands, which is a self-governing island country, is not a recognised state and is under the responsibility of New Zealand. However, the Cook Islands is a State Party to the Rome Statute (C.N.57.2015.TREATIES-XVIII.10). The same provision relates to the International Court of Justice (ICJ), where a non-member state to the UN has the possibility to become a party to the ICJ. This, at the same time, means that membership to the Court does not grant the state international recognition (Schabas, Opinion in Accordance with Article 103 of the Rules of Procedure and Evidence §§5-8).

At the request of Palestine, the Prosecutor of the ICC initiated a preliminary examination into the investigations in Palestine in 2015 (Statement of ICC Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination of the Situation in Palestine, and seeking a ruling on the scope of the Court's territorial jurisdiction, <https://www.icc-cpi.int/Pages/item.aspx?name=20191220-otp-statement-palestine>. Accessed 14.11.2021).

In late 2019, the Prosecutor came to the conclusion that the prerequisites for the investigation were met and requested on 22 January 2020 that the Chamber rule on Art. 19(3) of the Rome Statute (Situation in the State of Palestine, Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine, 22 January 2020). On 5 February 2021, the Pre-Trial Chamber assessed that it was not in a position to be able to determine the statehood of the state (*Situation in the State of Palestine*, Decision on the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine §§ 104-108), but found that the accession

procedure pursuant to Arts. 12(1), 125(3) and 126(2) of the Rome Statute of the Palestine to the Rome Statute is in consistence to the purpose of the Court of ending impunity by establishing individual criminal responsibility for crimes (Situation in the State of Palestine, Decision on the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine §§ 109-113; Loengarov; Gross). On 3 March 2021, the ICC Prosecutor started an investigation into the situation of the State of Palestine (Statement of ICC Prosecutor, Fatou Bensouda, respecting an investigation of the Situation in Palestine, <https://www.icc-cpi.int/Pages/item.aspx?name=210303-prosecutor-statement-investigation-palestine>. Accessed 14.11.2021).

Of course, the case of the Artsakh Republic cannot be compared with the case of Palestine solely because Palestine has observer status at the UN (A/RES/67/19) and enjoys more political and international acceptance than the Artsakh Republic. The self-referral of the Artsakh Republic, however, would create political activism at the international level and raise awareness of the international crimes committed during the Second War (the April War of 2016) and the Third War (the Forty-Four-Day War in 2020). Even if the Registrar of the ICC were to accept the self-referral, before starting any investigation the Prosecutor would have to examine, pursuant to the Art. 53(1) of the Rome Statute, (i) whether the information available to the Prosecutor provides sufficient grounds to believe that a crime under the jurisdiction of the Court has been or is being committed, (ii) whether the matter is, or would be, admissible under Art. 17 of the Rome Statute and (that there are no proceedings pending at domestic level), and (iii) whether there are substantial reasons to believe that conducting an investigation would not be in the interests of justice, taking into account the gravity of the crime and the interests of the victims (ICC, Policy Paper on Preliminary Examinations, 2013 8; ICC, Policy Paper on the Interests of Justice, 2007 2). As soon as the ICC Prosecutor is satisfied with the criteria, he/she may start with the investigations in the situation.

However, the first step in activating the ICC by filing a self-referral is tied to a number of political issues and diplomacy with the members of the Assembly of State Parties to accept such a self-referral. At this point, it should be pointed out that the activation of the international criminal justice system is about the individual criminal responsibility of the members of the armed forces who have committed international crimes. This is very different from the international state responsibility that stands before the European Court of Human Rights (ECtHR), for example. At the same time, it has to be taken into account that the ICC Prosecutor will investigate the conflict from all sides.

In view of the political reluctance to activate the ICC at this point in time, it is also important to examine other options for international criminal justice.

Special Tribunal for Artsakh

The establishment of special courts for international crimes is still a visible feature of international criminal justice. This is related to the various factors such as lack of jurisdiction of the ICC, a political decision to create an independent and flexible mechanism, etc. For example, in order to prosecute the former president of Chad, Hissène Habré, for crimes against humanity, the African Union demanded (HRW) that Senegal prosecute the former president, who had found asylum there, as the ICC did not have temporal jurisdiction over the case because the crimes were committed prior to 2001.¹ Thus Senegal created a specialized court in order to prefer charges against him (AU welcomes appeal outcome of the Hissene Habre case by the African Extraordinary Chambers, <https://au.int/en/pressreleases/20170502/au-welcomes-appeal-outcome-hissene-habre-case-african-extraordinary-chambers>. Accessed 14.11.2021). Similarly,

¹ The ICC does not have jurisdiction on the cases before 2001.

the Kosovo Chambers were set up on the basis of an agreement between the EU and Kosovo since the crimes were committed between 1998 and 2000.

With respect to different conflicts, other fact-finding and investigative mechanisms are put in place, however it seems that the establishment of a specialized unit or court or tribunal for the prosecution of international crimes depends on the political will of the states involved. It is not foreseeable that something similar will be established within the OSCE or between the conflicting parties in the near future.

Third States and Artsakh

The Member States of the Rome Statute are, under the provisions of the Statute, obliged to take action against macro-criminals. In accordance with the Nuremberg Trials' established principles, any person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment (Nuremberg Principles I). The fact that domestic law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law (Nuremberg Principle II). This means that regardless of the crime scene, the macro-criminal is liable to prosecution.

It is also known as universal jurisdiction (*Weltrechtsprinzip*) where the obligation to prosecute and to punish transnational (BGH 3 StR 372/00 - 21 February 2001) and international crimes¹ derives from the international treaty and customary law. The action of the state in order to prosecute and to punish those crimes is known as international obligation towards international community (*obligatio erga omnes*) (Bassiouni 34), otherwise, any inactivity on the part of the state and ignorance in prosecuting the criminals of "foreign matters" would lead to the breach of international obligation and, accordingly, to state responsibility pursuant to Art. 12 Draft Articles on Responsibility of States for Internationally Wrongful Acts (Draft Articles) (Petrossian, Saatenverantwortlichkeit für Völkermord 157-161). The fundamental question here is why this type of involvement by the so-called third state in punishing criminals, who are in no way related to that state, is necessary. The answer is tied to the core and protected interests of the offenses arising from the international treaty and customary law. The best historical example is piracy. Piracy is considered as an historical problem where the maritime-armed pirates steal, seize and hold cargo vessels, ships and their crews for ransom (Kraska 1-9). Piracy targets the economy and the trade system of the states and threatens not only the sovereignty of the states but also the well-being of the international community (Garrod 197; Cohen 214). Therefore, combatting piracy is everyone's task.² Art. 105 of the UN Convention on the Law of the Sea allows any state to take measures against the pirates and the courts of the state which carried out the seizure to decide upon the penalties to be imposed on the pirates. Similarly, based upon the international multilateral agreements, states agreed to combat certain offences on the principle of universal jurisdiction because those offences treat the fundamental values and interests of the international community (Hovell 443). If, in the event of transnational crimes, it is still disputed whether the principle of universal jurisdiction may apply or not (Ambos §6),³

¹ Such as crimes against humanity, genocide and war crimes.

² Cicero described the piracy as the enemy of all, "Nam pirata non est ex perduellium numero definitus, sed communis hostis omnium; cum hoc nec fides debet nec ius iurandum esse commune" in De Officiis.

³ International conventions on transnational crimes do not explicitly emphasize the universal jurisdiction; it is in margin of appreciation of the member state to adjust the plank from the aut dedere aut iudicare principle to universal jurisdiction, e.g. Article 31(3) Council of Europe Convention on Action against Trafficking in Human Beings 2005, Article 15(4) The United Nations

international crimes, especially peremptory norms (*jus cogens*), such as genocide, crimes against humanity, war crimes, slavery and torture are subject to universal jurisdiction because of their international nature (Cockayne et al 254). Recalling the Princeton Principles, universal jurisdiction is criminal jurisdiction based solely upon the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other nexus to the state exercising such jurisdiction (Petrossian, The Nine-Year Term of the New Prosecutor – a Test for International Criminal Justice?).¹

During the conflict in the former Yugoslavia, numerous perpetrators travelled to Europe under the curtain of refugees. European states have initiated criminal prosecutions against those criminals who had committed crimes in the conflict zone and who fled to Europe. The same scenario repeated itself after the conflicts in Syria and Iraq (Safferling, Petrossian 244).

The most active role in the prosecution of macro-criminals on the basis of universal jurisdiction was taken Germany. It initiated hundreds of cases against alleged perpetrators from different conflict zones, including Afghanistan, Syria, Iraq and Sri Lanka (Safferling, Petrossian 245).

Although from a theoretical point of view the prosecution of macro-criminals is clear, on the practical level difficulties arise. Prosecutors in third countries would avoid prosecuting foreign criminals not only because of their political ties or interests but also due to a lack of evidence and a lack of international cooperation in criminal matters. Pursuant to Section 153c of the German Code of Criminal Procedure (*Strafprozeßordnung*; StPO), the public prosecutor's office (*Staatsanwaltschaft*) has the option of refraining from prosecuting offenses abroad without the court having to consent. Moreover, in regard to international crimes, the prosecution's discretion to prosecute is even more restricted (Safferling, *Völkerstrafrecht*). Accordingly, there is a compulsion to prosecute in the event that the act has a domestic connection (if the accused person is in Germany, Section 153f StPO) (DEARJV, 16).

This means that third states' prosecutors will only initiate criminal proceedings if they already have sufficient evidence and materials to bring proceedings against the person who is on their territory. Otherwise, the investigations into the "foreign" affairs will not bear "fruits". This results in an important task for the victim representatives inside and outside Artsakh to conduct their own investigations into war crimes and crimes against humanity. The published video on war crimes and testimony of the victims are the primary source for conducting the investigation using satellite imagery, geolocating the commission of crimes, identifying the armed units and their commanders who have been actively involved in the war crime zones. Social media is another source of evidence that can help conduct the investigation and identify the perpetrators.

Without their own investigation, there is little hope that third state prosecutors will initiate proceedings. Not only the commanders of the armed forces had to be identified, but also the soldiers who executed the orders and directly committed the crimes.

There are already applications to the third state prosecutors by the Ombudsmen of the Republic of Armenia (Armenian ombudsman submits reports on Azerbaijani war crimes to prosecutor's offices of different countries, <https://www.panorama.am/en/news/2020/12/28/Armenian-ombudsman/2428260>. Accessed 14.11.2021), the German-Armenian Lawyers' Association (Strafanzeige wegen

Convention against Transnational Organized Crime 2000, Article 4(2) UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988.

¹ Princeton University Program in Law and Public Affairs, The Princeton Principles on Universal Jurisdiction 28 (2001), Principle 1.

aserbaidshischer Kriegsverbrechen gestellt, <https://anfdeutsch.com/weltweit/strafanzeige-beim-gba-wegen-aserbaidshischer-kriegsverbrechen-22288>. Accessed 14.11.2021) and the Argentinian-Armenian Lawyers' Association with regard to the war crimes committed by the armed forces of the Republic of Azerbaijan.

Conclusion

All three legal ways to activate international criminal justice are possible. The problem, however, is the political willingness to use the instrument of international criminal justice to prosecute the macro-crimes committed during both the April and the Forty-Four-Day Wars. National authorities appear to be slow in collecting and documenting evidence of international crimes. The international criminal justice mechanism should be used not only to prosecute international crimes but also to prevent future atrocities. The international rules do not have a symbolic function, but must be respected and appropriate steps must be taken by the national authorities to activate them.

Another crucial instrument is the diplomacy of using the mechanism of international criminal justice. Accordingly, the national authorities should use every diplomatic opportunity to raise awareness of the crimes committed by members of the armed forces of the Republic of Azerbaijan.

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ԱՐՑԱԽՅԱՆ ԵՐՐՈՐԴ ՊԱՏԵՐԱԶՄԻ ԸՆԹԱՑՔՈՒՄ ԿԱՏԱՐԿԱԾ ՄԱԿՐՈՅԱՆՑԱԳՈՐԾՈՒԹՅՈՒՆՆԵՐԻ ՄԻՋԱԶԳԱՅԻՆ ՀԵՏԱՊԵՆԴԻՄԱՆ

ԳՈՒՐԳԵՆ ՊԵՏՐՈՍՅԱՆ

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ավագ գիտաշխատող, միջազգային քրեական իրավունքի հետազոտական խմբի
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Հոդվածը ներկայացնում է միջազգային քրեական իրավունքի հնարավոր իրավական ուղիները՝ Արցախյան երրորդ պատերազմի ընթացքում կատարված

մակրոհանցագործությունների հետապնդումը ակտիվացնելու համար: Ո՛չ Հայաստանի Հանրապետությունը, ո՛չ Ադրբեջանի Հանրապետությունը և ո՛չ էլ Արցախի Հանրապետությունը Միջազգային քրեական դատարանի (ՄԶԴ) Հռոմի կանոնադրության անդամ չեն: Սա դժվարացնում է միջազգային մակարդակով պատերազմական հանցագործությունների քրեական հետապնդման նախաձեռնումը: Հոդվածում ընդգծվում են միջազգային քրեական հետապնդման ակտիվացման իրավական խոչընդոտները համադրման ու համեմատման միջոցով: Իրավական համեմատությունը և պատմական ակնարկը թույլ են տալիս դիտարկել Արցախյան երրորդ պատերազմի ընթացքում կատարված միջազգային հանցագործությունների հետապնդման երեք տարբեր մակարդակներ, որոնցից համընդհանուր իրավասության հիման վրա ազգային քրեական հետապնդումը թվում է ամենաարդյունավետ գործիքը:

Հիմնաբառեր՝ *պատերազմական հանցագործություններ, Միջազգային քրեական դատարան, մարդկության դեմ հանցագործություններ, Նյուրնբերգյան սկզբունքներ, Արցախյան պատերազմ, հարկադիր տեղահանում, խոշտանգում, անդամահատում, անմարդկային վերաբերմունք, Ադրբեջան, Արցախի Հանրապետություն, Պաղեստինում իրավիճակ, Քուկ կղզիներ, համընդհանուր իրավասություն:*

МЕЖДУНАРОДНОЕ ПРЕСЛЕДОВАНИЕ МАКРОПРЕСТУПЛЕНИЙ, СОВЕРШЕННЫХ ВО ВРЕМЯ ТРЕТЬЕЙ АРЦАХСКОЙ ВОЙНЫ

ГУРГЕН ПЕТРОСЯН

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Ключевые слова: *военные преступления, Международный уголовный суд, преступления против человечности, Нюрнбергские принципы, Арцахская война, насильственное перемещение, пытки, увечья, бесчеловечное обращение, Азербайджан, Республика Арцах, ситуация в Палестине, Острова Кука, универсальная юрисдикция.*