Journal of Liberty and International Affairs | Vol. 7, No. 2, 2021 | eISSN 1857-9760
Published online by the Institute for Research and European Studies at www.e-jlia.com

Peer review method: Double-Blind
Accepted: May 23, 2021
Published: June 18, 2021
Review article
DOI: https://www.doi.org/10.47305/JLIA21720154c

EXECUTION OF IMPRISONMENT SENTENCED BY JUDGMENT OF THE INTERNATIONAL CRIMINAL COURT

Dragana Cvorovic
The University of Criminal Investigation and Police Studies - Belgrade, Serbia
ORCID iD: https://orcid.org/0000-0002-2206-8175
dragana.cvorovic@kpu.edu.rs

Hrvoje Filipovic
Police College - Zagreb, Croatia
hfilipovic@fkz.hr

Abstract: *One of the current issues of criminal law, in general, is the issue of execution of a criminal judgment sentenced by the international criminal court (ad hoc or permanent international criminal court). The issue is ongoing because international criminal courts do not have their institutions for the enforcement of criminal sanctions they impose, but are, in that regard, instructed to cooperate with states that express readiness to execute criminal sanctions - imprisonment sentences imposed by an international criminal court in their prison facilities. Among the numerous issues related to this issue, the paper analyzes only those related to the legal basis for standardization, conditions, and manner of execution of a prison sentence imposed by an international criminal court.*

Keywords: *International Criminal Court; Ad Hoc Tribunal for The Former Yugoslavia; Imprisonment Sentence; Life Imprisonment; Prison Facility; Supervision of the Execution of a Sentence*

INTRODUCTION

The execution of imprisonment sentenced by the judgment of the International Criminal Court in our region gained its relevance with the establishment of the *ad hoc* Tribunal for the former Yugoslavia in 1993[1], and then with the establishment of a permanent International Criminal Court by adopting its statute in Rome on July 17, 1998 (Law on Ratification of the Rome Statute, Official Gazette of the FRY - International Agreements, No. 5/2001). Of course, it cannot be concluded from this that these are the only sanctions that can be imposed by an International Criminal Court. On the contrary, there is also a fine and confiscation of income, property, and goods, but those as

[1] The Court was established on May 25, 1993, by UN Security Council Resolution 827.

additional criminal sanctions are not the subject matter in this paper. The key basis for the topicality of this issue lies in the fact that these two, as well as other international judicial institutions of this character,[2] do not have facilities for the execution of imprisonment they impose, which is why they rely on the national legislation of those states that have accepted execution of judgments of the International Criminal Court on their territory (Škulić and Bajović 2018). As a result of this, what arises first is the question of (in)compatibility of this issue with the issue of execution of a criminal judgment of another state court as one of the newer forms of international criminal cooperation in criminal matters between states in general (Bejatović 2017, 197).

The differences are multiple and are reflected primarily in the reasons for their standardization. The main reason for predicting the possibility of executing a criminal judgment of another state in the state of which the person is a citizen is the fact that the convicted person is equal concerning the domestic perpetrator of the same act only in a criminal legal and criminal procedural sense, but not in penitentiary terms. In contrast, the key reason for the special standardization of the issue of execution of a criminal judgment of the International Criminal Court lies in the fact that these international judicial institutions do not have their facilities for the execution of a sentence, regardless of whether it is a certain duration or life imprisonment. However, from this key difference in the reasons for standardizing the execution of a criminal judgment on the territory of a state that was not pronounced by its judicial bodies, it must not be concluded that there are no compatibilities between the execution of a criminal judgment of another state court and the execution of the judgment of an International Criminal Court. On the contrary, there are many compatibilities. One of them is contained in the fact that in both cases it is not only about the interest of international crime suppression, but also about the interest of the efficiency of the fight against crime in general. In this sense, Jescheck, quite rightly, points out that this form of legal aid represents a new means of power for states to pursue international criminal policy in cooperation with each other while creating the best chance for resocialization of a convicted person (Jescheck 1986, 35). Secondly, when we talk about the choice of the state in which the criminal judgment of the International Criminal Court will be executed, one must also keep in mind is one of the key reasons for allowing the execution of a criminal judgment of another state, and that is the rehabilitation of a convicted person and respect for international standards on the protection of basic freedoms and rights and generally accepted international legal standards of persons serving a criminal sanction imposed on him (Stojanović 2018). In a word, in the case of execution of a criminal judgment of another state and execution of a judgment of an International Criminal Court, generally accepted international legal standards on this issue must be respected, and these are numerous.

[2] We talk about all *ad hoc* international criminal courts.

Finally, when it comes to general remarks, it should be noted that despite the compatibility of many decisions for the execution of a criminal judgment of the International Criminal Court in general, regardless of whether it is an *ad hoc* Tribunal for the former Yugoslavia or a permanent International Criminal Court, there are numerous differences between them and they require the need for a separate analysis of this issue depending on which court it is (permanent International Criminal Court or *ad hoc* court) (Caianiello 2013). Furthermore, when it comes to *ad hoc* courts, the subject of analysis is the execution of the judgment of the *ad hoc* Tribunal for the former Yugoslavia. Arguments for the justification of such an approach to this issue in *ad hoc* courts do not need to be specifically proven.

EXECUTION OF IMPRISONMENT SENTENCED BY *AD HOC* TRIBUNAL JUDGEMENT FOR THE FORMER YUGOSLAVIA

In the last three decades, after the establishment of the *ad hoc* Tribunal for the former Yugoslavia (hereinafter: the Tribunal) in 1993, above all, the issue of the execution of the criminal judgment of this international judicial institution, i.e. the imprisonment sentence imposed by this court, is current. The relevance of the issue lies in the fact that this, as is the case with other international judicial institutions of this character, does not have its capacity to execute the prison sentences it imposes (Kaseze 2004). For this reason, the court relies in this regard on the national legislation of those states that accept the execution of Tribunal judgments on their territory (Škulić 2013, 80). Observed from the aspect of the Statute of this international judicial institution, the execution of its criminal judgment is discussed in Article 27 where it is envisaged that imprisonment (for a specified period or life) shall be carried out in a state-designated by the International Tribunal from the list of states which have expressed their readiness to accept the sentenced person to the UN Security Council.[3] Execution shall be carried out under the positive law of that State, under the control of the Tribunal or a body designated by the Tribunal (Jorgensen 2000). In addition to this, which seems completely indisputable, the fact that deserves attention is the fact that even before the adoption of the Statute of the Tribunal, the place of execution and the manner of execution was announced by the Secretary-General of the United Nations (hereinafter: UN) in his report of 3 May 1993 in which he pointed out that the nature of the crime and the character of the Tribunal indicates that the execution of the judgment should take place outside the territory of the former Yugoslavia and that states should be encouraged to express their readiness to offer their prisons for execution (Kokolj 1995, 187). In connection with this position, it is interesting to point out the fact that much

[3] Statute of the *ad hoc* Tribunal for the former Yugoslavia,https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_bcs.pdf [Accessed: 10 March 2021]

earlier before the establishment of the Tribunal, the UN recommended that states conclude bilateral and multilateral agreements on the execution of foreign court judgments in the country of which the convicted person is a citizen. The reasons for this quite correct position of the UN are primarily contained in the fact that the perpetrator of a crime convicted in another state and thus by an International Criminal Court concerning a domestic perpetrator of the same act is equal only in a criminal legal and criminal procedural sense, but not and in penitentiary terms. This is primarily due to lack of knowledge or insufficient knowledge of the language, lack of knowledge of legal regulations, difficulty in communication and visits of relatives due to distance and other administrative obstacles, aggravated contact with defense counsel and the like (Horvat 1987, 96). In addition, in the theory of criminal law, there is a unique understanding that in determining the meaning of this institute, one should start not only from the interest of international crime suppression but also from the setting of a contemporary theory about the goal of criminal sanctions. From the aspect of today's, completely correct understandings about the goal of executing criminal sanctions, its goal is the resocialization of the convicted person and thus his reintegration into society after serving the sentence, which is realized faster and easier in the environment to which he belongs - in his country. However, despite all this, a few decades later, the UN Secretary-General denies what the UN itself had previously advocated that the execution of the sentence imposed by this Court be carried out outside the territory of the former Yugoslavia. With such a solution, the position of the convicted person after his conviction by this Tribunal for the committed criminal offense worsens, and even among the convicts themselves, there can be, there has been and there is discrimination in the penitentiary phase. For example, when two convicts for the same crime were sentenced by this court to the same sentences, and one was sent to Sweden and the other to Iran, due to different penitentiary systems, their position is drastically different. Furthermore, although so many years have passed since the establishment of the Tribunal (Beigbeder 2006, 304), and even though it has already ceased to function, a relatively small number of states have expressed readiness to be on the list of states to serve their sentences and some states even set additional conditions for execution, such as e.g. to accept only their citizens for execution or persons who have a permanent residence with them, etc. However, despite the expressed readiness of the states of the former Yugoslavia for convicts to serve the criminal sanctions imposed by this court in their prisons, such cases have not been recorded. All this in itself, to say the least, speaks of the character of this court.

Observed from the aspect of the Republic of Serbia, what deserves attention is the fact that based on Article 34 paragraph 1 of the Law on Cooperation with the International Criminal Court (Official Gazette of the FRY, No. 18/2002 and Official Gazette of Serbia and Montenegro, No. 16/2003, hereinafter: the Law), it accepted the possibility of executing the final judgment of this Court in its competent institutions.

However, despite all this, that readiness was unfortunately not accepted. In addition to the general reasons for the inadequacy of this approach of the Tribunal to this issue, the following two features of special importance for the status of a convicted person by this court should be pointed out which would possibly occur when serving the sentences imposed by that court in prisons in the Republic of Serbia. These are: first, imprisonment would be carried out according to the regulations of the Republic of Serbia, but with the supervisory function of the Tribunal (Article 34, paragraph 3 of the Law) (Skulić 2005, 107); secondly, starting from the fact that possible changes in the final judgment of this court can be made only based on its decision and not the decision of the judicial bodies of Serbia, Article 35 of this Law stipulates that in case the conditions for a pardon, mitigation of sentence or conditional release are met according to the regulations of the national legislation of the Republic of Serbia, the International Criminal Court is notified to make an appropriate decision (Radulović 2009, 211), which means that judicial institutions of the Republic of Serbia would not be able to in any way correct the criminal sanction imposed by the Tribunal.

EXECUTION OF PRISON SENTENCED BY THE JUDGEMENT OF THE PERMANENT INTERNATIONAL CRIMINAL COURT

The issue of the execution of the criminal judgment of the permanent International Criminal Court is an issue that will become increasingly important. The reasons for the correctness of such a statement are indisputable and do not need to be analyzed separately. Viewed from the aspect of the sources of law that regulate the issue of execution of the criminal judgment of this court, they are twofold. In addition to the Rome Statute[4] (Articles 103-111), there are also Rules of evidence and procedure before this court.[5] Observed about the manner of regulating this issue in the *ad hoc* Tribunal for the former Yugoslavia and this court, there are two key differences. First, the permanent International Criminal Court pays far more attention to the issues of execution of its judgment. Secondly, it does not contain the downsides that are present on this issue at the *ad hoc* Tribunal for the former Yugoslavia (there is no exclusion of the possibility of execution of the pronounced judgment in prison facilities of the state of which the convicted person is a citizen before this court). In a word, in standardizing this issue, far more attention was paid to universal-generally accepted standards of execution of a criminal judgment of a foreign court as a special and increasingly relevant form of international criminal cooperation in general.

[4] Rome Statute of the International Criminal Court, https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf [Accesesd: 18 March 2021]
[5] Rules of evidence and procedure, https://www.icc-cpi.int/iccdocs/pids/legal-texts/rulesprocedureevidenceeng.pdf [Accessed: 18 March 2021]

Among the many features that characterize the execution of the criminal judgment of the permanent International Criminal Court (hereinafter: the Court), the following are of special importance:

First, this court does not have the capacity - facilities for the execution of imprisonment. The execution of the criminal sanction imposed by this court is also realized in cooperation with the member states of the Statute. The legal basis for cooperation between the court and the state on this issue is formal and is reflected in the cumulative fulfillment of three conditions. These are: that a specific state has previously manifested its readiness for the sentence to be carried out on its territory, and the court can but does not have to accept its readiness. Next, that the Court had placed such a state on the list of states in which the sentence of imprisonment could be enforced, and finally that the Court had decided that the sentence of imprisonment was being enforced in that state itself (Article 103, paragraph 1 (a) of the Statute).

Secondly, the possibility that a person convicted by this court is serving a sentence in the prison facility of his country is not excluded here, as well as the possibility of serving a prison sentence in a host state prison if no other state is specified (Article 103, paragraph 4 of the Rome Statute).

Third, the key circumstances that the court takes into account when choosing the state in which a convicted person will serve a prison sentence from the list of reported states are: the principle that member states should share responsibility for the application of imprisonment following the principle of the equitable division including the principle of geographical distribution, but that these circumstances are not of a limiting nature since the elements of the principle of the equitable division include all other relevant circumstances, which is *quaestio facti* depending on the factual features of the particular case; the degree of implementation of generally accepted international legal standards on the treatment of prisoners in the legislation of a particular country; citizenship, nationality, and attitude of the convicted person which is not binding but must be taken into account;

Fourth, the Presidency of the Court shall inform the competent authorities of that state of the final decision on the choice of the state in whose territory the sentence will be served and at the same time provide them with the documentation necessary for the execution of the sentence, but the transfer of the convict to the state of enforcement will not take place before the final decision on the sentence, and the state which has accepted the execution of the sentence imposed by the Court on its territory may always revoke its decision on acceptance. Also, the court has the right to decide at any time to transfer a convicted person to a prison facility of another state, whereas the transfer can be requested by the convicted person as well, at any time during the execution of the sentence, but a change of state of execution of the sentence is possible only based on a decision of the competent body of the court (Josipović, Krapac and Novoselec 2001, 270).

Fifth, the sentence is executed according to the rules of the state in whose institution the sentence is executed, provided that they must be based on two assumptions. They must comply with generally accepted standards of treatment for prisoners and must not, in any case, be more favorable or unfavorable than those under which persons convicted of similar offenses in the state of enforcement are served. Supervision over the execution of the sentence is performed by the court, and to that end, the communication between the convicted person and the Court during the entire time of execution of the sentence must be unimpeded and confidential (Article 106, paragraph 3 of the Rome Statute);

Sixth, the state of enforcement cannot change that sentence. It may not release the convicted person until the sentence imposed by the court has expired. The sentence of imprisonment is binding on all member states of the Rome Statute and can in no case be changed by a decision of judicial or other authorities of the state of enforcement. The right to amend a final judgment belongs only to the competent bodies of the permanent International Criminal Court, and this can only happen under the acts of the Court. Thus, for example, mitigation of the sentence - its reduction can occur only after the convicted person has served 2/3 of the sentence or 25 years in the case of life imprisonment, in which case there is a mandatory consideration of this issue by the Court (Article 110, paragraph 3 of the Rome Statute). This happens even in the case when the imposed sentence of life imprisonment is executed in the prison facilities of the states that do not allow the possibility of release on parole of persons sentenced to life imprisonment, which is, for example, the case with the Criminal Code (Official Gazette of RS, No. 85/2005, 88/2005 - amended, 107/2005 - amended, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94 / 2016 and 35/2019) of the Republic of Serbia (Ignjatović 2019, 79).

Seventh, a convicted person in the custody of the state of enforcement shall not be subject to prosecution, punishment, or extradition to a third state for any act of that person which occurred before the extradition of that person to the state of enforcement, unless such prosecution, punishment or extradition has been approved by the Court at the request of the state, provided that the Court makes its decision on this issue only after hearing the convicted person (Article 108, paragraph 1 of the Rome Statute);

Eighth, if a convicted person escapes from a prison facility and flees from the state of enforcement, that state may, after consulting the Court, request the surrender of the person from the State in which that person is, under applicable bilateral agreements, or it may also request that the Court itself request the surrender of the convicted person. In addition, there is the right of the Court to rule in such a case that an escaped convicted person be extradited not only to the State in which the sentence is being served but also to another State (Article 111 of the Rome Statute). Contrary to this situation, in the case of an escaped convict from a prison facility and his hiding in the

territory of the state in which the institution is located, the problem is resolved following the laws and other acts of that state;

Ninth, the convicted person may remain in the territory of the state of enforcement after serving the sentence imposed on him, and if he is not a citizen of that state, provided that the competent authorities of that state allow it. In addition, this person may, following the law of the state of enforcement, be transferred, taking into account his position on the matter, to any state which must receive him as well as to another state whose competent authorities so agree (Article 107 paragraph 1 of the Rome Statute).

CONCLUSION

One of the current issues when it comes to the International Criminal Court, in general, is the issue of the execution of prison sentences that they impose. The relevance of the issue lies in the fact that these international judicial institutions do not have the facilities for the execution of the criminal sanctions they impose.

There are three key results of the analysis of the provisions of the legal acts of the *ad hoc* Tribunal for the former Yugoslavia and the Permanent International Criminal Court, which deal with the issue of the execution of the prison sentences they have imposed.

First, the execution of prison sentences imposed by the *ad hoc* Tribunal for the former Yugoslavia is not in line with the key criminal and political reasons for legalizing the execution of a foreign court's verdict, which is to allow the convict to serve his sentence in a prison facility of his country.

Secondly, the standardization of the issue of execution of the verdict of the permanent International Criminal Court is under generally accepted international legal standards which treat both the issue of execution of the criminal judgment of a foreign court and the issue of the status of a convict during the execution of a prison sentence.

Thirdly, even though the prison sentences imposed by the judgment of the permanent International Criminal Court are served in the prison facilities of some of the states, the permanent International Criminal Court is not only unavoidable but can also be said to be a key subject of its execution. It decides on the choice of the state in which the convicted person will serve the sentence imposed on him and supervises its execution. Then, the final judgment can, during the execution, be changed only by the decision of the competent body of the permanent International Criminal Court and not by the decisions of the judicial bodies of the state in which the pronounced prison sentence is executed.

REFERENCES

1. Bejatović, Stanko. 2017. Fundamentals of International Criminal Law. Faculty of Law. Kragujevac.
2. Beigbeder, Yves. 2006. Judging war Crimes and Torture. MartinusNijhoff Publishers. Boston
3. Caianiello,Michele. 2013. "Models of Judicial Cooperation with *Ad Hoc* Tribunals and with a Permanent International Criminal Court in Europe" In Transnational Inquiries and Protection of Fundamental Rights in Criminal Proceedings, edited by Stefano Ruggeri, 111- 125. London: Springer
4. Criminal Code of the Republic of Serbia, "Official Gazette of the RS", No. 85/2005, 88/2005 - cor, 107/2005 - cor, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 and 35/2019
5. Horvat, Vlasta. 1987. "Execution of a foreign criminal verdict"Yugoslav Review of Criminology and Criminal Law 1: 91-105.
6. Ignjatović, Đorđe.2005. "Sentence of life imprisonment - reasons for introduction and review of solutions in the last amendment to the Criminal Code" In *Reform of criminal legislation of Serbia,* edited by Stanko Bejatović*,* 71- 85. Belgrade: Serbian Association for Criminal Law and Practice
7. Jeschek, Hans Heinrich. 1986. Strafrect im Dienste der Gemeinschaft, Ansgewalt-her Beitrage zur Strafrectsreform zur Strafrectsvergleihung und zum Internationa-lenStrafrecht aus den Jahren 1953-1979. Duncker&Humbolt. Berlin
8. Jorgensen, Nina. 2000. Responsibility of states for international crimes. Oxford: Oxford University Press
9. Josipović,Ivo, Krapac, Davor, andNovoselec, Petar. 2001.Permanent International Criminal Court. Official Gazette. Zagreb
10. Kaseze, Antonio. 2004. International Criminal Law. Belgrade Center for Human Rights. Belgrade
11. Kokolj, Mitar.1995. International Criminal Tribunal for the Former Yugoslavia. Faculty of Law. Belgrade
12. Law on Cooperation with the International Criminal Court, Official Gazette of the FRY, No. 18/02 and Official Gazette of Serbia and Montenegro, No. 16/2003.
13. Law on Ratification of the Rome Statute, Official Gazette of the FRY - International Agreements, No. 5/2001
14. Radulović,Drago. 2009. International Criminal Court. Faculty of Law. Podgorica
15. Rules of evidence and procedure. Available at: https://www.icc-cpi.int/iccdocs/pids/legal-texts/rulesprocedureevidenceeng.pdf
16. Rome Statute of the International Criminal Court. Available at: https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf

17. Statute of the *ad hoc* Tribunal for the former Yugoslavia. Available at: https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_bcs.pdf
18. Stojanović, Zoran. 2018. International criminal law. Lawbook. Belgrade
19. Škulić, Milan. 2005. International Criminal Court. Faculty of Law. Belgrade
20. Škulić, Milan. 2013. "One view of the Hague tribunal and its place in history." In *The Hague Tribunal between Law and Politics*, edited by Jovan Ciric, 56-120. Belgrade: Institute for Comparative Law
21. Škulić, Milanand Bajović, Vanja.2018. Historical development of international criminal justice and basic features of the procedure before the International Criminal Court. Faculty of Law, University of Belgrade. Belgrade