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International Criminal Tribunal for the Former Yugoslavia

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INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

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ABSTRACT

The article presents the activities of the International Criminal Tribunal for the former Yugoslavia. The text is divided into the following chapters: Genesis of the establishment of the International Criminal Tribunal for the former Yugoslavia, activities and structure of the International Criminal Tribunal for the former Yugoslavia, the hearing before the Court, the practical activities of the ICTY. The Author described situation of Serbia and relations between Serbia and European Union. This example shows the meaning of the meaning of the International Criminal Tribunal for the former Yugoslavia.

The objective of the article was to discuss the structure and activities of the International Criminal Tribunal for the former Yugoslavia and to present the thesis that the establishment of CTY was the right decision.

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GENESIS OF THE ESTABLISHMENT OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

At the beginning of the 90s of the twentieth century in Yugoslavia the processes of disintegration took place. In 1989 Slobodan Milosevic was

elected to become the president of Serbia. During his presidency he abolished the autonomy of Vojvodina and Kosovo. During this period Slovenia, Croatia and Macedonia declared their independence. Then, on the 6th of March 1992 Bosnia and Herzegovina declared the independence. Serbia did not recognize the independence of the aforementioned countries and together with Montenegro announced the establishment of the Federal Republic of Yugoslavia. Federal Army attacked the countries which declared their independence. The most severe fighting took place in Bosnia. At the beginning the states were not engaged in military action at the territory of Bosnia. The UN formed only five security zones to protect civilians. The Serbian army, however, attacked one of the zones, and the UN forces had to surrender due to lack of support. As a part of the cleansing Serbian army murdered 7,000 Muslims. Men at the age between 15 and 65 were killed and then buried in mass graves. The information on the massacre conducted by the Serbs spread among the international community and during the London summit it was decided that air raids on Serb positions would be organized. After the aforementioned raids Serbia initiated negotiations and during the international conference with Croatia, Bosnia and other countries signed the agreement. Croatia, however, did not want to give its lands to Serbia, thus in August 1995 it carried out the operation "Storm". Croats suddenly attacked Serbian Krajina - Serb-controlled territory which the Croats claimed as theirs. The attackers proceeded to fast offensive to take the Serbs by surprise. The operation "Storm" was preceded by 150,000 soldiers of Croatian origin and 25,000 soldiers of the Bosnian Army of Bosnia and Herzegovina, who supported the attackers. Serb troops were much smaller, i.e. approximately 50,000 (including 10,000 Bosnian Serbs). Croats quite easily took over the area they were most interested in. The operation "Storm" was the end of the conflict between Serbs and Croats¹.

The decision on the establishment of the International Criminal Tribunal for the former Yugoslavia was affected by the conflict in Kosovo. In 1991 Kosovo Albanians demanded independence. During the national referendum, Ibrahim Rugova, who did not support the Serbs, came to power. Fighting between the two sides took place in 1998. Serbs started to carry

¹ M. Matyasik, P. Domagała, *Międzynarodowe Trybunały Karne oraz inne instrumenty sprawiedliwości tranzytowej* [International Criminal Tribunals and other instruments of transit justice], Difin S.A., Warsaw 2012, p. 71-77.

out mass resettlement of the Albanians. Numerous violations of humanitarian law were committed against civilians. The situation in Kosovo resulted in peace talks organized by the international community. The meeting was held in Rambouillet on 6th – 23rd February and 15th – 19th of March 1999. The negotiations were not successful as Serbia refused to recognize the independence referendum in Kosovo and forbade NATO to move on the territory of Yugoslavia. World observed the situation in Kosovo apprehensively, consequently on the 24th of March NATO launched air raids on military targets in Serbia. Interim Administration Mission of the United Nations in Kosovo was established in this area. Serbs lost their power there. Kosovo declared independence as late as in 2008².

THE ACTIVITIES AND STRUCTURE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

Violations of humanitarian law by Serbia within the area of the former Yugoslavia could not be left unpunished and, therefore, a commission to investigate the problem was appointed. The report prepared by the Commission on the 10th of February 1993 indicated the need to judge the perpetrators of these crimes. After examining the report the UN Security Council adopted the Resolution 808 on the establishment of the Tribunal on the 22nd of February 1993. Moreover, the UN instructed the Secretary-General to present a report on fast and effective implementation of the decision on the establishment of the Tribunal³. In May of 1993 the Security Council in its Resolution 827 adopted the Statute of the Tribunal for the Deposition of Persons Responsible for Serious Violation of International Humanitarian Law committed in the former Yugoslavia. No legal act authorized the UN Security Council to establish such a tribunal. Therefore, there were doubts as to the appointed Tribunal being in accordance with the international law. The UN challenged these concerns, citing Chapter VII of the United Nations Charter, under which the UN Security Council has the ability to take action to ensure peace and security in the world. These authorizations raised many as regards among the international community, however, the need to prosecute criminals justified

² A. Casses, *International Criminal Law*, Oxford University Press, Oxford 2008, p. 339–342; M. Matyasik, P. Domagała, *op. cit.*, p. 71–77.

³ Report of the Secretary – General pursuant of paragraph 2 of Security Council resolution 808 (1993), S/25704.

the action of the UN Security Council. All members of the UN had to follow the resolution on the appointment of the Tribunal. The most significant difficulties in this regard appeared in the case Prosecutor v. Tadic Dusco as the defenders questioned the legality of the establishment of the Tribunal. The Trial Chamber indicated that it had no power to review decisions of the UN Security Council on establishing the Tribunal. While considering the appeal the Board of Appeal issued a precedential ruling of historic significance and responded to the contested entitlements⁴. The Board of Appeal, in accordance with the principle of *legal competence to define one's own powers* decided to be competent to determine the legality of the Tribunal. The Chamber, as well as the UN Security Council, decided that the operations in the former Yugoslavia constituted a threat to global security and, therefore, the UN Security Council had the power to appoint Tribunal under Chapter VII of the Charter of the United Nations⁵.

The International Tribunal for the former Yugoslavia operates on the grounds of the Statute constituting an annex to the resolution passed by the UN Security Council and “Procedure and appeal rules” adopted by the Judges. The Tribunal is seated in the Hague. It is financed from the budget of the United Nations. The official languages of the Tribunal are English and French. According to the accepted rule, the accused has the right to communicate in their own language. Also there is a free interpreter provided to people who do not know the official languages. President of the Tribunal annually presents the UN Security Council with a report on the activities of the Tribunal.

The Tribunal has jurisdiction over natural persons who have committed a crime against humanitarian law within the territory of the former Yugoslavia after the 1st of January 1991. The Tribunal has the right to judge: violations of the laws and customs of war, genocide and crimes against humanity⁶. Competence *ratione personae* applies to any natural person regardless the nationality, who instigated, planned, urged or issued the orders aimed at committing the crimes listed in the Statute. The position

⁴ Appeals Chamber Judges unanimously confirm the Tribunal's jurisdiction. The Hague, 2 October 1995, CC/PIO/021-E.

⁵ R. Cryer, H. Friman, D. Robinson, E. Wilmshurst, *An Introduction to International Criminal Law and Procedure, The Ad Hoc International Criminal Tribunals*, Cambridge University Press, Cambridge 2014, p. 130–132.

⁶ Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949.

of the person who committed the crimes does not affect the jurisdiction of the Tribunal. The ICTY judges also superiors who did not react to the crimes committed or who knew or could learn about the acts committed. An action based on the orders does not exempt from responsibility before the Tribunal, however, can be the basis for excluding criminal responsibility if it is supported by the principles of justice⁷.

The Tribunal is composed of the Secretariat and the two Chambers, which have already been mentioned - Trial Chamber and the Appeals Chamber. The Appeals Chamber is of a specific character as it is common for the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda.

Trial Chamber is composed of three judges and a maximum number of 6 *ad litem*, whereas the Appeals Chamber consists of 7 judges (2 from ICTR and 5 from the ICTY). Judges are elected by the United Nations General Assembly from among candidates nominated by the UN Security Council. The term of office of a judge covers four years. The ICTY consists of 16 permanent independent judges and 9 judges for a particular case (*ad litem*). The judges considering a particular case are also appointed by the General Assembly of the United Nations. Judges elect the President of the ICTY themselves from among their group. Moreover, ICTY judges have numerous rights and privileges.

In the ICTY there is the office of the prosecutor. Prosecutor's duty is to investigate and prosecute those responsible for the crimes listed in the Statute of the Tribunal. The prosecutor's office is an independent body. No government can provide the prosecutor with instructions or guidance. It is independent from any influence. The prosecutor's office includes the prosecutor and employees appointed by the UN Secretary General. The main objective of the prosecutor is conducting an investigation as well as preparation and presentation of indictments.

The last office operating within the ICTY is the Secretariat. It mainly covers any administrative operations of the ICTY, provides the help for victims and witnesses, transport of the accused and any administrative actions⁸. The main activities of the Secretariat also include maintaining records and servicing the meetings. The Secretariat comprises of a Secre-

⁷ I. Bantekas, *International Criminal Law*, Hart Publishing, Oxford 2010, p. 412-414.

⁸ R. Cryer, H. Friman, D. Robinson, E. Wilmshurst, *op. cit.*, p. 129.

tary elected for four-year long terms by the Chief Secretary of the United Nations and the President of the ICTY as well as support staff⁹.

TRIAL BEFORE TRIBUNAL

The Prosecutor initiates an investigation on Prosecutor's own initiative (*ex officio*) or based on other sources, such as e.g. information provided by international organizations or by the governments. In order to investigate the prosecutor may apply to all bodies, including Interpol, asking for legal aid. After completing the investigation, the prosecutor formulates the accusation, which includes facts and persona data of the suspect. Moreover, the indictment contains a type of alleged crime as well. This document is sent to the Trial Chamber, which may confirm it, if sufficient evidence is available. At the request of the prosecutor, the Tribunal passes a decision on the arrest warrant or delivering the suspect to the Tribunal. Then a meeting is summoned during which the accused is presented with the charges, the accused is asked whether he/she understands them and what his/her process position is. If the suspect confessed to the charges against him/her - the judgment is passed, if not - and open and public hearing is scheduled¹⁰. Court proceedings constitute a combination of two different legal systems: civil law and common law. The process takes place before the Tribunal in accordance with the following principles:

- equality of the parties appearing before the Tribunal;
- the right to trial without undue delay;
- presumption of innocence;
- the right to information on presented allegations;
- the right to use the services of an interpreter in case of ignorance of the official languages of the ICTY;
- the right to appeal;
- the right to hear witnesses of the opposite side;
- the right to refuse to testify against themselves¹¹.

The process before the Tribunal respects all universally recognized rights and privileges of the accused, e.g. the right to an interpreter, the ability to defend oneself at the trial or the right to interview witnesses.

⁹ M. Matyasik, P. Domagała, *op. cit.*, p. 71-77; United Nations International Criminal Tribunal for the former Yugoslavia, <http://www.icty.org/> (accessed 06.06.2016).

¹⁰ M. Matyasik, P. Domagała, *op. cit.*, p. 86-90.

¹¹ *Ibidem*, p. 88-104.

In case of the Tribunal there is no possibility of passing a default judgment. In some cases, if the accused fails to appear at the hearing or if authorities failed at catching the accused, it is possible to evaluate the evidence in the absence of the accused. This is not a default judgment, this procedure merely enables securing evidence in purpose of future proceedings. The judgment is passed by the majority of votes. Every sentence must include a written justification. As regards the judgment the parties (the accused and prosecutor) can file an appeal within 30 days after the judgment is passed. An appeal can be filed referring to an individual issue and the judgment determining the merits of the case. The basis for the appeal can include be erroneous application of the law, which invalidates the decision or an error of fact¹².

In addition to a sentence of imprisonment the Tribunal can order the return of seized property. While imposing punishment, the Tribunal applies universal principles adopted in the criminal law. It takes into account the seriousness of the offense and the individual circumstances as regards the convicted person.

The highest penalty which can be imposed by the ICTY is life imprisonment. The convicted individuals serve their sentences in prison in one of the countries the United Nations signed an agreement with. These are the following countries: Albania, Austria, Belgium, Denmark, Estonia, Finland, France, Spain, Norway, Poland, Portugal, Slovakia, Sweden, Ukraine, United Kingdom, Italy.

The national courts in the former Yugoslavia and the Tribunal are equivalent in terms of considering the cases of violations regarding the humanitarian law. The ICTY is, however, entitled to take over the case being considered by the national courts if such conduct is in the interests of international justice. "According to the principle of *ne bis in idem*, no one should be tried by national courts for acts constituting serious violations of international humanitarian law if that individual was tried by the ICTY for the same acts. A person who has been tried by national courts for serious violations of international humanitarian law may be subsequently tried by the International Criminal Tribunal for the former Yugoslavia in the following cases:

- act the person was tried for constituted a common crime and not an international crime;

¹² Ibidem.

- the main proceedings before national court was not impartial and independent, was conducted to protect the accused from international criminal responsibility (i.e. Sham trial), or the case was conducted in neglectful manner.

Decisions of national courts are not binding for ICTY, while determining the punishment for the accused, the Tribunal takes into account the amount of the penalty imposed by the national courts against the same person for the same action¹³.

PRACTICAL ACTIVITIES OF THE ICTY

Describing the structure and operations of the ICTY, it is worth mentioning its practical activities. One of the most significant and also most interesting cases was the one of Slobodan Milosevic. He was the president of the Serbia as well as of the Federal Republic of Yugoslavia. He held the position of Chairman of the Supreme Council of National Defense and Supreme Commander of the Army of Yugoslavia.

Milosevic was accused and arrested in May of 1999, charged of corruption and abuse of power. This case was also transferred to the ICTY. Milosevic was the perpetrator of violations of humanitarian law in Kosovo, Bosnia and Herzegovina and Croatia. The prosecutor participated in the trial by presenting the evidence obtained from the cooperating Western states. Moreover, in 1999 the prosecutor investigated all crimes committed in Yugoslavia. Most NATO countries participated. A year later the Tribunal accused the Prosecutor of the investigation not being carried out completely. The prosecutor agreed with the charges which aroused much controversy¹⁴.

The Tribunal decided to consider these three cases together. The perpetrator was also charged with acts committed jointly and in cooperation with others as well as with superior responsibility. Acts committed within the territory of Kosovo were classified as Art. 3 of the Statute and Art. 5 of the Statute as violations of the war laws and customs and as a crime against humanity. Acts committed in Croatia qualified with the Art. 3 of the Statute and the Art. 5 of the Statute, but also Art. 2 of the Statute as

¹³ Document prepared by Information Center UN In Warsaw based on UN materials, June 2003, <http://www.unic.un.org.pl/> (accessed 21.10.2014); R. Cryer, H. Friman, D. Robinson, E. Wilmschurst, *op. cit.*, p. 129–130.

¹⁴ R. Cryer, H. Friman, D. Robinson, E. Wilmschurst, *op. cit.*, p. 132–134.

a gross violation of the Geneva Conventions. Crimes committed in Bosnia and Herzegovina were classified as genocide, crimes against humanity, violation of the Geneva Conventions and violations of the laws and customs of war in accordance with the Statute. In the initial phase of the trial the accused did not recognize the jurisdiction of the ICTY and, therefore, did not have a defender. The Tribunal wanted to provide Milosevic with a fair trial, thus so called advocates appearing as a friend of the court were summoned (*amici curie*). In the middle of the process the accused changed his mind and asked for the possibility of communicating with his own defender. The Tribunal also assigned him two defenders *ex officio*: Steven Kay and Gillian Hill. The hearing was scheduled for the 12th of February 2002. Defenders of Milosevic filed a request under Art. 98 of Procedural and Evidence Rules on the discontinuance of the proceedings, before carrying out their evidence. The defenders claimed that based on evidence conducted by the prosecutor, guilt of the accused was not proven. The Tribunal agreed with the defenders, that there was no evidence as to some acts allegedly committed by Milosevic. The proceedings were continued as the Tribunal considered some of the alleged acts of the accused credible. On the 11th of March 2006 Milosevic died and, as a result, the Tribunal discontinued the proceedings¹⁵.

The case of Milosevic was the loudest trial conducted before the ICTY. Naturally the Tribunal considered the case of Radovan Karadzic, Ratko Mladic (the proceedings are not completed yet) as well, the Tribunal dealt with the case of operation "Storm" and members of the KLA.

The creators of the ICTY realized that this institution would not be a permanent tribunal. It was assumed it would be of a temporary nature. On the 28th of August 2008 the UN Security Council adopted a resolution aimed at terminating the activities of the Tribunal. All investigations were to be completed by the end of 2004 as regards the proceedings at first instance by 2008 whereas the Tribunal itself was to terminate its operations before 2010. The President of the Tribunal was also required to provide the Council with a report on actions taken aiming at completing the work of the Tribunal every six months. The ICTY was not able to complete its work before 2010. Thus, with the resolution of the 22nd of December 2010

¹⁵ M. Matyasik, P. Domagała, *op. cit.*, p. 89-104.

a body called the “Residual Mechanism” was formed which took over the function of the Tribunal and is to complete its work¹⁶.

SUMMARY

The meaning of the International Criminal Tribunal for the former Yugoslavia is significant for the relationships between the countries. Serbia started the negotiations with regard to the accession to the European Union but the Serbian policy towards ICTY came between. The Serbian authorities are still hiding the witnesses who should be examined by ICTY. Moreover, Vojislav Szeselj is going to run for the President of Serbia in spite of the fact that the contestation of his verdict was submitted to the Board of the International Criminal Tribunal for the former Yugoslavia at the beginning of May. In March the Tribunal acquitted him. Such an attitude does not improve foreign policy. What is more, Croatia, Belgium and Holland hinder the accession of Serbia to the EU because of the poor cooperation with ICTY. Serbia will be admitted to the European Union only if its relation to the Tribunal improves. The situation described above shows how important the International Criminal Tribunal for the former Yugoslavia is in the political arena. When judging the subsequent operations of the ICTY it is crucial to emphasize that it did not have the easy task.

Evaluating the activities of the ICTY one should pay attention to the fact it did not have an easy task. The accused used the help of their governments, therefore, the Tribunal had problems with capturing them. What is more, there were difficulties with access to witnesses and victims. Initially, the international community was skeptical about the activities of the Tribunal. Nobody believed that this concept could be successful. However, such personalities as Richard Goldstone (first prosecutor) or Antonio Cassese (First President of the Tribunal) proved that one could effectively judge even the biggest war crimes. Thanks to the work of the Tribunals the most significant perpetrators of violations of humanitarian law in the former Yugoslavia were charged. Despite the difficulties which arose during the Tribunal’s activities, ranging from doubts concerning its powers of jurisdiction by difficulties in prosecuting the perpetrators, the Tribunal

¹⁶ Ibidem.

proved to be a strong and enduring institution. Activity of the ICTY is assessed positively. It had succeeded as regards its operating. It must also be noted that the ICTY contributed to the creation of the International Criminal Court.

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