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INTERNATIONAL COURTS IN THE HAGUE: A COMPARISON BETWEEN THE ICTY AND THE ICC AND THEIR RESPECTIVE CONTRIBUTIONS TO THE RULE OF INTERNATIONAL LAW FROM THE PERSPECTIVE OF VICTIMS OF INTERNATIONAL CRIMES[1]

Poređenje Međunarodnog krivičnog tribunala za bivšu Jugoslaviju i Međunarodnog krivičnog suda i njihov dobrinos vladavini međunarodnog prava iz perspektive žrtve

Međunarodni krivični tribunal za bivšu jugoslaviju jeste model koji upućuje na ad hok pristup pravnog rešavanja problema zločina u ratnim sukobima. Mane ovog sistema su: pitanje da li će se uvek poklopiti sve okolnosti potrebne za osnivanje ad hok suda, prevelik uticaj (stalnih) članica Saveta bezbednosti Ujedinjenih nacija koje bi time ostvarivale sopstvene političke interese, dok bi međunarodna krivična dela učinjena pod njihovim patronatom ili odobrenjem ostajala van domašaja bilo kakvog pravednog kažnjavanja.

Međunarodi krivični sud osnovan Rimskim statutom je imun na većinu prigovora upućenih Tribunalu za bivšu Jugoslaviju. Projekat međunarodnog stalnog i univerzalnog krivičnog suda postaje, međutim, žrtva sopstvene ambicioznosti*. Postavlja se pitanje ostvarljivosti ovakvog projekta.Trajno prenošenje ovlašćenja koje je do sada bilo eksluzivno pravo SB, najmoćnije države vide kao ugrožavanje svojih interesai odbijaju da učestvuju u njemu. Bez vojno najmoćnijih zemalja koje direktno ili indirektno učestvuju u najvećem broju vojnih operacija, ne možemo govoriti o uspostavljanju univerzalnog međunarodnog krivičnog sudstva.*

1 Na međunarodnom konkursu za najbolje studentske eseje 2008. godine Grocijus instituta za međunarodno pravo u Hagu, na temu pod kojom i objavljujemo rad, autor je nagrađen studijskim boravkom na pomenutoj instituciji.

Mane Međunarodnog suda za bivšu Jugoslaviju proizilaze upravo iz njegovog nametnutog karaktera, činjenice da je SB osnovao kao prinudnu meru. Međunarodi krivični sud osnovan Rimskim statom praktične teškoće doživljva, međutim, baš zbog težnje univerzalnosti i dobrovoljnog prenosa suvereniteta, a ne nametnute nadležnosti. Mane jednog i poteškoće drugog suda prozilaze upravo iz mana I teškoća današnjeg međunarodnog prava.
Ključne reči: Razvoj međunarodnog prava.- Međunarodno krivično pravo.- Međunarodno krivično sudstvo.- Međunarodni krivični sud.- Međunarodni krivični tribunal za bivšu Jugoslaviju.

In our opinion, the most important differences are those resulting from the origin of space and time nature of these two courts. ICTY was founded on the basis of resolution of the Security Council on May 25 1993 and is competent for the crimes allegedly committed on the territory of ex Yugoslavia since January 1 1991. ICC originated through international agreements signed in Rome in 1998. The Statute of this court came in force 60 days after the 60th ratified agreement (July 1 2002). ICTY is restricted by time and space, i.e. it is a court for „single use'' only. Regarding that it was founded by the Decision of the Security Council, we can speak about an imposed nature of this court. With ICC, states renounce sovereignty in its favor, on voluntary basis, and it is potentially a universal court, because it seeks that its jurisdiction is recognized by all states.

We have to appreciate the contribution to the rule of international law from the perspective of victims. In order to avoid impreciseness and arbitrary interpretations, we shall define clearly what is meant by the expression „the perspective of victim'' in the paper. From possible interpretations, one will make the slightest mistake if the most lawful is chosen, and from this perspective one aspires toward legal protection. One takes a stand that an ideal law is to the interest of all victims, i.e. the law that will originate and will be enforced lege artis. Therefore, the comment and analysis in this paper will start from a position as to what should a law be.

When the word is about international criminal law, the basic premise, on which supporters (followers) and opponents of the present concepts and judgments agree, is a necessity of institutionalization of the international criminal law. The reason for this is the inertness of states when the word

is about trials for those who committed international criminal offenses. In addition to political component that would be predominant in such trials, there is also a reason that the mentioned criminal offenses were committed just under the patronage of a state (i.e. its governing structures).

ICTY originated as an ad hoc solution due to non-existence of universal court which would deal with violations of international humanitarian law.[1] A basic question that we could pose here is whether there are forces in the International Community which are capable of founding a court for the particular case at each violation of international humanitarian law. We think that they do not exist, and we shall also review other shortcomings of such a way of settlement of international conflicts. The Tribunal itself, as cited in the literature, was founded due to international circumstances that were in its favor. The end of cold war and victory of one side enabled the domination of the victor in the Security Council. Therefore, we can draw a conclusion that punishing the one who committed terrible crimes cannot wait for coinciding of all international circumstances in order to mete out justice to this end. It is also evident that some countries, namely, crimes committed under their sponsorship, would remain untouchable. One shouldn't cherish illusions that the most powerful countries, first of all, the ''veto possessors'' in the Security Council, would permit the founding and court proceedings that wouldn't suit them. Such a way of solving problems would bring about that many victims of international criminal offenses would be, as Kaseze said, killed the second time (''the first time they were killed in physical sense and the second time when they were forgotten [2] '').

Therefore, we can speak about ad hoc judiciary system only as an interim solution until the founding of universal international criminal court. Although the Tribunal supporters stated that one could speak, for the first time, about a court that wasn't a ''victor's court'', one could not disregard the participation of some permanent member countries in bombing the Republic of Srpska, Serbian Krajina and FR of Yugoslavia. Considering a decisive impact of these members on founding and financing the Tribunal and a significant role of the Security Council in the selection of judges and prosecutors, it is rather debatable to speak about independence and impartiality of the Tribunal, whereby one raises the issue of double standards.

It seems that ICC possesses the capacities not being subject to criticism, pertaining to ICTY. In view of its potential universality in time and space, one cannot reproach this court, because of ‘’selective justice’’, and the impact of influential countries would be reduced to a minimum. When social phenomena are considered, it is very important to ask a question not only whether something is good but also whether it can be carried out in reality. A major problem of this court is a possibility of achieving the set objective. Also, the founding of the court was followed by certain difficulties, and three groups of states were classified in operation of the Preparatory Committee. The first group advocating a broad ‘’automatic jurisdiction’’ of the court and independent prosecutor. The second group, composed of ‘’veto possessors’’ in the Security Council (without GB and France), among which the USA stood out as a leading ‘’hawk’’ and which opposed automatic court jurisdiction and giving the right to prosecutor to institute legal action. They advocated that the right to forward a case to the court should be under supervision of the SC with the possibility of stopping the proceedings.

The third group was composed of member countries of non-aligned movement which opposed severely the assigning of competencies to the SC. After adopting the Court Statute (Roman Statute), a question arises whether some countries are going to recognize it. For court universality, which we called potential with justified reason, it isn’t the most important that absolutely all states have to recognize it., but only those most relevant. The USA rejected the ratification of the agreement they signed and then they ‘’withdrew the signature’’. The agreement was neither ratified by Russia nor signed by China. The title of ‘’hawk’’, that we have already assigned to it, the USA deserved not only by its inactivity but also by extremely active sabotage of ICC. In this way they began to exert pressure with the view of signing bilateral agreements by which immunity is guaranteed to US citizens relative to ICC. Regarding that the other party to those agreements is already a signatory of Roman Statute, a collision between these two agreements is obvious. The situation became more tense by the enactment of American Service-Members Protection Act of 2002, which was enacted by II Administration of President Bush, and by which a military operation has been envisaged for acquittal of US citizens that would be extradited to ICC?

If we do not classify victims into ‘’our and their’’, ‘’justified and unjustified’’, by religious affiliation and nation (and each such classification would be unauthorized!) we can draw a conclusion that in the ad hoc deciding on international crimes remains an objection to selective justice, a problem as to whether there will always occur circumstances favorable for finding a corresponding solution. The fact is that the crimes committed ‘’to the interest’’ of the most powerful countries shall remain untouchable. It is only justified to speak about ad hoc international judiciary system as about an interim solution up to ICC. On the other hand, ICC pays the price of its legality in conformity with the law. In comparing these two courts, the situation is somewhat schizophrenic, the shortcomings and deficiencies of ICTY result from its imposed nature, i.e. from the fact that the Security Council founded it as a coercive measure, while ICC experiences difficulties in practice just because we have with it a voluntary transfer of sovereignty and not an imposed jurisdiction. However, some countries do not wish to recognize its jurisdiction on ‘’volunteer basis.’’ To be quite precise, not some ‘’banana’’ republics refuse to recognize the court but, besides others, three most powerful countries of the world, and as it is known, most conflicts occur with their direct or indirect participation. The entire situation seems as if we are spinning in a ‘’logically magic circle’’.

Both supporters and critics think that ICTY contributed to a significant extent to the founding of ICC, whereby the first ones cite it as an example in a positive and the other ones in a negative sense. Viewed from the aspect of victims of all international criminal offenses, the founding of ICC has been a gigantic step forward compared to the previous situation in which, after terrible wars and crimes, the victims sank into oblivion or partial solutions were found and ‘’victor’s courts’’ founded. Instead of determining, from one case to another, the domination of international policy and selectivity, we should have a universal, equal for everyone and to a possible extent depoliticized international criminal court in the future (whether it will be in the near future?!). However, there is no reason for euphoric triumph, because there are still many obstacles until the founding of such court in practice. All shortcomings, criticism and difficulties, encountered by the international criminal judiciary system, have not emerged by themselves, but they result from the present international law and problems faced by it.

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The ICTY is a model directing to ad hoc approach to solving crime problems in war combat. The shortcomings of this system are : an open issue whether all circumstances, necessary for founding the ad hoc tribunal, will always coincide, enormous impact of permanent members of the UN Security Council, which would thereby attain their own political goals, while international crimes, committed under their patronage or approval, would remain beyond reach of any righteous but not feigned punishments.

The ICC, founded on the basis of Roman Stat, is immune to the objections directed to the Tribunal for ex Yugoslavia. But, the project of the permanent international and universal criminal court becomes a victim of own ambition. The question of such project realization has been posed. Lasting assignment of competences, which was the exclusive right of SB so far, was seen by the most powerful States as the impeachment of their own interests. Without the most powerful countries in military sense of the word, taking part directly or indirectly in most military operations, we cannot speak about reaching a universal international criminal judiciary system.

The shortcomings of ICTY result just from its imposed nature, i.e. the fact that it founded the SB as a coercive measure. The ICC, founded on the basis of Roman Stat, experienced difficulties in practice just because just because we have with it a voluntary transfer of sovereignty and not an imposed jurisdiction.. The shortcomings of one and difficulties of the other court result from defects and problems encountered by the international law.

Key words: International Law Development. – International Criminal Law. - International Criminal Judiciary System.- International Criminal Tribunal for the former Yugoslavia.- International Criminal Court.