Prof. Vladimir Čolović, PhD
Institute for Comparative Law, Belgrade

ESTABLISHMENT OF ICTY – AN EXAMPLE OF DISRESPECT FOR LAW AND ACTUAL FACTS

Abstract

The establishment of the ICTY is a consequence of the armed conflict in the territories of the former SFRY. The specificities that characterise this Tribunal require an analysis of its establishment, bearing in mind the political relations at the time of its establishment, and the specificities of its bodies and the regulations that were adopted as a part of this Tribunal. This paper discusses the circumstances that preceded the creation of the ICTY, and the role of the UN Secretary-General, and the Commission for Investigation of Violations of International Law in Former SFRY, whose Report on the conflict in the former SFRY served as a basis for the establishment of the Tribunal. In addition, the author draws attention to some issues related to the work of the ICTY's bodies, the content of its Statute and some of its regulations, and the key issue, which is the qualification of the conflict in the former Yugoslavia, giving some initial elements for an assessment of the validity of the establishment of this Tribunal.

***Descriptors**: the ICTY, UN Secretary-General, Commission, Report, jurisdiction, SFRY, conflict.*

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Even after twenty years from the establishment of the International Criminal Tribunal for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia (hereinafter: the ICTY), the legitimacy, fairness, and impartiality of this institution continue to be questioned. The aftermaths of the war in the territory of the former Yugoslavia have been vast, they will be felt for a long time in this region and

will reflect on the life of all the nations in the newly created states in this territory in general. However, the consequences that have been and will be produced by the decisions that have been and will be adopted by the ICTY are no lesser and they will have a great impact on the position of the states - former SRFY republics, in relation to both the other former republics, and the international organisations and other countries in the world. It is certain that Serbia has suffered and will continue to suffer the worst consequences of the ICTY's decisions, considering that the greatest number or those indicted and convicted by this institution are Serbian nationals and nationals of the Republic of Srpska. Without dwelling on the numbers related to these judgments, we can ask what the legal basis that led to the establishment of the ICTY was, and weather the conflict that occurred in the territory of the former SFRY, and the role of the Yugoslav People's Army (JNA) in that war, were properly qualified. While these questions have already been discussed extensively, this paper will attempt to answer them exactly through a review of the legal rules, regulations and professional opinions that led to the establishment of the ICTY.

In the introductory part, we will also argue that the main cause of the ICTY's establishment and subsequent operation "lies" in the criteria that were used and the evaluations that were made by international organisations, as well as the greatest part of the international community, which were not equal. In fact, international organisations and the international community tried to "pinpoint" the culprit for armed conflict, and, therefore, misqualified the armed conflict in Yugoslavia.

As a matter of fact, the ICTY has attracted great attention of everyone, not just judicial professionals. The Statute and the Rules, which were adopted to regulate the operations of that tribunal, and which are interesting also from the point of application of law and from the standpoint of history, considering that this tribunal can, in a way, be compared to the International Military Tribunal at Nuremberg and Tokyo. In accordance with the 1945 London Agreement, the Allies established an *ad-hoc* tribunal to prosecute war criminals, and its judgments had a great impact and influence on the subsequent development of international criminal law, and international law in general. However, there are some differences between the 1945 International Military Tribunal (IMT) and the ICTY. The first difference is that the IMT was a tribunal created by the World War II winning states, while ICTY was set up to prosecute the perpetrators of war crimes that

occurred in the territory of one country, the former Yugoslavia. The second difference is that the IMT had to adopt on its own the rules of the trial and criminal responsibility of persons who had committed crimes in World War II, thus violating the basic rule of *nullum crimen, nulla poena sine praevia lege*, and exposing itself to the objections of its retroactive application of the criminal law. On the other hand, the ICTY applies predetermined rules, which were adopted before the beginning of its operations. Finally, the third difference is that the ICTY provides also for concurrent jurisdiction, i.e., parallel jurisdiction of the Tribunal and national courts.[1]

The aim of this paper is not political, although the circumstances that led to the creation of this tribunal show that political considerations can influence the creation of law or legal surrogates. The dilemma has always been politics or law, force or justice. The issue of the viability of the ICTY's establishment has been raised ever since its establishment. For the first time in the history of international law, this sort of a tribunal, which encroaches on the sovereignty of a country, its legal system, in its court proceedings, was created. It is very difficult to answer the question why there was a war in a country. A long and difficult history, religions differences, and centuries of considerable influences and interests of the great powers are the main causes of the war that took place. And due to all that, qualifying that conflict was so difficult and dangerous.

Commission for Investigation of Violations of International Law in Former SFRY

The Commission for Investigation of Violations of International Law in the Former SFRY has made the biggest impact on the establishment of the ICTY. The Commission's report, which will be discussed later and whose content is primarily a set of general, rather than specific facts, contributed to the preconceptions about not only the establishment of the ICTY, but also his work. The Commission was established in October 1992, which means more than one year after the onset of the war in the former SRFY. Just as before, when the whole of mankind was shocked by the war crimes and other serious violations of international humanitarian law in the First and

[1] Čolović V., Međunarodni sud za ratne zločine na području bivše Jugoslavije, časopis Pravni život No. 12/1998, Belgrade 1998, pp. 455-456

Second World Wars, the international community, after various doubts and long hesitations, established an investigation commission to determine the violations of international humanitarian law in the territory of Yugoslavia during the civil war in Croatia and, later, in Bosnia and Herzegovina. The commission was established at the request of the UN Security Council, pursuant to Resolution 780 (1992) dated 06 October 1992, under the name "Commission Of Experts To Investigate And Collect Information With Respect To The Secretary-General's Conclusions On The Evidence Of Grave Breaches Of The Geneva Convention And Other Violations Of International Law In Former Yugoslavia" (hereafter: the Commission). The Secretary-General appointed four members of the Commission and its Chairman. The first Chairman was F. Kalshoven from the Netherlands, and the members were M.C. Bassiouni of Egypt, W.J. Fenrick from Canada, Keba M'baye from Senegal, as well as T. Opsahl of Norway.[2]

While, the scope of the Commission initially focused on the analysis of information, and not on the collection of evidence, after the adoption of the Security Council Resolution 787 (1992) of 16 November 1992, its scope was extended to include the investigative function, which related especially to the investigation of the information about "ethnic cleansing." Although the Commission had difficulty in gathering evidence, and during the investigation activities, which was reflected, above all, in the lack of funding and other problems in the field, and which led to the Commission sometimes issuing statements that did not correspond to the actual situation, finally, after a year and a half, it succeeded in collecting 65,000 pages of written materials, as well as large quantities of other proofs, such as films and video recordings. The written materials contained the statements of witnesses and victims of crime. All the material was processed through an electronic database, and as such was forwarded, along with the Commission's final

[2] Krapac D., Međunarodni kazneni sud za teška kršenja međunarodnoga humanitarnog prava na području bivše Jugoslavije od godine 1991: pregled glavnih povijesnih, međunarodno-pravnih i kaznenopravnih pitanja, Zagreb 1995, p. 17; After Kalshoven's resignation on 19 October 1993, and after Opsahl's death, Bassiouni was elected Chairman and C. Cleiren and H.S. Greve from the Netherlands and Norway respectively were appointed members.

report, in April 1994 to the UN Secretary-General, and to the ICTY Prosecutor.[3]

Although the work and contribution of the Commission was undoubtedly of great importance for the ICTY Prosecutor and the Tribunal itself, it has to be noted that the Commission's report was at the verge of unacceptable because of its qualification of the armed conflicts in the former Yugoslavia. The same report was based on the fact-finding field work, which, as we have said, considering the difficulties in the work of the Commission, was of dubious credibility.[4] It is characteristic that the report contains the findings of constant crimes, and it is interesting that it deals in a comprehensive manner also with the identification and interpretation of the relevant rules of international humanitarian law. Similarly, in the report, the Commission sought to provide definitions of specific crimes, particularly genocide and crimes against humanity. The report also warned of the probable defence of the accused, who would argue in their defence that they committed the crimes at the orders of their superiors, and that they were not aware or could not have been aware of the massive crimes that were committed by paramilitary groups or local armed groups. That was considered important by the Commission, as in the territory of Yugoslavia, in addition to the regular military forces, there were also paramilitary groups, more specifically some 45 groups involved.[5]

- Report of the Commission

Attention will be devoted to some parts of the Report, from which it can be seen that the above statements are true. If the establishment of the ICTY, as an international judicial institution, depended on this Report, then the facts stated in that Report had to be more specific. It could be argued that

3 The Final Report in the English language contained 84 pages and included several annexes with more than 3000 pages; Čolović V., *op. cit*., p. 457

4 By 31 March 1884, the Commission had received the information that enabled it to establish the existence of 143 mass graves, each containing 3 to 5,000 dead bodies, created during the war in Bosnia and Herzegovina, and 44 in Croatia.

5 Krapac D., *op. cit*., p. 18; The Report states that some of these militias, or for the purposes of the Report "special units," committed "some of the gravest violations of international humanitarian law."

the Final Report (hereinafter: the Report) of the Commission was unsystematic. The impression is that the members of the Commission "pieced" the information about the events in the territory of Croatia and Bosnia according to the criterion of awareness of certain events, rather than chronologically, by date of such events or their importance for the war in that region. We will describe the order in which the members of the Commission stated the information they had obtained (these are Sections from the Report):

> The study of Opština [the Municipality of] Prijedor, located in north-western Bosnia: alleged genocide and mass violations of the fundamental principles of humanity.[6] The data relating to events in Prijedor is not specific. By the way in which is it stated, it can be concluded that it was obtained indirectly, and not through concrete fact-finding work in the field. We will cite some of the examples. The Commission states that in early 1992, "a very small Serbian paramilitary group took control of the television transmitter on the Kozara mountain in Opština [the Municipality of] Prijedor, and as a consequence the population in the district could not receive television programmes from Sarajevo or Zagreb any longer." It is not stated what paramilitary group that was, but it can be concluded, considering that the reception of the TV channels from the above cities was closed, that it was a Serb paramilitary group. Why did the Commission fail to state that? Maybe it pertained to something else. Secondly, are there any facts that prove that that was done by a paramilitary group? Furthermore, it is stated that that was a small group. How many members should a military or a paramilitary group have to be considered small. Similarly, it is not stated who commanded the group, i.e., at least an assumption in that respect could have been attempted. The next thing that is confusing in this Section relates to the sentence, "Prior to the power change on 30 April 1992, Serbs secretly armed other Serbs in the district." What Serbs were these? Where did those Serbs come from? From Croatia, Serbia, other parts of Bosnia and Herzegovina? Were they representatives of the authorities or not? Furthermore, it discusses in very general details the dismissals of

[6] Sections 151-182 of the Report.

those individuals who were not Serbs, radio broadcasts that insulted and slandered all those who were not Serbs, etc. It is interesting that the Report uses the term "non-Serbs," although that was not a large area, and is was relatively easy to determine the ethnicities that were in question. In addition, based on that it can be concluded that all those who had lived in the area, and were not Serbs, experienced all of the above. We certainly do not claim that this is false information. We cannot do that, as in that case we would have to establish these facts on our own, but the Commission had to make an effort to provide more specific data on those who had been banished, maltreated, liquidated, as well as those who had committed these acts;

The battle and siege of Sarajevo.[7] This part is rather confusing. Perhaps also due to the fact that, at the time of the collection of information and the preparation of the Report, Sarajevo was under siege. We will present only one part that relates to Sarajevo based on which no conclusion can be made, even though the Commission claims otherwise. It relates to a soccer game in the Dobrinja, a suburb of Sarajevo, played on 1 June 1993. This information is based on the statements of several witnesses on the Bosnian side, and the crater analyses, which was provided to the Commission by UNPROFOR. The Commission concluded that two mortar shells landed at the soccer field, and that thirteen persons were killed, and 133 injured. Furthermore, they concluded that the shells were fired from the Serb side. What is interesting here relates to the part where it is stated that the weather was clear and sunny with good visibility, and that the game site could not be seen from the Serb side because it was surrounded by apartment buildings. The climax of this part of the Report is the Commission's conclusion that persons on the Serb side deliberately attacked civilians and, therefore, committed a war crime, and that with the information available, it was not possible to identify the probable offenders who committed that crime;

[7] Sections 183 – 209 of the Report.

Medak Pocket investigation.[8] In this section, the Commission could have stated the names of the Croatian officers who were responsible for the events in the Medak Pocket. Furthermore, it is incredible that the Report states that the territory was "under the control of the Serbs," without stating that in that territory the Serbs had been an indigenous population for centuries;

Detention facilities.[9] The Commission was not able to find out who operated 308 camps. The Report states that there were 715 camps opened, of which 237 were operated by the Serbs, as well as by the former Republic of Yugoslavia. It is not certain what country it is referred to. At that time, FR Yugoslavia had already been established, but that is not stated. Furthermore, it is not stated who operated those camps from Yugoslavia, which is referred to in the Report. In this part, only one small paragraph is dedicated to the camps operated by the Bosnian Government, a somewhat bigger paragraph is dedicated to those under the control of the Croats, while the paragraph dedicated to the camps under the control of, as it is not stated, the Bosnian Serb Republic, is several times longer;

Rape and other forms of sexual assault.[10] The part of the Report that pertains to cases of rape and other sexual assault is somewhat more detailed. It is stated that the perpetrators have been identified. But it is not clear why the Commission compares the execution of this crime in wartime and in peacetime. The Commission states that rape is among the least reported crimes. While that is true, in wartime there are also other ways to identify rape cases, considering that there were also cases of mass rape, at all sides, and the Commission links rape with ethnic cleansing;

Mass graves.[11] The Report states the tentative number of graves, and well as the dead bodies buried in those graves. It is stated that the information relating to the mass graves may change, and that

[8] Sections 210 – 215 of the Report.

[9] Sections 216 – 231 of the Report.

[10] Sections 232 – 253 of the Report.

[11] Sections 254 – 264 of the Report.

> the graves contain also the bodies of those who were "not necessarily unlawfully killed."

The Report also includes parts dedicated to the investigation of the grave sites at Ovčara near Vukovar,[12] Dubrovnik investigation,[13] and destruction of cultural property.[14] In respect to Ovčara, the Report deals more with the communications with the administration of the Serb Republic of Krajina, than the event itself. That part is rather brief. In respect to the destruction of cultural property, the Commission deals with the Dubrovnik events and with the destruction of the Old Bridge in Mostar. These parts are also very brief. The Commission does not consider the destruction of other famous cultural sites, as if it did not have sufficient time, or perhaps sufficient credible information, which cannot serve as a justification for the Commission. Finally, very little room is dedicated to Dubrovnik. But even that little room is dedicated solely to one incident of bombardment of the Old City on 6 December 1991, the St. Nicholas Day in the Catholic Liturgical Calendar. That date and that Saint Day are repeated several times. In addition, the Report states also the tentative number of victims (82 or 88), as well as the estimate of the damages expressed in Deutsche Marks. The Commission finds that based on all the above it is possible to develop cases directed against the officers responsible for the St. Nicholas Day bombardment. St. Nicholas Day is celebrated by both the Catholic and Orthodox religions. But the above Saint Day is much more revered (if not the most revered Saint Day) by the Serb population, and therefore it is not clear why the Commission insists on repeating that it occurred on this Saint Day.

While the Commission's Report deserves a much broader analysis, the above review is, in our opinion, sufficient to show that it is based on too general information, which, as we have argued, was obtained indirectly, and which was the basis for the proposal for the establishment of the ICTY. The objections that can be made about the Report do not relate only to the data, the systematic and chronological order, but also to the way in which these facts are exhibited. In fact, some parts are devoted to the events in certain

[12] Sections 265 – 276 of the Report.

[13] Sections 298 – 301 of the Report.

[14] Sections 285 – 297 of the Report.

cities, areas, regions, and some are related to the specific crimes. For example, Dubrovnik is mentioned in the part where it relates to the destruction of cultural property, and in the part dedicated to this city. The same case is with the information about mass graves, rape, etc. On the basis of the above, we can raise a number of questions about the work of the Commission. More specifically, was the time that Commission had to draw up the Report inadequate, could it have obtained more specific data, was the Commission prevented by someone in obtaining such data, and whether the Commission had the capacity to do this job. Of course, other issues can also be raised.

UN Secretary-General's Proposal To Establish ICTY

The UN Secretary-General, in his report of 3 May 1993, proposed the Security Council to adopt the decision on the establishment of the ICTY, pursuant to Chapter VII of the UN Charter, as its subsidiary body to perform its functions.[15] The Secretary-General cited several reasons for this. First, from the criminal and political aspect, that way of establishing the tribunal is more expeditious than its establishment on the basis of a multilateral agreement, which could take a very long time to collect the required number of signatures and ratifications of the UN Member States, or by a decision of the General Assembly. Secondly, the establishment of the Tribunal in this regard corresponds with the scope that is, pursuant to the Chapter of the UN Charter, granted to the Security Council in the case of any threat to the peace, breach of peace, or act of aggression. In addition, the Secretary-General believes that, despite its character as a subsidiary body, the ICTY would perform its activity as a judicial body autonomously and independently, as it would not be under the supervision of the Security Council, in terms of adjudication, and it would not apply any norms that would be prescribed by the Security Council, but only the norms of international criminal law.

The question that is raised is weather these reasons, given by the Secretary-General, are based on the UN Charter. The UN Charter in Article

[15] Article 29 of the UN Charter sets out that the Security Council may establish subsidiary bodies as needed for the performance of its functions; Krapac D., *op. cit.*, p. 22

39 grants the right and obligation to the Security Council to determine "the existence of any threat to peace, breach of the peace or act of aggression," and to make recommendations, or decide what measures shall be taken to maintain or restore international peace and security.[16] However, the establishment of an *ad-hoc* international criminal tribunal is not expressly provided for in the UN Charter, although the basis for the establishment of the ICTY was found in the provisions of Articles 24, 29, 39 and 40 of the UN Charter. The rationale cited for this type of establishment of the ICTY is rather inconclusive, notwithstanding that, at first glance, it appears to reflect the true situation in the field, i.e., the former SRFY republics. Such one-sided approach to this problem has contributed for the key arguments for the establishment of the ICTY to include the following: 1) following the breakup of the former Yugoslavia and the international recognition of the successor states, the war that perhaps in the beginning and could have been considered a civil war became undoubtedly an international conflict, threatening international peace and security. If we remind ourselves how the war in Slovenia and Croatia, and later in Bosnia and Herzegovina, started, we will be able to see that the Yugoslav Army, i.e., the former JNA, defended the territorial integrity, i.e., integrity of SRFY. Subsequently, after the JNA withdrew from the territory of the former SRFY republics, the conflict between peoples who had lived in these territories for centuries continued. The conflict in the former Yugoslavia cannot be in any respect qualified as international, and therefore this reason for the establishment of the ICTY is not valid; 2) the second reason suggests that, although the war in Bosnia and Herzegovina could be considered an internal conflict between different ethnic and religious communities, the fact that there were mass and serious violations of international humanitarian law during the conflicts between different ethnic groups living in these territories requires the creation of a strong judiciary institution that would have a preventive effect on the participants in the conflict and that will convey a clear message to them that the war crimes and crimes against humanity will not be tolerated.[17] The

[16] Those measures are specified in Article 41 (measures not involving the use of armed force) and Article 42 (measures involving the use of armed force).

[17] Krapac D., *op. cit.*, p. 23; In respect to all the above, the victims of the war in Bosnia and Herzegovina also have to be noted. A collection of documents of the European Parliament "The Crisis in the Former Yugoslavia" EU, Directorate General for Research, Vol.18, Luxembourg 1994.

above factors, stated as the reasons for the establishment of the ICTY could have even been justified, if the crimes had not occurred in the territory of a sovereign state, and if all the parties of the conflict had been treated equally, regardless of their ethnicity or religion. Even when Bosnia and Herzegovina was internationally recognised, it should have been considered that in the territory, i.e., within the confines of the SFRY Bosnia and Herzegovina, a new entity, a new state was created;[18] 3) having undertaken all the provisional measures under Article 40 of the UN Charter, such as the numerous appeals to the warring parties to abide by international humanitarian law,[19] the Security Council has a duty to ensure prompt and effective UN action and to fulfil its responsibility to maintain international peace and security, which was entrusted to it by the UN Member States.

We can argue that the ICTY does not have any solid foundation in the UN Charter, as well as in the above reasons for its establishment. These shortcomings later affected also the work of the ICTY. Specifying this reason was in the function of bringing one party in the conflict in a much worse position in relation to the others. They did not take into account the facts that this related to a federal state, which had still existed at the time of the onset of the conflicts.

3. Establishment of ICTY

From February 1993, i.e., from the adoption of the Security Council Resolution 808 [20] until the adoption of the Security Council Resolution 827 (1993), which is a period of several months, the UN Secretary-General received a considerable number of proposals by some UN Member States, NGOs, and think-tanks relating to the establishment of the ICTY. The report of the UN Secretary-General from 13 May 1993 indicates an array of the comments and suggestions, which were submitted after the adoption of the UN Security Council Resolution 808, by 29 UN Member States and

[18] Republic of Srpska.

[19] In its Resolution 764 of 13 July 1992, the Security Council warned the warring sides that they were obliged to abide by international war and humanitarian law, and that there was individual responsibility. Similarly in Resolution 771 of 13 August 1992, and in Resolution 820 of 17.March 1993.

[20] The Security Council Resolution 808 was prepared at the motion of France.

Switzerland, as well as several reports by special judicial commissions (France and Italy), i.e., Secretary of the Conference on Security and Cooperation in Europe, the International Red Cross, and numerous non-governmental organisations.[21]

The Resolution 827, along with the Report and the Statute of the ICTY, was adopted on 25 May 1993 by the UN Security Council, and unanimously at that. Pursuant to Article 15 of the Statute, in the general meeting on 11 February 1994, the ICTY adopted the "Rules of Procedure and Evidence," and in the general meeting on 05 May 1994, the "Rules Governing The Detention Of Persons Awaiting Trial Or Appeal Before The Tribunal Or Otherwise Detained On The Authority Of The Tribunal." As for the "Rules of Procedure and Evidence," it is based on the classical adversarial model, i.e., adversarial procedure, in which the burden of proof lies with the prosecutor. More specifically, the prosecutor is obliged to provide proof as the foundation of its indictment, and to present evidence during the hearing. In the course of this procedure, the parties, rather that the court, present evidence in accordance with the principle of contradiction. However, that there are two exceptions. The rules do not contain elaborate regulations on the use of certain evidence before the Court, and the Court is given a relatively wide discretion to obtain evidence on its own initiative. The Rules address also the issues of the protection of witnesses, who were victims of crimes, and trials in absentia. In principle, trials in absentia are not allowed, but if after having conducted the investigation against the accused, the judge confirms the indictment, and the indictment is announced, and the state of the residence of the indicted or convicted person refuses to execute the warrant for arrest and extradition, the indictment will again be confirmed by the ICTY Trial Chamber, and an international arrest warrant will be issued for the accused.

Here, we will draw attention only to a couple of main characteristics of the ICTY's Statute. These characteristics relate to the specifics of this tribunal, which can and should be criticised. We will not dwell on the general provisions. The Statute includes a Preamble, which indicates the full

[21] Čolović V., *op. cit.*, p. 458

name of the Tribunal[22] and refers to Chapter VII of the UN Charter, which also underlies the decision on the establishment of the ICTY. According to Article 6 of its Statute, the ICTY tries only individuals for crimes committed after 1 January 1991. Why was the exact date of the beginning of the conflict not stated? It certainly was not 1 January 1991. Interestingly, the Statute (Articles 9 and 10) provides for concurrent jurisdiction of the ICTY and national courts, respecting the *non bis in idem* principle, but the ICTY reserves the right, in certain cases, to act in the place of the national court, i.e., adjudicate in its place. We will devote a special part to concurrent jurisdiction of the ICTY.

CONCURRENT JURISDICTION OF ICTY

As we have stated, the Statute of the ICTY defines the jurisdiction of this Tribunal as parallel, i.e., concurrent with the national courts of the states created in the territories of the former SRFY.[23] However, the second paragraph of Article 9 of the Statute specifies that the ICTY's jurisdiction shall have primacy over national courts, so that, at any stage of the procedure, the ICTY may formally request national courts to defer to the competence of the ICTY "in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal." Concurrent jurisdiction that is provided for in the ICTY Statute did present an innovation in international law, but it was of limited effect. More specifically, the primacy of the ICTY's jurisdiction can only be achieved pursuant to the provisions of the Statute and Rules of Procedure and Evidence. These provisions provide as follows:

a) Article 10, Para. 2, of the Statute specifies only two events in which jurisdiction is ceded; and

[22] It is interesting that there have been complaints about the name of the Tribunal, particularly the phrase "the former Yugoslavia." More specifically, it was proposed that it should refer to Croatia and Bosnia and Herzegovina.

[23] Article 9, Para 1, of the ICTY Statute.

b) the right to initiate the issuance of a request to a national court, under the conditions specified in the two events from Article 10 of the Statute, is granted exclusively to the prosecutor.[24]

As it can be seen, it is very unlikely that the ICTY would engage in deciding on its own concurrent jurisdiction. The above two events, provided for in Article 10, Para. 2, of the Statute, stipulate that a person who has been tried by a national court for acts that fall within the jurisdiction of the ICTY will be tried subsequently before the ICTY on subsidiary basis, i.e., "only if: a) the act for which he or she was tried was characterised as an "ordinary crime;" or b) the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted."[25]

When the ICTY Trial Chamber agrees with the Prosecutor's request, in accordance with Article 9, a formal request shall be submitted through the Registrar to the State under whose jurisdiction the court is. If the State fails, within 60 days, to file a response to the ICTY that it has taken or is taking adequate steps to comply with the request, the Trial Chamber may request the President to report the matter to the UN Security Council, in accordance with Rule 11 of the Rules of Procedure and Evidence.[26]

The terms used in Article 10, Para. 2 of the Statute, such as "ordinary crime", "not impartial or independent," "to shield the accused from international criminal responsibility," or "not diligently prosecuted" have created and will create major problems with their interpretation, and therefore in the relations between national courts and the ICTY. These terms are very difficult to interpret, as the qualification of the crime, the course of the procedure, or the nature of the procedure itself depends on the nature of the authority or the institution that qualifies, i.e., interprets these concepts. The ICTY does not have to agree with the qualification of any of the above

[24] Rules of Procedure and Evidence, Rule 9; Krapac D., *op. cit*., p. 37

[25] As a matter of fact, the first paragraph of Article 10 of the Statute, under the title *Non-bis-in-idem,* states: "No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal".

[26] Čolović V., *op. cit*., p. 468

institutions. On the other hand, is the ICTY competent and qualified to interpret a country's national legal system and procedure? How is it assessed whether a trial is not conducted in an impartial, independent and diligent manner? Could one also raise the question of weather the ICTY would assess the respective procedure in the same way? Do the Statute and the Rules of Procedure and Evidence include any reference of professional incompetence of the national legislative and judicial authorities, which created the legal system of the country in the first place? In assessing the impartiality and objectiveness of the procedure, the ICTY may use the standards that have been developed in practice by international human rights law protection bodies such as the Commission and the Court of Human Rights of the Council of Europe, but even these standards cannot be a sure way to assess a criminal procedure, which is governed by the laws and regulations adopted by the authorities of the respective country. Therein lies the reason for the uncooperativeness of state authorities with the ICTY. For serious breaches of the Geneva Convention, the ICTY can easily make a distinction between the legal qualifications of the legally qualified war crimes and ordinary crimes under national legislation, i.e., the legislation of the former SRFY republics, while it will have more difficulties with crimes against humanity.

Other Issues Pertaining To The Work Of ICTY

We have described just some of the elements that relate primarily to the establishment of the ICTY. However, other issues can also be raised in connection with the work of the Tribunal. Specifically, the ICTY is not a general, or "regular," criminal court, but an *ad- hoc* tribunal which has its temporal, territorial, and content-limited task to adjudicate. It has to be noted that the duration of the ICTY's operation is not predetermined, or otherwise tied to any tasks that had to be finalised in relation to indictment, arrest, and trial of the accused. The content-based limitation of the ICTY's operation results from its political task that consists of establishing and maintaining peace and security in a particular region affected by conflict.[27] Unlike the Nuremberg IMT, the ICTY's competence relating to adjudication does not arise from the occupation rights of the occupying power after the

[27] Roggemann H., Kaznenopravna i regionalna suradnja – napomene o odnosu prava i politike, časopis ADRIAS, Vol. 12, Split 2005, p. 24

unconditional surrender within the legal space without own sovereign power, but is based on a limited scope of interventions, aimed at achieving a specific political goal.[28] Therefore, we refer primarily to the political element that "follows" the ICTY.

On the other hand, although the ICTY has only a limited territorial and temporal jurisdiction, i.e., it can try only those suspects who are believed to have committed crimes against humanitarian law and the laws of war in the former Yugoslavia from 1991, until now it has not tried any suspects who are not members of one of the former Yugoslav nations. Even after the 1999 war between NATO and FR Yugoslavia in connection with the Kosovo crisis, when there were very clear indications that NATO may have committed serious violations of international laws of war by deliberately bombing civilian targets, the former ICTY Chief Prosecutor, Carla Del Ponte, concluded that there was no sufficient grounds to even launch a serious investigation of those crimes.[29] Based on this we can conclude that the ICTY was established to try the citizens of the former SFRY republics.

The next issue that has to be pointed out refers to the work of the prosecutors and other bodies within the ICTY. In fact, the prosecutors played a controversial role, as there has always been a large difference in terms the proportions of the indictments raised against members of different ethnic groups. While that, in itself, is not an argument against the objectivity of the prosecutors, if this discrepancy corresponds to the current political rating of the specific ethnic communities, then it becomes a reasons for concern, as it opens room for the interpretation that, in terms of the sequence and scope of indictments against members of certain ethnic groups, the prosecutors are guided also by the political influences and current priorities.[30] We said, at the beginning, that we would not dwell on the numbers, but there is an incredible disproportion between the numbers of accused and convicted of citizens of Serbia and the Republic of Srpska, and the numbers of accused and convicted of citizens of other former SRFY republics. Furthermore, the ICTY's organisation itself shows that the prosecutors and the defence are not

[28] Roggemann H., *op. cit.*, p. 25

[29] Fatić A., Međunarodni krivični tribunal za bivšu Jugoslaviju u savremenoj diplomatiji, Međunarodni problemi, Vol. 54, No. 1-2, Belgrade 2002, p. 50

[30] Fatić A., *op. cit.*, p. 62

in equal position, as the prosecutors are an organisational unit of the ICTY, and not an independent party that appears before it, which implies that the prosecutors enjoy a number of procedural and normative preferences in relation to the defence.[31] One of the main objections relates to the extremely high level of discretion that the ICTY judges have in the interpretation of the ICTY Statute and Rules of Procedure.[32] In fact, that is the root problem in the work of the ICTY, and less importantly in the qualifications of that institution.

Qualification of the Conflicts

However, the main problem relating to the work of the ICTY, i.e., all the facts related to the establishment and operation of this Tribunal, is perhaps the qualification of the war that took place in the territories of the former SRFY. The war in Bosnia and Herzegovina cannot be qualified as a civil conflict or as an international armed conflict. The armed conflict was *sui generis* a conflict that had both the elements of a civil war, i.e., internal conflict, and international conflict. Until the proclamation of the Independence of Bosnia and Herzegovina by the incomplete Assembly (Parliament) of Bosnia and Herzegovina, the recognition of Bosnia and Herzegovina as a new subject in the international community, and its subsequent admission to the United Nations, the conflicts in Bosnia and Herzegovina had been an internal conflict, more specifically a form of a rebellion of one part of the territory against the central government. At that time, a national militia of the secessionist (rebel) authorities was established, and (in early 1991) initiated general attacks on the central federal government authorities and the JNA forces.[33]

After the proclamation of the sovereignty and independence of Bosnia and Herzegovina by thee incomplete Assembly, the civil war (internal conflict) evolved into, as some authors argue, an international armed conflict in which one party existed as the fictional, legally non- established state. Such a creation cannot be called the state as it does not have all the main

[31] Ibidem.

[32] Ibidem.

[33] Jončić V., Pravni osnovi učešća JNA u ratovima 1990-1991 na prostoru SFRJ, časopis Vojno delo, Vol. 60, No. 3, p. 28

elements for the state power, i.e., it did not have full control over its territory (it could not impose its control, and it did not have a full legitimate and effective legal authority), which implies that Bosnia and Herzegovina not only did not control its territory (as a condition for the admission to the UN), it did not even have sovereignty - one of the main attributes of the state. On the other hand, two states were *de facto* not recognised by the international community – the Republic of Srpska and Croat Republic of Herzeg-Bosnia. This view is founded primarily on the opinion of the International Court of Justice in The Hague, ruling in a dispute regarding the Bosnia and Herzegovina action against the Republic of Serbia. In the case of the application of the Convention on the Prevention and Punishment of the Crime of Genocide in a dispute regarding the Bosnia and Herzegovina action against Yugoslavia, the International Court of Justice found that the acts of the Army of the Republic of Srpska could not be considered acts of Yugoslavia and its army.[34]

On the other hand, the war in Croatia had different characteristics, depending on the period of the conflict that is analyzed. At the beginning of the armed conflict in Yugoslavia there were three clearly distinct sides: Croatia, with its paramilitary forces that, according to the decision of the Presidency of SRFY, should have been dissolved, the people of Serb Krajinas with their armed formations, which also should have been dissolved, according to the decision of the Presidency of SRFY, and the JNA as the legitimate armed forces of SRFY whose task was to try to prevent the escalation of the war on ethnic basis and separate the conflicting forces.[35] In fact, that should be the starting point when it comes to qualifying the conflict in Croatia. The JNA was present in the territory of Croatia and defended the sovereignty of SRFY, the SRFY Presidency acted as the supreme commander of the armed forces, and the federal state still existed. These are the facts that had to be taken into account.

Conclusion

The creation of the ICTY is a sort of precedent, and it is certain that its establishment and its work, and the rules adopted for the trial of war

[34] Ibidem

[35] Jončić V., *op.cit.*, p. 35

criminals and establishment of accountability will have a major influence on the development of international law in general. The main problem in terms of the work of ICTY is its qualification of the armed conflict in the SFR Yugoslavia. A question that can be raised is weather the establishment of this Tribunal is viable. The answer may be different depending on the interpretation of the ICTY regulations, and the general attitude towards that court. The ICTY is indeed a court, established by the UN Security Council, but its character depends primarily on the actions of its bodies, as well as on the application of the regulations by these bodies.

If we had to make a certain conclusion about the creation of the ICTY, it would relate to the question of the viability of the establishment of the ICTY, and that question can be posed also as a question of the relationship between the current political interests and international law. This stems from a number of problems that occur in the work of this Tribunal. This problem does not relate only to its establishment. It is customary that courts are set up by parliaments, and not by the executive authorities. The ICTY was established by the UN Security Council, which is an executive authority, while, from the procedural aspect, it could have been expected naturally that the debate on its establishment would be initiated by the UN General Assembly.[36] These problems relate also to the incorrect assessment of the circumstances that led to the creation of the ICTY, as well as a misunderstanding of the historical events, which led to the 1990s conflict in the former SFRY.

[36] Fatić A., *op. cit.*, p. 64