

The Establishment, Scope, and the Completion of the Mission of International Criminal Tribunal for the Former Yugoslavia

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Abstract

This paper will treat the establishment, scope, and the completion of the mission of International Criminal Tribunal for former Yugoslavia. It is well known that this Tribunal, respectively The Hague Tribunal, is established with a resolution of United Nations Security Council, for the purpose of establishing peace in the troubled region of Yugoslavia. Since its establishment, the Tribunal has held many judicial processes, by bringing in front of the justice even the heads of states and people with significant state positions.

Currently, the tribunal is in the completion phase of its mandate set by the United Nations resolution. For this reason, the tribunal does not accept new cases in order not to extend its completion phase of the mandate.

The paper as such, has a practical importance because it will examine the success and challenges that this international court level has faced. Moreover, it will point out also the Completion strategy of this tribunal, where it is presumed that the cases will be transferred to the local justice in order not to overload the court with other cases.

Key Words: Tribunal, Completion strategy, Mandate, Crimes against humanity, Genocide

1. Introduction

The Serbian hegemony, which started in the 90's against people who lived in former Yugoslavia, created conflict situations between the nations within this territory.

The United Nations Security Council with its resolution 771 (1992) of 13th August 1992, demanded that all parties and others concerned in the former Yugoslavia, and all military forces in Bosnia and Herzegovina, immediately cease and desist from all breaches of international humanitarian law.¹

The reports for the massacre of thousands of civilians, rapes and tortures in the prison camps, the terrifying views from the cities and the sufferings of thousands of people who were expelled from their land, brought the United Nations in the position to raise the Experts Commission for evaluating the situation in the field. In its report, the Commission documented terrible crimes and provided the Secretary General with evidence about the breaches of Geneva Conventions and other violations of international humanitarian rights.

Conclusion or findings of the Committee lead the Security Council to establish an international tribunal for people who committed those crimes, in order to stop those actions and prevent peace and international security from the risk.²

The Security Council expressed one more time its concern regarding the continuous reports of violating the international humanitarian rights in the territory of former Yugoslavia, including those involved in the practice of "*ethnic cleansing*".²

The Council decided that these circumstances pose a threat for peace and international security and it was determined to end up these crimes and to take effective actions for bringing in front of justice the people who are responsible. The council was convinced that in the former Yugoslavia circumstances, the establishment of an international tribunal would accomplish this goal, and also would contribute in bringing back and maintaining peace. Thereby, the Security Council opens the doors for organizing an international tribunal to judge those crimes and decides to establish an international tribunal for prosecution of the responsible people

¹ Resolution of Security Council 771 approved on 13th August 1992.

² Resolution 808, Approved by Security Council in the meeting 3175 on 22nd February 1993.

who have violated international humanitarian rights in the territory of former Yugoslavia since 1991.³

2. The establishment of International Criminal Tribunal for former Yugoslavia

By reaffirming the resolution 713 (1991) of 25th September 1991 and other relevant resolutions, the Security Council decided to establish an international tribunal with the aim to prosecute the people who violated the international humanitarian rights in the territory of former Yugoslavia from 1st January 1991 until a date that will be determined by the Security Council after bringing back the peace and for this purpose, approved the statute of International Tribunal.⁴

This was the first court for war crimes established by United Nations and the first tribunal for war crimes since the Tokyo and Nuremberg Tribunals. This date marked the beginning of the end of non-punishment for war crimes in former Yugoslavia.

The 20 years experience of Hague Tribunal has resulted in a relatively small number of trials. According to the official statistics of Hague Tribunal, until now the tribunal has accused 161 individuals for violating international humanitarian rights in the territory of former Yugoslavia.⁵ From this number, 28 are accused and are currently in the detention center of Tribunal, 26 are in the process of trial⁶ and 135 are ended processes.⁷ The modest results that are achieved by this court, have revealed many deficiencies in the function of international justice.⁸ From the above-mentioned numbers, the Prosecution body of the Tribunal has raised the first indictment against Dragan Nikoliq, who was a commander of the Sushica camp in eastern Bosnia and Herzegovina and he was accused for war crimes against non-Serbs in Bosnia.

³ Ibid.

⁴ Resolution 827, Approved by Security Council in the meeting 3217 on 25th May 1993.

⁵ *Processes of Hague Tribunal in numbers*. Document updated at 10/09/2015.

⁶ 12 of them are in the appealing procedure, while 14 others are in the court procedure in the Court Rooms.

⁷ 18 of them are declared innocent, 28 are declared guilty and sentenced, 13 accused are transferred to national courts in the states of former Yugoslavia, 36 of them are withdrawn from the indictment or are dead and 20 others accused are self-declared guilty for the indictments raised towards them.

⁸ Ismet Salihu, *The international criminal law* (Prishtinë, 2005), 323.

Any level of trial in every organized court based on a legal system has also its leading bodies that help the institution to achieve successful work. However, the Hague Tribunal did not have that, due to the fact that as a prosecution body were only the investigators and the prosecutors who were helped by the international staff that were in a mission in places such as Kosovo and Bosnia and Herzegovina. They could not do anything in the territory of Serbia, because they did not have access there and also the Serbian state did not want to cooperate voluntarily with this Tribunal.

Serbia started to cooperate with the Hague Tribunal only after it was promised that it will not be known as an hostile state and war initiator, and also after giving a huge financial support and improvement of its position in international area as a state that promotes peace. The Serbian state not only was not sentenced, but for the irony it was rewarded.

The very small number of Serbian war criminals that were wanted by Hague Tribunal was protected by Serbia for "*her difficult days*". The same cases that were accused by the Hague Tribunal for war crimes and genocide, were also the criminals Radovan Karaxhiq who was handed over only in the year 2008, after 13 years that the indictment has been raised for genocide, and also Ratko Mlladiq, who was handed over in the year 2011, more precisely 16 years after the indictment. Both of them as political and army leaders of Bosnian Serbs were accused for committing genocide in the territory of Sarajevo on July 1995. Serbia did not respect the principle *aut dedere, aut punire*, which means either extradite or punish, instead Serbia abused this principle.⁹

3. The Mandate and Jurisdiction of International Criminal Tribunal for former Yugoslavia

As it is known, the Hague Tribunal established with the resolution 827 of Security Council of United Nations.¹⁰ With this resolution, the Security Council expressed one more time its deep concern about the continuous violation of international humanitarian rights in the territory of former Yugoslavia, which comprised of report for mass killings, rapes and the continuous practice of "*ethnic cleansing*", and also included the occupation of territory. Therefore, it expressed the determination to end these crimes

⁹ Ibid. page 323.

¹⁰ Resolution 827 (1993).

and to bring forward in effective way in front of justice the people who were responsible for those actions. The Security Council was convinced that in special circumstances that former Yugoslavia was facing, the establishment of international Tribunal as ad hoc from Security Council would enable the achievement of this aim and would contribute in bringing back the peace and continue with peacekeeping.¹¹

The Hague Tribunal was formed with the only purpose of prosecuting the criminal acts of people who were responsible for violating international humanitarian rights that were committed in the territory of former Yugoslavia with the mandate from 1st January 1991 until the date¹² that will be assigned by the Security Council after the completion of cases in front of this Tribunal.¹³

According to Article 6 of Statute of Hague Tribunal, the Tribunal has jurisdiction over individuals according to the provisions of the Statute.¹⁴ Therefore, it has jurisdiction over individuals and not over organizations, political parties, armies, administrative subjects, juridical subjects of independent states.

The timeframe of the jurisdiction is in accordance with the timeframe of the Hague Tribunal, so it has started since 1st January 1991. The territorial jurisdiction of International Tribunal is found in the territory of former Federal Socialist Republic of Yugoslavia, including its ground surface, airspace and territorial waters.¹⁵

The International Tribunal and state courts have simultaneous jurisdiction for criminal procedure of individuals for violating international humanitarian rights that were done in the territory of former Yugoslavia

¹¹ Ibid.

¹² Resolution 1503, approved by Security Council in the meeting 4817 on 28 August 2003.

This resolution with the paragraph 7, has asked from ICTY to take all the precautions for ending the investigation within the timeframe by the end of 2004, to end the 1st level court procedures within the year 2008, and to end the entire work in 2010 (Ending Strategies). According to resolution 1877, approved by Security Council in the meeting 6155, on 7th July 2009, it has been decided by the Ending Strategy (S/2009/253) that the Tribunal will not be able to complete its work by 2010. Therefore, it was decided to extend the timeframe of the temporary judges and those appointed as *ad litem* of Tribunal, until 31st December 2010, or until the ending of the cases for which they were assigned even if prior to this date.

¹³ Ibid. Article 2.

¹⁴ Statute of the Hague Tribunal, Article 6.

¹⁵ Ibid. Article 7.

since 1st January 1991.¹⁶ However, the International Tribunal has priority over state courts. In every phase of procedure, the International Tribunal can require officially from the state courts to pass the competences over the International Tribunal in accordance with the Tribunal Statute and the Regulation of Procedures and Evidence of International Tribunal.¹⁷ The Hague Tribunal can take over the investigations and state's trial procedures in every phase, if it is proven that it is in the interest of international justice.

The tribunal has competences to prosecute and to judge individuals for four (4) categories of legal violations:

- a) Serious violations of the Geneva Convention dated in 1949,
- b) Violation of laws and war traditions,
- c) Genocide and
- d) Crimes against humanity

3.1. Serious violations of Geneva Conventions, 1949¹⁸

International Tribunal has competence to prosecute individuals that have done or have ordered to conduct serious violations of Geneva Conventions dated on 12 August 1949, respectively the below-mentioned actions against individuals protected by provisions of relevant Geneva Convention:

- Intentional homicide;
- Torture or inhuman treatment, including biological experiments;
- Causes of intentional sufferings or heavy injuries;
- Total destruction and embezzlement of property, unjustified and done in illegal manner with no reasons;
- Obligation of civilians to serve in army;
- Intentional privation of war prisoners or civilians from their rights for fair and equal trial;
- Expulsion or illegal transfer of civilians, or illegally deprived from their freedom;
- Taking the civilians as hostage.

¹⁶ Ibid. Article 8, paragraph. 1.

¹⁷ Ibid. Article 8, paragraph 2.

¹⁸ Ibid. Article 2.

The Hague Tribunal does not have competence to prosecute states for aggression or crimes against peace, because these crimes rely under the jurisdiction of International Court of Justice.

3.2. Violations of laws and war traditions¹⁹

The International Tribunal has competence to prosecute individuals who violate the laws and traditions of war. Under those violations are included:

- Usage of toxic weapons or other weapons that are supposed to cause unnecessary sufferings;
- Destruction of cities and villages with no reason;
- Attack or bombing of cities, villages, buildings with different tools;
- Invasion, destruction, or intentional deterioration of religious institutions, charity, educational, artistic, science and historical monuments;
- Looting of private or public property.

3.3. Genocide²⁰

International Tribunal has competences to prosecute individuals that have committed genocide.

Genocide includes all of the following actions that are done with the intention of total or partly extermination of a national, ethnic, and racial or religious group, like:

- Killings of group members;
- Causing huge injuries on group members;
- Imposing a group to weak living conditions with the intention of extermination;
- Imposing of precautions that aim to stop the birth inside the group;
- Forcible transfer of children from one group to another.

The following actions are punished:

- Genocide;
- Plot for committing genocide;
- Direct and public incitement for committing genocide;
- Bid for committing genocide;
- Complicity in genocide.

¹⁹ Ibid. Article 3.

²⁰ Ibid. Article 4.

3.4. Crimes against humanity²¹

International Tribunal has competence to prosecute individuals who are responsible for the following crimes if they are done during an international or internal armed conflict, and directed against the civil population:

- Killings;
- Liquidation;
- Slavery;
- Expulsion;
- Imprisonment;
- Torture;
- Rape;
- Persecution on political, racial and regional grounds
- Other inhuman actions.

4. Former Yugoslavia as geographical area and organized political entity

As aforementioned, the Tribunal has jurisdiction to prosecute persons responsible for war crimes committed since 1 January 1991 in the territory of the former Yugoslavia.

Former Yugoslavia means the territory which until 25 June 1991 was known as the Socialist Federal Republic of Yugoslavia (SFRY). Yugoslavia was composed of six republics and two autonomous provinces including Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Slovenia as republics and Kosovo and Vojvodina as autonomous provinces, which altogether constitute the federation.

Slovenia became the first Yugoslav state which unilaterally on 24 June 1991 declared independence from the Yugoslav Federation, marking the end of the existence of the SFRY. By April 1992, as part of the federation remained only Serbia and Montenegro, since Croatia, Macedonia, and Bosnia and Herzegovina declared independence and secession from the Yugoslav federation.

On 27 April 1992, Serbia and Montenegro promulgated the Federal Republic of Yugoslavia (FRY). On 4 February 2003, the Federal Republic of Yugoslavia was transformed into the State Union of Serbia and

²¹ Ibid. Article 5.

Montenegro. This union disintegrated with the declaration of independence of Montenegro on 3 June 2006 and Serbia on June 5, 2006.

5. Completion strategy of the ICTY²²

The ICTY, namely Hague Tribunal, was established in 1993 as a temporary institution specifically created to investigate crimes committed during the wars in former Yugoslavia and to prosecute those responsible for crimes. This took place at a time when the judicial systems of the countries of the former Yugoslavia were not capable or willing to investigate and prosecute these crimes.

In 2003, ten years after its establishment, the Tribunal was already functional at full capacity, while at the same time various regional judicial systems demonstrated the will of different levels for war crimes prosecution. Consequently, the judges of the Tribunal took the initiative to draft a plan, which became known as the "*Completion strategy*". The aim of this strategy is to ensure the success of the Tribunal in terms of conclusion of its mission, within time frame and in cooperation with the judicial systems of the countries in the former Yugoslavia.

The plan was approved by the UN Security Council's resolutions 1503 and 1534 and consists of three phases with three deadlines for the closure of the Tribunal.

The aim of the first phase was the completion of all investigations by 31 December 2004. The Prosecutor of the Tribunal informed the Security Council on accomplishment of this aim.

The aim of the second phase is the completion of all trials by the end of 2008. Chairman of the Tribunal informed the Security Council on the possibility that proceedings continue in 2009.

The aim of the final phase is the completion of all appeals and activities by the end of 2010. However, given the nature of remained cases in this Tribunal, it was decided to extend the time of completion of the Tribunal's work until 31 December 2014.²³ The Hague Tribunal remains on track to meet the criminal proceedings within this time limit.

To achieve these results, the Tribunal focused on the top leaders, suspected of responsibility for crimes within the jurisdiction of the Tribunal

²² Official page of the Hague Tribunal. Available from: <http://www.icty.org/sid/10016> -, (access for the last time: 10/09/2015).

²³ Ismet Salihu. Op.Cit., page 318.

and forwarded court cases against the mid and lower level indicted to the competent courts of the former Yugoslavia. In addition, the prosecutors and the courts of these countries may initiate court cases without the participation of the Hague Tribunal.

Up to date, the Completion strategy was an important accelerator in terms of empowering the competent judicial systems in the former Yugoslavia countries. Upon the incentive of the UN Security Council and the international community's support, specialized mechanisms were established for the prosecution and trial of war crimes in Bosnia and Herzegovina, Serbia, Croatia and Kosovo. Hague Tribunal provides professional advice in the legislation reform, particularly with respect to command responsibility and the protection of witnesses.

Hague Tribunal provides expertise to other lawyers and professionals from the former Yugoslavia through participation in qualification programs and various study visits. Through the transfer of evidence and making available of data and electronic archives to state institutions, the Tribunal aims to ensure an effective transition from an international court in the judicial systems of respective countries.

6. The criminal proceedings in The Hague, in general²⁴

In principle, proceedings at the Hague Tribunal are regulated with the Statute of the Tribunal, whilst in detail are regulated with the Rules of Procedure and Evidence. The proceedings at the Hague Tribunal pass through several phases, of which the most important are:

- a) Investigation phase,
- b) Indictment phase,
- c) The pre-trial phase,
- d) Trial phase, and
- e) Appeal phase.

According to the Statute of the Hague Tribunal, investigation belongs to the Prosecutor, whom is given the power to act independently and without requiring further authorization. Article 18 stipulates:

²⁴ Official page of the Hague Tribunal. Available from: <http://www.icty.org/sid/146> (access for the last time: 10/09/2015).

"The Prosecutor begins investigations *ex officio* or on the basis of information received from any source, particularly from Governments, United Nations bodies, intergovernmental and nongovernmental organizations. Prosecutor will review information received or found and decide if there are significant grounds to proceed".

Prosecutor commences an investigation on the basis of information received from various sources. Prosecutor has full independence and freedom of judgment to decide about the continuation of the investigation.

The prosecutor must "be convinced (...) that there is sufficient evidence to provide sufficient reasons to believe that a suspect has committed a crime within the jurisdiction of the Tribunal". In this case we are dealing with *prima facie* case. After determining *prima facie* case, Prosecutor prepares an indictment and submits to a judge for confirmation. The judge examines the confirmation of the indictment and if considers that sufficient grounds exist, confirms. In contrary, indictment returned to the Prosecutor. Also at the same time the judge issues an arrest warrant. In exceptional circumstances, a Judge or a Trial Chamber may order holding of the indictment sealed until delivered to the defendant. In accordance with the Tribunal's Completion strategy, the Prosecution filed the last indictment within 31 December 2004.

After the arrest of the accused or his voluntary surrender, he immediately is transferred to the Detention Unit of the United Nations in The Hague. Further, detainee appears as soon as possible at the first hearing (or within 30 days thereafter) where he declares himself guilty or not guilty on each count.

If the accused pleads guilty and the Trial Chamber is satisfied that the conditions are met, it formulates a verdict of guilt and instructs the Registrar to designate the date of the sentence hearing.

The Regulation sets out the procedure for plea agreement (Rule 62 ter). The prosecution and defence can reach agreement after the accused pleads guilty in connection with the indictment or in conjunction with one or more counts of the indictment, the Prosecutor may request the Trial Chamber to amend the indictment in accordance with the plea and a defined sentence or to accept defined sentence limits suggested by the Defence. The Trial Chamber is not bound by any such agreement.

If the accused pleads not guilty, a hearing is assigned. If the defendant refuses to plead, judges declare not guilty on behalf of the accused.

After the initial appearance and prior trial commencement (pre-trial phase), the accused may exercise a request to the Trial Chamber for temporary release. If the judge orders temporary release, the accused can be released until the start of the trial. Temporary release is accompanied by conditions imposed by the Trial Chamber, which include mandatory reporting of the accused at the Court and the protection of victims.

Chairman of the Trial Chamber shall appoint a pre-trial judge to coordinate communication between the parties during the pre-trial phase and guarantees the avoidance of unnecessary delays in procedures.

During the trial, the presentation of evidence begins with the evidence of the Prosecution, followed by evidence of Defence, counter evidence of the Prosecution, counter evidence of the Defence, evidence ordered by the Trial Chamber and finally, any information that is related and can help the Trial Chamber in determining the sentence appropriate if the accused is found guilty. In all cases, both parties have the right to ask their witnesses, witnesses of the counterpart and to ask again.

At the end of the trial after, the prosecution and defence may present closing arguments. Further, Prosecution may file a counter argument on which Trial Chamber may reply.

After the close of the trial by the Chief Judge, the Trial Chamber confers separately. The judgment is given by the majority of judges with a written explanation attached. Separate or dissenting justification can be attached to the Judgment.

An individual found guilty can be punished with imprisonment for a period of up to life sentence. Tribunal imposes no death penalty. Sentenced serve their sentences in countries that have announced their readiness to accept the convicted and undersigned the relevant agreement with the Tribunal.

If declared not guilty, the accused shall be released immediately. If the Prosecutor informs the Trial Chamber about the intention to appeal, the Trial Chamber may issue an order (at the request of the Prosecutor) to continue detention of the accused until the decision regarding the appeal.

Tribunal has a wide appeal procedure both for the accused and for the Prosecutor. Also, additional evidence may be presented if the Trial Chamber deems it is in the interests of justice. Appeal phase consists of five judges and the Appeal judgement also given by a majority of the judges accompanied with a written explanation. Attached to Judgment may be separate or dissenting justification.

If a new fact is revealed, not available neither during the trial, nor during the appeals and it was not possible to disclose it through sustainable efforts, either party may request review of the judgment. The judgment in such proceedings is subject to appeal by both parties.

7. Organization and Trial Chambers at the Hague Tribunal

Statute of the Tribunal defines its organization. Pursuant to Article 11, the Statute provides that the Tribunal is composed of the following bodies:

- a) Chambers, including 3 Trial Chambers²⁵ and the Appeals Chamber;
- b) The Prosecutor; and
- c) The Registry, which serves both to Chambers and the prosecutor.²⁶

The Security Council of the United Nations consistently, through its resolutions issued in connection with the Hague Tribunal, made numerous changes in many segments of the court, including the composition of the Trial Chambers. Recent changes to the Statute of the Tribunal has determined that Chambers consist of no more than sixteen permanent independent judges, two of whom may not be nationals of the same country and at any time of no more than twelve independent judges *ad litem*, two of whom are not citizens of a same state.²⁷ At any time, members of each Trial Chamber are not more than three permanent judges and not more than six *ad litem* judges. Each Trial Chamber, with assigned *ad litem* judges, divided into panels of three judges, each with permanent judges, and *ad litem* judges except circumstances determined otherwise. A panel of a Trial Chamber has the same powers and responsibilities as a Trial Chamber under the Statute and imposes judgments in accordance with the same rules.²⁸

Members of the Appeals Chamber are seven permanent judges. In any appeal, the Appeals Chamber composed of five of its members. An individual, who in the context of membership of the Chambers of the International Tribunal could be regarded as a national of more than one country, shall be considered a citizen of the country where this person

²⁵ These Chambers include: Trial Chamber I, Trial Chamber II, and Trial Chamber III.

²⁶ Statute of the Hague Tribunal, Article 11.

²⁷ Ibid. Article 12, paragraph 1.

²⁸ Ibid. Article 12, paragraph 2.

usually exercises his political and civil rights. At the request of the Chairman of the International Tribunal, the Secretary-General appoints judges reserve, from *ad litem* judges elected in accordance with article 13 *ter*, to attend each phase of a trial in which they are appointed and to replace a judge if he is not able to attend.

If special circumstances require the replacement of a permanent judge of a panel resulting in a panel composed only of *ad litem* judges, the panel can proceed with the case, regardless having no permanent judge in its composition.²⁹

8. Conclusion

The International Criminal Tribunal for the former Yugoslavia was the first tribunal on war crimes established by the United Nations and the first tribunal on war crimes since the Nuremberg and Tokyo Tribunals. This date marked the beginning of the end of impunity for war crimes in the former Yugoslavia.

So far, the 20-year experience of the work of the Hague Tribunal, resulted in a relatively small number of trials at headquarter. According to official statistics of The Hague Tribunal, so far the Tribunal has indicted 161 persons for violations of international humanitarian law in the former Yugoslavia.³⁰ Of this figure, 17 were charged and found in the tribunal's detention center, 14 are in the process of trial and 147 are completed processes. Modest results achieved by this Tribunal have highlighted a series of deficiencies in the functioning of international justice. From the figures above mentioned, body of the ICTY prosecution has filed first indictment against Dragan Nikolić, who was commander of the Sušica camp in eastern Bosnia and Herzegovina, charged with war crimes committed against non-Serbs in Bosnia.

Given the work performed by this kind of court, strong necessity appears that within the framework of the UN to establish a permanent Tribunal, aiming to permanently deal with perpetrators who commit contrary to international law.

²⁹ Ibid. Article 13, paragraph 6.

³⁰ The processes of Hague Tribunal in numbers. Document updated at 10/09/2015.

On July 17, 1998 in Rome, the Rome Statute was drafted for the International Criminal Court. Statute of the Court entered into force on 1 July 2002, in full compliance with Article 126 of the Rome Statute.

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