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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA AND SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW: HAS «PUNISHMENT» EVER BEEN ON THE AGENDA?

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Abstract. Given the expediency of further exploring the essence of punishment in international criminal law, the proposed research is to be seen as the next rational and logical step following the historical phase of International Military Tribunals, on the path to developing a coherent and holistic concept of international punishment. Such an endeavour in turn is inconceivable without considering the experience gained from the lessons learned and the legacy of the next crucial stage in the evolution of international criminal justice, – that is, the developments surrounding the establishment and activities of the International Criminal Tribunal for the former Yugoslavia. The key focus of the scientific investigation lied in an effort to shape a general ambiance as a certain starting point for the formation of a preliminary and rough idea about the perception of punishment in scholarly thought during that particular period. This attempt was carried out through a scrupulous analysis of more than half a hundred doctrinal writings by leading experts in the relevant area, which made it possible to conclude that the issue of punishment not only did not appear as a separate subject of inquiry, but was rather deliberately omitted in order to concentrate attention on matters related to human rights, which ultimately sets the intriguing tone for future thinking.

Key words: punishment, Yugoslavia Tribunal, International Criminal Tribunal for the former Yugoslavia, ICTY, fight against impunity, responsibility for international crimes, international criminal justice, international criminal law.

Introduction. Following the epoch-making events of the Nuremberg and Tokyo periods, the situation in the former Yugoslavia which is being largely and reasonably considered as the «… biggest crisis in post-war Europe, both in terms of peace and security and in terms of violations of human rights and humanitarian rules …» (von Hebel, 1993: 437), where the «… mass killings, widespread and systematic rape and «ethnic cleansing» being practised … on a scale and of a ferocity not seen on the European continent since the end of the Second World War …» (Cassese, 1997: 601) marked the dawn of another major milestone not only for the «… irreversible change of the landscape of international humanitarian law …» (Potts, Kjær, 2016: 525), but also in the «… unprecedented development of international criminal law …» (Żarna, 2018: 73).

As the conflict in the region drew wide increasing attention (Schuett, 1997: 91), the growing international condemnation of the atrocities committed in the violent and barbaric war in the former Yugoslavia (Beresford, 1999: 557) ultimately led to the establishment of a «… new international organ …» (Shraga, Zacklin, 1994: 380), – an *ad hoc* (Beresford, 1999: 558) War Crimes Tribunal (Schuett, 1997: 91), which was set up by the United Nations Security Council (Beresford, 1999: 557) to serve as an «… instrument to restore peace to a deeply conflicted, blood-drenched arena …» (Baroni, 2000: 234) and to «… prosecute those who committed the violations …» (Beresford, 1999 : 558) in the territory of the former Yugoslavia (Schuett, 1997: 91). Thus, the creation of the Yugoslavia Tribunal (Baroni, 2000: 234) by way of «innovative measure» (Baroni, 2000: 235), as a «fully operational judicial body» (Vierucci, 1995: 134) and a «tool for enforcing international criminal justice in the new millennium» (Scharf, 2000: 925), in the mass, was regarded with a minor amount of caveats as

a certain «… breakthrough in the enforcement of international humanitarian law …», which in turn also heralded the «… beginning of a new era in international criminal justice …» (Baroni, 2000: 234).

In the light of these genuinely revolutionary and groundbreaking rhetorics and such a perception of realities of that time, it is quite expected to assume that, owing to the monstrous crimes committed [for more details, see, for example: (Pettigrew, 2020: 388; Penny, 1998-99: 265) and etc.], the «central theme» for reflection and discourse will obviously have to be the issues that if not directly, then at least in one way or another associated with the matters of punishment of those who «… blatantly disregard … the principles of humanitarian law …» (Akhavan, 1993: 265) and «… flagrantly violated the rules of international humanitarian law …» (Żarna, 2018: 67). Hence, if this is the fact, then the experience gained would apparently provide invaluable insights into the process of shaping an integral vision (Stahn, 2019: 382) of the comprehensive concept of punishment in international criminal law.

Thereby, accepting the relevant reasoning as a premise, noting the existence of a fairly impressive number of landmark scientific contributions devoted particularly to the thematic of the International Criminal Tribunal for the former Yugoslavia so far (Meron, 1993; Bassiouni, 1994; Akhavan, 1998; Cassese, 2004; Hazan, 2004; Kerr, 2004; Swart et al., 2011; Jarvis, 2017; Stahn et al., 2020 and van der Laarse et al., 2025 among others), in order to validate or refute a given hypothesis, it appears expedient to systematize those findings in an effort to ascertain what exactly is stirring the minds of prominent scholars in such a field, as well as to elucidate whether any of these concerns pertain to the problematique of punishment.

The results and discussion. As Shraga and Zacklin (1994: 380) rightly point out, «… much has already been written about the Tribunal and no doubt the literature of international law will continue to be enlarged by doctrinal studies …». And indeed, inasmuch as the «… ICTY has attracted immense interest among legal scholars since its inception …» (Potts, Kjær, 2016: 525), it now appears that this is absolutely how it is. At the same time, even a rather superficial analysis of the existing developments right from the first glance suggests that there is a considerable diversity among the «approaches».

In this way, the starting point for the deliberation is deemed to be the so-called «circumstantial issue» (Schuett, 1997: 93), which, according to above-mentioned experts (Shraga, Zacklin, 1994), as well as Šimonović (1999) and Kerr (2000), constitutes the «… key to understanding the Tribunal …» (Shraga, Zacklin, 1994: 360). And what is more, it includes not only the «… historical and political context of the emergence of the ICTY …» (Šimonović, 1999: 440), but also the «… context within which the Security Council took its decision of principle to establish it …» (Shraga, Zacklin, 1994: 360). Notably, this is precisely where the «… prevailing view …» takes root that the Tribunal is «… no more than a «sign of weakness» or a «fig-leaf for inaction», since it was established largely due to the «… pressure on the Security Council to «do something» to put an end to the atrocities, in the absence of the will or ability …», in particular «… the political will, to intervene forcefully to end the conflict in the former Yugoslavia …» (Kerr, 2000: 18). And so, what used to be fierce discussions about «… humanitarian [military] intervention …» (Hayden, 1999: 550) became intense debates regarding a «… form of intervention labelled «International Judicial Intervention» …» (Kerr, 2000: 17), or a «… judicial intervention – intervention with legal means, without the use of force …» (Birdsall, 2007: 397), which eventually leads to the pivotal question of «… whether this form of international intervention is appropriate and effective for the purpose of the restoration and maintenance of international peace and security …» (Kerr, 2000: 17).

With this in mind, emphasis has been shifting to the examination of the main purpose of the Tribunal (Schuett, 1997: 93), which relatively rapidly evolved into the process of deep exploration of the matter of «… what were the objectives behind …» its «… creation …» (Żarna, 2018: 66). And, as Clark (2009: 123) justly highlights, the ICTY's three principal objectives – to deter further crimes, to do justice, and to contribute to the restoration and maintenance of peace – come under the spotlight. It is noteworthy that, practically from the very beginning, this «logical order» was disregarded, and

the «peace-building task» (Baroni, 2000: 243) was brought to the forefront. It has been repeatedly stated that the «… ultimate goal of the Tribunal as a creation of the Security Council is the restoration and maintenance of peace ...» (Kerr, 2000: 24), and that «… ICTY was explicitly aimed at the restoration and maintenance of international peace and security …» (Kerr, 2007: 374). Meanwhile, this is unfolding against a backdrop of swiftly growing doubts about the feasibility of achieving this goal (Orentlicher, 2013: 542). Pretty soon, this results in the formation of a completely fair opinion about the expediency of distinguishing «… between modest but realizable goals and goals which look more ambitious, but are, for practical reasons, unattainable ... this would have dispensed with the unrealistic notions that a court of law could effectively promote …» (Ramet, 2012: 8). And herein lies the legitimate cause for concern that the «… existence of a body like the ICTY …» (Brammertz, 2015: 272) has been «… intended at worst as a «symbolic» registration of protest against atrocities, and at best as an attempt to deter further atrocities in the former Yugoslavia …» (Akhavan, 1993: 283). In fact, even the «… stated aim of deterrence scarcely seems a realistic one …» (Ramet, 2012: 6) and occasionally to such an extent that it is conveyed as a «… hope … of … the founders of wartime international criminal tribunals …» (McAllister, 2020: 125), casting a shade of uncertainty on the idea whether they «… are capable of doing so … , as opposed to escalate violence … » (McAllister, 2020: 125).

As a result, this kind of «… fertile ground for contested claims about what … [the Court] … can achieve, the degree to which it has met specific goals and whose interests it should serve (Orentlicher, 2013: 536) prompts thorough consideration of its mandate. To be more specific, as relates to the controversy surrounding the ability of the Tribunal to fulfil it (Gurevich, 1995: 83; Kerr, 2007: 375), along with the rigorous «… assessment of whether the Tribunal has accomplished [it] … » (Clark, 2009: 124) or how far it is from fulfilling the mandate (Beresford, 1999: 577). Exactly the belief that the «… ICTY would not only be able to provide redress for violations of the law but that it would also be able to «halt» ongoing crimes ...» leads to the mandate being referred to as «… very ambitious …» (Brammertz, 2015: 272). And last but not least, how to not bring up the «victor's justice»? The idea of having the mandate to «… prosecute and punish malefactors from all sides … » seems not being challenged too much; instead, the new argument is being made that «… it is a tool meant to ensure victory during [the conflict] …» (Hayden, 1999: 569). However, that is not the end of the «narrative». It is merely the first part, or in other words, the first component: the «political mandate» (Kerr, 2000: 24).

As Kerr argues (2000: 24), it is prudent to make a distinction between an «external» and «internal» mandate. Since the contribution to the «… restoration and maintenance of international peace and security …» was assumed to be through the «… administration of justice …» (Kerr, 2007: 373), it is precisely the latter that comes into focus further on. Remarkably, the heated disputes over the mandate concerning the «delivery of justice» (Kerr, 2007: 375) and «prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991» (Baroni, 2000: 233-234) generally originate from sophisticated and profound contemplation of «… whether peace can be achieved through justice …» (Baroni, 2000: 237; Kerr, 2007: 373) or, to put it simply, «… how can the Court create peace …» (Baroni, 2000: 238).

In striving to resolve an «… inherent dilemma …» (Kerr, 2000: 21) of whether «… justice, in the form of judicial process, can contribute to peace and security …» (Kerr, 2000: 25), all of this is accompanied by the necessity of determining the nature of a «… symbiotic relationship between peace and justice …» (Kerr, 2007: 373), as well as to clarify if there is a «… tension between justice and peace/reconciliation …» (Clark, 2009: 126) and a «… conflict between order and justice …» (Birdsall, 2007: 397). As a consequence, everything boils down to the main question: are «… peace and justice compatible …» or is it «… peace versus justice …» (Schuett, 1997: 99, 107, 91). Fascinatingly, all of these occurrences transpire amidst attempts to articulate what «peace» (Baroni, 2000: 238) and «justice» (Schuett, 1997: 107, 110; Birdsall, 2007: 399; Clark, 2009: 126, 127, 130; Ramet, 2012: 6) truly entail.

Moreover, the very idea of what kind of «peace» (either «interim» (Schuett, 1997: 110) or «enduring» (Baroni, 2000: 238), «fragile» (Schuett, 1997: 91) or «stable» (Kerr, 2000: 21), «political» (Fatić, Bulatović, 2008: 32) or «social» (Ramet, 2012: 2), « … of mind to the victims» (Ramet, 2012: 6) or «… in the region» (Fatić, Bulatović, 2008: 32), «lasting» (Kerr, 2007: 374) or some sort of other) and «justice» (substantiated by the «for whom» question (Schuett, 1997: 107), – «… for all» (McGonigle, 2005: 13) or «individual» (Birdsall, 2007: 397), «partial» (Schuett, 1997: 110) or «impartial» (McGonigle, 2005: 10), «retributive» (Clark, 2009: 123; Jeffrey, Jakala, 2012: 290) or «restorative» (Clark, 2009: 123; Ramet, 2012: 7), or «retributive and restorative» (Ramet, 2012: 6), «international» (Bardos, 2013: 23) or «criminal» (Schuett, 1997: 110; Baroni, 2000: 248), or «international criminal» (Brammertz, 2015: 271), «transitional» (Hayden, 2011: 314), and so forth) it should be all about has also been pretty vague.

On the other hand, what seems less ambiguous is that the «… image of justice via international tribunals is dominant …» (Hayden, 1999: 550). Apparently, «… within the judicial organ the purpose is to prosecute individuals, so the application of law must be the sole guiding principle …» (Kerr, 2000: 24). Nevertheless, pompous hailing of «… the new millennium as «the beginning of a new era for the human rights movement …» (Hayden, 1999: 549) makes its own adjustments. This is how «… serious human rights issues …» (Bardos, 2013: 24), together with «good governance» (Orentlicher, 2013: 542), «rule of law» (Brammertz, 2015: 267, 271), «tolerance» (Orentlicher, 2013: 542), «morality» (Hayden, 1999: 549, 550), «principles of justice» (McGonigle, 2005: 10; Birdsall, 2007: 397, 399) and «fairness» (McGonigle, 2005: 13) come to the fore.

Meticulously scrutinizing every single particle of the Tribunal through the prism of the «… highest human rights standards …» (Swaak-Goldman, 1997: 215), a rising tide of «severe» (Schuett, 1997: 110), «scathing» (Robinson, 2000: 570), «harsh» (Kerr, 2007: 376) and «bitter» (Ramet, 2012: 8) criticism (Swaak-Goldman, 1997: 215) immediately ensues. With a lashing whip, one after another, stern sentences «… judging the ICTY …» (Clark, 2009: 123), are handed down, – «… the Tribunal was created illegally …» (Davis, 2017: 397), since it was a «… by-product of international *realpolitik*, «born out of a political desire to redeem the international community's conscience rather than the primary commitment … to guarantee international justice …» (Birdsall, 2007: 407); «… it is not established by Law …» (Davis, 2017: 415), rather is a «… child of international politics (Fatić, Bulatović, 2008: 44) or a fruit of a «… politicized use of international legal provisions …» (Birdsall, 2007: 413); an illegitimate (Tolbert, 2002: 17; Brammertz, 2015: 273), arbitrary and selective (Birdsall, 2007: 406) political court (Tolbert, 2002: 17), which has no power to exercise the jurisdiction (Brammertz, 2015: 273). And this is just to start with. Further, – it is a Court that has no ability to fulfil its ambitious functions (Baroni, 2000: 238), cannot overcome obstacles to deter abuses in war zones (McAllister, 2020: 125) and has failed to make a difference in the region itself (Tolbert, 2002: 7), as its establishment is nothing more than «… a token gesture to appease those who criticised western powers for refusing to intervene to end the war …» (Beresford, 1999: 557). However, that is yet not the end of it either. The ICTY is described as a «… rogue court with rigged rules …» (Robinson, 2000: 570), as «… early drafts of what became the Statute of the International Tribunal contained many problems of concept and of detail (Rubin, 1994: 7), as well as «the Rules», including provisions that are purely inquisitorial and accusatorial (Robinson, 2000: 580). This is followed by the reservation that the «… retributive style of justice encapsulated by the ICTY … [is not] … addressing questions of forgiveness, truth and reconciliation (Jeffrey, Jakala, 2012: 290), suggesting whether it was actually a reflection of international justice at all (Żarna, 2018: 66). If agreed with, then it was emphasised that «… ICTY delivers a «justice» that is biased … », promoting the «… pattern of politically driven prosecution …» (Hayden, 1999: 551), questioning the «… fairness of its proceedings …» (Brammertz, 2015: 273). The stress is placed on a point that ICTY suffers from a tremendous number of systemic problems, including prosecutorial and structural biases, not having an «equality of arms» (McGonigle,

2005: 10, 12), especially in terms of such «… same basic problems …», as access to evidence, access to suspects, the challenges of conducting long and complex trials (Brammertz, 2015: 271). Therefore, it is extremely difficult if not impossible for an accused to obtain a fair trial (Hayden, 1999: 552), whereas trial on its own cannot accomplish the «civilizing mission» (Rubin, 1994: 11), more likely «… becoming a «show trial» in which the accused is being silenced …» (Birdsall, 1999: 413).

Conclusion. It feels like it would be possible to keep rambling on about all this «… widespread scepticism …» (Kerr, 2007: 373) *ad infinitum*. Indeed, there are plenty of structural (Robinson, 2000: 588), financial (Beresford, 1999: 562), bureaucratic (Ohlin, 2011: 322) and practical (Pruitt, 1997: 577; Sayers, 2003: 776; Kerr, 2007: 376) problems (Beresford, 1999: 557) out there which definitely required attention. And that is perfectly reasonable. However, what is truly puzzling is that amid all this grave anxiety about «… an evolution in public morality …» (Hayden, 1999: 549), the well-known maxim «justice must not only be done, but must be seen to be done» (Cassese, 1997: 602) and a Tribunal's must «… not only be fair, but be seen as fair …» (Scharf, 1997: 312) even if only in the rhetoric of the absolute majority of those concerned, there is simply no place for the «punishment».

Thus, «looking bravely into the eyes of the beast» (Baroni, 2000: 252), it is stated decisively and boldly that the Tribunal is not devoted nor to the acquittals, neither to the concept of acquittal (Sayers, 2003: 751, 776), expressing serious warnings that the rights of the accused must be protected, as innocent defendants may be wrongfully convicted (Pruitt, 1997: 578). Meanwhile, moderate phrases about the «… increasing pressure … to shift to … a true accountability …» (McGonigle, 2005: 10), «… holding perpetrators accountable …» (Birdsall, 2007: 399) or at least «… some form of accountability …» (Kerr, 2007: 374), «… bringing to justice those responsible (Beresford, 1999: 557) individuals (Baroni, 2000: 237), who «… may be prosecuted for violating humanitarian norms …» (O'Brien, 1993: 639) and «… should bear considerable responsibility (Schuett, 1997: 99), international criminal adjudication (Šimonović, 1999: 440) and adjudication of responsibility for the tragedies (Drumbl, 2003: 703) are timidly, hesitantly and reluctantly uttered in a very quiet voice.

One can only agree that all of this rather reinforces the idea that such a misconception of the threat to the accused's fair trial rights (Swaak-Goldman, 1997: 215) is turning the entire situation into a human rights travesty: humanrightsism (Hayden, 1999: 573), in which only a few remain truly fearless, «taming the beast», emphasising that punishment of war crimes (Fatić, Bulatović, 2008: 31; McAllister, 2020: 91) through due process of law (O'Brien, 1993: 642) is not only desirable (Akhavan, 1993: 287), but also that «… without prosecution and punishment, the law is a dead letter …» (Schuett, 1997: 94).

And if the story of the ICTY is one of challenges as well as achievements, both of which are important (Brammertz, 2015: 271), then it is actually still far from being finished (Orentlicher, 2013: 46), at a minimum in terms of the perception and redefinition of punishment.

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