

SYMPOSIUM ON THE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER
YUGOSLAVIA AND RWANDA: BROADENING THE DEBATE

DIVIDED WE STAND? THE *AD HOC* TRIBUNALS AND THE CEE REGION

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After WWII, countries of Central and Eastern Europe (CEE) actively backed the establishment of the military tribunals in Nuremberg and Tokyo. In the early 1990s, when the International Criminal Tribunals for the Former Yugoslavia (ICTY) and for Rwanda (ICTR) were created by the UN Security Council, the CEE countries again lent uniform, albeit largely rhetorical support to these institutions. A quarter of a century later, this uniformity seems to be gone. While the CEE countries continue to express belief in international criminal justice, they no longer agree with each other on whether this justice has actually been served by the *ad hoc* tribunals. The diverging views on the achievements of the ICTY and ICTR might also partly account for the differences in the approach to the permanent International Criminal Court (ICC), though the grounds for these differences are more complex.

Early Life of the Two Ad Hoc Tribunals

This contribution is primarily centred on three countries of the CEE region—the Czech Republic, Poland, and the Russian Federation. In the 1940s and 1990s alike, these countries, despite the obvious differences in their size, power, and history, adopted a similar stance towards international criminal justice. In the 1940s, they all favoured the prosecution of Nazi (and, less urgently, Japanese) war criminals through newly established international military tribunals. As members of the victorious coalition who had suffered heavy casualties during WWII, they wished to see justice for those who had started the war done in a severe but civilized manner. In the 1990s, the three countries were again in the same camp. Inspired by the liberal *ethos* of the early postcommunist era, they were outraged by mass atrocities committed in the former Yugoslavia and Rwanda and also concerned about the impact these events could have in the CEE region. In this situation, the establishment of the two *ad hoc* tribunals was interpreted not only as a logical follow-up on the post-WWII tribunals but also as a step on the way towards justice and stability in the region. And as such, it was welcomed.

The ICTY and ICTR were established by UN Security Council Resolutions 827 (1993) and 955 (1994). Russia, present in the Council in its capacity of a permanent member, cosponsored the draft resolutions. Commenting on the adoption of the first one, its representative Yuri Vorontsov described the newly created ICTY as “not a place for summary justice, nor a place for settling scores or for seeking vengeance, but an instrument of justice.”¹ He added that

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it is of particular importance that for the first time in history, it is not the victors who are judging the vanquished, but the entire international community that, through the Tribunal, will be passing sentence on those who are grossly violating not only the norms of international law but even quite simply our human concepts of morality and humanity.²

The Czech Republic, established as an independent country after the dissolution of Czechoslovakia in 1993, became a nonpermanent member of the Security Council in 1994. It was the first country to publicly use the term “genocide” in the Council to characterize the events in Rwanda.³ It also promoted, and voted for, the creation of the ICTR.⁴ Poland, though absent from the UN Security Council, was in favour of the prosecution of those responsible for serious international crimes as well.⁵

The three CEE countries continued to express their support of the two *ad hoc* tribunals for most of the 1990s. This support, however, remained largely rhetorical. None of the countries contributed in money, in kind, or in the form of the loan of personnel to the work of the tribunals. While this might have to do with the economic transformation that the CEE region was undergoing after the fall of communism, it is interesting to note that other countries of the region provided at least some, albeit symbolic, contribution in the same period (in 1998, Hungary and Slovenia contributed to the ICTY Voluntary Fund). None of the three countries signed an agreement on the enforcement of sentences or relocation of witnesses (Poland expressly declared that it is not in the position to accept prisoners), though it is fair to say that such agreements generally remained rather scarce till the mid-2000s. Due to the geographical proximity and historical ties, the ICTY was getting more attention in the CEE region than the ICTR but this pertained primarily to the media coverage and public interest, not to the official positions. Generally speaking, in the 1990s, the three CEE countries were supportive of the ICTY and ICTR but the tribunals did not feature very highly on their political agendas.

Later Life of the Two Ad Hoc Tribunals

At the turn of the 1990s and 2000s, the policy of the Czech Republic, Poland, and Russia towards the *ad hoc* tribunal, up to then quite similar, started to drift apart. The first two countries opted for a more proactive engagement with the ICTY and ICTR, progressively turning their rhetorical support into more substantial backing. In 2003, Poland provided its first contribution to the voluntary fund of the tribunal, amounting to twelve thousand USD. Two years later, in 2005, the Czech Republic followed, with the contribution of ten thousand USD. Voluntary contributions, of more or less the same amount, continued to be provided, albeit irregularly, in subsequent years.

In the second half of the 2000s, the first agreements relating to the ICTY and ICTR were concluded between the Czech Republic or Poland and the United Nations (UN). In 2006, the Czech Republic and the UN signed an Agreement on the Relocation of Witnesses of the ICTY and an Agreement on the Loan of Prison Staff to the ICTY. Both agreements entered into force in 2007 and while no data are publicly available relating to the implementation of the former one, the latter has clearly been put into practice, with the first Czech

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¹ UN SCOR, 47th Sess., 3217th mtg. at 44, UN Doc. S/PV.3217 (May 25, 1993).

² *Id.*

³ See Kovanda, Karel: *The Czech Republic on the UN Security Council: The Rwandan Genocide*, 5 GENOCIDE STUD. & PREVENTION 192 (2010).

⁴ UN SCOR, 49th Sess., 3453d mtg., UN Doc. S/PV.3453 (Nov. 8, 1994).

⁵ See 1993-1994 Y.B. POL. FOREIGN POL'Y (1994).

prison staff taking on their duties in The Hague as early as 2007. In 2008, Poland and the UN concluded an Agreement on the Enforcement of Sentences of the ICTY. Based on this agreement, two persons convicted by the ICTY were transferred to Poland in 2014—Radislav Krstić, the former chief of staff of the Drina Corps of the Bosnian Serb Army, sentenced in 2004 to thirty five years' imprisonment; and Sreten Lukić, the former Head of the Serbian Ministry of Internal Affairs Staff for Kosovo and Metohija, sentenced to twenty years' imprisonment. Following the Polish example, the Czech Republic is now getting ready to sign an agreement on the enforcement of sentences with the Residual Mechanism and can therefore be expected in the future to “host” individuals found guilty for serious international crimes committed during the civil war in Yugoslavia.

Neither the Czech Republic nor Poland has ever had a permanent judge at one of the two *ad hoc* tribunals. The Czech Republic, at least, had one *ad litem* judge, Ivana Janů, at the ICTY (2001-2004), and another *ad litem* judge, Robert Fremr, at the ICTR (2006-2008, 2010-2011). Poland has remained without any judges. The lack of determination to present suitable candidates and lobby for them played a role. Yet, as Avant and Voeten show in their chapter analysing the profile of the judges of the ICTY, ICTR, and ICC, there was a general exclusion of Eastern European judges from the ICTY.⁶ In this respect, there is an interesting contrast between the ICTY, with no judges from the CEE region, and the ICTR, where judges from Africa always had a strong presence. If one of the reasons for the exclusion in the former case was the fear that judges from the region might find it difficult to be impartial, then it is not clear why these reasons did not apply in the latter case as well. Probably as a “compensation” for the absence of its judges from the ICTY, the CEE region gradually had a few permanent judges at the ICTR.⁷ Three from Russia (Yakov A. Ostrovsky (1995-2003), Sergei A. Egorov (2003-2009), Bakhtiyar Tuzmukhamedov (2009-2012)) and one from Slovenia (Pavel Dolenc (1999-2003)). Yet, even there, the CEE region's presence was rather weak.

It might seem somewhat surprising that the only country of the CEE region with several permanent judges at the tribunals was Russia. Of course, Russia is the regional hegemon and one of the permanent members of the UN Security Council. At the same time, unlike the Czech Republic and Poland, Russia did not, at the turn of the 1990s and 2000s, closely cooperate with the ICTY and ICTR. Rather, it began to distance itself from the two *ad hoc* tribunals, and especially the ICTY, expressing doubts about their efficiency and credibility. These doubts have made themselves heard, with an increasing frequency, since the late 1990s, both from the Russian authorities and from Russian publicists.⁸ In the first period, they reflected discontent with the slowness of the trials (the tribunals were originally expected to close down around 2000) as well as a more general dissatisfaction over the events in the former Yugoslavia, primarily in light of the NATO intervention in Kosovo in the spring of 1999. Later, the outcome of certain trials (acquittal of Ante Gotovina in 2012, acquittal of Ramush Haradinaj in 2012, conviction of Radovan Karadžić in 2016) and the overall statistics of the ICTY (with more than a half of the persons on trial being, albeit for good reasons, of the Serb nationality) have made Russia question the impartiality of the tribunal.⁹

The discourse about the Tribunal not being an instrument of victors but of the entire international community was replaced by comments about one-sided, selective justice. After the acquittal of Gotovina, the Russian Ministry of Foreign Affairs stated that “the verdict once again casts doubt on the declared objectivity

⁶ See Deborah Avant & Erik Voeten, *Who runs the international criminal justice system?*, in, WHO GOVERNS THE GLOBE? 35, 48-50 (Deborah Avant et al. eds., 2010).

⁷ *Id.*

⁸ Месяев А.Б., *Международный уголовный трибунал по бывшей Югославии - незаконный, зависимый и пристрастный суд*, in ДВОЙНЫЕ СТАНДАРТЫ В ЗАЩИТЕ ПРАВ ЧЕЛОВЕКА: КАЗУС ПРОФЕССОРА ШЕПЕЛЯ 15-49 (2009).

⁹ ООН, *Представитель России – недавние оправдательные приговоры МТБЮ «дискредитируют идею международного уголовного правосудия»* (Dec. 6, 2012).

and impartiality of the ICTY. Unfortunately we must state that the Tribunal has failed to become a truly unbiased body of international justice with fair attitude to all parties of the conflict in the territory of Yugoslavia.”¹⁰ When Karadžić was sentenced to forty years’ imprisonment, the Russian Ministry of Foreign Affairs labelled the ICTY as a an instrument of revenge and a place to settle old scores, noting that

Russia which supported the ICTY creation in 1993 said openly that the tribunal should not become a place for settling scores or an instrument of revenge but be a true institute of justice, which would lead to the triumph of justice and common sense. These expectations have not come true.¹¹

The criticism was returned, albeit in a mild form, when the ICTY repeatedly admonished Russia for its reluctance to cooperate with the tribunal and to hand over individuals subject to an arrest warrant allegedly staying in the Russian territory (for instance Dragoljub Ojdanić in 2000).

Divided We Stand With Respect to the Permanent ICC

In the early 1990s, the three CEE countries were united in their support of the newly established *ad hoc* tribunals. A quarter of a century later, they are divided in their assessment of what the tribunals, and especially the ICTY, have actually achieved and whether they have lived up to the ideals they were created to uphold. It could even seem that the division between the optimists (the Czech Republic and Poland) and the sceptics (Russia) has been one of the main “legacies” of the two *ad hoc* tribunals. After all, is this division not copied in the approach that the three countries have adopted with respect to the ICC? Poland and—after some initial hesitation caused mostly by its attempts not to go against the official position of its crucial ally, the United States—also the Czech Republic have been among the active supporters of the ICC. They have ratified both the Rome Statute (Poland 2002, the Czech Republic 2009) and the Kampala amendments (Poland 2014, the Czech Republic 2015). They have judges at the ICC (Robert Fremr from the Czech Republic and Piotr Hofmański from Poland) and contribute to the regular budget and the Trust Fund for Victims.

Russia, on the contrary, remains outside the ICC system. Although it signed the Rome Statute in 2000, it had never completed the ratification process. In recent years, moreover, it has been growing increasingly uncomfortable about the permanent court. Since the opening of the preliminary examination of the situation in Ukraine in 2014 and of the investigation into the 2008 Russian-Georgian war in 2016 this discomfort, up to then kept muted, has been more and more often translated into open political criticism. Commenting, for instance, on the former event, the Russian Ministry of Foreign Affairs stated that “the Russian Federation . . . expected the ICC to become an important factor in the promotion of the rule of law and stability in international relations. Yet, in our opinion, this unfortunately has not come true. In this context . . . the Russian Federation will have to reconsider its relationship to the ICC.”¹² The reconsideration resulted in the “un-signing” of the Rome Statute on November 16, 2016, when President Putin issued a regulation on the intention of the Russian Federation not to become party to the Rome Statute of the ICC.¹³ The development of the relationship of the three CEE countries to the ICC thus mirrors that of their relationship to the *ad hoc* tribunals.

¹⁰ Ministry of Foreign Affairs Russia, *Statement by the Permanent Representative of the Russian Federation to the UN Vitaly Churkin at the meeting of the UN General Assembly on agenda items “Report of ICTY” and “Report of ICTR”*, (Oct. 13, 2008); Ministry of Foreign Affairs Russia, *Aquittal of Ante Gotovina and Mladen Markac by the International Criminal Tribunal for the former Yugoslavia*, (Nov. 19, 2012); *Karadzic case: Russia slams ICC over making solely Serbians responsible for Yugoslavia war crimes*, PANORAMA (Mar. 26, 2016).

¹¹ *Moscow says Karadzic verdict continues myth of Serbs’ sole responsibility for Yugoslav war*, TASS (Mar. 25, 2016).

¹² *РФ рассматривает вопрос об отношении к МУС из-за процесса по Южной Осетии*, РИА НОВОСТИ (Jan. 29., 2016).

¹³ Распоряжение Президента Российской Федерации от 16.11.2016 № 361-рп “О намерении Российской Федерации не стать участником Римского статута Международного уголовного суда.”

It would, however, be too simplistic to claim that history just repeats itself and that the CEE countries mechanically judge the ICC in light of their (divergent) experiences with the ICTY and ICTR. After all, the ICC differs in many ways from the *ad hoc* tribunals. On the one hand, it is not geographically limited to one specific country and may potentially consider situations in any part of the world, including the CEE region. On the other hand, it has up to now focused almost exclusively on crimes committed in Africa and has not (yet) rendered any decisions that would be of particular relevance for the CEE countries. The reluctance of the Russian Federation to ratify the Rome Statute, accompanied by its (so far) rather limited criticism of the institution seems to have more to do with the nature of the ICC than with any legacy the two *ad hoc* tribunals might have left in the CEE region. This region, in fact, has changed over the past two decades quite a lot. The optimistic atmosphere of the early 1990s is gone, replaced by a feeling of general mistrust and insecurity. This, again, makes the Czech Republic and Poland more supportive of, and Russia more cautious about the ICC, depending on their respective degree of power and on what they expect, or fear, from the ICC. Yet, that the division in the approach of the CEE countries towards the ICC cannot be imputed to the legacy of the ICTY and ICTR does not change the fact that the division is there and that it will haunt the permanent court as (or even more) seriously as it haunted its predecessors.