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A comparison between the ICTY and the ICJ and their contributions for the victims of international crimes[1]

"*I observed that men rush to arms for slight causes, or no cause at all, and that when arms have once been taken up there is no longer any respect for law, divine or human; it is as if, in accordance with a general decree, frenzy had openly been let loose for the committing of all crimes.*"
(Hugo Grotius, *De Iure Belli ac Pacis*, Prol., 28.)

One of the essential human rights and a basic principle in law, written in Art.7 of the *Universal Declaration of Human Rights,* is *equality before the Law*. In the history of international criminal justice this principle had mostly been put aside. Starting from the earliest known trial for war crimes – that is of *Peter von Hagenbach*[2] in 1474 – as well as in the processes at Nürnberg and Tokyo *ad hoc* courts in the Second World War – only commanders of the defeated sides were put on trial. This problem exists even today: the most powerful states (USA, Russia, China) have not ratified the *Rome Statute* of the *International Criminal Court* (ICC). Therefore, victims of the crimes which these states would commit (in most cases) would not find justice and satisfaction.

Apart from ICC, there are two other important international courts located in The Hague: the *International Criminal Tribunal for the former Yugoslavia* (ICTY) and the *International Court of Justice* (ICJ). There are many differences between these two courts – in fact, they have very little in common. First of all, ICTY is an *ad hoc* criminal court and ICJ has a permanent status with a general jurisdiction. Every court is determined by its **jurisdiction** – so that's where mostly the distinction between them lies. ICTY has jurisdiction (*rationae personae*:) over individuals who allegedly, (*rationae loci*:) on the territory of ex-Yugoslavia, (*rationae temporis*:) after 1 January 1991, committed any of these 4 groups of crimes (*rationae materiae*): grave breaches of the *Geneva Conventions of 1949*, violations of the laws or customs of war, crimes against humanity, genocide[3]. ICJ possesses two types of jurisdiction: for *contentious cases* (legal disputes between States) and for *advisory proceedings* (requests for advisory opinions on legal questions). ICJ's Statute establishes that for contentious jurisdiction only States can be parties, on the other hand, advisory proceedings can be initiated only by UN organs and specialized organizations authorized by or in accordance with the *Charter of the UN* (jurisdiction *rationae perso-*

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1 Rad je nagrađen na natjecanju "*Hague Essay Competition 2008*" – u organizaciji poglavarstva grada Haaga te *Grotius centra za međunarodne pravne studije*. Puni naslov zadane teme eseja, koji smo skratili za potrebe izdavanja, glasi: "*International Courts in The Hague: A comparison between the ICTY and the ICJ and their respective contributions to the international rule of law from the perspective of victims of international crimes*".

2 Unfortunately, this is a lonely example of international criminal justice in a historical view – it will take centuries for "giant leaps" to be taken in this area.

3 Art.1-6 and Art.8 of the ICTY's Statute.

nae)[4]. ICJ's jurisdiction *rationae loci* and *rationae materiae* is not restricted – as well as *rationae temporis*, however, States can make time qualifications while submitting their declarations under Art.36(2) of the Statute[5].

Within the question of jurisdiction of international courts, inevitable is the relation to the local (national) courts. Art.9 of the ICTY's Statute establishes a *concurrent jurisdiction*, but it also establishes primacy over national courts – at any stage of the procedure ICTY can request the national court to defer to the competence of ICTY. ICJ's Statute doesn't deal with its relation to local courts, but in Art.38 allows the appliance of customary international law where an important rule has arisen – *the rule of exhaustion of local remedies*. In some cases, especially in the *ELSI case*[6], ICJ established the principle that a foreign national must firstly exhaust all local remedies and only after that its state of nationality can bring a claim against the host state before the ICJ. This is a very slow way for the victims to international justice, comparing to the ICTY's concurrent jurisdiction.

Another important difference between ICJ and ICTY is the **applicable law**. ICJ applies international law as summarized in Art.38 of its Statute: *international conventions*, *international custom* and the *general principles of law recognized by civilized nations*[7]. ICTY has fewer law sources to apply: *Geneva Conventions*, laws and customs of war, ICTY's Statute (which includes: the definition of genocide in Art.4, definition of crimes against humanity in Art.5, some issues on individual criminal responsibility in Art.7, the *ne bis in idem* principle in Art.10, determination of penalties in Art.24). Also, we can mention: Art.24(1), which prescribes that in determining the terms of imprisonment, the Court shall have recourse to the practice regarding prison sentences in the courts of ex-Yugoslavia; and Art.28 which allows the Court to apply the law of the state in which the convicted person is imprisoned regarding pardon or commutation of the sentence. Some interpretations allow ICTY to apply the entire international humanitarian law – it makes sense even if we just read the name of the Court and its Statute[8].

From the perspective of victims, international courts should provide: **punishment for the responsible persons**, **finding the truth** and **compensation** for the suffered losses. ICTY's main task is to try individuals responsible for serious violations of international humanitarian law – the facts found in the judgments are *per se* helping to find the truth. Art.22 of the Statute prescribes that ICTY shall provide procedural rules for protection of victims as witnesses (e.g. in camera proceedings and protection of the victim's identity). Art.24(3) of its Statute prescribes that, in addition to imprisonment, ICTY may order the return of any property and profit from the criminal conduct to their rightful owners – so this is where victims can find their compensation[9]. On the other hand, ICJ can do something for the victims only if their state of nationality refers to the Court - if there is a breach of international law which can be submitted to the ICJ. A good example is Art.IX of the *Convention on the Prevention and Punishment of the Crime of Genocide* (1948.), which prescribes that the disputes between the States relating to the interpretation, application or fulfillment of the Convention, including those relating to the responsibility of a State for genocide or any of the other enumerated punishable acts, shall be submitted to the ICJ at

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4 Art.34(1) and Art.65(1) of ICJ's Statute. Individuals cannot be a party before ICJ, however, their interests can be protected at Court by the states of their nationality.

5 Such as arising before or after a specified date (e.g. before the date from which they came into force).

6 Case concerning *Elettronica Sicula S.p.A*. (*U.S.A v. Italy*), ICJ Rep., 1989.

7 For interpretation of law, ICJ can refer to academic writing and previous judicial decisions. On the other hand, Art.38(2) of the Statute allows ICJ to decide a dispute *ex aequo et bono* if the parties agree.

8 *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.*

9 Unfortunately, this provision is never being used. It should have been prescribed obligatory for the Court to decide – as in Art.28 of the *Charter of the Nürnberg International Military Tribunal.*

the request of any of the parties to the dispute. This opens a very controversial question – whether a state has criminal responsibility[10] (and ICJ a criminal jurisdiction) or is this only a responsibility for an international delict (as a breach of law). Anyway, ICJ's judgments also show us the facts which can help in finding the truth. In the case *Bosnia and Herzegovina v. Serbia and Montenegro*[11], ICJ found that Serbia had not committed, conspired to commit nor had been complicit in genocide, however, ICJ also found that Serbia violated the obligation to prevent genocide, to comply with the provisional measures and failure to cooperate with ICTY – and in the end, ICJ didn't find payment for compensation "appropriate". Such compensation would not be a direct help to the victims, but the state can use it in the interest of the victims or as a "refund" for the expenses she already had to help them. Also, the compensation can be seen as a sanction for the responsible state. The mentioned *provisional measures* (Art.41 of the ICJ's Statute) could be a way to stop the ongoing actions which produce victims.

From these arguments one can clearly conclude that ICTY (or ICC as a permanent court with general criminal jurisdiction) has more advantages comparing to the ICJ in helping the victims, but obviously they both cannot fully comply with all of their needs. Moreover, they cannot provide them in time, as it takes years (after the committed crimes) for the judgments of these courts to show up. However – justice is slow, but achievable.

[10] It's impossible to challenge this question in this short essay. *See* Weiler-Cassese-Spinedi (Eds.), *International crimes of state*, De Gruyter, Berlin - New York, 1989.

[11] *Bosnia and Herzegovina v. Serbia and Montenegro*, ICJ, Judgment of 26 February 2007, §.471.