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## The Political Dimension in the Work of the International Tribunal for the Former Yugoslavia: ICTY as a Form of Political Justice

“NATO is the friend of the Tribunal... NATO countries are those that have provided the finances to set up the Tribunal, we are among the majority financiers”

*Jamie Shea, NATO spokesman, explaining why he does not expect  
ICTY indictments against NATO officials, May 16<sup>th</sup>, 1999.*

### Abstract

In 1961 Otto Kirchheimer published his book *Political Justice*. The book was trying to illustrate how laws and courts are being used in political struggle. In this article, the author tries to apply this concept to the work of International Criminal Tribunal for Yugoslavia, and he tests the hypothesis claiming that transitional justice in ICTY case actually became political justice. He focuses on the ways in which ICTY was used as a tool of great powers to manipulate and influence political processes in the countries of former Yugoslavia that were subjected to it. The timing of issuing indictments, the length of the processes, the threats of indicting as a pressure, verdicts, work of appeal councils, etc. have been massively used as tools against political actors and the states during the work of ICTY. Justice was also used as a conditionality instrument during the process of European integration which also makes it a form of political justice. The author concludes by explaining why ICTY rose serious reservations among peoples of former Yugoslavia about the concept of transitional justice and the ways in which it is implemented, seeing in it plenty of elements of political justice.

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**Key words:** ICTY, Kirchheimer, political justice, Yugoslavia, transitional justice.

## Introduction

The idea of the so-called transitional justice has experienced tremendous popularity in the last thirty years and has become a separate academic field. It received a major boost with the establishment of special *ad hoc* tribunals, first for the former Yugoslavia and then for Rwanda. There are, however, a series of controversies associated with this idea. Except for the manner of its implementation, the concept of transitional justice itself is under question; acting less as a form of objective and universal justice, but rather as a form of Europeanization (Bachmann, Fatić 2015: 157), liberalization (Dyzenhaus 2003), democratization etc., which in itself includes deep ideological, political and normative aspects. This has led to numerous accusations of transitional justice becoming selective, one-sided and instrumental to the question as to what extent can transitional justice be stretched for political purposes and yet preserving justice.

The purpose of this article is to contribute to such criticism based on the analysis of the work of the International Tribunal for The Former Yugoslavia (ICTY). The basic idea can be formulated in this manner: There is possibly a dimension of the political use of the Tribunal which has not been emphasized enough, but it ought to have attention drawn to it. In Serbia the Tribunal is often criticized as the place where the “alleged historical truth” about the recent events is manufactured. However, if one takes a serious look at the decisions and especially at the timing of certain acts of the ICTY, it seems that the ICTY has also been used as an instrument for daily political activities and for directing of the political processes in the region of The Former Yugoslavia. Therefore in addition to being a tool of *ad hoc* and selective justice and “historical revisionism”, the ICTY could also be perceived as an effective instrument for directing and manipulating Balkan politics towards the interests of the big Western powers that have played a crucial role in its establishment and functioning (the US & the UK).

From a theoretical point of view, it is interesting to pose the question as to whether the ICTY could, and to what extent, be perceived as a case of political justice in the sense of Otto Kirchheimer’s established concept.<sup>2</sup> Since he mostly talks about the cases connected with internal

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2) See his classical book from 1961, and his article in *International Encyclopedia of*

political struggle, we could for this purpose modify the concept to talk about *geopolitical justice*. Hence, could transitional justice in some cases be regarded as a form of political justice or geopolitical justice? Here the concept is stretched to include not only verdicts but the whole process, along with indictments, timing of indicting, threats of indicting etc.

Let us put this hypothesis on trial.

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Generally speaking, two visions prevail in the perception of the Hague Tribunal for The Former Yugoslavia:

1) This is an important step in the overall process of establishing international criminal justice. It is true that this is an *ad hoc* tribunal covering only one region and treating only one conflict area. It is also true that there have been many problems, many things that are unclear, vague accusations, judgments, verdicts and so forth in the Tribunal's work. Essentially however, it is a successful endeavor that has led to having certain important criminals convicted and punished on the one hand and on the other victims have been satisfied. The process discussed herein is lengthy, imperfect and gradual – clearly, the crimes committed by the great powers cannot be prosecuted for now, but anyway, in the long run this process will result in the victory of the idea of universal justice.

Just as the methodologies and the system of World governance (Babić, Bojanić, 2010) has in literature and practice replaced hope that the World government (and thus the World Supreme Court) will be formed, the idea of transitional justice, advancing gradually and spreading to those areas where it can, has replaced the idea of an unequivocal jump to universal justice delivered by the universal court in accordance with the same laws applicable to the whole World.

2) While the first vision insists on a normative point of view, the second is occupied with harsh reality and the actual results of the ICTY's operations since 1993. From this perspective, the practice of ICTY seems so overburdened with partiality that it almost becomes the institution in which the idea of justice gets too often abused for the intended geopolitical goals of big Western powers. Moreover, it is particularly dangerous since, under the guise of alleged justice and the alleged fulfilling of moral demands and universalism, it implements selective justice and undermines the trust in the real idea of universal criminal justice.

I find the latter interpretation far more realistic and closer to the truth. There are numerous examples for that. There are many pieces of evidence that support this view, ranging from the problematic and the illegal establishment of the Tribunal, via its financing, instrumentalization and partiality, up to the scandalous cases of the acquittals of Ramush Haradinaj and Gotovina, or the mild conviction of Naser Orić.<sup>3</sup>

Allow us now to take a look at the example of the study (elaboration) ordered by the Tribunal and written by Audrey Helfant Budding. The thirteen pages of this report were published under the title of *Serbian Nationalism in the Twentieth Century* (Budding 2003). In it, the author provides an overview of the development of Serbian nationalism in the twentieth century, with an explicit intention to show that there was Serbian national (nationalist) mobilization in the 1980's and how, together with national mobilization, such a mindset contributed to the disintegration of Yugoslavia (Bachmann, Fatić 2015: 232-240). This fits into the overall strategy of the ICTY's prosecutors to state and prove that Serbs and the Serbian nationalist mobilization led to the breakup of Yugoslavia. They claim that, with his accomplices from inside and outside of Serbia, Milošević began a "joint criminal enterprise" intended to create Greater Serbia. They also asserted how for that purpose members of this JCE conducted ethnic cleansing of other nations. In accordance with the standard propaganda matrix, the said report spins that the breakup of Yugoslavia was a result of Serbian nationalism, the Serbian Academy of Sciences and Arts memorandum, Milošević and so on.

Simultaneously, the prosecutors failed to commission studies of any other people's nationalism, such as the study of the secessionist Albanian nationalism that had caused the protests at the end of the 1960's, namely in November 1968 (about the same time when a wave of the nationalist MASPOK (Mass Movement) was rising in Croatia), followed by the escalation of the same immediately after Tito's death, with the protests in 1981, despite the fact that they had had a quasi-statist autonomy and full control over the area of Kosovo and Metohija. More interestingly, the ICTY failed to commission a similar study on something to which there was explicit evidence and testimonies: Croatian nationalism. These testimonies were presented by persons involved and they clearly display the continuous and intentional development of Croatian nationalism since MASPOK, only to be followed by the actions taken by the Roman

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3) In 1996 there could already be heard voices asking for more initial proportionality between indictments against members of the various ethnic communities. See Fatic, (1996).

Catholic Church and ending with the formation of the HDZ (Croatian Democratic Union) and violent secession.

The so-called Mass Movement or MASPOK was a widely organized movement of Croatian nationalism and secessionism supported by Josip Bakarić (according to some researchers, even by Tito himself), which was being developed in Croatia in the late 1960's. After the starting phase implemented at universities and cultural institutions, the leadership of the Movement was nominally put to the leaders of the Croatian Central Committee of the League of Communists, Savka Dabčević Kučar and Mika Tripalo. The requests also included one for the formation of separate national armies.

At that time the Serbs were far from expressing any kind of nationalism whatsoever. Moreover, the then Serbian leadership and leading party's cadres from Serbia were fully attached to the ruling brotherhood-unity policy. The so-called Serbian liberals insisted on modernization, economic development and so forth. In Serbia, even intellectual protests against the 1971 constitutional amendments and the 1974 Constitution were rare. The said Constitution split Serbia into three separate parts and created the basis for the future disintegration of the country.

After the fall of MASPOK and the period in which Croatian nationalists carried out terrorist attacks, such as the bomb planting in Belgrade's cinema "20<sup>th</sup> October" in 1968, followed by the placing of a bomb on JAT's (Yugoslav Air Transport) flight in January 1972 and inserting a terrorist group in Bugojno in June 1972, the suppressed flag of anti-Yugoslav Croatian nationalism was taken over by the Roman Catholic Church in Yugoslavia. As Don Živko Kustić explained in his confession to journalist Darko Hudelist for the Zagreb weekly magazine *Globus*, in the period from 1975 to 1984 the Church had revived an old project that had been prepared prior to World War II, commemorating thirteen centuries of Christianity among the Croats. The project was led by Don Kustić, the editor-in-chief of the Official Gazette of the RoC's Church in Yugoslavia, *Voice of the Council* (Glas koncila). The action was clearly designed and implemented precisely in order for the Church to take over the political strategy and ideology of secessionism through the instruments of allegory and metaphor and prepare the Croats for their exit from Yugoslavia.

According to Kustić's explanation, all the biblical metaphors had been used to send the appropriate message to the Croats regarding their leaving Yugoslavia: e.g. the exit of the Jews from Egypt was commemorated in such a way as to suggest the need for the release of the Croats from Yugoslavia and so on. The second task was to teach the Croats

how to organize big rallies, go out onto the streets, gather in large numbers and follow the leaders and the goals which were not Yugoslav and party ones. In this venture they succeeded extraordinarily, constantly increasing the number of participants, so that, at the final rally in Marija Bistrica in 1984, there were an estimated 400 000 people. As the author noted, they had conducted a complete preparation and five years later, the HDZ only took over its infrastructure and used it to bring to the rallies the population the church had already largely prepared (Hudelist 2008). Kustić alone claimed that he did not understand why the Yugoslav leadership had not done one single thing at that time to stop it, although everyone had been clear what that was about.

There is no study on the foreign powers' continuous operations against Yugoslavia either. It is also absolutely impossible to understand the process of the breakup of Yugoslavia without a clear sense of Germany's continuous operations and of German nationalism and expansionism against Yugoslav people, the Serbs and Yugoslavia itself. In the First and Second World Wars, this led to military occupation, whereas in the period after 1985, it led to the encouragement of Croatian secessionism and the breaking up of Yugoslavia. As we shall see however, absolutely without any convincing explanation, the Tribunal decided to exclude foreign powers' operations and their leaders, although as the participants in all those developments and in compliance with the rules of the Tribunal itself, they should have been treated as being equally responsible participants whose crimes would have had to be prosecuted.

This exclusion of foreign factors and the Roman Catholic Church goes hand in hand, because the institution of the Roman Catholic Church, particularly since 1979 and the appointment of Wojtyła as the head of the Vatican, in coordination with the Americans and other Western powers (Flatley 2007), is known to have spurred Eastern European nationalisms and the renewal of religious intolerance as a tool for the collapse of communism. Though the fall of the Berlin Wall and the Eastern Bloc is often celebrated as a victory of liberalism and democracy, nationalistic (and separatist) sentiments of eastern European nations against Russians or in Yugoslavia against Serbs, played an enormous role.<sup>4</sup> It seems that ICTY simply integrated that cold war inheritance according to which some nationalisms are friendly, useful and good, while others are not, and only they should be prosecuted.<sup>5</sup> But if the cold war

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4) Mark Beissinger pointed to this neglected dimension of the fall of communism. See: Beissinger (2009).

5) Apart from geopolitical interests and alliances, part of the explanation could be found in the implicit popularity of the concept that Tamir calls *remedialist nationalism*.

geopolitical perspective enters the space of justice, which probably has happened with ICTY, there comes a problem.

The researchers wrote about these things on various occasions.<sup>6</sup> Hayden gives a clear example of double standards with comparison of the cases of Milan Martić, who was prosecuted for using cluster bombs and the same practice by NATO which is ignored. French colonel Jacques Hogard, who led French troops that were entering Kosovo in 1999, testifies about the close alliance of British Special Forces and KLA fighters, which included the giving of logistic support for ambushing retreating Serbian civilians (Hogard 2014: 75,83). It is possible that this alliance from the field and its sentiments have found their way even into the field of justice that should be objective and impartial.

There is another dimension to the political use of the Tribunal which has not been stressed enough as yet and should have the attention drawn to it. As having been stated at the beginning, there are serious accusations that the Hague Tribunal for The Former Yugoslavia has also been used as an instrument for daily political action and for the directing of the political processes of dissolution within the area of the former Yugoslavia. Thus, in addition to being a tool of *ad hoc* and selective justice and historical revisionism, the ICTY could also be perceived as an effective instrument for directing Balkan politics towards the interests of the great powers and financiers (the US, the UK, Soros, NATO), as stated by the aforementioned words of Jamie Shea.

For the purpose of illustrating and corroborating this working hypothesis, seven cases are used and shortly presented and developed as the confirmation<sup>7</sup> for the said hypothesis.

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Public opinion in the Western countries, during the nineties, sympathized with nationalisms of ethnic groups which were perceived as oppressed and endangered. See Tamir (1993), "Introduction".

- 6) A good example is Robert Hayden (2011).
- 7) In addition to the above, there are other examples that could be systematically analyzed from this perspective. A prominent and an illustrative example is that of the Serbian politician Vuk Drašković. At the beginning of the war in Croatia, his party – SPO (Serbian Renewal Movement Party) created the Serbian Guard paramilitary organization, commanded by a man with a criminal record, Giška Božović. In the last fifteen years, whenever Drašković (who was the Minister of Foreign Affairs during a particular period) tried to distance himself from the Euro-Atlantic path, there was always some person from the prosecutor's office of the court to issue a speculation that their office had an interest in the crimes committed by the Serbian Guard in Croatia. Drašković would very soon change his policy. Today, he is the loudest advocate of Serbia's membership in NATO. Vojislav Šešelj asked the Prosecutor's office on 28. 2. 2006 to see all the documents about the Serbian Guard, but his motion was denied. It only strengthened the suspicion that there are some interesting materials, linking the Serbian Guard with war crimes, but for the time

1. Allow us to start with the fact that, through this court, the responsibility for the crimes and other unpleasant events in the former Yugoslavia is exclusively attributed to the local participants. Since the beginning of the work by the ICTY, the Tribunal has taken a position and a view that the conflict is of a local character and that the sole responsibility is with the participants from the Former Yugoslavia. The Tribunal's officials systematically severed all links leading to the direct involvement and responsibility of the big Western powers involvement. There is neither a single rational nor a legal justification for this. Moreover, the Court has jurisdiction over all crimes committed in the former Yugoslavia in the period following 1<sup>st</sup> January, 1991 through to 2003. The Tribunal has jurisdiction over individuals regardless of their nationality; this jurisdiction being clear even for the obvious crimes committed by NATO members in 1999. As it is known, the ICTY Prosecutors have all but initiated any process whatsoever against the direct perpetrators or the military and political leaders of the NATO leading countries. Boris Krivokapić cataloged a series of acts committed in 1999, which can be clearly demonstrated to belong to the category of war crimes (Krivokapić 2000; Krivokapić 2013: 32-36).

Incidentally, in a similar way, the operations of the International Criminal Court, which until 2013 initiated proceedings for crimes committed in only seven countries, which are all in Africa, can be called into question. According to many reports, the NATO forces committed obvious war crimes, including also *inter alia* those aimed at civilian targets, during the Libyan events in 2011. The ICC, however, did not react to it.

As far as the ICTY is concerned, the Tribunal even suppressed the defendants' attempts to bring as witnesses to The Hague the former and current political and military leaders of the United States, UK and Germany, as well as others. Why? Why are individuals coming from Western countries untouchable and above the law to the ICTY officials, whereas local participants are not?

Recently, however, in the United States a dispute has ended in the lawsuit pursued by the organization "Krajina Victims of Genocide" against the successor of the US private company MPRI, whose members advised, trained and equipped the Croatian army for the "Storm" operation despite the UN embargo. As proof, the contracts between the US companies and Croatia signed in the US in September 1994 with the approval of the State Department were submitted to the Chicago Court. Under the agreement, the company's officers, headed by the retired US General Carl Vuono (a former US Army Chief of Staff), trained the

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being it is all kept out of reach, and no one has yet been accused.

Croatian Army and its officers in the military complex “Petar Zrinski” in Zagreb and in other garrisons also. Due to a lack of money for a further procedure, the plaintiffs have accepted mediation and agreed upon a settlement, according to which the defendant is to pay \$ 1.4 million for various humanitarian activities in connection with the suffering of Serbs in the “Storm” Operation. This is *de facto* the recognition of the involvement of the MPRI and the US Administration in this crime. The ICTY, however, rejected all such initiatives.

We should also stress the controversial position of the United States as the main supporter and promoter of the ICTY, on the one hand, while simultaneously being the opponent that in every possible way fights against the ICC and creates bilateral agreements with all possible states, prohibiting the extradition of American soldiers to this court, on the other (Smith and Smith 2010). So, this is a clear piece of evidence that the United States is against real universal justice, which would be equally valid for all potential perpetrators. There are suspicions that it is supportive of only transitional, selective justice, allowing it to control the processes in the countries that are under the Sword of Damocles of the ICTY. Serbia was, for example, at the same time pressed by the US to extradite its citizens to ICTY and to sign the bilateral Article 98 agreement<sup>8</sup>, prohibiting the extradition of American soldiers to ICC.

By this *a priori* exemption of the risks of any liability, the leaders of the Western powers were able to influence and in some cases to instrumentalize the ICTY for their own needs.

2. In the famous book entitled *Shadowplay*, the British journalist Tim Marshall (2003: 79) displays the testimonies to the use of the institution of the ICTY in the course of preparations for the military intervention against the Federal Republic of Yugoslavia, which began on 24<sup>th</sup> March, 1999. British senior officers directly telephoned their Yugoslav counterparts who were soon to become their adversaries from the top of the Yugoslav Army, only to warn them to take care of how to behave during the upcoming war. It was a direct threat that if one carried out his duty and adequately defended his country he could end up with an indictment before the ICTY. These threats were real because everyone in the Yugoslav security forces was clearly aware of the fact that it was the Americans and the British who were the most influential where the

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8) This is a title for series of bilateral immunity agreements that USA signed with huge number of countries, in order to avoid possible prosecution of its military personnel and citizens for war crimes. They are based on Article 98 of Rome Tribunal. See for example agreement with Montenegro: <https://www.state.gov/documents/organization/175687.pdf>

Tribunal's politics of indicting were concerned. In this way, the Tribunal as an institution was directly used to undermine the defensive power of the state, which would soon be attacked by the NATO Pact. It seems that *de facto*, during that year, the ICTY was being used as a part of the joint direct attack on Yugoslavia<sup>9</sup>.

3. This is best evidenced by the timing of the disclosure of the indictment against Slobodan Milošević and Željko Ražnatović Arkan. The indictment against Milošević for the alleged crimes committed in Kosovo was raised and made public on 27<sup>th</sup> May, 1999, precisely at the time when the Western mediators were trying to break the resistance of Serbia during the war in Kosovo. In an interview with the CNN, the prosecutor Louise Arbour said that the indictment had been filed even though they had no access to the events on the ground. However, the crucial fact was that on the 22<sup>nd</sup> May, they reportedly received important evidence from the US and NATO allies<sup>10</sup>.

The indictment against Željko Ražnatović Arkan was allegedly filed in September 1997, but was unsealed and made public on 31<sup>st</sup> March 1999, one week after the bombing started. In early June 1997, CNN broadcasted a half-hour show by Christiane Amanpour dedicated to Arkan and the operations of his guard during the previous wars. Her interlocutors Richard Holbrooke's and the president of the Court Antonio Cassese's astonishment was obvious regarding the fact that Arkan had not been indicted. (Klarin 1997). However, there are testimonies that, in 1995, Arkan and his men helped the Americans during the deployment of the troops in Bosnia and Herzegovina. It is possible that in this way, he postponed the indictment against him for a while.<sup>11</sup> Disclosure of

9) However, one has to point out the problematic nature of the very fast and legally controversial formation of the Hague Tribunal in 1993, as a means of pressure primarily directed towards the Serbian side, which was then militarily dominant in B&H and Croatia, and was refusing to accept the destruction of Yugoslavia as the Westerners defined it (a dissolution along the borders between republics). According to prosecutor Richard Goldstone's testimonies, they were asked to start with the indictments as soon as possible in order to justify the existence of the Court. See Škulić (2013: 61-63). Before the first indictments ICTY was criticized by media for inaction. See Bass (2002: 220).

10) See <http://edition.cnn.com/WORLD/europe/9905/27/kosovo.milosevic.04/> Tim Marshall (2003: 175) clearly speaks of the ICTY as a part of the strategy of pressure on Milošević. Western services have created his psychological profile and then abused the knowledge of his diabetes, raising the pressures when he was under stress. Thus, during the war, he was charged as the first sitting head of the state.

11) In the case of Jovica Stanišić, former chief of Serbian secret police this cooperation is even disclosed. In 2004 the CIA sent the document to the ICTY in support of the defense of Stanišić who was indicted there. *Los Angeles Times*, on 1. 3. 2009, published an article based on that document, full of evidence of cooperation between

Arcan's indictment immediately after the NATO attack against Yugoslavia, however, was clearly in the power of intimidation, threatening and reducing his readiness to play a more important role in the forthcoming war. The same applies to the disclosure of the indictment against Milošević. Krivokapić convincingly claims that the act had been in the function of propaganda and the justification of aggression and illegal NATO intervention (p. 47).

The ICTY had the same political and instrumental function during the intelligence preparation of the "Fifth October Coup" in 2000. Many high-ranked and influential officers in the army and the police moved "to the other side", thanks to the promises that that would help them to avoid the indictment before the ICTY. Similarly to other cases, it did function for a while, only to subsequently see the Western players acting contrary to the promises they had made. Zoran Živković, the former Prime Minister in 2003, testified in the case of Sreten Lukić that the Serbian authorities had contacted the Tribunal in order to check his status and received an answer that he was clear. Lukić was one of the chiefs of Serbian police during the Fifth October Coup and has contributed to its success by obstructing intervention against protesters. However, in October 2003, Lukić was indicted, on the basis of which he was extradited to the Tribunal in 2005, where he was sentenced to twenty years in 2009.

4. The concept of transitional justice as developed in the case of the ICTY has one extremely problematic dimension. It is highly dubious that the concept of justice, which should be universal and objective, is linked to the fundamentally selective and intentional concept or request for "transitional" justice, directed towards the democratization of the country concerned. From this perspective it becomes fully justified to invent reasons for arresting a man and violating his most elementary human rights. Klaus Bachmann<sup>12</sup> explicitly defends this concept of transitional justice in terms of the justification of accusations and moving out of the area local people who could disrupt the process of transition to democracy. Allow us now to look at what it means in the case of Vojislav Šešelj.

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Stanišić and CIA which had started in 1992. Stanišić was using his cooperation with CIA as strong support to his request for temporary release from the Tribunal. See Greg Miller (2009). The fact that he was closely collaborating with CIA (including handing them top secret material about Iraqi military bunkers), at the same time when he was, according to prosecutors, establishing paramilitary troops accused of war crimes, raised justified serious suspicion in Serbia.

12) See Bachmann, Fatic (2015: 157). Klaus Bachmann repeated this statement recently at a conference held in Novi Sad on 23<sup>rd</sup> Oct. 2016.

There is a famous testimony given by ICTY's prosecutor Carla Del Ponte, published in her book *The Hunt: Me and the War Criminals* in 2008. She was told this by Prime Minister Zoran Djindjic in 2002, concerning Šešelj: "Take him away and do not ever return him."<sup>13</sup> On the basis of the indictment settled in this way, on 24<sup>th</sup> February 2003, Vojislav Šešelj voluntarily surrendered to ICTY, where he spent the next eleven and a half years. His trial began in 2007, namely more than four years after his arrival at the ICTY. He was released on 12<sup>th</sup> November 2014. In Serbia all political participants know that his release stalled without any legal basis, only for the fear of its possible impact on the political scene in Serbia. Moreover, there is speculation that he was released when some political subjects wrongly estimated that he could contribute to a decrease in Vučić's rating given the fact that Šešelj's party – SRS (Serbian Radical Party) – could be a serious opponent to the absolute dominance of the SNS (Serbian Progressive Party) in Serbian politics<sup>14</sup>.

In this way, his right to trial without undue delay<sup>15</sup> and to have the verdict in a reasonable time, which is guaranteed by the European Convention on Human Rights and by International Covenant on Civil and Political Rights, was violated (Krivokapić 2013: 37). Šešelj complained about that in 2011 but the Court rejected his appeal without giving clear legal reasons. Finally, on 1<sup>st</sup> March, 2016, the Trial Panel announced the verdict, after which Šešelj was acquitted of all charges and became a free man. Since under the ICTY's Statute there is no right to compensation for the time spent in custody, it becomes possible for this Tribunal to file charges at its own discretion against anyone and illegally keep him/her in custody for a long time, only to later release him/her without any consequences, simultaneously directly and deliberately violating the rights of the accused. Šešelj was known not to have been involved in any direct crimes and to have been tried for verbal incentives for a joint criminal enterprise. So this case shows how it is dangerous to build justice on what some unknown bureaucrat, leader from the West, or even ambitious prosecutor seems to consider as necessary for transitional justice in the given country.

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13) Del Ponte (2008). On 14<sup>th</sup> April 2008, Serbian daily *Politika* published a translation of some parts of the book under the title of this famous Djindjic's sentence. <http://www.politika.rs/sr/clanak/39448/Dindic-Vodi-Seselja-i-nemoj-vise-da-nam-gavracas>,

14) Serbian Minister Aleksandar Vulin, who Vučić uses as an informal port-parole, has openly criticized the ICTY for this. See <http://www.teleprompter.rs/sleteo-stigao-seselj-u-srbiju-da-rusi-vucica.html>

15) For treatment of this right at ICTY see Boas (2007: 29).

Although the Serbs usually complain the most about this practice of ICTY, the same method can also be spotted in accordance with the representatives of other Balkan nations. We will show this in several cases.

5. The most famous Croatian ICTY prisoner was general Ante Gotovina, against whom a secret indictment was filed in 2001 for crimes committed in the operation “Storm”. After he was informed about this, he disappeared. He had been on the run, hiding, until 2006, when with the help of the Croatian government he was arrested in the Canary Islands. It was a condition for starting negotiations on the Croatian membership to the EU. Gotovina was sentenced to 24 years in the proceedings before the ICTY in April 2011 and Mladen Markač to 18 years. Both were convicted of having participated in a joint criminal enterprise, which aimed at expelling the Serbs. Only a year and a half later, in November 2012, the Appellate Chamber of the ICTY issued the acquittal of both. What happened in the meantime?

In Croatia, the HDZ party was ultimately dethroned after eight years. The Western leaders, in particular those in the United Kingdom, were extremely dissatisfied with their government. In the period from 2010 to 2011, the UK blocked negotiations on the Croatian accession to the EU and in fact, campaigned against this country<sup>16</sup>. It was a period when the media in Britain and even the Foreign Office warned UK citizens not to go on holidays to Croatia, since it was a country defined as dangerous to visit.

The actual reasons for which Sanader firstly resigned in 2009, only to later be charged in 2010, and why the Western countries (UK and the Netherlands) conditioned harshly and almost blackmailed Croatia are still only a matter of speculation. At that time, all the accused had already been transferred to Hague, so cooperation with the ICTY was not an outstanding condition. The Western countries’ (Britain’s and according to some, Germany’s) intention was to remove Sanader first and then the HDZ from power. The assertions that the reason for that was corruption were absolutely all but convincing because in the Balkans the Westerners certainly know how to tolerate corrupt governments if they meet their requirements (Đukanović’s Montenegrin regime is the best example for that). Finally, all charges against Sanader fell at the appellate level and six years after his arrest, he is awaiting a new trial.

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16) On 9<sup>th</sup> December, British *Guardian* published an article based on the *Wiki leaks* Telegraph, in which the Americans expressed their dissatisfaction with the UK’s blocking of Croatia’s accession to the EU. <https://www.theguardian.com/world/2010/dec/09/wikileaks-uk-us-croatia-accession>.

The geopolitical reasons are more convincing in this case. Sanader was representing the HDZ's sovereigntist wing, which sought to preserve Croatia's resources and prevent the delivery of those resources to foreign factors. One of the possible reasons mentioned was his insistence that Croatia should use its own funds to build the Zagreb-Rijeka highway which should only pass through the Croatian territory. Similarly, as in the case of Hungary, the Westerners were more prone to let the more cooperative government formally take the country into the EU. Finally, after having had Sanader removed, the process of the *NATO-ization* of the HDZ began. Initially the goal was its removal from power and ultimately the complete removal of the remains of the "old team", headed by Karamarko. Upon the completion of the said process, the HDZ assumed a new, pro-NATO leadership and character, with Kolinda Grabar Kitanović and Plenković at the head of the Party.

In any case, after Croatia having fully returned to the desired gauge set by the Westerners, the negotiations were brought to an end in June 2011 and the Accession Treaty was signed in December in the same year. The first instance verdict against Gotovina and Markač was overturned at the Appellate Panel, with a very strange explanation in support of that<sup>17</sup>. Simultaneously, this decision brought to light that no person is responsible for the crimes committed during the operation "Storm", despite the Brioni transcripts<sup>18</sup>, the 2000 victims, the hundreds of thousands expelled and so forth.

6. Another controversial case is the first hearing verdict passed in May 2013 against the Croats from Bosnia and Herzegovina, Jadranko Prlić, Slobodan Praljak, Bruno Stojić and others, who were charged with crimes of JCE directed towards the cleansing and removal of the Bosniacs from "Herzeg-Bosnia" and sentenced to 25 and 20 years. This verdict is very interesting because it hanged over the head of not only the Croats from Bosnia and Herzegovina, but also of Croatia itself. It claims that the JCE project was implemented together with Croatia's then leadership with the aim to form the Croatian entity that would later be joined to Croatia proper. It means that this was an international conflict, implying that Croatia committed aggression against Bosnia.<sup>19</sup>

While in the former case of Gotovina and Markač the appellate decision was made within a year and a half, in the latter case the judgment of the Appellate Council was expected to be brought no sooner than No-

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17) On controversies of this decision, see Marko Novaković (2013).

18) The Gotovina case, Prosecution Exhibit P461, *Brioni Transcripts*.

19) The summary of the Judgement can be seen at [http://www.icty.org/x/cases/prlic/tjug/en/130529\\_summary\\_en.pdf](http://www.icty.org/x/cases/prlic/tjug/en/130529_summary_en.pdf)

vember 2017, which is four and a half years after the first verdict. There is speculation that this is a way to exert political pressure primarily on the Croats in B&H to accept the announced process of the re-composition of the Dayton Agreement of Bosnia and Herzegovina, with respect to which the Croatian leaders in B&H have been very critical, trying to have the third-entity proposal re-discussed at the table again.

Since they refused to join the political process, and since Croatian leadership didn't succeed in persuading them to do that, initial verdict was confirmed at the appellate court. Six Croats from BiH were convicted to 111 years of prison for JCE with then president of Croatia Franjo Tuđman. It is still hard to predict precise political consequences of this verdict, but that is without doubt hard political burden lying on the shoulders of Croats in Bosnia and Croatia as well.

7. On the Albanian side there are also accusations that the establishment of the Special Court for War crimes of the KLA, which the foreigners imposed on the Assembly of Kosovo in 2015, was politically motivated so as to, among other things, be used for managing the political processes in Kosovo in these very turbulent times.<sup>20</sup> Since an enormous huge number of former KLA leaders dominate the political life in Kosovo, there is speculation that the international community intends to use this court for a change of the political elite in power in Pristina. It is expected that the war elite could be changed for a new modern, educated and easily manageable one. Local analysts criticize the fact that alleged crimes will not be prosecuted at ICTY, but at a special Court for KLA.

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In a manner which we tried to emphasize in here, Richard Holbrooke spoke about ICTY as a “huge valuable (political - M. Đ.) tool”. Although prosecutor Goldstone spoke about the release of indictments against Karadžić and Mladić at the time of Dayton preparation as a coincidence, Holbrooke denied it claiming that “We used (the tribunal -M. Dj.) to keep the two most wanted criminals in Europe... out of the Dayton peace process and we used it to justify everything that followed” (Holbrooke 1998: 107). Even for those who are in favor of such an instrumentalization of justice for political purposes, it becomes necessary to ask where is the limit?

After everything presented here, we might recall the dictum that selective justice can sometimes be worse than injustice. But advocates of

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20) Fazliu. (2016) presents some of the crucial arguments against the court that can be heard at Kosovo.

the need for transitional justice insist that even imperfect justice is better than none. They can argue that in spite of everything a large number of perpetrators have been sentenced and that at least one part of the victims' corpus received satisfaction. From this perspective, the cases we mentioned come as unintended incidents, as a result of random decisions of individuals who succumbed to their preferences, sympathies and political views.

However, it seems that there are too many such cases which in the broader context confirm our hypothesis about the ICTY as a court which has largely succumbed to the temptation of implementing (geo) political justice. For example, avoiding the arraignment of Western political and military participants in front of the ICTY, even as witnesses, if not as accused, casts a big shadow over the fairness of this court.

In any case, this article attempts to add yet another dimension to the understanding of the work of the International Tribunal for The Former Yugoslavia. We are aware that in such cases, one can hardly find, for the time being, adequate documentation and primary sources for complete corroboration of the basic hypothesis. But we hope that we have presented substantive valid material to initiate further debate and investigation.

We should at the end, point out the factual situation in the former Yugoslavia as well. Twenty-three years after the formation and operation of this court, relations between the former conflicting nations are no better than they used to be. Moreover, during 2016, there was a remarkable tension in relations between Serbs and Croats, among all the three ethnicities in Bosnia and Herzegovina, in Macedonia and so on and so forth. Hardly anyone can truly claim that this kind of transitional justice has given good results and, above all, healed the wounds and repaired relations in the region. Moreover, ICTY is often considered to be yet another complication that has brought new bad blood among the local people.

Contrary to the proponents of such transitional justice, we find that an *ad hoc* tribunal is not a good solution and that, according to Krivokapić's proposal, much better results can be provided by universal or regional courts on the condition that, of course, such courts are indeed fair and equal for all, independent of private financiers and finally able to make judgments even against the members of the military and political leaderships of the most powerful states in the World.

With Boas (2007: 293) we can at best conclude that the practice of the ICTY can offer sufficient valuable lessons for the future development of international criminal justice. However there are two *but*s:

1. The fact that ex/Yugoslav citizens were subjects of imperfect justice, experiments, political instrumentalizations of justice or political justice, etc., might be in some way justified if ICC spreads its competence across the whole globe, including the biggest powers. 2. After Brexit, Trump's victory, or the annexation of the Crimea to Russia, it is more logical to expect a global return to sovereignty politics rather than the further development of international criminal justice. So it would be highly problematic if the biggest powers continue to sabotage efforts for global criminal justice and at the same time force smaller nations to participate in that. If it be the case, it would become completely understandable why small nations will still have huge reservations about the concept of transitional justice and the ways in which it is implemented, seeing in it plenty of elements of political justice.

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