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LEGAL STANDARD "JOINT CRIMINAL ENTERPRISE"- GENERAL OVERVIEW

Apstrakt

The system of international justice, in the previous history of the development of human society, has gone through a long way from the absence of an organized system of international criminal legal protection to its today's form. The international criminal law and administration of justice, today, are still not the perfect forms of protection of the universal values of humanity, but still stand as an important step compared to the period of absence of organized systems of protection which has marked almost the whole history of development of humanity until the last century. The system of criminal law, as a protective mechanism of the values of a certain society, is in itself universal enough so that it can be simply applied in the system of international relations. Furthermore, the member countries have developed it up to the level, that the current and Continental and Anglo Saxon criminal legal systems present extremely developed mechanisms of protection. It is different with the system of international criminal legal protection, this system is not so developed and codified as the national systems are. In those circumstances, it draws its strength from a small number of universal conventions, which have originated after World War II, - the so-called ''Geneva conventions'' and their additional protocols, customs in the international criminal law and institutes and the principles of contemporary systems of criminal law. This deficit of the systems of international criminal law combined with undeveloped system of international criminal administration of justice is significantly noted upon the quality of decisions which are formed in those circumstances. One of them is also the legal standard of liability of accomplice known as ''joint criminal enterprise'', which is created by the Tribunal for the former Yugoslavia. This problematic standard presents a great challenge to the current international criminal law, because of its opposition to the basic principles of the international and criminal law in general, and as well as to the practice introduced into the system of international criminal law.

Keywords: *''joint criminal enterprise'', international criminal law, international criminal administration of justice, accomplice, judicial decision.*

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INTRODUCTION

The evolution of society throughout history has been marked with permanent trends and turmoil which often ended in the change of socio-economic systems. Sometimes the outcomes were insignificant, sometimes they brought positive changes and sometimes brought negative changes. As the negative changes were faced, the consciousness that these negatives could be prevented grew. With the development of human tendency to destroy, so grew the humane side that tried to find a way to protect the universal positive values of the human society, or at least the minimum of those values, on which most of the people could agree. Therefore, the first societies had at first, informal and after formal systems of justice that allowed them to carry on normally. However, even with the growing conscience and the mechanisms of protecting universal human values, in certain moments of complex social turmoil throughout history, the consequences that befall humanity were catastrophic. The consequences threatened the destruction of what we today know as global society. These consequences are a threat even today, if measures are not taken to prevent further escalation but also to prevent the occurrence in other social circumstances. The technical advancement of developing weapons of mass destruction which went side by side with this process made the danger even greater and very much serious. From that moment, the possibility of total destruction of humanity and its values is something which the modern society could count on, but to also find an effective mechanism that will assure everyone's safety without the constant risk of their destruction. In such circumstances, besides from internal judicial systems that protected the universal values of a society, international agreements began forming which set the terms upon which an international society functioned as a congregation of different societies in terms of peaceful and uninterrupted development. The order that has the goal of protecting the people and positive social values from potential destruction was built upon these terms. This order was specifically important due to the fact that new reasons and causes for jeopardizing human rights of humanity could suddenly reappear it was impossible to foresee them. Unfortunately, such a possibility has not yet been rooted out, not even today. There is an impression that it is even more intensified. One of the reasons why that possibility is even more realistic today is that in the beginning of the 21st century, there is not a universal consensus about values that need to be protected judicially. Many international conflicts that threaten world peace today, conflicts that are seen differently by the members of the international society, confirm the lack of such a consensus in contemporary society. However, imperfections aside, the accomplishments of institutional judicial protection have

been some of the largest steps of society when it comes to universal values and equality among people. It was the judicial protection that allowed the protection of the weaker and unprotected members of society, which was a big step in the right direction. At a certain point in time, such legal protection was recognized as law which acts when someone does something wrong, and it was therefore named criminal law. Criminal law developed over time and differentiated in the general part where general principles of criminal law were defined and specialized,[2] where acts that were deemed socially unacceptable were defined. Criminal law became a more and more dominant mechanism of protection of the social values, and so it is now the widest and the most comprehensive normative basis for protecting contemporary society.

In circumstances where the international criminal justice system is not sufficiently developed and codified like national systems, it draws its strength from universal conventions created after World War II, the so-called "Geneva Conventions" and their Additional Protocols, customs in international criminal law and the international ad hoc criminal tribunals' and special courts' practice. One of the legal standards developed through the practice of the International Criminal Tribunal for the former Yugoslavia is the so-called joint criminal enterprise, whose encompassing of objective liability, otherwise unacceptable in criminal law, has generated numerous disputes. The paper analyzes the contradictions in the process of establishing and organizing the Tribunal and later on the legal standard of joint criminal enterprise, with the aim to point out that introduction of this legal standard is a result of interlacing politics and law in work of the Tribunal, which does not contribute to the final reconciliation but to the deepening of existing disagreements over conflict that led to the dissolution of former Yugoslavia.

INTERNATIONAL CRIMINAL LAW

With the development of criminal-judicial systems so grew the consciousness of society that certain universal values have to be protected outside the border of national states. The process of economic globalization speeded up this process due to the growing need to protect the capital and profits all over the world. This is how the basis of international criminal law, as we know it today, came into existence. Even though the roots of international criminal law go further back in his-

[2] Evgeny Pashentsev, "Enforcing "Humanitarian Wars": A Case Of Communication Mismanagement", *Nauka i društvo [Science and Society], No 1. 2014*, p. 36.

tory, the turning point in its development came in the 20th century along with the largest global conflict in history, which brought the consequences of the largest destruction of basic human values in the last several thousand years - the Second World War**.** As a result of the distress of that size, the winning side decided to form a special court that will judge the Nazi war criminals for their acts of crime during the war. Due to the fact that the trial took place in the city of Nurnberg in Germany, the newly-formed International Martial Court became known as the Nurnberg Court. At the same time, in the Far East the International Martial Court in Tokyo was formed with the intention to prosecute war criminals from Japan. Not long after that, the international community adopted two conventions of great importance for the international criminal law. The first one is the Convention of preventing and punishing the crimes of genocide from 1948. and the second one is the Geneva Convention from 1949., which was updated with two additional protocols in 1977. The Geneva conventions were formed as a consequence of facing the lack of international norms in the material and procedural sense which would lead to easier processing of war criminals. Simultaneously, the formation of international criminal court was continued, which resulted in the adoption of the Statute of international criminal court in 1998. Even though the Statute came into effect in 2002. and the court was officially opened in 2003., and with a few processed cases of war criminals, this permanent international court remained in the shadow of the *ad-hoc* international criminal courts from the 1990's. Similar to the court, the system of international criminal justice today still remains underdeveloped and limited with dominant national criminal-judicial systems. Besides that, the process of its forming takes place very slowly and it is almost completely stopped. One of the consequences of that state, is the dominance of *ad-hoc* instead of the permanent International criminal court and the specifically of applied law by the temporary international courts. *Ad-hoc* international courts have marked the institutional and the common system of international criminal law during the end of the 20th century and the beginning of the 21st century. Two main courts of that type are the Tribunal for ex-Yugoslavia and the Tribunal for Rwanda. The first, International Tribunal for pursuing the persons responsible for the major violations to the international human law in the territory of former Yugoslavia (further in the text mentioned as the Tribunal for ex-Yugoslavia, Court and Tribunal), was formed by the Resolutions of the Security Council No. 808 of 22 February 1993, and 827. Of 25 May 1993.[3] The second one, the International

[3] More on that: United Nations, Resolution 808, S/RES/808 (1993), 22 February 1993. Available on http://www.icty.org/x/file/Legal%20Library/Statute/statute_808_1993_en.pdf., United

Tribunal for pursuing the persons responsible for major violations of international human rights performed on the territory of Rwanda was formed by the Resolution of the Security Council No. 955 of 8 November 1994.[4] Even though the intention of the Resolution for the Tribunal of Rwanda was identical to that of the Tribunal for former Yugoslavia, it is certain that this court remained in the shadow of the Tribunal of former Yugoslavia.

The informal "dominance" of the Tribunal of former Yugoslavia was based on the greatest number of processed cases of violation of international criminal law since the International Martial Court in Nuremberg, while the "specificity" of applied solutions is consisted in creating certain criminal-law standards which was used by this court intensively during its sessions and thus included them into the international criminal customary law. Otherwise, the Tribunal for former Yugoslavia faced many obstacles from the beginning, so that "the controversial authenticity and the foundation" of the created standards, presented only the continuation of the problematic history for this international court. For example, the "legally uncommon" way that this court was formed presented the problematic talking-point of legal theorists about whether the Security Council of the United Nations has the mandate to create such an institution and how much the institution is in concordance with the tenets of international criminal law. Also added to the above mentioned is the lack of adequate material law and procedural stipulation, which would allow the process to function normally, serious organizational problems and inaccessibility of significant number of accused persons. There are still no rational answers for these and other questions that essentially complicate the proceedings of this international court and give power to the controversy of the court. To make matters worse, some of the prominent countries in the international community, such as Russia and others, ignore cooperation with this judicial institution, which makes the legitimacy of this international court even less valid.

Nations, Resolution 827 (1993), S/RES/827 (1993), 25 May 1993. Available at http://www.icty.org/x/file/Legal%20Library/Statute/statute_827_1993_en.pdf.

[4] More on that: United Nations, Resolution 995 (1994), S/RES/955 (1994), 8 November 1994. Available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N95/140/97/PDF/N9514097.pdf

JOINT CRIMINAL ENTERPRISE

However, as if all these external problems which accompanied the establishment and the operation of the Tribunal were not enough, the court itself did its best to add further confusion to the work of the institutions by its certain decisions and "specific" enforcement of law. By doing so, the legitimacy of the institution was further undermined to the extent that it justifiably raises the question of overcoming the problems that have risen. This especially refers to applying the institute of complicity in the international criminal law and determining the nature and level of the charged subjective attitude of the suspect towards the criminal act that would be necessary for the liability of the accomplice. The statutes of the two *ad-hoc* international tribunals and the Statute of the International Criminal Court define complicity in a similar fashion. In the absence of its own precise provisions for the interpretation of complicity issues, the Tribunal for the former Yugoslavia applied the legal norms of the Statute of the International Criminal Court by which it created its own standard of liability of the accomplice. In this case, the court applied a highly non-standard and unconventional approach on the alleged subjective relationship between the offender and the criminal act that occurs as necessary for the existence of complicity. When we say non-standard and unconventional, we refer to the deviations from the solutions that are common in national criminal legislation. The Tribunal for former Yugoslavia went with a legal framework that would be declared anachronistic in most criminal justice systems in the world. Its essence is to place perpetrators and accomplices in international crimes almost on an equal footing. By doing so, this standard contradicts the basic principles of national and international criminal law. This legal framework of the Tribunal for former Yugoslavia is known as "joint criminal enterprise." Based on the previous concept of common purpose, the "joint criminal enterprise" has made, the suspect's *mens-rea* to the criminal act, which is an important condition for the existence of criminal liability of the individual responsible person as a perpetrator or accomplice, extremely relative and almost irrelevant. This is mainly because the legal standard "joint criminal enterprise" in practice has equated all forms of *mens-rea* of the suspect towards the accomplished crime, which exist both with the perpetrator and the accomplice. That is how accomplices became responsible in the same manner as the perpetrators, that is, the accomplices. In that way, anyone who even had an indirect contact with the committed crimes could be charged with being the perpetrator. There is almost no *mens-rea* of the accomplice of the criminal act towards the act which would objectively protect the person from liability. As it is foreseen in the most flexible, the so-called, third form of the legal

standard of "joint criminal enterprise", the existence of the accomplice's liability does not even require his/her knowledge that someone has committed a particular criminal act or acts implementing a joint plan. In that way only the "membership" or participating in a certain "joint criminal enterprise", no matter if the member or the participant has been aware of the crimes, has become sufficient to establish his/her responsibility, if it could have been "foreseen" that the crimes could be committed by the other subjects of "joint criminal enterprise" and if the responsible member has "voluntarily" taken the risk .

We can agree with many critics of legal profession that the "predictability" as an element of the responsibility of accomplices in a "joint criminal enterprise" during a state of war in a country, can be attributed to almost every citizen of a country participating in the war, especially in the case of the members of armed military or police formations, as well as persons engaged in other government bodies. Given that the limits of subjective liability have almost disappeared in the case of this legal standard, an opportunity has been created by introducing the objective liability in international criminal law. Of particular concern is the potential for abuse that may occur when non-standard[5] and unlawful practices are applied by other international judicial institutions. The former Yugoslavia Tribunal and the legal standard "joint criminal enterprise" are paradigms of those negative circumstances. The confusion that was brought by the Tribunal for former Yugoslavia with the standard "joint criminal enterprise" has not produced any positive consequences, but rather induced many negative ones. The basic criminal legal consequence is made up of the implementation of a legal standard that is contrary to the basic principles and criminal law institutes of international and criminal law in general.

Ambos Kai relying on the opinion of other legal theorists, considered that an element of "foreseeability" standard of the "joint criminal enterprise" liability mode "is not accurate nor reliable."[6] In other words, based on these findings, the author believes that the implementation of standards in this way makes the "punish-ability of convicts unpredictable."[7] The author finds sense in such acting of the Tribunal, in its ability to overcome the present problems of the typical lack of evidence in international criminal proceedings, especially in cases of presenting evidence of

[5] Marković Darko, "Hague justice through prism of new forms of criminal responsibility", *The Review of International Affairs*, Vol. LXIII, No. 1148, pp. 38–51, Belgrade, October 2012, pp. 47-48.

[6] More on that: Ambos Kai, „Joint Criminal Enterprise and Command Responsibility", *Journal of International Criminal Justice*, 5, 2007, pp. 174-176.

[7] *Ibid.*

direct involvement of certain suspects in international criminal acts.[8] We consider the author's views completely right and justified to ask the question about the presence of the logic of pragmatism at the expense of traditional principles and institutions of international criminal law within the system of international criminal justice. A logical question arises legitimacy which in some cases can provide additional justifying circumstance for certain shortcomings of the system of international criminal law. However, it can never be the basis for the exclusion of generally applicable principles and institutes of international and criminal law in general. This is especially referred to the acting of the International Military Tribunal at Nuremberg. However, in this case, it is impossible not to point out the fundamental differences between these two Tribunals in dealing with cases. The International Military Tribunal at Nuremberg trials for the greatest crimes in human history in the largest ever recorded armed conflict on the planet, while, on the other hand, the Tribunal for the Former Yugoslavia trials for crimes committed in a limited local conflict a civil war in one part of the former Yugoslavia.[9] The main and only mission of the International Military Tribunal at Nuremberg was justice after such war atrocities, which was the justification for any other shortcomings in the organization or acting of international court.[10] These other defects in the case of this court could be composed in the absence or neglect of certain fundamental principles of international and criminal law in general, about which Škulić and some other authors spoke.[11] However, in the case of the Tribunal for the former Yugoslavia, due to the previously mentioned facts of the conflict for

[8] "*Ultimately, under this standard, the doctrine introduces a form of strict liability. This may be the reason for the attractiveness of the doctrine for the Prosecution, raising the possibility of elegantly overcoming typical evidentiary problems in international criminal law prosecution, especially where proof of direct participation is lacking*." More on that: *Ibid*.

[9] More on this: Škulić Milan, „One Look at the Hague Tribunal and its Place in History", *The Hague Tribunal between Law and Politics* (ed. J. Ćirić), Institute for Comparative Law, Belgrade, 2013, pp. 61. and B. Čolović, The Formation of The Hague Tribunal - An Example of Disrespect for Rights and Real Facts, *The Hague Tribunal between Law and Politics* (ed. J. Ćirić), Institute for Comparative Law, Belgrade, 2013, pp. 120-138.

[10] *Krivokapić points out that the core mission of the Nuremberg Tribunal was* "*to satisfy Justice.*" More on that: B. Krivokapić, A slightly different view of international criminal courts, *The Hague The Tribunal between Law and Politics* (ed. J. Ciric), Institute for Comparative Law, Belgrade, 2013., pp. 17-18.

[11] Thus, Škulić points out that in the case of the "Nuremberg process, it is not about adaptable or very flexible interpretation of the principle of legality but it is rather about disrespect of the principle of legality, that is, considering it relatively immaterial to the particular case..." More on this: M. Škulić, Principle of legality in criminal law, *Annals of the Faculty of Law in Belgrade*, Faculty of Law, Belgrade, UDC 343.211.2, Year LVIII, I / 2010, pp. 88-89.

which this court was established, the possibility of such acting with such justification is excluded. Jens David disputes the argument of normative legal standard "joint criminal enterprise" and considers essential that the normative base of subjective attitude of accomplice to the crimes of the joint enterprise should return within the scope of Article 30 of the Rome Statute of the International Criminal Court where the intent or accomplice's premeditation is required.[12] Otherwise, if the existing structure of this legal standard retains the already existing form, Petronijević believes that there will be an objective and real danger of holding every individual, who was a member of armed formations during the war, or even any employed person in the institutions of a state that is in a military conflict, criminally liable.[13] It seems particularly worrying to extend the range of the potentially responsible persons, under this standard of accomplice liability, and to those categories of persons ,who are not in an armed conflict, cannot be held responsible.[14] Such a possibility to the outmost limits relativizes the basic principles of international criminal law in general and, in particular, the principle of legality, legitimacy and individual responsibility. Disavowal of these principles is unacceptable in modern national criminal justice systems, and to the international criminal justice system, especially due to unauthorized importance that this system of peace and public order in the contemporary international community. Under these circumstances, Zoran Stojanović justifiably challenges the application of the legal standard "joint criminal enterprise" as a standard that was already present in international common criminal law, as claimed by the Tribunal for the Former Yugoslavia when explaining the application

[12] "Furthermore, the ICC Pre-Trial Chamber has recently taken the position that with regard to co-perpetration and Article 25, the Rome Statute requires action 'with intent' as a required mental element under the Statute. In light of this, JCE III (vicarious liability for criminal acts of others that fall outside the scope of the criminal agreement) should be inconsistent with the Statute's intent requirements." Више о томе: J.D. Ohlin, *Joint Criminal Confusion*, Cornell Law School – Faculty Publication, New York, 2009, pp. 418.

[13] "This form (inevitable or strict accountability) may include each of the individual, from an ordinary combat soldier to the top of the command structure, with only one condition to be in any way engaged in war operations on some of the sides." More on it: G. Petronijević, Lack of principles in the application of legal standards in the work of the ICTY, *The Hague Tribunal proceedings between law and politics* (ed. J. Ćirić), Institute of Comparative Law, Belgrade, 2013, pp. 142.

[14] According to Petoronijevic's views, the use of a third form of the legal standard of "joint criminal enterprise" can lead to "every citizen who voted for a certain political option could anticipate that this political option included LNG that can escalate into war conflicts -civil war, where crimes, for which that one voter can be held liable, are likely to appear…" More on that: *Ibid*.

of this standard.[15] The author believes that this standard has never been applied in international criminal law, both formal and common, and that it could not be applied in explaining the decisions of this Court. Given the fact that the legal standard of "joint criminal enterprise", especially its third form, has not been established either in international criminal common law, nor in the Statute of the Tribunal for the former Yugoslavia and the statutes of other international courts, Stojanović believes that this is a case of "rough" violation of the principle of guilt and the principle of legality.[16] Although there are also numerous other legal theorists of the same mind, it did not prevent the Tribunal from applying this standard[17] in most of its decisions.[18]

POSSIBILITIES OF REMOVING SHORTCOMINGS

Upon the application of the standard "joint criminal enterprise", a problematic history and the functioning of the Tribunal for the Former Yugoslavia are almost complete, since there is no segment of the functioning of this court that is not burdened with certain problems. Starting from the inadequate establishment, through the selection of relevant law enforcement in the work and the manner of selecting judges in the judicial and appellate panels up to the creation of this legal standard which opposes to general institutes and principles of international and criminal law tenets in general, a number of contested decisions are permanently extended. Each individual court decision based on this controversial legal standard, whose number is increasing, prolongs the situation, thus causing the potential consequences of such decision-making. It is therefore necessary to take measures that will rectify problematic areas and one segment of international criminal judiciary and criminal law should also be corrected to restore law within the limits of legality and respect for the basic modern principles of international criminal law. As an essential

[15] Therefore, Professor Stojanović reasonably asks: *"... if the concept is really known in common international law, why the Tribunal for the former Yugoslavia took so long to implement it, actually until 1999."* For more information: Z. Stojanović, International Criminal Law, Legal books, Beograd, 2008, pp. 99.

[16] For more information: *Ibid*., op.cit., pp. 98-99.

[17] Marković Darko, *Zajednički zločinački poduhvat - Joint Criminal Enterprise*, Zadužbina Andrejević, Beograd, 2013, pp. 133-134.

[18] Thus, Danner and Martinez performed statistics according to which 64% of the indictment of the Tribunal for the former Yugoslavia in the period from 25 June 2001. to 1 January 2004. was based on this doctrine. For more information: According to A.M. Danner and J.S. Martinez in K. Ambos (2007), op. cit., pp. 159.

measure in this endeavor we see the return to law in those situations where it is still possible. If, on the one hand, it is impossible to correct method and procedure through which the Tribunal for the Former Yugoslavia was established, on the other hand, it is possible to return applied legal standard "joint criminal enterprise" to the framework of legality through the appeals court decision in the established procedure. This can be achieved by simply harmonizing the legal standard basic principles of criminal law and general institutes of modern criminal law. Of course, it is certain that such action is linked with a number of normative and legal issues. Legal and political aspect of the problem is related to the unwillingness of the Tribunal for the former Yugoslavia and its founders to return to the original institutes and principles of international and criminal law in general. This is perfectly understandable if we bear in mind that the existing problems in the work of Court and the legal standard of "joint criminal enterprise" arose precisely as a result of the operation of the Tribunal with the full support of its founder. The normative problem lies in the fact that the existing norms of the Tribunal for the former Yugoslavia conditions to use a remedy to the court's decision are set very restrictively. This normative act specifies that the review of the court decision as a remedy can only be used when "new fact is discovered which was not known to the complainant during the process before the trial or appellate panel and could not be detected in the course of a fair trial."[19] "The principle of rotation" which is present in the work of the Tribunal for the former Yugoslavia, makes this situation even more complicated.[20] Its essence lies in the fact that the same judges may appear as assigned judges of trial and appellate courts. This violates the basic principle of the appeals procedure in criminal law and substantially impairs the rights of the indicted as it has not provided the impartiality of the panels that hear appeals of the indicted person.[21] In addition, the termination of the Tribunal for the former Yugoslavia to base its decisions on "interpretations" but solely on the enforcement of international criminal law provisions would make this return to

[19] *"Where a new fact has been discovered which was not known to the moving party at the time of the proceedings before the Trial Chamber or the Appeals Chamber, and could not have been discovered through the exercise of due diligence, the defense or, within one year after the final judgment has been pronounced, the Prosecutor, may make a motion to that Chamber for review of the judgment."* Art. 119 (a) of the Rules of Procedure and Evidence. More tome: UN-ICTY Rules of Procedure and Evidence, United Nations, IT / 32 / Rev. 49, 22 May 2013, available at: http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev49_en.pdf.

[20] For more information*: Ibid.*

[21] For more information: Z. Stojanović, op. cit., pp. 169-171.

law significantly faster.[22] Finally, the Special Chamber of the court in Cambodia dismissed to apply the extended or the third form of legal standards "joint criminal enterprise" with the explanation that this standard was not part of common international criminal law at the time when the conflict in Cambodia occurred.[23] If this type of legal standard "joint criminal enterprise" was not part of customary international criminal law in the period from 1975. to 1979., then it definitely was not even in the period from 1979. to 1990., when the conflict in the former Yugoslavia began to happen. This attitude is completely complementary to the attitude and question that Stojanović, whose attitude was similar to the members of Special Chamber of the court in Cambodia, asked to the Tribunal for the former Yugoslavia. The Tribunal did not provide an answer, which consists in the fact that if the legal standard of "joint criminal enterprise" was part of common international criminal law, why this court did not specify where and when the legal standard was used in common international criminal law.[24] This formally legal fact will largely determine the fate of the disputed standards of accomplice liability at the Tribunal for the former Yugoslavia and other international courts in the future.

CONCLUSION

The decision on the establishing and implementation of the legal standard of "joint criminal enterprise" has produced not only the formal and legal consequences, but also various others. Stojanović rightly points out that "the legal conglomerate", which was created and implemented by the Tribunal for the former Yugoslavia, including in the process of creating this legal standard is "*arbitrary and unequal*."[25]

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[22] This is Jens David, who specifically insists that the Tribunal for the former Yugoslavia rejects the "*interpretation*" of the already literal reading and application of Article 25 (3) (d) of the Rome Statute, which has been used as one of the normative bases for establishing the legal standard "joint criminal enterprise." More on that: J.D. Ohlin, op. cit., pp. 410.

[23] "*On 20 May 2010., the Pre-Trial Chamber rejected the Co-Prosecutors' reasoning in part, ruling that JCE III did not form part of customary international law between 1975 and 1979, but upholding the applicability of JCE I and II. The Closing Order in Case 002 consequently did not include JCE III as a form of responsibility against any of the Accused but did allege responsibility in relation to all Accused pursuant to JCE I and II*." More on that: Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Decision on the applicability of Joint Criminal Enterprise, No. 002/19-09-2007/ECCC/TC, 12 September 2011.

[24] More on this: Stojanović Zoran, op. cit., pp. 98-99.

[25] *"The law to be created (by the Tribunal for the Former Yugoslavia,.) is a conglomerate of customary international law, "general legal principles", the provisions of some international*

Škulić, on the other hand, calls for caution when applying legal standards of the Tribunal for the former Yugoslavia by other international criminal courts, especially bearing in mind the formal legal controversy of some of them, such as the legal standard of "joint criminal enterprise."[26] The legal and political implications of the Tribunal for the former Yugoslavia can leave a permanent mark on the fate of the whole nation and provide a completely erroneous explanation and interpretation of certain historical developments in the war-affected areas. In this context, Škulić talks about "giving the peculiar historical lesson", which is definitely not and cannot be the role of an international criminal court, and especially not a temporary international tribunal burdened with numerous problems in all aspects of organization and functioning.[27] This inevitably creates conditions for further confronting the unstable socio-political conditions in which almost the entire international community exists today, rather than to create the conditions for lasting and sustainable peace as a basic prerequisite for the development of modern societies. This is also Ćirić's view, who believes that trials at the Tribunal for the former Yugoslavia in a way that involves the creation of "artificial winners and losers" only deepen the existing disagreements over the conflict in the nineties and lead to even greater lack of understanding in the forthcoming period, rather than contribute to the process of lasting reconciliation and establishment of a sustainable stability of the region. Similarly, in the context of the role of the Security Council of the United Nations in the creation of the Tribunal for the former Yugoslavia contrary to the provisions of public international law, Kohler believes that "... *as long as the Security Council is entrusted with judicial functions, the boundary between law*

conventions that are themselves often vague and contentious, the views of one part of the doctrine, the views that The Tribunal applied in resolving specific issues, comments from the International Committee of The Red Cross of the Geneva Conventions, etc. The effort to create something out of nothing may be for praise but not in such a sensitive area and in matters resolved (though often in different ways) in national criminal law almost two centuries ago. Law enforced by the Tribunal is heterogeneous, incomplete and indefinite and therefore arbitrary and unequal (which are characteristics of criminal law in Europe in the Middle Ages.) " More on this: Z. Stojanović, op. cit., pp. 173.

[26] *"...to impose a practice that has already emerged from ad-hoc tribunal decisions, as something that is self-explanatory and without any explanation of the ratio and the legal basis of such treatment, to the newly-founded permanent international criminal court, because these are essentially and fundamentally different institutions." "Therefore, the legal effect of their decisions cannot be of a lasting nature compared to other permanent courts, that is, above all in relation to a permanent international criminal court, but it may be allowed very cautiously and in rare situations, only as restrictive and cautiously applied exception."* More on this: M. Škulić, (2013), op. cit., pp. 56.

[27] Škulić Milan, (2013), op. cit., pp. 115-119.

and politics is blurred and „*international justice*" *serves as* "*international politics of the powerful.*""[28] It is precisely because of such contradictions in the process of establishment and organization of the court, and subsequent contradictions and standards applied by international and criminal law institutions in general that it emerges as necessary to take all formally legal measures that can be taken at this stage of the functioning of the court, with the aim of preventing the effects of the consequences that have already arisen and to prevent those that may occur in the future. The international law and justice as the highest values of modern society, would benefit most from such acts, so the hope remains that there will be enough will in the Tribunal itself to do take such a positive step.

LITERATURE:

Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Decision ont he applicability of Joint Criminal Enterprise, No. 002/19-09-2007/ECCC/TC, 12 September 2011.

Kai Ambos, "Joint Criminal Enterprise and Command Responsibility", *Journal of International Criminal Justice*, Volume 5, Issue 1, March 2007, pp. 159–183.

Kochler Hans, *Global Justice or Global Revenge? – International Criminal Justice at the Crossroads*, Springer, Wien, New York, 2003.

Krivokapić Boris, "A somewhat different view of international criminal courts", in: *The Hague The Tribunal between Law and Politics* (ed. Jovan Ćirić), Institute of Comparative Law, Belgrade, 2013.

Marković Darko, "Hague justice through prism of new forms of criminal responsibility", *The Review of International Affairs*, Vol. LXIII, No. 1148, pp. 38–51, Belgrade, October 2012.

Marković Darko, *Zajednički zločinački poduhvat - Joint Criminal Enterprise*, Zadužbina Andrejević, Beograd, 2013.

Ohlin Jens David, "Joint Criminal Confusion", *New Criminal Law Review*, Vol. 12, pp. 406-419, New York, 2009.

Pashentsev, Evgeny "Enforcing "Humanitarian Wars": A Case of Communication Mismanagement", *Nauka i društvo [Science and Society], No 1. 2014.*

[28] More on this: H. Kochler, "Global Justice or Global Revenge?", *The ICC and the Politicization of International Criminal Justice*, International Progress Organization, Vienna, 2009, pp. 5.

Petronijević Goran, “Unbiased Practices in the Application of Legal Standards in the ICTY”, in: *The Hague Tribunal between Law and Poltics* (ed. Jovan Ciric), Institute of Comparative Law, Belgrade, 2013.

Stojanović Zoran, *International Criminal Law*, Law Book, Belgrade, 2008.

United Nations, Resolution 808, S/RES/808 (1993), 22 February 1993.

United Nations, Resolution 995 (1994), S/RES/955 (1994), 8 November 1994.

Čolović Vladimir, “The Formation of The Hague Tribunal - An Example of Disrespect for the Rights and the Real fact”, in: *The Hague Tribunal between Law and Politics* (ed. Jovan Ciric), Institute for Comparative Studies Law, Belgrade, 2013.

Škulić Milan, “A Look at the Hague Tribunal and Its Place in History”, in: *The Hague Tribunal between Law and Politics* (ed. Jovan Ciric), Institute for Comparative Studies Law, Belgrade, 2013.

Škulić Milan, “Principle of Legality in Criminal Law”, *Annals of the Faculty of Law at Belgrade*, Faculty of Law, UDC 343.211.2, Belgrade, LVIII, I / 2010.

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ПРАВНИ СТАНДАРД „УДРУЖЕНИ ЗЛОЧИНАЧКИ ПОДУХВАТ" – ОПШТИ ОСВРТ

Апстракт

Међународно кривично право још није савршен облик заштите универзалних вредности човечанства, али и на достигнутом нивоу представља важан корак у поређењу с периодом непостојања организованих система заштите који су обележили скоро целу историја развоја човечанства до друге половине прошлог века. У околностима да систем међународне кривичноправне заштите није разрађен у довољној мери и кодификациран попут националних система, он снагу црпи из универзалних конвенција, насталих после Другог светског рата, такозваних „Женевских конвенција" и њихових допунских протокола, обичаја у међународном кривичном праву и праксе међународних кривичних ad hoc трибунала и специјалних судова. Један од правних стандарда развијених кроз праксу Међународног трибунала за бившу Југославију јесте тзв. удружени злочиначки подухват, чије је захватање објективне одговорности, која је недопустива у кривичном праву, изазвало бројна оспоравања. У раду се анализирају противречности у процесу успостављања и организације трибунала и касније правног стандарда удружени злочиначки подухват, с циљем да се укаже да је увођење овог правног стандарда резултат преплитања политике и права у раду трибунала, што не доприноси коначном помирењу већ продубљивању постојећих несугласица око сукоба који су довели до распада бивше Југославије.

Кључне речи: *удружени злочиначки подухват, међународно кривично право, одговорност, саучесништво, трибунал.*