THE TOPIC OF THE ISSUE

SERBIA'S CONSTITUTION AND WAR CRIMES TRIALS IN FRONT OF NATIONAL COURTS – POSSIBLE PERSPECTIVES

A GOOD FRAMEWORK FOR A GOOD WILL

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The supreme law does not mention explicitly the existence of special, i.e. specialized judicial and prosecutor's bodies, authorized to deal with either war crimes, or other types of crimes. The Constitution, however, does leave room for their existence.

Serbia is one of the few countries in the world in which in the recent years the national courts have continuously conducted trials for offenses which represent so-called international crimes. Such crimes are – both in international law and in the laws of Serbia – genocide; crimes against humanity; war crimes against civilians, prisoners of war, wounded and sick people; and other forms of grave violations of international humanitarian law (which is sometimes rightfully called also the law of armed conflicts). These crimes constitute the greatest part of Chapter XXXIV of the Criminal Code. Colloquially they are often called in a summarized way only war crimes, so in this paper, too, this expression will be used not only to denote war crimes in the narrower sense, but rather the entire bulk of these crimes.

What makes trials for these crimes different from other cases in front of courts in Serbia is their international legal character and the special jurisdiction and organization of prosecutor's offices and court departments which deal with them. It is exactly these two features in regard to which we shall analyze here the potential significance and influence that the new Constitution's provisions might have for the war crime trials in Serbia.

The position of the Prosecutor's Office and the War Crimes Chamber

The Constitution's provisions related to the position and guarantees for independence of the judiciary and the prosecution, the election of judges and prosecutors, the High Judicial Council and the State Prosecutors Council and other constitutional provisions related to the judiciary relate, inevitably, also to judicial institutions authorized for war crimes trials like to any other part of Serbia's judiciary. However, the possible influence of these constitutional provisions – some of which, particularly those regarding the election of judges and prosecutors, are criticized and differently interpreted by experts – upon the mentioned special institutions is not a subject of this text. Focus will be upon what separates the organs dealing with war crimes from the rest of the judiciary in the procedural and organizational sense.

After the Constitution was adopted the basic issue related to the specific mandate for prosecuting war crimes in Serbia is whether or not the Constitution provides for a further existence of specialized, i.e. separate prosecution or court bodies which should act in these cases. As is well known, such bodies have been part of the Republic of Serbia's judiciary since 2003. The War Crimes Prosecutor's Office, as a separate body which is functionally independent from the rest of the public prosecution, has exclusive authority (shared only with the International Criminal Tribunal for former Yugoslavia) to prosecute in the Republic of Serbia those responsible for war crimes committed anywhere in the territory of the former Yugoslavia, regardless of the citizenship of either the perpetrator or the victim. The War Crimes Chamber, as a specialized department of the District Court in Belgrade and as part of the regular judiciary, has also an exclusive authority and one which it shares with The Hague Tribunal to judge in cases in which the War Crimes Prosecutor's Office pressed charges. In the Supreme Court of Serbia, which in regard to these cases is the court of second instance, there is also a special chamber for war crimes. Jurisdiction thus established is based upon the Law on the Organization and Competences of the State Organs for the Procedure Against War Criminals (which is habitually called the War Crimes Act), which has been in force since July 2003. The same distribution of competencies, with certain modifications, was envisaged also in the new Draft Law on state organs and proceedings for crimes against international humanitarian law which – although under a changed title – is dealing with the same issues.

Such separation and independence from the prosecutor's office, or the specialization of the court, is based upon certain presumptions and comparative experience, which was also confirmed by domestic experience after 2003. Such concept makes it possible, among others, to transfer knowledge and experience in the field of international humanitarian law more efficiently, it provides for one focal point

for collecting information on frequently linked events and perpetrators, it makes possible a more efficient protection and support to witnesses, it makes easier international cooperation with both other countries' judiciaries– particularly those in the region – which is necessary in these cases and with The Hague Tribunal, it enables bigger transparency in the trials and provides for a more adequate information of the public.

Hence, the question is whether the Constitution envisages or excludes the possibility to have special judicial bodies which will deal with war crimes? What is clear from the Constitution's provision is that the supreme law has not been explicit in regard to the existence of special, i.e. specialized, judicial and prosecution bodies, whether in charge of war crimes, or other types of crimes. However, the Constitution leaves room for their existence. Namely, Art. 158 of the Constitution says that the establishment, organization and jurisdiction of the public prosecutor's office is defined by law (underlined by the author). So, this means that laws define the competences and the organization of prosecutor's offices in Serbia, and that accordingly they can envisage the establishment of a separate prosecutor's office for war crimes, or retain the present Prosecutor's Office. Such a separate law can be the existing War Crimes Act, i.e. the above mentioned Law on crimes against international humanitarian law, which at the moment is being drafted and which, if adopted, will substitute the previous one. Also, room is left for one of the future laws to foresee the existence of a separate prosecutor's office, both for war crimes and for organized crime or other forms of crime which will be assessed to need specialization – the act on public prosecutors, which is to be adopted during the second session of the National Parliament after the election of the new Government.

As regards court jurisdiction, Art. 143 of the Constitution says that the establishment, organization, competencies, arrangements and composition of courts are also defined by laws. Besides, the Constitution is retaining the principle of citizens' participation in trials, so that both professional judges and jurors (laypersons) participate in trials; however, there is also an exception to this rule since there is the possibility to prescribe by law that only professional judges can be engaged to rule in certain courts and in certain issues. (Art. 142). These provisions, similar to those pertaining to the prosecutor's office, allow for the law to establish specialized court departments and establish their specific jurisdiction. This makes it possible for the present War Crimes Chamber of the District Court in Belgrade to exist further on, and to rule within chambers consisting of three professional judges without jurors, as envisaged also in the Criminal Procedure Law.

Hence, the Constitution itself does not envisage judicial organs which would have some separate competence over war crimes, however, the supreme law allows to have laws which will establish such separate prosecution and court bodies and define their jurisdiction and position in relation to regular prosecutors and courts. Such solution seems to be good, since it does not fix the existence of separate judicial institutions in the constitution, which should not be changed frequently, having in mind that some of them will in the long run maybe become obsolete, and the need for some other type of specialization may arise; it allows for the law – which is both sufficiently firm and flexible – to arrange these issues in accordance with the requirements of reality.

Extradition of the state's own citizens

The extradition issue is of particular relevance in war crimes proceedings committed in the former Yugoslavia. Namely, in the majority of cases the perpetrators, witnesses, crime scenes and places in which the investigations and trials are taking place are situated in at least two, and often also in three or more different states, mainly those which resulted from the disintegration of SFRY. It is often the case that one of the states initiates court proceedings, that it has huge evidence, the witnesses are in its territory, but the perpetrator is in another state to which, in a big number of cases, he flew and subsequently acquired its citizenship exactly with the aim to avoid criminal proceedings in the country in which he committed the crime, and whose citizen, not so rarely, he also is. This extends the problem of impunity for some of the most severe atrocities. Although there are ways to solve the problem of impunity developed from the perpetrator's getaway to another state, such as the transfer of initiated proceedings from one state to the other, or mutual transfer of evidence, extradition of the state's own citizens remains one of the options, although it is traditionally considered to be the ultimate means and a sensitive political issue. Thus, many states refuse not only to extradite their own citizens to other countries, but also refuse any talk on the subject, invoking the ban on extradition of their own citizens which is written down in their constitutions. Here it should be said that the extradition to other states is not equal to transferring the accused ones to an international court, such as The Hague Tribunal, which for Serbia, like for all other countries, is an obligation upon Chapter VII of the UN Charter, and one which has been respected until now.

Serbia's Constitution no longer banns extradition of Serbia's citizens to third states. Namely, Art. 38 of the Constitution says that Serbia's citizen cannot be expelled, deprived of citizenship or the right to change it. There is no mention of the ban of extradition to a third country in this article of the

Constitution, nor any other article for that matter. Anyway, this does not mean that extradition to other states is automatically allowed. The Criminal Procedure Code, the previous one as well as the new one which is to entry into force on June 1, 2007, continues to ban extradition (handing over – as the law says) of the accused or convicted persons if they are Serbia's citizens (Art. 517 of the newly adopted Criminal Code Procedure). This legal obstacle, however, can be overcome by international treaties on two grounds. First, the Criminal Code Procedure itself says that the accused and convicted persons are to be handed over according to provisions of international treaties, and that this handing over is performed upon this Code only if there is no international treaty, or if certain issues are not regulated by this treaty. Second, even if there were no such provision in the Criminal Procedure Code, Serbia could conclude an international treaty with any state, or a number of them, which would envisage the extradition of Serbia's citizens. Such a treaty would, upon ratification in parliament, revoke the relevant provisions of the Criminal Procedure Code, in accordance with the provisions of the Constitution discussed above, by which ratified international treaties are superior to national laws and are directly implemented.

With the adoption of the Constitution the extradition of Serbia's citizens to other states is no longer a constitutional category and becomes one regulated by law, which can be revoked by international treaty. Accordingly, there are no longer – as was the case up to now – legal obstacles for the extradition of domestic citizens which would request the change of the Constitution, instead, this depends on the political will to reach an agreement with another state on, most often, mutual extradition of citizens.

The Relation Between National and International Law

To begin with, it should be noted that it is a positive element that the important principle of international law by which criminal prosecution and imposition of penalties for war crime, genocide and crime against humanity are not subject to the statute of limitations, is contained not only in the Criminal Code, but now also in the Constitution (Art. 34). Thus, these crimes have become the only one which are mentioned in the Constitution, which is obviously a recognition of their specific weight and of the significance of their criminal prosecution.

Anyway, the Court took a very affirmative stance regarding international law and its implementation in the national legal order. The generally accepted rules of international law and ratified international treaties constitute, says the Constitution (Art. 16), an integral part of the legal order of the Republic of Serbia and are directly implemented. The phrase "generally accepted rules of international law", which was contained also in the Constitution of FRY and the Constitutional Charter of Serbia-Montenegro, actually implies international common law, which represents the established practice of certain acts and omissions of states together with their conscience that they have the obligation of a certain conduct. It is also required that laws and general documents shall not be contrary to confirmed international treaties (Art. 194), and only the Constitution itself is placed above ratified international treaties (but not above international common law). Guaranteed is also direct implementation of human rights guaranteed by international law, and their interpretation is concordant with existing international standards and practice (Art. 18), which can be significant for war crime trials, particularly the safeguards for fair trials. Such provisions in the supreme law would place Serbia, within traditional distribution, among the so-called monistic countries – those in which international law is directly implemented in the national legal order as if it were national law (in contrast to the so-called dualist countries, in which the international instrument in order to be implemented must first be installed in some of the national rules).

Such an approach of the framers of the Constitution is of particular importance when it comes to war crime trials in the general sense. These acts were initially defined in international conventions, and also in international common law, and in time the practice of sates, international institutions, and particularly international criminal tribunals, added to the list, the number of elements and forbidden acts was extended, different forms of responsibility were identified. Through international conventions the state has overtaken also the duty to initiate criminal prosecution of those responsible for these acts. Therefore, it is difficult to imagine trials for war crimes in accordance with international standards without referring to international conventions or common law, particularly because national legislatures often are not capable of harmonizing timely with achievements of international law. Filling up of "holes" which thus arise in national law and proper conduct in accordance with international obligations are possible exactly through direct implementation of international law.

However, there are also certain defects in the Constitution which can bring into question the implementation of previously mentioned principles regarding the relationship between national and international law. First, the Constitution proclaims that courts rule on the basis of, among others, generally accepted rules of international law and ratified international treaties (Art. 142). Somewhat further, however, it is said that court decisions can be based also upon ratified international treaties (Art 145), but generally accepted rules of international law are omitted. Similarly, the Constitution says that the public prosecutor's office acts upon ratified international treaties (Art. 157), but it also is omitting generally accepted rules of international law. It remains unclear why the courts can rule, but cannot

decide, on the basis of generally accepted rules of international law, as well as how would this difference be identified. Also, the question is whether this excludes the possibility for the prosecutors to recall in their work generally accepted rules of international law. Both would be strange in regard to contemporary practice of not only international and mixed (so-called hybrid) criminal tribunals, but also of many national courts and prosecutors' offices, particularly in cases related to international crimes like the ones which are here dealt with. In regard to them the international common law, despite known difficulties in establishing the contents of its norms, represents a valid and significant source of law and a basis for establishing individual criminal responsibility. Also, the mentioned provisions threat to narrow to a rather considerable extent the principle of direct implementation and primacy of both international treaty law and international common law, as mentioned in Art. 16 of the Constitution.

Maybe the most important thing which the framer of the constitution in this section has failed to do is to define the principle of legality in criminal law in a manner which would be in line with international law and the proclaimed monistic approach of direct implementation of international law by the courts. This principle is contained in Art. 34 of the Constitution, which says that - "No person may be held guilty for any act which did not constitute a criminal offence under law or any other regulation based on the law at the time when it was committed, nor shall a penalty be imposed which had not been defined for this act." Further on, in the same article, it is said that crimes and criminal sanctions are defined by law. What is missing in these provisions is the possibility to consider a certain act as crime if at the time when it was committed it was not specified as such in national law, but it was subject to penalties under international law.

Such a broader principle of legality in international law is particularly important in regard to war crimes, namely genocide and crime against humanity. The example of the latter one is particularly illustrative. Crimes against humanity, until the Rome statute of the standing International Criminal Tribunal in 2002 entered into force, where not defined in any international convention, but were considered to be a part of international common law, and the states did not have disputes on whether this crime existed and was subject to penalties, although many of them did not sanction it in their criminal laws. So, the criminal laws of the former Yugoslavia did also not register such crime and in Serbia it has been envisaged as a separate crime only with the entry into force of the Criminal Code on January 1, 2006. Therefore, as well as because of recalling the principle of legality which until now was defined in national criminal law like in the mentioned Art. 34 of the Constitution, the judiciary of Serbia – according to the dominant interpretation and the practice up to now – cannot prosecute anybody for this crime if the crime was committed before the Criminal Code entered into force, although crimes against humanity in the former Yugoslavia were committed on a mass scale during the nineties. (The fact that it is not punishable is evaded, in practice, by classifying it mostly as war crime against civilian population, as it is defined in the Criminal Code, although these two crimes differ in some elements.) A very similar conflict arose in war crime trials between the principle of legality in domestic law and the rules of international law in cases in which prosecution was based on responsibility in the chain of command.

The development of international law up to now speaks in favor of the presumption that in the future, too, some acts will gradually be banned by international law (for instance, something like that could be expected for the use of certain types of weapons or warfare methods), but will not be adequately and timely followed by changes in national criminal rules. Having this in mind, as well as – which is even more important – the above mentioned examples of the open issue of crime against humanity and command responsibility in conflicts in the former SFRY, the Constitution would have made possible criminal prosecution of such acts, and by this the conduct of Serbia in accordance with international law, had it explicitly envisaged that crimes are not only those envisaged by law and with a clearly defined penalty by law, but also those which by international law were punishable at the time when they were committed. Such a solution would, furthermore, be completely in accordance with the two most significant conventions on human rights whose signatory is also Serbia – the International Covenant on Civil and Political Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms. The International Covenant (Article 15) and the European Convention (Art. 7) define, in an almost identical manner, that no one shall be held guilty of any criminal offence which did not constitute a criminal offence under national or international law at the time when it was committed, as well as that the principle of legality does not prevent punishing for any act which at the time when it was committed was "criminal according to the general principles of law recognized by the community of nations"

The Constitution and afterwards

Generally speaking, the text of the Constitution does not create obstacles to efficient investigation and war crime trials, as well as to broader international cooperation in bringing to justice those responsible for these offenses. This is significant, first of all, because of the heritage of the recent past in which war crimes were committed on a mass scale, as well as for some future prevention or imposition of penalty in situations when they might be committed; the need for something of this kind might arise in the future if, for instance, citizens of Serbia commit war crimes while engaged in peace missions or other

multinational forces, when they fight as volunteers or mercenaries abroad, or in case that Serbia, in accordance with the principle of universal jurisdiction, brings to trial foreigners who had committed such offenses anywhere in the world.

First of all, it is possible to keep specialized judicial institutions – the prosecution and court departments – the establishment of which proved to be justified, namely the scope of their jurisdiction, organization and proceedings are arranged by law. It is up to the legislator, namely the relevant ministry which proposes these laws to the parliament, to decide on adequate models and solutions, taking into account the realistic needs and experience, and to guarantee these institutions adequate independence and procedural capabilities. For this purpose the new Parliament, i.e. the Ministry of Justice, will have at its disposal the Draft Law on state organs and proceedings for crimes against international humanitarian law.

This paper did not discuss the issue of the general position and election of prosecutors and judges defined in the new Constitution because this is an issue related to the entire judiciary and is not typical only for the Prosecutor's Office or the War Crimes Chamber. The extent to which the constitutional definitions regarding the election of prosecutors and judges and guarantees to their positions will prove good or bad for their independent and professional work, will be the very extent to which such consequences can reflect also upon war crime trials.

In principle, the Constitution promotes the implementation of international law, particularly international treaties, in the national legal order. On the other hand, there are certain limitations to such an approach since international common law is excluded from the bulk of norms upon which courts take decisions (although they can rule on the basis of it) and, particularly, in relation to the principle that crimes and penalties can be defined only by law, and not by international law. In view of other states' constitutions and laws the impression is that Serbia's Constitution, too, reflects the already traditional discrepancy between the way in which domestic criminal law – unprepared to seek its sources in international law, particularly common international law – sees the principle of legality, and the way in which international law defines the principle of legality

The implementation of international law, however, will mostly depend on the judiciary itself and its practice. The supreme laws in existence until now were, too, very open to international law – the Constitution of FR Yugoslavia considered both treaty law and common law as component parts of the internal legal order, and the Constitutional Charter of Serbia and Montenegro went even a step further from the present solution, placing international law above the national one, even above the Constitution itself. Notwithstanding, the parties to the proceedings and the courts have very rarely invoked international law, particularly in criminal cases. The practice of invoking international common law (generally accepted rules of international law) in Serbia was never even recorded, although until now this was also possible according to the constitution. It is up to the prosecutors and courts to be more open in their work for leaning upon international law, which the Constitution and international obligations of Serbia not only make possible, but also order them to do.

Extradition of nationals to third countries is no longer banned by the Constitution. Serbia is free to make agreements on extradition, which would envisage extradition of own citizens, with any state willing to do so including also those from the region. This opens a new direction, leading to the decline in numbers of those who are at large although they are held responsible for severe offenses during wars in the former Yugoslavia, and the war crime trials would to a greater extent be organized were the evidence is easiest to access.

It remains for the state organs to use the framework given by the Constitution and secure conditions for the judiciary to work without problems and efficiently on establishing the truth on crimes in former Yugoslavia and identifying those guilty of them, as well as to create through this in the long run a system which in the future will be able to respond to international obligations regarding prosecution of the most severe international crimes. It is up to the judiciary to make full use of potentials opened by this framework and, in accordance with the interests of justice and fair trial, to make the best of the adopted constitutional solutions and principles.

* Views expressed in this text are exclusively those of the author and do not necessarily reflect the standpoints of OSCE

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1 The Draft was elaborated by the working group within the Ministry of Justice of the Republic of Serbia, with the support of the OSCE Mission in Serbia. The first draft was presented at a public debate organized on June 30, 2005. The Draft was later amended, with some changes in the composition of the working group, in order to harmonize it with the National Strategy for Judiciary Reform and the new Constitution, and presented to the Round Table held on November 23, 2006, and after taking into

account remarks made at the Round table, it was forwarded to the Ministry of Justice for further procedure.
2 Art. 5, para. 2, the new Constitutional Act for the Implementation of the Constitution of the Republic of Serbia.
3 The same article says also that the judicial authorities in the Republic of Serbia is performed by courts with general and special jurisdiction. The legislator most probably thought that the courts with special jurisdiction are administrative, commercial and misdemeanor courts, or some other courts which can be founded by law, even more so because the War Crimes Chamber of the District Court in Belgrade is not a court with special jurisdiction, but a specialized department of the court with regular jurisdiction.
4 Articles 16 and 194 say that the international treaties must be in accordance with the Constitution, i.e. must not be contrary to the Constitution, which is frequent in comparative law. Anyway, it is the states' sovereign decision whether or not they will ratify a given treaty, and they take into account also the provisions of their constitutions. However, if some already ratified treaties were contrary to the Constitution, these treaties would oblige Serbia in regard to other states, because according to the Vienna Convention on the Law of Treaties changes in national rules do not free the state from overtaken responsibilities. In this case, Serbia would have to withdraw from such treaties.