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Administrative backbone of the international criminal justice

Administracja jako kręgosłup międzynarodowego prawa karnego

Summary

The goal of this paper is to underline the necessity of a strong administrative backbone within the International Criminal Law regime. Often an overlooked phenomenon in the ICL, the administrative endeavours of various Tribunals provide not only an excellent ground for comparative analysis but also a fresh, fascinating perspective on the entirety of the administrative law. The depth to which it saturates other fields of law, and the very noble ideals behind this commonly disregarded field of law. Within this paper an introduction to the International Criminal system will be made, with emphasis on its various administrative realities, and further analysis of the function of the International Criminal Courts administrative branch as an example of excellence in the field.

Keywords

international criminal law, administrative law, international administrative law, legal theory

Streszczenie

Celem artykułu jest uzasadnienie konieczności budowy silnych struktur administracyjnych w systemie międzynarodowego prawa karnego. Aspekt ten jest często pomijany w trakcie analizy systemu prawa karnego międzynarodowego. Niemniej jednak działania międzynarodowych trybunałów karnych pozwalają w sposób nowatorski spojrzeć na funkcje prawa administracyjnego i jego relacji z innymi dziedzinami prawa. Prawo administracyjne funkcjonuje w głębokiej, ale często niewidocznej symbiozie z prawem karnym międzynarodowym, pozwalając jego organom na wypełnianie swojej misji w sposób efektywny i w zgodzie z rządami prawa oraz przyjętymi normami pracy trybunałów. W artykule zawarto charakterystykę systemu prawa karnego międzynarodowego w ujęciu administracyjnym oraz dokonano analizy funkcjonowania Międzynarodowego Trybunału Karnego, który stanowi przykład jednostki sądowniczej z silnym i rozbudowanym systemem administracyjnym.

Słowa kluczowe

międzynarodowe prawo karne, prawo administracyjne, międzynarodowe prawo administracyjne, teoria prawa

Introduction

“Injustice anywhere is a threat to justice everywhere.” This quote by Dr. Martin Luther King Jr. is a testament to the necessity of a uniform, global stance against certain, insurmountable violations of law. In a classical legal theory, a sovereign State bears an ultimate responsibility for the exercise of justice over its citizens. In such an exercise there is no greater ally for the judicial system of a State than well-functioning administrative machine, allowing not only for swift, legal and proper exercise of justice, but also maintaining a necessary degree of impartiality for the agents of the State involved in the dispense and maintenance of justice [Locke, 1690]. This clear necessity for strong administrative background, allowing for a function of justice within a State can be easily observed in the failed States. Collapse of States such as Yugoslavia, Rwanda or Somalia has begun with the abuse of power by the public officials, who in their exercise of State authority had forgone the principles of good administration and governance. This collapse of the administrative backbone has in turn led to a corruption within a criminal system, where willingly or not, the judges and prosecutors were unable to carry out their tasks, due to their inability to entrust the systemic foundation which ideally should guarantee their freedom to act in an unbiased and safe manner. Such abandon for the underlying principles of governance inevitably results in a power vacuum, which in the worst case scenario, as it has happened in Yugoslavia, leads to an armed conflict [Bucheister, 2012]. A notable example of this process could have been observed in the 1993 Yugoslavia, where the United Nations Security Council, has decided to install an outside, Hague based judiciary Tribunal [United Nations Security Council Resolution 827] (hereinafter referred to as the ICTY) as a supreme legal body of a State, due to the inability of local courts to act in an impartial manner. Thus, whilst the overarching purpose of the ICTY was to provide justice for victims, and punishment to the perpetrators of Yugoslavian War, the initial necessity for its creation and continued operation can be traced all the way to the diminishment of the administration within the State, and consequentially collapse of fair and just dispense of state authority.

1. International Element

The above example illustrates the crux of the titular problem. Conflict which due to its scale, severity or potential consequences provokes an international response will often see a complete or partial collapse of local governments’ effective control over the state. In such scenario the now defunct judiciary branch will be replaced by an artificial one, which provokes an entire host of administrative problems that must be dealt with.

The branch of international law – international criminal law (hereinafter referred to as the ICL) is the regulatory body concerned with the resolution of said instances of judicial vacuum [Cassesse, 2004]. Being a relatively new, and revolutionary body of law – normatively dating back to the Nuremberg Trials of 1945 [The London Charter] and only recently having been "modernized" [Alter, 2012] with the advent of two *ad hoc* Tribunals [United Nations Resolutions 827 and 995] (ICTY and International Criminal Tribunal for Rwanda[1] [Hereinafter referred to as the ICTR] respectively) and the International Criminal Court [The Rome Statute] [hereinafter referred to as the ICC]. Having been described as fluid and evolving, this body of law provides for an incredibly interesting analysis from an administrative perspective due to both its procedural intricacy and the international element, which dictates both certain limitations and prerogatives over its subjective organs and institutions (for the sake of brevity, this article will not devolve into historical analysis and will only deal with the "big three" of the modern ICL – ICTY, ICTR and the ICC). This international aspect of administrating such an institution is largely political, due to the necessity of coordination and continued support of the party States. Due to the "soft" nature of international law, there (normally) can be no expression of sovereign authority which results in a very horizontal model of relations. In practice there were two main areas of conflict amongst the involved parties – checks and balances and logistics – both of which at their core can be resolved by a combination of good administration and administrative overview. The first issue manifested itself during, and post creation of the *ad hoc* Tribunals, and during the Rome Conference [Drafting of the Rome Statute of the ICC]. Due to the technically universal jurisdiction (within the confines of their mandates) of the ICL Tribunals, the States involved were afraid of seceding too much of their sovereign power to the Courts. First instance of such outrage can be observed in the critique of the ICTY's mandate. The Tribunal has been established by the virtue of Security Council Resolution 827, instead of a treaty and thus was quoted as "manifestly illegal" for violating the principle of law providing that the courts must be established by the law. Those voices of concern were addressed in a Prosecutor v. Tadic, Decision on Jurisdiction case, where in a bizarre turn of events, the Tribunals was tasked with establishing its own legitimacy and jurisdiction. Furthermore the appeal's chamber has declared that due to the unique, international nature of the Tribunal, and special circumstances concerning its creation the apparent violation of the principle of law was justified, and in turn the ICTY was manifestly lawful institution, operating within the confines of the rule of law principle [Cassese, 2013].

Such precedent may be shocking within a traditional legal theory. After all, in a municipal setting it seems inconceivable for a court, i.e. Supreme Administrative Court of Poland to debate the question of its own legitimacy. Public law, checks and

balances, administrative overview alongside with the proper procedural regulations allows the State to install a degree of mutual control and assuredness within the boundaries of its legal system. However in the ICL theory there exists no readily available solution. The process of drafting the constituent documents, highly scrutinized as it was, can only happen after all of the involved parties have been satisfy [Bellelli, 2010]. In other words the ratifying States must be ensured that the Tribunal will be administered properly, and carry out its mandate dutifully. To this end the *ad hoc* Tribunals were created with strict limitations placed upon their mandate, limiting them only to their respective, immediate surroundings. And only after the special committee of experts designated by the United Nations (hereinafter referred to as the UN) deemed their existence as justified in light of the scale of atrocities committed in Yugoslavia and Rwanda [Cassese, 2009]. Furthermore, in order to facilitate efficiency and independence, instead of creating another supervisory body for the Tribunals, the SC has drafted a lengthy and incredibly detailed Rules of Procedure and Evidence, which further supplemented the clarity with which the administrative side of things were to be undertaken in the future Tribunals [Statute of the Tribunal]. Having breached the initial, legal, issues the more immediate concerns became of the logistical nature. Such an unprecedented and major undertaking has been a costly one, both financially and in human resources. One of the most prevalent and major points of critique towards the *ad hoc* Tribunals concerns its administration of resources. To an extent where any future endeavours in creating such an institution were vetoed by China during the SC meeting, as fiscally unbearable. In order to facilitate those concerns the UN had to, again, seek administrative solution to the criminal law institution which resulted in the two Tribunals (ICTY and ICTR) being "effectively joined at the hip" [Shabas, 2004, p. 12]. The tribunals shared their Prosecution, Appeals Chamber, and parts of the clerical staff. Those financial shortcuts, however have taken their toll, provoking another host of accusations towards the quality of judgements, which unsurprisingly dealt not with the legality but the logistics of thereof. The ICTR has been criticised for lengthy proceedings, multiple delays, major difficulties in translation of Kinyarwanda into English and French, the logistical mistake of separating the Tribunal from the Prosecution geographically and finally the treatment of victims [Cryer, 2010]. Such failures, clearly, can and should be attributed to poor administration and lack administrative oversight, rather than an error of law. Had the Tribunal worked in a municipal setting fixing those issues would have been simple enough (albeit costly and time consuming), whereas due to the international nature of its mandate even the smallest revision to the administering of the Tribunal became a Gordian knot of criminal procedural, administrative and public international law. This intersection, while ineffective at times bears ground for a very

clear and often overlooked outline of how the administrative law serves as a backbone for any institution and endeavour and transcends its boundaries.

As noted previously the International Criminal Law suffers from lack of proper executive branch, which normally would be tasked with ensuring the governance and administration of its subjective organs. This particular legal field, even more-so than other branches of international law shows a resonating need for a developed (at times overtly so) system of checks and balances, *in lieu* of traditional Montesquieu system. The issue becomes even more jarring when the focus is shifted from the *ad hoc* Tribunals to the ICC. While a host of arguments were made against their mandate, one conclusion remained throughout and throughout, the gravity of Security Council decisions utilized in their creation has allowed the Tribunals to operate with relatively minimal resistance. The existence of superior institution with established mandate of rights and duties allowed for this "external" control to become streamlined in an already developed political and administrative processes, and focus the Tribunals on fulfilling their judicial mandates.

In case of the ICC the process becomes infinitely more convoluted. While it is true that the Court has been created with the weight of the UN support and developed on the foundations provided by the work of the *ad hoc* Tribunals, there now exists a jarring void in place of the unified support previously ensured by the SC's authority. This obstacle is most famously illustrated by the Permanent Five Members continued resistance to the ICC's position as supreme judicial body of the field. This hard headed approach of ICC's potentially most potent allies is rooted in the aforementioned problem of State's reluctance to part with their sovereignty over criminal process, and went as far as the US threatening acts of aggression in case of arrests [Human Right Watch].

The entirety of existence of the ICC is deeply rooted in the soft law premises, enforced by the sovereign equality of the international law [Cherif Bassiouni, 2008]. While justified and understandable this system carries over very poorly into the realm of criminal justice, where an exercise of independent (where such independence and autonomy results in fairness and unbiasedness rather than abuse) authority is a necessary component of any operations. Apart from the strong recognition of an existing legal theory, practice, principles and its own limitations this unique nature of the ICC requires more than anything, crystal clear administrative practice. Not a single dollar can go uncounted, each action must carry a proper administrative justification and all members from clerical staff to the prosecutor stay strictly within their mandate. Otherwise the repercussions, which normally would range from fiscal penalties, to relegation of staff will instead take on the potentially existence threatening proportions. The delicate net of support achieved by the ICC is under a constant threat of failure, especially given the negative stance of powers such as the US or China towards its operation. While on the surface this prob-

lem might seem of little relevance to the administrative law theory, when barred from the idealistic philosophy so often associated with the ICL it pragmatically becomes a very administrative issue.

Putting aside the ICC's "mission" for a moment, the Court, practically speaking is an international organization with a special mandate. Foremost of all the IO's are judged by their continued usefulness, which is derived from their effective fulfilment of their constituent goals. While it always remains so, that those particular goals are of a certain, special, nature, the operative word is "effective". The ICC can only exists for so long as there exists a consensus that no other subject of international law may fulfil its role with a superior capacity. Therefore the question of ICC's continued survival becomes one related not to the number of indictments it produces but to the economics of its operation. The effectiveness with which the Court's human resources departments operate translates to the quality of judgements, the effectiveness of the accountants results in better logistics capabilities, which in turn provides victims with higher standard of protection, more skilled translators and ultimately freedom to testify, etc. While on the surface the ideals of the Court always remain the most prominent, in the very pragmatic, practical reality the Court is an institution expected to manage itself in an exceedingly strict manner, thus instead of deluge into the morality and necessity of its mission it can be reasonably assumed that the majority of supporting States are interested in results. Results which are born of effective management of available resources, an issue which the administrative law is the most appropriate and effective tool to ensure.

2. The Registry of the ICC

Having illustrated to external factors motivating the need for the Courts excellence in its administrative functions, its internal practice may be observed. The Registry is one of the two main organs of the ICC, alongside the Office of the Prosecutor – dedicated to legal operations of the Court. The Registries task is to ensure such operation and make possible fulfilment of the ICC's judicial mandate. As such the Registry is provided with a wide range of duties and privileges enumerated in the Article 43 of the Rome Statute. Above all the Registry serves to provide all non-legal needs of the Courts and enable the work of judicial chambers and prosecution, through "judicial support, external affairs and management" [ICC Website].

Those three blocks hide a deceptively extensive network of tasks, all of which are crucial to the operation of the Court. It is within the Registries mandate to manage the court proceedings, records, translation, witnesses, investigators, support counsels, main-

tain inductees, manage public relations and outreach, provide onsite security, budget and relegate human resources [ICC Website]. This titanic list of tasks is further deconstructed in the Regulations of the Registry [The Rome Statue of the ICC], itself an 81 page manual on good governance and management of the Court. This attention to detail, necessitated by the aforementioned factors is not only the very highest level of administrative ordinance, but also a cumulative effect of over 20 years of constant development of an unprecedented field of law. The ICC makes a constant point to learn from the mistakes of its predecessors, and continues to maintain its record of excellence in normative and substantive framework surrounding every aspect of its work.

At the head of the Registry stands the Office of the Registrar, who must be a person of highest moral character and qualifications. (Current Registrar, Mr. Peter Lewis has, amongst others, served as the Chief Executive of the Crown Prosecution Service and was the UK delegate to the UN Preparatory Commission for the Rules of Procedure and Evidence of the ICC [see: The Registrar]. Furthermore the positions authority is ensured by the election procedure, which consists of an election through the absolute majority of the Judges through a secret ballot. The Registrar acts directly to the President of the Court, which entails responsibility only to the very highest authority of the ICC, and as a head of his respective office enjoys complete authority and freedom in the performance of his or her tasks [see: ICC Structure and Officials]. This high reverence relegated to the often overlooked administrative arm within the Court again illustrates the constant necessity of strong administrative mechanism in the ICL. While, as numerously mentioned through this paper, this approach is consequence of political reality in which the Court operates, a more optimistic motivation must also be mentioned, one which underlines another façade of the administrative law. It is often the case in the public's eye to view the administration as a soulless machine, a mechanism of control born of Orwellian vision. However the ICC's administrative arm proves that it is not the case. At the heart of the Courts Registry lies not need to control but help. This strict enforcement of rules and procedures is also born out of the gravity of the ICC's mission. The work of the Court involves matters of the most serious nature, each case an unprecedented disaster, a blood stain on the human history. With such monumental weight bearing down on the Court, the Prosecutor and Judges need hold themselves to an even higher standard than their municipal counterparts. The cases adjudicated in the Court deal with the very worst of what the humanity has to offer, there can be no room for error or else the exercise of justice will be undone. It is the role of the Registry to ensure that the accused are adjudicated in a manner that leaves no loophole, no procedural mistake that would allow them to defy the system and walk free, barring the victims the single modicum of reprieve in this form of legal restitution.

Conclusion

Duality. This single word can perhaps illustrate best the function of the administrative law within the field of ICL. On one hand it can be viewed as necessity enforced by the less than perfect political system, where ambition of States takes precedent over the exercise of justice. On the other however, this motivates constant growth and stride for excellence, unseen in many other fields. The constant pressure from the outside agents that is placed upon the ICC as it was previously place on the *ad hoc* Tribunals, forces those institutions to adapt and maintain a constant track record, which in the end benefits those who the entire system was created to protect – the victims. With that in mind there must be no doubt left of the unsurmountable role that the administrative law and administrative principles applied to ICL practice play. The man and women of the Registry should, rightfully so, be hailed as the unsung heroes of the ICC and ICL as a whole, for it is their work first and foremost that allows the more specialised elements of the field to operate at all.

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[1] For other information on the relevant topic see: UN Official Discusses Rwandan Criminal Tribunal at Lawrence University (October 23, 2007), available at: https://blogs.lawrence.edu/news/2007/10/un_official_discusses_rwandan_.html, access date: 14.08.2018.