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THE PRINCIPLE OF SOVEREIGNTY AND INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA

This paper deals with relevant issues related to the establishment and operation of the ICTY and ICTR. The starting premise is the principle of sovereignty in international law in its external form, i.e. suprema potestas. In this sense, the principle implies independence within the norms of international law, as a counterpoint to absolute sovereignty. As far as the establishment of the ICTY and ICTR is concerned, both were established according to the same pattern, resolutions of the UN Security Council. As the ratio of the establishment, the relevant resolutions state the punishment of the persons responsible for the committed crimes, on the one hand, and the establishment and maintenance of peace, on the other. Differences exist, however, in the jurisdiction of the tribunal ratione materie. According to Resolution 827 of 1993, the competence of the ICTY is limited to serious violations of international humanitarian law, and the competence of the ICTR includes the crime of genocide.

Furthermore, the author examines the issue of the legal effect of the Law on Cooperation with the ICTY, which was adopted by the State Union of Serbia and Montenegro in 2002 and 2003. The author finds that the effects of the Law are limited in terms of the recognition of the Tribunal in foro interno, as a legal basis for the cooperation of competent internal authorities with the Tribunal, without implying the recognition of the Tribunal in foro externo.

Based on the provisions of the relevant resolutions of the Security Council, the author finds that, in the light of the provisions of general international law, the establishment of the ICTY and ICTR is, by its very nature, an unprovided form of international intervention in the context of peace-building.

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The author pays special attention to the question of the authority of the Security Council to establish judicial bodies within the measures provided for in Articles 41 and 42 of the UN Charter, the establishment of the Tribunal and the principle of the rule of law, and the jurisdiction of the Tribunal and the principle of competence de la competence.

In the second part, this paper deals with the relationship between the principle of sovereignty and the rules of international criminal law applied by the Tribunals.

Key words: ICTY; ICTR; Security Council; Sovereignty.

1. THE PRINCIPLE OF STATE SOVEREIGNTY

In a decentralized international community in which states are original, natural and permanent subjects, the principle of sovereignty is, in the nature of things, a fundamental principle. Sovereignty is a complex concept that has philosophical, sociological, political, and legal meaning. In this particular case, its legal meaning is of interest. In analytical sense, sovereignty can be internal and external. Sovereignty, in an internal sense (*summa potestas*), implies real, *de facto* power over the state territory. Power is exercised by means of an institutional network integrating national courts, as well. External sovereignty (*suprema potestas*), as arbitrator Max Huber says in the case of Las Palmas, "in the relations between States signifies independence".[1] A state could not be considered independent "in a legal sense if it was placed in a position of dependency upon another power, if it ceased to exercise *suprema potestas* or sovereignty within its own territory".[2] *Per analogiam*, the same conclusion would be reached if it were placed in a position of dependency upon an international organization.

Sovereignty is not a static, petrified legal category with precisely defined boundaries. It is a variable category whose boundaries are determined by the degree of development of international law.[3] It cannot be understood as an absolute category, as, thus created, it would presuppose, on the one hand, a common sense postulate about the impossibility of the existence of absolute sovereignty of a state with many other states within the international community, and the fact that sovereignty as a legal concept has been established and defined by international law, on the other. International law is

[1] J. B. Scott, *The Hague Court Reports*, Cambridge 1932, 83.

[2] Dissenting Opinion of Judges M. Adatci, M. Kellogg, Baron Rolin-Jaequemyns, Sir Cecil Hurst, M. Schücking, Jonikheer van Eysing and M. Wang, Series A/B: Collection of Judgments, Orders and Advisory Opinions (from 1931), para. 160.

[3] Nationality Decrees Issued in Tunis and Morocco, Advisory' Opinion, 1923, P.C.I.J., Ser. B, No. 4, p. The reasoning of the International Court of Justice is similar in Anglo-Norwegian fisheries dispute, Fishers, Judgment, ICI Reports, 1951, para. 116; Nottebohm case, ICJ Reports, 1955, para. 4, 20–21.

per definitionem a restriction of sovereignty, the limitation of the freedom of states in the choice of conduct *in foro externo et foro interno*. In consensual law, such as international law, restrictions on sovereignty are not creations of an imaginary legislator or dictates of third states, but arise on the basis of the consent of the state. The limitation of sovereignty, from a legal and technical point of view, can be realized in a contractual form, in the form of customary rules, or unilateral legal acts of the state.

There is a dialectical connection between sovereignty and its limitations. The basis of the limitation of sovereignty is sovereignty itself, because the state, being the holder of sovereignty can also limit it by acting independently or *in corpore*, in community with other states. Thus, the restriction of sovereignty manifests itself as an expression of its exercise. However, the exercise of sovereign rights in this sense must not be detriment to the rights that constitute the essence of the term sovereignty. The principle of sovereignty is manifested through the overall structure of international law, including the jurisdiction of states in criminal matters, which is, as a rule, territorial.

The relation between the ICTY / ICTR sovereignty principle can be viewed on two levels:

i) institutional – concerning the principle of sovereignty in the establishment of the ICTY / ICTR, and
ii) normative – concerning the relationship between the principle of sovereignty and international criminal law applied by the ICTY / ICTR.

2. THE PRINCIPLE OF SOVEREIGNTY AND THE ESTABLISHMENT OF THE ICTY/ICTR

A relevant characteristic of the two Tribunals is that they are international institutions in all elements of the establishment of the structure and functioning. Basically, they are established according to the same pattern. The ICTY was established by United Nations Security Council Resolution 827 of 25 May 1993, to which the Statute of the Tribunal was added. The resolution was adopted on the basis of Chapter VII of the United Nations Charter, because, as stated in the Preamble to the Resolution, "widespread and flagrant violations of international humanitarian law" continue to "constitute a threat to international peace and security". The Security Council is further determined to end "such crimes and to take effective measures to bring to justice the persons who are responsible for them". In fact, it implements Resolution 808 of 22 February 1993, which contains the decision on the establishment of the Tribunal. The ICTR, on the other hand, was established by Security Council Resolution 955 of 8 November 1994. The structural elements of the resolution on the ICTR coincide with the resolution of the ICTY in both diction and content:

i) they were both adopted on the basis of Chapter VII of the UN Charter;

ii) as a *ratio* for their establishment, they both stated the punishment of persons responsible for the crimes committed, on the one hand, and the restoration and maintenance of peace, on the other. Resolutions differ in terms of the tribunal's jurisdiction *ratione materiae*. The relevant jurisdiction of the ICTY includes "serious violations of international humanitarian law", while the relevant jurisdiction of the ICTR, according to Resolution 955, includes genocide besides serious violations of international humanitarian law. (However, the crime of genocide is covered by the ICTY Statute itself by the provision of Article 4).

In the context of the relationship to the principle of sovereignty, an essential difference between the ICTY and ICTR should be emphasized. The FR of Yugoslavia consistently and arguably opposed the establishment of the Tribunal by the Security Council Resolution. In a discussion held in the Security Council, the representative of the FR of Yugoslavia pointed out that the alleged perpetrators should be punished by national courts under national law harmonized with international law. He also pointed out that the FRY supports the establishment of a permanent Criminal Court with the "respect for the principles of equality of the states and universality and, therefore, he considers attempts to establish an *ad hoc* tribunal discriminatory".[4]

The representative expressed doubts about the validity of the legal basis for the establishment of the Tribunal, finding, moreover, that the Security Council acted *ultra vires*, since it does not have legal power to establish a judicial organ according to the UN Charter. In the opinion of the FRY representative, the tribunal is an expression of political motivation rather than international legal practice, therefore, the proposed statute of the Tribunal is "inconsistent and filled with legal gaps to the extent that it makes it unacceptable for any state that protects its sovereignty and dignity".[5] The FRY explained its opposition to the establishment of the Tribunal in the CSCE along the same lines.

Contrary to the position of FR Yugoslavia, Rwanda asked the Security Council to establish a tribunal and offered full cooperation.[6] True, Rwanda, as a non-permanent member of the Security Council, voted against Resolution 955 for disagreeing with the provisions of the Statute concerning the *ratione temporis* jurisdiction, the absence of the death penalty, and the *ratione materiae* jurisdiction which, in Rwanda's view, should have been limited to genocide. This fact, however, does not affect the consent of the *ex*

[4] Provisional Verbatim Record of the 3207 Meeting of the UN Security Council, para. 470.

[5] *Ibid.*, para. 480.

[6] See D. Shraga, R. Zacklin, "The International Criminal Tribunal For Rwanda", *European Journal of International Law*, vol. 7, issue 4, 1996, pp. 501–518.

ante Rwanda to the establishment of the Tribunal by the Security Council. Namely, the consent was given in the form of a unilateral act, issued by the competent authority, which is binding on the state. It appears certain that the establishment of the ICTY was *prima facie* in violation of the principle of sovereignty, as the FRY was consistently opposing its establishment.

3. LEGAL MEANING OF THE LAW ON COOPERATION WITH THE HAGUE TRIBUNAL

In 2002/2003, the State Union of Serbia and Montenegro adopted the Law on Cooperation of Serbia and Montenegro with the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.[7]

The law deals with, *inter alia*, "the fulfillment of obligations of Serbia and Montenegro arising from UN Security Council Resolution 827 (1993) of the Statute of the International Criminal Tribunal",[8] thus "Serbia and Montenegro shall abide by and implement the judicial decisions of the International Criminal Tribunal and shall render legal assistance to its investigating and judicial organs".[9] These general provisions of the Law imply that the establishment of the ICTY does not infringe on the judicial sovereignty of Serbia and Montenegro. In this regard, the Law deviated from the position taken by the FRY during the establishment of the ICTY. True, the principle of sovereignty shyly peeps, declaratively and without real effects, through the provision which stipulates that "If the competent organ assesses that a particular procedure for cooperation might threaten the sovereignty or security interest of the State Union, it shall so inform the Council of Ministers or the government of the member state".[10]

The scope of this provision is more than modest, because, as provided for in paragraph 3 of Article 4, "If the Council of Ministers or the government of a member state determines that the implementation of a request would threaten the sovereignty or security interests of the State Union, it shall order the Ministry of Foreign Affairs or the ministry responsible for justice in the member state to communicate this to the International Crim-

[7] Law on Cooperation of Serbia and Montenegro with the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, *Official Gazette of the Federal Republic of Yugoslavia*, No. 18/2002 and *Official Gazette of Serbia and Montenegro*, No. 16/2003.

[8] Article 1 (1) of the Law.

[9] Article 1 (2) of the Law.

[10] Article 4 (2) of the Law.

inal Tribunal and submit an objection in accordance with the Rules of Procedure and Evidence". Thus, something that could *prima facie* resemble a dispute, is decided in accordance with the Rules of Procedure and Evidence of the Tribunal itself and by a decision of the Tribunal itself. In addition, the relevant Rules of Procedure and Evidence do not speak of the "threat to sovereignty", but of "national security interests".

It is undisputed that the Law on Cooperation with the Tribunal recognized the Tribunal as a legal institution. However, the recognition was limited in its scope, as a recognition in *foro interno* which served as a legal basis to the competent internal bodies for co-operation with the Tribunal. Namely, the Law as an internal legal act, passed by the Assembly, which, under international law, is not authorized to represent Serbia and Montenegro *in foro externo* could not *per se* produce recognition of the legality of the Tribunal in an international sense. Such recognition was made by public statements of high state officials, competent to bind Serbia and Montenegro with their statements and actions in international forums, especially in the United Nations.

4. THE ESTABLISHMENT OF THE TRIBUNAL IN LIGHT OF GENERAL INTERNATIONAL LAW

The recognition of the legality of the Tribunal by Serbia and Montenegro, regardless of whether it expressed the real, free will of the State Union, does not, however, resolve the issue of its legality. It operates on the level of the relationship between the state that recognized the Tribunal and the Tribunal itself, without affecting the relationship between the Tribunal and general international law. Hence, it is necessary to consider a couple of relevant legal issues.

4.1. "Threat to the peace" as a basis for the adoption of Security Council Resolutions 827 and 955

Security Council Resolution 827, establishing the ICTY, started from the qualification that the situation on the territory of the former Yugoslavia "constitute a threat to international peace and security", and the establishment of the Tribunal would "contribute to the restoration and maintenance of peace". (Preamble to the Resolution). The Appeals Chamber in the Tadić case concluded that "the establishment of the International Tribunal falls squarely within the powers of the Security Council under Article 41 of the United Nations Charter".[11] The conclusion was confirmed in the Milošević case. In the case, the Chamber found that the establishment of the Tribunal "in the context of the conflict in the State at the time was pre- eminently a

[11] The Prosecutor v. Duško Tadić, IT-94-1, Jurisdictional Appeal, para. 36.

measure to restore international peace and security".[12] The Security Council gave an analogous qualification regarding the situation in Rwanda. Are such qualifications based on the relevant provisions of the United Nations Charter taking into consideration the situation in the territory of the former Yugoslavia, especially in Bosnia and Herzegovina specifically addressed in resolution 827, and the situation in Rwanda? There are serious doubts about the legal validity of such qualifications. In this context, the meaning of the expression "threat to the peace" is essential.

In the letter and spirit of the Charter and its provisions concerning the Security Council, "international peace" implies peace in a negative sense, i.e. the absence of armed conflict between states. Threat to the peace would, therefore, be a threat of armed conflict between states. In that sense, Brownlie mentions the threat of the use of force which consists of "explicit or tacit promise of the government to resort to force in the event of non-acceptance of certain requests of the government".[13]

Since the 1990s, with the end of the Cold War and the imbalance in the global balance of power, a spate of attempts to quietly revise the United Nations Charter has led to an expansion of situations that the Security Council describes as a "threat to the peace", Thus, as threats to international peace are qualified, *inter alia*, civil wars, lack of democracy, and serious violations of international human rights including international humanitarian law. The latter situation served as the basis of qualifying the situation in Yugoslavia and Rwanda as a "threat to the peace". The Security Council saw the threat to the peace in "widespread and flagrant violation of international humanitarian law" in Resolution 827, and in "genocide and other systemic, widespread and flagrant violations of international humanitarian law, etc." in Resolution 955 on the situation in Rwanda. In both countries, a civil war was fought at the time with a strong ethnic element, i.e. internal armed conflict. There is no fact or indication in the text of the Council resolutions that would imply that these violations of humanitarian law, regardless of their severity, threaten a conflict between states. It is not disputable that the issue of human rights is not within the exclusive competence of the states. However, it is disputable to equate the violation of human rights with the threat to the peace. By putting a sign of equality between mass violations of human rights and the threat to international peace, the Security Council encroached on the legislative domain, a silent revision of the Charter, usurping powers that does not possess.[14] Because, the discretionary powers of the

[12] The Prosecutor v. Slobodan Milošević, IT-02-54, Trial Chamber, Decision on Preliminary motions, para. 7.

[13] I. Brownlie, *International Law and the Use of Force by States*, New York 1963, 364.

[14] M. Happold, "Security, Council resolution 1373 and the constitution of the UN", *Leiden Journal of International Law* 3/2003, 610.

Security Council are to be exercised for the purpose they were given, and are essentially provided for in Article 39 of the Charter, and concerned with the maintenance of international peace and security. The Security Council, like the UN as a whole, is subject to the rules of general international law, especially the rules of corpus *iuris cogentus*.

The ICTY's finding in the Tadić case that even if the armed conflict "were considered merely as an internal armed conflict, it would constitute a "threat to the peace" according to the settled practice of the Security Council and the common understanding of the United Nations membership in general"[15] maintains a post-positivist reason that formal legislation of international law, i.e. its main sources should be substituted with informal normative practice.[16] In this particular case, it would mean that 15 states - members of the Security Council, five permanent and 10 non-permanent ones - take over the role of international legislator, acting as the creator of the international order on behalf of about 200 states. Even if we were to, *arguendo*, accept that in identifying violations of the rules of international humanitarian law with threats to the peace, the Security Council acted in accordance with the provisions of the United Nations Charter, another fundamental question would arise - whether *ad hoc* international criminal tribunals are an appropriate measure regarding Articles 41 and 42 of the UN Charter? The establishment of the ICTY and ICTR is also presented as a "non-military form of international intervention" in the context of restoring peace.[17]Although there is an indisputable *nexus* between the law and peace, the instrumental role of the adjudicating body in the establishment of peace can hardly be an inherent feature of the court's activities in the strict sense of the word. The establishment of peace is primarily a political matter that is achieved by measures that are *stricto sensu* illegitimate or illegal. The terms "peace" and "justice" do not necessarily coincide. Peace is often achieved through unjust solutions.[18] The very concept of collective security in the final analysis is based on the factual power of the anti-aggression coalition.

[15] The Prosecutor v. Duško Tadić, IT-94-4, para. 30.

[16] V. Lowe, "The politics of Law-Making: Are the Method and Character of Norm-Making changing?", *Rule of Law in International Politics: Essays in International Relations and International Law* (ed. M. Byers), New York 2003, 207–227. E. Loquin, L. Ravillan, "La volonte des operateurs vecteur d'un droit mondialise", *La Mondialisation du droit* (eds. E. Loquin, C. Kesseidjan), Paris 2000, 91–132.

[17] H. Shinoda, "Peace building by the Rule of Law: An examination of Intervention in the Form of International Tribunals", *International Journal of Peace Studies* 7/2002, 15.

[18] Moreover, the first one may be an obstacle to peace, as exemplified by peace treaties. If the rules of contract law were applied *stricto sensu* to peace treaties, the peace achieved by them could not be legally established because, as a rule, peace treaties are based on supremacy on the battlefield, which in terms of contract law is usually expressed as coercion over the state as a collectivity.

International practice has developed two main methods for the establishment of international relations and dealing with international disputes. One is purely political. The other is legal. Due to this fundamental difference between the two approaches to resolving international disputes, the analogies between them are fallacious.[19] The fact that the ICTR was established after the armed conflict in Rwanda had ended, goes in favor of the perception of the Tribunal's instrumental inability to contribute to the establishment of peace.

4.2. Is the establishment of judicial organs included in the corpus of measures under Articles 41 and 42 of the UN Charter?

It appears obvious that Articles 41 and 42 of the UN Charter do not provide the Security Council the power to establish judicial organs. Therefore, it is attempted to find legal basis for the foundation of the ICTY and ICTR elsewhere, by invoking the implicit powers of the Security Council in terms of the Council's powers not explicitly stated in the Charter but necessarily arising from its function of preserving international peace and security. In the Tadić case, the ICTY Appeals Chamber found that Article 41 of the Charter contained the Council's implicit authority to establish a judicial organ as "an instrument for the exercise of its own principal function of maintenance of peace and security, i.e., as a measure contributing to the restoration and maintenance of peace in the former Yugoslavia".[20] The Appeals Chamber has given too broad interpretation of the implicit powers of the Security Council.

Born in the constitutional practice of the USA, the doctrine of implicit powers has been accepted in the jurisprudence of the International Court of Justice[21]in matters concerning the jurisdiction of international organizations and their organs. The interpretation of the Appeals Chamber is close to the concept of inherent powers, which, especially when it comes to the Security Council as an organ with a limited number of members in which the great powers play a dominant role, would leave the door wide open to abuses.[22] They are practically unlimited, if we bear in mind that acts of the Security

[19] S. Rossene, *The Law and Practice of the International Court 1920-2005*, Leiden 2006, 4–5.

[20] The Prosecutor v. Duško Tadić, Decision on the Defence Motion for Interlocatory Appeal on Jurisdiction, IT- 94-1-AR72, para. 38.

[21] Reparations for injuries suffered in the service of United Nations, Advisory Opinion, ICJ Reports, p. 184–185; Effects of awards of compensation made by the UN Administrative Tribunal, Advisory Opinion, ICJ Reports 1954, 57; Certain Expeces for the United Nations (Art. 17 para. 2 of the Charter) Advisory Opinion, ICJ Reports 1962, 153; Legality of the Use by a State of Nuclear Weapons in Armed Conflict; Advisory Opinion, ICJ Reports 1996, 79. G. Arangio–Ruiz, "The 'Federal Analogy' and UN Charter Interpretation: A Crucial Issue", *European Journal of International Law* 1/1997, 8–9. Legality of the threat or use of nuclear weapons, Advisory Opinion, ICJ Reports 1996, 78–79.

[22] See G. Arangio–Ruiz, 8–9.

Council are not subject to judicial review. There is no sign of equality between inherent and implied powers. Strictly speaking, the inherent powers belong only to the sovereign government, that is, in the environment of today's international community, to the states as original and permanent subjects. Even the United Nations, as a derivative and, in the normative sense, a transitory entity, has no inherent powers, as its powers are contractual creation of the states and, as such, delegated by them.

Implicit powers, as powers not explicitly stated in the United Nations constitutional act, are subject to clear limitations. As powers necessary for performing the functions explicitly entrusted, the implicit powers of the Security Council under Chapter VII of the UN Charter relate to measures which, in a specific context, relate to coercive measures covered by Articles 41 and 42 of the UN Charter. This is the meaning and relevance of the principle of specialty as an essential criterion for the qualification of implied powers. Klabbers seems right when saying that the doctrine of implicit powers played a useful role at the time when international organizations were evolving and that today, at least when it comes to stabilized organizations, the doctrine has crossed its peak.[23] Through the optics of the principle of sovereignty, the establishment of international criminal courts in the form of an international treaty appears to be an axiom. By Resolution 260 V (III), the UN General Assembly called on the International Law Commission to consider "the possibility of establishing an international judicial organ for the trial of persons accused of genocide or other acts over which jurisdiction *will be conferred upon that organ by international treaties*". (M. K.). Having considered two reports by Special Rapporteurs R. Aefar and E. Sandstrom and discussions, the UN Commission on International Law decided that "the establishment of an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions is desirable", and that the establishment of such a judicial organ is possible.[24]

4.3. Establishment of the Tribunal in light of the rule of law

Considering the objection of the Defence in the Tadić case that the Tribunal was not "established by law"; the Appeals Chamber gives a reduced meaning of the principle of the rule of law. The principle of the rule of law, as a universal legal principle, relevant in both domestic and international law is not subject to general legal definition. Rather, it could be defined as a synthetic

[23] J. Klabbers, "The Paradox of International Institutional Law", *International Organization Law Review* 1/2008, 79.

[24] Doc. A/1316: Report of the International Law Commission covering its second session, 5 June–July 1950, YILC 1950, 379.

expression of a multitude of legal rules and institutes, formal and substantial, which, taken individually and *in corpore*, ensure the supremacy of rights over politics. In this regard, it is indicative that the relevant rule of law documents are designed as The Rule of Law Checklist (the Venice Commission) and the UN Rule of Law Indicators, without giving a general definition of the term. It is wrong, however, to conclude that the substance of the rule of law is reduced to procedural rules and the rights of the accused, as done by the Appeals Chamber of the Tribunal. The meaning of the expression "independent and impartial tribunal" in the sense of a court established in accordance with the rule of law is clearly and unambiguously defined in case of the European Court of Human Rights. The consistent jurisprudence of the European Court implies that an independent court must not depend on the discretionary assessments of the executive, but should be regulated by a legislative act.[25]

The Appeals Chamber's observation that there is no legislation in a technical sense in international law nor is there a Parliament in the international community, is correct There is, however, international law in a substantive sense, located in a state which, acting *in corpore* with other states, exercises legislative powers analogously to the Parliament within the state. *A contrario*, it is unclear how the rules of international law would have originated and developed. In this particular matter, one should not go beyond the example of the Permanent International Criminal Court established by the law-making will of states in the form of a legislative multilateral treaty.

4.4. Can a subsidiary organ of the UN executive organ represent an "independent and impartial" court?

Although Security Council Resolution 827, as well as Resolution 955, do not state that the ICTY and ICTR were established as subsidiary organs of the Security Council under Article 29 of the UN Charter, there is no doubt about it. The Report of the UN Secretary-General, which proposed the establishment of the ICTY, states, *inter alia*, that the Tribunal would be established under Article 29 of the Charter as a subsidiary organ of the Security Council of a judicial nature.[26] In the official documents, the UN, ICTY and ICTR appear as subsidiary organs of the Security Council established under Article 29 of the UN Charter.

The subsidiary organs of the principal organs of the United Nations are defined in the Repertory of the Practice of the United Nations organs as follows: "(a) a subsidiary organ is created by, or under the authority of, a

[25] See, among others, Zand v. Austria, App. No. 7360/76; Piersack v. Belgium, App. No. 8692/79; Crociani Palmiotti, Tanassi and D'Ovidio, v. Italy, App. Nos. 8603/79, 8722/79, 8723/79 & 8729 (joined).

[26] Report of the Secretary General (S/25704), 1993, para. 28.

principal organ of the United Nations; (b) the membership, structure and terms of reference of a subsidiary organ are determined, and may be modified by or under the authority of, a principal organ; (c) a subsidiary organ may be discontinued by, or under the authority of, a principal organ."[27] Such definition of subsidiary organs in the organizational structure of the United Nations can be taken as authoritative, since the UN Charter does not provide a definition of subsidiary organs of the Organization.

In concrete, two, organically related questions arise.

Primo. Does the Security Council have the legal power to establish a judicial organ as its subsidiary organ? In fact, by establishing a subsidiary organ, a principal body, *in concreto*, the Security Council, delegates competencies. Article 29 of the Charter, expressing this general, cogent principle, states that "The Security Council may establish such subsidiary organs as it deems *necessary for the performance of its functions*" (M. K). In other words, in order to establish a judicial organ under Article 29 of the Charter, the Security Council would also have to have the powers of the judicial organ. And it obviously does not have such powers, so the establishment of a judicial organ by the Council is an unconstitutional act, an act contrary to the letter and spirit of the UN Charter. It is a general legal principle that *nemo plus iuris ad alium transferre potest quam ipse habet*.

Secundo. can the Tribunals act independently from the Security Council's policy in the performance of their function? Elementary logic suggests that, although they might enjoy some degree of autonomy, the ICTY and ICTR can hardly act as independent judicial bodies since they are under the direct and indirect control of the Security Council. The very status of a subsidiary organ of a political body is in fundamental conflict with the nature of the judicial function, which is, by definition, independent of anyone and anything except from international law.The ICTY's practice, for example, clearly shows the strong influence of the Security Council and, even, the Chief Administrative Officer of the UN, on the reasoning of the Tribunal. Needless to say, such reasoning is in the function of political goals whose promotion lies outside the function of the judicial organ.

5. JURISDICTION OF THE TRIBUNAL AND THE PRINCIPLE OF COMPÈTENCE DE LA COMPÈTENCE

In the Tadić case, the ICTY Appeals Chamber, resorted to the argument of compètence de la compètence in decision on the objection of the Defence that the Tribunal, being established *contra legem*, has no jurisdiction. The Appeals Chamber correctly states that the said principle was a part of

[27] Repertory of Practice of United Nations Organs I, 228.

the incidental jurisdiction of any judicial organ, consisting of its "jurisdiction to determine its own jurisdiction".[28] As a necessary, inherent component in the exercise of the judicial function, the principle of compètence de la compètence does not need to be expressly provided for in the constitutive documents of the Tribunals.[29] Such reasoning of the Appeals Chamber provides for one essential feature of the principle of compètence de la compètence. The principle of compètence de la compètence is, in its nature, a structural-functional principle that does not have its own, independent content in terms of substantive law. This principle is only a legal remedy that enables a judicial organ to determine that the conditions governing its jurisdiction and established by a valid, constitutional law-based constitutional act of the judicial organ are met. If the previous condition of the international legal validity of the constitutional act of a judicial organ is not fulfilled, the principle of compètence de la compètence has only a technical meaning, the meaning of technical demonstration without legal significance. Because, the decision of a judicial organ made on the basis of the application of the principle of compètence de la compètence is declarative in nature and, as such, cannot give any judicial organ, not even the Tribunal, jurisdiction that does not exist under international law.

6. THE PRINCIPLE OF SOVEREIGNTY AND THE RULES OF INTERNATIONAL CRIMINAL LAW APPLIED BY THE ICTY AND ICTR

The principle of sovereignty is also expressed in a specific way through the rules of international criminal law (ICL) applied by the ICTY and ICTR. Compared to the relationship between the principle of sovereignty and the establishment of an *ad hoc* Tribunal, where the principle of sovereignty is directly and explicitly expressed, the principle, when it comes to the law applied by a judicial organ, is expressed indirectly and implicitly.

It is expressed, namely, through the consent of the state, as an attribute of sovereignty, in the constitution of the collective will or the will of the international community as the basis for the establishment and necessity of the rules of international law. Thus, the state, as a sovereign entity in the environment of a decentralized community, acting *in corpore* with other states, represents the international legislator, the creator of the rules of international law. The function of any judicial organ is to apply the international law thus created *ad casum*. As pointed out by the International Court of Justice, a

[28] The Prosecutor v. Duško Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 17.

[29] *Ibid.*, para. 18.

judicial organ "could not render judgment *sub specie legis ferende* or anticipate the law before the legislator had laid it down".[30] The jurisprudence of the ICTY and ICTR, however, went beyond this framework in a number of relevant issues and encroached on the legislative domain. Without detailed analysis of such legislative excursion of both Tribunals, we will mention a couple of characteristic examples of fundamental importance related to both general and specific rules of international law concerning certain crimes that are, according to the statutes, within the jurisdiction of the Tribunal.

7. PERCEPTION OF CUSTOMARY RULES

The perception of customary rules, on which the ICTY based all judgments concerning genocide, is, to put it mildly, surprising. Namely, the Tribunal rendered its judgment on the basis of "customary international law at the time the events in Srebrenica took place".[31] The Krstić verdict served as a model for other genocide verdicts. The ICTY perception of custom as a source of international law is highly innovative, going well beyond the understanding of custom in the jurisprudence of the ICJ. According to the well settled jurisprudence of the ICJ, which follows the provision of its Statute referring to "international custom, as evidence of a general practice accepted as law", custom is designed as a source based on two elements: general practice and *opinion iuri sine necessitatis*. As it pointed out in the Nicaragua case: "[b]ound as it is by Article 38 of its Statute... the Court may not disregard *the essential role played by general practice*"[32] (emphasis added).

The jurisprudence of the ICTY generally moves precisely in the opposite direction, giving the predominant role to *opinio juris* in the determination of custom[33] and, thus, showing a strong inclination towards the single element conception of custom! In doing so, it considers *opinio juris* in a manner far removed from its determination by the Court. For, in order "to constitute the *opinio juris*... two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it."[34] *Opinio juris* cannot be divorced from practice because "[t]he Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed

[30] Fisheries Jurisdiction (UK v. Iceland), Judgment, ICJ Reports 1974, para. 53; Fishery Jurisdiction (FR of Germany v. Iceland), Judgment, ICJ Reports 1974, para. 45.

[31] Prosecutor v. Duško Krstić, Trial Judgment, para. 541.

[32] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, 97–98, para. 184.

[33] G. Mettraux, *International Crimes and the ad hoc Tribunals*, Oxford 2005, 13 fn. 4.

34 North Sea Continental Shelf, Judgment, I.C.J. Reports 1969, para. 77.

by practice".[35] The ICTY has often satisfied itself with "extremely limited case law" and state practice.[36] A large part of law qualified by the ICTY as customary law is based on decisions of municipal courts[37] which are of a limited scope in the jurisprudence of the Court.[38] In case concerning *Certain German Interests in Polish Upper Silesia*, the Permanent Court stated that national judicial acts represent "facts which express the will and constitute the activities of States".[39]

Hidden under the surface of the general characteristic of the ICTY's approach to customary law, which is dubious *per se*, is incoherence and subjectivism. It has been well noted that differently-composed Chambers of the ICTY have utilized different methods for identifying and interpreting customary law, even in the same case, including simply referring to previous ICTY decisions themselves as evidence of a customary rule.[40] In addition, the ICTY has failed to consistently and rigorously address the concepts of state practice and *opinio juris* by, *inter alia*, failing to refer to evidence of either, referring merely to the bulk existence of national legislation as evidencing custom without addressing *opinio juris* or framing policy or "humanity" related rationales as *opinio juris*.[41]

The establishment of customary law in the ICTY resembles in many aspects a quasi- customary law exercise based on deductive reasoning driven by meta-legal and extra-legal principles. As can be perceived "many a Chamber of the *ad hoc* Tribunals have been too ready to brand norms as customary, without giving any reason or citing any authority for that conclusion".[42] This has resulted in judicial law-making through purposive, adventurous interpretation,[43] although, according to the Secretary-General, on the

[35] Nicaragua v. United States of America, para. 184.

[36] A. Nollkaemper,"The Legitimacy of International Law in the Case Law of the International Criminal Tribunal for the former Yugoslavia", *Ambiguity In the Rule of Law: The Interface between National and International Legal Systems* (eds. T. A. J. A. van Vandamme, J. H. Reestman), Groningen 2001, 17.

[37] A. Nollkaemper, "Decisions of National Courts as Sources of International Law: An Analysis of the Practice of die ICTY", *International Criminal Law Developments in the Case Law of the ICTY* (ed. W. A. Schabas), Leiden 2003, 282.

[38] H. Thirlway, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence*, Oxford 2013, 248.

[39] Certain German Interests in Polish Upper Silesia Judgment, 1926, P. C. I. J., Ser. A, No. 7, 19.

[40] N. Arajärvi, *The Changing Nature of Customary International Law: Methods of Interpreting the Concept of Custom in International Criminal Tribunals*, Routledge 2014, 117.

[41] *Ibid*., 118.

[42] G. Mettraux, 15.

[43] M. Swart, "Judicial Law-making at the *ad hoc* Tribunals: The Creative Use of Sources of International Law and Adventurous Interpretation", *Heidelberg Journal of International Law* 70/2010, 463–468, 475–478.

establishment of the ICTY, the judges of the Tribunal could apply only those laws that were beyond doubt part of customary international law.[44] Being in substantial conflict with custom, as perceived by the TCJ, the ICTY perception of custom, applied in its jurisprudence, opens the way to a fragmentation of international criminal law and, even, general international law.[45]

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ПРИНЦИП СУВЕРЕНИТЕТА И МЕЂУНАРОДНИ КРИВИЧНИ ТРИБУНАЛИ ЗА БИВШУ ЈУГОСЛАВИЈУ И РУАНДУ

Сажетак

Рад обрађује релевантна питања у вези са оснивањем и деловањем МКТЈ и МКТР. Полазна премиса је принцип суверенитета у међународном праву у његовом спољашњем виду тј. *suprema potestas*. У том смислу, принцип подразумева независност у оквирима норми међународног права, као контрапункт апсолутној суверености. Што се оснивања МКТЈ и МКТР тиче, оба су установљена по истом обрасцу, резо-

луцијама Савета безбедности УН. Као *ratio* установљења релевантне резолуције наводе кажњавање лица одговорних за почињене злочине, на једној страни, и успостављање и одржавање мира, на другој. Разлике постоје, међутим, у надлежностима трибунала *ratione materie.* Надлежност МКТЈ је, према Резолуцији 827 од 1993. године, ограничена на тешке повреде међународног хуманитарног права, а надлежност МКТР обухвата и злочин геноцида.

Затим, аутор разматра питање правног дејства Закона о сарадњи са МКТЈ који је Државна заједница Србије и Црне Горе усвојила 2002. и 2003. године. Налази да су дејства Закона ограничена у смислу признања Трибунала *in foro interno*, као правни основ за сарадњу надлежних унутрашњих органа са Трибуналом, а да не подразумева признање Трибунала *in foro externo*.

На основу одредаба релевантних резолуција Савета безбедности налази да је, у светлости одредаба општег међународног права, оснивање МКТЈ и МКТР, по својој природи, непружана форма међународне интервенције у контекст васпостављања мира.

Посебну пажњу посвећује питању овлашћења Савета безбедности да оснива судске органе у оквиру мера предвиђених чланова 41 и 42 Повеље УН, оснивања Трибунала и принципа владавине права (*rule of law*), те надлежности Трибунала и принципу *competence de la competence*.

У другом делу, обрађује однос принципа суверенитета и правила међународног кривичног права која су Трибунали примењивали.

Кључне речи: *МКТЈ; МКТР; Савет безбедности; Суверенитет*.