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APPEARANCE OF SPECIALIZED TRIBUNALS AND THE QUESTION OF THE BALANCED APPLICATION OF INTERNATIONAL LAW

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Rodoljub Etinski

Faculty of Law of the University of Novi Sad

Abstract. *The relations between the International Court of Justice and the specialized tribunals in the process of application of international law; states before the Court may influence the application of law, while nongovernmental subjects cannot do that before the tribunals; The Court is composed of experts of international law, while tribunals need not; it is necessary to provide an equalized application of international law through the Court as a principal judiciary organ in the system of the United Nations.*

Key words: *International Court of Justice, Specialized Tribunals, international law application*

Development in the field of international judiciary in the 20th century has been marked, among other things, by establishing, first of all, the "world court" of universal competence and the specialized international tribunals. Those are administrative tribunals: Administrative Tribunal of the United Nations, Administrative Tribunal of the International Labour Organization, Administrative Tribunal of the World Bank, Administrative Tribunal of OECD. New criminal tribunals have emerged. The Security Council has established two ad hoc tribunals for prosecution of persons responsible for crimes committed in the former Yugoslavia from 1991, and for crimes committed in Rwanda.[1] The United Nations Conference, held on 17 July, 1998, enacted the Rome Statute of the Permanent International Criminal Court.[2] On the basis of Annex VI to the Convention of the

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[1] Acting based on Chapter VII of the UN Charter, the Security Council has decided, based on Resolution 827 (1993) to establish the International Criminal Tribunal for Former Yugoslavia for the only purpose of punishing persons responsible for serious violations of international humanitarian law. The question is whether the decision on establishing the Tribunal has been made within the frameworks of competences of the Security Council. However, it is certain that the Tribunal discredits the idea of international criminal judiciary violating the principles of impartiality and equality of all before the law and in other ways.

[2] United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June – 17 July, 1998, A/CONF. 183/9.

United Nations on Maritime Rights of 1982, the International Tribunal for Maritime Law was established which commenced to judge. In addition to universal, regional courts and tribunals have also benn established such as European Court for Rights of Man, Inter-American Court of Human Rights, European Communities Court of Justice, and Administrative Court of European Communities.

The aforementioned tribunals are specialized for application of certain fields of international law, but in the law application procedure they face the question of universal international law. It is very important how they apply the rules of universal international law.

An essential element of any law, and of international as well, is consistency, uniformity in interpreting and application of law, that the legal rule should be used equally under equal or essentially similar circumstances and situations. The International Court of Justice itself takes care of this, so that it often strives to back up its legal attitudes in the cases it resolves with the previously assumed attitudes in similar circumstances.[3] Serious fragmentation would result in lack of this, which would bring the international legal subject into an unenviable position. In domestic laws, the function of maintaining uniformity of application of laws is entrusted to the supreme courts. Absence of a supreme court in the international community and appearance of specialized tribunals makes the concerns for maintenance of equalized interpretation and application of international law actual. These concerns are not based on doctrinaire considerations only.

Resolving the complaint of the plaintiff to the verdict of the board of judges in the first degree of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 (hereinafter referred to as the International Criminal Tribunal for Former Yugoslavia)[4] according to which Duško Tadić was relieved from the charge of violating the Geneva Convention, the board of judges in the second degree discussed the nature of the conflict taking place in the territory of Bosnia and Herzegovina beginning from 1992 and, for that purpose, investigated the relations of the Army of Republika Srpska towards the Federal Republic of Yugoslavia. The board of judges in the first degree found out that the Army of Republika Srpska was not an organ of the Federal Republic of Yugoslavia, therefore, after May 19, 1992, the date of withdrawal of the Army of Yugoslavia, the armed conflict was not of international character and, therefore, there were no severe violations of the Geneva Convention. The decision was reached by the majority of votes. Gabriela Kirk McDonald was against, who in the meantime became the president of the International Crime Tribunal for Former Yugoslavia. When making this decision, the board of judges in the first degree has followed the criteria of application of the rights of the International Court of Justice in the case of Nicaragua. According to the view of the board of judges in the first degree, the relations of the Army of Republika Srpska with the Federal Republic of Yugoslavia are similar to those of Contras[5] with the United States during the civil war in Nicaragua. The International Court of Justice did not

[3] Of course, full consistency of the International Court of Justice in applying laws cannot be talked about, but these endeavours of the Court are obvious.

[4] The Tribunal itself uses thus abridged name.

[5] Contras were armed rebellious formations, trained, financed, armed and in other ways supported by the American Administration, which fought against the sandinistic government of Nicaragua.

consider the acts of Contras as the acts of the United States, so that the board of judges in the first degree, applying the rule of international law in the same way as the International Court of Justice, did not consider the acts of the Army of Republika Srpska as the acts of FR Yugoslavia, consequently did not consider FR Yugoslavia to be a party to the conflict.[6] In the appellation proceedings, the board of judges in the second degree has changed the judgement in the first degree in this part. It refused to follow the way in which the International Court of Justice applied the relevant legal rule in the case of Nicaragua finding that it, the way, is not in conformance with the logics of law on a state responsibility and that it deviates from the judicial practice and practice of states. In its verdict of July 15, 1999, the appellation board used the relevant legal rule of international law in a new, its own way, coming, thus, to a conclusion that the act of the Army of Republika Srpska are ascribed to FR Yugoslavia, so that she is a party to the conflict.[7] The board of judges in the second degree was composed of five judges, of which two were international lawyers[8] and three criminal lawyers[9] Thus, the body, composed mostly of persons not fulfilling one of the usual criterion for selection of international judges or arbitrators, particularly knowledge of international law, has rejected the way in which the International Court of Justice applies the relevant rule of international law.

Addressing the General Assembly of the United Nations on 26 October, 1999, the judge Stephen Schwebel, in the capacity of the president of the International Court of Justice, dealt with the proliferation of international tribunals. He estimated that this phenomenon was positive, and to contribute to the effectiveness of international law. However, he pointed to the possibility of contradictory interpretations of international law and to the need that this possibility should be reduced as much as possible. In that sense, he commented that it could be of great advantage to enable another international tribunals to ask for advisory opinions of the International Court of Justice concerning questions of international law they are faced with and which are of significance to the harmony of international law. As for the international tribunals, which are the organs of the United Nations, that is, of international tribunals for prosecution of war crimes in former Yugoslavia and Rwanda, there is no any legal obstacle, according to judge Schwebel, that these should refer to the Security Council requesting from it to ask for advisory opinion of the International Court of Justice. The Security Council is empowered under the Charter, observes judge Schwebel, to ask for advisory opinions on each legal question and nothing in the statutes of tribunals for war crimes poses an obstacle to these to refer to the Security Council to ask for opinions for their purposes.[10]

A question of relations between the International Court of Justice and the specialized

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[6] Prosecutor v. Duško Tadić, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991, Opinion and Judgement, 7 May, 1997, pp. 213-228.

[7] Prosecutor v. Duško Tadić, International Tribunal for Prosecution of Persons responsible for serious Violation of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991, Judgment , 15 July, 1999, pp. 47-62.

[8] Antonio Cassesse and Mohamad Shahabuddeen.

[9] Wang Tieya, Rafael Nieto-Navia and Florence Ndepele Mwachande Mumba.

[10] Address to the Plenary Session of the General Assembly of the United Nations by Judge Stephen Schwebel, President of the International Court of Justice, 26 October, 1999.

tribunals has also been, in fact, posed as regards the interpretation and application of the universal international law.

The Charter of the United Nations and the Statute of the International Court of Justice do not particularly regulate the relations of this Court with other courts. Yet, the Charter defines the International Court of Justice as one of the principal organs of the United Nations[11] and as a principle judicial organ of the United Nations.[12] Together with the General Assembly, the Security Council, the Economic and Social Council, the Trusteeship Council and the Secretariat the International Court of Justice is the principal organ of the United Nations. The characteristic of the principal organ is essential for regulation of their mutual relations. Particularly significant for our topic is the provision according to which the International Court of Justice is the principal judicial organ of the United Nations.[13] The provision on the principal judicial organ refers to the possibility of existence of other judicial organs in the United Nations as well, among which the International Court of Justice would be the "principal". Its potential supremacy is based upon the following facts. It is accessible to all states, to organs of the United Nations and to specialized agencies. It applies overall international law, both general and universal and special and particular. States appear before it, that is, the international subjects the role of which is primary in creating and interpreting the international law.

Statutes of criminal courts as well as those of the international maritime tribunal for maritime law do not contain particular provisions under which the relations with the International Court of Justice are regulated. However, Article 11 of the Statute of the Administrative Tribunal of the United Nations regulates the relations of this Tribunal with the International Court of Justice.[14] Also regulated is under Article 12 of the Statute of the

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[11] Article 7 of the Charter of the United Nations.

[12] Article 92 of the Charter of the United Nations and Article 1 of the Statute of the International Court of Justice.

[13] "The ICJ has special characteristics which distinguish it from other international institutions. It is the only international judicial body that is open to all states, first of all to UN members but also to non-members. It is, therefore, qualified to become a general court of the whole international community... Furthermore, on the basis of the definition of the so-called sources of law in its Statute, the Court is the only judicial body which applies generally binding international law without limitation to a defined treaty system of the restrictions of a specialized legal field ... The Court is, therefore, in a better position than any other judicial institution to contribute through its case law to the development of general international law... The GA's request to the ICJ to give an advisory opinion is based on the role of the Court as the principal judicial organ; the GA experts 'authoritative legal guidance'". Herman Mosler, The Charter of the United Nations, A Commentary, edited by Bruno Simma, Oxford University Press, 1994, p. 979.

[14] 1. "If a Member State, the Secretary-General or the person in respect of whom a judgement has been rendered by the Tribunal (including anyone who has succeeded to that person's rights on his death) objects to the judgement on the ground that the Tribunal has exceeded its jurisdiction or competence or that the Tribunal has failed to exercise the jurisdiction vested in it, or has erred on a question of law relating to the provision of the Charter of the United Nations, or has committed a fundamental error in procedure which has occasioned a failure of justice, such Member State, the Secretary-General or the person concerned may, within thirty days from the date of the judgement, make a written application to the Committee established by paragraph 4 of this article asking the Committee to request an advisory opinion of the International Court of Justice on the matter".
2. "Within thirty days from the receipt of an application under paragraph 1 of this article, the Committee shall decide whether or not there is a substantial basis for the application. If the Committee decides that a such basis exists, it shall request an advisory opinion of the Court, and the Secretary-General shall arrange to transmit to the Court the views of the person referred to in paragraph 1."

Administrative Tribunal of the International Labour Organization.[15] This provision is modified under the Annex to the Statute so that it is applicable also when the competence of the Tribunal is accepted by the other international organization: "In any case in which the Executive Board of an international organization which has made the declaration specified in Article II, paragraph 5 of the Statute of the Tribunal challenges a decision of the Tribunal confirming its jurisdiction, or considers that a decision of the Tribunal is vitiated by a fundamental fault in the procedure followed, the question of the validity of the decision given by the Tribunal shall be submitted by the Executive Board concerned, for an advisory opinion, to the International Court of Justice." Of particular importance to the subject of this text is the provision from Article 11 of the Statute of the Administrative Tribunal of the United Nations according to which a reason for a complaint to the International Court of Justice may be, among other things, an error in applying the law relating to the rules of the UN Charter. The ratio of this provision is obvious. The International Court of Justice is the last and the highest judicial instance within the System of the United Nations empowered to interpret the provisions of the UN Charter.

When considering this question, the fact thar individuals or other nongovernmental subjects can appear before the specialized tribunals should be born in mind. International law is, first of all, a normative creation, which is generated in the interactions of states. With reference to states, this is mostly a jus dispositivum, so that the interested states can replace any of its rules by a new one. Using their arguments before the International Court of Justice they can affect the interpretation and application of these rules. If they agree on the interpretation of a certain rule of the jus dispositivum, the International Court of Justice shall accept it. However, subjects other that states or international organizations can appear before the specialized tribunals. They can be physical persons and economic subjects. They do not have legal and creative capability in international law, therefore, they cannot, in that capacity, build new or change the existing rules of international law. Essentially different situation is when the International Court of Justice applies the rule of international law, faced with the arguments of states to dispute or other the states participating in the proceedings and when the specialized tribunal applies international law, faced with the arguments of nongovernmental subjects. The first situation contains legal and creative potential. Most frequently, the parties dispute on the legal rule interpretation and application. A judgment by means of which the dispute is settled may affect subsequent application of the disputed legal rule. If the parties agree on the interpretation of some jus dispositivum legal rule, the Court will register this agreement and interpret the rule in that way. It is another legal situation when a specialized tribunal applies international law in proceedings in which nongovernmental subjects appear. They are not authorized to change the existing rules of international law. For them, international law is a public order, imperative law. In disputes between states before the Court, the judicial

[15] "In any case in which the Governing Body of the International Labour Organization or the Administrative Board of the Pensions Fund challenges a decision of the Tribunal confirming its jurisdiction, or considers that a decision of the tribunal is vitiated by a fundamental fault in the procedure followed, the question of the validity of the decision given by the Tribunal shall be submitted by the Governing Body, for an advisory opinion, to the International Court of Justice. The opinion given by the Court shall be binding."

judgments are subsidiary way of establishing the international law rules.[16] In proceedings before the specialized tribunals the judicial judgments are of greater significance for establishing the international law rules and the way of their application.

The basic principle of international courts and tribunals is that individuals possessing good knowledge of international law should be chosen for judges. When specialized courts are in question, this principle is accommodated to actual needs. Individuals particularly conversant with that law, that legal field which is primarily applied in the specialized courts are chosen. Therefore, these specialized courts may be inadequately qualified for application of the general international law.

Because of the aforementioned reasons, specialized tribunals should very carefully approach the application of the general international law. On that occasion, they would have to pay particular care to the way the International Court of Justice applies some of the international law rules and to follow that way. When tribunals within the United Nations system are in question, they should respect the fact that the function of the principal organ within that system under the UN Charter has been entrusted to the International Court of Justice. This fact would also be, because of the professional reasons of qualification of those who apply the law and needs of providing a unique application of international law, respected by tribunals acting outside the system of the United Nations when in the states in the proceedings appear before the them as well.

There are more possibilities of providing a unique application of the general international law. One of them is that the function of the appellation court should be provided to the International Court of Justice under the Statute of a specialized tribunal, as it has been done under the statutes of administrative tribunals. Another possibility is that the International Court of Justice is to be used like a reference court. Consequently, when a specialized court is faced with a question of the general international law, this would not go into its settlement, but would ask for an advisory opinion of the International Court of Justice.[17] When specialized courts are in question which are established in the family of the United Nations, there are no obstacles to use by the Charter provided mechanism of asking for advisory opinions. When specialized courts are in question outside the system of the United Nations, a certain legislative action of the member states of the United Nations would be required.[18]

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[16] Article 30 of the Statute of the International Court of Justice.

[17] There is an analogue solution in the legal system of the European Community. National courts can refer to the European Court when faced with the application of the European law. There appeared opinions that is would be useful such possibility to be set up on a universal international level, so that a national court can refer to the International Court of Justice and ask for an opinion when in situation to apply the general international law. See Stephen M. Schwebel, Preliminary Rulings by the International Court of Justice at the Instance of National Courts, Virginia Journal of International Law, 1988, 28, 2, p. 495 or Justice in International Law (Selected Writings of Judge Stephen M. Schwebel), Cambridge, 1994, p. 84.

[18] See a treatise on the topic The Court and Other International Tribunals within the framework of colloquiums organized on the occasion of 50 years of the Court by the International Court of Justice and UNITAR. Increasing the Effectiveness of the International Court of Justice, proceedings of the ICJ/UNITAR Colloquium to Celebrate 50th Anniversary of the Court, Edited by Connie Peck and Roy S. Lee, The Hague, Boston, London, 1997, pp. 280-323.

POJAVA SPECIJALIZOVANIH TRIBUNALA I PITANJE UJEDNAČENE PRIMENE MEDJUNARODNOG PRAVA

Rodoljub Etinski

Odnos Medjunarodnog suda pravde i specijalizovanih tribunala u procesu primene medjunarodnog prava; države pred Sudom mogu da utiču na primenu prava, a nedržavni subjekti pred tribunalima ne mogu; Sud je sastavljen od znalaca medjunarodnog prava, a tribunal ne mora da bude; potrebno je obezbediti ujednačenu primenu medjunarodnog prava preko Suda kao glavnog pravosudnog organa u sistemu Ujedinjenih nacija.

Ključne reči: *Medjunarodni sud pravde, specijalizovani tribunali, primena medjunarodnog prava*