FACTA UNIVERSITATIS
Series: **Law and Politics** Vol. 1, N° 4, 2000, pp. 525 - 539

LEGALITY AND LEGITIMACY OF THE TRIBUNAL FOR THE PROSECUTION OF PERSONS SUPPOSED TO BE RESPONSIBLE FOR SERIOUS VIOLATIONS OF THE INTERNATIONAL HUMANITARIAN LAW COMMITTED IN THE TERRITORY OF FORMER YUGOSLAVIA (THE HAGUE TRIBUNAL)

UDC 341.645.2:341.49

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Abstract. *The valid principle for establishment of an international criminal tribunal is nullum forum sine lege, which means that it can be established only under the corresponding international act. The notion "law", that is, "legal tribunal" in international criminal procedural law is observed here in the light of international contractual law, which is the way to reach the international criminal tribunal. The provisions of Article 29 of the United Nations Charter the Security Council refers to empowers the Security Council to establish subsidiary organs to take over measures under Articles 41 and 42 of the Charter, but such measures are taken only against the states, but not individuals. Therefore, establishment of the tribunal cannot be an enforcement measure for maintenance, that is, restoration of peace and security.*

Key words: *international law, international criminal law, international organizations, international criminal tribunal, the Hague Tribunal, Security Council, the UN Charter, international relations, international co-operation, international legal rules, agreements, legal grounds, legality, legitimacy*

I.

1. Why even today, seven years after the Hague Tribunal has been established, we are discussing the questions of its legality and legitimacy, whether such discussions should attract attention, are they delayed, have we had enough of such discussions so far are all the questions put to the author of this contribution. The question of legality and legitimacy

Received March 11, 2000

of this Tribunal has been posed by the very Security Council Resolution No. 827 passed on 25 May, 1993, under which it was established and the Statute passed and the opinions on this question are debatable. Both the pro and contra advocates have advanced arguments denying, that is, approving the legality and legitimacy of this Tribunal. Then, the question might have also been put bearing on this question, which is the question of objectivity and impartiality as basic qualifications of the Tribunal in general. Then, the question of objectivity and impartiality of the Tribunal, at the very beginning, could not be evaluated, but only estimated (forecasted), because the time had to pass and the practice to be experienced.

Today, viewed from this time distance, the question of objectivity and impartiality of the Hague Tribunal could be, by the force of argument, discussed, but this question will not be dealt with here. We will go back to the aforementioned Resolution and its legal grounds and discuss the legality and legitimacy of the Hague Tribunal, not because this question has not been considered so far[1], but maybe mostly because some individuals, pointing out that the Hague Tribunal is legal and legitimate, have changed their opinions recently. This is to emphasise, at the very beginning, that we stick to the fundamental principle proclaimed already in Article 1 of our Law on Criminal Proceedings "that nobody innocent shall be sentenced, and that the guilty shall be sentenced the punishment he deserves". We would add under the law regulated proceedings and under the law established court.

2. The criminal tribunal within the national frameworks is said to be the legal court, but the legitimacy principle is also of the first-class importance for the international tribunal, nothing less than in domestic law. The notion "law" in international law is not understood in a classical sense, but in an extensive sense meaning here both international agreements and international customs even legal principles recognized by the enlightened peoples. Such understanding of the notion "law", that is, the principle of legitimacy is acceptable for the international material and criminal law. The situation is different in the international processing and criminal law, particularly when judiciary organs are in question. Thus, while the international material and criminal law could develop on the customs as well, none of the international institutions, the least a tribunal cannot be established based on customs, but under the explicit agreement of states, that is, under an agreement.

The idea of establishing an international criminal tribunal dates back in the past. The greatest "merit" that it was not translated into reality goes to the most powerful worldwide states which permanently endeavoured and succeeded in it to thwart the idea of establishing a criminal tribunal or not providing their consent or evading to ratify the already concluded agreements under which the establishment of such tribunals was provided for.

To set up an international criminal tribunal of significance is the nullum forum sine

[1] On this see: Dr. Momir Milojević, Osnivanje medjunarodnog krivičnog suda, in the publication "Medjunarodnopravna pitanja i Haški tribunal" Pravni fakultet Beograd, 1997; Dr. Milan Paunović: Medjunarodni krivični tribunal za teške povrede humanitarnog prava bivše Jugoslavije, in the same publication; Dr Vladan Vasiljević, Medjunarodni krivični tribunal za prethodnu Jugoslaviju i kažnjavanje za teške povrede medjunarodnog humanitarnog prava, Beograd, 1997; Dr. Drago Radulović, Medjunarodno krivično pravo, Podgorica, 1999.

lege principle, which means that this tribunal, as well as other international tribunals, may be established only under the corresponding international act. Mentioned in the literature are three possible modes of establishing the international criminal tribunal: establishing a tribunal through the revision of the UN Charter, then under the UN General Assembly Resolution and under an International agreement.[2]

3. Through the revision, that is, amendment to the Charter of the United Nations, the criminal tribunal could be established in several modes.

First, that could be done by creating a criminal tribunal as an independent body within the United Nations. In that case Article 7, paragraph 1, of the Charter could be amended where the principle organs of the United Nations are given, and the position of this tribunal would be the same as that of the International Court of Justice. In that case it would be necessary to pass a Statute of the International Criminal Tribunal that must be an integral part of the Charter as the case is with the Statute of the International Court of Justice (Article 92 of the Charter). There were such considerations three decades ago, but they are actual today, even within the United Nations. Thus, at the Sixth (Legal) Committee of the General Assembly (1995) there were proposals to amend the UN Charter that the position of the International Criminal Tribunal could be the same as that of the International Court of Justice.

The second variant within this first mode could be to amend the UN Charter so that the criminal tribunal should be established as a criminal council of the already existing International Court of Justice, in which case a revision of the Statute of the International Court of Justice should be necessarily done. There were such proposals earlier, after the Second World War. Known as such was the Panamian proposal. This solution would be economical, because expert offices of the International Court of Justice would be utilized.

The third variant within this first mode to create the international criminal tribunal is that based upon which the International Court of Justice was established. To remind, based on Article 14 of the Pact of the League of Nations the Council was instructed to prepare a draft of the Permanent Court of International Justice and to submit it to the members of the League. In that sense, according to the opinion that can be found in literature,[3] under a new article of the Charter the General Assembly would be authorized to make the Statute of the International Criminal Tribunal and to forward it to the members for ratification.

Finally, according to the fourth variant, creation of the international criminal tribunal supposes revision of the UN Charter by eliminating from it those provisions that interfere with the establishment of this tribunal.

If we would come out for this mode of establishing the International Criminal Tribunal, including all of its variants, then we could say that this is anyway a harder way to implement the idea of its creation. There are, first of all, difficulties of political nature that were particularly expressed in the times of the block-divided world and the period of cold war, that could still be felt over the postblock and postcold war period. Therefore, the cir-

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[2] Dr. Branimir Janković, Osnivanje medjunarodnog krivičnog suda, Year Book of the Law Faculty of Sarajevo, 1957. p. 55; Dr. Vladan Vasiljević, Medjunarodni krivični sud, Beograd, 1968, p. 176.

[3] Dr. Branimir Djordjević, op.cit., p. 55.

cumstances of political nature, and to a certain extent those legal, are the main barrier to all the aforementioned variants of establishing the International Criminal Tribunal through the revision of the UN Charter. For, the revision of the Charter is a very hard and complex operation that could, we are afraid, cause new tensions in today's world still burdened with the conflicts of different nature.

4. The second mode of establishing the International Criminal Tribunal is under the Resolution of the United Nations General Assembly. This would be the simplest mode of establishing the International Criminal Tribunal, the question of its jurisdiction in this case being regulated under a separate convention. However, as for this mode of establishing the International Criminal Tribunal a question of legal grounds of such authorization of the General Assembly is posed. We think that those legal grounds cannot be found in Article 10 of the Charter, which mainly deals with all the questions within the scope of the Charter and making recommendations. Some tried to find those legal grounds in Article 22 of the Charter according to which the General Assembly may establish subsidiary organs for the performance of its functions, and since the General Assembly may transfer to the subsidiary organs only those authorizations it is entrusted, then reservations are expressed as regards the authorizations of the General Assembly in the sphere of the judiciary.[4]

Another legal grounds of establishing the International Criminal Tribunal under the Resolution of the General Assembly can be found in Articles 11 and 13 of the UN Charter based upon which the General Assembly is competent to consider general principles of co-operation for the purpose of maintaining the peace and security and in that sense to make recommendations as well as to initiate studies and make recommendations of promoting international co-operation and to encourage the progressive development of international law and its codification.[5]

With both these viewpoints there appears as a moot question the question of the tribunal legal position, that is, the question whether the tribunal as a judicial organ by the nature of the functions it performs may be a subsidiary organ, for as a subsidiary organ it is subordinated to the General Assembly which is contrary to the principle of independent judiciary. There were even objections on the account of the International Court of Justice, that it, although an independent international body, is not immune to the political impacts, so how the international criminal tribunal, as a subsidiary organ of the General Assembly, could aspire to independence.

The possibility of establishing the International Criminal Tribunal under the UN General Assembly Resolution referring to the already made precedents creating the Administrative Tribunal of the United Nations No. 351 (IV) of 24 November, 1949, can hardly be excused by the very fact that jurisdiction of this court is quite different from that of the criminal tribunal. Namely, the UN Administrative Tribunal is competent for the officers' complaints against the international organization, and although being a subsidiary organ of the General Assembly, its independence could be accepted by the states of the international community. The International Criminal Tribunal can neither have such status nor

[4] Dr. Vladan Vasiljević, Medjunarodni krivični sud ... p. 176
[5] Dr. Branimir Djordjević, op. cit., p.56.

go below the level of the International Court of Justice.[6]

Except that it is hard to legally and politically accept the status of the International Criminal Tribunal as anyone else's, and even General Assembly, subsidiary organ, it is hard to find legal grounds in the UN Charter, even as a subsidiary organ for the performance of functions of the principal organ (General Assembly), provided for under Articles 10 and 17 of the Charter. This because the judicial functions authorization does not emanate from any provision of the Charter, since the principal rule known way back in the ancient Rome is that no more powers than anyone is entitle to can be transferred to some other personality. Even the already mentioned Administrative Tribunal has not been established based on Article 22 of the Charter, as some authors point out,[7] but on quite different legal grounds, that can be found in Article 8 of the UN Convention on Privileges and Immunities (1946).[8]

5. The third mode of establishing the International Criminal Tribunal is under the international agreement, where, as it is pointed out in the literature, such mode of establishing would not mean any transfer of governmental power although the Tribunal would only have the authorizations to be provided under the act on its foundation.[9] Prior to concluding an agreement, states could gather on a diplomatic conference, not only the member state of the United Nations, that they could establish a tribunal suitable to all or to the majority of states.

II.

1. We have earlier pointed out to possible modes of achieving the International Criminal Tribunal (meaning the Permanent International Criminal Tribunal), because overall endeavours of both individuals and international organizations after the Second World War have just been directed towards that aim. Nobody thought of establishing ad hoc tribunals, because such tribunals (Nuremberg and Tokyo), immediately after the Second World War had ended were created by the victorious powers to put on trial the war criminals of the Axis, completed their "mission" and ceased working. And when, after the preparing measures had been taken, establishment of the Permanent International Criminal Tribunal was expected particularly by the International Law Commission, an ad hoc International Tribunal[10] was created under the resolution of the Security Council for persecution of persons responsible for serious violations of international humanitarian law

6. A mention should be made here that such possibility of establishing an ad hoc tribunal has also been rejected by Boutros-Boutros Ghali, the then UN Secretary-General, because he, as a good expert in international law, also knew the jurisdiction of the General Assembly and the significance of its decisions.

[7] Dr. Branimir Janković, op. cit., p. 56.

[8] Dr. Momir Milojević, Osnivanje medjunarodnog krivičnog suda, p. 107.

[9] See Dr. Momir Milojević, Neki pravni problemi medjunarodnog krivičnog sudstva, Anali Pravnog fakulteta u Beogradu, No. 1-2, 1994, p. 155.

[10] According to the opinions of some authors the term tribunal is more adequate than court and it is more frequently used. In addition, this term involves prosecution that is not the case with the classical court. See Dr. Milan Paunović, op. cit., p.125.

committed in the territory of former Yugoslavia beginning from 1 January, 1991. Such an outcome was indicated earlier under Resolution 808 of 22 February, 1993, according to which the intention was to establish the International Tribunal for Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia.

By the very act of establishing the Tribunal there appeared a series of moot questions that otherwise come up with the problem when such institutions are created. One of the most debatable is: where is the legal basis to establish the Tribunal? That is should be legal it must be grounded in the same assumptions as the Permanent International Criminal Tribunal, that is, the same rule nullum forum sine lege applies to it. Whether Chapter VII of the UN Charter, the Security Council refers to, provides authorization to establish an institution of this kind, where the Security Council takes over prerogatives of "legislative power" and whether according to Article 29 of the Charter the Tribunal may be a subsidiary organ of the Security Council and whether such organ can serve the purpose of establishing peace and security, are the questions posed before the expert, even before the general public.

That we could convince ourselves in the legal grounds to establish the Tribunal the Security Council refers to in Resolution No. 827, we will quote Article 29 of the Charter, which prescribes that "The security Council may establish such subsidiary organs as it deems necessary for the performance of its functions".

Chapter VII of the Charter (Articles 39 through 51) is titled "ACTIONS WITH RESPECT TO THREATS TO THE PEACE" and actions of the Security Council are meant. Thus Article 39 empowers the Security Council to determine the existence to any threat to the peace, breach of the peace, or act of aggression and empowers it to take measures to maintain and restore international peace and security in accordance with Articles 41 and 42 of the Charter. What are those measures? Article 41 provides for measures not involving the use of armed force, such as complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communication, and the severance of diplomatic relations.

The Security Council is empowered under Article 42 to take, if it considers that measures provided for in Article 41 would be inadequate or have proved to be inadequate, action by air, sea or land forces as may be necessary to maintain or restore the peace and security. That action may include demonstrations, blockade, and other operations by air, sea or land forces of the member states of the United Nations.

From the quoted provisions of the Charter, certain things are not debatable. It is not debatable that the Security Council may establish subsidiary organs to accomplish the tasks and to take measures provided for its competence, even those provided for in Articles 41 and 42 for the purpose of restoring the peace and security. Further, it is not debatable that measures in Articles 41 and 42 taken over by the Security Council itself or through the subsidiary organs are undertaken only against the states, but not against the individuals. Therefore, establishment of a tribunal either permanent or ad hoc cannot be an enforcement measure to maintain, that is, to restore the peace and security.

2. But, in spite of, it seems, clear provisions we have quoted, the theory abounds in dissenting opinions concerning the legal grounds of the Resolution on establishing the ad hoc Hague Tribunal, that is, its legality.

According to one opinion, the Security Council has had all legal prerogatives to adopt Resolution No. 827 and to establish the international tribunal and has not overstepped bounds of its regular actions. On the contrary, according to the opinion of the advocates of this opinion, it has proceeded in keeping with the requirements intended for achievement of fundamental objectives of protection of the peace and security and the granted authorizations provided for in Article 24, paragraph 1, of the Charter.[11]

Contrary to this opinion there is, however, the majority of authors who deny the right of the Security Council to establish a tribunal, either permanent or ad hoc terminals are in question. Thus, it is pointed out that only one extensive interpretation of the provisions of the UN Charter in favour of the extension of competence of the Security Council could formally "cover" the decisions of the Security Council on the establishment of an ad hoc tribunal, which, then, would mean that the Security Council can do anything. Should we start from such interpretation of the authorizations of the Security Council, the advocates of this opinion point out, the Security Council would, according to such interpretation, rather be able to dissolve a parliament of a certain state or to dismiss a president of a state if it considered that that state was a threat to the peace than to set up a criminal tribunal.[12]

Other authors emphasise that the Security Council in its history has not had such precedent, so that it had to resort to any legal grounds for this "questionable business" of its and that it found it in a wide interpretation of the provision of Article 29 of Charter VII of the UN Charter, according to which the Security Council may take all measures to maintain or restore the international peace and security if it previously determine that there exists any threat to the peace or breach to the peace. Thus, the expression tribunal has been assigned to the notion measures, by means of which, as it is underlined in the literature, the members of the Security Council, especially those permanent "have probably thought not only that force makes law, but that they may attach that meaning to certain words they have never had, because the expression "measure" and "tribunal" have become synonyms.[13]

Consequently, the members of the Security Council should have been "persuaded", that is, the wide public should have been "convinced" of the legality of establishing an ad hoc tribunal for former Yugoslavia based on the legality without referring to the law.[14] Boutros-Boutros Ghali, the then Secretary-General of the United Nations, otherwise a good expert in international law, has taken over that duty, but he did not come forth then with such qualifications, although they are the most important for establishing a judicial body, but he came forth more as a "homo politicus".

During the half-a-century-old history of the United Nations, which has been burdened with problems not less than those in the former Yugoslavia over the last years, the Security Council, as a political and in certain sense its executive organ, has not even tried to set up a judicial organ, on the one hand because of the lack of legal grounds, the basic source in international law, and even the basic source of the judicial power, being con-

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[11] Dr. Vladan Vasiljević, Medjunarodni krivični tribunal ... p. 399; Dr. Milan Paunović, op. cit., p. 126

[12] Dr. Zoran Stojanović, Medjunarodni krivični sud, odnos prava i politike, JRKK, No. 1, 1997, p. 26.

[13] Dr. Kosta Čavoški, Hag protiv pravde, Beograd, 1998, p. 24.

[14] We have indicated earlier what we mean by legality in international law with reference to that notion in domestic law.

tained in the international agreements, since there is no any international legislative organ at the international community level that would be responsible to the parliament within the domestic frameworks.

On the other hand, disappearance of bipolarity in today's world increasingly brings the fact out in the open that a unilateral domination of certain states (state) is hiding behind the United Nations, that is, the Security Council, as its political and executive organ, while the choice of situations considered dangerous for the world's peace feature obvious selectivity, that is, domination of these states (state). It was frequently pointed out at the diplomatic conference held for the purpose of establishing the Permanent International Criminal Tribunal in Rome on 17 July, 1998, that the significance of establishing that Tribunal also lies in the fact to resist the domination of power, because this is not the world of the Security Council only, but of all states.

3. Thus, at the moment of establishing the ad hoc Tribunal, among other things, using arguments seemingly noble, great efforts have been made to eliminate those situations, which make barriers to achieving the desired domination over the world, that is, to eliminate those situations that are, to a certain degree, constitute resistance. That the thing was not legally clear it could also be observed in the course of preparing the Statute of the future tribunal because neither the mode of its establishing nor the legal grounds were foreseen in the Security Council's Resolution No. 808 of 22 February, 1993. That was admitted by the Secretary-General in his report No. S/25704 of 3 May, 1993,[15] which says that the approach which would be followed in the normal course of events when establishing the International Tribunal would be conclusion of an agreement, in which way the contracting states would establish the Tribunal and adopt its Statute. The agreement would be made and adopted by a corresponding international body (General Assembly or a specially convened conference) after which the same would be presented for signing and ratification. Such mode would enable to check and resolve all questions of significance for establishment of the International Tribunal. While negotiating and concluding the agreement the states would demonstrate their sovereign will for the Tribunal, particularly when acceptance of the status of signatories is in question. Anyway, this would be a way to creating the Permanent International Tribunal.

And then, referring to Chapter VII of the Charter, the ad hoc Tribunal was established, the Secretary-General being responsible to justify such measure. The Secretary-General points out that establishment of the Tribunal for Former Yugoslavia on the basis of an agreement would take much time, and the outcome would be uncertain. Therefore, in this particular case (in what this case is particular compared with many similar cases) the Security Council creates the ad hoc Tribunal as an enforcement measure in keeping with Chapter VII, that is, the subsidiary organ within the frameworks of notions of Article 29 of the Charter, but the subsidiary organ of judicial nature. This approach, points out the Secretary-General, would have an advantage because it is more suitable and effective since all the states would be bound to undertake everything necessary to carry out the de-

[15] Report of the Secretary-General of the United Nations on the basis of paragraph 2 of Resolution No. 808 of the Security Council, JRMP, Nos. 1-2, p. 208.

cision made as an enforcement executive measure on the basis of Chapter VII.[16]

It can be noticed that the Secretary-General does not refer to reliable legal grounds of the authorization of the Security Council to create the Tribunal, but refers to the principle of opportunity, that political, but not of the procedural nature, so that the principle of legality remains in the shadow of the principle of opportunity.

In addition to the aforementioned, the Secretary-General points out that the Security Council entrusting to the ad hoc Tribunal the tasks to bring criminal charges against individuals for serious violations of international humanitarian law "does not create nor legalizes the law, but applies the existing humanitarian law". However, this assertion cannot stand since the Security Council has, exercising its nonexistent legislative power, suspended the application of the Geneva Convention of 12 August, 1977, as well as the Convention on Prevention and Punishment of Crimes of Genocide of 9. December, 1948.[17] It has suspended them in the sense that by transferring the jurisdiction, primarily granted to the national tribunals under these conventions, to the ad hoc International Tribunal and seizing one more authorization to suspend and even to amend international agreements.

4. Thus, the chain reaction goes on and one injustice causes the other, causing the next, and so on. And that other is that according to Article 15 of the Statute of the Hague Tribunal the Tribunal itself has been granted the legislative power inexperienced in the former legislative and judiciary practice by being authorized to make Rules on Procedure and Proving. Consequently, the Tribunal has in the matter of procedure become its own legislator and it was already in February 1994 that it passed the Rules. And not only that, it has in the meantime amended the Rules several times over a short period of time, so that out of 125 rules in all nearly half of them were changed. And to make it more strange, the Rules were amended in the course of the proceedings and applied to the already processed subjects, although it conflicts Rule 6, paragraph (c), according to which the Rules cannot be amended to the disadvantage of the defendant in the already processed case.

And as we have pointed out, one injustice causes the other, and again the next and so the chain reaction goes on. And that reaction goes on in that the Tribunal has ceded "a part of its jurisdiction" to the prosecutor who would prescribe himself the rules of conduct. If the parties are equal, and they should be, then in all those inventions the defender himself should be allowed to make rules to follow, so that the circle of hell around the law should be closed.

5. It is not debatable that the authorizations of the Security Council according to the UN Charter are really wide. It was at one time noticed by Hans Kelsen, a protagonist of the pure theory of law, to which authorizations he has pointed out in his widely renowned book "The Law of the United Nations" of 1951, particularly when authorizations on passing and accomplishing enforcement measures for the purpose of maintaining and restoring the peace. Kelsen also reported that under the expression, "demonstrations, blockade, and other operations by air, sea or land forces of members of the United Nations"

[16] See the report in JRMP, Nos. 1-2, 1993, p. 209.
[17] Dr. Kosta Čavoški, op. cit., p. 25.

from Article 42 even bombardment of certain targets in certain states can be understood, but he would not even think that the Security Council would create an ad hoc tribunal as an enforcement measure.

The Charter itself in Article 29 does not state precisely what subsidiary organs are in question, so that a question comes up from that whether a judicial organ may function as a subsidiary organ in the sense of Article 29 to which article the Security Council has referred when establishing the Tribunal.

The subsidiary organs the establishment of which is provided for in Article 29 should act there and in affairs where actions of principal organs (here the Security Council) are impossible or impeded. So, all those affairs for which subsidiary organs are established may also be taken over by the Security Council, but because of efficiency and promptness in the concrete cases, and when protection of the peace and security is in question, that is not done by the Security Council but by the corresponding subsidiary organs. In that sense the room intended for the actions of subsidiary organs may also be observed as a way to span difficulties in the common interest in replacing actions of the principle organs by those of other, subsidiary organs which have not expressly been listed in the Charter of the United Nations. Since a principle organ of the United Nations can have no judicial function so does a subsidiary organ. In addition, a judicial function neither in the domestic law, even in international law, can be a subsidiary function, but it is a kind of power independent of other powers. Consequently, establishment of any criminal tribunal, whether permanent or ad hoc, cannot be an enforcement measure under the Charter of the United Nations.

6. According to the report, the Tribunal was created as a measure to restore and maintain the peace and security, so that a question is immediately posed whether the Tribunal as an organ of the Security Council is suitable for restoring and maintaining the peace and security. No case of a criminal court established for the purpose of accomplishing a peace mission has been recorded in the former development of the society. The peace was breached by states, but individuals were put on trial, because the principle of individual criminal responsibility was also accepted in the international criminal law.

If punishment of war crimes can restore peace, then a question could be posed whether after the peace has been restored there is a need to put to trial the rest of criminals, since the "objective of punishment has been fulfilled by the peace restored" (for the first time we hear that restoration of peace is among the objectives of punishment). Sure that it is no so, it is after the war has ended (restoration of peace) that the situation for putting to trial for violations of the humanitarian law is most suitable. That was also admitted by the Secretary-General in his report, as well as in Resolution No. 827 where jurisdiction of the Tribunal was said to have been restricted to crimes committed "until the date to be determined by the Security Council after the restoration of the peace". Thus, in a tacit way, he admitted that, as it was well noticed and pointed out in the literature, that the purpose of the trial is punishment for crimes committed in the past and has nothing to do with the enforcement measures that should provide conduct in the future.[18] After all, the peace was

[18] Dr. Momir Milojević, Osnivanje medjunarodnog krivičnog suda... p. 111.

restored by the passage of more that two years from the establishment of the Hague Tribunal; not by the punishment of crimes, but by the will of those who "produced the war".

Should we remind that until the establishment of the Hague Tribunal there were no attempts during wars, prior to its end, to establish tribunals, but it was done after the war ended and that have never been established for the purpose of restoring the peace. Therefore, the establishment of the ad hoc Tribunal for the former Yugoslavia rightfully causes suspicion in the intentions of the founders, that is, that an undoubtedly necessary international institution, should be abused against the state that was one of the founders of the United Nations and a supporter of the establishment of the Permanent International Criminal Tribunal.

7. Also, the way the ratione temporis jurisdiction has been determined is contrary to the generally accepted and adopted principles of criminal law on the prohibition of the retroactive effect of the criminal law, that is, the rule that the legal norm is valid for the future, that is, from the moment of its coming into effect. Since the Statute of the Tribunal was passed on 25 May, 1993, its application could not have been foreseen for the period prior to that date. The Statute could contain provisions on the application of certain, previously adopted conventions (Geneva, the Hague, and the like) where illegal conducts of participants in the war had been prescribed, but it could not prescribe its own application for the period prior to "its own birth".

Unsustainable are the legal grounds for establishment of the Hague Tribunal becomes more apparent when the modes of establishing this Tribunal and the Permanent International Criminal tribunal are compared. The latter was established under the legislative international agreement, which means that in this matter, finally, legislative jurisdictions belong to the sovereign states on the basis of agreement of wills realized in appropriate agreements.

III.

1. Some authors find the legitimacy of the Hague Tribunal in that it was (in contrast to the Nuremberg and Tokyo Tribunals created by a narrow set of individuals in the Second World War) established by the international community on the whole.[19] However, it is today a usual abuse of the notion "international community", because 15 members of the Security Council, even if there existed legal grounds for creating the Tribunal, are not even 10% of states of the world community (186 members), so that neither from that aspect this tribunal can be legitimate, not to speak of that that the draft Statute was adopted without any amendment, without any intervention to the text offered, even punctuation marks, because of insisting not to waste time and to prevent possible polemic.

2. The legitimacy of the Hague Tribunal may be estimated in that how many states have adapted their domestic legislature to Resolution No. 827 and the Statute of the Tri-

[19] Dr. Milan Paunović, op. cit., p. 125.

bunal as well as in that how many states have expressed their readiness that the Hague convicts serve their punishments in their prisons.

Let us remind that Point 4 of the aforementioned Resolution provides for that "all states will fully co-operate with the International Criminal Tribunal and that all states will, bearing on that, take necessary measures, according to their domestic law, to introduce the provisions of this Resolution and the Statute into their legal system including obligations of states to submit to the requests for aid or orders issued by the judging department in keeping with Article 29 of the Statute."

The legal grounds for bringing an individual before the Hague Tribunal have been provided for by the founder of the Tribunal under Article 29 of the Statute which prescribes "that the states will co-operate with the Tribunal in the investigation and prosecution of persons charged with serious violations of the international humanitarian law. The states will accept without unnecessary delays any request for aid or an order of the judging department, including but not limiting to:

- identification and position of individuals
- taking of statements and results of testimony
- use of documents
- detention and arresting of persons and extradition and bringing of the defendant to the International Criminal Court.

The question of co-operation, rendering of legal aid and extradition have further been worked out in the Rules of Procedure and Proving out of which the most resolute is Rule 58 which reads: "the obligations contained in Article 29 of the Statute shall prevail over all legal barriers bearing on the handing over or extradition of the defendant to the Tribunal if they exist in the domestic legislation and agreements on extradition which the state in question has concluded".

Comparison of the quoted provision of the Statute and the Rule of Procedure and Proving, as well as the previously cited decision of the Security Council under which the states are called (bound) to co-operatin with the Tribunal discloses great contradictions. Thus, Rule 58 regulates that no legal barriers provided for in domestic legislatures or agreements, not even the basic barrier provided for in modern legislatures not to extradite domestic citizens can stay on the way of carrying Article 29 of the Statute into effect (rendering of aid until extradition). On the other hand, the cited decision of the Security Council (from Point 4), according to which the states are called to co-operation with the Tribunal, suggests that they should do that "taking necessary measures in keeping with the domestic legislature". Consequently, on the one hand, there can be no any barriers in the domestic legislatures and agreements to render aid in extradition and, on the other hand, the necessary measure of co-operation are taken in keeping with the domestic legislatures. This exclude each other or the latter should be brought into harmony, that is, amended so that the former could be fully passable, because exactly the barrier to realization of the requests of the Statute of the Tribunal and the Rules of Procedure and Proving or better to say realization of political or other power of the creators of the Tribunal is contained in the regulations of the modern domestic legislatures on rendering legal aid and extradition.

And it was exactly under Resolution No. 827/93 that the Security Council has bound the states to amend the legislature so that the request of the Tribunal could be satisfied without violating the domestic legislature, because the moderators of the "new international law" are aware that the states, under the domestic norms of highest degree (consti-

tutional norms) prohibit extradition of their citizens. Passing such decision the Security Council has forgotten or overlooked that on the very problems, specified as criminal acts of genocide (indictments against individuals have earlier been brought by the Hague Tribunal for criminal acts of genocide, and the state of the Federal Republic of Yugoslavia has been accused by Bosnia and Herzegovina for the criminal act of genocide), nearly 50 years ago a Convention on Preventing and Punishing Crimes of Genocide was passed by the General Assembly. In that Convention, Article VII lays down: "The contracting parties undertake in such cases to approve extradition pursuant to their legislature and agreements in effect". As it can be noticed, this Convention is also unambiguous in the provision that domestic citizens should not be extradited.

It is interesting how the states have accepted the obligation to adapt their legislatures for the purpose of co-operation with the Tribunal. Four years after the binding resolution was passed the president of the Tribunal informed the Secretary-General of the United Nations in 1997 that twenty states had passed such legislatures (Austria, Australia, Belgium, Bosnia and Herzegovina, Croatia, New Zealand, Norway, Sweden, Spain, Switzerland, Great Britain, USA, Denmark, France, Finland, Germany, Hungary, Island, Italy and Holland), four states reported that their legislatures need not be amended because the existing ones provide maxim co-operation with the Tribunal (Russian Federation, Republic of Korea, Venezuela and Singapore), while eight states reported that they were going to innovate their legislatures in the sense of the request of the Tribunal (Canada, Turkey, Poland, Romania, Slovakia, Sri Lanka and Luxembourg).[20]

Consequently, a small number of states (less than 10%) have accepted the requests from the Resolution, and a closer look at the law texts of states which have passed them[21] reveals that only several of them accept the thesis on immediate obligation of states to perform the order of the Tribunal without delay, while most of the states condition the performance of the order by carrying out a special procedure and passing a decision of a competent national organ on the acceptance of the order of the International Criminal Tribunal.[22]

Thus, for example, neither the United States nor France have succeeded in achieving the co-operation with the Tribunal in keeping with the attitudes of their governments and the regulations passed. The American courts, known for their loyalty to the Constitution of the United States, but not to the political attitudes of the government, refused to carry out the requested extradition of an accused person, citizen of Rwanda, to the International Criminal Tribunal for Rwanda, having found that there were no assumptions provided for under the Constitution of the United States, while the French government sustained over a long period of time the attitudes of their generals who refused to appear before the Hague Tribunal as witnesses.[23]

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[20] UN documents, A/52//375/, S/1997/729, p. 38.

[21] The laws that were passed for the purpose of co-operation with the Tribunal were published in "Medjunarodni krivični tribunal" by Dr. Vladan Vasiljević et al. published by Prometej, Beograd, 1996.

[22] Dr. Miodrag Mitić, Odnos država prema Medjunarodnom tribunalu za gonjenje lica odgovornih za ozbiljne povrede medjunarodng humanitarnog prava na teritoriji bivše SFRJ, Medjunarodna pravna pitanja i haški tribunal, Pravni fakultet, Beograd, 1997, p. 149.

[23] Dr. Budimir Košutić, Obaveza država da saradjuju sa Medjunarodnim krivičnim tribunalom za bivšu SFRJ, a report read at the International Conference on Trials for War Crimes organised by the Fudn for Humanitarian

Governing with the states, which have allegedly adapted their legislatures to the requests of Resolution, Statute and the Rules of Procedure and Proving, is the so-called illusion of outwardness. Given here is only the example of Germany.

To demonstrate her alleged co-operation with the International Tribunal, Germany has passed a Law on Co-operation with the International Tribunal, which, although nowhere written in the law text, does not permit extradition of domestic citizens to the Tribunal because it is expressly forbidden according to Article 16 of the German Constitution. In preparing the Law there were proposals (Liberal Party) the constitutional norm on the prohibition of extradition of domestic citizens to be transferred into the Law, but that was refused so that the Law might make impression that it refers to everybody. Thus, nothing has changed in essence, and everything was presented to the world public as a great change and adaptation to the requests of the Tribunal. However, legal grounds were created for Germany to extradite many foreigners living on her territory, unfortunately only the Serbs so far, to the Hague Tribunal, although everybody knew that her citizens took part in paramilitary formations in Croatia and Bosnia and Herzegovina committing horrible crimes.[24]

A close study of the law solutions of other states out of twenty "most co-operative", as it is usually said, where a series of provisions contradicts the provisions of the Statute of the Tribunal and the Rules of Procedure and Proving, increasingly proves the fact that it is really a minor number of states that are ready to carry out, without limitations, the request from the aforementioned acts. Rightfully, a question may be posed what the reason is for such rejecting conduct of most of the states of the world community. We think that this is, to a great extent, as its is pointed out in literature, the consequence of neglecting the fundamental objections made, not only by the states, but by a great number of scientists in the field of international law, that establishment of an international criminal court, even that ad hoc such as the Hague Tribunal, cannot rashly and easily be left to the competence of the Security Council.[25]

3. As we have already pointed out, the legitimacy of the Hague Tribunal may also be estimated by the fact how many states have expressed readiness that the Hague convicts serve their punishments in their prisons.

Article 27 of the Statute of the Tribunal speaks about the execution of a sentence, which provides for that the prison sentence will be executed in the state indicated by the International Tribunal from the list of states that have expressed their will to the Security Council to accept the convict. The execution of a sentence will be realized according to the applicable law of that state, controlled by the Tribunal. This is repeated in Rule 113, while Rule 114 prescribes that each service of the prison sentence shall be supervised by the Tribunal or a body to be decided by the Tribunal.

Although seven yeas have passed from the establishment of the Tribunal, very few

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Law, Beograd, 7-8 November, 1998, page 3.

[24] Thus, Eugen Kamerer, a German, told to a journalist of Fokus that over 1000 foreigners, mainly Germans, took part on the Croats' side, some of them on the Moslems' side as well in the war in Croatia and Bosnia and Herzegovina. See Dr. Mitar Kokolj, Medjunarodni krivični sud za prethodnu Jugoslaviju (Kome se sudi u Hagu?), Beograd, 1995, p. 144.

[25] Dr. Miodrag Mitić, op. cit., p. 149

states have expressed will to be on the list of states for execution of the sentence (as far as we know to date those are Denmark, Finland, Norway, Sweden, Germany, Italy, Pakistan, Iran, Croatia and Bosnia and Herzegovina), some of which have set additional conditions (such as to accept only their own citizens or persons who are residents in those states and the like).

To conclude: if only a small number of states, over that period of time since the establishment of the Tribunal, have expressed readiness to adapt their legislatures for the purpose of co-operation with the Tribunal, and even fewer number of states have shown readiness for execution of the sentence, then this proves that the way taken from the very establishment of the Tribunal is a wrong one, which is the way of politics instead of the way of law.

LEGALITET I LEGITIMITET MEDJUNARODNOG TRIBUNALA ZA SUDJENJE LICIMA ZA KOJA SE PRETPOSTAVLJA DA SU ODGOVORNA ZA TEŠKE POVREDE MEDJUNARODNOG HUMANITARNOG PRAVA UČINJENE NA TERITORIJI BIVŠE JUGOSLAVIJE (HAŠKI TRIBUNAL)

Drago Radulović

Za osnivanje medjunarodnog krivičnog suda važi načelo nulum forum sine lege, što znači da se on može osnovati samo odgovarajućim medjunarodnim krivičnim aktom. Pojam "zakon", odnosno "zakoniti sud" u medjunarodnom krivičnom procesnom pravu posmatrano u svjetlu medjunarodnog ugovornog prava, kojim putem treba doći i do medjunarodnog krivičnog suda. Odredba člana 29 Povelje UN na koju se Savjet bezbjednosti poziva daje pravo Savjetu da formira pomoćne organe radi preduzimanja mjera iz čl. 41 i 42 Povelje, ali se takve mjere preduzimaju samo protiv država, a ne pojedinaca. Zato osnivanje suda ne može da predstavlja prinudnu mjeru za održavanje, odnosno uspostavljanje mira i bezbjednosti.

Ključne reči: *Medjunarodno pravo, medjunarodno krivično pravo, medjunarodne organizacije, medjunarodni krivični sud, haški Tribunal, Savjet bezbjednosti, Povelja UN, medjunarodni odnosi, medjunarodna saradnja, medjunarodna pravna pravila, ugovori, pravni osnov, legalitet, legitimitet*