STUDENTS FORUM

International Criminal Tribunal for the Former Yugoslavia: Legal Basis for the Establishment

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1. Introduction

The International Criminal Tribunal for the former Yugoslavia (ICTY) was established by a UN Security Council resolution No 827(1993) which was passed on 25 May 1993. The Tribunal has considered and decided many cases in the over ten years of its existence although the legitimacy of the decisions made about the establishment of the Tribunal itself have been questioned. These questions exist on a scientific level in an absolutely theoretical view and come up periodically between the parties in cases considered by this Tribunal. So far, it has been only the defence which has challenged the jurisdiction of the Tribunal.

The civil war, which broke out in the former Yugoslavia in 1991, escalated strongly in a very short period of time with the victims of the armed conflict having reached an unbelievable number. A major part of the population became victims of violence, torture, inhuman treatment and other criminal actions with the conflict having been especially severe in Bosnia-Herzegovina.

The UN Security Council (hereinafter Security Council), deeply concerned by such a situation, passed several Resolutions dating from 25 September 1991 in which strict warnings were given to the parties who were urged to observe the rules of international humanitarian law.[1] When these rules ultimately failed and were found to be ineffective, the Security Council adopted the Resolution No 808(1993) in which it decided that "an international tribunal would be established for the prosecution of persons responsible for serious violations of international law committed in the territory of the former Yugoslavia dating from 1991".[2] Under the same Resolution, the UN Secretary General was requested to submit a report on all aspects of this matter and the proposals for the establishment of this tribunal at the earliest possible date. Resolution No 827(1993) of the Security Council about the establishment of the International Criminal Tribunal for the former Yugoslavia was formally announced on 25 May 1993 with the same Resolution providing for its Statute. Subsequently, on 11 February 1994, the rules of procedure and evidence on the basis of Article 15 of the State were adopted. These two documents have served as the basic legal framework of the Tribunal.

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[1] See No 713(1991), No 764(1992), No 771(1992), No 780(1992) Resolutions of the UN Security Council.

[2] Resolution No 808(1993) of UN Security Council of 22 February 1993, §1.

2. Background

There is a concern from the point of legal theory regarding an *ad hoc* tribunal which then becomes established as a judicial body. The question raised, most precisely, is about the disputability of such a body as a fair and impartial judicial authority: What is an *ad hoc* tribunal? Justice or the victor's justice?

In modern history, the idea of a similar tribunal emerged at the end of WWII when, in a more or less modern manner[3] at the initiative of the winning allies, the tribunal for German and Japanese war criminals was held in Nuremberg and Tokyo, almost concurrently. Although the legal issue of these two tribunals is a different subject matter, it should be mentioned briefly that the tribunals have more to do with the past than with the later period. It was a typical "victor's justice" in a more civilised manner and, in most cases, the court's sentence was known in advance. For the violations of the rules of international humanitarian law and of international customary law, moreover, it was only the representatives of the defeated party who were prosecuted whereas there is historical evidence that numerous other similar actions were also committed by the allies (USSR, USA, UK). As for the so-called "holocaust,"[4] the other countries of the world watched calmly, it can be observed, as the then German Government conducted its brutal acts which were considered to be a part of the country's domestic affairs in the period preceding WWII. This was confirmed by the 1936 Olympic Games in Berlin in which almost no country objected to participate in the competition. The inadmissibility of the "holocaust" and the need to punish those who committed the crimes occurred to the minds of the leading states of the world only when they had won the war.

The Nuremberg and Tokyo tribunals, nevertheless, are very important for the development of international criminal law. First of all, they could be considered as a link between the historical past and modern international criminal justice. In addition, they significantly contributed to the prevention of grave crimes and crimes against mankind. It was during the Nuremberg Tribunal that aggression was classified for the first time as the gravest international crime. The most significant change to come out of the establishment of the Nuremberg and Tokyo Tribunals was the realisation of the international community of the need for an international criminal tribunal on a permanent basis. The reason was in the form of a contradiction. On the one hand, the actions committed by Nazi Germany and Japan could not have remained unpunished. On the other, the justice administered by the allies was obviously a "victor's justice" and not a justice serving for the establishment of fairness and for finding the truth. The logical explanation of this

[3] This was unlike in previous centuries when the winner of a war would formally call the punishment of a defeated party a tribunal. All instruments applicable by the modern court were applied at these trials.
[4] Between 1933-45, the Nazis exterminated 4-6 million Jews.

contradiction was that there was no court in the world which could prosecute people for grave international crimes.

The next important step in the legal evolution of the *ad hoc* tribunal was the international criminal tribunals established in the beginning of 1990s, almost simultaneously, for the former Yugoslavia and Rwanda. Despite the passing of nearly 50 years, the main question of the legal nature of such a tribunal; that is, an *ad hoc* tribunal justice or a victor's justice" remains. In order to find the answer to this question, it is necessary to check the legitimacy of the decision made on the establishment of the Yugoslavia Tribunal and the international legal documents and substantive law which served for its establishment and which specified the scope of the UN Security Council, as the body establishing the Tribunal, for the establishment of such an organisation.

3. UN Security Council and Applicable Law – Correctness of Application

The Yugoslavia Tribunal is a subsidiary organ of the Security Council whereas the Security Council is the principal organ of the United Nations. In order to determine the legal nature of Tribunal, therefore, we should consult what is written in the UN Charter[5] regarding such a Tribunal. Paragraph 1 of Article 7 of the Charter lists the principal organs of the United Nations whereas paragraph 2 states that "Such subsidiary organs as may be found necessary may be established in accordance with the present Charter."[6] According to this Article, the UN may establish any kind of organisation in the form of a subsidiary organ in order to implement the purposes and objectives within the limits of its scope. The UN's competence regarding the situation in the former Yugoslavian territory during 1991-95 is, in all certainty, unchallenged. Its competence derives from Article 1[7] of the UN Charter which sets the Organisation's purposes and principles[8] as well as from the principle of the delegation of powers to this Organisation by the Member States of the UN[9]. If we presume that it was necessary to prosecute persons who committed the gravest of crimes, when their role within is determined beyond all doubts, and if we consider that this was not done in due course within national jurisdiction – when there is sufficient grounds to believe that such prosecution might not have been undertaken or might have been inefficient – we can consider that the creation by the UN of the *ad hoc* tribunal for Yugoslavia was necessary following the obligations of the Organisation and legitimate insofar as there was no

[5] See the UN Charter, adopted on 26 June 1945 in San Francisco, USA.
[6] See the UN Charter, Article 7.2, source www.un.org (hereinafter the translation in Georgian by the author).
[7] See UN Charter, Article 1.
[8] These are: to maintain international peace and security, to suppress acts of aggression, to develop friendly relations amongst nations and to achieve international co-operation in solving international problems including those in the fields of humanitarian and human rights issues.
[9] This power means automatically entitling the UN to take necessary measures for the implementation of its purposes and principles if the state fails to do it within the framework of its national scope and jurisdiction.

previously existing permanent authority to administer international justice which would have been able to perform this function.

It is another matter whether or not it was necessary and legitimate to establish the Tribunal as an auxiliary of the Security Council and not as a body directly supporting the UN when, in fact, there were apparent grounds for its establishment directly under the auspices of the UN. In legal terms, there could have been two reasons: 1. The Security Council has a priority competence over the establishment of this tribunal, 2. There is an equal or parallel competence and for some particular reason the choice was made in favour of the Security Council.

When it comes to establishment of the tribunal under the auspices of the UN, we are referring to the General Assembly which is the principal organ of the Organisation. Despite the fact that Article 7 paragraph 1 of the UN Charter lists some principal organs[10] of the Organisation, it does not address the supremacy of the General Assembly. The function of this organ as a principal organ of the UN is given in Article 10 of the Charter according to which "The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12..."[11] As for Article 12, it is written as follows: "Whilst the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests".[12] On the one hand, it is apparent from these two articles that the General Assembly is the principal organ of the UN however, on the other hand, the General Assembly has an equal or parallel competence on certain issues with all other organs of the UN except the Security Council. Consequently, it is very important to see how a situation will qualify to fall within the scope of one of these two organs given the fact that the functions between them is strictly separated and, should the situation fall within the competence of the Security Council, it is the Council which will run the case at its own discretion. The UN Charter, unfortunately, is silent about which is the competent body and what is the mechanism for categorising an issue under the competence of a particular organ of the UN. In fact, there is no such mechanism. The Security Council can independently announce that an issue falls within its scope or not and, if so, there is no way to check its competence over this issue.[13] We should begin our investigation from Chapter V

[10] General Assembly, Security Council Economic and Social Council, Trusteeship Council, International Court of Justice, Secretariat, amongst others.
[11] See UN Charter, Article 10.
[12] See UN Charter, Article 12.1.
[13] The point is that the United Nations, established after WWII, was based mainly on the so-called realist principle and should have protected the interests of the then five biggest states of the world (USA, USSR, UK, France and China). This created the broad and inevitable power of the Security Council (all five countries are permanent members of the Security Council and are entitled to veto the decision of this UN organ) which is considered as one of the main reasons for the need to reform the UN system in line with the new global circumstances of the world today.

of the UN Charter as is dedicated to the Security Council. Article 24 provides for the functions and powers of this organ as follows:

"1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII".[14] This Article states that the Security Council's objective is to ensure international peace and safety and in this it enjoys the principle of delegation of states' powers which it can apply independently and at any time. Moreover, the reference is made to the Chapters of the UN Charter which cover the issues falling within the terms of reference of the Security Council. Resolution No 827(1993) of the Security Council, which refers to the establishment of the Tribunal for Yugoslavia, states that Security Council "operates on the basis of Chapter VII of the UN Charter".[15] Chapter VII, then, should contain the legal basis proving the legitimacy of the Yugoslavia Tribunal as an international criminal judicial body within the composition of the Security Council. Further important is Article 29 of the UN Charter which states that "The Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions".[16] From this Article one could conclude that the last step towards checking the legitimacy of the Yugoslavia Tribunal is to find whether or not the establishment of such a Tribunal falls within the mandate of the Security Council under Chapter VII of the UN Charter.

It is worth mentioning that although the Security Council's Resolution No 827 (1993) refers to Chapter VII of the UN Charter as a legal basis for the establishment of the Tribunal, it does not specify a substantive norm which stipulates that the establishment of an *ad hoc* tribunal administering the international criminal justice is the function of the Security Council. Indeed, none of the Articles[17] of Chapter VII makes neither a direct nor indirect mention of the functions of the Security Council to establish the judicial body for ensuring the fulfilment of the duties imposed thereupon. In cases heard by the Tribunal itself, therefore, the defence has many times raised the issue of the jurisdiction of this judicial body.[18] There is, for example, the case of Prosecutor v. Tadic[19] wherein the lawyers for Dusko Tadic challenged the jurisdiction of the Tribunal on two occasions; first, before the Trial Chamber, and second, before the Appeals Chamber. One of the arguments of the Defence was that there was no par-

[14] See UN Charter, Article 24, paragraphs 1 and 2.
[15] See UN Security Council Resolution 827(1993) of 25 May 1993, paragraph XII.
[16] See UN Charter, Article 29.
[17] See UN Charter, Articles 39-51.
[18] See, for example, the following cases: Prosecutor v. Tadic, Prosecutor v. Kordic and Cerkez, Prosecutor v. Slobodan Milosevic.
[19] See Prosecutor v. Tadic, Case No. IT-94-1 (Decision of 7 May 1997).

ticular substantive norm which allowed the Security Council to establish such a judicial body. The Trial Chamber denied the motion and decided that it was incompetent to make a decision on the legal foundation of the Tribunal. The Defence appealed this decision before the Appeals Chamber which, although it agreed with the argument of the Defence that the establishment of an international criminal tribunal was not directly provided for in the enforcement measures under Chapter VII of the UN Charter – namely Articles 41 and 42 – on the basis of a broad interpretation of the norm found that the list of measures under Article 41 was not exhaustive. Consequently, the Appeals Chamber found that the establishment of the international tribunal falls within the scope of the Security Council as one of the measures not expressly provided for.[20] In order to determine whether or not this measure should have been "implied" in Article 41, it is necessary to examine its contents: "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions and it may call upon the Members of the United Nations to apply such measures. These may include 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".[21] The phrase in the second sentence of this Article "include" means that the general measures which contain its sub-measure as one of the listed ones are, by nature, homogeneous with these measures. Since it is impossible that a general rule of conduct regulating one particular relationship could contain a measure absolutely different by nature, we can conclude, according to the definition of this Article and on the basis of logical thinking, that measures not related to the use of armed forces but falling within the scope of the Security Council, by their meaning, include isolation, embargo, economic and political sanctions. It should be further noted that this has nothing to do with administration criminal justice in any form. Even if we consider that the principle of "implication" is an applicable legal instrument, then, which is quite disputable[22] in jurisprudence, we will still come to the conclusion that the margins of its logical admissibility[23] were clearly exceeded.

Another important argument proving the unlawfulness of the establishment of the Yugoslavia Tribunal as a subsidiary organ of the Security Council is that in so establishing this Tribunal within its scope, the Security Council established a subsidiary organ and granted it the powers that it did not possess itself. Had the Tribunal been established under the auspices of the UN, it would have been established by a legally competent organisation and, under the principle of delegation, it would have been entitled to powers legally enjoyed by the entitling organ. Together with many other arguments, this issue was also

[20] See Prosecutor v. Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, App. Ch., 2 October 1995, §§. 33, 35, 36. Source: www.un.org/icty/judgement.htm.
[21] See UN Charter, Article 41.
[22] This principle is applied in the Anglo-American (Common) law system. It is denied, in practise, by Roman-German (Continental European) legal doctrine.
[23] Determination of these margins in common law system is the mandatory approach when applying the principle of "presumption" to prevent the continuous interpretation of the norm.

challenged by Dusko Tadic's lawyers with regards to the illegitimacy of the Tribunal.[24] The Chamber answered that the Security Council was entitled to establish a subsidiary organ to which it could have given powers which the Council itself did not possess. Evidence of this is found in two examples of the establishment of such subsidiary organs by the Security Council, to which, in the opinion of the Chamber, it gave such powers; namely, the United Nations Emergency Force in the Middle East (UNEF), established in 1956, and the United Nations Administrative Tribunal (UNAT). A detailed analysis of the functions and purposes of these two organs shows, however, that the Yugoslavia Tribunal has essentially nothing to do with either of them and an analogy is without justification.[25]

4. Attempts at Justification

Being mindful that the Security Council has no superior, equal or parallel competence over the establishment of the Tribunal under the auspices of the UN, there arises a logical question: Why was such a decision made? In the main, the answer to this question goes beyond a legal scope and reaches more political interests although a certain amount of legal reasoning also exists within. The Report of the UN Secretary General of 3 May 1993, No S/25704, made on the basis of § 2 of No 808 Resolution of Security Council is a good example.[26] This report concerns issues relating to the organisation of the Tribunal and the legal issues which will guide it. The Report became effective under No 827 Resolution of the Security Council[27] which, as stated above, approved the Tribunal and the Statute. It is interesting to consult Chapter I of the Report under the name "Legal Basis for the Establishment of the International Tribunal"[28] in which the Secretary General states that the Resolution does not indicate how such an international tribunal is to be established.[29]

It is stated in the beginning of the Report that "in the normal course of events" the establishment of an international tribunal would be the conclusion of a treaty which "would be drawn up and adopted by an appropriate international body (for example, the General Assembly or a specially convened conference)"[30] following which it would be opened for

[24] See Prosecutor v. Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, App. Ch., 2 Oct. 1995, §§27-40. Source: www.un.org/icty/judgement.htm.
[25] See in detail: *Mikhailov*, About the Legitimacy of International Tribunal for Former Yugoslavia, Observer, 2004, No 1(168), www.rau.su/observer/N1_2004/1_12.htm.
[26] § 2 of No 808 Resolution of UN Security Council: "Requests the Secretary General to submit for consideration by the Council at the earliest possible date, and if possible no later than 60 days after the adoption of the present resolution, a report on all aspects of this matter (establishment of Tribunal – T.A.), including specific proposals and, where appropriate, option for the effective and expeditious implementation of the decision contained in paragraph 1 above (establishment of Tribunal – T.A.), taking into account suggestions put forward in this regard by Member States".
[27] See UN Security Council Resolution No 827 (1993), §1.
[28] See Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808(1993) – 1. The Legal Basis for the Establishment of the International Tribunal (§§18-30). Source: www.un.org.
[29] See Report, §18.
[30] The Charter of the International Criminal Court, the Rome Statute, was later adopted at this kind of conference.

signature and ratification.[31] As further mentioned in the Report, this also would allow the States to exercise their sovereign will."[32] The introduction, which precedes Chapter 1, also indicates that "the Decision (on the establishment of the Tribunal) does not relate to the establishment of an international criminal jurisdiction in general nor to the creation of an international criminal court of a permanent nature with issues which are and remain under active consideration by the International Law Commission and the General Assembly".[33] Paragraphs 12 and 19 clearly demonstrate that the party who initiated the establishment of this Tribunal agrees that this issue falls within the terms of competence of the UN and not the Security Council. Simply, the reference is made to the Security Council because it is a Force Majeure situation. In order to substantiate this provision, the Report says: "The involvement of the General Assembly in the drafting or the review of the statute of the International Tribunal would not be reconcilable with the urgency expressed by the Security Council in resolution 808 (1993)."[34] Further, the discussion is followed by the argument that transferring the competence of another organ to the scope of the Security Council is caused by the need for urgent measures to take place for the restoring and maintaining of international peace and security. Within, one of these measures is the establishment of the Tribunal.

In order to see whether or not the above mentioned measure was effective for such purposes, it is enough to look chronologically through the events that took place on the territory of the former Yugoslavia. The Tribunal, which was established quickly and should have efficiently stabilised and settled the conflict, was begun on 25 May 1993. The agreement between the parties involved, which put an end to mass armed conflict, was reached on 14 December 1995 however thousands of people continued to die during these two and a half years. Consequently, the principle which served as a legal basis for the establishment of the Tribunal within the system of Security Council – the end justifies the means – was not implemented. Neither the establishment of the Tribunal nor any other measures employed succeeded in leading to the efficient and expeditious restoration of international peace. The reason for this is not because the initiators of this process did not know in advance that it would not work but, instead, because the judicial body has never before and could never perform the task of peacekeeping. Its aim was to maintain law and order and to prevent their violation and not to establish these realities if they did not exist. The authors of the idea, in terms of their occupational liability and duties, should have been aware of the limitations of the process they proposed.

The argument made in the Report of the UN Secretary General on the legal basis for the establishment of the Tribunal can prove this point as well. It should be mentioned that the Report itself states that in its preparation, consultations and suggestions were put forward by 30 states around the world. After reading the list of these particular states, it becomes certain that these include almost all of the countries which formed the so-called "political climate" as it was at the time. Moreover, the list of these states represents the

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[31] See Report, §19.
[32] *Ibidem.*
[33] See Report, §12.
[34] See Report, §21.

interests of almost all the political and strategic groups[35] and this and provides a reason to believe that the appeal made to the General Assembly was with a different aim than only raising the issue with a fear of delay. As stated in the report of the Secretary General: "the Secretary-General has taken into account suggestions or comments put forward formally or informally by the listed Member States since the adoption of resolution No. 808 (1993)".[36] If it was possible to have such consultations in this situation, we can surmise, then, that nothing would have precluded from such consultations within the format of the General Assembly or a specially convened conference.

5. Conclusion

The United Nations, as an organisation established on the basis of the realist principle after WWII, aimed to exercise the will of those states dominating world affairs in that particular period. An intolerance of the need for changes required by the time has caused the forced stagnation of the principle of realist theory. Consequently, mankind has not made a step forward for 50 years in one of the aspects of the most important field of international law. The International Criminal Tribunal for the former Yugoslavia, like the Nuremberg and Tokyo Tribunals, still raises the question: *ad hoc* tribunal – justice or a victor's justice?

[35] These include: Australia, Austria, Belgium, Brazil, Canada, Chile, China, Denmark, Egypt, Germany, Iran, Ireland, Italy, Malaysia, Mexico, the Netherlands, New Zealand, Pakistan, Portugal, the Russian Federation, Saudi Arabia, Senegal, Slovenia, Spain, Sweden, Turkey, the United Kingdom, the United States of America and Yugoslavia (present Serbia-Montenegro). Moreover, it has also received suggestions or comments from Switzerland, a non-member State, which became member of the UN in 2001).
[36] See Report, §13.