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Historical development of international criminal courts

Darko Radulović[a]

This paper deals with the historical development of international criminal courts. The need for the establishment of an international criminal court has always been tied to armed conflicts and wars in which the most severe crimes had been committed - and the entire international community would be interested in the trials - so international justice would not be served if the adjudication was carried out by national courts. Beside a short introduction, the work is divided into four parts. The first part covers the period before World War Two, the second encompasses the period after World War Two, where the emphasis is put on the Nuremberg and Tokyo ad hoc tribunals, the third part is dedicated to the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia (the Hague Tribunal) and the International Criminal Tribunal for Rwanda, whereas the fourth part addresses the permanent International Criminal Court. The establishment of the permanent International Criminal Court is undoubtedly one of the most significant events in the history of international criminal law. The creation of the last global institution of the 20th century implied at last the materialisation of the almost hundred-year-old idea of the establishment of a supernational court within whose jurisdiction would be the most severe international crimes.

KEYWORDS: International criminal law, court, crime, jurisdiction, proceedings, trial

[a] Assistant Professor, Faculty of Law in Podgorica, University of Montenegro.
E-mail: darko77@t-com.me; ORCID: https://orcid.org/0000-0002-7806-0973

Introductory remarks

What is especially important in the historical development of international criminal law is the issue of the historical development of international criminal courts as its significant constituents. On this path of development, two most significant issues - inextricably linked to each other - stand out. These include, on one hand, the codification of international criminal law, and on the other, the establishment of international criminal courts (Čejović, 2006, p. 50). The United Nations' efforts to form a permanent criminal court can, too, be followed in two aspects: the codification of the matter of international crimes and the work on drafting the statute of an international court (Cassese, 2005. p. 393; Bassiouni, 1998, p. 10). It is important to note here that international criminal justice did not develop in a straight line, and that its development could instead be followed in connection to some court or para-court cases and in certain historical circumstances, primarily linked with concrete wars and armed conflicts (Škulić, 2005, p. 25). These historical circumstances and the differentiation between the winning and the losing side in war were of vital importance when it comes to who would stand trial, whether there would be a trial at all and how the proceedings would be conducted. This is why it is difficult to talk about a single planned and continuous development of international criminal courts, let alone to say that since the very beginnings of the trials there already used to be an idea of the establishment of universal international criminal law and justice. We could rather say that this was a spontaneous process which mostly depended on the context of certain historical circumstances and relations among the political powers at the international level, with a prominent feature of all these processes: all of them, usually, came down to the winners of a war prosecuting the defeated (Škulić, 2005, p. 25). The literature states that the history of international criminal law - and of international criminal courts within its scope - is a history of political influence on its shaping and application, although this is the only obstacle for which science claims it had a twofold impact on international criminal law: as much as it is a burden for international criminal law, political influence is also necessary for its existence and activity (Ristivojević, 2012, p. 161).

Victor's justice could hardly be regarded as impartial and unbiased, insomuch as it could be universal in the application of law. We hope that there will be a breakthrough with the adoption, i.e. the acceptance of the Rome Statute on the establishment of the permanent International Criminal Court, regardless of the fact that its application is complementary in relation to the criminal legislation of the member states.

The idea of the formation of a single international criminal court has been present for a long time - it dates back to the 19th century - and it is the expression of an understanding of international courts as a means for the resolution of international disputes. The biggest obstacle to the embodiment of this notion was the concept of sovereignty as the basic characteristic of countries which prevented their subjugation to any government outside of their own borders (Milojević, 1997, p. 91). Having in mind the bumpy development of international criminal law and international criminal justice - we have observed on this path both periods of delay and periods of growth - the historical de-

velopment of international criminal courts shall be followed through several periods: 1) period before World War Two, 2) period after World War Two (Nuremberg and Tokyo ad hoc tribunals), 3) Hague Tribunal and Tribunal for Rwanda and 4) permanent International Criminal Court.

Period before World war two

Even though it is often stated how the history of international criminal justice began after World War Two, it should be said that the idea of the establishment of some kind of an international court emerged much earlier, as an expression of the need to sanction severe violations of humanitarian law. The roots of the laws of armed conflict and humanitarian law date back to Ancient History, where historical sources tell about crimes of such proportions which could be qualified as genocide today. In that context, there is the Roman destruction of Carthage and the slaughter of its inhabitants, then the Biblical description of the slaughter of the Canaanites after the Jews conquered Jericho and other events (Josipović, Krapac, Novoselec, 2001, p. 13). Parallel with the endeavour to humanise war, as the ultimate and inhumane means of conflict resolution, the idea evolved to create an appropriate judicial body with the task of establishing the criminal liability of persons who committed crimes in war. In that sense, during the Hundred Years' War (1337–1453), an idea came from the pope about a criminal court which would be competent for the prosecution of the perpetrators of the most gruesome crimes committed during wartime (Jovašević 2012, p. 112; Đurđić, Jovašević, 2003, p. 115). However, the first activities of such a court were recorded only in the 15th century. Namely, following the unprecedented crimes against the civil population in Breisach in 1474, the citizens of Breisach formed a multinational court comprising 28 judges, i.e. eight from said place and two from each of the surrounding regions (Alsace, Germany and Switzerland) where the Duke of Burgundy, Peter von Hagenbach, was put on trial, as the person responsible for the committed crimes "against natural law and the transgression of the laws of God and man," and was given a death sentence which was later carried out indeed (Bring, 2001, p. 12).

This trial - from the perspective of the criminal law standards of today - could hardly be called an international crime trial, but, as the literature points out, it certainly has a certain historical significance and it anticipated certain questions which play a highly important role in contemporary criminal law as well, especially in regard to superior orders, individual criminal responsibility and command responsibility (Škulić, 2005, p. 29).

The idea to establish a unique international criminal court is ascribed to the founder of the International Red Cross, the Swiss Gustave Moynier, who - horrified by the atrocities of the Franco-Prussian War - submitted in 1872 a proposal to the International Committee for Relief to the Wounded for the creation of an international court whose council would comprise five judges (one from each warring country and three from neutral countries). For that purpose, he prepared the draft rules of the International Criminal Court in 1878, whose jurisdiction would encompass the offences prescribed

by the Geneva Conventions of 1864 (Lombois, 1971, p. 23). This idea, like many before it, regardless of its noble nature, was not implemented, but there was a permanent effort in the commitment of individuals and professional institutions to bring the idea to fruition: the establishment of a permanent international criminal court. Obstacles that were in the way of implementing the idea to establish a permanent international criminal court were put there by the most influential countries which either refused to give their consent or avoided the ratification of already concluded treaties which provided for the establishment of such courts. The same fate befell the Hague Convention XII on the establishment of the International Prize Court in 1907, which was supposed to be a court of appeals against the judgments of national courts regarding the capturing of enemy property, i.e. the first-instance court if national courts would fail to resolve a case in two years. To make all this more absurd, all credit for the unsuccessful ratification of the Convention goes to the countries which got the main judicial positions in the court: Austria-Hungary, Germany, Russia, England, Japan and Italy (Radulović, 1999, p. 40).

The beginning of the 20th century brought new ideas aimed at the establishment of an international criminal court (Rascmany, 2001, pp. 608-625). A modified concept of warfare, radicalised to a terrifying extent, with the use of the latest technical achievements, often without a real military need, mobilised the international community to come up with a way and to find the resources to combat this evil (Palević, 2001, p. 195). Thus, following the end of World War One, at the Supreme Council Conference held on 4 December 1918 in London, England, France and Russia agreed to put the German Emperor Wilhelm II and a large number of accomplices, both military personnel and civilians, on trial before an international court. For that purpose, the so-called Commission of Fifteen was established at the Paris Peace Conference of 1919, whose task was to analyse all the materials and submit a report to the Conference. Because of the great powers' opposing opinions, the question of the above persons' responsibility became even more obscure, so Article 227 of the Treaty of Versailles of 28 June 1919 prescribed that "the Allied and Associated Powers publicly arraign William II, German Emperor, for a supreme offence against international morality and the sanctity of treaties." Despite the fact that Article 229 of the Treaty provided for the possibility to establish an international criminal tribunal, where each power would appoint one member, this didn't happen and the courts of the interested countries were pronounced competent. The Dutch government refused to extradite Wilhelm II who went into exile in the Netherlands following the abdication of 8 November 1918 (the Netherlands were not a party to the Treaty of Versailles). In doing so, it invoked two grounds: first, the offences for which his extradition was requested were not envisaged by the treaties which the Netherlands had with other countries and second, that the Netherlands, according to the legislation and tradition of the country, has always granted asylum to those defeated in international conflicts (Ignjatović, 1996, p. 46). Such a position of the Dutch government has been regarded as disputable, to say the least, because this concrete case deals with the obligations of a member of the international community towards that very community, and not with the relationship between individual countries on the basis of bilateral treaties on legal assistance (Vasili-

jević, 1968, p. 15). The only trial of war criminals whose guilt was significantly less severe in comparison to that of Wilhelm II was held before the Supreme Court in Leipzig, but only six persons were convicted in this trial (as many as the number of those who were exonerated), even though the Allies had compiled a list of 896 perpetrators.

Regardless of the poor results of the Treaty of Versailles regarding the delivery of justice, its importance must not be underestimated, because it emphasised several significant principles of international criminal law. In the first place, there is the emphasis on individual criminal responsibility, and not just the responsibility of the state as a legal entity, then the notion that war criminals should not only be tried before national courts, but also before the courts of those countries where the crimes had been perpetrated, and even before an international court if such court is formed, and finally that a person's position and function do not justify the crimes committed.

The question of the establishment of an international court was relevant even after the end of World War One because of the exceptional work of the League of Nations (as the predecessor of the United Nations Organisation), since Article 14 of the League's Covenant demanded the establishment of an international criminal court, which was also supported by professional organisations in the field of criminal law. However, these activities didn't result in either the formation of a separate international criminal court or the extension of the competences of the Permanent Court of International Justice so they could encompass criminal matters. Consequently, the Allies' attempt to sanction the persecution and murder of more than six hundred thousand Armenians in Turkey failed, despite the recommendation of the Committee formed by the Allies in 1919 to prosecute and punish the persons responsible for these actions. There was no prosecution because the USA was opposed with the explanation that crimes against humanity had not been recognised by international law at the time when these acts were committed. The Treaty of Sèvres, concluded on 10 August 1920 between the Allies and Turkey, which laid the basis for the establishment of criminal responsibility, was never ratified, whereas the Treaty of Lausanne of 1923 granted amnesty to Turkey (Radulović, 1999, p. 41).

Following the assassination of King Alexander I of Yugoslavia and of the French Foreign Minister Louis Barthou in Marseille in 1934, an expert committee appointed by the League of Nations prepared two draft conventions. One was aimed to prevent and combat terrorism, while the other referred to the establishment of an international criminal court against terrorism which would enforce the former Convention. Great Britain objected to the establishment of the court, with the excuse that the preconditions for that had not yet been met.

In addition, international professional associations such as the International Law Association, the International Association of Penal Law and others, which brought together the leading figures of the time (Bellot, Pella, Caloyanni), pushed for the establishment of a permanent international criminal court, but the implementation of this idea had always been thwarted by non-legal reasons. Politics is the culprit for the obstruction of these ideas, so the literature points out that all global - and especially European - policies,

along with historical circumstances, were dominantly responsible for the fact that "until a new end, a new world war and a new division between the victors and the vanquished" no trial for international crimes could proceed, i.e. there was no practical application of international criminal law, which represents another very illustrative indicator of the direct impact of international and political factors and of the real balance of power among countries on the situation in the field of international criminal law (Škulić, 2005, p. 36).

Period after World war two (Nurenberg and Tokyo Tribunals)

The unprecedented atrocities committed by the Nazis in World War Two prompted the four great powers (the USA, Great Britain, the Soviet Union and France) to establish, through the London Charter of 8 August 1945, the International Military Tribunal in Nuremberg before which the highest ranking war criminals of the European Axis countries would stand trial. This act was preceded by the Declaration regarding the defeat of Germany of 5 June 1945 (signed on 8 May in Reims), which also contained provisions on punishment for war crimes. In a similar fashion, for the crimes perpetrated in the Far East, by the decision of the commander of U.S. Army Forces in the Far East, General Douglas MacArthur, the International Military Tribunal for the Far East was formed on 19 January 1946, with its seat in Tokyo. The establishment of this court was preceded by the Potsdam Declaration of 1945, by which the representatives of the above stated four powers decided how Japanese offenders will be punished in addition to the Nazi criminals of Germany. It should also be noted that the issue of punishing war criminals had an important place at the meetings of the state and government leaders of the Allies even before the London Charter was concluded. So, already in 1942, the Allied Forces signed a declaration in St. James's Palace in London establishing the UN War Crimes Commission composed of seventeen representatives of the respective countries. This Commission compiled a list of 8,178 cases (files) about persons who had been suspected of the most severe international crimes committed during the war, as well as a list of crimes by 750 Italian war criminals, committed in Ethiopia during the short war starting from 1935 (Jovašević, 2012, p. 114).

The Moscow Declaration of October 1943, signed by the Governments of the United States, the Soviet Union and Great Britain, stipulates that war criminals would be tried in those countries where they committed their crimes according to the laws of said countries, while criminals who had no special geographical localisation would be tried on the basis of a special decision of the Allied Forces (United Nations, Collection of Documents 1941-1945, Second Edition, Belgrade, 1947). Shortly thereafter, at the conferences of the Big Three (the President of the US, the British Prime Minister and the Leader of the Soviet Union) held in Tehran from 28 November to 1 December 1943, in Yalta from 4 to 11 February 1945 and in Potsdam from 17 July to 2 August 1945, it was agreed that the major German war criminals need to be put on trial (Smith, 1982, p. 120).

And, as we have stated above, these decisions (conferences) were embodied in the signing of the London Charter by the great-power victors on 8 August 1945, which established

the International Military Tribunal to which the Charter of the International Military Tribunal was annexed, for the trial of war criminals whose offences have no particular geographical location. Regarding those crimes for which the International Military Tribunal was not competent, the proceedings against their perpetrators were regulated by Law No. 10 of the Control Council for Germany which was adopted on 20 December 1945. These crimes came under the jurisdiction of zone courts (Germany was divided into four zones: American, Soviet, British and French) and of German courts authorised for adjudication. It is interesting that there were proposals (coming from Great Britain) that, after Germany's defeat, it was sufficient to capture and execute (on summary conviction) those who were primarily responsible for the creation and enforcement of the Nazi policy and that no time should be spent on legal proceedings, while lower-ranking war criminals should be tried before specially established tribunals (Smith, 1982, pp. 31-35). The Americans did not agree with this, and were backed by the Soviets, so the International Military Tribunal was formed in order to establish guilt for offences which had no particular geographical localisation. Several reasons were stated in favour of the position to resolve even the most severe crimes before a court and not on summary conviction. First, although the victors are putting the defeated on trial, this must be done through legal proceedings, because resolving a crime without a trial would negate the basic rule that no one shall be held guilty until proven guilty in a fair trial. Otherwise, they would resemble the Nazis, who often killed innocent people on summary conviction. Second, facing the Nazi crimes before the Nuremberg Tribunal would have a strong effect on the global public opinion, so the gruesome crimes of the Nazi state could be witnessed by all of mankind. The third reason for the resolution of Nazi crimes before the International Military Tribunal arose from the desire of the Allied Forces to do something for posterity, because the crimes committed by the Third Reich and its Nazi officials were so heinous that some trace had to be left about them. This could be achieved through a court trial, which was also envisaged as a way to compose a file of historical documents which would have disappeared had the Tribunal not been formed, and consequently would not have been able to serve as a history lesson for future generations (Cassese, 2005, p. 389).

The International Military Tribunal convened in Nuremberg from 20 November 1945 to 1 October 1946 and this was the first time in history that a judgment was passed and sanctions imposed by an international court for crimes against peace, war crimes, crimes against humanity and for participation in the preparation or execution of a common plan or conspiracy for the accomplishment of said crimes. Out of a total of 22 defendants, 12 were sentenced to death by hanging, three to life imprisonment, four received prison sentences ranging from 10 to 20 years, while three were acquitted. These trials brought the individual responsibility for international crimes to the fore, which some believe is the greatest legacy of the Nuremberg Trials (Mettraux, 2011, p. 5).

The trial of Japanese war criminals commenced on 28 April 1948 in Tokyo. Twenty-five accused ministers, diplomats and military leaders were brought before the tribunal, five of which were sentenced to death, sixteen to life in prison and two received 7 and 20 years in prison, respectively.

Regarding the accused associations, i.e. organisations, the Nuremberg Tribunal pronounced the following as criminal: Nazi Party leadership, Gestapo and SS (independent Nazi Party units).

The work of the Nuremberg and the Tokyo Tribunals didn't have any major differences. One difference, for example, was the fact that the Tokyo Tribunal could not pronounce some organisation as criminal, and the period under the jurisdiction of this court was longer.

After World War Two, international criminal law was implemented on multiple levels: the highest level of implementation was before the Tribunals in Nuremberg and Tokyo, where major military and political leaders were tried, the medium level covered trials before Allied military tribunals in the occupation zones of Germany and before US military tribunals in the Far East, while the lowest level included trials before the national tribunals of individual states (Bassiouni, 2005, p. 119).

The experience after World War One demonstrated how international justice can be compromised because of political needs, whereas the experience following World War Two showed the opposite: how efficient 'international' justice can be when there is an appropriate political will and necessary resources (Cassese, 2005, p. 391). However, it should be stated that even during the Nuremberg Trials, and afterwards, opinions were divided on many questions connected to the Charter and the trials (Heller, 2011, pp. 107-138).

The importance of the London Charter and the Charter of the International Military Tribunal as its integral part, observed from its legal perspective, lies in the fact that this was the first document in the field of international criminal law which entered into force and had certain legal effects. The ruling of this tribunal represents the technical finish of what had been prepared for decades and the most important step towards the punishment of perpetrators of the most severe international crimes (Milojević, 2012, p. 46). This broke the 'monopoly' on criminal jurisdiction in the most severe criminal cases which had thus far been vested in national courts. The literature contains opinions that the Nuremberg and Tokyo Tribunals were not international (but tribunals of the winners instead), nor were they independent, because in their proceedings they were following the instructions of the countries which had appointed the judges (Krivokapić, 2007, p. 44). Appointing judges from neutral countries to the tribunals - as was proposed by prominent names of that time, such as Hyde and Kelsen - would have contributed to their better impartiality and objectivity (Ristivojević, 2012, p. 163). There are opinions that these trials would have been even more significant had the Allies mustered the strength to make persons from their own environment stand trial as well, since there were those among them who could have been charged with certain international crimes, for it is almost impossible to deny the criminal nature of the bombing of civilians, near the end of the war at that (Škulić, 2012, p. 134).

Among other things, there are remarks about the disproportionate, and even frantic bombing of Hamburg (1943) and Dresden (1945) by British and American forces, not to mention the bombing of Hiroshima and Nagasaki at the very end of the war when, as the

literature points out, Japan had already been on the brink of collapse (Krivokapić, 2012, p. 45). Although the opinion prevails that these were military tribunals established by the victorious great powers, where the judges were military personnel subject to military discipline, there are contrary views as well. So, we can find the opinion that this was not an international, but rather an inter-Allied tribunal, which on top of that wasn't of a military nature, because the judges, as well as their deputies - except for the Soviet representatives - were civilians, and what also allows the possibility of contesting the 'military' nature is the fact that not all defendants were members of the military, while some crimes they were charged with weren't primarily military crimes (Degan, Pavišić, 2005, p. 10).

Various arguments are given in defence of the international character of the International Military Tribunal. In that sense, it is underlined that the foundation for that tribunal had already been laid in the Atlantic Charter of 14 August 1941 which provided for the punishment of war criminals, followed on 1 January 1942 by the United Nations Declaration which confirmed the readiness of all nations gathered in the democratic coalition to restore peace and to completely recover "human rights and justice" (Marković, 1965, p. 30). In addition, the fact that the London Charter was signed by nineteen countries (Vasilijević, 1971, p. 68), and that the General Assembly adopted the principles recognised by the Charter and by the ruling of the Nuremberg Tribunal entirely and without reservations, confirms the international character of this tribunal (Glaser, 1958, p. 630).

The criticism expressed during the trials by the defendants, and later voiced by theoreticians, came down to several issues, such as the issue of the legal basis for the responsibility for crimes against peace, then the retrospective application of the law, which implies the violation of the known principles of criminal law nullum crimen sine lege, nulla poena sine lege, etc. (Marković, 1973, p. 424).

Notwithstanding any objection to the tribunals in Nuremberg and Tokyo which claims that these supported victor's justice, and that they breached the principle of legality, these trials undoubtedly had their justification and were a much better solution than treating the defeated on summary conviction (Kittichaisaree, 2001, p. 20 in relation to Stojanović, 2006, p. 172). The Charter of the Tribunal and the Nuremberg ruling promoted certain principles of international criminal law such as:

1. individual criminal responsibility for international crimes,
2. the fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility,
3. the fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible government official does not relieve him from responsibility under international law,
4. the fact that a person acted pursuant to order of his superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him,

5. any person charged with a crime under international law has the right to a fair trial on the facts and law,
6. the crimes hereinafter set out are punishable as crimes under international law:
   a) crimes against peace,
   b) war crimes,
   c) crimes against humanity.
7. complicity in the commission of these crimes is also a crime.

The United Nations General Assembly Resolution 95 (I) of 11 December 1946 confirmed the principles of international law recognised by the Charter of the International Military Tribunal and by the ruling of that Tribunal, which is the best evidence of their importance and international significance. The literature states that, from a practical perspective, the Nuremberg and Tokyo trials paved the road for the establishment of new international tribunals, both ad hoc ones and the permanent International Criminal Court (Krivokapić, 2012, p. 41).

Ad Hoc Tribunals for ther Former Yugoslavia and Rwanda

The tribunals in Nuremberg and Tokyo were ad hoc tribunals which fulfilled their mission and dissolved, but they were the bridge for the establishment of one universal international court. The overall efforts of both individuals and international organisations following World War Two were directed towards establishing a permanent international criminal court and no one even thought about forming new ad hoc tribunals. In that sense, there were proposals as to how to accomplish the creation of such a court. So, building upon the fact that the rule nullum forum sine lege applies both to the forming of international courts and to the forming of national courts, there were three options to establish this court: establishment through a review of the UN Charter, by a UN General Assembly Resolution and by an international treaty (Janković, 1957, p. 55). The advantages and shortcomings of each of these routes to a permanent international criminal court were discussed at length. And when it was just a matter of time when a permanent international criminal court would be established, following numerous preparatory activities, especially by the International Law Commission, the United Nations Security Council Resolution 827 of 25 May 1993 established the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia (the Hague Tribunal). This demonstrated that a tribunal can be formed and a prosecution initiated even in cases when a military conflict has no winning and losing side (Crien et al., 2010, p. 133). A little over a year since the establishment of the Hague Tribunal, the Security Council Resolution 955 of 9 November 1994 established an ad hoc tribunal for Rwanda. The adoption of the Resolution on the establishment of the Hague Tribunal, which also implied the adoption of the Statute of the Tribunal, was preceded by a series of acts:

a) United Nations Security Council Resolution 780 of 6 October 1992 tasking the UN General Secretary with establishing an impartial Expert Commission to analyse the information "on serious violations of the Geneva Conventions and humanitarian law" in the territory of the former Yugoslavia.

b) General Secretary's Report to the Security Council (S/25274) of 10 February 1993, compiled on the basis of the Expert Commission's work on the violation of humanitarian law.

c) United Nations Security Council Resolution 808 of 22 February 1993 by which the General Secretary was requested to submit within 60 days a report on all aspects of the potential establishment of a tribunal and possible other options.

d) Finally, the General Secretary's Report (S/25704) of 3 May 1993 on the basis of which the Resolution on the establishment of the Hague Tribunal was adopted (Avramov, 1994, p. 443).

Since the very establishment of the Hague Tribunal, many questions were disputable and were met with different answers both among the professional and the general public. The primary disputable question was that of the legal grounds for the establishment of the Tribunal, i.e. whether Chapter VII of the UN Charter to which the Security Council refers gives the latter the authorisation to establish such an institution, whether it thereby assumes the competences of the 'legislative branch'. Furthermore, whether the tribunal can be a subsidiary organ to the Security Council in the context of Article 29 of the UN Charter, to what extent it can be independent and autonomous considering the manner of appointment of the tribunal's judges, how much it can contribute to restoring peace and preserving security, etc.

That the matter was not legally clear could be seen during the preparation of the Statute, because the already mentioned Resolution 808 of 22 February 1993 did not state the legal grounds and manner of establishment of the tribunal. Besides, in the already mentioned report (S/25704) of 3 May 1993, the General Secretary states: "The approach which, in the normal course of events, would be followed in establishing an international tribunal would be the conclusion of a treaty by which the States parties would establish a tribunal and approve its statute. This treaty would be drawn up and adopted by an appropriate international body (e.g., the General Assembly or a specially convened conference), following which it would be opened for signature and ratification."

Although the Resolution establishing the Hague Tribunal was adopted unanimously by the Security Council, the representatives of China, Brazil and Mexico made remarks regarding the legal grounds for its formation (Kokolj, 1995, p. 17; Matić, 1997, p. 477). The most heated discussion and the most divided opinions in the literature were generated by the issue of the legal basis of the Resolution on the establishment of the Tribunal. Before we set forth the differing opinions on this matter, we shall quote Article 29 of the UN 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 to 51) is titled "Action with Respect to Threats to the Peace", and it

refers to the activities of the Security Council. Pursuant to Article 39 of the Charter, the Security Council is authorised to determine the existence of any threat to the peace and to take measures to restore peace and security in accordance with Articles 41 and 42 of the Charter. The measures prescribed by Article 41 exclude the use of armed force, and may be complete or partial interruption of economic relations and of rail, sea, air, postal and other means of communication, and the severance of diplomatic relations. Should the Security Council consider that these measures would be inadequate or have proved to be inadequate, it may take, pursuant to Article 42 of the Charter, such action by air, sea, or land forces as may be necessary to maintain or restore peace and security.

From the above quoted provisions, it can be concluded that the Security Council may form subsidiary organs to perform tasks and take actions within the competences of the Security Council, including those for the restoration of peace and security; that these measures are taken towards states, and not towards individuals. This is why the establishment of a tribunal, be it a permanent or ad hoc tribunal, as stated in the literature, cannot represent an enforcement measure for the preservation or restoration of peace (Radulović, 2000, p. 10). It is stated that the Security Council could even rather dissolve some country's parliament or dismiss some head of state if it deems that this country poses a threat to the peace, than establish a criminal tribunal (Stojanović, 1997, p. 26). The international justice system which was in force at the global level prior to the establishment of the Hague Tribunal was the product of contractual relations, because a tribunal's contractual character is an important precondition for the enforcement of sanctions and - what is most important for tribunals - the contractual character of tribunals in the international community is a guarantee that they will not be under the control of a single country, or a group of countries, but independent and impartial forums instead (Avramov, 1994, p. 454). Besides, in his Report S/25704 of 3 May 1993, the UN General Secretary points out how the real approach in establishing an international tribunal would lead through the conclusion of a treaty, which would have to be signed by the countries, but at the same time he expresses doubts that this would require a long period of time, and there is also no guarantee that the countries would ratify the treaty. Therefore, he proposes a (legally dubious) shortcut in which the Security Council would establish a tribunal with reference to Chapter VII of the UN Charter and this approach, as stated by the General Secretary, would have the advantage of being expeditious and of being immediately effective as all States would be under a binding obligation to take whatever action is required to carry out a decision taken as an enforcement measure under Chapter VII of the UN Charter (Račić, 1997, p. 54). For the purpose of preserving peace and security, the Security Council may take various measures, including measures of a legal nature, but it cannot establish a tribunal, because the notion of a tribunal cannot be equated with the notion of a measure (Čavoški, 1998, p. 24), since this would on one hand be logically absurd, and on the other, it is in a certain way offensive to the judicial function which has a general moral significance as well (Škulić, 2005, p. 54).

Article 29 of the UN Charter does not state which types of subsidiary organs the Security Council may form, but the question is posed whether a judicial body can be

a subsidiary organ in the sense of the above Article. Subsidiary organs perform tasks within the competences of the principal organ for the purpose of efficiency and expeditiousness in certain situations, but such organs, by their nature, are not and cannot be independent, nor can they act autonomously, but only under the instructions of and within the mandate given by the principal organ (Security Council).

If the principal organ does not have a judicial function—and according to the Charter, the Security Council doesn't have one—then the subsidiary organ cannot have such a function either, because it has been known since Roman times that one cannot transfer to another more rights than he has. The nature of the Hague Tribunal, as has been stated in the literature, does not correspond to the role of a subsidiary organ of the Security Council, because the judicial function cannot be a subsidiary function - in national as well as international law - but rather a form of power, independent of other forms of power (Đorđević, 1997, p. 157; Milisavljević, Palević, 2010, p. 278). There are opinions that there is no need to delve into the discussion of this matter from a legal perspective, because this is a political solution to political problems placed before the Security Council at a specific moment of time (Stojanović, 1999, p. 8).

Unlike the previously voiced opinions, there are also opposite viewpoints according to which the Security Council is authorised to establish a tribunal for the purpose of the preservation of peace and security (Vasilijević, 1997, p. 399; Paunović, 1997, p. 126), and the fact that Article 41 of the Charter does not explicitly provide for criminal prosecution measures does not mean that the authors of the Charter wanted to limit the Security Council regarding the choice of measures which are considered the most adequate and appropriate to the situation (Obradović, 1994, p. 13). It is further added that the Hague Tribunal is both legally grounded and credible to serve international justice (Pocar, 2010, p. 67). Additionally, the establishment of an international criminal tribunal by a Security Council resolution obliges all UN members, which could not be achieved if the tribunal was established by contractual means (Bantekas, Nash, 2007, p. 514). Some support the opinion of the General Secretary, expressed in the above mentioned Report of 3 May 1993, that the International Tribunal is established with reference to Chapter VII of the UN Charter as a subsidiary body for the performance of its tasks, because in the criminal and political context, this manner of establishing a tribunal is much more expeditious, not just in comparison to the contractual establishment of a tribunal, but also in comparison to a decision adopted by the General Assembly (Krapac, 1995, p. 23). The critics of this position state that references to criminal and political reasons cannot be valid in this case, and the matter of expeditiousness has no legal significance in this case, because the criterion of the need for swift action cannot compensate for the legal fallacies of a certain decision (Škulić, 2005, p. 53). Some justify this shortcut in the establishment of the Hague Tribunal by the fact that it can hardly be expected of national courts to prosecute and punish war criminals, so if the Tribunal was to be formed contractually, that would (strictly speaking) satisfy the law, but justice would be sacrificed, thereby negating the maxim - acknowledged since the time of Cicero - that the welfare of the people should be the supreme law (Aćimović, 1997, p. 197).

Article 92 of the UN Charter states that the International Court of Justice is the principal judicial organ of the United Nations, which - according to some opinions - points to the possibility of the existence of other UN judicial organs as well, among which the International Court of Justice would be the 'principal' one (Etinski, 2001, p. 158). It follows from the foregoing that the Security Council may establish an ad hoc tribunal, but not a permanent international criminal court (Degan et al., 2011, p. 477). Therefore, the International Court of Justice is the principal judicial organ of the UN, the successor of the Permanent Court of International Justice formed in 1921, and this court is, inter alia, competent to provide advisory opinions to the UN General Assembly or the UN Security Council on all legal matters, which is why the literature contains criticism as to why the Security Council didn't request this court's opinion before the establishment of the Hague Tribunal (Etinski, 2001, p. 157; Antić, 2002, p. 137). It is further added that the main protagonists of the establishment of the Hague Tribunal shied away from the court's opinion and, instead of striving towards the creation of a permanent international criminal court, whose jurisdiction would be limited neither in terms of time nor space, steps were taken to establish individual ad hoc tribunals, whose selection primarily depends on the leading powers in the Security Council (Đorđević, 1996, p. 4).

What can be said after these discussions on the legality of the Hague Tribunal? It is a fact that, in international trials, both factual and legal questions are extremely complex (Cassese, 2003, p. 398). Although there are disagreements regarding the legal basis of the decision on the establishment of this tribunal, no one disputes the imperative to punish war criminals in the territory of the former Yugoslavia, because that is the sacred duty of organised international justice. The question is posed: if there wasn't a permanent International Criminal Court already in place, what would have happened if the Hague Tribunal wasn't formed and if the national courts were entrusted with the prosecution of war criminals, or if the trial had to wait until the establishment of the permanent International Criminal Court (Boas, 2011, p. 52). Being aware of the circumstances in the countries of the former Yugoslavia, we believe that those who were charged before the Hague Tribunal would rarely be tried before the national courts. They might have even occupied important positions in their social and working environments. Besides, as far as we know, none of those who were charged before the Hague Tribunal had previously been charged with those crimes in their respective countries. Having all this in mind, irrespective of the fact that ad hoc tribunals cannot be freed from political influences, reasons of justice nevertheless justify the establishment of this tribunal, or in plain words: we are better off even with the Hague Tribunal than without it. History has shown that the trials of war criminals are always torn between legality and legitimacy, where legitimacy usually prevails.

What also faced criticism is Article 15 of the Statute of the Hague Tribunal, because this Article gave the tribunal 'legislative' authority as well, since it authorised it to adopt the Rules of Procedure and Evidence, which it did in February 1994, by adopting said rules which were amended on several occasions, even during proceedings, despite the fact that courts do not have the power and authority to create rules, but only to interpret

or apply them (Đorđević, 1995, p. 562). On the other hand, the criminal law provisions, as stated in the literature, do not have a constitutional character, but a declarative one, because they only confirm what had earlier been promoted by the Nuremberg principles and appropriate conventions (Kambovski, 1998, p. 389).

The Rwanda Tribunal was established by a Security Council resolution a little over a year after the establishment of the Hague Tribunal. Although it has many similarities with the Hague Tribunal, it is also specific in some ways, regarding the following: the manner in which it was established, its competences, the circumstances in which this tribunal operates and so on (Krivokapić, 1997, p. 79; Radulović, 1999, p. 166). Having in mind the limited space at our disposal, we shall in short outline the differences between these two tribunals. The Rwanda tribunal was established upon the request of the Government of Rwanda, albeit not the one which started the war, but the one which was the victim of genocide. As a result of the circumstances, Rwanda was at the time a non-permanent member of the Security Council, and even though it initiated the tribunal's establishment, it voted against (China abstained), because it reckoned that the Tribunal would be controlled by the Government in Rwanda, and also because it feared that it could be abused by those countries which supported the previous regime.

The jurisdiction of the tribunal (temporal, spatial and subject-matter) was defined differently than in the Statute of the Hague Tribunal. Articles 1 and 7 of the Statute of the Tribunal for Rwanda limit the temporal jurisdiction to the period from 1 January 1994 to 31 December 1994, i.e. to only one calendar year. The territorial jurisdiction is wider than is the case with the Hague Tribunal and spans not only the territory of Rwanda, but also the territory of neighbouring countries in regard to the serious violations of international humanitarian law committed by Rwandan nationals. The subject-matter jurisdiction has also been regulated differently. Article 3 of the Statute of the Tribunal for Rwanda, which defines crimes against humanity, does not require these crimes to be "committed in an armed conflict, international or internal in character", but it explicitly prescribes that crimes against humanity shall only be those acts which were "committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds." Since it began, the war in Rwanda has been treated as a civil war, so the competences of this Tribunal could not include serious violations of the provisions of the 1949 Geneva Conventions, since these are related to conflicts of an international character. Another difference between these two tribunals is the fact that prison sentences can be served in Rwanda as well, apart from the countries which have expressed their readiness to accept the convicts. Despite the stated differences between these two ad hoc tribunals, they have a common prosecutor and a common appeals chamber. This is, perhaps, an expression of the need for ensuring a certain degree of uniformity in the enforcement of international criminal justice.

Permanent International Criminal Court

The establishment of the International Criminal Court has been the long-standing idea of many individuals and professional organisations in the field of international criminal law. At the international level, it was first expressed in a normative manner in the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, and was implemented fifty years later, on 17 July 1998, when the Statute of the International Criminal Court was adopted and opened for signature and ratification at the diplomatic Conference in Rome. The placement of the most severe international crimes within its jurisdiction is an expression of the belief that such crimes are contrary to the vital interests of the international community, and that justice cannot be served by relying on national jurisdictions only. The reasons why the formation of such a court had to wait for so long should primarily be sought in the lengthy and laborious process of creating a favourable international legal and political environment, because the political circumstances in the world had for a prolonged period of time not been inclined towards the implementation of this idea, because of the obstructions of some of the main actors in international relations. This is why it was easier to resort to the establishment of ad hoc tribunals with limited temporal and spatial jurisdictions, even though the International Criminal Court has significant advantages compared to ad hoc tribunals.

Apart from cost-efficiency reasons, the establishment of a single permanent court eliminates the influence of the Security Council - and thereby of the great powers - in assessing whether it is purposeful (in the political sense) to establish a tribunal in a concrete situation. In addition to that, the establishment of a permanent court whose Statute prescribes the crimes within its jurisdiction, the criminal sanctions which are imposed for such offences and the rules of procedure and evidence, leaves no room for discussions on the legality of the act, punishment and procedure, which ad hoc tribunals were criticised for, starting from the Nuremberg to the Hague tribunals (Radulović, 1999, p. 172). The literature states that, among other things, experiences gathered in the work of ad hoc tribunals had an influence on the establishment of the permanent International Criminal Court (Stojanović, 2006, p. 187; Cassese, 2005, p. 402; Babić, 2011, p. 193; Boas et al., 2011, p. 39). It is also added that the permanent International Criminal Court should rather be regarded as the beginning of the development of new international criminal law and new international legal practices, and not as some final product of previous experiences and previous case law (Škulić, 2005, p. 157). The principal body for the establishment of the permanent International Criminal Court following World War Two was the International Law Commission (ILC) founded by the UN General Assembly. This Commission even prepared draft Statutes in 1951 and 1953, but because of the situation regarding international relations, and because of the great powers' lack of interest, further work on these documents never materialised. This issue was reopened only in 1992 when the General Assembly requested that the Commission prepare a draft Statute of the permanent International Criminal Court, which the latter did and submitted to the General Assembly in 1993 the draft Statute which would soon, in 1994, be

revised after the suggestions and remarks of the governments of certain countries had been received. Later, the General Assembly established an ad hoc committee which concluded in 1995 that work on the Statute's text should be continued simultaneously with the preparations for the diplomatic Conference, which was also supported by the Sixth Committee (Legal) of the General Assembly. Afterwards, the General Assembly decided to establish the Preparatory Committee for the purpose of preparing the diplomatic Conference and adopting the final version of the Statute. The diplomatic Conference was held in Rome, from 15 June to 17 July 1998, and it adopted the Statute and established the permanent International Criminal Court, presenting it to the countries for ratification. The Rome Statute entered into force on 1 June 2002 after it had been ratified by sixty countries. The establishment of the permanent International Criminal Court was also supported by many international and regional organisations, starting from the European Union, to the Non-Aligned Movement (McGoldrick, 2004, p. 391).

This short overview of the activities en route to the establishment of the permanent International Criminal Court shows that it all implied many difficulties and evolved slowly, and the reason lies in the strong reluctance of governments to relinquish a part of their sovereignty in the field where they have always wished to maintain their exclusive internal jurisdiction. In that sense, the literature states that the field of criminal law is tightly connected to the sovereignty of a state, where this sovereignty is also reflected in the state's exclusive jurisdiction for offences committed in its territory (Crawford, 1995, p. 405).

At the diplomatic Conference which was held in such a complicated situation burdened by differing interests of individual countries, the Statute of the Court was adopted, which represents the result of difficult compromises made for the purpose of finishing the Conference's work. Credit goes, among others, to a group of prominent diplomats, and especially Canada's Philippe Kirsch, Chairman of the Committee of the Whole (Cassese, 2005, p. 404). Prior to the adoption of the final text of the Statute, three groups of countries could be distinguished during the work of the Preparatory Committee and at the diplomatic Conference. The first group, led by Canada and Australia, included countries which came forward with a proposal supporting a quite powerful court with wide and 'automatic jurisdiction', with an independent prosecutor who would be authorised to initiate proceedings before the court and a comprehensive definition of war crimes, including those committed in internal armed conflicts. The second group comprised permanent members of the Security Council. This group was against 'automatic jurisdiction' and the prosecutor's right to initiate proceedings, and it urged that the most important tasks be given to the Security Council, where it would be authorised to forward cases to the court for resolution, as well as to prevent the forwarding of cases to the court. They were opposed to the crime of aggression being listed among the crimes within the court's jurisdiction, and claimed that the use of nuclear weapons cannot be considered as a violation of humanitarian law, for which the court would also be competent. The third group mainly consisted of members of the Non-Aligned Movement which were against the Security Council having any role in connection to the court, and

promoted the inclusion of the crime of aggression among the crimes envisaged by the Statute. Some countries from this group proposed that the crimes of drug trafficking and terrorism be placed under the court's jurisdiction (Cryer, 2010, p. 147; Cassese, 2005, p. 403). Even after the Cold War ended, the threat to the peace remained because of international and internal conflicts, so the Security Council's influence on the work of this court could not have been excluded (White, Cryer, 2009, p. 455).

One of the most important questions for every court, including the International Criminal Court, is the question of its jurisdiction, and especially subject-matter jurisdiction. The basic subject-matter jurisdiction of this court is limited to the most serious crimes of concern to the international community as a whole. So, Article 5 of the Statute prescribes that the Court has jurisdiction with respect to the following crimes: a) the crime of genocide; b) crimes against humanity; c) war crimes; and d) the crime of aggression. Article 5 paragraph 2 of the Statute adds that the Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with Articles 121 and 123 of the Statute (the provisions are related to the possibility of submitting and adopting amendments to the Court's Statute, as well as the possibility of its review) defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime, provided that such a provision must be consistent with the relevant provisions of the Charter of the United Nations. The reasons for postponing the 'effective' jurisdiction of the Court for the crime of aggression are primarily of a political nature, because the issue of defining aggression is a highly sensitive one and, according to some opinions, the majority of other crimes against humanity and international law arise from a prior act of aggression (Škulić, 2005, p. 346).

A definition of aggression in international law was provided by the UN General Assembly in 1974 by the Resolution 3314-XXIX according to which aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, but the question was posed whether this definition of aggression could be applied to individual criminal responsibility. Twelve years after the adoption of the Statute of the permanent International Criminal Court and eight years after its entry into force, at the Review Conference of all signatories of the Statute held in Kampala (Uganda) from 31 May to 11 June 2010, the definition of aggression was adopted. So, the crime of aggression implies the planning, preparation, initiation or execution by a person, in a position effectively to exercise control over or to direct the political or military action of the State, of an act of aggression whose character, severity and scope constitute a manifest violation of the Charter of the United Nations (Simović et al., 2013, p. 426). Even when dealing with these most serious crimes, pursuant to Article 1 of the Statute, it is prescribed that the International Criminal Court shall be complementary to national jurisdictions and it is primarily up to the states to prosecute the perpetrators of the crimes referred to in Article 5 of the Statute, and if they fail to do so, then the International Criminal Court shall take over. This means, the principle of complementarity is of great importance for the operation of the International Criminal Court, because that principle, among other things, manifests itself as one of the key differences in relation to

ad hoc tribunals (Škulić, 2020, p. 64). One of the key reasons for the increasing reliance on national courts lies in the problems faced by the International Criminal Court, which is primarily because it does not have its own executive force or police (Vuletić, 2025, p. 337). This confirmed the basic rule of international law on national sovereignty, but the question arises whether the court will be able to fulfil its mission because of the efforts of states to preserve their sovereignty in the judicial branch as well (Çakmak, 2017, p. 213). Article 21 of the Statute prescribes which legal sources will be applied, with the note that the application and interpretation of the law pursuant to this Article must be consistent with internationally recognised human rights (Zeegers, 2016, p. 64).

Despite all efforts to eliminate the Security Council's influence on the work of the Court, this was not avoided, for the Security Council was authorised to initiate proceedings before the International Criminal Court, even without the limitations which apply in case a signatory state or a prosecutor initiate proceedings before the Court. In addition to this, maybe the Security Council's greater influence on the work of the Court was expressed in the provision of Article 16 of the Statute according to which the UN Security Council has the right, acting on the basis of Chapter VII of the UN Charter, to request the Court to defer an investigation or prosecution for a period of twelve months (Sanooshi, 2004, p. 110). This leaves room for the great powers - even if they become signatories to the Rome Statute - to avoid the prosecution of their citizens, even more so because the Security Council may repeat its request under the same conditions.

Conclusion

In the historical development of international criminal law, two issues stand out as the most significant. On the one hand, this concerns the codification of international criminal law, and on the other hand, the establishment of the International Criminal Court. Bearing in mind the history of warfare and wars, as well as the division into victors and the defeated, it is difficult to speak of a planned and continuous development of international criminal justice. However, the idea of establishing an International Criminal Court is an old one and was particularly pronounced in the twentieth century. Obstacles to the establishment of a permanent International Criminal Court were created by the most influential states, either by withholding consent or by avoiding the ratification of already concluded treaties. Instead of a permanent international criminal court, ad hoc tribunals were established, beginning with the International Military Tribunal for the trial of Nazis after the Second World War. Regardless of the objections raised against the tribunals in Nuremberg and Tokyo, these trials had their historical justification and promoted some of the most important principles of international criminal law.

And when it was believed that these would be the first and last ad hoc tribunals, as predecessors of a permanent International Criminal Court, the Hague Tribunal was established to prosecute war crimes committed in the territory of the former Yugoslavia. We have previously indicated all the controversial issues related to this tribunal, starting

with the questionable legal basis for its establishment, and here we merely emphasise that justice was not served through the proceedings before the Hague Tribunal, or rather that it was, to a significant extent, selective. The establishment of ad hoc tribunals represented an intermediate step toward the creation of a permanent International Criminal Court, which occurred at the Diplomatic Conference in Rome in 1998. The establishment of this court was met with a certain sense of relief and with expectations that it would achieve universal justice and that perpetrators of the most serious international crimes would be adequately sanctioned. In addition, it was expected that the existence of this court would have a preventive effect and serve as a serious warning to those who believe that by committing grave international crimes, they could evade punishment. Although more than twenty years have passed since the entry into force of the Rome Statute, the practice of the International Criminal Court remains very limited, despite the fact that wars and armed conflicts are taking place across the globe. This has led to disappointment among many, resulting in scepticism regarding the Court's ability, through its activities, to manifest the idea of universal justice and to exert a preventive influence on potential perpetrators of criminal offences. The future of this Court will depend on how the major powers relate to it, that is, whether they will accede to the Rome Statute. Unfortunately, the opposite process is occurring, with some states withdrawing from membership in this institution. Likewise, the future of the Court is also being called into question by the revival of the idea of establishing ad hoc tribunals, including those proposed for events in Ukraine.

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