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## THE LEGALITY OF CREATION OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR FORMER YUGOSLAVIA (ICTY)

### *Abstract*

*The main goal of this paper is to conduct a legal analysis of the way in which the International Criminal Tribunal for Former Yugoslavia (ICTY) has been created. In order to achieve this goal, the authors have researched the process of the creation of the tribunal, the theoretical reflections on its creation, as well as the decision of the ICTY itself on the matter in its Tadić case. The authors have ascertained that the UN Security Council, which has created the ICTY with reference to the Chapter VII of the UN Charter, did not have the authority to do such a thing – they concluded that the ICTY was created unlawfully. Therefore, the authors are of the opinion that the jurisprudence of the ICTY should not be interpreted in a way that it has any precedential effect, i.e. in a way that it contributes to the development of general customary international criminal law. In this sense, the authors conclude that other international criminal courts and tribunals, and especially the International Criminal Court, should not in their own practice refer to the jurisprudence of the ICTY as a source of law of any kind, as well as that such jurisprudence could only be relevant in the field of legal theory, as if it represented doctrinal work.*

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## 1. INTRODUCTION

Until quite recently in historical terms, the exercise of jurisdiction in criminal matters has been reserved for national criminal courts.<sup>1</sup> In other words, criminal jurisdiction, as the precondition for the exercise of the right to conduct criminal repression (*ius puniendi*) was strictly within the competences of the state, as one of the key elements of that state's sovereignty.

This started to change over the course of the twentieth century. Namely, the horrors of two world wars which were waged on until then unprecedented, industrial scale, have appalled the humanity and accelerated ideas of “transferring” parts of national criminal jurisdiction for the most serious crimes, which are of concern to the international community as a whole, to international criminal judicial organs. Although there were such (although unsuccessful) attempts before,<sup>2</sup> the first time that they have been materialized were the famous trials in Nuremberg and Tokyo in the aftermath of World War II.

The very idea of conducting international criminal proceedings is generally not a bad one, given the fact that some crimes are indeed so politically sensitive, that it could not be reasonably expected that any national judiciary could completely professionally and impartially subject them to criminal proceedings (see Cassese 1998, 6–8). However, in order for international criminal proceedings to have any sense, and not to be regarded as a mere farse, the international judicial organs that are conducting them in the first place need to be formed in a legally perfect way. In other words, how can any “judicial” organ take upon itself the right to issue criminal sentences, the most severe of them being penalties, without fulfilling the condition that such an organ was at least formed according to law?

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<sup>1</sup> However, there have been some notable historical exceptions, such as the trial of Konradin von Hohenstaufen in Naples in 1268 and the more famous trial of Peter von Hagenbach in Breisach in 1474 (see more about these trials in Škulić 2020b, 96).

<sup>2</sup> For example, the famous attempt to put German Kaiser Wilhelm II on trial after the World War I (see more in Škulić 2020b, 97–98; Bojanić 2022).

In the spirit of what has been said, in this paper we shall analyze the way in which the International Criminal Tribunal for former Yugoslavia (ICTY) was created. The main hypothesis of the article is that this tribunal has not been established in a lawful manner, because the organ that founded it – i.e. the UN Security Council – did not have the authority to do it. In order to check the hypothesis, we will research and analyze various arguments that have been pointed out in legal theory, as well as in the practice of the ICTY itself and by some of the organs of United Nations (i.e. the UN Secretary General), *pro et contra* the method which was chosen for the creation of the tribunal.

The analysis that we are about to conduct is a strictly legal one, i.e. we would evaluate the creation of the ICTY strictly from the legal point of view, using legal argumentation and legal reasoning. Namely, the question of legality of the ICTY could essentially only be examined from the legal perspective of (in)validity of legal basis for its creation, while political arguments must not play any role in this regard (Škulić 2013, 55). In other words, “in examining the legitimacy of the ICTY’s creation, the questions of whether an international criminal tribunal should have been formed and whether the acts committed in the former Yugoslavia were severe violations of humanitarian law are wholly distinct from whether the ICTY was formed according to rule” (Davis 2002, 406).

## 2. OVERVIEW OF THE PROCESS OF CREATION OF THE ICTY

Starting from the early 1990s, the Socialist Federal Republic of Yugoslavia (SFRY) was in the process of disintegration. This process was not a peaceful one – in fact, it encompassed several armed conflicts: the War in Slovenia (1991), the War in Croatia (1991–1995), the War in Bosnia and Herzegovina (1992–1995), the War in Kosovo (1998–1999) which culminated in the NATO aggression against the Federal Republic of Yugoslavia (FRY) in the spring of 1999, the armed insurgency in the so-called Preševo valley in the Southern Serbia (1999–2001), as well as the armed conflict in Macedonia in 2001. During these armed conflicts it is indisputable that numerous atrocities, some of them amounting to international crimes, have been committed.<sup>3</sup>

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<sup>3</sup> It has been noted that the UN Security Council “created the Court under the pressure of an international outcry” and that the “many resolutions preceding Resolution 827 were nothing more than a moderate reaction to an external pressure that,

The UN Security Council, an organ of the United Nations which was “given primary responsibility for the maintenance of international peace and security” (Shaw 2003, 1084), started to deal with the armed conflict(s) in the territory of the former SFRY in 1991 when it passed its first resolution on the matter.<sup>4</sup> In the following year and a half, a “chain” of the UN Security Council resolutions concerned with the situation in the former Yugoslavia followed,<sup>5</sup> among which of particular importance is the resolution 780 of 6 October, 1992, when the Security Council requested the UN Secretary-General to “establish, as a matter of urgency, an impartial Commission of Experts to examine and analyse the information submitted pursuant to resolution 771 (1992) and the present resolution, together with such further information as the Commission of Experts may obtain through its own investigations or efforts...with a view to providing the Secretary-General with its conclusions on the evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law committed in the territory of the former Yugoslavia”.<sup>6</sup>

It has been noted that “while the Commission of Experts was not originally set up in October 1992 with the specific view that it would be the first step in the establishment of an ad hoc war crimes tribunal, that prospect was nonetheless contemplated by several members of the Security Council” (Bassiouni 1994, 790). So, it could be said

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in 1993, became so strong that the Council had no other option than to create the Court” (Baroni 2000, 237–238) – therefore, “the decision to establish the new tribunal was a logical step for the Security Council” (Greenwood 1993, 642). The question whether the Security Council possessed an authority to create the ICTY will be addressed in the following pages. Here we would only like to point out that, although, as we have said above, it is indisputable that heinous crimes were indeed committed in the armed conflict(s) in former Yugoslavia, during the course of the conflict(s) there was nevertheless a massive media effort that greatly exaggerated the scale of these crimes. For example, Ćirić (2013, 175) reminds that on 3 January 1993 *Newsweek* spoke about 30.000–50.000 rapes committed by the Serbs, event though such an enormous and outrageous number, bearing in mind the population figures at the time in former Yugoslavia (more specifically, Bosnia and Herzegovina), as well as the duration of the conflict, was even theoretically impossible.

<sup>4</sup> Resolution 713, 25 September 1991. United Nations Digital Library. <https://digitallibrary.un.org/record/126827?v=pdf>, (13. 8. 2025).

<sup>5</sup> See e.g. resolution 764 of 13 July 1992, resolution 771 of 13 August 1992, resolution 780 of 6 October 1992.

<sup>6</sup> Resolution 780 of 6 October 1992, para. 2. United Nations Digital Library. <https://digitallibrary.un.org/record/151310?v=pdf> (13. 8. 2025).

that the Commission of Experts “has made the greatest impact on the establishment of the ICTY” (Čolović 2013, 122), i.e. that “the subsequent stages in the establishment of the International Criminal Tribunal [...] revealed the nexus between the Commission and Tribunal, though no formal institutional links were developed” (Bassiouni 1994, 790).<sup>7</sup> After the Commission submitted its first Interim Report,<sup>8</sup> the Security Council “took the first step in establishing an *ad hoc* International Criminal Tribunal for Former Yugoslavia” (Bassiouni 1994, 791) – namely, on February 22, 1993 the Security Council passed resolution 808, through which it decided “that an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed on the territory of the former Yugoslavia since 1991” (para. 1).<sup>9</sup> Finally, after the Secretary-General submitted his Report (in further text: *Report*),<sup>10</sup> which also contained the statute of the future tribunal in an annex, the UN Security Council has on 25 May 1993, “acting under Chapter VII of the Charter of United Nations”,<sup>11</sup>

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<sup>7</sup> Schabas (2001) notes that the Commission of Experts “urged the establishment of an international criminal tribunal, an idea that had originally been recommended by Lord Owen and Cyrus Vance” (10). Calls for the creation of the tribunal were also present in a part of legal theory at the time (see e.g. Meron 1993, 122, 132)

<sup>8</sup> Čolović (2013) analyzes the report critically (see 124–128) and concludes that it was “based on information that was too general and that was acquired [...] by indirect means” (127–128).

<sup>9</sup> United Nations Digital Library. <https://digitallibrary.un.org/record/243008?v=pdf> (13. 8. 2025). The Security Council further requested the UN 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, including specific proposals and where appropriate options for the effective and expeditious implementation of the decision contained in paragraph 1 above, taking into account suggestions put forward in this regards by Members States” (Resolution 808, para. 2).

<sup>10</sup> Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), S/25704, 3 May 1993. United Nations Digital Library. <https://digitallibrary.un.org/record/166504?v=pdf> (13. 9. 2025).

<sup>11</sup> In the preamble of the resolution 827 the UN Security Council has noted, *inter alia*, that “this situation continues to constitute a threat to international peace and security”, as well as that “in the particular circumstances of the former Yugoslavia the establishment as an *ad hoc* measure by the Council of an international tribunal and the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the restoration and maintenance of the peace”.

adopted resolution 827,<sup>12</sup> thus creating the ICTY.<sup>13</sup> In the preamble of the resolution 827 the UN Security Council has noted, *inter alia*, that the situation in former Yugoslavia “continues to constitute a threat to international peace and security”, as well as that “in the particular circumstances of the former Yugoslavia the establishment as an ad hoc measure by the Council of an international tribunal and the prosecution of persons responsible for serious violations of international humanitarian law [...] would contribute to the restoration and maintenance of the peace”.<sup>14</sup>

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<sup>12</sup> United Nations Digital Library. <https://digitallibrary.un.org/record/166567?v=pdf> (13. 8. 2025). It is interesting to note the resolution 827 was unanimously adopted in the Security Council (Čolović 2013, 130). Namely, “it was far from certain at the outset that using Chapter VII authority to create a criminal tribunal and to impose criminal penalties on individuals – including high state officials – would be acceptable to the international community as a whole” (Matheson & Scheffer 2016, 179). However, the quoted authors then note that “fortunately, the Yugoslav situation came to a head in the period immediately after the end of the Cold War when the members of the Security Council were freely using Chapter VII to take wide-ranging actions having important political, military, and economic consequences” (Matheson & Schaffer 2016, 179). A different view on this issue has been presented by Avramov – she remarks that the resolution has been adopted “under pressure from the US”, which has considered itself to be “a supreme arbiter in the post-Cold War world” (Avramov 1994, 490). In this sense, it has been pointed out that “the creation of such a tribunal thus was one of the first priorities of the new administration” in the US, i.e. Clinton administration (Matheson & Scheffer 2016, 175; for a detailed account on the official policy of the US regarding the creation of the ICTY see Matheson & Scheffer 2016, 174–176).

However, several member states of the UN Security Council, i.e. China (a permanent member of the Council), as well as Brazil (an elected member at the time), have issued statements in which in their essence they declare their generally negative stance to the creation of an international criminal tribunal through this method, and that a lawful way for its founding would be an international treaty. These states have nevertheless voted in favor of the creation of the ICTY due to political reasons and considerations. Similar objections were also raised by Mexico and FR Yugoslavia (see Mitić 1997, 146–148).

<sup>13</sup> The official name of the ICTY was “The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1 January 1991”.

<sup>14</sup> The creation of the ICTY by the UN Security Council was a completely unprecedented measure in 1993 (Murphy 1999, 63; Avramov 2011, 413). Some authors note that “the establishment of the Yugoslavia Court is one example of the many innovative measures that the Security Council has employed in enforcing its decisions after the Cold War, creating for the first time a direct link between accountability and peace” (Baroni 2000, 235; similarly, Greenwood 1993, 646). Namely, it was the first time in the history of United Nations that an *ad hoc* international criminal tribunal has been created (see Avramov 1994, 480; Radulović

### 3. WAS THE ICTY CREATED LEGALLY?

A part of legal theory is of the opinion that “the creation of the Yugoslavia Tribunal was most certainly a breakthrough in the enforcement of international humanitarian law and marked the beginning of a new era in international criminal justice” (Baroni 2000, 234). Nevertheless, ever since the ICTY was founded, debates have been ongoing about the legality of the method chosen for its creation. Naturally, these debates are more present and are more vigorous in the circle of authors coming from the states that have been impacted the most by the ICTY, i.e. the states that emerged from the SFRY. The issue of legality of the creation of the ICTY has also been addressed by the ICTY itself, in *Tadić* case.<sup>15</sup>

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2000, 531–532), even though, in the period since the founding of the UN, numerous wars have taken place, e.g. Korean War (1950–1953), Algerian War (1954–1962), War in Vietnam (1955–1975), Soviet–Afghan War (1979–1989), Iran–Iraq War (1980–1988), Gulf War (1990–1991) etc. – not in a single one of these cases did the UN create an *ad hoc* international criminal tribunal, even though there were plenty of evidence of various international crimes being committed during them (see Abramov 1994, 485–486). Thus, the creation of such a tribunal only in the case of former Yugoslavia (and a year later in the case of Rwanda) could hardly be reconciled with an idea of equality before criminal justice. This is the fact that not even the most prominent supporters of the ICTY in the field of legal theory can directly deny. For example, Cassese (1998, 10) stated that it is “essential for the international community to establish and strengthen criminal justice. Since, by definition, justice cannot be selective, the present ad hoc Tribunals should soon be replaced by a *Permanent* Criminal Court with general jurisdiction”. Similarly, Meron (1993, 135), while vehemently supporting the idea of creation of the ICTY, confessed that, in order to “avoid charges of Eurocentrism this ad hoc tribunal for the former Yugoslavia should be a step toward the creation of a permanent criminal tribunal with general jurisdiction”.

<sup>15</sup> *Prosecutor v. Duško Tadić*, IT-94-1-T, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 (in the following text of this paper – *Tadić*). The defendant has, *inter alia*, claimed that the ICTY was created unlawfully (see *Tadić*, para. 8), while the court dismissed this claim (see *Tadić*, para. 146). While we shall address the particular and relevant parts of this decision on the following pages of this paper, we will here only comment on the fact that the ICTY has decided to determine whether it itself *has been formed in a lawful way*.

At first instance, the Trial Chamber in *Tadić* has declared itself to be incompetent in relation to the question of the legality of the ICTY’s establishment (see *Disposition in Prosecutor v. Duško Tadić*, IT-94-1-T, Decision on the Defence Motion on Jurisdiction, 10 August 1995) – in has stated that the “validity of the creation of the International Tribunal is not truly a matter of jurisdiction but rather of the lawfulness of its creation, involving scrutiny of the powers of the Security Council and of the manner of their exercise” (para. 4) and that “this International Tribunal is not a constitutional court set up to scrutinize the actions of organs of the United Nations”, in a sense that it is without an authority to investigate the legality of its

The main and most important question of this topic is whether it was within the UN Security Council jurisdiction to create an (*ad hoc*) international criminal tribunal. As we have seen, when it had created the ICTY, the Security Council has referred to Chapter VII of the UN Charter, which regulates the Council's action with respect to threats to peace, breaches of peace and acts of aggression. Namely, the Security Council "shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security" (Art. 39 of the UN Charter). Furthermore, "the Security Council may decide what measures not involving the use of armed force are to be employed to

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creation by the Security Council (para. 5) – nevertheless, the Trial Chamber did provide a series of arguments in favor of the thesis that the ICTY was indeed created lawfully (see paras. 6–40), being of an opinion that "it would be inappropriate to dismiss without comment the accused's contentions that the establishment of the International Tribunal by the Security Council was beyond power and an ill-founded political action, not reasonably aimed at restoring and maintaining peace, and that the International Tribunal is not duly established by law" (para. 6).

However, the Appeals Chamber has considered the question of whether the ICTY has been formed in a lawful way as the question of *la compétence de la compétence* (*kompetenz-kompetenz*; see *Tadić*, paras. 18–19) – i.e. that "it possessed the jurisdiction to decide its own jurisdiction" (Davis 2002, 408). This principle is well established in international arbitrations, and its essence is that the "arbiters have competence to decide themselves on their own competence (jurisdiction) [...] if the arbiters did not possess „Kompetenz–Kompetenz“, than when an issue of jurisdiction is raised, the arbiters should stop and wait for the determination of the competent court regarding the validity of the arbitration agreement [...] the arbiters can themselves decide whether the contended arbitration agreement is valid or not" (Varadi *et al.* 2019, 583) – therefore, the arbiters could themselves decide whether they, as arbitrators have been "formed lawfully" or not. In this sense, the Appeals Chamber decided that it, i.e. the ICTY, had the authority to determine whether it has been established in a lawful way or not. Nevertheless, an institute of *la compétence de la compétence* is incompatible with criminal law. Namely, criminal courts do not possess the jurisdiction to adjudicate whether or not they have been formed lawfully or not – they can only determine whether they have jurisdiction regarding the concrete crime or not (see Škulić 2020a, 101–102). Also, it is plausible to say that it has been hardly to expect that the ICTY would issue a different decision in the *Tadić* case than the one it has issued, given the fact that, "have the judges issued a different decision, they would have pronounced themselves to be participants in illegal activity, so it could be in no case concluded that they were unbiased in this case" (Škulić 2020b, 125). In the end, we can say that the stance taken by the Trial Chamber seems much more plausible than the one taken by the Appeals Chamber – indeed, the ICTY itself was not empowered in any way to adjudicate whether it was created lawfully or not.

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” (Art. 41 of the UN Charter). Of relevance for our topic is also the power of the UN Security Council to “establish such subsidiary organs as it deems necessary for the performance of its functions” (Art. 29 of the UN Charter).

In its *Report*, the UN Secretary-General has stated that he believed that “the International Tribunal should be established by a decision of the Security Council on the basis of Chapter VII of the Charter of United Nations” and that “such a decision would constitute a measure to maintain or restore international peace and security, following the requisite determination of the existence of a threat to the peace, breach of the peace or act of aggression” (para. 22). Furthermore, he has stated that “in this particular case, the Security Council would be establishing, as an enforcement measure under Chapter VII, a subsidiary organ within the terms of Article 29 of the Charter, but one of a judicial nature” (para. 28). This line of thought was followed by the ICTY in *Tadić* case, when it determined that “in sum, the establishment of the International Tribunal falls squarely within the powers of the Security Council under Article 41” (*Tadić*, para. 36).<sup>16</sup>

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<sup>16</sup> There exists a tendency in a part of theory of international criminal law, when it comes to the issue of legality of the ICTY, to uncritically adopt the ICTY’s own decision on the matter in *Tadić* case (in which it has deemed its own formation as completely legal) and thus to proclaim its creation as legal, “without providing any further argumentation. In this sense, Degan & Pavišić (2005) write that the ICTY has in *Tadić* with compelling legal reasons dismissed numerous arguments of the defense that disputed the authority of the UN Security Council to create this ad hoc organ of criminal judiciary”, and that, therefore, “there should be no doubt regarding its creation” (400). In this sense also Dahm, Delbrück & Wolfram (2002, 1132–1133). Cassese similarly only notes that the ICTY itself proved that the objections raised about the legality of the creation of the ICTY are unfounded (Kaseze 2005, 398), while Schabas (2001, 12) simply states that in the *Tadić* jurisdictional decision, the ICTY “clarified important legal issues relating to the creation of the body”. It is interesting to note that one of the previously cited authors, Antonio Cassese, a former judge and the first president of the ICTY (1993–1995), was also the president of the Appeals Chamber in *Tadić* case that has issued the relevant decision. Without entering into further considerations on the appropriateness of the ICTY itself to make an adjudication on the legality of its own creation (which we were discussing elsewhere in this paper, see supra note 15), here we would only like to remind that the task of legal theory is, *inter alia*, to research, analyze and criticize

Secretary-General admitted that “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”, which would then “be open for signature and ratification”, and concluded that “such an approach would have the advantage of allowing for a detailed examination and elaboration of all the issues pertaining to the establishment of the international tribunal”, and particularly that “it also would allow the States participating in the negotiation and conclusion of the treaty fully to exercise their sovereign will, in particular whether they wish to become parties to the treaty or not” (*Report*, para. 19).

Nevertheless, the Secretary-General then listed the reasons that, in his opinion, make the formation of the tribunal via treaty disadvantageous. In this sense, he outlined that it would require “considerable time to establish an instrument and then to achieve the required number of ratifications for entry into force”, and that “even then, there could be no guarantee that ratifications will be received from those States which should be parties to the treaty if it is to be truly effective” (*Report*, para. 20). Furthermore, the Secretary-General noted that the involvement of General Assembly, “as the most representative organ of the United Nations”, 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)” (*Report*, para. 21). The Secretary General concluded that the creation of the tribunal by the UN Security Council “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” (*Report*, para. 23).

A part of doctrine concurs with the arguments that the UN Secretary-General presented in his Report. In that sense, Raičević remarks that the process of “concluding an international treaty would require a complex procedure and take a lot of time”, while there was also “a serious concern (which would most probably have proven to be correct) that some states, most notably the actors of the conflict on

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jurisprudence. Therefore, the fact that the ICTY, or any other court in the world, has made some decision, does not mean that such a decision must be regarded in legal theory as some sort of a “sacred cow” – in other words, it can be subject to theoretical research, analysis and eventually criticism – exactly what we are doing with the decision of the ICTY in the *Tadić* case in this paper.

the territory of former SFRY, would not want to ratify the international treaty on the creation of the tribunal, which would make its functioning completely impossible” (Raičević 2002, 351; in this sense also Meron 1994, 79; Matheson & Scheffer 2016, 179). Sorel (2011, 32–33) notes that “the lack of results from negotiations, combined with the growing information about atrocities, ethnic cleansing, mass rapes, and population displacements, compelled the Security Council to act in a manner both symbolic and significant”.

Although the UN Security Council has obviously followed the reasoning of the Secretary-General, such an approach was criticized for various reasons. The first, somewhat prejudicial question, was whether the situation in former Yugoslavia at the time could at all have been qualified as a “threat to international peace and security”, as the UN Security Council claimed in its resolutions 808 and 827 and, as such, represent the basis for the Security Council to undertake measures for maintaining or restoring international peace. In *Tadić* the ICTY, although arguing that the “threat to the peace” is more of a political concept than the concept of an “act of aggression” which it deemed to be more amenable to a legal determination, nevertheless conceded that “the determination that there exists such a threat is not a totally unfettered discretion, as it has to remain, at the very least, within the limits of the Purposes and Principles of the Charter” (*Tadić*, para. 29). In legal theory the fact whether the conflict(s) on the territory of former Yugoslavia indeed represented a threat to (international) peace has been disputed (see Čavoški 1998, 144–145; Škulić 2013, 61–62; Čolović 2013, 135–137). However, the ICTY concluded that, even if the conflict in the former SFRY was considered to be merely “an ‘international armed conflict’, it would still constitute a ‘threat to the peace’ according to the settled practice of the Security Council and the common understanding of the United Nations membership in general” (*Tadić*, para. 30).<sup>17</sup>

Having deemed the situation in former Yugoslavia as a “threat to the peace”, the UN Security Council has chosen to react to such a threat by creating the ICTY as a measure which had the aim to “maintain or restore international peace. The ICTY opined that “*prima facie*, the

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<sup>17</sup> The ICTY further provided the examples when the UN Security Council has classified cases of civil war or internal strife as a “threat to the peace” (Congo crisis at the beginning of 1960s, and more recently Liberia and Somalia) and subsequently acted in such situations under Chapter VII of the Charter (see *Tadić*, para. 30).

international Tribunal matches perfectly the description in Article 41<sup>18</sup> of “measures not involving the use of force” (*Tadić*, para. 34). A part of doctrine also supports this view. In that sense, Paunović (1997, 126) states that the UN Security Council had a discretionary right to create a criminal tribunal, if the maintenance of peace and security in the world is in question (126). Vasiljević (1996, 55) similarly argues that it was left to the UN Security Council to “assess what measure it is going to implement in the concrete case, and therefore criminal prosecution is not excluded neither”.

Nevertheless, such a view has not been universally accepted in legal theory. There have been multiple grounds on which various authors have contested it. First of all, it has been said that the “creation of a judicial organ within the framework of enforcement measures goes further than even the most extensive interpretation of the text of the UN Charter in accordance with the rules on interpretation of international treaties according to the 1969 Vienna Convention” and that the “redactors of the UN Charter in 1945 never even thought about such an outcome – that according to the “famous” Chapter VII international courts could be created” (Đorđević 1997, 157–158; in this sense also Davis 2002, 397; Krivokapić 2013, 28). The creation of a judicial organ, including a criminal tribunal, is not explicitly listed as one of measures that the UN Security Council could implement according to the art. 41 of the UN Charter (see Milojević 1997, 104; Čolović 2013, 129).<sup>19</sup> However, the ICTY argued that “it is evident that the measures set out in Article 41 are merely illustrative examples which obviously do not exclude other measures” and that “all the Article requires is that they do not involve the use of force” (*Tadić*, para. 35).

It is true that the list of measures contained in the art. 41 of the Charter is provided in an *exempli causa* manner – it does not represent *numerus clausus*. However, that does not mean that the Security Council is completely free in deciding what other measures, besides the ones already explicitly mentioned, could be implemented. As Davis (2002,

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<sup>18</sup> “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.”

<sup>19</sup> This indisputable fact was also acknowledged by the ICTY in *Tadić* (see para. 33).

410–411) correctly points out, the Security Council has completely disregarded one of the basic principles of statutory interpretation – *ejusdem generis*, according to which “when a list of options is referred to by a broad phrase, that broad phrase will be interpreted to include only those options in that same general category or in the same genus as the list of options”. Accordingly, the cited author concludes that, as all the exemplary measures prescribed in the art. 41 of the Charter “involve a limited or complete stoppage of economic, political, or communicative ties”, then “the general phrase that the Council may choose what non-military means can be used to effectuate the ends of its decisions, while seemingly limitless, should have been construed to include only measures of the same kind as the listed measures (e.g., interruptions to economic, political, or communicative ties)” (Davis 2002, 411). We support this view entirely. Furthermore, if we have accepted the opposite stance, i.e. the view that the creation of a criminal tribunal could be legally subsumed under the measures stipulated in the art. 41 of the UN Charter, that would *a fortiori* have meant that “the Security Council could do anything. Moreover, based on such interpretation the Security Council would be more authorized to dissolve a parliament of a state, to depose its head of state, to change state borders etc. if it is of an opinion that the state in question represents a threat to the peace, than to create a criminal court” (Stojanović 2017, 120)<sup>20</sup> – it is sufficient to note that the UN Security Council obviously does not possess such powers.<sup>21</sup>

Let us now take a look on the *character* of the creation of a criminal tribunal as a *measure* to maintain or restore international peace. A list of authors drew the attention to the fact that the creation of a criminal tribunal is completely incompatible with the aim that the UN Security Council has, at least declaratively, tried to achieve – the maintenance or restoration of international peace and security. In that sense, although it might be true that there has been “no instance in the

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<sup>20</sup> In this sense also Krivokapić (1996, 53–54), when he says that “an argument that the perpetrators should have been punished is not sufficient, at least not for a lawyer, because with the same or similar motivation the Security Council could very soon begin to claim many other competences which have not been given to it by the Carter, including various forms of interference in domestic affairs of the state”.

<sup>21</sup> With obvious relevance to this discussion, doctrine of international law recognizes, as a deficiency in the work of the UN Security Council, the “lack of efficient control of legality of its decisions, which has created room for abuses that could have very severe consequences, taking the power of the Security Council into account” (Etinski *et al.* 2017, 241).

history of mankind where war has broken out because a person has been tried for his misdeeds” (Cassese 1998, 8), it has also been noted that “it is not known from history that any court was formed in order to help anyone in fulfilling a peace mission” (Milojević 1997, 109), and similarly, that a “court for punishing persons who acted contrary to the rules of international conventions and customs, is not an institute by the means of which the peace in the world is being secured” (Vujin 1997, 119).

Namely, it is true, in principle, that “it would be a total misconception of what are the criteria of legality and validity in law to test the legality of such measures *ex post facto* by their success or failure to achieve their ends” (*Tadić*, para. 39). However, the choice of the concrete measure can be important in connection to the teleological method of interpretation of the relevant norms of the UN Charter. Teleological interpretation represents a “decisive and final method of interpretation” which “solves the dilemma which of all the possible meanings of the norm is indeed its true meaning”, by “determining the reasons of the existence of the norm by the means of its *ratio legis*” (Mitrović 2015, 273). Therefore, one must ask himself – what is the purpose, i.e. the aim that the UN Security Council is to achieve by implementing the measures in question? The answer is obvious – the purpose is maintenance or restoration of international peace and security, as it is stipulated in the Charter. The creation of an international criminal tribunal in connection to the armed conflict that is still ongoing is not a suitable means of achieving this aim in any way (Škundrić 2021, 34). Namely, even though there are opinions that “mass and grave violations of international humanitarian law in the conflicts of collectivises that live close to each other demand the establishment of a strong legal institution with preventive effect on the participants of the conflict, which would send them a clear message that the barbarities will not remain unpunished” (Krapac 1995, 23), we are of an opinion that it would be logical to expect that the creation of such an institution could only have an effect that the conflict lasts even longer, given the fact that persons that hold high-ranking positions within the civil and/or military hierarchy of the sides in conflict and who would most likely be subject to criminal proceedings before the tribunal, would in their own interest prolong the conflict, in order to postpone or even avoid criminal prosecution, for the crimes they have already committed or, eventually, for the crimes they

are about to commit (Škundrić 2021, 34).<sup>22</sup> In this sense, Gajić points out that the “expediency of international criminal judiciary can only be assessed in the context of a post-conflict situation and the will of states to cooperate with the prosecution. There is no basis for a claim that international criminal tribunals are expedient during the armed conflict and at least during the period while those that have been accused are in power” (Gajić 2009, 145).

The futility of the creation of a criminal tribunal as a measure to achieve, or at least to contribute to a cessation of hostilities has exactly shown itself in the case of armed conflicts on the territory of former Yugoslavia – it can quite easily be noticed that the ICTY “did not contribute to achieving peace on the territory of former SFRY, because for years after it was created and started to actively function, a bloody civil war was ravaging on the territory of former Yugoslavia”,<sup>23</sup> and that “during 1998/99, an armed conflict has spread on the territory of Serbia, where until then there were no hostilities, and culminated in the NATO aggression against the Federal Republic of Yugoslavia” (Škulić 2013, 60–61). Therefore, from the point of view of the teleological method of interpretation of law, it follows that the UN Security Council could not have resorted to creating an international criminal tribunal as a measure stipulated in art. 41 of the Charter, because the purpose of that norm, i.e. maintaining or restoring international peace and security, could not have been achieved by the means of creating such a tribunal.

One more point on which the method of creation of the ICTY has been criticized is that, as the Security Council itself did not possess competence to conduct criminal trials of individuals, it could not convey such authority on other bodies neither – *nemo plus iuris ad alium transferre potest quam ipse habet*.<sup>24</sup> Namely, the UN Charter has “strictly made a distinction between political and judicial functions and has determined the jurisdiction in the sphere of political and judicial organs in detail”, with the Security Council being the main political and executive organ “whose jurisdiction is strictly limited on the field of

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<sup>22</sup> Similarly, Damaška (2008) remarks that if the leaders of warring parties „expect that after the end of hostilities a criminal proceedings would be initiated against them, many of them will simply continue the conflict“ (18).

<sup>23</sup> ICTY was created in 1993, and wars in Croatia (started in 1991) and Bosnia Herzegovina (started in 1992) lasted until the end of 1995.

<sup>24</sup> See e.g. Vujin (1997, 119) and Đorđević (1997, 158).

securing peace in the world, but without legislative function. Therefore, it does not have right to create courts” (Avramov 1994, 490).<sup>25</sup>

In its decision in the *Tadić* case, the ICTY was of an opinion that “the argument that the Security Council, not being endowed with judicial powers, cannot establish a subsidiary organ possessed of such powers is untenable” and that “it results from a fundamental misunderstanding of the constitutional set-up of the Charter” (*Tadić*, para. 37). Furthermore, although it admitted that the Security Council indeed “is not a judicial organ and is not provided with judicial powers”, but an organ whose “principal function is the maintenance of international peace and security, in the discharge of which the Security Council exercises both decision-making and executive powers” (*Tadić*, para. 37), the ICTY also determined that the establishment of the International Tribunal by the Security Council does not signify, however, that the Security Council has delegated to it some of its own functions or the exercise of some of its own powers, nor that it meant “that the Security Council was usurping for itself part of a judicial function which does not belong to it but to other organs of the United Nations according to the Charter” (*Tadić*, para. 38). Following this line of thought, the ICTY concluded that the “Security Council has resorted to the establishment of a judicial organ on the form of an international criminal tribunal as an instrument for the exercise of its own principal function of maintenance of peace and security, i.e., as a measure contributing to the restoration and maintenance of peace in the former Yugoslavia” (*Tadić*, para. 38).

As we can see, the ICTY has just once again reiterated its general determination that the creation of a criminal tribunal could be subsumed under the scope of measures which the UN Security Council can implement in order to maintain or restore international peace and security (art. 41 of the Charter), thus deeming the objection that the Council, as an organ that does not have jurisdiction in criminal matters, could not create subsidiary organs that do possess such jurisdiction, as irrelevant. However, if we do accept the main thesis of this paper that the UN Security Council could not have subsumed the creation of a criminal tribunal under measures which it can implement in order to maintain or

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<sup>25</sup> Some authors in a somewhat harsher way note that the UN Security Council has arrogantly assigned to itself the role of the supreme judicial authority, which it did not possess in accordance with the UN Charter (see Köchler 2003, 171–172).

restore international peace and security, then this issue becomes relevant once again.

Namely, in contrast to internal (municipal, national) legal systems, in which there is a centralized legislature authorized by the constitution to, *inter alia*, create criminal courts and assign jurisdiction to them,<sup>26</sup> in international law there is no such thing. On contrary, international law, as the law of international community, “a decentralized community of sovereign political units – states” (Kreća 2019, 30) does not have such a centralized system of legislation, but rather a system of various formal legal sources, such as international treaties and international customary law. Therefore, the UN Security Council, as an executive organ of United Nations, could not take upon itself the role of such a “centralized legal authority” which could, analogous to the power of certain organs in national legal systems, create criminal courts.<sup>27</sup> Namely, “in international community the source of judicial power rests on treaties. By the means of treaties states transfer a part of their judicial power on international judicial organs. The system of international judiciary, as it exists today in the world, is without a single exception [...] a product of treaties, whether it is the permanent court in question or a court for ad hoc cases” (Avramov 1994, 489–490). The argument presented by the UN Secretary-General that the tribunal should be created by the Security

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<sup>26</sup> See e.g. art. 143 of the Constitution of Serbia, Official Gazette of the Republic of Serbia 98/2006 and 115/2021.

<sup>27</sup> Here we would emphasize that neither does the UN General Assembly have competence to create international criminal courts/tribunals. Namely, although the creation of the tribunal by the General Assembly could be regarded as a more *legitimate* way than its creation by the decision of the Security Council (more about the possibility of creating an international criminal tribunal by the General Assembly, see Radulović 2000, 528–529), it would still not be completely lawful (see Škulić 2013, 59). However, it could have been legally possible that a process of negotiating and subsequent adoption of the text of the treaty on establishing such tribunal was conducted within the auspices of the General Assembly. For example, such was the case with the 2017 Treaty on Prohibition of Nuclear Weapons. Nevertheless, here too would the act of creation of the tribunal essentially be an international treaty, which would therefore be applicable only in relation to those states that have become parties to it. In other words, the adoption of the treaty on establishing an international criminal tribunal by some majority vote in the UN General Assembly would not *per se* create an obligation for the state on which territory, i.e. in relation to which nationals this tribunal would have had jurisdiction – that state would necessarily need to accept jurisdiction of that tribunal. As Kreća correctly remarks, “in the light of fundamental rules of international law, international courts cannot be created by the means of unilateral acts of the United Nations” (Kreća 2019, 766). This quote applies to the General Assembly as well.

Council decision rather than by a treaty because such an approach is more expedient, i.e. faster (see *Report* para. 20, 23)<sup>28</sup> is not an argument that legalizes the way the ICTY was created – in other words, “such logic is not possible in relation to the question whether something was created legally or not, because notwithstanding how much a certain institution is desirable and useful, with an existing need that it be formed as soon as possible, these arguments cannot lead to the conclusion that the creation of such institution was lawful, if it objectively was not” (Škulić 2013, 65).<sup>29</sup>

It is true that the UN Security Council may create *subsidiary organs* as it deems necessary for the performance of its functions (art. 29 of the UN Charter). Nevertheless, “because the creation of a judicial tribunal is not a means by which the Council may maintain the peace, it was improper for the Council to form a subsidiary organ to effectuate that purpose” (Davis 2002, 415). Also, as Avramov correctly points out, “subsidiary organs [...] are not independent, they do not act autonomously, but strictly according to instructions and within the mandate that has been given to them [...] by their nature they are advisory bodies, with the possibility of giving them some operational tasks, but strictly within the functioning and jurisdiction of main organs” (Avramov 1994, 490).<sup>30</sup> As the UN Security Council has no jurisdiction in criminal matters, it is inevitable to conclude that any subsidiary organ that it created, such as the ICTY, could not have such a jurisdiction neither.

In addition to this, legal theory has also criticized the classification of the international criminal tribunal as a “subsidiary organ” *per se*. In

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<sup>28</sup> This kind of argumentation is also present in the part of legal theory (see Zacklin 2004, 361–363)

<sup>29</sup> Moreover, the futility of the conception that such arguments of “speed” and “expediency” somewhat “legalize” the way in which the ICTY was created is also shown in the following example – in the case of some very severe crime, in any state, a public lynching of the perpetrator, or a simple execution of a flagrant perpetrator, would be significantly faster, i.e. expedient, than conducting judicial criminal proceedings and such an outcome can often even be favored by a majority of the population, but such situations in the states where *rule of law* exists must not happen in any circumstances (Škulić 2013, 59). Some other authors similarly also elaborate on why justice is better than revenge in the field of international crimes (see Cassese 1998, 1–6) – this seems indisputable. However, the way in which this justice is done, and which encompasses the question of legality of the creation of a body that delivers justice, needs to be in accordance with law. If not so (as in the case of the ICTY), then no real justice could be achieved, and such “justice” would essentially not be much different than pure revenge.

<sup>30</sup> In this sense also Vujin (1997, 119–120) and Radulović (2000, 534).

his Report, the UN Secretary-General noted that the tribunal “would of course, have to perform its functions independently of political considerations” and that “it would not be subject to the authority or control of the Security Council with regard to the performance of its judicial functions” (*Report*, para. 28). However, various theoreticians have not been convinced by such reasoning. For example, Krivokapić (2013) argued that the tribunal has been founded as a subsidiary body of an executive organ (the UN Security Council), and that because of it the principle of judicial independence has been violated (28).<sup>31</sup> The concern for the independence of the ICTY and, consequently, for the impartial conducting of criminal proceedings before it, seems even more legitimate if one bears in mind that, over the years, there have been numerous indications that the ICTY was biased during its operation.<sup>32</sup> In this sense, it has been noted that by the means of a simple overview of statistical data about ethnicity of persons that were prosecuted before the ICTY, as well as of the persons that were convicted before this tribunal (and particularly having in mind the severity of the sentences), one could reach the conclusion that the “discrimination against the Serbs dominated the operation of the ICTY” (Petronijević 2013, 139).<sup>33</sup> In a similar manner, Ćirić (2013) has somewhat ironically pointed out that relevant statistical data could lead to the conclusion that “almost exclusively the perpetrators of war crimes on the territory of former Yugoslavia were Serbs”, while on the other hand, “among the victims of these tragic wars, there are almost no Serbs at all” (188) (for an in-depth analysis of the statistical data concerning the operation of the ICTY see

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<sup>31</sup> Similarly, Kreća (2019, 766).

<sup>32</sup> See e.g. Köchler (2003, 179–180).

<sup>33</sup> Čolović (2013) similarly notes that there exists an “incredible disproportion between the number of indicted and convicted nationals of Serbia and Republic of Srpska and the number of indicted and convicted nationals of other former republics of the SFRY” (135). Through an analysis of data available on the official website of the International Residual Mechanism for Criminal Tribunals, we can conclude that about 2/3 of the persons that were indicted, as well as about 2/3 of persons that were sentenced by the ICTY during the time of its operation, were Serbs. <https://www.icty.org/sid/24>, last access 14. 8. 2025. In this sense, it is even more indicative that “the prosecution of the Hague tribunal has indicted as many as four Serbian presidents and all four of them found themselves in detention and in the courtroom in the Hague. As it is known, an indictment was never filled neither against Tuđman, nor against Izetbegović” (Ćirić 2013, 177).

Ćirić 2012, 196–202).<sup>34</sup> One more fact that is a strong indicator of a biased approach of the ICTY is that there was no criminal prosecution for the crimes that were committed by NATO during the aggression against FRY in 1999, although there was no any jurisdictional obstacle to that (see Degan, Pavišić 2005, 378; Babić 2011, 188; Čolović 2013, 134).

Finally, any sort of a criminal court could not be created as a “subsidiary organ” of any kind, because that would be completely opposite to the purpose of the court and the essence of its function, with an already *prima facie* and even on a terminological level moral disqualification of such a court in relation to the requirements of judicial independence in adjudication (Шкулић 2013, 60). Čavoški (1998, 144) is also of the opinion that “a court as an institution – and especially a valid and independent court – can in no circumstances be considered to be a subsidiary organ of an another, not even an executive organ”. In a similar manner, Stojanović (2017, 120) writes that “such an extensive interpretation of the UN Charter is not in line with the spirit of the Charter” and that “it does not suit neither the nature nor the purpose of a criminal court” – “a criminal court could not be regarded as a mere measure”.<sup>35</sup>

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<sup>34</sup> Cassese tries to counter such criticisms by highlighting the separation of the court (i.e. judicial function) from the prosecution within the ICTY (Kaseze 2005, 398). In that sense, it can generally be said that the “policy” of a certain international criminal court or tribunal is created “not by the judges, but predominantly by the prosecutor” (Gajić 2018, 144. For a critical overview of the practice of the ICTY prosecutor, see e.g. Banović 2011, 257, 259–260; Ristivojević 2011, 215–216). However, it is obvious that the criticisms in question are directed at the ICTY as a whole, i.e. in the broader sense, of which the *prosecutor* is an integral part, and not just at the court *stricto sensu*. Namely, the ICTY Statute (which was adopted by the UN Security Council at the same moment when the ICTY was created), explicitly prescribed the following organs of the “International Tribunal”: (a) the Chambers, comprising three Trial Chambers and an Appeals Chamber (i.e. the court in narrower sense); (b) the Prosecutor; and (c) a Registry, servicing both the Chambers and the Prosecutor (see art. 11 of the Statute). Therefore, we could deem Cassese’s answer as a not too convincing, and even somewhat cynical, attempt to “clean” the ICTY from the accusations of conducting biased proceedings/trials (in this sense see Škulić 2013, 72).

<sup>35</sup> In this sense also Čavoški: “But the members of the Security Council, and especially its permanent members, have thought not only that force is the law, but also that they can attribute to certain words the meaning which they never had before. In this way the terms ‘measure’ and ‘court’ became synonyms” (Čavoški 1998, 24). See also Škulić (2013, 56–57, 60).

#### 4. CONCLUDING REMARKS

The analysis conducted in this article has shown that the UN Security Council did not have the authority to create ICTY. In other words, the ICTY was founded in a way that was contrary to the rules of international law of the time. As one author quite plainly and correctly underlines, “the ICTY was created through an illegitimate<sup>36</sup> process, and accordingly did not possess the jurisdiction to try Tadic or anyone else” (Davis 2002, 412–413). Namely, law in general, including international criminal law, “cannot be created, implemented and built by institutions which were created in a way that is contrary to law” (Škulić 2013, 57).

Nevertheless, this “tribunal” did *de facto* function for more than two decades and its legal successor, the International Residual Mechanism for Criminal Tribunals, which was also created by the UN Security Council via its resolution 1966 “in order to take over residual (remaining) functions of the International Criminal Tribunal for Former Yugoslavia and International Criminal Tribunal for Rwanda” (Gajić 2024, 432), operates to this day. This factual operation of the ICTY has been used by some authors as an argument that supports the thesis of legality of its creation – in this sense, it has been stated that the practice of the ICTY has “developed significantly” and that the tribunal “is no longer disputed by any state in the international community” (Paunović 1997, 126). However, a *de facto* operation of the ICTY, which is historically undeniable, cannot be considered to be a legally valid argument (Škulić 2013, 57). In other words, the fact that this “tribunal” did factually operate does not in any way legalize the way it was created.<sup>37</sup>

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<sup>36</sup> The better word here would be “illegal” or “unlawful”.

<sup>37</sup> It is true that in the end there were no states that formally contested the way in which the ICTY was formed and, consequently, the legality of the tribunal *in toto*. Therefore, all of relevant states decided to cooperate with the tribunal (see e.g. Law on the Cooperation of Serbia and Montenegro with the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Official Gazette of the Republic of Serbia 18/2002 and Official Gazette of Serbia and Montenegro 16/2003). However, such state practice cannot be an argument in favor of the legality of the creation of the ICTY, but rather a demonstration of acknowledgement of political reality by the states in question. In other words, how could the states in relation to which territory, i.e. in relation to which nationals the ICTY had jurisdiction, effectively try to resist the cooperation with this institution, having in mind that all of these states are relatively small and more or less insignificant factors in the international community? The answer is in no way, because, if they decided not to cooperate and “recognize” the tribunal, they would

In this regard, we cannot accept from a legal point of view the following reasoning: “Even if the Security Council has indeed exceeded its authority, that could be countered by the use of the same logic which was used by the Nuremberg court when it dismissed the objections of German defense in connection to the application of *the nullum crimen, nulla poena* principle [...] Would not the conscience of humanity and the feeling of fairness have been seriously undermined if the persons, who have been completely aware that they were violating international law – and such awareness must have been on a by far greater level, given the development of law, than the one of Nazi war criminals 1939–1945 – stayed unpunished because of formal reasons” (Obradović 1996, 101). Given the fact that a discussion on the question of the *nullum crimen, nulla poena sine lege* (i.e. principle of legality) in the context of post-World War II trials by far exceeds the scope and purpose of this paper,<sup>38</sup> we would only limit ourselves to, in some sense, the confusion that the quoted author has made. Namely, one thing is whether a concrete body of international criminal judiciary has been formed legally, while another thing is whether such a body conducts its operation according to law. The former is a precondition for the later – if such a body is not formed lawfully, then the way in which it operates is irrelevant. On the other hand, the fact that an international judicial organ has been formed legally does not *per se* mean that it would conduct criminal proceedings legally. The IMTN has been formed by international treaty, while the ICTY has been formed by the decision of the UN Security Council – therefore, the IMTN has been formed in the far more lawful way than it was the case with the ICTY.

Also, the second part of the citation is legally dubious – the quoted author speaks of “persons who have violated international law” and who would stay unpunished if the ICTY had not been formed. It is indisputable *in abstracto* that the perpetrators of crimes, and especially the perpetrators of core international crimes must be punished for the crimes they have committed. It is also clear that such crimes were indeed

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be faced with serious political repercussions, until they would essentially be forced to yield (see Шкундрић 2021, 35–36). Here we once again see the consequences of the abuse of powers that the UN Charter has given to the Security Council – the sovereign states were essentially unlawfully coerced to renounce part of their sovereign rights, i.e. part of their criminal jurisdiction, and transfer it to the ICTY.

<sup>38</sup> For detailed analysis of the principle of legality in international criminal law see Škulić (2010, 85–99) and Škundrić (2024).

committed on the territory of former Yugoslavia. However, how do we determine who are the persons that have committed these crimes *in concreto*? And how do we know which are the crimes that have been committed *in concreto*? These are the questions that only a court, national or international, could answer, but *only* the court which has been formed in accordance with law. The ICTY – as we have seen – was not such court.

In this sense, from the legal point of view, we can dismiss the concerns expressed by some authors that “the consequence of accepting the thesis on illegality of the Tribunal would be that it would not be possible to try anyone before an international court for crimes committed during the conflicts on the territory of former Yugoslavia” (Dimitrijević *et al.* 2013, 54) – the possibility to try persons in relation to whom there were reasonable grounds to believe that they have committed international crimes during the armed conflicts on the territory of former Yugoslavia before an international court would be exactly the same as in the case of such crimes committed during any other war or armed conflict after the Second World War, in which cases, as we have seen, no international criminal tribunal has been set up. This means, as it was possible (but never materialized) in those earlier cases, that in the case of former Yugoslavia the relevant states could have concluded an international treaty to create such an international criminal court or tribunal and transfer a part of their criminal jurisdiction to it. On the other hand, if they had decided not to conclude such a treaty, then their national criminal judiciaries would have had jurisdiction. It is true, as we have already pointed out, that national criminal proceedings in relation to international crimes are at the utmost risk to be futile. Nevertheless, that does not mean that an international criminal tribunal could and should have been created *contra legem* in order to eradicate that futility, as it was done with the ICTY – in the end, that meant that the nationals of former Yugoslavia (as well as the nationals of Rwanda), that were suspected to be responsible for international crimes in question, were discriminated in relation to the nationals of all the other states in the world that have been involved in wars and armed conflict since the end of the World War II, in which such crimes have been committed.<sup>39</sup>

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<sup>39</sup> In this sense, we must deem the conclusion to which Davis (2002, 419) comes (an author that, as we have seen in this paper, quite clearly and openly regards the method in which the ICTY was created as an unlawful one), that “the age-old maxim ‘two wrongs don’t make a right’ has finally faltered. In a situation where one

We have, in our opinion, demonstrated in this article that the ICTY has been formed unlawfully. Now the question is posed – what to do with that conclusion? The ICTY now belongs to the realm of legal history.<sup>40</sup> Therefore, the first and the most obvious contribution of this paper is in the field of legal-historical evaluation of the ICTY, whose creation should be regarded as a negative example when it comes to the legal means and methods of creating international criminal courts and tribunals.

However, the second contribution of this paper is aimed at the legal legacy of the ICTY, i.e. its influence on further development of international criminal law. Namely, given the fact that, as we have shown, this tribunal has been created unlawfully, its legacy should also be assessed having that fact in mind. This means the following:

1. All the existing, as well as all the eventually “upcoming” international criminal courts and tribunals should, in their practice, have an almost complete disregard of the jurisprudence of the ICTY. This also applies to national criminal courts when they conduct trials for international crimes. In other words, the decisions of the ICTY should not be given the precedential character and they should not be consulted in the process of determining whether a concrete norm of general customary international criminal law exists or not. This is particularly important for the (permanent) International Criminal Court (ICC) – a court that has been formed in accordance with the rules of international law (by the means of an international treaty, i.e. the Rome Statute) and which has at its disposal a complex and comprehensive (albeit not perfect) system of sources of law applicable before it – in the first line the Rome Statute itself, as well as the Elements of Crimes and Rules of Procedure and Evidence.
2. Legal doctrine could of course research, analyze and critically evaluate the concrete decisions of the ICTY. However, it must always be aware that these decisions were made by the unlawfully

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wrong is the commission of heinous and brutal war crimes and the other wrong is the illegal establishment of a tribunal to try those criminals – two wrongs do make a right”, as unconvincing.

<sup>40</sup> Notwithstanding the operation of the already mentioned International residual mechanism for criminal tribunals, which continues to perform its remaining functions.

created tribunal, and that as such they cannot be regarded as having any influence on general customary international criminal law. Therefore, the status of the ICTY's jurisprudence within the domain of legal theory should be somewhat similar to the doctrine itself, i.e. similar to theoretical works and considerations.

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## ЗАКОНИТОСТ ОСНИВАЊА МЕЂУНАРОДНОГ КРИВИЧНОГ ТРИБИНАЛА ЗА БИВШУ ЈУГОСЛАВИЈУ (МКТБЈ)

### Резиме

Главни циљ овог рада је да се изврши правна анализа начина на који је основан Међународни кривични трибунал за бившу Југославију (МКТБЈ). У циљу остварења овог циља, аутори су истражили процес оснивања трибунала, теоријске расправе о његовом стварању, као и одлуку самог Трибунала у предмету *Tadić*. Аутори су утврдили да Савет безбедности Уједињених нација, који је основао МКТБЈ позивајући се на Поглавље VII Повеље УН, није имао овлашћење да то учини, те су закључили да је МКТБЈ основан незаконито. Стога, аутори сматрају да судска пракса МКТБЈ не треба да се тумачи на начин који јој придаје прецедентни карактер, односно као допринос развоју општег обичајног међународног кривичног права. У том смислу, аутори закључују да други међународни кривични судови и трибунали, а посебно Међународни кривични суд, не треба у својој пракси да се позивају на судску праксу МКТБЈ као на извор права било које врсте, већ да би таква пракса могла бити релевантна једино у области правне теорије, као да представља доктринарни рад.

Кључне речи: Међународни кривични трибунал за бившу Југославију, МКТБЈ, Хашки трибунал, међународно кривично право, Савет безбедности УН, Међународни кривични суд, Повеља УН.